THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 91

Record Nos. 2019/185

2019/186

Whelan J.
Power J.
Murray J.

BETWEEN:

CHUBB EUROPEAN GROUP SE

APPELLANT

- AND -

THE HEALTH INSURANCE AUTHORITY

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 8th day of April 2020

I CONTEXT

Background.

1. The appellant ('Chubb') is a UK authorised non-life insurance undertaking. It carries on business in the State through a registered branch. The respondent ('HIA') is the statutory regulator of the private health insurance market. HIA is constituted by and discharges its functions pursuant to, the Health Insurance Act 1994 as amended ('the Act').

2. The Act provides for a system of mandatory registration of undertakings carrying on the business of effecting health insurance contracts. Once so registered, undertakings must comply with various obligations in the conduct of their insurance business. Chubb has not registered as an undertaking under the Act.

3. The Act provides, essentially, that a policy which provides health insurance cover to a person who is not '*ordinarily resident*' in the State is not a health insurance contract for this purpose. Therefore, undertakings whose business it is to effect such policies are not by reason only of that business, required to register under the legislation.

4. Chubb sells a health insurance policy known as the '*MediCover Student Personal Medical Expenses Insurance Policy*' ('the Policy'). The Policy is made available to non-EEA students attending a course of education in Ireland. HIA has adopted the position that where a student is undertaking such an educational course of more than one year's duration, they are '*ordinarily resident*' in the State. It is HIA's position that because Chubb is providing health insurance to such persons it *is* carrying on a health insurance business. Thus, HIA contends, Chubb is subject to certain obligations and restrictions imposed by the Act.

5. On 20th March 2017 HIA served an enforcement notice on Chubb pursuant to s. 18B of the Act. That notice recorded HIA's opinion that Chubb was contravening the Act. The notice directed Chubb to restrict the availability of the Policy to non-EEA students

attending a course of study of not more than one academic year, or to become a registered undertaking.

6. In these proceedings, Chubb challenges this enforcement notice by way of both a statutory application for cancellation of the directions contained in it (2017/185 MCA) and an application for Judicial Review (2017/353JR). In the two separate judgments the subject of this appeal, ([2018] IEHC 609 and [2018] IEHC 609, respectively) Burns J. rejected all grounds of challenge advanced by Chubb in each case. This judgment addresses the issues arising from the appeals by Chubb in both proceedings.

The Act.

7. One of the purposes of the Act (s.1A) is to ensure that access to health insurance cover is available to consumers of health services with no differentiation being made between them based on health risk status, age, sex, or the frequency with which such services are provided to those consumers. The legislation seeks to implement that objective by requiring undertakings operating in the health insurance market to register under the Act, and by imposing on registered undertakings various obligations and restrictions. These obligations are defined by four principles and requirements - community rating, open enrolment, lifetime cover and minimum benefit.

8. One of the objectives of the Act, expressed in s. 1A(1)(d), is described in the following terms:

> *'the importance of discouraging registered undertakings from engaging in practices, or offering health insurance contracts, whether by segmentation of the health insurance market (by whatever means) or otherwise, which have as their object or effect the favouring of the coverage by the undertakings of the health insurance risk of the more healthy, including the young, over the coverage of the health insurance risk of the less healthy, including the old.'*

9. Central to this structure is the definition of when a body is, and is not, required to register. This is achieved by means of a prohibition imposed by s.16, contravention of which is a criminal offence:

> *'A person other than a registered undertaking shall not carry on health insurance business.'*

10. Section 2(1) provides that '*health insurance business*' means '*the business of effecting health insurance contracts*'. '*Health insurance contract*' is defined in the first instance, as follows:

> *'a contract of insurance, or any other insurance arrangement, the purpose or one of the purposes of which is to provide for the making of payments by an undertaking, whether or not in conjunction with other payments, specifically for the reimbursement or discharge in whole or in part of fees or charges in respect of the provision of hospital in-patient services or relevant health services.' …*

11. There are a series of exclusions from this general definition. Critical to these proceedings is that appearing at para. (d):

> *'A contract of insurance, or any other insurance arrangement, the purpose of which is to provide for the making of payments specifically for the reimbursement or discharge of fees or charges in respect of the provision of hospital in-patient services or relevant health services to persons or any dependants of any of them and one of the following conditions is satisfied –*
>
> *(i) neither the said persons nor any such dependents are ordinarily resident in the State, or*
>
> *(ii) where any of the persons to whom the said contract or arrangement relates are temporarily resident in the State during the subsistence of the said contract or arrangement –*
>
> *(1) those persons are resident solely for the purposes of carrying out their duties as employees, and*
> *(2) those persons constitute not more than –*
> *(A) 20% of the total number of persons (other than dependents of them) to whom the said contract or arrangement relates, and*
> *(B) 20 of the total number of persons employed in the State by the one person.'*

12. The Act establishes HIA as the statutory regulator (s.20), defines its powers and functions (s.21) and (s.18B) enables it to serve an enforcement notice where it is of the opinion that a person is contravening, or has contravened and is likely to continue to contravene one of a number of identified provisions of the Act, including s.16.

13. Where there is a failure to take the steps identified in the enforcement notice, HIA may apply to the High Court for orders requiring the taking of those steps (s.18B(5)). Section 18C enables a person on whom an enforcement notice has been served to apply to the High Court for the cancellation of any direction specified in the notice. Upon such an application the Court may cancel, confirm or vary the direction (s.18C(1)).

Relevant facts.

14. Persons coming to Ireland from non-EEA countries for the purposes of undertaking a course of study may be granted leave to enter and reside in the jurisdiction for that purpose by means of what is known as visa stamps 2 and 2A. Persons holding stamp 2 or 2A are permitted to remain in the State solely for the duration of their academic study. This generally operates to a maximum period of seven years, although the period may be extended for students undertaking a PhD, a course such as medicine or where the student presents special circumstances such as illness. Upon graduation students may obtain an extension of their permission to remain under a Third Level Graduate Scheme. As of 2014, over 36,000 non-EEA students were registered with the Irish Nationalisation and Immigration Services ('INIS'), approximately 18,500 of whom had had their registration renewed.

15. The stamp 2 and 2A permissions (which in no case are valid for more than one year, although such visas can be renewed) are subject to a number of conditions imposed by INIS. The conditions identified in the evidence in this case were contained in guidelines issued by the INIS in 2011. According to those guidelines students must not avail of state benefits. One of the '*key conditions*' applicable to a student coming to Ireland on these visas is that they be able to support themselves and live without claiming such benefits. They may, however, work up to twenty hours per week during term and during normal college holiday periods they may work on a full time basis up to forty hours per week. In general students have no right to family re-unification, and no right to bring their partner or children with them. The 2011 INIS guidelines for degree programme students state that students will not be permitted to be accompanied or joined by children other than those born during their stay. It stipulates that in general family reunification will be achieved by the student visiting his or her children and family during academic holidays. There are exceptions to this.

16. Persons seeking to enter and reside in the State on this basis are required by INIS to have private medical insurance. They must have this insurance at the time they register with the Garda National Immigration Bureau ('GNIB') or, in relation to those non-EEA students who require a visa in order to be able to travel to the State, they must satisfy the immigration authorities at the point at which they apply for their visa (which may be some three months or more before their arrival in the State) that they are in possession of that insurance. Thereafter, at every subsequent registration, students are required to have proof that they were in possession of private medical insurance for all of the previous registration periods by way of a letter of renewal. That insurance may comprise a group insurance scheme operated by the academic institution they are attending, individual medical insurance coverage bought in Ireland or (in the case of newly arrived first year students) travel insurance if it covers the student for up to a full year and covers the student to specified levels.

17. The Policy comprises a medical expenses insurance policy. It is offered to any student under the age of sixty whose country of origin is outside the EEA and who is undertaking a course of study in the State. It extends cover to any partner of the student or child of the student or that partner. The period of insurance is tied to the residency permit which is valid for one calendar year only, although it can be renewed. It does not provide for any maximum period of cover. The policy itself draws a distinction between the '*insured*' (which may be the educational institution) and '*insured persons*' that is the student attending a course with the insured, his or her partner and a child of either of them. This reflects the fact that the policies are operated by the relevant institution having a group policy. Students can take out that insurance either through the institution itself (paying the premium to the institution through course fees or otherwise) or by doing so through a broker. The information provided by the student in this regard is furnished to Chubb by the broker. It appears to have been accepted in the High Court that Chubb has never provided any MediCover Policy with the name of any individual student to HIA. It was also accepted that Chubb did not know the duration of the academic course on which any particular student is enrolled.

The correspondence and enforcement notices.

18. The correspondence between the parties commenced with a letter from HIA to Chubb dated 4th July 2011 referring to the Policy, recording the provisions of s.16 of the Act, and enquiring why Ace Europe (as Chubb – the name I will use in respect of all periods – was then known) did not need to be registered with the HIA. Chubb responded by letter dated 14th July stating that the insurance was limited to foreign students or their dependents who were ordinarily resident outside the EEA and visiting Ireland for the purposes of attending an educational course. It stated that it was Chubb's understanding that such insurance did not require to be registered with the HIA.

19. Five years elapsed before any further correspondence in respect of the Policy was sent to Chubb by HIA. In its evidence to the Court, Chubb says that it continued to underwrite the Policy in the belief that there was no dispute about the terms of the Policy or Chubb's compliance with its obligations under the Act. In its evidence HIA does not provide any explanation for its failure to take any further action during this period of time, although it emphasises that it did not provide any assurance to Chubb or make any representations to it in 2011.

20. On 28th June 2016, HIA again wrote to Chubb in relation to the Policy. That letter – which did not refer to the earlier correspondence regarding the policy – noted that the policy was available to foreign students irrespective of the length of the course of study they were undertaking. An explanation was sought from Chubb as to why it was not required to be a registered undertaking with HIA. This was responded to on 13th July, Chubb essentially repeating the explanation that had been provided in its letter of 14th July 2011.

21. In its response of 15th July, HIA referred to a circular issued by the Minister for Health (circular 13/92). This was issued in connection with the eligibility requirements for accessing public health services. These entitlements are framed by the Health Act 1970 as amended by reference to ordinary residence in the State. That circular states:

> *'A non-EC national who is in Ireland as a student should be regarded as 'ordinarily resident' if s/he is attending a registered course of study of at least one academic year's duration.'*

22. The letter recorded that while this circular was not '*binding*' on HIA as it was directed at the HSE, it was nonetheless '*persuasive*' as it dealt with '*similar subject matter*' as the 1994 Act. It continued:

> *'Given the relationship between the 1994 Act and the 1970 Act, I am of the view that it is reasonable for the Authority to adopt the position that it will be guided by Circular 13/92 when considering the issue of 'ordinarily resident in the State'. However, the Authority remains open to considering any arguments as to why Circular 13/92 should not be followed.'*

23. Between then and 8th December Chubb and HIA exchanged further rounds of correspondence setting out their respective positions. Chubb contended that the Department of Health circular was irrelevant to the proper construction of the Act. Conceding that a literal construction of the legislation did not yield a determinative meaning of '*ordinary residence*' Chubb contended that looking to the rationale for the Act it was not the purpose of the legislation that students who were resident in Ireland for finite study purposes should have to sign up to the long term support of reduced premiums for health insurance for those residing in the State on a long term basis. Chubb emphasised that the policies were sold to persons who were not in Ireland at the time of their purchase but were instead in their home jurisdiction. It explained the requirements imposed on non-EEA students to present proof of insurance on arrival in the State. The need for legal certainty was, throughout, re-iterated.

24. HIA, on the other hand, stressed the centrality of the definition of '*health insurance contract*' to the operation of the Act, and re-stated its belief that exceptions to that definition had to be construed strictly and in the light of the general intention of the Act to provide for a comprehensive health insurance system in the State based on the principles of community rating, open enrolment and lifetime cover. In the light of these considerations, HIA observed in its letter dated 2nd September 2016 -

> *'… persons resident for less than one year will not normally be considered to be 'ordinarily resident' within the meaning of the section. However, please note that the Authority may consider the facts of any particular case and conclude that a person is or is not ordinarily resident where that person is resident for more or less than one year.'*

25. In their response of 26th October, Chubb summarised legal advice it had obtained as to the proper construction of the provision and, in particular, the suggestion that having regard to the definition of 'ordinary residence' appearing in s.820 of the Taxes Consolidation Act 1997 (which defines such residence for tax purposes as arising where in any one year of assessment an individual has been resident in Ireland for each of the three years of assessment preceding that date), students present in Ireland for a period of more than three years '*may risk*' being considered to be ordinarily resident. HIA requested Chubb to disclose this advice in full. It has refused to do so. Chubb noted that because the policy could be viewed as technically covering periods of indefinite years, they proposed '*to limit the maximum period of insurance to a period of no more than three years*'.

26. In its final letter prior to the issuing of its first enforcement notice, HIA reiterated its position, but stated as follows:

> *'… the Authority is of the view that non-EEA students who attend a course of one academic year's duration or less, are not "ordinarily resident" within the meaning of the 1994 Act and, accordingly, a policy offered by ACE which was restricted in this manner would not fall within the definition of a health insurance contract under the 1994 Act.'*

27. On 12th January 2017, HIA purported to issue a notice pursuant s.18B of the Act recording the opinion that Chubb was contravening s.16 of the Act. The notice contained a paragraph introduced with the statement '*[t]his contravention has been …*'. It proceeded to frame the contravention alleged by reference to Chubb's:

> *'failure to be a registered undertaking within the meaning of the Acts while selling the MediCover Student Personal Travel Relates Medical Expenses insurance policy to persons who are ordinarily resident in the State.'*

28. Chubb contended in response that the notice was invalid having regard to alleged non-compliance in a number of procedural requirements of the Act. Its concerns in that regard were set forth in a letter dated 1st February 2017. In that letter, Chubb also took issue with the basis for the opinion recorded in the enforcement notice emphasising – in particular – the lack of certainty attending the phrase '*ordinarily resident*' arising from the HIA's interpretation of the relevant provisions. It requested that HIA cancel the enforcement notice. The letter from Chubb's solicitors presented as one of it complaints that, insofar as it was alleged in the notice that Chubb had sold the Policy to persons who were ordinarily resident in the State, the notice failed to specify who those persons were, when the Policy was sold to them, and the basis on which it was said that those persons were ordinarily resident in the State.

29. On 22nd February 2017 (2 days before the expiry of the period of 45 days fixed by the Act for a statutory application in respect of such a notice) HIA wrote to Chubb accepting that the notice was not in compliance with the applicable legislative requirements and cancelling the notice. That letter expressly stated that the cancellation of the first enforcement notice was without prejudice to the entitlement of HIA to issue a new enforcement notice.

30. In the meantime - on January 25th 2017 - HIA published a press release on its website. There, HIA said:

> *'The HIA has determined that "ordinarily resident" in the State in respect of non-European Economic Area … students means attending a course of study of more than one academic year's duration.'*

31. Chubb having by letter from its solicitors dated 24th February repeated its objection to the use of an enforcement notice in circumstances where there was a serious dispute as to the proper application of the legislation, HIA issued a further enforcement notice on 20th March 2017. That notice did not follow the model of the earlier notice which had clearly identified the contravention in respect of which it had been issued. Instead, the second notice introduced what it termed '*[t]he matter occasioning the contravention*' as follows:

> '*… the sale by ACE … of the MediCover … policy … to non-European Economic Area (EEA) students, in circumstances where the terms and conditions of the policy do*

not restrict its availability to non-EEA students attending a course of study in Ireland of not more than one academic year's duration.'

32. The notice continued:

> *'The Authority has determined that a non-EEA student is "ordinarily resident in the State" within the meaning of section 2(1)(d)(i) in circumstances where he or she is attending a course of study in Ireland of more than one academic year's duration.'*

33. Incorporated within the notice is a section headed '*Reasons*'. These comprise an iteration of relevant provisions of the legislation and reference to HIA's belief that its terms and conditions do not place any restriction on the temporal scope of the Policy. It stated that HIA is '*required to adopt a reasonably strict or narrow interpretation of the exceptions to the definition of* '*health insurance contract*'.

34. Chubb's solicitors wrote to HIA on 28th March regarding the enforcement notice. They requested a copy of '*the determination referred to in the Enforcement Notice on foot of which the Authority*' made the decision recorded there. HIA responded by letter dated March 30th stating that the Authority '*did not adopt a determination notice as such*' but instead had decided the interpretation of ordinarily resident under s.2(1)(d)(i). The press release published on the Authority's website on 25th January was referred to. In the affidavit grounding the statutory application, Chubb's deponent (Mr. Duncan) records that it was not clear to Chubb that the Authority had in fact made a determination to ground the Notice or if it did, that it adopted a different and new determination to that which grounded the first notice.

35. Before leaving the chronology, it should be noted that Chubb claims that HIA's position as to the ordinary residence of non-EEA students has evolved in an inconsistent manner. In 2011, Chubb says, HIA appeared to accept Chubb's position that such students undertaking courses here were not ordinarily resident in the State. Then, in September 2016 it suggested that such non-EEA students could be ordinarily resident for more or less than one year depending on the facts of a particular case. By December 2016, HIA adopted the position that students were not ordinarily resident as long as they remained in the State for one academic year or less.

36. The Statutory Application to cancel the direction was issued pursuant to s.18B of the Act on 3rd May 2017. Leave to seek Judicial Review of the underlying decision was granted on the same date.

The claims.

37. In its statutory application, Chubb advanced three principal contentions. First, it said that HIA was wrong in conclusively determining the meaning of the phrase 'ordinarily resident' under the Act, particularly where this created potential criminal consequences for those affected. In that regard it emphasised the requirements of legal certainty. HIA, it said, was not competent to determine legal questions of statutory interpretation.

38. Second, it argued that HIA erred in the manner in which it approached the task of interpreting the provision and in its conclusion as to the proper interpretation of the phrase '*ordinarily resident in the State*' insofar as it applies to students from non-EEA countries. In this regard, Chubb said, the purpose of the Act was to exclude from the obligation to register those effecting contracts of insurance with persons who are ordinarily resident in other States but who may be temporarily resident in Ireland. It contended that the rationale underlying the legislation – that healthier, younger insured should contribute to the higher health costs incurred by those who were older – had no application to students who were in the State for a limited period in order to pursue educational opportunities. Reference was also made to a number of statutory provisions – s.820 of the Taxes Consolidation Act 1997 and s.14(4) of the Student Support Act 2011 – in which ordinary residence was defined by reference to residence in the State for identified periods of time. The reliance placed by HIA on the Ministerial circular, was criticised and the contention advanced that he had been '*disproportionately influenced*' by a single section of that communication.

39. Third, it said that HIA had acted in a way that was inconsistent with the requirements of the underlying statutory framework. It stressed that the non-EEA students to whom the Policy is offered are not ordinarily resident in the State. In that connection it contended that the notice failed to identify a contravention by reference to Chubb having effected a health insurance contract with a person ordinarily resident in the State, and that the contravention alleged (the failure to include a restriction in the terms and conditions of the policy to ensure it could not be sold to someone ordinarily resident in the State) was not actually a breach of the section at all. Further, it was said that the alleged contravention was illogical because a person signing up for a one-year course was not ordinarily resident, while a person signing up for a two-year course, was. It was, in addition, contended in this context that the reasons given in the notice were inadequate, and that the notice failed to properly advise Chubb the steps it had to take to remedy the alleged contravention. Subtending all arguments was the proposition that HIA does not have the jurisdiction to posit a general definition of '*ordinarily resident in the State*', but instead must determine whether an individual policyholder does or does not fall within this description on a case by case basis.

40. Many of the grounds identified in the Statutory Application were repeated in the Judicial Review proceedings. There, Chubb sought orders of certiorari quashing both the determination or decision of HIA that a non-EEA student is ordinarily resident in the State if attending a course of study in the State of more than one academic year's duration, and the enforcement notice. Various ancillary declaratory orders were also sought. The essential grounds for the relief were (a) that the HIA had made no determination preceding and grounding the issue of the enforcement notice, (b) that the notice failed to specify how the policy is to be amended to meet HIA's concerns and had not defined the term '*academic year*', (c) that in reaching the interpretation of the provision which it did, the Authority had failed to have regard to various relevant matters and had regard to irrelevant matters and (d) that the inactivity of HIA following the 2011 correspondence

generated a legitimate expectation on the part of Chubb that it could continue to issue the policies, which was breached by the subsequent issue of the enforcement notice.

Judgment of the High Court in the Statutory Application.

41. At the outset of her consideration of the arguments advanced by Chubb in the statutory application ([2018] IEHC 609), Burns J. emphatically rejected the claim that HIA was precluded from determining at a general level (or, as it was described by Chubb '*on a blanket basis*') what the meaning of '*ordinarily resident*' was. Burns J. said (at para. 31):

> *'I do not find merit in the argument that the Respondent must carry out an exercise of whether an individual is ordinarily resident within this jurisdiction on a case by case basis. The Act of 1994 certainly does not envisage any such enquiry. Such a system would be quite unworkable and nonsensical.'*

42. Leading to that conclusion was the Court's view that it was within the HIA's remit in regulating the health insurance market for it to identify the factual conditions which will always result in HIA being of the view that a student is ordinarily resident in the State. Burns J. (noting the correspondence from Chubb and referred to above), felt that Chubb itself agreed with the approach adopted by HIA, having offered to limit the Policy to students attending a course of study of no longer than three years. What was really at issue between the parties, Burns J. thus suggested, was the length of time at which the threshold was crossed rather than whether HIA could adopt a generalised view as to the length of time a student could be within the jurisdiction before being considered to be ordinarily resident in the State.

43. From there, the Court proceeded to address the meaning of '*ordinarily resident*'. Noting (at paras. 37 and 41) the comments of the Supreme Court in *State (Goertz) v. Minister for Justice* [1948] IR 45, that these words should be construed according to their ordinary meaning and with the aid of such light as is thrown on them by the general intention of the legislation in which they occur and with reference to the facts of a particular case, Burns J. expressed her agreement with the interpretation of the natural meaning of the words posited in *R. v. Barnet London Borough*, *ex parte Shah* [1983] 2 AC 309. There, Lord Scarman drew a distinction between ordinary residence and domicile, relating the former to an abode adopted '*voluntarily and for settled purposes'*

44. Burns J, in particular, expressed her agreement with the conclusion in that case that attending a course of study is a settled purpose in the context of that test (at para. 42). Further, and having regard to the difference between '*domicile'* and '*ordinary residence*', to the amendment history of s.2(1)(d) of the Act and in particular to the fact that between 2001 and 2008 the exemption referred to both domicile and ordinary residence, with reference to the former being removed in 2008, she concluded (at para. 44):

> *'issues which relate to domicile, such as an individual's intention of remaining and purpose for remaining in this jurisdiction are now removed from the equation.'*

45. The Court attached importance to the provisions of s.2(1)(d)(ii) of the Act. This excludes from the definition of *health insurance contract* contracts or arrangements relating to persons temporarily resident in the State where resident solely for the purpose of carrying out their duties as employees, subject to the imposition of a numerical limitation on the number of such persons being employed by one employer. Burns J. expressed the view that if the meaning contended for by Chubb were correct, there would be no need for this separate exemption at all. The implication, she held, was that the exemption arising in respect of persons who were not ordinarily resident, was more restrictive than the exemption provided for by s.2(1)(d)(ii). She concluded (at para. 45):

> *'The upshot of that reasoning, when taken in conjunction with the various amendments referred to above, is that the Oireachtas intended that to be considered ordinarily resident in the State for the purposes of the Act of 1994, the period of time present in the jurisdiction for a settled purpose is short.'*

46. Burns J. then proceeded to consider the objectives of the 1994 Act. Having regard to those aims, she felt that the intention of the legislature was '*that the net to be cast over consumers of health insurance cover is extremely wide*' (at para. 46). Noting the number of non-EEA students re-registering for visas, the Court (at para. 48) expressed the view that '*providing health insurance of the nature provided under the MediCover Policy is a segmentation of the market which has as its object or effect the favouring of the more healthy and young over the less healthy and old*'.

47. The conclusion of the Court on the question of whether the decision of HIA was correct, was as follows (at para. 50):

> *'For all of these reasons, namely the natural and ordinary meaning of the words 'ordinarily resident within the State'; the amendment history to the Act of 1994; and the aims and objectives of the Act, I am of the opinion that the Respondent has not erred in its determination that non-EEA students who are pursuing a course of study here for more than one academic year within this jurisdiction are ordinarily resident here.'*

48. Chubb raised four specific objections to the terms of the enforcement notice in the High Court statutory application. Each of these was rejected by Burns J. Thus, the claim was made that the contravention specified in the contravention notice was not in fact a proven contravention, as the notice failed to establish that a contract of insurance had been effected with a specific person who was attending a course of study in excess of an academic year. The Court concluded that because Chubb accepted that it did not limit the time period in respect of which the Medicover Policy could be held by an individual, HIA had not erred in its identification of the contravention specified in the enforcement notice (at para. 53).

49. Chubb also complained that it was not logical to determine that a person was ordinarily resident by reference to the duration of a course of study which was yet to be undertaken. That status, it was said, was acquired over time having regard to the

individual's connection to the State. This argument was similarly rejected, the Court holding that fixing an individual's ordinarily resident status by reference to a known fixed period of study which is to occur in the future was not illogical (at para. 54).

50. Applying the test for adequacy of reasons set out in *EMI Records (Ireland) Limited v. Data Protection Commissioner* [2013] IESC 34, [2013] 2 IR 669, the Court held that the enforcement notice left no room for reasonable doubt as to the reasons for HIA's decision. There was no necessity, as Chubb had contended, for HIA to explain why it was not accepting Chubb's submissions as to the meaning of ordinarily resident having regard to the provisions of the Taxes Consolidation Act 1997, the Student Support Act and the Irish Citizenship and Nationality Act (at para. 55).

51. Finally, because the enforcement notice directed that the Policy should not be available for renewal to a non-EEA student, the notice was not deficient by reason of the fact that the policy was but a 12-month contract (at para. 56).

52. By order of 14th January 2019, the Court granted Chubb leave to appeal its decision in the statutory application on three questions of law – the meaning of the term 'ordinarily resident' in s.2(1)(d)(i) of the Act, whether Chubb was carrying on a health insurance business by entering or renewing a policy with persons who are attending a course of study in excess of one calendar year, and whether the enforcement notice was valid at all. In a reserved judgment delivered on 11th January, Burns J. concluded that it was not necessary, in accordance with s.18C, that the Court grant leave in respect of each question of law an appellant seeks to raise and that an appeal is not limited to the specified questions of law. Neither party to this appeal has questioned that conclusion.

Judgment of the High Court in the Judicial Review proceedings

53. In her judgment in the Judicial Review application ([2018] IESC 608), Burns J. started from the proposition that only those complaints which were not amenable to review pursuant to the procedure provided for in s.18C, could be the subject of relief by way of Judicial Review (at para. 30). This left three substantive grounds for that relief.

54. Emphasising that s.18B of the Act requires that HIA form an 'opinion' that an entity is or has contravened a relevant provision of the Act before it can issue an enforcement notice, Chubb had argued that there was no evidence of a determination made by HIA to ground the notice as issued. This argument was rejected by the Court, which noted that a decision had clearly been made by HIA that there was a contravention prior to issuing the first enforcement notice in January 2017. There was, the Court held, no necessity for HIA to make that determination again prior to the issue of the second notice (at para. 38).

55. Chubb had also placed reliance on the fact that it had advised HIA of the business being conducted by it in 2011, and that no steps had been taken by HIA in the immediate aftermath of that correspondence. This, it claimed, generated a legitimate expectation that an enforcement notice would not be served on it in relation to the matter. Burns J. rejected this contention as follows (at para. 40):

'On the basis of the factual matrix, I cannot see how the Applicant can assert that it had a legitimate expectation that the Respondent would not come to a different view to it. Nothing was confirmed to the Applicant by direct or implicit assertion. The Applicant did not act to its detriment, it just continued to act as it had been doing.'

56. Finally, an argument advanced by Chubb to the effect that HIA had acted in breach of Article 15.2.1 of the Constitution by determining and imposing on Chubb its view of what 'ordinarily resident' means, was determined by the Court to be a mirror of the argument advanced in the statutory application to the effect that HIA is not permitted to determine the meaning of 'ordinarily resident' in a general way. Burns J. said that for the reasons set out in her judgment in those proceedings, she was of the view that HIA had not engaged in a legislative function but rather had set out the factual circumstances which will give rise to a non-EEA student being considered by it to be ordinarily resident in the State (at para. 42). The respondent (the Court said) had not purported to legislate.

II ANALYSIS

57. In concluding his oral submissions Counsel for Chubb, Mr. Sreenan SC, helpfully reduced his argument in both cases to six propositions.

Section 18B:

58. Mr. Sreenan's first point is that the contravention alleged in the notice is not a contravention of the Act at all. Unlike the purported enforcement notice issued on January 27th 2017, the enforcement notice now relied upon does not assert that Chubb, while unregistered, effected insurance policies with persons who were ordinarily resident in the State in contravention of the legislation. Instead, it is directed to the failure to limit the provisions of the policy to non-EEA students who are undertaking a course of education of less than one academic year in duration. Chubb says that the failure to include a particular term in a contract is not and cannot be a contravention of the Act. Therefore, it says, the enforcement notice is bad in law.

59. Section 18B provides:

'Without prejudice to the generality of sections 4 and 15, where the Authority is of the opinion that a person –

(a) is contravening a relevant provision, or

(b) has contravened a relevant provision in circumstances that make it likely that the contravention will continue or be repeated,

then the Authority may serve on the person a notice in writing accompanied by a copy of this Part –

(i) stating that it is of that opinion,

(ii) specifying the relevant provisions as to which it is of that opinion and the reasons why it is of that opinion

(iii) directing the person to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it, and

(iv) specifying a period … within which those steps must be taken, being a period reasonable in the circumstances.

60. HIA contends in its written legal submissions that s.18B '*does not impose any requirement in relation to the identification of the contravention*'. If by this it is suggested that HIA can issue an enforcement notice under this provision without actually identifying the specific contravention complained of, this is patently incorrect. The '*opinion*' which s.18B(1)(i) requires to be recorded on the notice, is the opinion that there is a 'contravention of a relevant provision.' The section requires that HIA state the reasons it is of that opinion. HIA cannot record that opinion and give those reasons, without stating on the face of the notice what that contravention actually is. One would have expected that this would be stated clearly and identifiably in a separate part of the notice. If that is not done – and there is no requirement imposed as to the form of the notice – it must at the very least assert and record precisely the alleged contravention. The party the subject of the notice is entitled to be told in clear and exact terms what the contravention is in order that it can consider whether the notice discloses an illegality at all. Were the position otherwise, the requirement to give reasons for HIA's view that there had been a contravention would be meaningless, and indeed the undertaking the subject of the notice might have no basis for gauging whether the steps it was required to take on foot of the notice were rationally related to the alleged contravention.

61. A failure to observe this requirement renders the notice non-compliant with the Act. An enforcement notice is a formal legal order issued pursuant to statutory authority. It is a statutory instrument within the definition at s.2(1) of the Interpretation Act 2000. Aside entirely from the legal consequence of an obligation to give reasons for a decision, such an instrument must comply with the statutory requirements attending its issue and content.

62. HIA's correspondence, affidavit evidence and legal submissions in both cases, and its Statement of Opposition in the Judicial Review proceedings, all proceed on the basis that Chubb is acting in breach of s.16 of the Act by entering into contracts of insurance with EEA students who are ordinarily resident in the State when not a registered undertaking within the meaning of the Acts. The purported enforcement notice issued on 12th January 2017 clearly identifies in a separate paragraph the contravention in respect of which it was issued in these terms. It refers to '*selling the MediCover Student Personal Travel Relates Medical Expenses insurance policy to persons who are ordinarily resident in the State.*'

63. Strictly speaking this may not express the contravention with absolute accuracy. The '*ordinary residence*' of the students is relevant not at the point of sale, but at the point of cover. This is a point alluded to by HIA itself in addressing the contention advanced by Chubb that sometimes the policies are entered into before the student has arrived in the

State, and therefore before they are ordinarily resident here at all. As I explain below when considering this issue, the contravention is more properly defined by reference to residence at the time the policy incepts. Either way, the essence of the contravention is clearly expressed in this version of the notice in such a way that Chubb could determine whether what was alleged to be a contravention was a contravention and whether the steps it was bring required to take on foot of that contravention were lawful.

64. In contrast, the enforcement notice issued on 20th March contains no clear identification of the contravention alleged. The difference in this regard between the two documents is so striking that it is difficult to avoid the conclusion that this change of course was deliberate. Nowhere in the notice is it stated that Chubb is in breach of s.16 by entering into policies of insurance with persons who are not ordinarily resident in the State. The clear statement in the first notice ('*the contravention has been ..*') has been replaced with an identification not of the contravention, but of '*the matter occasioning the contravention*'. This phraseology presumably derives from ss.18B(iii) ('*remedy the contravention or, as the case may be, the matters occasioning it*'). That very language shows that the contravention and the matter occasioning it are not the same. The latter assumes the former. The 'matter occasioning the contravention' means the facts or circumstances which have enabled or caused it to occur. That reference to the 'matter occasioning the contravention' in the Act is thus relevant to the remedial measures directed to address the contravention rather than to the description of the contravention itself. The acts or omissions comprising the contravention must still be identified.

65. Whether deliberately so or not, the enforcement notice uncouples the alleged contravention from the simple act of effecting of policies of insurance with persons who are ordinarily resident in the State. The assumption seems to be that the contravention arises from a failure to frame the policy in a particular way and the subsequent sale of that policy to non EEA students:

> *'THE MATTER OCCASIONING THE CONTRAVENTION is the sale by ACE … of the MediCover Student Personal Travel Related Medical Expenses insurance policy .. to non-European Economic Area (EEA) students, in circumstances where the terms and conditions of the policy do not restrict its availability to non-EEA students attending a course of study in Ireland of not more than one academic year's duration.'*

66. Certainly, HIA can plausibly state that the failure of Chubb to include a term of the kind alleged in this paragraph has enabled the contravention to occur, but there is a difference between the identification of one of a number of steps that might have been done to prevent a contravention, and the contravention itself. As I have noted, that same distinction is reflected within the Act in its differentiation between a contravention, and a matter that occasions it.

67. Burns J. addressed this issue at para. 53 of her judgment:

*'I am of the opinion that there is nothing of substance to this argument. As required by sub-s. 18B(1)(ii), the Respondent has identified the relevant provision which it is of the opinion the Applicant has breached. The Respondent's position regarding the Medicover Policy is not that it is the sale of the Policy which is at issue, but rather the sale of the Policy to persons who avail of it for longer than an academic year. Accordingly**, the Applicant is carrying on a health insurance business by entering or renewing a policy with persons who are attending a course of study in excess of an academic year as such persons are factually ordinarily resident within the State.** The Applicant accepts that it does not limit the time period in respect of which the Medicover Policy can be held by an individual albeit that the Policy is a twelve-month policy. However, it can be renewed. Accordingly, I am of the opinion that the Respondent has not erred in its identification of the contravention specified in the enforcement notice.'*

(Emphasis Added)

68. Certainly, HIA's case is that it is the sale of the policy to persons who avail of it for more than an academic year is a contravention of the Act. That is a contravention involving a specific transaction or transactions with two elements - (a) sale (b) to persons attending courses of more than one year. If HIA is correct in the contention that a person attending a course of more than one year is ordinarily resident in the State, then the sale of a policy insuring such a person would comprise a breach of s.16. This is the contravention highlighted in this quotation. However, this is not the contravention alleged in the notice.

69. The contravention that is suggested in the notice involves different elements - (a) sale, (b) of a policy which omits a term restricting its availability to non-EEA students attending a course of study of not more than one year's duration. Selling a policy without such a term may well expose Chubb to the prospect that it ends up insuring persons who are ordinarily resident in the State. However, the sale of a policy without such a term is not itself a breach of s.16. The breach is in carrying on the business of insuring a particular category of person.

70. It follows that in this regard, in my view, Chubb is correct. An enforcement notice can only issue under s.18B when HIA decides that there has been a contravention of the legislation. There is no clear and separately identified contravention on the face of the notice in issue here. Insofar as a specific allegation of a contravention can be deduced from the notice it is that Chubb sold a policy to non EEA students that did not include a particular term. Such a term may well have prevented Chubb from entering into policies with insured persons who were ordinarily resident in the State (as HIA defines that term). However, neither the failure to include such a term in the policy nor the sale of a policy without a term is itself a breach of the Act. It follows that the notice is bad in law.

71. In the light of this conclusion, it is not necessary to address the distinct issue raised by Chubb around the terms of the enforcement notice of March 20th. That arises from the fact that, in contrast to the first notice, HIA has produced no evidence that the board of the authority ever gave consideration to whether the terms of that notice disclosed a

contravention of the Act and/or whether the status of ordinary residence could be acquired by an individual who has yet to enter the State. There was, Chubb says, in consequence, no valid determination grounding the enforcement notice. Given that I am of the view that the second enforcement notice does not actually assert a contravention, the question of whether HIA ever decided that there had been a contravention other than that which formed the subject of the first notice, does not arise. That said, if HIA had issued a second notice alleging a contravention that was materially different from that reflected in the first, it is not evident to me how the Authority could have left to its executive the function of determining whether the acts alleged in the second notice constituted a contravention.

72. The allegation arising from the decision making process around the second notice of lack of candour – hotly contested by HIA – similarly falls away.

Power of HIA to determine ordinary residence.

73. Counsel for the appellant's second proposition is that HIA have purported to determine the meaning of '*ordinary residence*' for a class of people. This, he says, is not a power that has been conferred on HIA by the statute. By effectively declaring non-EEA students attending academic courses in excess of one year's duration to be '*ordinarily resident*', he argues, HIA is engaging in a legislative function. This, Chubb claims, is both *ultra vires* its powers and breaches the provisions of Article 15.2.1 of the Constitution.

74. I do not believe this contention, so stated, to be well founded.

75. It is certainly true to say that HIA has not been given any function under the legislation of determining in any normative sense the meaning of the term '*ordinarily resident*'. Such a function could have been conferred by, for example, conditioning the definition of '*insurance contract*' by reference to a contract which is with a person who in the opinion of HIA is ordinarily resident. It could have been achieved by giving HIA a power to make regulations defining ordinary residence. Clearly, no powers of either kind have been conferred on HIA by the Act. Instead, the meaning of ordinarily resident is one of law (as to the meaning of the term) and of fact (as to its application) to be ultimately determined where giving rise to a dispute, by the courts. HIA has no function in assuming that role for itself.

76. However, this is not what HIA has done. Every entity involved in the private health insurance market must, as a matter of practicality, form its own view in any given situation whether an actual or proposed contract is one the execution of which breaches the legislation. As regulator, HIA will be required on occasion to come to a view as to when certain contracts are or are not within the definition in s.2(1)(d), and in cases such as those in issue here this will require it to reach an opinion as to what '*ordinary residence*' means. As a provider of health insurance, Chubb similarly has to form such a view. When HIA forms an opinion based on its interpretation of the legislation, it is entitled to act on it. Its opinion as to the law is as valid as and no more valid than that of any other actor in the market. Any other actor who wishes to challenge it can do so through the courts. There is nothing unusual about any of this.

77. What Chubb must say takes the instant situation out of the ordinary is the fact that in this case HIA's interpretation of '*ordinary residence*' involves deciding not that an individual contract is or is not without the statutory definition of contract of health insurance, but instead involves a determination that all members of a large group of persons are by reason of one and only one common factor, ordinarily resident. However, whether or not HIA can reach such a decision depends not on the powers of HIA, but on the meaning of '*ordinary residence*' itself. If viewing the statute as a whole and having regard to the specific language used in the Act, a contract of insurance comes into being whenever entered into so as to insure one member of a class defined by that common factor (non-EEA students attending a course of more than one academic year's duration) then HIA does not err in basing the exercise of its enforcement powers on that interpretation. If the interpretation is wrong, then the exercise of the enforcement power is in error also. However, that is all a consequence of the meaning of *ordinary residence* rather than being a product of any limitation on HIA's powers.

78. The next point made by counsel for the appellant falls to be addressed in the same way and is properly disposed of for the same essential reason. He says that the enforcement notice flies in the face of HIA's own letter of 9th September 2016. There, HIA said that it may consider the facts of any particular case and conclude that a person is or is not ordinarily resident where that person is resident for more or less than one year. I do not believe it correct to characterise HIA's actions in sending this letter as HIA prescribing that it must look at the individual case before deciding whether or not a person was ordinarily resident. But even if it did, this is irrelevant if HIA is not legally required to look at each case on this individual basis. Once again, the question of whether it is so legally required depends not on what it did or did not say in its correspondence, but on what the term '*ordinarily resident*' as properly construed actually means.

Ordinary Residence: the case law.

79. This leads to the fourth issue identified by counsel. This lies at the heart of the dispute between the parties. That issue has two related aspects. The first is whether HIA can only determine on an individualised case by case basis whether a given counter party to a policy of health insurance is '*ordinarily resident*' and the second, which arises only if it can make such a generalised decision, is whether the fact that a student is undertaking an academic course in the State of more than one year's duration renders that student for that reason alone, ordinarily resident here. This requires in the first instance a consideration of the case law interpreting the phrase, and from there, an analysis of the relationship between that interpretation and the Act.

80. The term '*ordinary residence*' has been a feature of the statute book since the early nineteenth century. Originally deployed in tax legislation, it was more latterly introduced into family law, immigration statutes, and it now defines the personal connecting factor used to ground jurisdiction in civil and commercial proceedings. It differs from domicile in that it can be generally largely determined by reference to objective proof rather than evidence of subjective intention or state of mind (see Deutsche Bank v. Murtagh [1995]

IR 122 at p. 130). Whether a person is '*ordinarily resident*' is a question of fact in each case.

81. It is trite to say that the term '*ordinary residence*' falls to be construed having regard in the first instance to the plain and ordinary meaning of the words, and in the second to the specific legislative context in which it appears. The interpretation by the Courts of the phrase as it appears in other legislation cannot without qualification be transplanted into the Act. The manner in which other legislative codes have defined the term tells nothing about its meaning in the Act – except that had the Oireachtas wished to impose a specific definition of the term for the purposes of the Act, it could easily have done so.

82. All that being said, the case law confirms some general principles all of which follow from the phrase itself. In *The State (Goertz) v. Minister for Justice* the prosecutor had arrived unlawfully in the State as a member of the German armed forces and to assist that country in its war effort. That was in May 1940. Some eighteen months after his arrival in the State he was interned for five years. In August 1946 the Minister made an order for his deportation. The issue was whether he was '*ordinarily resident*' in the State for five years so as to entitle him pursuant to s. 5(5)(c) of the Aliens Act 1935 to three months' notice of that deportation. The Court held he was not so ordinarily resident.

83. Maguire CJ (with whom Murnaghan, Geoghegan and O'Byrne JJ agreed) adopted the view that cases from other statutory contexts were of little help. The words, he said, should be interpreted according to their ordinary meaning and with the aid of such light as is thrown upon them by the general intention of the legislation in which they occur and with reference to the facts of a particular case (at p.50). The purpose of the facility for notice prior to deportation was to allow time for a person who had come to the country legally and was taking part in the '*normal life of the community*' and upon whom it would be a hardship to be forced to summarily uproot himself (at p.56). The applicant was not resident in the State in that sense. To construe the phrase so that mere physical presence in the State would suffice would produce an absurd result. Murnaghan J. emphasised that the phrase referred to '*the character as well as the duration of the residence*' (at p.57).

84. Black J. viewed the matter as turning on whether the absence of volition on the part of the applicant in making his stay in the country for most of the five-year period, made it right to hold that he was ordinarily resident. Having regard to the wording of the legislation, he decided that it precluded the taking account of a period of enforced internment in determining ordinary residence. In the course of his judgment, he cited and was clearly influenced in his conclusion, by the speech of Viscount Cave in *Levene v. Inland Revenue Commissioners* [1928] AC 217 who defined 'resided' by reference to '*some degree of continuity*', and by that of Lord Buckmaster in *Inland Revenue Commissioners v. Lysaght* [1928] AC 234, who related ordinary residence to residence that was not casual and uncertain.

85. *Goertz* was cited with approval by the Supreme Court in *Quinn v. Waterford Corporation* [1990] 2 IR 507. There the question was whether students at Waterford Regional

Technical College were, for the purposes of s.5(1)(b) of the Electoral Act 1963 '*ordinarily resident*' in a constituency within the respondent's functional area during the academic year. The case was brought by seven appellants, who had originally and unsuccessfully sought to appeal to the Circuit Court the refusal of the Country Registrar to place them on the register of electors for County Waterford. The judgment of McCarthy J. records the appellants as acting on behalf of over 500 students. The only information regarding the circumstances of the plaintiffs viewed as relevant by the Court was recorded by McCarthy J. as follows (at p. 509):

> *'during the academic year each of the seven appellants resides in the county borough of Waterford, whilst the home of none is within that borough. Each appellant is on the register of electors for the "home" constituency'.*

86. Noting, and accepting as correctly made, the concession of the respondent that the appellants were capable of being regarded as ordinarily resident in the county borough of Waterford during the academic year, McCarthy J. characterised that proposition as '*reflecting*' the decision in *Goertz* that the issue fell to be determined according to the ordinary meaning of the words viewed in their legislative context. He referenced with apparent approval Black J.'s dicta defining the term in contradistinction to residence that was '*casual and uncertain*' (at p. 511). In the course of his judgment, McCarthy J. also approved observations of Black J. in Goertz that '*the addition of the word "ordinarily" to "resident" mak[es] little difference*' ([1990] 2 IR at 511). On that basis, and having regard to the legislative context, McCarthy J. said '*the students are ordinarily resident in the county borough during at least the whole of the academic year*'.

87. The Court in *Quinn* referred to the decision of the English Court of Appeal in *Fox v. Stirk* [1970] 2 QB 463 and appears to have viewed that case as persuasive. *Fox v. Stirk* concerned a section of the Representation of the People Act 1949 which related the entitlement to appear on the electoral register to '*residence*'.

88. In determining that students at universities at Bristol and Cambridge were resident for that purpose, each member of the Court of Appeal in *Fox v. Stirk* referred to the speech of Viscount Cave in *Levene v. Inland Revenue Commissioners*. Lord Denning identified three principles governing the construction of the phrase. First, a man could have two residences. Second, that temporary presence at an address does not make a person resident there. Third, that temporary absence does not deprive a person of his residence. The key consideration in his view, was permanence:

> *'Was there on October 10 1969, a considerable degree of permanence in the stay of these students in Bristol or Cambridge? I think there was. They were living there and sleeping there. They were there for at least half the year – as a minimum. Many of them were there for much more … There was certainly a sufficient degree of permanence to make them 'resident' in Bristol or Cambridge, as the case may be.'*

89. The decision of the House of Lords in *R v. Barnet London Borough Council ex parte Shah* [1983] 2 AC 309 was also opened to the Supreme Court in *Quinn* but is not referred to in the judgments. More recent authority suggests that it continues to hold sway in interpreting statutory criteria based on residence in Irish law (see *AS v. CS* [2009] IESC 77, [2010] 1 IR 370).

90. In *Shah*, the issue was the proper construction of s.1(1) of the Education Act 1962. This imposed a duty on local authorities to bestow educational awards in respect of attendance at courses at certain third level institutions. That duty was exercisable vis-a-vis persons who possessed the necessary educational qualifications and who were '*ordinarily resident in the area of the authority*'. Regulations made under the Act released local authorities from the obligation to confer such an award on a person who had not been ordinarily resident throughout the three years preceding the first year of the course in question.

91. Four of the applicants in the five conjoined appeals before the House were from outside the European Community area and entered the United Kingdom as students with limited leave, the fifth having been entered with his parents for settlement and having obtained indefinite leave. It was a condition of the limited leave obtained by the first four applicants that they leave the United Kingdom upon completion of their studies, although they had the entitlement to apply for an extension. All had been living in the United Kingdom for the purposes of pursuing their educational courses for at least three years. Some of the local authorities contended that the applicants were not '*ordinarily resident*' in their functional areas for the relevant period, contending for what they described as 'the real home' test, that being the place where he has his home permanently or indefinitely, being his permanent base or centre adopted for general purposes such as his family or his career. One local authority contended for a test based upon where the person lived as a member of the general community and not merely for a limited or specific purpose. The Divisional Court and the Court of Appeal determined that the applicants were not ordinarily resident for the purposes of the legislation, attaching particular importance to their perception of the policy of the legislation, the immigration status of the students and their view that a specific limited purpose could not be a '*settled purpose*' under the Act.

92. The decision of the House of Lords as explained in the single speech of Lord Scarman overturning those rulings is obviously of significance here given the similarity of the underlying issue, and it was correctly so viewed by the High Court Judge. The test he formulated proceeded by reference to whether the person has adopted an abode with a degree of settled purpose. Lord Scarman explained (at p. 343 G-H):

> *'Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.'*

93. Four features of this test merit emphasis. First, the test proposed meant that proof of ordinary residence would depend '*more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind*' (at p.344 E-F). This was stated to be important in the context where it was necessary that the local education authorities should have a simple test by reference to which ordinary residence could be determined (id.)

94. Second, the state of mind of the subject was relevant in two respects – the residence had to be voluntary, and '*there had to be a degree of settled purpose*'. Education was such a settled purpose:

> *'That is not to say that he "propositus" intends to stay where he is indefinitely: indeed, his purpose while settled may be for a limited period. Education, business or profession … spring to mind as reasons for a choice of a regular abode.'*

95. Third, the Court rejected a test which excluded from '*ordinary residence*' those who located in a jurisdiction for a limited purpose: '*the notion of a permanent or indefinitely enduring purpose as an element in ordinary residence derives not from the natural and ordinary meaning of the words 'ordinarily resident' but from a confusion of it with domicile*' (348 E-G). This, it might be noted, corresponds with the conclusion of Costello J. in *Deutsche Bank v. Murtagh* at 130, where the Court (for the purposes of construing the reference to 'ordinary residence' in Part 1 of the Fifth Schedule to the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988) determined that the first defendant was ordinarily resident in the State even though he had averred that he might change his residence should a suitable business opportunity arise. That state of mind, Costello J. said, might be relevant if the court was determining whether the defendant had acquired an Irish domicile of choice according to common law principles, but it was not relevant to whether the defendant was ordinarily resident in the State.

96. Fourth, Lord Scarman refused to apply a test based on where the '*real home*' of the person was. This was again a product of the legislative scheme in question (345 F-G):

> *'The choice of ordinary residence for determining the test of eligibility for a mandatory award suggests to my mind a legislative intention not to impose upon LEA's who are entrusted with the duty of making mandatory awards the infinitely difficult, if not impossible, task of determining whether a student has established a permanent home in the United Kingdom.'*

97. The approach adopted by Lord Scarman in *Shah* provides the correct framework within which the meaning of ordinary residence as the term is used in the Act should be determined. Certainly, there are some statutory contexts in which the analysis in *Shah* may not be appropriate. Thus, for example, the test has been abandoned in the United Kingdom as the benchmark for the determination of habitual residence under the Hague Convention. In *A v. A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1, the Court decided that in determining the habitual residence of a child for the purposes of the Brussels II Regulation revised (Council Regulation (EC) No. 2201/2003) and the Hague

Convention, the Shah test should not be followed, the focus instead properly being on the location which reflects the integration of the child in the social and family environment. However, this is because of the particular legislative context. Indeed, Baroness Hale expressed the view (at para. 24) that the phrase 'habitual residence' was adopted in family legislation in part to differentiate it from ordinary residence as used in the taxation and immigration contexts. Accordingly, it makes sense that in that context the subject's state of mind is clearly relevant (*Re LC (No.2)* [2014] UKSC 1 [2014] AC 1038 at para. 37). However, none of this affects the fact that *Shah* remains '*the leading modern authority on the meaning of the expression in a statutory context*', *(Cornwall Council) v. Secretary of State for Health and anor* [2015] UKSC 46, [2016] AC 137 at para. 41). Nothing in the text or purpose of the Act suggests that the approach adopted in Shah is other than appropriate. Indeed, in this case both parties argued their position by reference to it.

98. Gathering these cases together, it is clear that while the question of whether a person is '*ordinarily resident*' in the State is one of fact, the legal meaning of the term is necessarily affected by the legislative context in which it appears. Subject of course to the implication of any particular legislative scheme, the meaning of those words should generally fall to be determined having regard to the following:

    (i) The critical inquiry is directed to whether the subject has a settled and usual place of abode in the place in question. To that end, his or her residence there must be neither casual nor uncertain (*Goertz*).

    (ii) In determining whether the subject has established such a residence, the focus is properly on the question of whether the person has adopted an abode in the jurisdiction for settled purposes and as part of the regular order of his life for the time being, whether of short or long duration. Education can comprise such a purpose (*Shah*).

    (iii) That purpose, while settled, may be for a limited period, it may be a limited purpose and it may be contingent. All that is required is that there be a sufficient degree of continuity to be properly described as settled (Shah). The fact that the person has subjectively determined that if certain eventualities come to pass they will change their residence, is similarly not determinative (*Deutsche Bank v. Murtagh*)

    (iv) Absent legislative provision to the contrary, it is possible to be ordinarily resident in more than one place at the same time (*Quinn*).

    (v) In a legislative context where public bodies have to reach determinations based upon where a person is ordinarily resident, the Court should incline towards a test which is objective and readily capable of application without a detailed inquiry into whether the subject has established a permanent home in the jurisdiction (*Shah*).

(vi) Proof of ordinary residence will depend more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind or subjective intention (*Murtagh*). While, necessarily, a consideration of the '*purpose*' of a person's presence in the State requires an understanding of their intention, this can be ascertained from the objective facts (*Shah*).

(vii) It is not correct to frame this test by reference to where a person has their '*real home*' in the sense of where they have, on a long term basis, the centre of their social, economic or familial interests (*Shah*).

Individualised assessment of ordinary residence under the Act.

99. The decisions of the Supreme Court in *Quinn v. Waterford County Council* and of the English Court of appeal in *Fox v. Stirk* afford examples of cases in which a single common factor defining a class of persons was in itself sufficient to enable an assessment of whether that class was '*ordinarily resident*' for the purposes of specific legislative provision. It is both significant that, and obvious why, this conclusion was reached in two cases involving the residence of third level students during the academic year. Given that the critical indicia of whether a person is ordinarily resident is the purpose of that residence, given that the class of third level students is defined by location in a place for the same purpose, and given that education may be a settled purpose within the test, it makes sense that it is – at least in theory – possible to look at a class of such students and determine for a particular statutory provision that they are ordinarily resident by reason, and by reason alone, of their presence in a place during the academic year.

100. This is demonstrated by a consideration of what, exactly, the individualised assessment contended for by Chubb would involve. In the course of oral argument, counsel for Chubb was asked to give examples of a person attending a course of more than one year's duration who is *not* ordinarily resident in the State. The examples tendered in response fell into two categories.

101. The first was of persons whose presence was in some sense contingent – those who did not know if they would pass their first year exams, if they would be able to afford the fees for their second year, or persons who might have to leave the country in the course of their first year because a parent or family member gets ill abroad. An analysis based on uncertainties of that kind is flawed. Each of these persons has as their purpose the attending of a course of education which, as I have noted, is capable of being settled. In those examples that purpose is hedged by contingency. However, these are the types of contingencies which attach to the presence of anyone in a jurisdiction that is not their place of origin or place where their family is located. In *Deutsche Bank v. Murtagh* the fact that the defendant might have left Ireland if appropriate business opportunities presented themselves abroad did not affect the fact that he was ordinarily resident in Ireland.

102. The second was of persons who might have to return during vacations because they had a spouse or children in their native country, or because they were on leave of absence from

their job. However, that is to confuse the concept of ordinary residence, with the real home test rejected in *Shah*.

103. Those very examples bring into focus a more fundamental difficulty with Chubb's case. The Court in *Shah* rightly emphasised the importance of avoiding a test that would render the statutory decision maker's function incapable of practical operation, thereby undermining the evident legislative intent. The test by reference to which Chubb says HIA should discharge its functions is individualised and would involve in respect of each student and their dependants to be insured by Chubb an examination of the student's own personal circumstances, his or her family connections abroad, their employment in another jurisdiction – together it would appear with their personal anxieties around their likely academic performance or financial wherewithal to complete their courses of study. A test of this kind would not merely be incapable of operation by HIA, it would be incapable of operation by Chubb which (as Chubb itself emphasises throughout its submissions) commits a criminal offence by undertaking the business of health insurer without registration (s.4 of the Act).

104. Nor does Chubb provide *any* explanation as to how, if the law is as it contends, the Supreme Court could have decided *Quinn* as it did. There, there was no question of an individualised assessment being undertaken. The Court was in a position to determine that presence in a location for the purposes of undertaking a course of academic study was in and of itself sufficient to render not merely the appellants but also the five hundred or so other students on whose behalf they brought the proceedings, ordinarily resident for the purposes of the provisions in the Electoral Act. Precisely the same point stands to be made in relation to *Fox v. Stirk*. The critical question presented by this aspect of Chubb's case is whether, and if so why, the Act should be interpreted differently.

105. Chubb submits that s.18 '*clearly envisages*' HIA making a case by case determination as to whether a person is contravening the Acts, including through the sale of the policy to an insured whom it considers to be ordinarily resident. It says that it is only if the respondent forms such an opinion on the basis of the facts before it than it may serve an enforcement notice.

106. While none of this is necessarily wrong, it misses the point. HIA *has* made such a determination. It has determined that a student who is attending an academic course in the State of more than a specified duration is so ordinarily resident. Once it satisfied itself that Chubb was contracting to insure such persons, it was entitled to serve the notice. Nothing has been identified in s.18 which requires it to look at the factual situation of each individual insured *if* it is the case that presence within the jurisdiction for the settled purpose of education for the period in question alone renders such students ordinarily resident.

107. Finally, in this regard Chubb contends that the decision of HIA to impose what Chubb describes as '*a blanket definition*' of ordinary residence, stems from a misplaced reliance on the circular issued by the Minister for Health as guidance for determining eligibility for public services under the Health Act 1970. Certainly, it is clear that in formulating its

position HIA had regard to that policy, and it is equally clear that in placing any reliance on the Department of Health Circular, HIA erred. The circular is not even a binding interpretation of the 1947 Act, let alone of an entirely different legislative instrument. The proposition that the circular could be *persuasive* in the interpretation of ordinary residence under the Act is, to put it at its mildest, puzzling.

108. However, none of this renders the enforcement notice invalid. The issue subtending Chubb's case is an essentially legal one, involving the application of a single fact, to a statutory definition. Either HIA is correct or it is incorrect in its determination that undertaking a course of education of more than one year's duration renders a person ordinarily resident. That it derived that from a source to which it should not have had regard does not render an otherwise correct legal conclusion in error. In referring as it does to the *weight* attached by HIA to the circular, Chubb confuses the proper consideration of the factors taken into account in the exercise of a discretionary power with a process of legal analysis. In exercising a discretionary power, the taking account of matters that are not envisaged by the statutory scheme pursuant to which the power was conferred may vitiate the exercise of the power. In reaching a conclusion of law, the authority is either right or wrong. The fact that it reaches a correct conclusion by a process of reasoning that is erroneous does not convert the correct legal answer into a mistaken one.

109. For the same reason, many of the arguments advanced in the course of the judicial review proceedings sought to contend under the guise of '*rationality*' conclusions which are not rational or irrational, but right or wrong. These include the definition of '*ordinary residence*' applied by HIA, the failure to take account of the use of that term in other legislation, the question of whether there was an obligation to require a period of prior residence before a person could be *ordinarily resident*, the alleged failure to take account of the students' immigration status, or the fact that students are not considered resident for the purposes of the Irish Nationality and Citizenship Act 1956 as amended.

Are students undertaking a course of more than one year's duration ordinarily resident in the State?

110. That leads to the next question – whether students taking such a course were so resident. Having regard to the legal authorities to which I have referred, the proper starting point is that they are. They are resident within the jurisdiction for an appreciable period of time and they are here for a specific purpose which is capable of being settled. It is this jurisdiction – to revert to the language of Lord Denning in *Fox v. Stirk* - where they live, sleep, and where they are for at least half the year at minimum (and see also *A. v. A* at para. 18).

111. In contending otherwise, Chubb commences from the proposition that ordinary residence is 'backward looking'. The relevant period, it says, is not the future but the period of time that has elapsed when the question of whether a person is ordinarily resident falls to be answered. In its notice of appeal, Chubb describes it as '*a fundamental principle*' that the status of ordinary residence can only be acquired subsequent to completion of a certain period of residence in a place. In that regard, Chubb stressed the comment of Lord

Scarman that to establish a settled purpose there must be '*a regular, habitual mode of life in a particular place, the continuity of* ***which has persisted*** *despite temporary absences*'. Given that HIA does not look to the period a student has spent in the State before determining them to be ordinarily resident, and indeed given that on HIA's case they are ordinarily resident in the State once their policy of insurance takes effect, Chubb says that the approach adopted by HIA is not consistent with the language used in the legislation.

112. However, this argument ignores the difference between two concepts of ordinary residence as used in the statute book. Some statutes - the legislation considered in *Goertz* and in *Shah* being cases in point – condition ordinary residence by reference to the location of the subject over specified time periods. The provision of the Aliens Act considered in the former case conferred the entitlement to notice in advance of deportation to those ordinarily resident for five years, the Regulations promulgated under the Education Act addressed in the latter looked to a period of three years before the date of the application for the educational award. Many of the statutes referred to by the parties in the course of this appeal operate on the same basis: the Taxes Consolidation Act 1997 defines ordinary residence by reference to a period of three years prior to any given year of assessment (s.820), the Student Support Act 2011 (s.14(4)) provides that a person is ordinarily resident in the State for the purposes of that Act where they have been resident in the State for at least three out of the period of five years ending on the date of application, while the Gender Recognition Act 2015 applies a definition of ordinary residence for a period of one year on the date an application for a general recognition certificate is sought. In considering each of these statutes, a Court necessarily looks to accumulated periods of residence and seeks to determine (a) if it falls within the period prescribed in the legislation and (b) if so, whether in all the circumstances it is properly characterised as '*ordinary residence*' within the meaning of the legislation. That is what Lord Scarman was doing in *Shah*, and that is why he made the comments upon which Chubb relies.

113. If anything, the fact that when the Oireachtas has intended a specified period as being required before location in the State qualifies for a particular statutory purpose it has prescribed that period, suggests that the focus directed by Chubb to accumulated periods of residence is in error. The other legislation to which it points does not prove a general meaning of ordinary residence framed by the past. It proves instead a legislative realisation that if residence is to be fixed for some purposes by reference to the passing of particular periods of time, this must be stated and the time prescribed. The fact, incidentally, that a student may be ordinarily resident for the purposes of the Act, but not for the purposes of either Income Tax legislation or the Student Support Act (another point made by Chubb) is hardly more relevant than the fact that a person can be so resident for one of these Acts but not the other.

114. Here, the Act does not impose such a restriction. It thus functions as did the legislation considered in *Quinn* and in *Fox v. Stirk*. No accumulated period is required: absent some legislative context suggesting otherwise, '*[o]rdinary residence can be changed in a day*'

(Dicey, Morris and Collins '*The Conflict of Laws*' 15th Ed. (London, 2012) at para. 6-163). A student who begins his or her residence in the State with the settled purpose of undertaking a course of academic study can thus acquire residence when they give effect to that purpose by arriving in the State. The legislation, viewed as a whole, supports that conclusion: the concern is with ensuring that persons who are in the State for purposes that are other than temporary or transient are insured by registered undertakings. That exigency is not affected by whether they have been here for any particular period prior to the inception of the policy.

115. Chubb presents a further and related objection. Sometimes, it is said, the insurance contracts are entered into by students before they even arrive in the State. While for students commencing their second year of study, they have been in the State for an academic year when they renew their policies for the following year, for those who are starting first year some will not have come to Ireland when the policies are effected. Thus, Chubb contends, it is not possible for a person to acquire the status of ordinary residence who has yet to enter the State but is nonetheless ordinarily resident for the purposes of the Act by virtue of the course of study on which they are engaged.

116. Given that Chubb has never suggested that it does not write insurance for persons who are in their second year of an academic course, this argument seems to me to be entirely academic. However, I believe HIA is correct in its essential response - that it is not illogical to determine whether a person is ordinarily resident in the State by reference to a period of study yet to be undertaken where the question is whether ***in respect of a contract of health insurance*** (HIA's emphasis) the insured person is ordinarily resident in the State. The non-EEA student, it says, will be ordinarily resident in the State during the period of cover. The period in respect of which they are covered under the Policy does not commence until they arrive in the State.

117. The trial Judge rejected Chubb's argument as follows (at para. 54):

> *'While an individual who came to this jurisdiction with an intention of only remaining for a short period of time but then remained for a longer period, might find themselves altering from a status of not ordinarily resident to ordinarily resident in light of the time period involved, fixing an individual's ordinarily resident status by reference to a known fixed period of study which is to occur in the future is not illogical.'*

118. In its own terms, this reasoning appears correct. The injunction in s.16 is to the effect that an unregistered undertaking '*shall not carry on health insurance business*'. That means the business of effecting health insurance contracts. Once Chubb is effecting such contracts so as to render this as the carrying on of its business, it is in breach of the prohibition.

119. The exemption in s.2(1)(d)(i) is *not* framed by reference to the entering into or effecting of the policy. Instead, a contract of insurance is outside the general definition and within

the exception if its purpose is to reimburse persons who are not ordinarily resident in the State:

> *'a contract of insurance … the* ***purpose of which*** *is to provide for* ***the making of payments*** *… in respect of the provision of … health services* ***to persons or any dependants of any of them*** *…and …*
>
> *neither* ***the said persons*** *…* ***are*** *ordinarily resident in the State …'*
>
> (Emphasis added)

120. 'Purpose' necessarily looks to a future event – payment to the insured upon the happening of the event insured against. The real question, accordingly, is not whether the insured person is ordinarily resident when the policy is effected, but whether the purpose of the contract is to reimburse them when they are so resident. Viewing the matter thus, it is immaterial where those persons are resident at the time of execution of the policy if it is the purpose of the policy to indemnify them when they are so resident.

121. Chubb also relies in this connection upon the immigration status of the students. Stamps 2 and 2A allow the student to remain in the State for one calendar year only. A settled purpose, it is said, cannot be achieved if the subject's legal entitlement to reside is limited as that of the EEA students is. This, however, is to confuse an inquiry into whether a person has put down roots in a place in a substantial way so as to render that place their home, and the distinct question of whether the person has a settled purpose. A settled purpose may be fulfilled by meeting a purpose of short duration or one conditional upon future events (see *Re P-J (Children)* [2009] EWCA Civ. 588 at para. 26(4)). The fact that the subject hopes to obtain leave to return to complete his studies – as evidenced by his having commenced a course of more than one academic year's duration – satisfies this requirement irrespective of whether he has an entitlement to it.

The trial Judge's consideration of the amendments to the Act.

122. Chubb's fifth criticism of the trial Judge's decision is directed to her examination of the amendment history of the provision. When the 1994 Act was originally promulgated the Act did not provide for any segregation of the health insurance market on the basis of the residence status of the insured. In 2001 (Health Insurance (Amendment) Act 2001) the Act was amended so as to exempt from the definition of health insurance contract contracts held with persons who were neither domiciled or ordinarily resident in the State, and those temporarily in the State carrying out their duties as employees. In 2008 (Voluntary Health Insurance (Amendment) Act 2008) the reference to domicile was removed. In her judgment, the trial Judge expressed the view that the removal of the reference to domicile implied that the Oireachtas had determined that questions such as the intention of an individual to remain and the purpose for which they did so were '*removed from the equation*' in determining whether a person was ordinarily resident for the purposes of s.2.

123. Chubb says that the trial Judge erred in the significance she attached to this aspect of the amendment history. Whether or not this is so, the conclusion she reached is, essentially,

correct. The difference between domicile and ordinary residence is that concentration on the latter removes the need to consider the issues of subjective intention which dominate analysis of the former. This, as I have noted, was the point made by Costello J. in *Deutsche Bank v. Murtagh*. Lord Scarman made it clear in Shah that the intention of the subject was not entirely irrelevant to the ordinary residence test: it was relevant, he said, to whether the person was in the relevant location voluntarily, and it was relevant to the issue of purpose. However – and this is the point made by Lord Wilson in *Re LC (No.2)* at para. 37 – evidence of a state of mind does not necessarily involve subjective proof. The settled purpose of the subject – at least in the context that presents itself here – can be ascertained by reference to the objective fact that they have committed to an academic course of more than one year's duration. For this reason, it is not correct to say (as Chubb does) that HIA's '*entire definition*' is based on subjective considerations of intention.

124. In this connection, Chubb also criticises the trial Judge's reference to the provisions of s 2(1)(d)(ii). This provides a second exception in respect of persons who are in the State temporarily and for the purpose of carrying out their duties as an employee. The trial Judge held that the period of time during which the Oireachtas intended ordinary residence to be acquired for the purposes of s.2(1)(d)(i) was short. She said that if the meaning contended for by Chubb were correct, there would have been no need for that exemption. Thus, the exemption in respect of persons who were ordinarily resident was, she said, more restrictive than the exemption in the second paragraph.

125. Chubb says that this conclusion is difficult to justify having regard to the fact that the second paragraph does not specify any time period for those who fall within it. The requirement is that they be in the State '*temporarily*' and '*solely for the purposes of carrying out their duties as employees*'. However, the essential point made by the trial Judge is both important and correct. The assumption has to be that there will be some persons within para. (ii) who do not fall within (i). Therefore, some persons who are in the State for the purposes of temporary employment duties will be ordinarily resident here. So viewed, the section detracts from rather than advances Chubb's case. The analysis I have suggested above would mean that persons in Ireland for the settled purpose of employment would be ordinarily resident here, even if that employment was for a defined and potentially relatively short time. Paragraph (ii) provides a specific and tailored exemption for these persons – presumably included to reflect the needs of multinationals operating within the State. The conjunction of the sections can only mean that persons can be at the same time *ordinarily resident* in the State, and *temporarily resident* here, a proposition which reflects the view in the authorities that (absent provision or context suggesting otherwise) it is possible to be ordinarily resident in two places at the same time.

The policy of the Act.

126. The final point emphasised by counsel for the appellant in concluding his oral submissions relates to the policy underlying the Act. He contends that the decision by HIA as to the meaning of the ordinary residence exemption in the Act insofar as it applies to non-EEA

students is inconsistent with that policy. To that end, Chubb emphasises the principle of intergenerational solidarity which is built in to the Act and which it says supports the proposition that students of the type in issue here were intended to be excluded from the Act. In particular, it says that it must follow from that principle that the Oireachtas intended to exclude from the scope of the regulated market those students who are in the State for educational purposes only and who could never hope to benefit from the principle of intergenerational solidarity.

I do not find this convincing. It is not possible to deduce from a general policy underlying the legislation, a specific basis for exempting from its terms a class of persons by reason of their age, nationality or occupation. The Oireachtas has excluded contracts of insurance with persons who are not ordinarily resident from the scope of the legislation. The reason this was done was to ensure that those whose presence in the State is merely temporary may be insured without having to contribute in the insurance premia they pay to a health system in a jurisdiction with which their connection is transient. The critical issue arises from the question of how 'temporary' and how 'transient' that connection has to be. The policy of the legislation as relied upon by Chubb does not provide any structured answer to that question and, apart from arguing that it means that (some) foreign students in the jurisdiction for less than three years are not 'ordinarily resident', Chubb has not proposed one. The Oireachtas has given expression to that policy not by defining classes of persons (save and insofar as it has posited the single exemption prescribed in s.2(1)(d)(ii)) nor by exempting persons who are within the jurisdiction only for a specified period of time. It has used a familiar phrase to which effect must be given in its own terms.

Legitimate expectation.

127. The contention that Chubb enjoyed a legitimate expectation that HIA would not issue an enforcement notice against it featured in both sets of proceedings (although HIA objected that it had not been pleaded in the statutory application). This arose from the correspondence exchanged between the parties in 2011. Chubb says that viewed against the backdrop whereby HIA's role in the health insurance market is to monitor the market and ensure compliance with the Acts, its silence and inaction for five years when it was fully aware of the terms of the policy and the fact that Chubb was not a registered undertaking have given rise to a legitimate expectation that the sale of the Policy was in compliance with the terms of the Act. It says that during the five-year period between the last communication to HIA in July 2011 and the correspondence from HIA of 28th June 2016, Chubb continued to invest in its product and develop its brand in the relevant market. In that connection, Chubb refers to the decisions in *Glenkerrin Homes v. Dun Laoighaire Rathdown County Council* [2007] IEHC 298, [2011] 1 IR 417, *R v. Inland Revenue Commissioners ex parte Unilever* [1996] STC 681 and *R (Gallagher Group Limited) v. The Competition and Markets Authority* [2018] UKSC 25.

128. It is difficult to see how Chubb can hope to bring itself within the doctrine addressed in these cases. HIA has made no representation of any kind to Chubb to the effect that the provision of health insurance to non-EEA students attending academic courses in the

State is lawful without Chubb registering under the Act. The last statement made by HIA in relation to the issue prior to the train of correspondence commencing in June 2016, was in its letter to Chubb of 4th July 2011. There, it requested an explanation as to why Chubb did not need to be registered with HIA. Chubb's response of 14th July 2011 recorded an understanding that Chubb did not require to be registered given that the students were ordinarily resident outside the EEA and were visiting Ireland for the purposes of attending an educational course. HIA did not respond. It made no representation of any kind that it accepted this position. The end point of Chubb's argument is that failure to respond to this correspondence in some sense exempted it from compliance with, or at least enforcement of, the law.

129. Generally, a legitimate expectation must be grounded on a representation. That representation may be expressed, or it may be implied (see *Glencar Exploration plc v. Mayo Co. Co. (No.2)* [2002] 1 IR 84 at para. 18). In exceptional circumstances, the general law may treat silence as a representation, but only where there is an affirmative duty to speak (see *Doolan v. Murray* (Unreported, High Court, 21st December 1993)). Here, Chubb has pointed to no basis on which it could be said that HIA owed a duty to advise Chubb that its actions were or might be in breach of the law. The fact it wrote to Chubb once, and failed to respond to Chubb's reply to that correspondence, does not create such an obligation.

130. Although this Court has held that even an established and inveterate practice cannot amount to an implied promise or representation (*O'Donoghue v. South Kerry Development Partnership* [2018] IECA 10 at para. 51 to 52), the *Glenkerrin Homes* decision suggests that a settled practice which, at least, is undertaken to facilitate the interests of a section of the public which comes to rely upon it may give rise to such an expectation. There, the Court held that an implied representation could derive from the universal following of a particular practice for a prolonged period of time. In that case, it was held that a local authority was obliged in certain circumstances to make available certificates of compliance with obligations to pay financial contributions under the planning code where these documents had acquired the status – in effect – of documents of title and in which the practice had become so entrenched that the expert evidence to the Court was that a solicitor would not advise the purchaser of affected properties to complete a sale without one. The obligation would not be imposed, however, where the local authority had reasonable grounds for believing that the grant of a certificate would facilitate a sale which would deprive it of the opportunity to obtain units in the development in accordance with the provisions for social and affordable housing provided for in Part V of the Planning and Development Act 2000. *Glenkerrin Homes*, however, was a very particular case. The discretion being exercised by the local authority was not in fact a statutory discretion in the sense in which that term is usually used, at all: all the applicants wanted was confirmation that they had paid the contributions they were required to make and had made (at para. 20). Thus, Clarke J. noted:

> *'Were it not for the complications which arise in this case relating to compliance with the relevant requirements in respect of social and affordable housing, I would*

have little difficulty in principle in declaring that a developer who has paid the relevant financial contribution is entitled to an appropriate form of certification of that fact from the local authority.'

131. Putting to one side the consideration that Chubb established no settled practice of any kind, *Glenkerrin Homes* is different, not merely because it did not involve a statutory discretion as such and did not involve any release from legal obligations, but because the case essentially presented a situation in which (as regards some of those seeking the certificates of compliance which were not being made available) there was simply no good reason for not observing the pre-existing practice, upon which very considerable reliance had been placed. To extent it reflects the position in *ex parte Unilever*, where the Court enforced an expectation based on previous conduct, essentially on the basis that resiling from it was so unfair as to amount to an abuse of power.

132. *Unilever* arose from Inland Revenue's treatment of a taxpayer's claims for relief for loss against corporation tax. Revenue had a discretion to allow claims made outside the statutory time limit fixed for making a claim for that relief. On thirty occasions over a period of more than 20 years the taxpayer submitted late claims and the Revenue accepted them. However, for three accounting years the taxpayer's claims were refused without notice on the ground that they were not made within the statutory time limit. The reason the applicant succeeded in obtaining judicial review of the decision of Revenue to refuse the claims on the basis of a legitimate expectation, was that Revenue's conduct was viewed as being so unfair that it could not stand (see Bingham MR at 691g and Simon Brown LJ at 697c).

133. Thus, in referring to *Unilever in R (Association of British Civilian Interests) v. Secretary of State for Defence* [2003] EWCA Civ. 473, [2003] QB 1397, the Court of Appeal explained the position as follows (at para.72):

'Thus it is clear that it will be only in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. That is because it will only be in a rare case where, absent such a representation, it can be said that a decision-maker will have acted with conspicuous unfairness such as to amount to an abuse of power. In the Unilever case, the taxpayer had, in effect, been lulled into a false sense of security, and had regulated its tax affairs in reliance on the Revenue's course of conduct, and thereby acted to its detriment. In those circumstances, and in the light of the Revenue's acceptance of its duty to act fairly and in accordance with the highest public standards, it is not surprising that the court felt able to treat this as a wholly exceptional case.'

134. The United Kingdom Supreme Court (*R (Gallagher Group Ltd. and ors.) v. Competition and Markets Authority* at para. 40) now prefers to see Unilever as an example of irrationality, and indeed perhaps as a case of a settled practice giving rise to an implied representation. Whichever way one views it, in this case, there was no representation, no '*course of conduct*' by HIA, no settled practice and certainly nothing that could be

presented as irrationality. All Chubb can point to is a failure by HIA to correct Chubb (or more accurately to correct it in part given that HIA accepts – whether correctly or not is not a matter for this Court in these proceedings – that non EEA students undertaking academic courses of less than a year are not ordinarily resident in the State). And critically, the correction is not the extension of a statutory or non-statutory discretion so as to confer a benefit of some kind, but the provision of comfort that Chubb was not breaking the law, something HIA could not itself extend in a binding way in any event. A representation that a party could do an act which is unlawful, can never give rise to a legitimate expectation, (*Bates v. Minister for Agriculture, Fisheries and Food* [2011] IEHC 429, [2012] 1 IR 247 at para. 27).

Judicial Review and Statutory Appeal:

135. One final issue within the appeal in the Judicial Review proceedings arises from the refusal of the trial Judge to determine in those proceedings matters which she felt fell within the statutory appeal. Chubb has not identified any error in this regard. The starting point in the application of the discretion of the Court to refuse relief by way of Judicial Review at the instance of an applicant who has available to him or her an alternative remedy, is that such relief should be refused unless that remedy is not in fact adequate or there is a particular exigency in the interests of justice which requires otherwise (see *Habte v. Minister for Justice* [2020] IECA 22 at paras. 111 to112). Thus, the requirement to exhaust such remedies represents the default position. Those cases in which review is permitted in that circumstance are exceptional to the general rule. It follows that the onus is on the party seeking relief by way of Judicial Review to establish either that the alternative remedy is not adequate, or that there is a particular exigency which renders it unjust that it should have to be exhausted. No such circumstances have been identified here.

136. Section 18C enables an application to the High Court to cancel a direction and confers a corresponding power on the Court. Although not describing itself as an appeal it is similar in its description of the jurisdiction conferred upon the Court to the procedure considered in *FitzGibbon v. Law Society* [2014] IESC 48, [2015] 1 IR 516. The process falls within the category of provisions enabling an appeal against error as identified by Clarke J. (as he then was) at paras. 119 to123 of his judgment. It is therefore broader in its scope than an appeal on a point of law. Although statutory appeals will not usually extend to claims that a body lacked jurisdiction to determine a matter (see *Sheehan v. Solicitors Disciplinary Tribunal* [2020] IECA 77), an appeal on a point of law itself will usually capture most, if not every category of error that might give rise to judicial review (see the description in *Attorney General v. Davis* [2018] IESC 27 [2018] 2 IR 357 at paras. 54 to 55). It must follow that – absent some unusual limitation arising from the terms of the statute conferring the right of appeal – the presumption is that an appeal of this kind is intended to both supplant and enlarge the remedies provided for by way of an application for Judicial Review. This is the position as explained by Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 at para. 20. There is nothing in the text of the Act to suggest that that presumption is rebutted.

137. In a context in which the case law consistently reserves the scope of a statutory application in the nature of an appeal to the particular legislative context in which it appears, it is understandable that – at least absent a definitive determination in the context of the precise scheme in issue – prudent legal advisors will seek to protect to the greatest extent possible their client's rights by instituting parallel judicial review proceedings. However, the grounds in issue here were all capable of being addressed within the statutory application and, even if that was not the case, it would not have been correct for the Court to have duplicated consideration of issues addressed in the statutory application, in the judicial review proceedings.

III CONCLUSIONS

138. Between both sets of proceedings in issue here, Chubb raised a wide array of different claims. All are considered in the course of this judgment. My conclusions on what appear to me to be the principal issues can be shortly stated.

139. First, the enforcement notice served by HIA on March 20th 2017 is bad in law for failing to properly specify a contravention of the Act. The notice depends for its efficacy upon its being compliant with the statutory scheme, and it was not so compliant in a respect which is clearly material. Chubb is accordingly entitled to an order under s.18C(1)(a) of the Act cancelling the direction. This is, of course, without prejudice to HIA's entitlement to serve a further and regular enforcement notice.

140. Second, the authorities make it clear that there is no objection in principle to a determination that a group of persons sharing as a single common factor that they are in the State for a course of academic education of some duration, are for that reason alone ordinarily resident in the State.

141. Third, construing the phrase *ordinarily resident* in accordance with the principles developed in the case law I consider in this judgment and having regard to the statutory scheme as a whole, non-EEA students undertaking an academic course of more than one year's duration are ordinarily resident in the State. In so concluding, I am not out-ruling the possibility that students attending shorter courses are also so resident. This issue does not arise for determination here.

142. Fourth, Chubb did not enjoy any legitimate expectation of the nature alleged in these proceedings.

143. In those circumstances, the appeal in the judicial review proceedings is dismissed. The appeal in the statutory application is allowed, but only to the extent that the notice failed to specify a contravention of the Act as is required by s.18C.