Bond Law Review

Volume 21
Issue 3 *20th Anniversary Edition*

Article 5

12-1-2009

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Recommended Citation
Ogawa, Megumi (2009) "Hypothetical: potential problems of a student visa," *Bond Law Review*: Vol. 21: Iss. 3, Article 5.
Available at: http://epublications.bond.edu.au/blr/vol21/iss3/5

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This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol21/iss3/5

HYPOTHETICAL: POTENTIAL PROBLEMS OF A STUDENT VISA

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Abstract

There has been an ongoing concern that the student visa scheme might prevent overseas students from expressing their complaints. This article first identifies the basic structure of the Australian student visa scheme which is an integration of more than one Act and by-laws. It then considers the potential problems of the student visa scheme. In doing so, it analyses how the current student visa scheme operates. The article finds that not only does the present scheme require students to make unreasonably intricate judgments to comply with their visa conditions but also results in students on occasions failing to comply no matter what action they take. On the other hand, there appear to be occasions where breaches of student visa conditions are not dealt with.

Introduction

It is becoming a rather old memory that a planned hunger strike by overseas students protesting against their university hit the national newspapers.[1] According to the media reports at the time, the students alleged that their university had treated them as 'cash cows' when 67 percent of the students failed their final examination.[2] The university responded to the media reports stating that it had to maintain academic standards, which effectively pushed the blame back on to the students.

This sort of contest is not uncommon between universities and students regardless of their nationality. What made this event peculiar to the overseas students might be that, as reported by one of the newspapers, the hunger strike was called off since 'the

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1 AAP, 'Failed Uni Students Threaten Hunger Strike', *Sydney Morning Herald* (16 March 2006). Rood D, '"Cash Cow" Students Take Stand against Uni', *The Age* (14 March 2006).

2 AAP, 'Failed Uni Students Threaten Hunger Strike', *Sydney Morning Herald* (16 March 2006).

students were under the mistaken impression that protesting would threaten their visas'.[3]

Overseas students stay in Australia on student visas which require the student to comply with certain conditions. Although the above case has reportedly been resolved in an educational manner,[4] there has been an ongoing concern that the student visa scheme might prevent overseas students from expressing their concern.

This article first identifies the basic structure of the Australian student visa scheme and then considers its potential problems. In doing so, it analyses how the current student visa scheme operates. While certain issues are shared by the entire education sector, this article refers only to the universities.

Basic structure of the student visa scheme in Australia

A student visa

Section 189 of the *Migration Act 1958* ('the Act') requires an immigration officer, the police or the like specified under s 5 of the Act, to detain a person whom the officer suspects is an unlawful non-citizen defined under ss 13 and 14 of the Act as, in effect, a non-citizen who does not hold a visa which is in effect. The immigration officer is also required to remove the detained non-citizen from Australia as soon as practicable according to s 198 of the Act. Accordingly, a non-citizen who wishes to stay in Australia to study at an Australian university must obtain a visa which the Minister may grant pursuant to s 29 of the Act for the purpose of travel to, entering and remaining in Australia.

As s 31 of the Act provides, there are various classes of visas that the Minister may grant non-citizens. There is no complete list of classes of visas at one place in the legislation but the classes can be found in ss 32, 33, 34, 35, 36, 37, 37A and 38 of the Act and clause 2.01 and Schedule 1 of the Migration Regulations 1994 ('the Regulations'). The criteria for granting visas again are not in one place but are contained in ss 33, 34, 35 and 38 of the Act and Schedule 2 of the Regulations. As is obvious from those provisions, visas for university students are Temporary (student) (Class TU) visas of which subclass is, as specified in 1222(4) of Schedule 1 of the Regulations, either 573, 574, 575 or 576. These are the student visas for university students on which this article focuses.

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3 Rood D, '"Cash Cow" Students Take Stand against Uni', *The Age* (14 March 2006).

4 'Students Threaten Hunger Strike after Poor Exam Results', ABC News (16 March 2006).

Since a number of classes of visas other than student visas do not prohibit the holders of those visas from studying,[5] it is possible for holders of visas other than student visas to pursue their study at universities. However, the main purpose for those who stay in Australia on visas other than student visas is not study even though they happen to enrol in a university, and in that sense, they are not students in the context of the Act.

Granting a student visa

The criteria for the grant of student visas appear in Schedule 2 of the Regulations. The requisite criteria vary primarily depending upon the nationality of a student and whether an application for a student visa is made in or outside Australia. In either case, a non-citizen student is required to provide either through their education provider such as a university, or in person, a certificate of enrolment issued by their education provider.

A certificate of enrolment can be issued only by a provider defined under s 5 of the *Education Services for Overseas Students Act 2000* (Cth) ('the *ESOS Act*') as an institution or other body or person that provides, or seeks to provide, courses to overseas students. This is because s 8 of the *ESOS Act* prohibits a person from enrolling overseas students for a course unless the person is registered as a 'provider' in accordance with the conditions set out in s 9 of the *ESOS Act*.

A student visa is granted subject to certain conditions. The possible conditions are listed in Schedule 8 of the Regulations. The conditions commonly imposed upon student visas are: 8105 (maximum of twenty hours of work per week when the course of study is in session); 8202 (maintain enrolment in a registered course and achieve a satisfactory academic result);[6] 8501 (maintain the arrangements for health insurance); 8516 (continue to satisfy the criteria for the grant of the visa); 8517 (maintain the arrangements for education of any school-age dependant of the visa holder); and 8533 (notify the education provider of the visa holder's residential address).

Monitoring a student visa holder

Among the conditions of a student visa, the adherence to conditions 8202 and 8533 are monitored by the provider by virtue of the *ESOS Act*. Section 21 of the *ESOS Act* requires providers which accept overseas students to keep their student records and

[5] For example, Subclass 309, 457 and 820 visas allow the holders of those visas to enrol in universities.

[6] Condition 8202 also imposes an attendance requirement but only for students enrolling in education institutions other than higher education institutions.

if there is any change, requires providers, under s 19(1) of the *ESOS Act*, to report the change to the Secretary of the Department administering education.

The reporting obligation of providers under s 19 of the *ESOS Act* also includes subsection (2), namely, the requirement to inform the Secretary of the Department administering education of any breach of a visa condition relating to academic performance. If a provider such as a university believes that an overseas student breached a visa condition by failing to maintain satisfactory academic performance, the provider must send a notice to the overseas student requiring the overseas student to report to the Department of Immigration within 28 days from the date of the notice. This notice must be sent as soon as practicable pursuant to s 20 of the *ESOS Act*. At the same time, the provider must inform the Secretary of the Department administering education of the breach pursuant to s 19(2) of the *ESOS Act*.

The method of providing information to the Secretary of the Department is to be 'in a form approved by the Secretary' under s 19(3) of the *ESOS Act*. Regulation 1.03 of the Education Services for Overseas Students Regulations 2001 ('the ESOS Regulations') prescribes the approved form as 'PRISMS (Provider Registration and International Students Management System)', which is an electronic system commonly used by the Department administering education, the Department of Immigration and the registered education providers.

Cancelling a student visa

If the notice under s 20 of the *ESOS Act* requiring an overseas student to report to the Department of Immigration within 28 days is issued and the student fails to attend the Department of Immigration within 28 days, the student visa is cancelled automatically under s 137J(2) of the Act. Automatic cancellation does not occur if the student turns up to the Department within 28 days. In that case, consideration will be given under s 116 of the Act.

Section 116 of the Act allows the Minister for Immigration to cancel a visa if, amongst other grounds, the Minister is satisfied that a condition of the visa has not been complied with. Further, Regulation 2.43(2)(b)(ii) provides that the Minister must cancel the student visa if a breach of condition 8202 occurs through the student's fault. In addition, Regulation 2.43(2)(b)(i) of the Regulations requires the Minister to cancel a visa if there is a breach of condition 8105. Moreover, specifically for a student visa, s 116(1)(fa) provides for the possible cancellation of a visa if the visa holder is unlikely to be a genuine student or to have engaged in, or is likely to engage in, conduct not contemplated by the student visa.

Among the conditions commonly attached to a student visa, conditions 8202 and 8105 seem to carry serious potential for trouble.

Hypothetical

Condition 8202

Condition 8202 is comprised of several requirements which overseas students must satisfy. It provides:

> '(1) The holder (other than the holder of a Subclass 560 (Student) visa who is an AusAID student or the holder of a Subclass 576 (AusAID or Defence Sector) visa) must meet the requirements of subclauses (2) and (3).
>
> (2) A holder meets the requirements of this subclause if:
>
> (a) the holder is enrolled in a registered course; …
>
> (3) A holder meets the requirements of this subclause if neither of the following applies:
>
> (a) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course progress for:
>
> (i) section 19 of the *Education Services for Overseas Students Act* 2000; and
>
> (ii) standard 10 of the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007...
>
> (4) In the case of the holder of a Subclass 560 visa who is an AusAID student or the holder of a Subclass 576 (AusAID or Defence Sector) visa — the holder is enrolled in a full-time course of study or training.'

Must enrol in a registered course

Condition 8202(1) requires overseas students to enrol in a registered course or, in the case of an AusAID student, a full-time course. This seemingly simple requirement of enrolment in a registered course could cause dispute in some instances.

First, since condition 8202 requires an overseas student (save for an AusAID student) to enrol in a 'registered course' which is defined in Regulation 1.03 of the Regulations, as 'a course of education … registered, under section 9 of the *Education Services for Overseas Students Act 2000*', the course in which an overseas student is enrolling must be registered under s 9 of the *ESOS Act*. One of the criteria for registration under s 9 of the *ESOS Act* is that the provider comply with the National

Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 ('the National Code').[7] The latter is established under s 33(1) of the *ESOS Act* in order to provide a nationally consistent code of conduct for education providers.[8] The National Code requires the registered courses to be full-time[9] and at least one unit in each compulsory study period to be delivered on campus.[10]

What we often see in a prospectus, particularly of postgraduate courses, is a statement such as 'this subject may be offered by distance mode depending upon the enrolment'. The course offered in this way might not be able to maintain registration under the *ESOS Act* due to the enrolment, since all subjects offered in a certain compulsory study period might fail to attract a sufficient number of students for on-campus delivery. If this happens, a student who enrols in the course would become unable to maintain his or her enrolment in a registered course notwithstanding that the student continues to enrol in the same course. The student in those circumstances would have no choice but to enrol in another course to satisfy condition 8202 or leave the country. If the student was studying on a scholarship granted to study in Australia, leaving the country may result in the termination of the scholarship and the student may become unable to complete his or her course of study.

Secondly, since condition 8202 is imposed under the *Migration Act 1953* (Cth) and is administered by the Department of Immigration, the enrolment of an overseas student must be recognised by the Department of Immigration. This could be an issue if the enrolment status of an overseas student is disputed between the student and his or her university. Once the university cancels the enrolment of an overseas student, even if the university's decision is possibly unlawful and null and void, the Department of Immigration is unlikely to acknowledge the student's enrolment in a registered course. Therefore, if the overseas student wishes to embark on judicial review of the university's decision, the redress of which is available to local students in many cases, the overseas student will have to find a way to secure a visa to prosecute his or her case. This would be most difficult, if not impossible, since pending judicial review of a university's decision is not a ground for granting any visa. Condition 8202 in this way effectively works to eliminate judicial review and hence the rule of law only in relation to overseas students.[11]

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7 Section 9(2)(c) and (d) of the *ESOS Act*.

8 Section 34 of the *ESOS Act 2000*.

9 See paragraph 7.1 Part C of the National Code.

10 See paragraphs 9.1 of Part C and 9.1 of Part D of the National Code.

11 See, Ogawa M, 'University Grievance Handling for Overseas Students: ESOS Act and the National Code' (2003) 10 *Australian Journal of Administrative Law* 162.

Must achieve satisfactory academic record

Condition 8202 further requires overseas students to 'achieve satisfactory course progress' for the purpose of Standard 10 of the National Code.[12] What exactly amounts to 'satisfactory course progress' might be disputable as the National Code leaves the criteria of satisfactory course progress open to each education provider. However, it would be plain that an academic record would not be satisfactory if an overseas student failed all the subjects for which he or she was enrolled. Even in such extreme cases, condition 8202 could still be troublesome.

First, since this condition is solely concerned with academic performance, it does not stop students from ceasing study in their enrolled course. A problem would arise if a student failed all subjects, immediately abandoned study in the course and swiftly enrolled in another course at the same university. In this hypothetical case, the university satisfies its reporting obligation under s 19 of the *ESOS Act* if it reports the student's cessation of study with no reference to the student's unsatisfactory academic record. A breach of condition 8202 in this respect would not be detected.

Secondly, since this condition, when it comes to enforcement, relies upon a notice sent by an education provider by the ordinary post, the enforcement of this condition could result in an unintentional outcome. For example, if an education provider sent a notice under s 20 of the *ESOS Act* to the address of a student known to the education provider at the time but the student has already relocated to a different address, the notice is unlikely to reach the student. This could occur particularly since the education provider is required to send the notice 'as soon as practicable' under s 19(2) of the *ESOS Act* and the student is required to notify the education provider of the change of his or her residential address 'within 7 days' by Condition 8533 of his or her visa. If this happens, it is most unlikely that the student would attend the Department of Immigration within 28 days since the student is unlikely to be aware that he or she is required to attend. As a consequence, even if the student has a legitimate reason to explain his or her unsatisfactory academic record, the student's visa will be cancelled under s 137J(2) of the Act.

It is true that a student whose student visa was automatically cancelled under s 137J(2) of the Act can apply to the Minister for Immigration under s 137K(1) of the Act for revocation of the automatic cancellation. However, such application must be made in writing and if the student has already been detained as an unlawful non-citizen under s 189 of the Act, by virtue of s 137K(3)(a), only two days are allowed to make such an application. Section 137K(3)(b) allows the student to apply for an extension of time for making such an application. However, again such an

[12] See paragraphs 10.1 and 10.6 of Part D of the National Code.

application must be made in writing within two days. All in all, unless the student can write some application, s 137J(2) of the Act does not provide the student with an opportunity which the legislation intended to provide.

Under s 194 of the Act, an immigration officer who detained a student as a result of s 137J(2) of the Act must inform the student about the possible revocation of the cancellation of his or her student visa under s 137K of the Act. The problem is, however, that the officer is not obliged to provide assistance for the student to make such an application. If the student is detained in a police watchhouse or any other detention facility where the use of a pen and paper is not permitted, the student loses his or her right to make an application to the Minister for revocation of the cancellation of his or her visa. Even if the student is detained in a place where he or she can use a pen and paper, one would not expect the detained student to maintain the presence of mind to begin preparing an application and complete the job within two days.

Condition 8105

Condition 8105 provides:

> '(1A) The holder must not engage in any work in Australia before the holder's course of study commences.
>
> (1) Subject to subclause (2), the holder must not engage in work in Australia for more than 20 hours a week during any week when the holder's course of study or training is in session.
>
> (2) Subclause (1) does not apply to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students.
>
> (3) In this clause:
>
> ***week*** means the period of 7 days commencing on a Monday.'

'Work' is defined in the Regulations as 'an activity that, in Australia, normally attracts remuneration' (Regulation 1.03).

Must not work more than 20 hours a week during any session

Condition 8105 requires overseas students not to engage in 'an activity that, in Australia, normally attracts remuneration' more than 20 hours a week during any session. Therefore, in order to comply with this condition, students must be able to assess correctly whether or not the activity they are proposing to engage in normally attracts remuneration in Australia. At times this is not so easy to determine.

Assume that an overseas student has a relative in Australia who runs a barber's shop near the student's university. One day, the student visits the relative at his shop during the shop's opening hours. While the student and the relative are having a chat, the relative receives an emergency call from his child's school and needs to go to the school to pick up the child. The relative asks the student to stay at the shop for ten minutes while he goes to the school and if any customer arrives, tell the customer that the barber will be back in twenty minutes. The student agrees to do so as a matter of course without any remuneration.

In this case, perhaps one could not blame the student and the relative for thinking that the student's act of looking after the barber's shop for ten minutes was not work since it was mere unpaid assistance by a relative and was only for twenty minutes in an emergency. However, officers of the Department of Immigration are likely to determine that the student's act is work since looking after a shop is normally paid work in Australia. No matter what the true legal position is, if an officer of the Department of Immigration finds the student looking after the shop and thinks that the student is working more than 20 hours a week, the student's visa must be cancelled by force of s 116 of the Act and Regulation 2.43(2)(b)(i) of the Regulations.

While the decision to cancel a student visa under s 116 of the Act is a reviewable decision under s 338 of the Act, it is at times difficult for a student to apply to the Migration Review Tribunal for review of such a decision. This is because s 347(1)(b) requires an application to the Migration Review Tribunal to be made within 28 days from the notification of the cancellation of a visa and s 347(1)(c) requires the prescribed fees to accompany an application to the Migration Tribunal. The current prescribed fees for review are $1,400 by virtue of Regulation 4.13(1) of the Regulations and, notwithstanding that the Registrar of the Migration Tribunal has power to waive the fees under Regulation 4.13(4), the fees are rarely waived in practice since overseas students are supposed to be able to afford all expenses incurred during their stay in Australia. An overseas student who cannot pay $1,400 within 28 days loses the right to review the decision to cancel his or her student visa.

Conclusion

Overseas students are studying on student visas. Students have no choice but to become participants in the student visa scheme. As was identified above, the student visa scheme is an integration of more than one Act and by-laws. It is not easy for anyone to follow the complex provisions, which tend to make the decisions of authorities more definitive regardless of the true legal position. Furthermore, not only does the present scheme require students to make unreasonably intricate judgments to comply with their visa conditions but it also results in students on occasions failing to comply no matter what action they take. On the other hand, there

appear to be occasions where breaches of student visa conditions are not dealt with. At some stage, the student visa scheme needs to be reformed to remove potential and actual problems.