Neutral Citation: [2015] IEHC 140

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 665 J.R.]

BETWEEN

NATIONAL EMPLOYEE DEVELOPMENT TRAINING CENTRE LTD

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND QUALIFICATIONS AND QUALITY ASSURANCE AUTHORITY OF IRELAND

RESPONDENTS

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 666 J.R.]

ACADEMIC BRIDGE LTD

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND QUALIFICATIONS AND QUALITY ASSURANCE AUTHORITY OF IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 13th day of January, 2015

Facts

1. Both applicants are limited liability companies incorporated in Ireland and both of them carry on the business of providers of educational services, primarily the teaching of English as a foreign language to international students. The companies have been engaged as educational providers for three years in the case of the first applicant, and four years and in the case of the second applicant.

2. The first respondent is sued as a Minister of Government and the second respondent as a statutory authority established pursuant to s. 8 of the Qualifications and Quality Assurance (Education and Training) Act, 2012.

3. Each of the applicants has enrolled a large number of foreign students in its language programmes. The numbers of students enrolled at any one time of course will differ, but in each case there are hundreds of students enrolled, and the majority, if not all of the students, are from non EU/EEA countries. The companies are not associated companies and there is no overlap in directorships or shareholdings. Each of them employs teaching and non teaching staff. The two cases before me, while they involve separate institutes of education, raise the same questions of law, and substantially the same questions of fact, and the cases were run together.

4. In 2014 a number of high profile closures of schools offering diploma type education to international students came to be of concern and a number of schools shut down at short notice leaving some 3,000 students unable to complete their programmes. Some of those students, having paid substantial fees for a course which was discontinued, found themselves stranded without their course and where they had no funds to take up an alternative course in another college.

5. Allied to these immediate and very public closures there has been growing in Government a concern regarding the proper control and management of these schools, and a view had evolved that a more robust regulatory framework was required. In particular it was perceived that some schools operating in the international education sector were thought to offer courses of an inferior quality in order to be in a position to facilitate non EU/EEA students in obtaining immigration permission as a student. The permission obtained by students attending some of these courses was seen as particularly favourable in that a student could obtain a special type of visa, a so-called "Stamp 2" visa, enabling him or her to remain in the State for twelve months, to study part-time for six months and during that period to be permitted to work also part-time for a maximum of twenty weeks, and for a further six months to work full time. Some of these students were perceived by the relevant Minister as more interested in being in the Sate for the purpose of working rather than for study, and some colleges were seen more as visa processing centres than education centres.

6. In practical terms non EU/EEA nationals who wish to come to study English in Ireland will often do so through the services provided by English language schools but it came to be perceived that some educational providers were offering courses which were not of a high quality in education standards, and that the high profile failure of some of these institutions had a negative effect on the sector as a whole, a sector which Government was anxious to protect.

7. Particular concern was expressed with regard to schools which offered English language courses and it was thought that some of these colleges offered courses at fees which were unsustainably low given sectoral norms, and which did not offer Irish accredited programmes. It was also noted with some concern that attendance records of students in certain institutions were less than satisfactory and that the majority of students in some institutions did not sit any exams and showed no move through levels of competence in their subject. It is said that the courses that are offered by many colleges, including many of those offered by the two applicants, may ideally be availed of with the benefit of a three month holiday visa, but that the programme of study is "stretched out" so that what is in essence a short course is taken over a long period in order to give students the benefit of a particularly

generous immigration regime.

The ACELS Recognition Scheme
8. For upwards of forty years a voluntary scheme operated for the inspection and recognition of English language schools in the State, the control of standards in teacher training, and the promotion of English language courses in Ireland, Accreditation and Co-ordination of English Language Services ("ACELS"), initially from 1969 under the auspices of the Department of Education and Science whose functions were transferred to a company limited by guarantee in 1995. That company was dissolved on or about the 1st June, 2012. After the dissolution of the company limited by guarantee ACELS was operated for a short period of time from the 30th June, 2009 to the 6th November, 2012 (the date of the establishment of the second respondent), through a statutory body, the National Qualifications Authority of Ireland ("NQAI").

9. ACELS accreditation was not a requirement for a college to carry on the business of English language teaching in the State, nor was it until the matters herein complained of, necessary that a student be registered with an ACELS course to obtain a Stamp 2 visa. Neither of the applicants has ACELS accreditation, and each of them was accredited by a UK provider. It is asserted that EDI/Pearson, the UK accrediting body which oversees the Irish operations of the applicants, does not in fact recognise the courses operated by them but that the registration which the applicants have with EDI/Pearsons is as accredited exam centres.

The Qualification and Quality Assurance (Education and Training) Act, 2012
10. The second respondent was established on the 6th November, 2012 pursuant to the provisions of the Act 2012, with the principal objectives of devising the institutions and operating a system of quality assurance for educational service providers generally. The role of the second respondent is not confined to English language schools and the system of quality assurance is intended to cover all education service providers. As part of its function the Qualifications and Quality Assurance Authority of Ireland (the "QQI") has signalled an intention to establish an International Education Mark, (the "IEM"), and in time it is intended that only those service providers who can demonstrate compliance with the code of practice of, and who use, the international mark will be accredited.

11. The ACELS brand was closed on the dissolution of the company limited by guarantee on the 1st June, 2012, but, presumably because of a perceived lacuna and as an interim measure, the ACELS accreditation system was reopened during a short window between October 2013 and January 2014, and that accreditation system was operated by the second respondent.

The Internationalisation Register
12. The first respondent has for many years maintained what was called the Internationalisation Register on which was entered particulars of courses which met certain criteria, and students who enrolled on one of these programmes of study were almost invariably granted permission to be in the State for 12 months and to obtain through the Garda National Immigration Bureau a Stamp 2 visa.

13. Certain guidelines for colleges offering courses to full time non EU/EEA students were issued by the Department of Justice and Law Reform in August 2011. These set out *inter alia* the conditions for colleges regarding permission to recruit international students and one of those conditions was that a college would be allowed to bring full time students into Ireland to attend only those courses listed on the Internationalisation Register. Both applicants are registered on this Register.

2014 reform: Irish accreditation a requirement
14. The Department of Education and Skills issued a policy statement on 2nd September, 2014, entitled "Regulatory Reform of the International Education Sector and the Student Immigration Regime", which sought to impose a new and more regulated regime for the accreditation of English language schools in the State. The scheme involved the establishment on an interim basis by that Department of an Interim List of Eligible Programmes (the "Interim List") which was intended to come into operation on the 1st January, 2015, but which has been delayed for three weeks pending the determination of these proceedings. Eligibility for inclusion in the Interim List depends on accreditation or recognition by Irish awarding bodies. The Minister explains her wish that colleges be Irish accredited as a wish that the courses offered by those colleges would have to undergo an Irish accreditation process described as "more rigorous and hands on" than an overseas accreditation process which would not be expected to conduct regular inspections of the teaching facilities and/or of the courses.

15. One aspect of the criteria for eligibility for inclusion on the Interim List has given rise to these proceedings, namely that colleges, other than established third level institutions not relevant to the matters herein, be ACELS or QQI accredited. As a result of this policy ACELS accreditation is for the first time required before a college can hope to be placed on the Interim List, and to give an assurance to its prospective students that they will obtain a Stamp 2 type visa. Further, ACELS accreditation is the sole means identified by which the necessary accreditation can be obtained.

16. The National Employee Development Training Centre ("NEDTC") has already applied for and failed to obtain ACELS accreditation and equally failed on appeal. Academic Bridge is awaiting a decision on its application for ACELS accreditation.

These proceedings
17. By order of Noonan J made on the 10th November, 2014, the applicants were given leave to challenge by way of judicial review the decision of the Minister to impose what were described as "fixed preconditions" to the grant of a visa to a non EU/EEA student who wished to pursue a course of English language study in the State, namely that the student pursue a course accredited by ACELS and for failing to have regard to any other accreditation, experience or track record of the college where the student intends to study. The applicants impugn the decision contained in the document of 2nd September, 2014 as *ultra vires* the Minister and amounting to a fettering by her of her discretion. Leave was also granted to seek a declaration that the second respondent had no power to operate the ACELS scheme.

18. Before turning to the arguments I note that the document of September 2nd expresses the requirement that the relevant programme be "ACELS/QQI-recognised English language provision", and I take the view that what was intended by this somewhat terse phrase was that the college have historic ACELS accreditation or ACELS accreditation granted by QQI as the case may be, and an assumption is made in the document that QQI operates ACELS, presumably on an interim basis pending the operation of the IEM anticipated to be in mid 2016. I do not understand the requirement to be that all colleges obtain ACELS through QQI, but clearly the two applicant companies, not having the benefit of ACELS accreditation under the old schemes, could satisfy the new requirements only if they could obtain ACELS through the only body purporting to offer the brand, and in that context they challenge the *vires* of the QQI.

The arguments
19. The applicant argues that the second respondent has no statutory power to operate the ACELS accreditation system, and that its only statutory power is to operate and manage the IEM, the new accreditation system which has not yet come into operation. It

is argued that the Minister by imposing the requirement of ACELS accreditation has fettered her discretion to grant an entry visa to prospective students, and that she may not lawfully impose a requirement of ACELS accreditation as the brand is now closed, and may not be operated by the second respondent.

20. Counsel for the Minister argues that what is in essence in issue in this case is not the conduct of English language schools but the immigration policy of the State. It is pointed out that most international students in Ireland in fact come from either the EU or the EEA and the applicants are somewhat unusual in that the bulk, if not all, of their students are non EU/EEA nationals. Government identified what it views to be widespread abuse of the schools accreditation system and came to the conclusion that this was undermining the executive function and duty to control immigration, as well as posing a risk to the *bona fide* sector and to international students generally.

21. The Minister argues that the policy document of September 2nd is not amenable to judicial review as it expressed a policy reflecting the decision of Government and made pursuant to an inherent power of Government to fix policy in the State. The decision by the Minister to issue the policy document on the 2nd September, 2014 was not the exercise of a statutory function by the Minister but was an executive decision of Government and expressed Government policy

Judicial review of executive function?
22. Certain decisions made by the executive do not lend themselves to judicial review as they are concerned with matters of policy and this is clear from a long number of cases, including the judgment of *McGimpsey v. Ireland* [1988] IR 567. The nonjusticiable nature of such decisions is too well established to require comment and such decisions are not amenable to review in particular because of the separation of powers.

23. The control of immigration is an executive function and the courts have long recognised the power of the State to regulate immigration and to establish its boundaries, described by Hardiman J in *A.O. and. D.L. v. Minister for Justice* [2003] 1IR 1 as *"an antecedent and inherent power"* of State and one that has existed throughout history. The policy document issued on the 2nd September, 2014 is a statement of Government policy and one squarely within the executive power in this regard. That power is of a dual nature. The executive has an inherent function to control immigration, and the Oireachtas through various legislative actions makes laws to control immigration. The court has a limited role and in general it could be said that the role of the court is limited in immigration matters to a challenge to a decision by the Minister in an individual case to refuse permission to be in the State.

24. The State can change underlining policies as factors affecting the exigencies of the common good themselves change. The publication by the Minister on the 2nd September, 2014, of the new policy document was an action precisely of the nature envisaged by the Supreme Court in *A.O. and D.L. v. Minister for Justice* and the Minister's policy was identified as arising from a perceived difficulty with immigration control and the operation of certain sectors in the education sphere.

25. As the policy document issued by the Minister on the 2nd September, 2014 is a policy document and not a document made in the exercise of the statutory power, the applicants cannot challenge the change in policy and the importation of a more rigorous and Irish based regulatory regime and the Minister is entitled to adopt new policies having regard to current views of the common good.

Decisions amenable to review
26. The Minister has a clear interest in ensuring that the courses taken by so many foreign students who are seeking to benefit from immigration permission are genuine courses, and with that in mind she has now required that those programmes meet standards and are accredited in accordance with domestic accreditation procedures and standards. That general statement of policy contained in the document of September 2nd is not in my view open to review by me in these proceedings, but the first question I must decide is whether the challenge by the applicants is a challenge to the policy.

27. The Statement grounding the application for leave to bring judicial review expressly by its language focuses on the decision of the Minister and not the decision of Government and this distinction was the subject of some argument before me. Counsel for the Minister argues that her decision was the decision of Government and not amenable to review. Counsel for the applicants points to the fact that the matter is pleaded in a narrow way and that the challenge is a challenge to a decision of the Minister, and points me to the fact that the Statement of Opposition of the first respondent takes up this description and nowhere asserts that the decision was one of Government. In this regard he makes the point that the decision sought to be impugned is not the policy of the Government to control immigration but rather the decision of the Minister contained in that document that she would deem eligible for inclusion on the Interim List only those colleges that had ACELS accreditation.

28. I accept the argument that the criteria proposed for inclusion on the Interim List may give rise to review, and this could be so if these criteria impact on the decision making process to such an extent that the criteria themselves preordain the result or involve a fettering of discretionary decision making. The 2nd September document is a statement of government policy, not open to review, but the document also contains within it the means of regulation or implementation of that policy which may be reviewed by the courts.

Has the Minister fettered her discretion under s. 4?
29. By virtue of s. 4 of the Immigration Act 2004 the Minister has a wide discretion to grant visas to non-Irish persons wishing to come into the State. The Minister has no power to regulate immigration outside the power vested in her pursuant to s. 4 of the Immigration Act 2004, and this is clear from the judgment of Denham J in *Bode v. Minister for Justice and Equality* [2008] 3 IR 663 but more especially from the express terms of s. 5 of that Act which provides that a person may not be present in the State save under permission granted by the Minister under her powers contained in s. 4. This power is a very broad power and the Minister has very broad discretion but it has a statutory origin.

30. Section 4 of the 2004 Act provides, in the relevant part, as follows:

> *"(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").*
>
> *…*
>
> *(6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national, or an inscription placed on his or her passport or other equivalent document, attach to a permission under this section such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.*

…

(7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefore by the non-national concerned."

31. Section 5 of the 2004 Act provides, in the relevant part, that:

"(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State."

32. It is argued by the applicants that the Minister has by adopting the policy contained in the 2nd September document precluded herself from fully considering an application by a prospective student, or from considering the quality and nature of the individual programme of study offered to such student, that the rigid adherence to a requirement of ACELS accreditation is a fettering of her discretion to give permission to a prospective student, and that she has foreclosed the consideration of applications by determining in advance that students intending to pursue a programme in certain colleges be refused entry to the State. That a deciding body must not close it eyes to the factors operating in an individual application is well established and a decision is only properly characterised as having been made if it did engage with these particular factors and merits in an application, and did not slavishly follow an inflexible rule. As described by Keane J in *Carrigaline Community Television Broadcasting Company Limited v. The Minister for Transport* (No. 2) [1997] 1 ILRM 241 at pp. 252 and 253:

"[The Minister's] paramount duty remained to consider all the proposals before him for the use of the airwaves in a fair and impartial manner. He was not entitled effectively to foreclose such a consideration of any of the applications, including that of the plaintiffs, by determining in advance, as he did, that one form of retransmission alone would be permitted and that franchises would be granted for it to the exclusion of any other system. That would not be a valid exercise of the power vested in the Minister."

33. Equally in *O'Neill v Minister for Agriculture* [1998] 1 I.R. 539 Keane J in considering the exclusivity scheme adopted for artificial insemination centres by the relevant Minister said at p. 556:

"It is not that there is any reason to doubt that the scheme ultimately devised by the first respondent was desirable, and may well have operated in the national interest, it is simply that such a scheme is so radical in qualifying limited number of persons and disqualifying all others who may be equally competent from engaging in the business. It may be that such a far reaching power could not be delegated by the national parliament at all. Certainly I would be unwilling to accept that in using general words the Oireachtas contemplated such a far reaching intrusion on the rights of citizens."

34. A policy can guide the exercise of a discretion providing the deciding body does not breach constitutional justice or provided the decision is not pre-ordained or the policy is not slavishly followed. A policy or even a set of rules or requirements, may guide, but a policy which is stated in the general may not be applied without considering the individual facts and factors in an individual application. This is clear from the judgment of Kelly J in *Mishra v. Minister for Justice* [1996] 1 1IR 189, at pp. 204 to 205:

"[The affidavit] demonstrates the general policy of the Minister not to naturalise people who would be unemployable in their chosen profession and who, by reason of such, would immigrate on or subsequent to obtaining their Irish citizenship here and thereby would not fulfill condition (d) of s. 15, sub-s. 1 of the Act of 1956. It is clear from the affidavit that this policy emerged from past experience…

In my view, there is nothing in law which forbids the Minister upon whom the discretionary power under s. 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant."

35. In *Robert and Mursean v. Minister for Justice, Equality and Law Reform* [2004] 11 JIC 0202, Peart J made it clear that a rigid adherence to a policy could of itself amount to a denial of fair procedures.

36. In *O'Neill v. Minister of Agriculture* the effect of the impugned decision was that the number of eligible applicants for a licence for the practice of artificial insemination was limited by the exclusivity scheme put in place by the Minister. While the policy document of the Minister of the 2nd September 2014 does not of itself limit the number of schools, the practical effect of her decision to limit eligibility for entry on the Interim List to schools with ACELS recognition has been to limit the number of schools, the type of programmes or the manner of the delivery of such programmes. Were ACELS to be a functioning brand, application for which could still be made under a valid system, no coherent argument could be made that the Minister had fettered her discretion or prejudged the applications by imposing a limit on the number of potential applicants, but ACELS is closed and accordingly the class of potential applicants is also closed.

37. I adopt these general statements of the law, and consider that the requirement contained in the document of September 2nd was a statement by the Minister by which she did unduly fetter her discretion, or more accurately by which she indicated in advance of determining any application by a prospective student that she would not consider eligible a course of study which did not have ACELS accreditation, and in doing so she predetermined that enrolment on the courses offered by the NEDTC at least, which has failed on appeal to obtain ACELS, cannot qualify a prospective student. The Minister may well in an individual case decide that the student intending to take a course with either of the applicants be permitted to obtain a Stamp 2 visa, but the policy and criteria clearly stated by her in the document suggest otherwise.

38. In my view the decision of the Minister in this case is broadly akin to that successfully challenged in *Carrigline Co Limited v. Minister for Transport* [1997] 1 ILRM 241 where Keane J held that the Minister's decision was unlawful because he had determined in advance *"that one form of retransmission alone would be permitted and that franchises would be granted for it to the exclusion of any other system"*. The court in that case held that the Minister by this exclusion had failed to consider all the proposals for licences for the use of the broadcasting waves in a fair and impartial manner.

39. It is undoubtedly the case that the Minister intended Irish accreditation to be in place for any programme to be placed on the Interim List. There is no other domestic body which provides this accreditation and indeed the document published by the Minister suggests that only ACELS accredited bodies or programmes are eligible for inclusion. Because the phraseology in the document with regard to ACELS accreditation is, as I have already said, somewhat terse and unclear it is not obvious whether the Minister meant also to include as eligible programmes those accredited by QQI, but having regard to the limited purpose of the Interim List, which was to be in place only until the IEM was established, my view is that as the Minister did not intend the Interim List to continue once the IEM was in place, and she did not have in mind that QQI would operate another form of accreditation other than ACELS. While the phraseology in the document is less than clear the Minister did intend to confine inclusion on the list to those programmes which were ACELS accredited either under the historic system or through QQI, and did not intend any other form of domestic accreditation to be eligible.

40. Whilst there is no other domestic body which accredits English language schools, the Minister herself through her officials may, and in my view must in the absence of a proper statutory scheme, consider each programme on its merits, albeit she may introduce or apply a set of principles and rules for that purpose. She may not however in my view confine herself to ACELS recognised programmes primarily because the scheme is closed, and these applicants may not reapply for ACELS accreditation even were they to improve their programmes to meet the Minister's concerns. I accept that the Minister retains a discretion to grant a visa to a student who is registered to study on a programme other than one on the Interim List, but has given herself little or probably no scope to do so, and has entirely and probably unwittingly closed the Interim List to NEDTC by the importation of the requirement of ACELS accreditation which it cannot now achieve.

41. There are now only eight pending applications under ACELS, one of which is the application of Academic Bridge. After these eight pending applications, all lodged during the short window that was opened between December 2013 and January 2014, are determined the brand will close. ACELS, in other words, is almost at the end of its life. It is and has been closed for new applications since January 2014, and the number and identity of bodies or persons who can still be accredited is an identified and a closed set. The Minister may not now impose a requirement that limits the qualifying bodies to members of this closed set.

The *vires* argument

42. It is undoubtedly the case that the ACELS accreditation system was a voluntary, and to a large extent ad hoc, system with no statutory basis, although the existence of an accreditation mark or brand was of benefit to all education providers in the sector and to prospective students. It was only in 2012 with the enactment of the Act of 2012 and the establishment of the QQI that the Oireachtas for the first time put in place an accreditation system for education providers, and it is intended that the statutory quality mark, the IEM, will be rolled out from early in 2015, and be issued from 2016.

43. Counsel for the applicants argues that QQI is not mandated by the Act to operate the ACELS, or indeed any other type of accreditation other than the IEM itself.

44. Section 9 of the Act sets out a long list of the powers and functions of QQI and includes a general provision that it shall have all powers *"necessary or expedient for the performance of its functions"*.

45. Undoubtedly there will be a delay in the introduction of the IEM and counsel for the second respondent argues that there is as a result a lacuna or interregnum during which time the Oireachtas must have intended that some implicit or implied power would exist for ongoing accreditation of education providers, that as it is in the interests of all persons using or providing the service that such a scheme be in place, a power to manage a voluntary scheme must be vested by implication in QQI. It is further suggested that all of the relevant stakeholders did as a matter of fact adopt or contract into this voluntary structure and that QQI had a power incidental to its broad statutory function in the area of quality control and education to manage this voluntary process.

46. QQI is a statutory body with no inherent powers, its powers being those vested in it by its enabling legislation, whether expressly or by implication. The law is well established and was explained by Kelly J. in *Director of Consumer Affairs v. Bank of Ireland* [2003] 2 I.R. 217 when in considering the powers of the Director of Consumer Affairs pursuant to s. 149 of the Consumer Credit Act 1995 at pp. 237 to 238 he stated:-

> *"The plaintiff is a statutory officer and is therefore strictly confined to the functions and powers conferred upon her under the Act. She has no inherent power. But she may have powers which, although not expressly conferred, may be regarded as incidental to or consequential upon those which the legislature has expressly authorised."*

A similar view was taken in *Keane v. An Bord Pleanála* [1997] 1 I.R. 184 where Hamilton C.J., in considering the powers conferred on the Commissioners of Irish Lights under the Merchant Shipping Act 1894, stated at p. 212:-

> *"The powers of the Commissioners, being a body created by statute, are limited by the statute which created it and extend no further than is expressly stated therein or is reasonably necessarily and properly required for carrying into effect the purposes of incorporation or may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised."*

47. The second respondent relies in particular on the statutory power contained in s. 9(1) (c) of the Act to *"review and monitor the effectiveness of providers' quality assurance procedures"*. That exact phrase, *"quality assurance procedures"* is found also in s. 27(2)

48. I must attempt as far as possible to give a harmonious interpretation to the provisions of the Act, and the phrase *"quality assurance procedures"* must be read as having similar meanings and intent in each part of the Act, and for the purpose of s 9(1) (c) must be understood to refer to s. 27(2). Thus I consider that the QQI does not have a general power to review and monitor quality assurance, but has one within the confines of the express statutory power vested in it under s. 27(2), not the more general one that would enable it to operate the ACELS scheme as presently constituted. Further as stated by Finlay Geoghegan J in *Gama Construction Ireland Ltd v. Minister for Enterprise Trade and Employment* [2007] 3 IR 472 any implicit power must be construed in the context of the purpose for which the powers were given.

49. The second respondent also argues that under s. 9(3), QQI has vested in it all power to *"all powers necessary or expedient for the performance of its functions"*, and that this includes a power in furtherance or in *"performance of its function"* to manage or operate the voluntary ACELS type scheme. Thus it is argued that whilst its function is to set up the IEM it must equally have been envisaged by the Oireachtas that QQI had a role in the period of transition until the IEM procedures were fully operational. I accept the argument by the applicants that this mischaracterises the statutory scheme, and in particular the historical context of that scheme. The Act of 2012 was the first time that the Oireachtas legislated in this area and to that extent it seems to me that there

was neither an interregnum nor the need for the legislation to provide transitional provisions. The ACELS scheme was indeed a voluntary scheme and was discontinued some months before the QQI was established. There is no logical link between the previous voluntary scheme and the now mandatory statutory scheme and no basis on which I can construe the legislation as requiring for its proper operation some form of transitional provisions. There is in essence no transition between one statutory regime or another, and in that context the argument that there is an interregnum is incorrect.

50. Further the Act does contain transitional provisions, for example in s. 21 with regard to the continuation of employment contracts, s. 72 with regard to the preservation of claims for loss or injury, s. 73 for the vesting of land and other property, s. 74 for the transfer of contractual rights and obligations. Section 75 permits QQI to carry on and complete *"[a]nything commenced and not completed before the establishment day by or under the authority of a dissolved body"*, but this transitional provision is relevant only where a function has been transferred by the Act of 2012 to QQI, and has no application without such an express statutory transfer of identified functions. The absence of an express transitional provision in regard to quality assurance functions formerly carried out by the now dissolved NQAI is significant and I cannot imply that one was intended where other express transitional or transferring provisions are clear in the Act.

51. NQAI was dissolved by Part 8 of the Act of 2012 and s. 71 (2) of that Act provided that reference to any of it and other identified bodies in any enactment, instrument under an enactment, in the Memorandum or Articles of Association of any company or in any other legal document are to be construed as a reference to QQI. It is argued by the second respondent that by virtue of this provision QQI is the statutory successor to NQAI and accordingly has all of the powers that NQAI had to administer the ACELS scheme. I cannot accept this argument and the transitional provision, and in particular s. 71(2), while it expressly provides for the substitution of QQI in enactments and instruments for NQAI, does not and cannot by virtue of such substitution confer on the new body the statutory powers vested in the old body, and such transfer of statutory powers, or creation of the succession of powers, can only be created expressly or by necessary and limited implication as outlined above.

52. In my view the operation of the ACELS system is neither necessary nor expedient for the performance of the functions of QQI, and therefore s. 9(3) does not confer power upon QQI to operate the scheme. Indeed one of the purposes for which the 2012 Act was enacted, and the primary purpose for which QQI was established by that Act, was to establish and operate an entirely different and more rigorous and recognisable quality mark for all education providers, the IEM, which will take over the quality assurance function in respect of all education providers sometime in 2016. While the Act of 2012 does provide for the transfer of rights, entitlements, obligations and liabilities from NQAI to QQI it does not expressly, and cannot be said to implicitly, transfer the powers of NQAI to the new party.

53. I am fortified in this view by the provisions of Part 3 of the Act of 2012 which identifies the means by which the QQI must carry out its statutory functions, and by the fact that not only are these procedures not followed or even purported to be followed by QQI in its current operation of the ACELS system, but such procedures and regulations are specifically referable to the express statutory powers conferred by the 2012 Act, including in particular to administer and issue the IEM, and not any other scheme.

54. Finally the second respondent argues relying in particular on the decision of the Supreme Court in *Gama v. Minister for Justice Equality and Law Reform* that insofar as the QQI is not expressly prohibited from managing the ACELS process the court should not intervene and in this they rely on the dicta in *A.G. v. Grace Eastern Railway Co* (1880) 5 App. Cas. 473 per Shelburne L.J. that:-

> *"Whatever may fairly be regarded as incidental to or consequential upon, those things which the legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires."*

55. This decision was cited with approval and applied by the courts on a number of occasions and most recently by Birmingham J in *Magee v. Murray* [2008] IEHC 371 where he accepted the submission that an implied power could only exist:-

> *"…where (1) that is justified by the statutory context; (2) the power contended for is not of such a nature that one would expect to see set out specifically and (3) the power contended for is consistent with the statutory scheme."*

56. Counsel for the applicants argues an inherent illogicality in the position contended for and in particular he points to the fact that the QQI opened ACELS for a short period between October 2013 and January 2014. He suggests in that context that either there was a need to fill a lacuna or to deal with the interregnum or there was not, and if QQI closed the gate it implicitly accepted that no transitional need arose, or that if it did arise it could be satisfied by a very short opening of the window.

57. More fundamentally it seems to me that, adopting the test as described by Birmingham J in *Magee v. Murray*, I can find that there exists an ancillary power only if such is justified in the statutory context, and is such that one would not expect to see set out specifically, and is one consistent with the statutory scheme. I cannot accept that the ACELS scheme, which is entirely different both in form and procedure from the complex and nuanced scheme set up under the statute for the granting of IEM status, is consistent with or implicitly part of the IEM scheme. A clear structure is contained in the Act of 2012 and what the second respondent wants me to do is to imply from the fact that such a clear structure is given a power to operate an entirely different structure.

58. I am fortified in this view by the decision of Kelly J in *An Blascaod Mòr Teoranta v. Commissioner of Public Works* [1996] IEHC 45 where he held that an implied statutory power existed in the particular circumstances of that case where on a true reading of the legislation it gave power to the Minister to *"prescribe"* certain matters and the court found that this implied a right to make regulations for such prescription. Kelly J made it clear that the power of the court to infer a power not expressed in legislation must be limited and indeed, in his judgment in that case, set quite clear parameters in the context of his view of the meaning of the legislation.

59. Thus I am of the view that the QQI does not have a power to operate the ACELS accreditation system and that one cannot be implied as an incidental or consequential power from its express quality assurance powers in the Act of 2012. QQI is a statutory body and must be understood as a creature of statute to have vested in it only those powers expressly or on a true interpretation of its statutory powers, impliedly vested in it, and cannot be said to have a residual power to operate what was never any more than a voluntary accreditation scheme within different procedures and requirements.

60. Up to the publication of the 2nd September document QQI was operating ACELS, albeit within a short window, for the mutual benefit of participants who sought the brand benefit and it could be said that its operation arose from what was a contractual nexus between QQI and these bodies. However, the criterion introduced by the Minister on 2nd September has an exclusionary and mandatory effect and the power to operate the scheme described as ACELS/QQI cannot arise by agreement as it is neither contractual, informal nor ad hoc. Thus, QQI can in my view operate a mandatory scheme only if it is doing so within its express or

implied statutory power.

Discretion to grant judicial review
61. Both respondents have suggested that the applicants are not *bona fide* providers of education services and that each of them operates an outmoded business model. There is no plea in the statements of opposition that the claims of the applicants are not brought *bona fide* but it was asserted in the course of argument that both colleges were "colleges of concern" or linked to colleges which had closed in controversial circumstances, and the argument is made that judicial review should be refused and the court has a discretion to do so.

62. The Minister points to the fact that there is no evidence before me that the applicants are in reality of good standing or that they offer quality assured courses. The deponents of the various affidavits on behalf of the applicants are newly or relatively newly appointed directors or owners of the companies and an overlap has been shown to me between the persons who are now operating the schools or who are directors or shareholders of the applicant schools and some of the schools which closed in controversial circumstances in the summer of 2014.

63. Counsel for the second respondent argues that this case centres on the ability of the applicants to give or assure their students that they will obtain a Stamp 2 visa and the *vires* argument against the second respondent is a collateral attack on Government policy. It is argued that the court must not adopt a blinkered approach to the vires question and must look in its discretion in deciding whether to grant judicial review to the reality behind the application, as this particular way of living and working in Ireland is contrary to now stated Government policy.

64. It is not my function in an application for judicial review to determine issues of fact, nor does it seem to me helpful to consider in the context of this case whether the applicants do or do not operate *bona fide* language schools, whether their actions have been in conformity with the established requirements of such schools that they, for example, liaise with the Garda Immigration body, or whether their business model is outdated or their businesses operate as *de facto* immigration facilitators. The discretion of the court to refuse judicial review is well identified in the case law but this discretion is limited by O. 84 which requires that it be "just and convenient" that the court grant review. This phrase must be seen in the context of the procedural reasons why judicial review is a more suitable remedy than plenary proceedings or on appeal, and equally there is a discretion of the court to refuse judicial review if there has been delay but delay is not pleaded as a ground of opposition in this case.

65. Hardiman J in *O'Keeffe v. Connellan* [2009] 3 I.R. 643 rejected the argument that there was a broad discretion in the court to refuse the remedy of judicial review if the person making the claim had a direct interest in the matter challenged. I have no doubt that the applicants in this case have a direct interest in the decision of the Minister to link her decision on entry to the Interim List to ACELS accreditation. The decision on immigration status is one that must be made by the Minister in each individual case on the making of an application by a prospective student. That Minister has by virtue of the document of 2nd September, 2014 identified specific and entirely clear criteria which she indicated would, in the case of schools such as the applicants, always be an element in her discretion.

66. The application before me is primarily focused on the new requirement imposed by the document of 2nd September and the applicants seek an order for that purpose that the second respondent has no power to operate the ACELS scheme. The relief claimed against the second respondent must therefore be seen as ancillary to the primary relief and I take the view that the second respondent was joined, and had to be joined in the proceedings, for the purpose of binding it to a declaratory order that might be made, and not for the primary purpose of preventing it from hearing or determining the applications for accreditation or to quash the refusal of accreditation to other parties.

67. I reject the submissions of the respondents that I ought not to make an order against the second respondent as such an order might impact on certain persons or bodies not before the court and whose applications have yet to be determined, and I take the view that the relief sought against the second respondent is secondary to the primary relief sought against the Minister, and that the effect of any order will be limited to the power of QQI to operate ACELS for the purpose of the Interim List and will have no impact on any body or person who has voluntarily submitted to QQI an application for the benefit of ACELS accreditation outside the narrow purpose for which it may be require for the purpose of the Interim List

Waiver, estoppel or acquiescence
68. Both respondents argue that the applicants have waived any right to challenge the *vires* of the QQI as they engaged with the ACELS application process in the short window that was opened by the QQI between October 2013 and January 2014, and that the applicants are estopped from bringing the claim as a result of this engagement with the ACELS process which they now seek to impugn.

69. If the QQI did lack the power to operate the ACELS system it is asserted that this absence of vires has existed since the coming into operation of the Act in 2012. As both applicants engaged with the ACELS process and both of them made application in the window when ACELS was reopened between October 2013 and January 2014, they approbated the operation by QQI of the scheme, and indeed Academic Bridge still continues to process an application under ACELS and its application remains live. At any stage in the course of the ACELS process either applicant could have withdrawn from the process and brought judicial review. Indeed NEDTC, having failed to obtain ACELS accreditation at first instance, appealed that decision, and the result of the appeal was communicated to it only in the last month or so. It is argued that what the applicants wish to have in reality by bringing this judicial review is a fall back position should they not obtain ACELS recognition, but they were perfectly content to engage with the ACELS process in the hope that they would meet the bar that it set.

70. It cannot be doubted, and is not being argued by the second respondent, that an estoppel or acquiescence may not confer jurisdiction but the second respondent argues and particular in reliance on the judgment of Henchy J in *Corrigan v. Irish Land Commission* [1977] 1 IR 317 at 326 as follows:-

> *"The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."*

71. This extract from the judgment of Henchy J undoubtedly states the law of estoppel both in public and in private law, but one

essential element as identified by Henchy J in that case is missing in this case, and that is that an estoppel, acquiescence or approbation can be said to exist only if the person alleged to be so estopped or to have so approbated must have done so with knowledge of all the relevant circumstances. To that extent I cannot accept the argument that the applicants are estopped or have acquiesced in the operation by QQI of the ACELS scheme on account of the fact that they made application for accreditation through that body, and continue, in the case of Academic Bridge at least, to hope for a positive response. The missing element or circumstance, knowledge of which would be essential in my view to raise an estoppel or to found an argument of acquiescence, is knowledge of the importance of ACELS accreditation, and at all times during the process engaged in by the applicants they were operating in what they believed to be a voluntary system for the conferring of them of accreditation by a recognised brand. They did not know, and could not have known, that ACELS accreditation would take on the degree of importance it did, and that without it they could not hope to satisfy the new criteria for their non EA/EEA students. Accordingly I am of the view that there has been no estoppel, nor any approbation, such as to disentitle the applicants from seeking the declaratory relief they seek. Such might have existed had the application been for *certiorari* to quash a refusal by QQI to accept an application, or for mandamus to grant the accreditation, or deal with the application in a particular way. That is not the basis of these proceedings and estoppel might well be validly raised had that been the context.

72. I accept the argument made by counsel for the applicants that their applications made for ACELS accreditation was made in complete ignorance of the future importance that ACELS accreditation would come to have for the Minister's decision on a visa application by prospective students, and the applications were made in the short window which closed in January 2014, some eight months before the Minister's decision now challenged. At no point before the applications were lodged, or indeed in the case of one of the applicants before the application was fully completed and rejected, was it apparent that ACELS accreditation would become a *sine qua non* for the exercise by the Minister of her discretion to grant a visa to students attending a school with such accreditation. Accordingly I reject the argument that an estoppel or waiver exists in regard to the application for declaratory relief, as such grounds of defence might have been relevant had the applicants sought to challenge the decisions in or processing of their ACELS applications, and not the role the accreditation status has now come to play in the visa applications of their prospective students.

Locus standi

73. It is argued, correctly in my view, that the only person who can challenge the exercise of the Minister's decision under s. 4 of the Immigration Act 2004 is a person who has applied for and been refused immigration permission. It is argued in that context that the applicants have no *locus standi* insofar as they cannot seek to now challenge any decision of the Minister under that Act when they themselves are not and cannot be an applicant for immigration status, the application being one that is capable of being made by a natural person only, and one made in the context of a myriad of factors which the Minister may take into account. It seems to me to be quite clear that the applicants could not have *locus standi* to challenge any decision made under s. 4, and indeed no decision has been made under s. 4 that might have arisen as a result of the Minister's publication of the policy document of 2nd September 2014.

74. However, the first respondent argues that the applicants have no locus standi to seek the reliefs sought in the proceedings primarily because it is said that neither company is in good standing, neither can hope to obtain through the Minister or any other body that she may nominate, an Irish accreditation such as to satisfy the requirements of the policy document of 2nd September 2014. It is argued that the applicants cannot then hope to benefit from any order that may be made by this court, and the default position will not be that the applicants will be deemed to have satisfied the criteria for eligibility, or that the Internationalisation Register will be restored.

75. It is not my function to assess the suitability of the applicants as education providers nor to look in any sense to the merits of any application they or their prospective students might make to the Minister that an individual programme offered to the students satisfies that requirements of the 2nd September document. It is clear, and cannot be doubted, that were the Minister to meet an application by either applicants for accreditation or approval of one or several of its programmes, the application would have to be dealt with on the individual merits of the course being offered within the programme and the applicants would be afforded natural justice in the various ways this is recognised by the courts. The Minister has not received an application from either applicant for accreditation or approval of any their education programmes, and this is because she has already indicated by means of the policy document of 2nd September 2014 that the programmes will be approved only if they have satisfied the ACELS process. Indeed the Minister by publishing the policy document has made this clear and it is an inevitable conclusion from the requirement of ACELS accreditation that the class of programmes or colleges which will be placed on the Interim List is now closed. This is because ACELS has or is about to reach the end of its life, and an identified and finite number of applicants remain in the system and no new applications may be made. It is possible even from this vantage point and without the conclusion of the ACELS process in respect of those applicants to identify precisely the number of new programmes that will be admitted to the Interim List and this has to be fewer than eight, the number of applications in the system that not yet determined. The class is closed, no new applications may be made, and the applicants in the case of NEDTC know, and in the case of Academic Bridge, suspect, that neither of them will be successful in obtaining ACELS accreditation and neither of them therefore will be successful in obtaining a place on the Interim List. They both find themselves in a position where the Interim List is effectively closed to them by a process which commenced after they lodged their application for ACELS accreditation in early 2014, and at a time when they did not and could not have known that the accreditation would take on the importance it now has. It is a matter of significance that no other means by which the Minister can be satisfied with regard to the quality of an education programme is available to prospective applicants for those wishing to be placed on the Interim List and the policy of the Minister, while she was entitled to impose a more rigorous structure and criteria, is such that it cannot in itself ever be satisfied by these two companies. No alterative Irish accreditation system is offered, no alternative means by which the Minister might consider the quality or performance of an individual course or college is available, and the structure within which the school had to fit is now closed to new applicants.

76. The Minister's discretion is founded primarily in the Immigration Act but the State generally has an inherent power to regulate immigration into the State, the presence of non-nationals in the State and whether they have permission to work and on what basis. The Minister was entitled to have a policy and the reasons stated for this policy are laudable. There is however implicit in the requirement of ACELS accreditation a limit on the number of programmes that can be included on the Interim List as there is no means by which a new programme can be accredited, and this is so because the ACELS window has now been closed, the Minister purports to operate ACELS through QQI which she may not do having regard to the view that I take that it has no statutory power to operate the scheme, and no other fall back or ad hoc position is offered either to the English language schools in general or to an individual applicant who wishes to satisfy the Minister of the quality and nature of the course that it wishes to offer.

77. The applicant can in my view hope to benefit from a declaration that the Minister may not impose the strict requirements notified in the 2nd September document that ACELS accreditation is essential for inclusion in the Interim List, in that were such a requirement to be struck down by me, the Minister would pending the introduction of the IEM be required to individually consider the applications of prospective students, to adopt other criteria for accreditation, or other accreditation criteria for inclusion on the List or establish by lawful means an interim accreditation body or structure. To that extent I reject the argument of the respondents that the applicants have no interest to protect, or no advantage to be gained from an order quashing the impugned elements of the 2nd

September document.

Summary
78. In summary, then I hold that the Minister has unduly fettered her discretion in limiting the set of bodies or persons who may be eligible for inclusion on the Interim List, and that QQI has no power to operate or manage the ACELS system of accreditation for the purpose of admission onto that List, although it may have a contractual power to do so for a more limited and voluntary scheme of recognition.