The Status of Foreign Students under the *Immigration Act, 1976*

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Introduction

Before the adoption of the *Immigration Act, 1976*,[1] students constituted a separate class of "non-immigrants".[2] There were no specific rules for obtaining student status and it was often acquired inside Canada by tourists and other "non-immigrants". Because students were treated as a separate class, ceasing to study meant losing the right to remain in Canada for the remainder of the time allotted in the visa.[3]

Under the most recent *Act*, students are merely one type of "visitor".[4] If they cease to study, they remain "visitors" until the expiry of their permit. In short, they need not remain "*bona fide* students" at all times so long as they remain "visitors", do not stay in Canada beyond the time granted to them, and observe all the ordinary rules imposed upon visitors in Canada. In this way, students may be treated slightly more liberally than before. In all other ways, however, their treatment has become more harsh.

I. General Considerations

It is, of course, of the essence of student status that it be temporary. It is not unlawful for a student to apply for permanent residence or to hope to get it.[5] But he must intend to leave if he is unsuccessful, otherwise he is no longer a visitor: s. 2 includes the adjective "temporary" in the very definition of a visitor.

The *Immigration Act, 1976* has treated permission to study in Canada in a way which is almost identical to its treatment of permission to work. This is

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[1] S.C. 1976-7, c. 52.

[2] *Immigration Act*, R.S.C. 1970, c. 1-2, s. 7(1)(f), am. S.C. 1973-4, c. 27, s. 5.

[3] Sections 7(1)(f), 18(1)(vi) and 18(2). Authorities were naturally particularly sensitive about students working in Canada and some jurisprudence resulted from this. See *Anegbeh* v. *M.M.I.* (F.C.A.) No. A-478-76, 27 September 1976, *Okalakpa* v. *Paré* (F.C.A.) No. A-247-76, 15 June 1976.

[4] S.C. 1976-7, c. 52, s. 2(1).

[5] See *Sai Yau Fan* v. *M.M.I.* [1974] 2 F.C. 3 (C.A.).

surprising because there does not appear to be a shortage of places in universities equivalent to current levels of unemployment. The policy appears to be based on the fact that every student is to some extent subsidized by the state; hence, it is argued that each subsidy must be controlled with great care. This rationale is weakened when one takes into account the difference between fixed cost and marginal cost. It does not cost substantially more to increase the student body by a moderate percentage. Nevertheless, governments have insisted on this rationale in limiting access to our universities and in charging foreign students fees to cover both fixed cost—which would, at least in the short run, be the same without the foreign students—and marginal cost, which represents the actual expense to these students.

Canada has long been a popular destination for students from all over the world as a place to study and train. This has in part been due to the international reputation of such institutions as McGill University and the University of Toronto. Other causes have been the Commonwealth connection and the difference between tuition fees in Canada and the United States. In recent years, Canadian policy with respect to foreign students has taken a surprising turn and this new attitude deserves careful scrutiny.

II. The *Act*

The sections of the *Act* which govern student status are ss. 10 and 26. Section 10 makes it necessary for a prospective student to obtain his authorization from abroad. Hence, visitors from distant lands are at a very serious disadvantage if they change the purpose of their stay and decide to remain as students. It should be noted that s. 10 applies to people wishing to work as well as to people wishing to study.

Section 26 governs the loss of visitor status generally: working and studying illegally are both included in s. 26(1)(a). Any visitor studying illegally—*i.e.*, without any authorization at all, or at the wrong institution or for the wrong course of studies—automatically loses his visitor status and becomes subject to removal under s. 27(2)(e).[6] Unlike illegal work, however, illegal study is not by *itself* a cause for removal. The removal is directly caused by the loss of visitor status. Persons who are temporarily in Canada other than as visitors may apparently study with impunity. This applies primarily to holders of minister's permits.[7]

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[6] Section 26 applies to any visitor who "without authorization, attends any university or college, [or] takes an academic, professional or vocational course". Fortunately, the French version of "attends" is "suivent des cours" and therefore the visitor need not fear being found physically on the grounds of a university.

[7] However, holders of minister's permits are otherwise in an even more precarious position than visitors because their status can be taken away at any time (s. 37(4)) and an administrative deportation order can be issued against them (s. 37(5)).

III. The *Regulations*

Much of the law regarding students is spelled out in the *Regulations*.[8] The authority and guidelines for such regulation is found in s. 10 of the *Act*, which permits regulations exempting classes of persons from the requirement of an authorization obtained outside Canada; s. 115(a), which allows the Department to blacklist unacceptable institutions and course programmes by regulation; and s. 115(i), which allows regulations to specify the documents required of any class of visitor.

Regulation 2 defines a "student authorization" as a document; this means that, as in the case of employment, implicit authorization is not possible. Regulation 15 governs the issuance of student authorizations and creates two basic requirements: proof of admission to a recognized institution, and proof of financial means. If follows that a "general" student authorization does not exist: a visitor can only receive the right to study a particular subject at a specified institution. Once again the parallel between employment and studies becomes very clear.

As in the case of employment, it is possible to violate the law not only by studying without permission but also by studying at the wrong institution or the wrong subject. Under s. 26 of the *Act* a visitor who does this forfeits his status and must leave Canada.

Regulations 15(2) and 16 exempt certain persons from the requirement of applying for an authorization from outside Canada. The most important group exempted is that of holders of subsisting authorizations. If the exemption did not exist, a renewal would be impossible and student status would be of little practical utility since few degrees can be completed in one year. There are other listed classes of exempt persons but they are not of great practical significance.[9]

Regulation 17(1) states that no course of less than six months duration or 24 hours of weekly instruction can be accepted for an authorization. It would seem that this is a gratuitous intervention of government in purely academic questions and a justification seems unlikely to prove convincing. Regulation 17(2), on the other hand, forbids the awarding of student authorizations to students of institutions listed on a special schedule; this serves as a recognition of the fact that so-called institutions of learning have at times turned out to be fronts for the sole purpose of getting persons into the country.

One serious lacuna in the *Regulations* involves refugee status. A person who has applied for refugee status, but whose case has not been decided, is

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[8] *Immigration Regulations* (1978) S.O.R./78-172.

[9] One wonders why Americans, who least needed an exemption, received one. They may apply at any port of entry under reg. 14(2).

exempted by reg. 19(3) from the requirement that he obtain an employment authorization outside Canada prior to arrival. He may apply for work during the time his application is being considered, which is often a lengthy period of time. No such exemption exists for student status unless one takes literally the suggestion that only *visitors* are prohibited from studying.[10] There seems to be no way that a refugee applicant can study without risking removal. In any case, many refugee applicants are visitors and therefore s. 26 applies to them. Since people who apply for refugee status are very frequently at an age when studies are important, it seems unjust to block them in this indiscriminate way. There seems to be no advantage to Canada in this policy. On the contrary, it appears that since many of these applicants will ultimately remain in Canada, we should do nothing that would make them less prepared to adapt to this country. If anything, one could argue that refugee applicants should be exempted from foreign student fees, both in the interests of Canada so that they not become a burden in the future and as part of our international, humanitarian duties.

IV. Practical Training

One of the most difficult parts of the law in this area, and one where employment and studies do touch, is that of practical training. Many courses require some remunerated work as part of the curriculum.[11] This is particularly the case in many professional and vocational programmes. While permission for work which is strictly necessary for a degree has usually been granted, the Department of Immigration is tough with other applications and has often required clearance from Canada Manpower. For similar reasons, the Department is not well disposed towards applications for part-time employment for students; it is clearly risky to make such an application, even on the basis of great need, because the renewal of the applicant's visa could be denied under reg. 15.[12] Unlawful work is now an automatic ground for loss of student (or other visitor) status under s. 26 of the *Act*. In the past the law was more lenient on this point.[13]

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[10] Thus someone without any status or possessing a ministerial permit would simply proceed to study without formalities.

[11] *E.g.*, accounting clerks, articling lawyers, medical interns.

[12] Technically speaking, of course, it should not be dangerous to make an application. See *Sai Yau Fan* v. *M.M.I.*, *supra*, note 5.

[13] See *Narain* v. *M.M.I.* [1974] 2 F.C. 747 (C.A.): this is not a case involving students but the same principles apply as in *Anegbeh* v. *M.M.I.*, *supra*, note 3, and *Okolakpa* v. *M.M.I.* [1977] 1 F.C. 437 (T.D.).

V. Jurisdiction Problems

An agreement between the federal government and Québec[14] reached in 1978 has transferred much of the discretion in granting student visas to the Québec authorities. The *Regulations* under the *Immigration Department Act*[15] adopted on 13 December 1978[16] reflect the determination of Québec authorities to occupy this field.[17] They force prospective students to obtain a provincial permit before arriving in Québec to commence their studies. The requirements of this permit do not differ substantially from those under the federal *Act* and *Regulations*.

Unfortunately, given the fact that the federal *Act* still applies and hence that most of its requirements could not lawfully be waived,[18] the foreign student in Québec now carries the burden of having to make two successful applications.

Clearly, once a student authorization is issued, the provincial authorities no longer have any power and cannot remove an individual in mid-stream; at that point they can only refuse to renew. The sole procedure for removing individuals is found in the federal *Immigration Act*.

It would not be difficult to formulate a challenge to the validity of the federal agreement with Québec or at least to question its binding nature. The agreement must be justified under s. 109(2) of the federal *Act* — but it does not necessarily follow from s. 109(2) that a complete delegation of discretionary powers is contemplated. A student who is refused a Canadian student authorization merely because Québec refused to admit him would have a strong case in *mandamus* proceedings, to force federal officials to consider him independently of the Québec issue.

Conclusion

This writer has previously expressed the view that the present *Act* is very severe indeed with respect to students.[19] For instance, the prohibition on all

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[14] *Agreement between the Federal Government of Canada and the Gouvernement du Québec with regard to co-operation on Immigration matters and on the selection of foreign nationals wishing to settle either permanently or temporarily in Québec* [referred to as the *Cullen-Couture Agreement*], signed in Montréal, 20 February 1978.

[15] S.Q. 1968, c. 68, am. S.Q. 1978, c. 82.

[16] A.C. 3834-78.

[17] It would be reasonable for a province which finances students to decide how many foreigners to subsidize. On the other hand, the "cultural" aspects of Québec's control have given some cause for anxiety to Québec's English institutions, and the international aspects of student exchange may seem somewhat incongruous with the notion of provincial control. See Institute of Public Administration, *Immigration Policy Making* (1976).

[18] See *R.* v. *Catagas* (1978) 81 D.L.R. (3d) 396 (Man. C.A.) where Freedman C.J.M. held that a government does not have the power to waive the application of the law.

[19] See Grey, *The New Immigration Law: A Technical Analysis* (1978) 10 Ottawa L. Rev. 103.

"illegal studies" smacks of obscurantism and narrow-mindedness. Cases which turn on whether an individual attended a class *prior* to applying for a change of universities[20] — and therefore is subject to deportation — or applied *before* going to class, are on the verge of total absurdity. Furthermore, why is it reprehensible for visitors to study a language or attend some lectures while in Canada? It seems very dangerous to outlaw learning for any reason, laudable though the justification may be.[21]

Another somewhat disquieting side of student authorizations has been a certain high-handedness and strict reading of the statute by certain officials. The fact that the Department chose to press cases like *Olegbade* v. *M.M.I.*,[22] *Adegbola* v. *M.M.I.*,[23] *Sai Yau Fan* v. *M.M.I.*[24] and *Fadahunsi* v. *M.M.I.*[25] leads one to the conclusion that the law should be much more lenient or at least more leniently interpreted. A student who has embarked upon a course of studies has invested both money and time in his endeavour and it is unfair to stop him from completing his course for any but the most compelling reasons.[26] Even where a student has violated the law it seems reasonable not to take Draconian measures. For instance, it would seem appropriate to postpone inquiries until after the end of the academic year for students in their last year, save in cases involving heinous crimes. It would also seem reasonable to grant departure notices, which would make it possible for the student to return (presumably chastised), rather than to insist on deportation orders which continue in force for the individual's lifetime.[27]

It is somewhat surprising that no rules have been adopted to guarantee renewal of student status to persons who have broken no laws. Student

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[20] See *Bernard Sjariel*, Adjudicator Decision under the *Immigration Act* (A.D.I.A.) No. 9529-1-00985, 20 April 1979.

[21] One way to soften the effect of the present law would be to interpret s. 10 of the *Act* to refer to a whole "course" of studies under reg. 15. In other words, sporadic studying would not be covered at all and courses not qualified under regs. 15 and 16, *e.g.*, courses of less than six months' duration, would be open to non-residents without special authorization and not forbidden to anyone. There are no decisions on this at present. However, reg. 16(6) may help visitors wishing to study on a casual basis.

[22] (A.D.I.A.) No. 2495-6-3825, 6 August 1979. This case is still before the Department on a refugee claim.

[23] (F.C.A.) No. A-327-76, 9 August 1976. In this case, a student who was deported because his visa was renewed three weeks late was left without remedy despite the Federal Court's evident sympathy for him. Appeal dismissed by the Supreme Court of Canada without comment, [1980] 1 S.C.R. 758.

[24] *Supra*, note 5; the case involved a discretionary refusal to prolong a visa which fortunately contained an error of law sufficient to quash.

[25] [1977] 2 F.C. 65 (F.C.A.); the case involved another discretionary refusal corrected by the Court of Appeal on the basis of error of law.

[26] An analogy can be made with the English case of *Schmidt* v. *Secretary of State* [1969] 2 Ch. 149 (C.A.).

[27] The recent case of *Re Ng and M.E.I.* (1981) 126 D.L.R. (3d) 187 (F.C.A.) may be seen as a step, albeit a tentative one, in this direction.

status is never a right; it is always possible for officials to send a student home, even before his final year, not because of any transgression on his part, but as a matter of discretion. This has at times been attempted in circumstances which are difficult to excuse. Clearly, pruning in this area should be done by universities themselves. If the intention is to prevent abuse by perpetual students, then the objection to allowing immigration officials to make judgments with respect to academic matters is overwhelming.[28] If, on the other hand, the purpose for the broad discretion is precisely to permit Canada or its provinces to carry out their political, demographic and educational goals more effectively, the provisions seem even more objectionable. A country may have wide discretion concerning a student's initial acceptance; to throw him out in the middle of his studies seems inconsistent with the ordinary practices of democratic governments.[29]

In conclusion, student status is one area where the *Immigration Act, 1976* seems too harsh and too peremptory. Since universities require international exchanges in order to be truly excellent and since the individuals involved deserve some security, it is suggested that the law and regulations be modified.[30]

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[28] See *Olegbade* v. *M.M.I.*, *supra*, note 22; *Wilson Ikeani* v. *M.M.I.* (A.D.I.A.) No. 2495-6-02838, 9 April 1976.

[29] See *Schmidt* v. *Secretary of State*, *supra*, note 26. One wonders if sudden and dramatic changes in fees in the middle of a student's course are not similar in effect to a non-renewal of a visa.

[30] One way of doing this would be to grant students who have begun their studies an appeal to the Immigration Appeal Board. Presently there is no such appeal. This would show that students are not quite as insecure as other visitors but share some of the rights of permanent residents. Another helpful change would be to grant adjudicators the discretion to decide not to issue an exclusion order even if a student has committed an illegal act. It hardly seems fair to deprive someone of his whole career because of a minor transgression, *e.g.*, working for one day, or even a minor theft. At present students are subject to removal like all visitors. See *Lee* v. *M.E.I.* (1979) 30 N.R. 575 (F.C.A.), where the student escaped for a technical reason, and *supra*, note 27. The only discretion is that of the Deputy Minister under s. 27(3) of the *Act* and that discretion is often illusory. There is therefore no recognition of a student's special status.