Visas: Background Checks for International Students

Australia • New Zealand • United Kingdom

June 2005

LL File No. 2005-02024
LRA-D-PUB-000312

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AUSTRALIA

VISAS: BACKGROUND CHECKS FOR INTERNATIONAL STUDENTS

I. Australian Visa Categories

There is no evidence, from publicly available sources, that Australia has any equivalent to the United States Technology Alert List. Australia has a highly elaborate system of visas, with various requirements for each category of visa.[1] The requirements for students who intend to study at an Australian university focus on demonstrating English proficiency and sufficient financial resources to meet expenses. Materials from the Department of Immigration make no reference to any review of visas for students or visiting scholars intending to work in certain areas of technology.

II. Australian Export Controls

The Australian government controls the export of defense-related and dual-use materials, under Section 112 of the Customs Act 1901 and the Customs (Prohibited Exports) Regulations. The Defence Trade Control and Compliance Section (of the Department of Defence) administers the export controls, which apply to all goods included in the Defence and Strategic Goods List.[2] Australia is also a member of several international export control regimes, which include the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Australia Group on Chemical and Biological Weapons Materials, the Nuclear Suppliers' Group and the Missile Technology Control Regime.[3]

No evidence has been found indicating that Australia applies the principles of its export-control regime to the admission of foreign students or scholars. However, the Australian government has complete discretion in the issuance of visas and it would be possible for a foreign student or scholar intending to work in certain fields of engineering, pharmaceuticals, or computer science not to be issued a visa.

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June 2005

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[1] Australian Government, Department of Immigration and Multicultural and Indigenous Affairs, Visiting Australia , http://www.immi.gov.au/visit/index.htm (last visited June 15, 2005).

[2] Australian Government, Department of Defence, Export Controls, http://www.defence.gov.au/strategy/dtcc/default.htm (last visited June 15, 2005).

[3] *Id.*

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NEW ZEALAND

VISAS: BACKGROUND CHECKS FOR INTERNATIONAL STUDENTS

New Zealand's Immigration Act of 1987 provides for the exclusion of persons believed to pose terrorist threats or "likely to constitute a danger to the security or public order of New Zealand."[1] New Zealand has not placed restrictions specifically on courses of study by foreign students that might lead to illegal transfers of controlled technology.[2] Consular officials have not been directed to specifically consider the problem of illegal transfers of controlled technology when issuing student visas. The grant of student visas is a matter of discretion that cannot be appealed.[3] Student visas are subject to conditions and may be revoked.[4]

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[1] 33 R.S.N.Z. § 7 (1995), as amended.

[2] This information was obtained from the New Zealand Embassy in Washington, D.C., on June 15, 2005.

[3] 33 R.S.N.Z § 10 (1995), as amended.

[4] *Id.* § 27

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UNITED KINGDOM

VISAS: BACKGROUND CHECKS FOR INTERNATIONAL STUDENTS

The United Kingdom does not have a compulsory system that requires a check into the background of international students prior to the issuance of student visas. It relies instead on a voluntary scheme and the cooperation of universities and academic institutions. The voluntary scheme applies only to post-graduate and doctoral students. The voluntary nature of the scheme is an attempt to achieve a balance between preserving academic freedom in research and maintaining national security. A legislative system of export controls and anti-terrorism provisions also serves as an additional counter-proliferation tool.

I. Introduction

The United Kingdom (UK) does not have a system in place that precisely resembles the United States' Technology Alert List (TAL). The immigration requirements for the issuance of student visas focus on the student's financial ability to support himself without recourse to public funds and his admission at an approved place of study. The requirements do not allow a decision on the issuance of student visa to be made on proliferation grounds.[1] One non-compulsory system currently in place that bears some similarities to the TAL is the Voluntary Vetting Scheme (VVS) that was established in 1994 as a counter-proliferation tool[2] in response to concerns that the UK was a base to train scientists from countries that posed a risk of proliferating weapons of mass destruction.

II. Operation of the Voluntary Vetting Scheme

The VVS aims to prevent state proliferation programs through cooperation with universities and colleges that receive applications from post-graduate students, from certain countries of concern,[3] who apply to study or transfer their studies to an academic discipline that is in an area of concern.[4] The VVS is not compulsory and invites colleges and universities to seek the advice of the Foreign and Commonwealth Office's Country Proliferation Department to determine whether an applicant from a country of concern that wishes to study a course that is a proliferation concern poses a risk. The Foreign and Commonwealth Office provides a classified response which states whether, in terms of national security, the applicant poses:

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[1] HOME OFFICE, THE IMMIGRATION RULES, HC 251 (as amended).

[2] HOME OFFICE, THE SCIENTIFIC RESPONSE TO TERRORISM, 2004, Cm. 6108, ¶ 141.

[3] Particularly Algeria; Cuba; Egypt; India; Iran; Iraq; Israel; Libya; North Korea; Pakistan; and Syria. FOREIGN AND COMMONWEALTH OFFICE, GUIDANCE ON THE VOLUNTARY VETTING SCHEME FOR POST-GRADUATE STUDENTS AND POST-DOCTORAL RESEARCHERS.

[4] Academic subjects that are specifically listed as areas of concern are: aeronautical engineering; biochemistry; biology; biotechnology; ceramics and glass; chemical engineering; chemistry; computing science; control engineering; electrical engineering; electronic engineering; genetics; materials science; mathematics; mechanical engineering; mechatronics; metallurgy; molecular biology and biophysics; physics (including nuclear physics); and production engineering. *Id.*

- No proliferation risk
- A moderate proliferation risk that could be lessened by restricting access to certain areas of research
- A high proliferation risk[5]

If the applicant is deemed a high proliferation risk, the Foreign and Commonwealth Office states that it would prefer the candidate not be offered a place, however, the advice is not binding and the final decision regarding admission remains with the university or academic institution.[6]

III. Problems Facing the Voluntary Vetting Scheme

The VVS has been reviewed and subjected to much criticism claiming it is inadequate[7] and not working as intended,[8] because it is not compulsory or universally applied. The United States' TAL system was examined when the VVS was under review, but it was considered that creating such a system in the UK would raise objections from universities over undue restrictions on academic freedom,[9] give rise to claims of racial discrimination, and result in "turning away a large number of research students for no good purpose."[10] The TAL system was viewed as an effective system by a House of Commons Committee, which stated:

> The way they deal with things in America is more through the immigration and the visa system and perhaps in this country we try to rely too much on the universities to do things which really the immigration service should be doing, in vetting people before they arrive in this country.[11]

During questioning by a government committee the Registrar and Secretary of the University of Birmingham stated that the if United Kingdom were to:

> Recruit good research students [that have been refused entry into the United States to study by the TAL] who will then go on and proselytise the values and the good things about this country, I think that is a wholly proper thing to do except that there need to be

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[5] GUIDANCE, *supra* note 3.

[6] *Id.*

[7] BBC Press Office, *Iraqi scientists infiltrated British research centres, reveals File on 4*, Nov. 17 2002, *at* http://www.bbc.co.uk/pressoffice/pressreleases/stories/2002/11_november/17/fileon4_iraqi_scientists.shtml (last visited Jun. 16, 2005).

[8] GUIDANCE, *supra* note 3.

[9] HOUSE OF COMMONS SELECT COMMITTEE, FIRST REPORT: THE BIOLOGICAL WEAPONS GREEN PAPER, 2002, H.C. 150, ¶ 26.

[10] HOUSE OF COMMONS SCIENCE AND TECHNOLOGY SELECT COMMITTEE, EIGHTH REPORT, 2002, H.C. 415-I.

[11] *Id.*

> some security considerations which we think the security service is in the best position to advise us on.[12]
>
> A House of Commons Select Committee considered that:
>
> Existing measures to regulate the use of biotechnology research in this country may be insufficient to prevent dangerous materials falling into the hands of terrorist groups. We are also concerned that the voluntary vetting procedure does not apply to the National Health Service, wholly commercial research laboratories or other institutions, but is confined to the higher education sector. Our anxiety is that a fully qualified research scientist, who unknown to the authorities was a supporter of a terrorist group, could be admitted to a postgraduate or other research institution within the United Kingdom to pursue an approved programme of research. Such a scientist could thus gain unhindered access to the dangerous materials or pathogens. The United Kingdom should be in a position to set an example to other States Parties in this respect. We recommend that, in the light of current threats to the security of the United Kingdom, the Government take steps to strengthen its control over biotechnological research in British universities and research institutions.[13]

IV. Government Response to Criticisms of the Voluntary Vetting Scheme

The government responded to the Committee's recommendation by stating that it believed that the Committee had misunderstood that the intent of the VVS is as a counter-proliferation tool, rather than a tool to combat terrorism, which is "is amorphous and much more difficult to categorize than a state programme."[14] The VVS's use as a counter-terrorism tool also was considered but found not possible to use to "distinguish a potential terrorist against the 'background noise' of other students."[15]

The government agreed with the criticisms that the VVS had shortcomings due to the patchy implementation of the scheme, with four Universities referring over 500 applications within six months and others referring none.[16] However, the government considers that the academic institutions considered to be of the highest concern do participate in the VVS. However, only seventy percent of institutions in the medium concern category and eighty-five percent in the low concern category participate.[17] The events of September 11, 2001 also caused a significant rise in the numbers of applicants processed through the VSS, indicating that it is becoming a more frequently utilized resource.[18] Concerns have also

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[12] *Id.*

[13] HOUSE OF COMMONS SELECT COMMITTEE, FIRST REPORT: THE BIOLOGICAL WEAPONS GREEN PAPER, 2002, H.C. 150, ¶ 30.

[14] HOME OFFICE, *supra* note 2, ¶ 141.

[15] *Id.* ¶ 142.

[16] HOUSE OF COMMONS SCIENCE AND TECHNOLOGY SELECT COMMITTEE, *supra* note 10.

[17] HOUSE OF COMMONS SELECT COMMITTEE, *supra* note 13, ¶ 26.

[18] The number of applications processed through scheme rose from 270 in 2001 to 740 in 2002. FOREIGN AND COMMONWEALTH OFFICE, THE VOLUNTARY VETTING SCHEME: BACKGROUND INFORMATION, Sept. 2003.

been raised that due to the "competitive and income generating environment"[19] in which institutions operate, the VVS may financially disadvantage the institutions that do make full use of the scheme.

V. Export Control Legislation as a Means to Prevent Proliferation

In addition to the VVS, the United Kingdom has legislation in place making it a criminal offense to assist in the development of a weapon of mass destruction or transmit intangible technology, if it can be used in the making of weapons of mass destruction.[20] Export controls apply to the physical export, electronic transfer or transfer by any other means of items a control list[21] or an end-use control list. Such export controls require any individual wishing to export such goods to obtain an export license from the Department of Trade and Industry and, for certain military exports, additional clearance from the Ministry of Defence. Recent developments have implemented controls on the transfer of software or technology by any means, including orally, within the United Kingdom or outside the European Community if the person wishing to transfer the software or technology has either been informed by the government, or is aware, that the transfer is intended for use, in whole or in part, for uses related to Weapons of Mass Destruction outside the European Community.[22]

The controls do not apply arbitrarily to all academics from certain countries studying certain subjects, but rather apply to all individuals when the specific end use of the information relates to WMD programs and when the:

> Tutor becomes aware, through specific evidence, that one of their students intended to make use of their studies for a WMD programme outside the EC – regardless of their nationality. Suspicion alone would not trigger an obligation under the controls … nor would the subject of research being of potential utility in the development of chemical weapons [trigger an obligation under the controls as it is only when the end use of the information is to be used in relation to weapons of mass destruction outside the European Community that the use of the controls are triggered].[23]

The Department of Trade and Industry has published the following guidelines to help academics assess whether their activities are regulated by the export controls:

- Is the area of study a subject that could be targeted by proliferators?
- Is the technology or software in the public domain?

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[19] HOUSE OF COMMONS SELECT COMMITTEE, *supra* note 13, ¶ 30.

[20] Anti-Terrorism and Security Act 2001, c. 24 and the Export Control Act 2002, c. 28.

[21] Contained in schs. 1 & 2 of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, SI 2003/2764.

[22] Specifically, "the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons." Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, SI 2003/2764, ¶¶ 2 , 8.

[23] DEPARTMENT OF TRADE AND INDUSTRY, GUIDANCE ON THE EXPORT CONTROL ACT FOR ACADEMICS AND RESEARCHERS IN THE UK, May 2004.

- Does the technology or software fall under a definition in the one of the export control lists?

- Could the technology or software be put to a use related to weapons of mass destruction and is the academic aware that the recipient of the information is to put it to this use or use the information outside the EC?[24]

VI. Anti-Terrorism Legislation as a Means to Prevent Proliferation

In addition to these export controls, specific areas of advanced research are also subject to additional regulatory requirements, such as practical research in bacteriology and toxicology subject to Health and Safety legislation; the security of pathogens provisions under the Anti-terrorism, Crime and Security Act 2001; and the provisions on the restriction on development of certain biological agents and toxins and of biological weapons under the Biological Weapons Act 1974.[25]

The Anti-Terrorism Crime and Security Act 2001 introduced a provision that makes it a criminal offense to aid, abet, counsel, procure or incite a person who is not a subject of the United Kingdom to commit an offense relating to biological agents and toxins under the Biological Weapons Act 1974; an offense relating to chemical weapons under the Chemical Weapons Act 1996;[26] or an offence relating to nuclear weapons under the Anti-Terrorism, Crime and Security Act 2001.[27]

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[24] *Id.*

[25] Biological Weapons Act 1974, c. 6.

[26] Chemical Weapons Act 1996, c. 6.

[27] Anti-Terrorism, Crime and Security Act 2001, c. 24, § 50.