THE HIGH COURT

2017 No. 146 MCA

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 18C OF THE HEALTH INSURANCE ACT 1994 AS INSERTED BY SECTION 14 OF THE HEALTH INSURANCE (MISCELLANEOUS PROVISIONS) ACT 2009

BETWEEN:

CHUBB EUROPEAN GROUP PLC

Applicant

AND

THE HEALTH INSURANCE AUTHORITY

Respondent

JUDGMENT of Ms Justice Tara Burns delivered on the 22nd October, 2018

The Health Insurance Act 1994

1. Section 1A of the Health Insurance Act 1994, as amended (hereinafter referred to as "the Act of 1994") sets out the principal objective of the Act as follows:-

> *"(1) The principle objective of this Act is to ensure that, in the interest of the common good and across the health insurance market, access to health insurance cover is available to consumers of health services with no differentiation made between them (whether effected by risk equalisation credits or stamp duty measures or other measures, or any combination thereof), in particular as regards the costs of Health Services, based in whole or in part on the health risk status, age or sex of, or frequency of provision of health services to, any such consumers or any class of such consumers, and taken into particular account for the purposes of that objective-*
>
> > *(a) the fact that the health needs of consumers of health services increase as they become less healthy, including as they approach and enter old age,*
> >
> > *(b) the desirability of ensuring in the interests of society and intergenerational solidarity, and regardless of the health risk status or age of, or frequency of provision of health services to, any particular generation (or part thereof), that the burden of the cost of health services be shared by insured persons by providing for a cost subsidy between the more healthy and the less healthy, including between the young and the old, and, without prejudice to the generality of that objective, in particular that the less healthy, including the old, have access to health insurance cover by means of risk equalisation credits,*
> >
> > *(c) the manner in which the health insurance market operates in respect of health insurance contracts, both in relation to individual registered undertakings and across the market, and*
> >
> > *(d) 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.*
>
> *(2) A registered undertaking shall not engage in a practice, or effect an agreement (including a health insurance contract), which has as its object or effect (whether in whole or in part) the avoidance of the achievement of the principle objective."*

2. Pursuant to s. 2(1) of the Act of 1994:-

> *"Health benefits undertaking" is defined as meaning "a person (including a body established under the laws of a place outside the State) carrying on health insurance business".*
>
> *"Health insurance business" is defined as meaning "the business of effecting health insurance contracts".*
>
> *"Health insurance contract" is defined as meaning "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 but does not include:–*
>
> > *(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 so resident solely for the purpose 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."

3. Section 4 of the Act of 1994 imposes criminal liability on any person who contravenes a provision of the Act.

4. Sections 7, 8, 9 and 10 of the Act of 1994 impose various obligations and restrictions on registered undertakings, which in essence amount to the principal requirements of the Act of 1994, namely community rating, open enrolment, lifetime cover and minimum benefit.

5. Section 14 of the Act of 1994 requires a Register of Health Benefits Undertakings to be established and sets out related matters in respect of becoming a registered undertaking pursuant to the Act.

6. Section 16 of the Act of 1994 provides:-

"A person other than a registered undertaking shall not carry on health insurance business".

7. Section 18B of the Act of 1994 provides inter alia:-

"(1) [W]here 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 provision 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.

(4) The Authority may cancel an enforcement notice by notice in writing served on the person concerned.

(5) Where a person fails to take the steps specified in an enforcement notice served on the person, the Authority may, on notice to that person, apply in a summary manner to the High Court for an order requiring the person to take those steps (or to take such varied or other steps for the like purpose as may be specified in the order), and the court-

(a) may-

(i) make the order sought,

(ii) make the order sought subject to such variations to those steps as may be specified in the order, or

(iii) make the order sought subject to such other steps for the like purpose as may be specified in the order, or

(b) may dismiss the application,

and, whether paragraph (a) or (b) is applicable, may make such order as to costs as it thinks fit in respect of the application."

8. Section 18C of the Act of 1994 provides:-

"(1) A person on whom an enforcement notice has been served may, on notice to the Authority, not later than 45 days after being so served, apply to the High Court for the cancellation of any direction specified in the notice and, on such an application, the court may-

(a) cancel the direction,

(b) confirm the direction, or

(c) vary the direction,

and, whether paragraph (a), (b) or (c) is applicable, make such order as to costs as it thinks fit in respect of the application.

(2) The decision of the High Court under this section on a direction specified in an enforcement notice shall be final save that, by leave of that court or of the Supreme Court, an appeal by the Authority or the person concerned, as the case may be, from the decision shall lie to the Supreme Court on a question of law."

9. The Respondent was established pursuant to s. 20 of the Act of 1994 and is the statutory regulator of the private health insurance market.

10. The principal functions of the Respondent are set out in s. 21(1) of the Act of 1994 as follows:-

> (a) to manage and administer the Risk Equalisation Scheme;
>
> (b) to maintain the Register of Health Benefits Undertaking and the Register of Health Insurance Contracts;
>
> (c) to evaluate and analyse information and other returns made to it;
>
> (d) to take such action as it considers appropriate to increase the awareness of members of the public of their rights as consumers of health insurance and of the health insurance services available to them;
>
> (e) to advise the Minister at his or her request or on its own initiative on matters relating to the functions of the Minister under the Health Insurance Acts, the functions of the Respondent under the Health Insurance Acts and health insurance generally;
>
> (f) without prejudice to the generality of paragraph (a), to advise the Minister either at his or her request or on its own initiate as to whether, in the opinion of the Authority, the principal objective specified in s. 1(A)(1) is being achieved to the appropriate extent, and
>
> (g) to monitor the operation of the Health Insurance Acts and the carrying on of health insurance business and developments in relation to health insurance generally;

Section 21(2) of the Act of 1994 provides that the Respondent:-

> *"shall have all such powers as are necessary for or incidental to the performance of its functions."*

Background

11. The Applicant is a UK authorised non-life insurance undertaking which carries on business in Ireland through a registered branch. The Applicant is not a registered undertaking pursuant to the Act of 1994 and accordingly is not subject to the various obligations and restrictions which are imposed on registered undertakings with the aim of achieving the four principles of private health insurance provided in the Act of 1994, namely: community rating, open enrolment, lifetime cover and minimum benefit.

12. The Applicant underwrites a type of medical insurance for non-European Economic Area students (hereinafter referred to as "non-EEA students") and their dependents who come to Ireland to undertake an educational course of study. The Policy in question is known as the Medicover Student Personal Medical Expenses Insurance Policy (hereinafter referred to "the Medicover Policy").

13. The Applicant contends that in underwriting such a type of medical insurance, it is not required to be a registered undertaking pursuant to the Act of 1994, as the Medicover Policy is offered exclusively to non-EEA students who it asserts are not ordinarily resident in the State and it thereby falls within the exception to the definition of "health insurance contracts" provided for in s. 2(1)(d)(i) of the Act of 1994.

14. In order to obtain immigration permission to enter and remain in the State for the purpose of attending an educational course, a non-EEA student, is required to establish amongst other matters that he/she can pay for the course and support themselves without availing of any State benefits and that he/she has private medical insurance at the time of registration with the Irish Naturalisation and Immigration Services (INIS). At every subsequent registration, he/she is required to have proof that he/she was in possession of private medical insurance for all the previous registration periods. Travel insurance in not sufficient.

15. A non-EEA student's permission to remain and study within the State is valid for up to 12 months and must be renewed before the expiry date should the non-EEA student wish to remain longer in the State. The maximum length of time which a non-EEA student may be given permission to study in the State is seven years with limited exceptions.

16. It is to such students that the Applicant provides medical insurance under the Medicover Policy referred to above. While this is a policy which extends for twelve months, Counsel for the Applicant accepted, in the course of the hearing, that the Applicant provides renewal of the Medicover Policy to students requiring further medical cover insurance whilst remaining within the State engaged on a longer course of study. Accordingly, the Applicant does not restrict itself to providing medical cover insurance to non-EEA students for a single year.

17. In July 2011, the Respondent wrote to the Applicant referring to the Medicover Policy. It requested the Applicant to explain why it did not need to be registered with the Respondent under the Act of 1994. The Applicant responded by explaining that the insurance cover was limited to foreign students, or their dependents, who are ordinarily resident outside the EEA and who are visiting Ireland for the purpose of attending an educational course. It indicated that it was its understanding that the provision of insurance of this nature did not require it to be registered with the Respondent.

18. No further correspondence ensued between the parties until June 2016 when the Respondent again corresponded with the Applicant referring to the Medicover Policy and asking the Applicant to explain why the Applicant believed that it was not required to be a registered undertaking with the Respondent.

19. Arising therefrom, considerable correspondence was engaged in between the parties wherein the meaning of "ordinarily resident in the State" within the context of the Act of 1994 was discussed in detail. I do not propose setting out the terms of that correspondence. In the affidavits sworn in this matter, criticism is levelled at the content of the correspondence which emanated from the Respondent in terms of how it set out its position. Issue is taken with this by the Respondent. Ultimately what is at issue in these proceedings, is whether the Respondent had the authority to make its determination regarding "ordinarily resident" and whether it erred in its determination in relation to same. There is no suggestion that the Applicant was not given an opportunity to make submissions in this regard. Accordingly, I am of the view that the content of the correspondence is not of particular concern to me.

20. By letter dated 9th December 2016, the Respondent informed the Applicant that it was the Respondent's view that the Medicover Policy amounted to a health insurance contract within the meaning of the Act of 1994; that the Respondent interpreted the term

"ordinarily resident" in s.2(1)(d)(i) of the Act of 1994:-

> *"as being, in respect of non-EEA students, where they are attending a course of study in the State of more than one academic year's duration".*

Accordingly, the Respondent requested the Applicant to restrict the offer of its Medicover Policy to non-EEA students who attend a course of one academic year's duration or less.

21. On 12th January 2017, the Respondent served an Enforcement Notice on the Applicant pursuant to s. 18B of the Act of 1994. On foot of objections from the Applicant, the Respondent cancelled this Enforcement Notice by letter dated 22nd February 2017. It stated therein:-

> *"The cancellation of the Enforcement Notice is without prejudice to the entitlement of the Authority to issue a new Enforcement Notice to ACE in accordance with section 18B.*
>
> *The Authority remains of the view that the [Medicover Policy] does not fall within the scope of the exception of the definition of "health insurance contract" provided in section 2(1)(d)(i) of the Health Insurance Acts, which applies where neither the insured nor any dependents are ordinarily resident in the State.*
>
> *We refer you to the Press Release issued on 25 January 2017 on behalf of the Authority concerning health insurance and non-EEA students studying in Ireland… which sets out the Authority's determination that "ordinarily resident in the State" in respect of non-EEA students means students attending a course of study of more than one academic year's duration.*
>
> *Please confirm …that ACE will amend the terms and conditions of the [Medicover Policy] so as to limit its availability to non-EEA students undertaking a course of study in Ireland of not more than one academic year's duration, or alternatively, that ACE will apply to become a registered undertaking within the meaning of the Health Insurance Acts.*
>
> *In the absence of such confirmation, the Authority reserves the entitlement to issue an Enforcement Notice in accordance with section 18B of the Health Insurance Acts "*

22. In the meantime, on 25th January 2017, the Respondent published on its website, as referred to above, a press release concerning health insurance and non-EEA students studying in Ireland. It stated therein:-

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

23. On 20th March 2017, the Respondent served another Enforcement Notice on the Applicant notifying it that the Respondent was of the opinion that the Applicant was contravening s. 16 of the Health Insurance Acts by offering for sale its Medicover Policy to non-EEA students attending a course of study in Ireland of more than one academic year's duration. It directed the Applicant to restrict the availability of the Medicover Policy to non-EEA students attending a course of study in Ireland of not more than one academic year's duration or to become a registered undertaking. The Enforcement Notice is appended to this judgment.

24. Pursuant to s. 18C of the Act of 1994, the Applicant instituted these proceedings seeking to have the direction contained in the aforementioned Enforcement Notice cancelled. The challenge to the Enforcement Notice is twofold: the Applicant challenges the Respondent's interpretation of the phrase "ordinarily resident in the State" within the meaning of s. 2(1)(d)(i) of the Act of 1994 and claims that the Respondent failed to comply with the statutory requirements set out in s. 18B of the Act of 1994.

25. Of note, in terms of the number of non-EEA students renewing a 12 month visa to stay within this jurisdiction, a replying affidavit sworn on behalf of the Respondent on 19th September 2017, exhibits a parliamentary question asked of the Minister of Justice in 2014 relating to the number of applications and renewals of visas granted to non-EEA students. The information provided by the Minister was that in 2014, 18,509 non-EEA students had their registration renewed; in 2013 - 16,341; in 2012 - 20,512; in 2011 - 23,396; in 2010 - 24,466; and in 2009 - 23,959.

"Ordinarily resident in the State"

26. The Applicant raises a number of issues regarding the Respondent's interpretation of the phrase "ordinarily resident in the State" within the meaning of s. 2(1)(d)(i) of the Act of 1994.

No jurisdiction to define "ordinarily resident" in a general way

27. On a preliminary basis, the Applicant submits that the Respondent is not permitted to define "ordinarily resident in the State" in a general way, but rather must determine this issue on a case by case basis. It points to the fact that criminal liability is imposed pursuant to s. 4 on any individual who contravenes a provision of the Act of 1994. It argues that the Respondent is effectively criminalising the Applicant's conduct of selling the Medicover Policy to non-EEA students who are engaged in a course of study of more than one academic year based on the Respondent's interpretation of "ordinarily resident in the State".

28. The phrase "ordinarily resident in the State" is not defined within the Act of 1994. Accordingly, it must be interpreted by the Respondent which is the statutory regulator of the health insurance market with extensive functions relating to that market and which has all powers as are necessary for or incidental to the performance of its functions pursuant to s. 21(2) of the Act of 1994. Indeed, the Applicant accepts that the Respondent has the power to interpret this phrase but complains that this should be done on a case by case basis.

29. By determining on a blanket basis that in fact a student who is attending a course of study of more than one academic year is ordinarily resident in the State, the Respondent has set out the factual conditions which will always result in the Respondent being of the view that a student is ordinarily resident in the State. This is entirely within the Respondent's remit in regulating the health insurance market. The Respondent, in its letter to the Applicant dated 2nd September 2016 makes it clear that this is its position by stating:-

> *"The [Respondent] also considers that it is helpful for undertakings seeking to offer insurance to understand how the Authority is likely to interpret the term "ordinarily resident" and for that reason has identified that 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 fact 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."

30. The Applicant in fact agrees with that approach. In its correspondence with the Respondent, it suggested that a student became ordinarily resident within the State having completed a three year course. In its discussions with the Respondent, it offered to limit the Medicover Policy to students attending a course of study of no longer than three years. Therefore, what really is at issue between the parties is the length of time decided upon by the Respondent which establishes a threshold beyond which ordinary residence is definitively acquired rather than whether the Respondent can adopt a generalised view about that the length of time a student can be within the jurisdiction before being considered to be ordinarily resident here.

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.

32. Further, I do not accept that there was any obligation on the Respondent to apply to the Court seeking some form of declaratory relief regarding the meaning of the term "ordinarily resident in the State" within the meaning of the Health Acts. The Respondent has full authority to determine that issue.

33. With regard to the issue of criminal liability, s. 4 of the Act of 1994 does not make failure to comply with an enforcement notice a criminal offence, rather contravention of a provision of the Act is an offence. By interpreting the phrase "ordinarily resident", the Respondent is not creating criminal liability, the liability is already created pursuant to the Act. As already stated, the Respondent is merely setting out the factual basis when it will be of the view that a student is ordinarily resident within the State.

Meaning of "ordinarily resident in the State"

34. The term "ordinarily resident in the State" is not defined in the Act of 1994, nor have any of the many amendments to the Act sought to define same.

35. The Applicant points to s. 820 of the Taxes Consolidations Act, 1997 which provides that if an individual is resident in the State for three consecutive years, he shall be ordinarily resident in Ireland from the beginning of the fourth consecutive year and to s. 14 of the Student Support Act, 2001 which provides that a person is ordinarily resident in the State if he has been resident in the State for at least three out of the last five years.

36. The Respondent, in its correspondence with the Applicant relating to this issue, pointed to a 1992 Circular issued by the Minister for Health relating to eligibility for accessing health services within the State which directed that a non-EC student national should be regarded as "ordinarily resident" in the State if attending a course of study of at least one academic year's duration.

37. In *State (Goertz) v. Minister for Justice* [1937] IR 45, the Supreme Court, in determining what the term "ordinarily resident" meant within the Aliens Act, 1935 stated:-

> *"Cases have been cited to us in which the meaning of the words "resident" and "ordinarily resident" have been considered. In my view they are of very little help. They are of assistance, however in showing that the word "resident" not being a term of art must be construed by reference to the statute in which it is found…. [The] words "ordinarily resident" 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, of course, with reference to the facts of the particular case"*

38. *R v. Barnet London Borough, ex parte Shah* [1983] 2 AC 309, which was considered with approval by the Supreme Court in AS v. CS [2010] IR 370, determined the ordinary meaning of the words "ordinarily resident". The case concerned itself with whether students who had come to England for a limited purpose of study for a limited time period had become ordinarily resident for the purpose of obtaining an award under s. 1 of the Education Act 1962. In the House of Lords, Scarman LJ stated at p 342 of the report:-

> *"[I]n their natural and ordinary meaning the words mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration. The significance of the adverb "habitually" is that it recalls two necessary features… namely residence adopted voluntarily and for settled purposes….*
>
> *I note that in the 19th century bankruptcy case In re Norris (1888) 4 T.L.R. 452, it was accepted that one person could be ordinarily resident in two countries at the same time. This is, I have no doubt, a significant feature of the words ordinary meaning for it is an important factor distinguishing ordinary resident from domicile…*
>
> *Parliament has evidenced a strong legislative preference for ordinary resident as a jurisdictional substitute for domicile: and the choice must be respected by the courts….*
>
> *Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used require a different interpretation, 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….*
>
> *There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary resident. The residence must be voluntarily adopted… And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled…..*
>
> *[P]roof of ordinary residence… is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind….*
>
> *An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can*

be."

Scarman LJ proceeded to find, at p 347 of the report, that the error of law made by the lower court was:-

> *"that they attached too much importance to the particular purpose of residence; and too little to the evidence of a regular mode of life adopted voluntarily and for a settled purpose, whether study, business, work or pleasure. A further error was their view that a specific limited purpose could not be the settled purpose…..: for study can be as settled a purpose as business or pleasure. And the notion of a permanent or indefinitely enduring purpose as an element in ordinary resident derives not from the natural and ordinary meaning of the words "ordinarily resident" but from a confusion of it with domicile".*

39. That a person may be ordinarily resident in more than one location was considered within this jurisdiction in *Quinn v. Waterford Corporation* [1990] 2 IR 507, a case which dealt with students exercising voting rights having regard to their location. There the Supreme Court found that having regard to s. 5 of the Electoral Act 1963 as amended, an individual may be ordinarily resident in more than one constituency.

40. I adopt the sentiments expressed by the Supreme Court in the *Goertz* case, that the references made by each side in the instant case, are of little help to me in deciding whether the Respondent erred in its determination of the meaning of "ordinarily resident in the State" within the meaning of s. 2(1)(d)(i) of the Act of 1994 dealing as they do with issues of taxation, student support and the provision of health services.

41. Having regard to *Goertz*, to interpret "ordinarily resident" within the meaning of s. 2(1)(d)(i) of the Act of 1994, regard must be had to the natural and ordinary meaning of the words and the general intention of the Act of 1994 with reference to the particular factual circumstance at issue, namely non-EEA students attending a course of study in Ireland for a limited period of time but that period of time being greater than one academic year.

42. I agree with the interpretation of the natural and ordinary meaning of the words "ordinarily resident" as enunciated in *R v. Barnet London Borough, ex parte Shah*. In particular, I agree that attending a course of study is a settled purpose when considering whether a person is ordinarily resident

43. Turning then to the terms of the Act of 1994 and in particular the amendments which have been made to the Act relating to s. 2(1)(d). Section 2 of the Act of 1994, as originally enacted, did not include an exemption from the requirement that health insurance contracts be subject to the requirements of the Act. Section 2 was amended by the Health Insurance (Amendment) Act 2001, which introduced an exemption from the requirements of the Act of 1994 in terms of the presently enacted s. 2(1)(d) except that s. 2(1)(d)(i) referred to a person not domiciled or ordinarily resident in the state. This amendment was subsequently further amended by s. 3(b) of the Voluntary Health Insurance (Amendment) Act 2008, which removed the concept of domicile from the exemption for health insurance contracts. In my view, the amendment history of s. 2(1)(d) of the Act of 1994 is an important consideration with respect to contracts which the Oireachtas intended to be excluded from the meaning of a health insurance contract. The Oireachtas went from a position of having no exemption for a health insurance contract concluded with a person not ordinarily resident in the State, to providing for an exemption in 2001 for contracts concluded with persons not domiciled or ordinarily resident in the State and persons referred to at s. 2(1)(d)(ii), to rowing back on that exemption in 2008 and limiting the exemption to contracts concluded with persons not ordinarily resident in the State and persons referred to at s. 2(1)(d)(ii).

44. Clearly, following the amendment of 2001, the question of domicile was a consideration in exempting a contract of insurance from the requirements of the Act of 1994. This has now obviously been removed from the Respondent's consideration by virtue of the amendment in 2008. That by necessary implication means that 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. "Domicile" and "ordinary resident" have two distinct meanings as explored in *R v. Barnet London Borough, ex parte Shah*.

45. Another important consideration, in determining what the legislature meant by the term "ordinarily resident in the State" is that persons who fall within the category of exempted persons set out in s. 2(1)(d)(ii) are in a different category to persons who are not ordinarily resident within the meaning of s. 2(1)(d)(i). That this is so is clearly evident from the fact that this exemption was not reconsidered and removed at the time of the amendment in 2008 when domicile was removed from the exemption. I note that a time limit is not referred to with respect to those persons covered by s. 2(1)(d)(ii), other than their presence within the State is for a "temporary purpose" and that a numerical limit is placed on the number of persons who can be included within such exemption by one employer. If the meaning contended for the Applicant in respect of "ordinarily resident" was correct, there would be no reason to have this separate exemption for employees here for a temporary purpose. The implication can only be that the exemption of not "ordinarily resident" within the meaning of s. 2(1)(d)(i) is more restrictive than the exemption provided by s. 2(1)(d)(ii). The difference between a person not ordinarily resident within the State and a person referred to at s. 2(1)(d)(ii), is the length of time that either such person spends in the State when both such persons are within the state for a settled purpose, namely study on the one hand and work on the other. 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 purpose of the Act of 1994, the period of time present in this jurisdiction for a settled purpose is short.

46. I turn next to consider the aim of the Act of 1994. That is set out at s. 1A of the Act of 1994 which is referred to at paragraph 1 of this judgment. In summary, the objective of the Act is that access to health insurance cover is available to consumers of health services with no differentiation made between them as regards the cost of health insurance cover based on health risk status, age, sex or frequency of provision of health services. It is thereby apparent that the intention of the legislature was that the net to be cast over consumers of health insurance cover is extremely wide.

47. Further, to be taken into particular account for this purpose, as per s.(1)(A)(d), is:-

> *"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."*

48. The number of non-EEA students re-registering for visas, as stated by the Minister for Justice in the Dáil, has already been referred to. This is a sizeable portion of individuals who are obtaining health insurance outside the regulated health insurance industry. There can be no dispute but 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. That is just

simply the effect of a policy of insurance of this nature. I note that the Applicant has sworn on affidavit that they have provided cover to older persons under the Policy, although I note that a term of the Policy is that cover is restricted to persons under the age of 60. However, the reality of the market is that the vast portion of the Applicant's customers simply must be younger, healthy individuals.

49. The Applicant argues that as a purpose of the Act of 1994 is to promote lifetime cover and community rating such that young persons support older less healthy individuals, this points against transient persons being required to be covered under the Act as they will never benefit for the payment of the higher premiums. While there is an attraction to that argument, it is not supported by the terms of the Act itself and the amendments which I have set out above.

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 for more than one academic year within this jurisdiction are ordinarily resident here.

Alleged deficiencies in the Enforcement Notice

51. The Applicant alleges that the Enforcement Notice served by the Respondent is not in accordance with s. 18B of the Act of 1994. The terms of s. 18B have already been set out at paragraph 7 of this judgment but for ease of reference s. 18B states that where the Respondent is of the opinion that a person is contravening a relevant provision of the Act, then the Respondent may serve on the person a notice in writing stating that it is of that opinion; specifying the relevant provision which it is of the opinion has been breached and stating the reasons why it is of that opinion; directing the person to take specified steps to remedy the contravention and specifying a period within which the steps are to be taken.

Identification of the Contravention

52. In the Enforcement Notice dated 20th March 2017, the Respondent sets out that it is of the opinion that the Applicant is contravening s. 16 of the Act of 1994, thereby complying with s. 18B(1)(ii). The Applicant complains that the contravention identified in the enforcement notice is not a contravention which has been proven as the Notice fails to establish that a contract of insurance has in fact been effected with a specified person who is attending a course of study in excess of an academic year.

53. 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.

54. The Applicant, further argues that it is illogical to determine that a person is "ordinarily resident in the State" by reference to the period of a course of study yet to be undertaken, because in doing so a person is determined to be ordinarily resident within the State at the time of the execution of the contract rather than such a status being acquired over time having regard to an individual's connection to the State. I do not find an attraction in that argument. 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 as claimed by the Applicant.

Adequacy of Reasons

55. The Applicant takes issue with the reasons which are set out in the enforcement notice and claims that there has not been compliance with s.18C(1)(ii). Having regard to the test regarding the adequacy of reasons as set out in *EMI Records (Ireland) Ltd. v. Data Protection Commission* [2013] IESC 34, one could not be left with any reasonable doubt as to the reasons for the Respondent's decision. I do not accept that the Respondent was required to explain why it was not accepting the Applicant's submissions regarding ordinarily resident having regard to the Taxes Consolidation Act, the Student Support Act and the Irish Nationality and Citizenship Act. In the Enforcement Notice, the Respondent refers to the objectives of the Act of 1994 as set out in s. 1A; the obligations placed on registered undertakings pursuant to the Act; the comprehensive health insurance system established by the Act of 1994 based on the principles of community rating, open enrolment and lifetime cover; the Respondent's opinion that it is required to adopt a reasonably strict or narrow interpretation to the exceptions to the definition of "health insurance contract"; and its determination regarding the term "ordinarily resident". In my opinion, the Respondent has not failed to adequately explain its reasons for its opinion that the Applicant is in breach of s. 16 of the Act of 1994.

Alleged deficiency in the Direction

56. I find no merit in the Applicant's argument that the direction issued was deficient in circumstances where the Applicant accepts that the Medicover Policy was a 12 month length contract. The direction clearly directs that the Policy should not be available for renewal to a non-EEA student, there is no deficiency or confusion in that regard.

Conclusion

57. I therefore find that the Respondent has not erred in its determination that a non-EEA student is ordinarily resident in this jurisdiction if attending a course of study in excess of one academic year and I find that the Respondent has complied with the terms of s. 18B of the Act of 1994 with respect to the Enforcement Notice issued.

58. I therefore refuse the relief sought by the Applicant.