405 7641 Ext.

Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

13 April, 1983

Peter Harvey, Esq., CB,
Legal Adviser,
Department of Education & Science,
Elizabeth House,
York Road,
London SE1 7PH.

Dear Peter,

OVERSEAS STUDENTS: FEES AND DISCRETIONARY AWARDS

The Solicitor General has asked me to respond to your letter of 30 March indicating his views on the questions you raise in paragraph 10 of that letter. (attached)

2. In answer to your first question (your para 10(a)) his view is that without primary legislation there is no way in which a system of differential fees and eligibility rules for discretionary awards can be operated without there being a risk of legal challenge if that system is in reality based upon distinctions in the nature or quality of residence here (i.e. whether or not students were resident here wholly or mainly for the purposes of education).

3. Such a challenge would be mounted upon the basis that such arrangements were indirectly racially discriminatory. Up until now it has been thought that universities and other institutions, in discriminating upon the basis of ordinary residence, have been covered by an approval given by the Secretary of State under Section 41(2) of the Race Relations Act, so that, whether or not their action was racially discriminatory, no action under the Act could lie. In so far as the wrong test of ordinary residence was applied, the student in question would not be caught within the terms of the approved arrangements, and we consider some of the implications of this below. What is clear is that it is outside the scope of section 41(2) for the Secretary of State now to approve arrangements for discrimination based upon whether or not a student was resident here for a particular purpose.

4. Accordingly, it is not possible for him to provide cover under Section 41(2) for universities operating the new arrangements. And it is the Solicitor General's view that if it is desired to restore the cover which was thought to exist - or provide any other "fireproof" cover for them-that can be achieved only by primary legislation.

/5. It is

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5. It is also his view that if such legislation is to be enacted it should be introduced at the very earliest possible moment. He has in mind not only the necessity to have the legislation in force as quickly as possible but also the danger that if proceedings were brought on the grounds of racial discrimination before the legislation was introduced, an inevitably controversial matter might so easily become even more controversial.

6. Though the Solicitor General is of the opinion that it by no means follows that the legal challenge of which there is a risk would inevitably succeed, as it seems from your letter (paragraph 5) that the Secretary of State would not wish to leave the Institutions exposed to any such risk, and in view of the urgency, he has considered the form which such legislation should take.

7. Of the two possibilities, amendment of the Race Relations Act or an Act enabling the Secretary of State to make regulations, as you propose, the latter would appear to be by far the best. But the Solicitor General asks me to alert you to one point which occurs to him and which he would like you and your Ministers to have in mind from the outset.

8. The purpose of legislating in the form proposed would be to enable the Secretary of State to make regulations which would give the institutions the same cover under Section 41(1) of the Race Relations Act as they were thought to have under Section 41(2). The question which should be considered is whether the Secretary of State would be content to make orders "requiring" rather than "allowing" differentiation and if not, whether orders simply "allowing" differentiation would afford the cover of Section 41(1). and serve his purpose. We have not had time to pursue the legal side of this. If you think it material please let us know - and let us have your views on it - as quickly as possible.

9. I turn now to your paragraph 10(b).

10. There are of course two entirely different sets of considerations relevant to this question - those of law and those of policy.

11. It may be that in view of what you say in your paragraph 5 et seq this part of the matter must be dealt with purely on grounds of policy but our views as to the questions of law arising are as follows.

12. Although there is a risk of legal challenge we do not think it should be conceded expressly or by implication that that challenge would necessarily succeed.

13. We think that any claim would be based on Section 57 of the

/Race

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Race Relations Act 1976. First, of course, the claimant would have to establish discrimination as defined in that Act. We agree that the relevant discrimination would not fall within para (a) of Section 1(1) of the Act but very likely would be held to fall within para (b) unless the Institution was able to substantiate the defence provided by subpara (ii) of para (b). The Solicitor General does not take so pessimistic a view on this as you expressed in your letter. He feels that an Institution might have substantial grounds for saying that the differentiation can be shown to be "justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied." He further considers that even if that defence failed the Institution would have a reasonable chance of establishing the defence provided by Subsection (3) of s 57 and of avoiding having any award of damages made against it.

14. Accordingly:-

(a) he would not like to see anything said or done which amounted to a concession that there is any obligation in law to repay any of the fees paid; and

(b) he would hope that if proceedings were to be taken the Institution against whom they were taken would plead those defences; and

(c) he can see no legal basis upon which Institutions should be advised that they are obliged to make any refunds in respect of fees already paid.

15. It follows that if your Secretary of State decides as a matter of policy that it is right that the Institutions should repay some specified part of the fees and that he should so recommend now to them, the Solicitor General would hope that it would be made clear at every stage that such payments were to be made ex gratia not under any legal obligation.

16. I understand that :

(a) MAFF has been relying on s 41(2) in respect of certain grants, and

(b) DHSS has been recovering NHS charges on the basis of ordinary residence.

As we have no details about these matters and have not been concerned with them nothing in the above should be taken as relating to them, but I am copying this letter for information to Gordon Gammie and Henry Knorpel.

Yours sincerely

Laurence Oates

(LAURENCE OATES)

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Department of Education and Science
Elizabeth House York Road
London SE1 7PH
Telegrams Aristides London SE1
Telephone 01-928 9222 ext 2720

Henry Steel Esq
Law Officers' Department
Attorney General's Chambers
Royal Courts of Justice
Strand
London WC2A 2LL

30 March 1983

Dear Henry,

OVERSEAS STUDENTS - FEES AND DISCRETIONARY AWARDS

1. As Laurence Oates already knows, the Secretary of State would be grateful for further advice from the Law Officers; in view of my exchanges with him and the discussions I have had with the Solicitor General, I have judged it unnecessary to write a full and self-contained letter and have left a number of things unsaid.

2. Following the meeting at No. 10 on Monday evening, the Secretary of State is to-day making a statement in the Commons relating to eligibility for mandatory awards. As respects fees he will merely say that it is the government's intention to retain for 1983/84 onwards the system of higher fees for overseas students which has operated for some years and that he will be making a further statement about this following the Easter recess. We shall by then have to have decided how this objective is to be achieved, in particular, whether it will require primary legislation this session.

3. Though it may not have been more than touched on at Monday's ministerial meeting, we shall on the same time scale have to decide how to secure that eligibility rules for discretionary awards which discriminate agains overseas students can be safeguarded against challenge under the Race Relations Act 1976.

4. Both on the fees and discretionary award fronts we have, up to now, relied upon approvals given by the Secretary of State for the purposes of section 41(2) of the 1976 Act. Approved arrangements have been ones which discriminated on the basis of 3 years' ordinary residence which (pace the period being questionable) is one of the bases mentioned in section 41(2). But, for the future, the

discrimination would be against students who either -

(a) lacked 3 years' ordinary residence, or

(b) had such ordinary residence but the period included residence wholly or mainly for the purposes of receiving full-time eduction.

This appears to go beyond what could be approved for the purposes of section 41(2).

5. The relevant discrimination would not fall within paragraph (a) of section 1(1) of the 1976 Act but could only fall within paragraph (b). It is submitted that it would not be possible to satisfy a court that the discrimination was objectively justifiable within the meaning of section 1(1)(b)(ii), certainly consistency with government policy does not render something objectively justifiable. But even if the Law Officers were inclined to take the opposite view, it would not be a view on which the Secretary of State would be likely to consider it expedient to rely. First, universities and other establishments might, as a result of advice they themselves took, not be prepared to take and act upon this view. If it were acted upon, it would almost certainly lead to further litigation, and whatever the outcome might be, this is something which the Secretary of State is, in this field, anxious to avoid.

6. On differential fees, there is not only the problem of deciding how best to preserve the substance of the present arrangements but also the question of what advice the Secretary of State should give to universities etc and local education authorities as respects the partial refund of fees paid at the overseas rate by students on the assumption that they lacked 3 years' ordinary residence but who, on the Scarman criteria, had that ordinary residence. It would not be feasible to avoid giving advice in this regard; a significant number of individual requests for such advice have been received over the last month or so.

7. So far as the level of fees depends upon an express or implied term of a contract, it would seem that the overseas fees would have been paid under a mistake of law and the excess over the home fees would not be recoverable.

8.-(1) There remains the possibility of an aggrieved student bringing proceedings for unlawful discrimination under section 57 of the 1976 Act. By reason of section 68(2)(b) such proceedings could relate only to fees in respect of the current academic year (it is considered that a court would be unlikely to allow out-of-time proceedings under section 68(6) for reasons of which Oates and the Solicitor General are aware). Section 57(3) would preclude any award of damages to the student.

(2) It might be argued that a refund of excess fees is analogous to damages and that, accordingly, there would be no moral or political obligation to make a refund if a student obtained a declaration in section 57 proceedings relating to the current academic year's fees. It is submitted, however, that there is a distinction between a moral and political obligation and a legal liability and that Parliament intended no more than that a defendant found to have committed indirect discrimination should be left to do that which, in all the circumstances, appeared to him appropriate and should not be held liable in damages. It seems arguable that government, and establishments largely funded by government, might politically be expected to draw the conclusion from a declaration that it was appropriate to rectify discrimination held to be unlawful and, in the present context, to refund excess fees which had been paid. In so far as there is any such moral and/or political obligation, it would seem virtually as strong in a case in which an institution judged that a student would get a declaration as in the case of a student who brought proceedings and got a declaration. Students should not be forced to go to, and take up the time of, the courts unnecessarily. If the view were taken that there is some such moral and/or political obligation, it could be argued that it was somewhat artificial to confine it to fees in respect of the current academic year by applying cy pres the limitation

provisions of section 68(2)(b). The wholly different approach canvassed in the following paragraph would, however, lead to that result.

9. The House of Lords judgment was, in effect, towards the end of the first term of the current academic year and therefore comparatively early in that year. Arrangements for the payment of fees will vary from institution to institution, they might be payable on a terminal or on an annual basis. While advance payment may commonly be required in the case of overseas students, there may be cases in which fees are paid terminally in arrears. DES has little detailed information. Presumably any fees charged since the House of Lords judgment have, in appropriate cases, been charged at the home rate. It would be highly anomalous if the aggregate fees for the current academic year required of a student depended upon the administrative arrangements at the institution he attended and how far they were paid in the first term (at the overseas rate) and how far in the second or third term (at the home rate). Good public administration arguably requires that a student's fees for the academic year should not depend upon accidents of administration but be determined at the same rate for the year as a whole. This suggests that any excess fees paid for the current academic year before account had been taken of the House of Lords judgment should be refunded.

10. The advice the Secretary of State seeks therefore relates to the following matters:-

(a) by what means can the system of differential fees and eligibility rules for discretionary awards be continued without running a real risk of further litigation and, in particular, is primary legislation either necessary or desirable for this purpose;

(b) what advice should be given to local education authorities, universities etc as respects the refund of excess fees and, in particular, should they be advised to refund

excess fees for the current academic year and/or not to do so for any earlier year;

(c) other questions or considerations which appear to the Law Officers to be relevant to, or have some bearing on or connection with, the above matters.

Sincerely,

Peter Harvey

Peter Harvey

PT

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Subject Copy filed on Education June 1980

Tuition fees for overseas students

DEPARTMENT OF EDUCATION AND SCIENCE
ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH
TELEPHONE 01-928 9222
FROM THE SECRETARY OF STATE

T Flesher Esq
Private Secretary
10 Downing Street
LONDON SW1

13 April 1983

Dear Tim,

... I enclose a copy of the Solicitor General's opinion on fees for overseas students in universities and FE establishments, since this will bear on the Cabinet's discussion of the legislative programme tomorrow. You will see that the Solicitor advises that primary legislation is urgently required.

I am sending a copy of this letter and its enclosures to the Private Secretaries to other members of the Cabinet and to Sir Robert Armstrong.

Yours ever,

Imogen Wilde

MRS I WILDE
Private Secretary