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Access of Foreign Doctors to Specialist Training in the UK

The BAPIO case was recently decided on final appeal to the House of Lords. It arose out of what can reasonably be described as an attempt by the Department of Health to exercise authority in the field of immigration – an exercise which was found by their Lordships to be unlawful.

The Secretary of State for Health has a statutory responsibility to provide medical and related services under the auspices of the National Health Service, a responsibility which includes the power to recruit and employ doctors and other medical staff. In the exercise of that power the Secretary of State from time to time issues guidance to NHS Trusts, which the Trusts will normally follow. In recent years it has been necessary in order to fill vacancies to recruit doctors who are not nationals of the UK or of any other Member State of the European Economic Area (EEA) and doctors in this category are known as international medical graduates (IMGs). The main source of IMGs has been the Indian subcontinent and doctors from there have their interests represented by the British Association of Physicians of Indian Origin (BAPIO).

The original arrangements for granting leave of entry to IMGs were amended in April 2003 by including them in the Highly Skilled Migrant Programme (HSMP). Applicants who met the necessary skills criteria for admission under HSMP had to show that they intended to make their main home in the United Kingdom and that they could maintain themselves and their dependants without recourse to public funds. Successful applicants were granted leave to enter for 12 months, which was later increased to 2 years, renewable for three years if conditions continued to be satisfied. After 5 years applicants became eligible to apply for indefinite leave to remain.

By 2005 there had been an increase in the numbers of students graduating in medicine in the UK and there was no longer a need to recruit IMGs as junior doctors, indeed there was a risk that continued recruitment would deny employment in the NHS to doctors trained in the UK. The Department of Health therefore proposed that HSMP be restricted so as to exclude IMGs at postgraduate training level from its scope. There were discussions between the Department and the Home Office with a view to amending the relevant Immigration Rules, which are made by the Home Office under section 3 of the Immigration Act 1971. However, no agreement was reached, so the Department decided to issue its own guidance, which it did in April 2006. The guidance was to the effect that only those IMGs whose leave to remain in the UK would extend beyond the termination date of the medical post on offer should be considered along with UK/EEA nationals. IMGs whose leave to remain would expire before the termination date should be offered the post if there were no suitable UK/EEA nationals. This guidance was contested by BAPIO in judicial review proceedings. In the High Court BAPIO succeeded in having the guidance found to be unlawful, but an appeal against this by the Department of Health was successful. On a further appeal by BAPIO to the House of Lords the decision of the Court of Appeal was upheld.

The objection to the guidance was that it introduced a restriction on the eligibility of IMGs for training posts, in that they had to show that they had sufficient leave to remain beyond the period of the contract of the junior doctor position for which they were applying – known as the resident labour market test. This restriction could properly have been introduced only in accordance with an amendment to the Immigration Rules, the responsibility of the Home Office. The guidance issued by the Department of Health was unlawful.

It is unfortunate that the two government departments concerned were unable to agree on amendments to the Immigration Rules which would have put the change in the procedure for recruitment of IMGs beyond questioning. The result of the decision of the House of Lords is clear. If the Department of Health or any other government department wishes to impose restrictions on the recruitment or employment of foreign nationals other than EEA citizens which go beyond the restrictions imposed by the Immigration Rules, it must persuade the Home Office to make appropriate amendments to the Immigration Rules. Any such amendments must be laid before and approved by both Houses of

Parliament and can be and are debated in Parliament. One of the objections to this guidance issued by the Department of Health was that it was not subject to Parliamentary scrutiny.

Harry Mitchell QC
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