

THE HIGH COURT

[2021] IEHC 748
[2020 No. 308 JR.]

BETWEEN

AMANDA MAGRET LANDSBERG AND EBEN ARNOLDIS BREETZKE

APPLICANTS

AND

ROAD SAFETY AUTHORITY,
THE MINISTER FOR TRANSPORT, TOURISM AND SPORT
THE ATTORNEY GENERAL
IRELAND

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Mr. Justice Mark Heslin delivered on the 5th day of November, 2021

Introduction

1. The present proceedings arise out of the refusal of the National Driving Licence Service (“NDLS”), which forms part of the Road Safety Authority (“the Authority”) to permit the applicants to exchange their South African driving licences for Irish driving licences, on the basis that the applicants, who are both South African nationals in the International Protection System, failed to provide valid evidence of residency entitlement in this State.

The 1961 Act and the 2006 Regulations

2. An application for an Irish driving licence is dealt with under s. 22 of the Road Traffic Act 1961 (“the 1961 Act”), as amended, which provides: -

“Application for Irish driving licence.

22.— (1) *Subject to this Part, a person may apply to a licensing authority for a licence (“Irish driving licence”) to drive a mechanically propelled vehicle of a specified category.*

2 *An application for an Irish driving licence—*

(a) *shall be made -*

(i) *to the licensing authority.*

(ii) *in accordance with the regulations made under s. 42 (2) (c) . . .”,*

3. Thus, an application for a driving licence must be made in accordance with regulations made pursuant to s. 42 (2) (c) of the 1961 Act. The Road Traffic (Licencing of Drivers) Regulations 2006 (S.I. no. 537 of 2006) (the “2006 Regulations”) constitute regulations made pursuant to s. 42 (2) (c) of the 1961 Act and recognise South African driving licences for the purposes of exchange, meaning that the holder of a South African driving licence can exchange that licence for an Irish one, without providing a certificate of competency (i.e. without having to pass a driving test).
4. Section 2 of the Road Traffic Act, 2006, provides that: - “[t]he power to make regulations under the Road Traffic Acts 1961 to 2006 includes the power to make provision in such

regulations to give effect to inter alia an Act adopted by an institution of the European Union”.

Directive 2006/126 EC

5. There is no requirement of normal residence or residency entitlement provided for in the Road Traffic Acts. However, Directive 2006/126 EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast) (the “Directive”) provides that driving licences shall only be issued to individuals who have their normal residence in the State. Article 7(1) (e) of the Directive states: -

“Driving licences shall be issued only to those applicants:

. . . .

- (e) *who have their normal residence in the territory of the Member State issuing the licence, or can produce evidence that they have been studying there for at least six months”.*

Regulation 12

6. Regulation 12 of the 2006 Regulations requires that an applicant for a driving licence have his or her normal residence in the State in that it provides as follows: -

“12 Application for driving licence.

- (1) *A person making an application for a driving licence shall -*

(a) have his or her normal residence in the State, or

(b) have been studying in the State for at least 6 months prior to the date of the application”.

Regulation 3

7. The term “normal residence” is defined in Regulation 3 (1) of the 2006 Regulations and reflects the definition contained in Article 12 of the Directive. Regulation 3 states: -

“ ‘normal residence’ means the place where a person usually lives, that is for at least 185 days in each year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he or she is living. However, the normal residence of a person whose occupational ties are in a different place from his or her personal ties and who consequently lives in turn in different places situated in 2 or more Member States shall be regarded as being the place of his or her personal ties where the person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school does not imply transfer of normal residence . . . ”.

Normal residence

8. Having regard to the foregoing, an application for a driving licence must be made in accordance with the 2006 Regulations which require an applicant for a driving licence to have their normal residence in the State. Of particular relevance to the present proceedings is whether the applicants have their normal residence in this State or, to put the question in different terms, whether the applicants are eligible to apply for a driving licence in the context of the basis upon which they have permission to be in the State.

Driving licence application form

9. Regulations 12 (2) and 20 (2) of the 2006 Regulations deal with the manner in which an application for a licence is to be made. An application shall be made on a designated form scheduled to the said Regulations. This form identifies the information required including the relevant declarations or medical reports if required. The scheduled form applicable at the time of the applications made by the applicants in these proceedings was that substituted by the Regulations made in 2016. In the driving licence regulations as originally adopted in 2006, the scheduled forms required applicants to provide their address and to make a declaration as to their normal place of residence. In the driving licence regulations as amended in 2016, the schedule forms continued to require applicants to provide their address and make a declaration as to their normal place of residence. However, immediately after the 3-page form (D401) which comprised a schedule to the 2016 Regulations was a 1-page document entitled "Application Checklist for Driving Licence".

Application Checklist

10. This "Checklist" (in relation to a learner permit or driving licence or the exchange a foreign licence) states that applicants must supply "*evidence of residency entitlement*" and reference is made to "*page 2 of the guidance notes*". The guidance notes do not form any part of the driving licence Regulations.

Guidance Notes

11. The guidance notes applicable as of November 2018 state the following with regard to "*Residency Entitlement*" (on p. 2 of the guidance notes): -

"Residency entitlement

To make an application for a driving licence or learning permit, you must be able to show that you are a national of the European Union, the European Economic Area or Switzerland or have leave to remain in Ireland. You may present your Irish driving licence or learner permit where your place of birth recorded on it is within the EU, EEA or Switzerland or a Public Services Card where your place or [sic] birth or nationality are recorded as within the EU, EEA or Switzerland.

Please see list 4 on page 4 of the application guidance notes for the full list of documents which can be accepted as evidence of residency entitlement". (emphasis added)

List 4

12. List 4 on page 4 of the guidance notes is entitled “*Evidence of residency entitlement*” and it sets out a list of documents which will be accepted by the NDLS. With regard to non – EU/EEA/Swiss nationals, it provides as follows: -

“Current certificate of registration (Garda National Immigration Bureau/GNIB card) or Irish residence permit (IRP) for non- EU/EEA/Swiss citizens (The GNIB and IRP cards must be presented with a current passport valid for international use or a Public Services Card).”

GNIB / IRP cards

13. The applicants do not have and, therefore, it was and remains impossible for them to provide, GNIB or IRP cards. Moreover, their passports have at all material times been in the possession of the International Protection Office. It is not in dispute that persons in the applicants’ position cannot receive either GNIB or IRP cards.

Section 16 of the International Protection Act 2015

14. Section. 16 of the International Protection Act, 2015 (“the 2015 Act”) is of relevance to persons in the applicants’ position and it begins as follows: -

“(1) An applicant shall be given, by or on behalf of the Minister, a permission that operates to allow the applicant to enter and remain or, as the case may be, to remain in the State for the sole purpose of the examination of his or her application, including any appeal to the Tribunal in relation to the application.

(2) A permission given under subsection (1) shall be valid until the person to whom it is given ceases under section 2 (2) to be an applicant.

(3) Subject to subsection (6), an applicant shall—

(a) not leave or attempt to leave the State without the consent of the Minister...”

15. In accordance with s. 16 of the 2015 Act, each of the applicants were issued with a Temporary Residence Certificate (“TRC”) as evidence that they are resident in the State pursuant to their application for international protection. Their TRC is renewed from time to time pending the determination of their application for international protection.

The relief sought by the applicants

16. On 02 June 2020, following an ex parte application made on behalf of the applicants, the Court (Meenan J.) granted the applicants leave to apply by way of an application for judicial review for the reliefs set out at para. (d) (i) – (ix) in the relevant Statement, on the grounds set out at para. (e) thereof. On 01 September 2020, the Court (Meenan J.) ordered that the Authority be substituted for the NDLS, without prejudice to any issue that the Authority may wish to raise concerning time or any other matter and the applicants were granted liberty to file an amended statement of grounds on or before 4 September 2020. The relief and the grounds upon which it is sought are as follows: -

“(d) Relief sought:

- (i) *An order of certiorari quashing the decision of the first named respondent of 13th November 2019 to refuse the first named applicant's application to exchange her South African driving licence for an Irish driving licence pursuant to Regulation 12 of S.I. no. 537/2006.*
- (ii) *An order of certiorari quashing the decision of the first named respondent of 13th November to refuse the second named applicant's application to exchange his South African driving licence for an Irish driving licence pursuant to Regulation 12 of S.I. no. 537/2006.*
- (iii) *A declaration that S.I. 537/2006, the Road Traffic (Licencing of Driver) Regulations 2006, contains no requirement that the applicant for an Irish driving licence must provide evidence of a residency entitlement that is materially different to that of a person who is resident in the State on the basis of his or her protection application pursuant to s. 16 of the International Protection Act 2015.*
- (iv) *In the event that S.I. no. 537/2006, the Road Traffic (Licencing of Driver) Regulations, 2006, excludes a protection applicant from obtaining an Irish driving licence on the basis of the nature of their residence, a declaration that the Regulations are unconstitutional, in breach of European Union law and/or incompatible with the European Convention on Human Rights (the latter, pursuant to s. 5 of the European Convention on Human Rights Act 2003).*
- (v) *A declaration that in requiring a Garda National Immigration Bureau (GNIB) card and/or an Irish Residence Permit (IRP) card as a prerequisite to processing an application for a driving licence and thereby excluding all asylum seekers the first named respondent is acting unlawfully.*
- (vi) *Such other declaration(s) of the legal rights and/or legal position of the applicant and/or persons similarly situated as the Court considers appropriate.*
- (vii) *In respect of (i) and (ii), an order extending the time for the bringing of the within application.*
- (viii) *Such further or other orders as to the Court shall deem meet.*
- (ix) *An order for the costs of and incidental to these proceedings.*

(e) Grounds on which such relief is sought: -

- (i) *Regulation 12 of the Road Traffic (Licencing of Drivers) Regulations 2006 S.I. 537/2006, as amended, requires an applicant for a driving licence to have their normal residence in Ireland in order to apply for a driving licence. "Normal residence" is defined in Regulation 3, and that definition contains no requirement of providing evidence of a type of lawful residence that excludes protection applicants who are resident in the State pursuant to s. 16 of the International Protection Act 2015. By reason of the foregoing, the first named respondent erred in law in*

refusing the applications of the first and second named applicants for the exchange of their South African driving licences for Irish driving licences.

- (ii) The applicants have resided in Ireland since September 2019 on a lawful basis, pursuant to s. 16 of the International Protection Act 2015, for the purposes of seeking international protection, and are therefore normally resident in Ireland, and have been unable to reside anywhere else since that time, such that they are entitled to avail of Regulation 12 of the Road Traffic (Licencing of Drivers) Regulations 2006 S.I. 537/2006.*
- (iii) In seeking a Garda National Immigration Bureau (GNIB) card and/or an Irish Residence Permit (IRP) card as a prerequisite to processing an application for a driving licence, the first named respondent has unlawfully excluded the herein applicants, and all applicants for international protection, from applying for an Irish driving licence, and has thereby acted unlawfully.*
- (iv) If (which is not accepted), the Road Traffic (Licencing of Drivers) Regulations 2006 S.I. 537/2006 does have the effect of excluding a person who is resident in the State pursuant to s. 16 of the International Protection Act 2015, from obtaining a driving licence, such exclusion is unreasonable and disproportionate, a significant interference with their fundamental and constitutional rights including their right to earn a livelihood and their right to respect for their private and family life, and/or constitutes unlawful discrimination. That part of the Regulations which imposes this exclusion is unlawful as:
 - a. contrary to Articles 40.1 and 40.3 of the Constitution;*
 - b. contrary to Article 15 of Directive 2013/33/EU, and Articles 7, 15, 20 and 21 of the Charter of Fundamental Rights of the European Union;*
 - c. incompatible with Articles 8 and 14 of the European Convention on Human Rights Act, pursuant to s. 5 of the European Convention on Human Rights Act 2003.**
- (v) Further to (iv), and if, (which is denied) the Road Traffic (Licencing of Drivers) Regulations 2006 S.I. 537/2006 exclude a person who is resident in the State pursuant to s. 16 of the International Protection Act 2015, from obtaining a driving licence, such exclusion is a form of discrimination which has no objective, reasonable or proportionate justification. An appropriate comparator to the applicants is another South African national who is resident in the State generally and/or as a student. No objective, reasonable or proportionate justification has been advanced by the respondents to prohibit the herein applicants from driving during their lawful residence in the State, whilst other South African nationals who are resident in the State are permitted to drive”.*

Statement of opposition

17. The pleas made in the respondent's statement of opposition dated 24 November 2020 can be summarised as follows: -

- The applicants failed to bring the application for leave to seek judicial review within the time allowed pursuant to O. 84, and have failed to put forward good and sufficient reason for extending time and no circumstances outside of their control or that could not reasonably have been anticipated, have been identified by the applicants as having caused the failure to bring the proceedings within time;
- All applications for an Irish driving licence must be made in accordance with the 2006 Regulations which require an applicant for a driving licence to have their normal residence in the State;
- The normal residence requirement is necessary to give effect to European Union Law, in particular Directive no. 91/439, Directive 96/47 EC, Directive 97/26/EC, and Directive 2000/56/EC as recast by the EU Driver Licencing Directive 2006/126/EC;
- It is denied that the applicants who are living in the State pursuant to s. 16 of the International Protection Act have their normal residence in the State for the purposes of the 2006 Regulations and the proper interpretation of the term "normal residence" in the 2006 Regulations does not include persons such as the applicants who have permission to be in the State for the sole purpose of the examination of their international protection application;
- It is denied that the first named respondent erred in law as alleged or at all;
- It is denied that the definition provided by Regulation 3 of the 2006 Regulations expands the meaning of normal residence to include the applicants and Regulation 3 merely defines where a person's normal residence will be when he lives in more than one place;
- In the exercise of the power under s. 42 (2) (c) of the 1961 Act, the Minister has prescribed the forms that must be completed and supporting documents that must be provided with an application for a driving licence and the relevant form, Form D401, provides a "checklist" of documents to be given with an application for a driving licence and requires an applicant include "evidence of residency entitlement" with their application, a GNIB or IRP card is acceptable evidence of residency entitlement;
- Residency entitlement is not a separate or an additional requirement to that of normal residence. The term residency entitlement is used as a descriptive term to convey that an applicant must have a regular immigration status in the State to satisfy the normal residence requirement. The purpose of requiring an applicant to provide evidence of residency entitlement is to verify that they are normally resident in the State within the meaning of the 2006 Regulations;

- The grant of a driving licence is a privilege and it is denied that the interpretation of normal residence contended for by the respondent's amounts to interference with the applicant's fundamental and/or constitutional rights;
- Insofar as the interpretation of normal residence contended for by the respondents does interfere with the applicants' rights (which is denied) such interference is not unreasonable and/or disproportionate. The normal residence requirement, which cannot be fulfilled by the applicants, is a legitimate and lawful exercise of the second respondent's legislative functions.
- The applicants do not disclose any basis on which they can lawfully enter employment in the State. The applicants' claim that their right to earn a livelihood has been breached is not sustainable on the facts;
- The applicants' pleadings and affidavits do not disclose with adequate specificity any impact on their private or family lives of sufficient severity to amount to an interference with the asserted constitutional rights;
- It is denied that the applicants have a personal right under the Constitution to an Irish driving licence;
- It is permissible under Article 40.1 of the Constitution for the purposes of personal rights under Article 40.3, to treat the applicants differently in respect of applying for a driving licence on the basis of their immigration status in the State distinguishing the position of persons whose only connection to the State is that they have made an application for international protection which has not yet been determined is a justified and legitimate distinction;
- It is denied that Article 15 Directive 2013/33/EU or the Charter of Fundamental Rights are breached by the interpretation of normal residence contended for by the respondents;
- It is denied that by the interpretation of normal residence contended for by the respondents is incompatible with Articles 8 or 15 of the European Convention on Human Rights;
- It is denied a South African national who is resident in the State generally and/or as a student is the appropriate comparator. The appropriate comparator is an individual who is living in the State without lawful permission or whose permission to be in the State is on the limited basis of permitting the determination of their status. The applicants are in a different category from persons who have been granted permission to enter and reside in the State and it is not incumbent on the respondent as a matter of law to advance an objective, reasonable or proportionate justification for treating the applicants differently from such persons;

- It is denied that the respondent has discriminated against the applicants and it is denied that the 2006 Regulations are unreasonable or disproportionate or without objective justification.

The evidence in this case

18. I have carefully considered the evidence in this case which comprises the affidavits and exhibits thereto. In support of the application, affidavits were sworn by the first and second named applicants as well as by Mr. Stephen Kirwan, a solicitor in the firm KOD Lyons & Co., retained to act on behalf of the applicants. Ms. Michelle Doyle, a partner in McCann Fitzgerald Solicitors, swore an affidavit on behalf of the Authority which, it is fair to say, focused largely on the question of delay and the contention made on behalf of the respondent that the present proceedings were brought out of time and that the court should refuse to extend time under O. 84, r. 21(3). Ms. Miriam Scott, assistant principal of the Authority, swore an affidavit in opposition to the reliefs sought in the statement of grounds. On 23 February 2021 this Court (Meenan J.) made an order pursuant to s. 10 (2) (e) of the Irish Human Rights and Equality Commission Act 2014 granting liberty to the Irish Human Rights and Equality Commission to appear as *amicus curiae* in the present proceedings. Ms. Sinead Gibney, chief commissioner of the Irish Human Rights and Equality Commission, swore an affidavit grounding the motion for liberty to appear as *amicus curiae* as did Mr. Stephen Collins, solicitor. For the sake of clarity, I have carefully considered all the following affidavits and the exhibits thereto: -

- Affidavit of Amanda Margaret Landsberg sworn 30 April 2020;
- Affidavit of Eben Arnoldis Breetzke sworn 30 April 2020;
- Affidavit of Stephen Kirwan sworn 14 July 2020;
- Affidavit of Michelle Doyle sworn 19 August 2020;
- Affidavit of Miriam Scott sworn 28 November 2020;
- Affidavit of Sinead Gibney sworn 21 January 2021;
- Affidavit of Stephen Collins sworn 21 January 2021;
- Affidavit of Amanda Margaret Landsberg sworn 25 January 2021.

The facts in chronological order

19. Arising out of a careful consideration of the aforesaid affidavits and the exhibits thereto, I am satisfied that the following are the relevant facts which emerge and, for the sake of clarity, I propose to set them out in chronological order with appropriate headings.

10/12 September 2019

20. Both of the applicants were born in South Africa. On 10 September 2019, both of the applicants, together with their son, Emilio, left South Africa. Both have made uncontested averments that they did so to seek international protection in Ireland. It is not in dispute that they arrived in Ireland on 12 September 2019 and claimed asylum. The applicants

have exhibited their respective asylum applications. Their passports are in the possession of the International Protection Office. The first named applicant had a full driving licence in South Africa which was issued to her on 11 April 2016 and was valid until 10 April 2020. The second named applicant had a full driving licence in South Africa which was issued to him on 08 December 2017 and is valid until 07 December 2022. The first named applicant has made an uncontested averment that she worked for over 20 years in South Africa, mainly in retail and sales, and would wish to work in Ireland also. She also avers that she would require a driving licence in order to be able to properly access the labour market in Ireland. In addition, she avers that her son is in primary school and she requires a driving licence in order to drive him to school as well as to access other essential services. The second named applicant has made an uncontested averment that he worked for over 20 years in South Africa in basic hydraulics, as a crane driver and as a delivery driver, and that he wishes to work in Ireland also. He avers that he requires a driving licence in order to be able to effectively access the labour market in Ireland and also refers to the applicant's son being in primary school, averring that both applicants require a driving licence in order to drive him to school.

13 November 2019

21. On 13 November 2019, the applicants attended at the National Driving Licence Service centre in Santry, North Dublin, in order to apply to exchange their South African driving licences for Irish driving licences. Their applications were refused on the basis that they did not have all the required documentation, in particular, valid evidence of residency entitlement. The applicants have exhibited the relevant "*NDLS Application Rejection*" which is dated 13 November 2019. It states inter alia: -

"We regret to inform you that your application has been refused due to Missing Document(s)

Driving Licence

Eyesight Report

Medical Report

Valid Evidence of Residency Entitlement

Valid Photographic ID

Valid Proof of Address

Valid Proof of PPSN". (emphasis added)

22. On the document exhibited, a manuscript note "GP" appears opposite the words "Medical Report" and a manuscript note "GNIB/IRP" appears opposite the words "Valid Evidence of Residency Entitlement". At this juncture it is appropriate to note that the sole issue in dispute in the present proceedings concerns whether the applicants have their normal

residence in this State for the purposes of an application to exchange their South African driving licences for Irish ones.

29 January 2020

23. On 29 January 2020 Messrs. KOD Solicitors wrote to the NDLS, to the Authority and to the second named respondent. That letter referred to the rejection by the NDLS of the applications on 13 November 2019. It referred to the expiry dates of the applicants' South African driving licences. It indicated that the applicants had normal residence in Ireland and went on to state *inter alia* as follows: -

"Mr. Breetzke and Ms. Landsberg are in the International Protection process and are intending to apply for a right to work pursuant to the government scheme. Mr. Breetzke worked as a truck driver in South Africa and intends to seek work as same in Ireland.

Mr. Breetzke and Ms. Landsberg require their car and their driving licences for dropping and collecting their child from school and running various everyday errands.

Mr. Breetzke and Ms. Landsberg recent application to exchange their driving licences was rejected on the grounds that they did not have a GNIB or IRP card. As you know, persons in the international Process such as Mr. Breetzke and Ms. Landsberg do not have GBIB or IRP cards. Instead, they are provided with Temporary Residence Certificates (TRC's) which is evidence that they are resident in the State pursuant to their application for International Protection.

Regulation 20 (1) of the Road Traffic (Licencing of Drivers) Regulations 2006 requires an applicant to have his or her normal residence in the State but it does not stipulate the particular forms of proof or documentation which must be furnished by an applicant for this purpose. In requiring our client to produce a particular document which is impossible for them to attend and refusing to accept other proofs of residence, your client is acting in a discriminatory, unfair and irrational manner.

Mr. Breetzke and Ms. Landsberg are also able to provide evidence confirming their place of residence, namely, a letter from the Manager of the Direct Provision Centre they are currently residing in.

The refusal to allow applicants for International Protection such as Mr. Breetzke and Ms. Landsberg apply for a driving licence or for the renewal of a licence is discriminatory and is a breach of fundamental and constitutional rights.

We call on you to confirm that you will process their applications on the basis that they can confirm their identity by way of their public services cards, their residency permission on the basis of their International Protection Cards and their PPSN and address in the usual manner, all of which you may find enclosed with this letter.

If you do not confirm that you will process Mr. Breetzke and Ms. Landsberg's applications on the basis outlined above within a period of 21 days from today's date, we will have no option but to initiate High Court proceedings and will rely on this letter in order to fix you with the costs thereof.

We look forward to hearing from you . . ."

24. There were a number of enclosures with the foregoing letter, including the applicants' South African driving licences. These contain, *inter alia*, a date of birth in respect of each of the applicants as well as their photograph and thumbprint. The letter also enclosed a copy of the Public Services Card in respect of each applicant. The first applicant's Public Services Card identifies her by name and contains her photograph. The expiry date in relation to the Public Services Card is stated to be 31 October 2029. The reverse of the public services card contains the logo "MyGovID" and states that the card remains the property of the Minister of Employment Affairs and Social Protection. In addition to a specific card number, the first named applicant's PPS number is specified on the Public Services Card. Similar comments apply in respect of the copy of the second named applicant's Public Services Card which comprised an enclosure with the 29 January 2020 letter. The next enclosure comprised a completed "Driving Licence Medical Report Form" in respect of each of the applicants. Both forms were dated 27 January 2020. In each form the relevant applicant provided their name, PPS number and date of birth. It was indicated on each form that the relevant applicant did not need to wear corrective lenses while driving; did not have a physical disability requiring adaptations on a vehicle; did not have a limb prosthesis/orthesis; did not suffer from epilepsy and did not require restrictions to be applied to their driving licence. Both forms were signed by a medical practitioner, namely a Dr. Noel Howard of the Claddagh Medical Centre, Galway, with the medical practitioner's stamp applied to each of the forms. The next enclosure with the 29 January 2020 letter comprised a copy of the Temporary Residence Certificate ("TRC") issued to each of the applicants pursuant to s. 16 of the 2015 Act. The final enclosure comprised a letter signed by a Ms. Trisha Turke of the Eglinton Hotel, Salthill, Galway, dated 05 December 2019, which stated: -

"To Whom it May Concern.

This letter is to confirm that Eben Arnoldis Breetzke and Amanda Magret Landsberg are currently residing in the Eglinton Hotel with their son Emilio Desmond Breetzke. They arrived on the 5th December 2019. If you require any further information, please do not hesitate to contact me . . ."

A telephone and fax number were provided on that letter.

31 January 2020

25. On 31 January 2020, the NDLS wrote to Messrs. KOD Lyons and the material part of that letter stated as follows: -

"Thank you for your letter.

The procedure to allow us to answer solicitor queries requires a valid Letter of Authorisation from each of your clients.

Please have your client forward in writing a signed letter of authorisation granting us permission to correspond with you.

The Letter of Authorisation needs to contain the below: -

- *PPSN*
- *Driver's name as it appeared on application form*
- *Date of birth*
- *Signature of client*

Once this is received, we can answer any questions you may have.

Alternatively, your client can contact the NDLS directly on the number below and we will answer any questions they may have"

26. Before examining the next item of correspondence in the sequence, it is appropriate to note that the applicants plainly contacted a firm of solicitors and sought advice in relation to their situation within a period of three months from the date of the initial rejection by the NDLS of the application on 13 November 2019. Even if it took no time whatsoever to give instructions to their solicitors and for the letter of 29 January 2020 to be drafted and for the documents which comprised enclosures to that letter to be obtained – and it must have taken some time – the letter dated 29 January 2020 was sent less than three months from the 13 November 2019 rejection. It also seems appropriate to observe that the response dated 31 January 2020 was sent within the same three – month period. That response was not a refusal to reconsider matters. It could not have been interpreted by KOD Lyons or by the applicants as an unwillingness or inability on the part of the NDLS to engage with the issues raised on 29 January 2020. In my view, it would not have been a reasonable response to the 31 January 2020 letter for the applicant's solicitors to say that they were refusing to provide any letter of authorisation and instead to state that they would be issuing legal proceedings immediately. I make these comments in circumstance where delay is pleaded by the Respondents. It is appropriate to note that this issue was not pressed at the hearing. I now turn to the next item of correspondence in the sequence.

12 February 2020

27. On 12 February 2020 the applicants' solicitors wrote to the first and second named respondents and to the NDLS enclosing signed authorities to act on behalf of the applicants and inviting a response to their previous correspondence. The authority signed by the first named applicant and dated 3 February 2020 was in the following terms:

"AUTHORITY TO ACT and CONSENT TO RELEASE PERSONAL DATA

I, Amanda Magret Landsburg, DOB 10/01/1981 Eglinton Hotel Galway say that I have instructed KOD Lyons Solicitors of Ushers Court, 31-33 Ushers Quay, Dublin 8, to represent me in relation to my application to international protection, transfer of driver's licence. I hereby consent release of the following personal data held by Minister for Justice & Equality, IPO, NDLS, RSA, Minister for Transport"

A box on the authority form was "ticked" opposite the words "All personal data". A similar authority was signed by the second named applicant, also dated 03 February 2020, and confirmed that KOD Lyons Solicitors had been instructed by the second named applicant and that he consented to the release of all personal data held by the NDLS/RSA. The said letter dated 12 February was sent immediately prior to the expiry of three months from the 13 November 2019 refusal. There was no response to that letter in the days or weeks that followed and this prompted the applicants' solicitors to write again to the NDLS.

06 March 2020

28. On 06 March 2020, the applicants' solicitors wrote to the NDLS referring to their letters of 29 January and 12 February 2020 and stating inter alia:

"We note that you are yet to respond to our previous correspondence. We can confirm that all required documentation has been forwarded to your office on behalf of our client. We are seeking confirmation that you will process our client's application for a transfer of their licence. Failing to do so, we will initiate court action within 7 days..."

This prompted a response from the NDLS five days later.

11 March 2020

29. By letter dated 11 March 2020 the NDLS wrote to the applicants' solicitors as follows:

"Thank you for your letter of authorisation on behalf of your clients. Unfortunately, the details are insufficient. Please have your clients forward in writing a signed letter for authorisation granting us permission to deal with you quoting the following:

The Letter of Authorisation needs to contain the below:

- *PPSN*
- *Driver's name as it appeared on application form*
- *Date of Birth*
- *Signature of Client*

Once this is received, we can answer any questions you may have. Alternatively your clients can ring the number below and we will answer any questions over the phone ..."

30. Although nothing turns on it as regards the central issue which is for determination in the present proceedings, it can fairly be said that, between their correspondence of 29 January and 12 February, the applicants' solicitors had already provided all the foregoing. This letter from the NDLS was sent over three months following the initial rejection of 13 November 2019 but it is plain that it was in response to efforts by the applicants' solicitors to have matters addressed to their clients' satisfaction which went back to 27 January. The 11 March 2020 letter does not indicate that there is no possibility of matters being revisited. It merely focuses on the question of authorisation to engage with the applicants' solicitors, notwithstanding the information and letters of authority which had, in fact, already been furnished. The copy letter exhibited bears a date stamp of 12 March 2020 and this clearly appears to note when the applicants' solicitors received the 11 March 2020 letter.

12 March 2020

31. On 13 March 2020 the first named respondent wrote to the applicant's solicitors in the following terms:

"I refer to your correspondence regarding your above-named clients.

I would advise that a person wishing to apply for a driving licence or exchange in Ireland, who are not nationals of the European Union, European Economic Area or Switzerland must submit their certificate of registration from the Garda National Immigration Bureau (GNIB card) or Irish residence permit (IRP) with their application.

Please see below extract from NDLS website,

Who needs to provide evidence of residency entitlement?

Residency entitlement is required for all NDLS applications. Evidence of residency entitlement must be provided at your first application to the NDLS and may be required to be provided with subsequent applications such as renewals, ad category, replacements and change of personal details.

The following documents will satisfy for the purpose of residency:

- *Public Services Card – where place of birth or nationality is within EU/EEA/Switzerland.*
- *Irish/UK (long-form) birth certificate or adoption certificate.*
- *EU/EEA/Switzerland driving licence or Irish Learner Permit which shows place of birth as within EU/EEA/Switzerland.*
- *Certificate of entry in the Irish Foreign Births Register.*
- *Irish passport/passport card (current or expired by no more than 12 months).*

- *Current passport for all EU/EEA/Swiss citizens (valid for international use).*
- *Current national identity card for EU/EEA/Swiss citizens.*
- *Irish certificate of naturalisation.*
- *Current certificate of registration (Garda National Immigration Bureau/GNIB card) or Irish residents permit (IRP) for non-EU/EEA/Swiss citizens (the GNIB and IRP cards must be presented with a current passport valid for international use or a Public Services Card)*

If your clients are not nationals of the EU, EEA or Switzerland, the NDLS will not be able to accept their applications unless accompanied by a GNIB card or an IRP.

By way of general information, I can confirm that the issue of residency and the entitlement to a driving licence is the subject of a Judicial Review in the High Court and has also been referred to the Workplace Relations Commission (WRC).

I trust this clarifies the matter. Please contact me if you require any further information.” (emphasis added)

32. It is clear from the foregoing letter that the Authority was not merely indicating that a GNIB or IRP card is acceptable evidence of residency entitlement. The Authority was going further and making clear that if the applicants are not nationals of the EU, EEA or Switzerland (which they are not) “... *the NDLS will not be able to accept their applications unless accompanied by a GNIB card or an IRP*” (which are impossible for them to provide, notwithstanding the fact that they reside in this State and do so lawfully in that their entitlement to reside arises from a permission given by the relevant Minister pursuant to s. 16 of the International Protection Act, 2015, as evidenced by the TRC issued to each applicant).

18 March 2020

33. On 18 March 2020 the applicants’ solicitor responded to the letter from the NDLS of 12 March 2020 in the following terms:

“You note in your previous correspondence that a GNIB card or an IRP is required to have any non-EEA driver’s licence transferred to an Irish Drivers Licence. Our client is an asylum seeker and as you may know, persons in the international protection process such as Ms. Landsburg do not have GNIB or IRP cards. Instead they are provided with Temporary Residence Certificates (TRC’s) which is evidence that they are resident in the State pursuant to their application for International Protection.

Regulation 20(1) of the Road Traffic (Licensing of Drivers) Regulations, 2006 requires an Applicant to have his or her normal residence in the State but it does not stipulate the particular forms of proof or documentation which must be furnished by and (sic) applicant for this purpose. In requiring our client to produce

a particular document which is impossible for them to attend and refusing to accept other proofs of residence you are acting in a discriminatory, unfair and irrational manner.

We call on you to confirm or deny that Ms. Landsburg's TRC suffices as proof of residency within 7 days from the date of this letter. Should you fail to do so, proceedings will issue without further notice to you. This letter will be used to fix your office with the costs of any such application..."

34. On any analysis, this letter represented an ongoing and reasonable effort on behalf of the applicant's solicitors to have issues resolved to the satisfaction of their clients without the need to resort to legal proceedings. The response from the NDLS was as follows.

20 March 2020

35. On 20 March 2020 the NDLS wrote to the applicants' solicitors. The exhibited copy of that letter bears a date stamp of 26 March 2020 and I am entitled to take it that this is when it was received by the applicants' solicitors. This letter was in very similar terms to the letter sent by the NDLS on 11 March 2020. It indicated that the NDLS was unable to go into detail regarding any driver's application with regard to enquiries by a third party for GDPR reasons. The letter referred to the requirement of what it described as a "*valid Letter of Authorisation*" and it repeated a request for the items listed in the 11 March 2020 letter (which was a repeat of the list of items detailed in the letter from the NDLS dated 21 January 2020). I am satisfied that as a matter of fact the applicants' solicitors had already provided those items and I fail to see how the letters of authorisation which had in fact been furnished could reasonably be considered as invalid. The applicants' solicitors responded to the NDLS on 27 March 2020.

27 March 2020

36. By letter dated 27 March 2020, the applicants' solicitors replied to the NDLS in respect of the first named applicant and that letter stated *inter alia* as follows:

"We note that your most recent correspondence dated 20th March 2020 is identical to correspondence we received from your office dated 31st January. We are, as I am sure you will appreciate, rather surprised that you are requesting this documentation again. Our initial letter dated 29th January 2020 included all of the required documentation you are now seeking once more, bar an authority including our client's date of birth, of which we forwarded by letter dated 12th February 2020. We ask you to note that Ms. Landsburg has already submitted the appropriate form for this application.

Our letter dated 29th January 2020 included the following documentation, which we have enclosed for your benefit once again:

- *Driving licence, medical report of Amanda Landsburg.*
- *Public Services Card (including PPSN on rear of card) of Amanda Landsburg.*

- Copy of South African driving licence of AM Landsburg.
- Copy of International Protection Temporary Residence Card.
- Authority to act (including signature and date of birth) of Amanda Landsburg.
- Proof of residence of Amanda Magret Landsburg from Trisha Turke of the Eglinton Hotel.

We trust that by forwarding these documents to your office again, we are providing clarity for you in relation to whatever unspecified issues may have arisen in our previous enclosures of the aforementioned documentation. We expect that you will not require this documentation to be forwarded again.

Further to this, as per our previous letter dated 18th March 2020, we would like to reiterate that Regulation 20(1) of the Road Traffic (Licensing of Drivers) Regulations, 2006 requires an Applicant to have his or her normal residence in the State but it does not stipulate that particular forms of proof of documentation which must be furnished by an applicant for this purpose. Our client is an asylum seeker and as you may know, persons in the international protection process such as Ms. Landsburg do not have GNIB or IRP cards. Instead they are provided Temporary Residence Certificates (TRC's, which come in the form of IPO cards) which is evidence that they are resident in the State pursuant to their application for International Protection.

We ask you to note that Ms. Landsburg's licence is due to expire on 10th April, 2020 and we wish you to confirm as a matter of urgency that you will process her application for an exchange of her driving licence in light of the fact that Ms. Landsburg currently holds a South African license, which is a recognised State for the purpose of driving licence exchange.

Should you fail to confirm that Ms. Landsburg's application will be processed within 7 days from the date of this letter, we will proceed to institute High Court proceedings seeking the appropriate reliefs without further notice to you. This letter will be used to fix your office with the cost of such an application ..."

37. This 27 March 2020 letter enclosed, once more, the first named applicant's signed authority dated 03 February 2020; Ms. Turke's letter dated 05 December 2019 on behalf of the Eglinton Hotel, Galway; copies of the applicants' TRC's in the form of copy IPO cards; a copy of the first named applicant's driving licence medical report form; a copy of her South African driving licence and a copy of her Public Services Card. Even though alleged delay on the part of the applicants is no longer an issue in the present proceedings, it is appropriate to say that it seems to me that the 27 March 2020 letter represented a *bona fide* attempt by the applicants, through their solicitor, to have the question of the latter's authority to represent them in the relevant matter dealt with fully

and finally in the context of an ongoing and *bona fide* attempt to try and resolve matters to the satisfaction of the applicants without having to resort to legal proceedings.

Events after 27 March 2020

38. Few of us will be unaware of the fact that the Covid-19 crisis arose in March 2020 and it is a matter of public knowledge, and not in dispute in the present proceedings, that the then Taoiseach announced a “lockdown” on 27 March 2020. The applicants’ solicitor did not receive a further response to the 27 March 2020 letter. The first named applicant has made an uncontested averment that her solicitor sought the advices of counsel, that the Covid-19 crisis intervened, as did the Easter vacation. She also avers that counsel reverted and, in the circumstances that then pertained, the proceedings were filed electronically amidst the Covid-19 restrictions in what she avers to be a very timely and expeditious manner. The first named applicant also avers that, by reason of what she describes as her “... *solicitor’s efforts to resolve this case by correspondence, and the highly unusual public health crisis we are in, I say respectfully and am advised that there is good reason to extend the time for the filing and issuing of the herein proceedings, and pray for an order to that effect.*” (see para. 20 of the first named applicant’s affidavit sworn 30 April 2020). It is clear from the averments made by the first named applicant in her 30 April 2020 affidavit that it was not until after her solicitor received the 12 March 2020 letter from the Authority that the advice of counsel was first sought. To my mind, that could hardly be characterised as an unreasonable approach to take, given the contents of correspondence exchanged between the relevant parties to which I have referred. Nor was it unreasonable, in my view, for the applicants’ solicitors to see if a positive or any response would be received to their 27 March 2020 letter prior to commencing legal proceedings. It is equally clear from the uncontested averments that difficulties were encountered both as a result of the Covid-19 crisis and the Easter vacation. Carefully considering the evidence I am entitled to conclude that the Covid-19 crisis resulted in some delay with regard to the issuing of proceedings. In my view it would not be fair to criticise the applicants for not issuing proceedings until it was clear whether there would be a positive, or any response to the 27 March 2020 letter, which letter referred to a 7- day deadline (being Friday 03 April 2020). The following Friday 10 April was Good Friday and Monday 13 April was Easter Monday Bank Holiday. Even more significantly, an unprecedented health crisis had arisen. I am entitled to hold that this crisis and the delays and difficulties it inevitably caused were entirely outside of the control of and could not reasonably have been anticipated by the applicants who, through their solicitor, had made ongoing, reasonable and *bona fide* efforts by means of correspondence between 27 January and 27 March 2020 to try and resolve matters without the need for legal proceedings. At this juncture, it is also appropriate to note that there is no evidence whatsoever of any prejudice to the respondents or any of them arising from the fact that leave to seek judicial review was not applied for at an earlier stage. Grounded on the applicant’s affidavits sworn on 30 April, the relevant *ex parte* docket, dated 05 May 2020, was prepared and it is not in dispute that the proceedings were filed in the Central Office of the High Court on 05 May 2020. It was not until 02 June 2020 before the matter came before the court and Mr. Justice Meenan made the order granting leave. The passage of time after the proceedings were filed in the Central

Office on 05 May 2020 is not something for which the applicants have control or responsibility. Given the evidence before the Court, it seems appropriate for me to make the foregoing comments, even though the delay issue, as pleaded, is no longer one with which the Respondent pursues.

Access to the labour market

39. By letter dated 05 June 2020, the Department of Justice and Equality wrote to the first named applicant granting her permission to access the labour market in accordance with the European Communities (Reception Conditions) Regulations, 2018. That permission was valid from 12 June 2020 to 12 December 2020. It was renewed for a further six months on 11 December 2020. Similar permissions have been granted to the second named applicant as is clear from the uncontested averments made at para. 4 of the first named applicant's 25 January 2021 affidavit. It is also appropriate to quote the following uncontested averments comprising paras. 5 – 7 of that affidavit:

- "5. *The refusal to process the application of my husband, the second named applicant herein, for an exchange of his driving licence has a particular impact on his right to earn a livelihood given that he worked as crane driver and a delivery driver in South Africa. However, in order to drive heavy vehicles in this State a person is required to hold an additional professional certificate called a CPC. My husband was offered a job doing deliveries some months ago but the potential employer withdrew the offer when he realised that Mr. Breetzke did not have a CPC. I emailed the first named respondent on the 10th July 2020 to enquire whether the holder of a non-EU licence could complete the course for a CPC. By response dated 22nd July 2020 I was told: 'to drive a truck professionally in Ireland you must hold a valid CPC card. To complete CPC training you must hold a European licence, so in this case you would need to exchange your South African license to Irish'...*"
6. *I was able to attain work as a cleaner in Caesar's Palace Casino in Salthill up until September 2020. However, our family were then moved from direct provision accommodation in Salthill to accommodation in Galway City Centre and the distance was too far for me to be able to bring our child to school every day and make it into work on time so I was unable to keep up that job.*
7. *It is stated in the respondents' Statement of Opposition that we have not provided with adequate specificity any impact on our private and family lives of sufficient severity. At the risk of repeating myself, the fact that we cannot change our driving licences to Irish licences restricts our ability to take up employment. Given that we have permission to work in the State, as international protection applicants who have resided here for a significant period of time, that is a major interference with our fundamental rights, as an aspect of both our private and family lives. The restriction on our ability to transport our child, and to travel ourselves, also impacts on our private and family lives."*

Certain comments in light of the evidence

40. It is clear from the evidence before the court that both of the applicants, in fact, reside in this State and that has been the position since they arrived in Ireland on 12 September 2019, having made the deliberate decision to travel to Ireland for the purposes of seeking international protection here. Not only is it an incontrovertible fact that they reside here and nowhere else, in the literal sense of that term, it is also a fact that they cannot leave this State without the consent of the Minister and there is no evidence whatsoever that they have left, or attempted to leave, this State with or without such consent at any time since they arrived. It is also a fact that they reside in this State lawfully. They have permission, for the time being, to remain in this State in accordance with the provisions of s. 16 of the International Protection Act, 2015. It is also a fact that they have been granted permission to work here. The first named applicant has, in fact, worked in this State. I am entitled to take from the evidence that the only reason the first named applicant ceased carrying out that work is because (as she avers at para. 6 of her 25 January 2021 affidavit) her family was moved from direct provision accommodation in Salthill to accommodation in Galway City centre and the distance was too far for her to be able to bring the applicants' child to school every day and to make it to work in Salthill on time. Thus, the evidence entitles me to hold that the first named applicant was forced to give up her job as a direct consequence of not being able to get an Irish Driving Licence (i.e. had she had an Irish Licence, she would have been able to get the applicants' son to school and also get to her job on time but, without it, this was impossible). Having received an offer of a job doing deliveries, the second named defendant's intention to work here as a driver has been frustrated by the impossibility of exchanging his South African licence for an Irish one to enable him to undergo the necessary CPC training for which an Irish licence is required. As well as it being entirely clear that both of the applicants wish to work in this State, I am entitled to take it from the evidence that the applicants' desire is for their application for international protection to be successful. I am also entitled to take from the evidence that, having chosen to come here, and being desirous of a positive outcome to their application for international protection, the applicants wish to remain in this State with their young son. There is certainly no evidence to the contrary. There is no evidence of any desire or intention on the part of the applicants to leave this State at any future point or of the applicants indicating any such intention. I am also entitled to take from the evidence that the applicants wish to care for their son and to educate him in this State for the foreseeable future, with no evidence to the contrary.

Legal Submissions

41. The Court had the benefit of detailed written submission which were provided by all three parties. These were supplemented by oral submissions made with clarity and skill by Mr. Lynn S.C, Mr. Callanan S.C and Mr. Power S.C, counsel for the applicants, respondents and *amicus curiae*, respectively. I am extremely grateful to them, and to the junior counsel and instructing solicitors for the assistance provided. Given the comprehensiveness and sophistication of the submissions, it is appropriate to set out in some detail the case made by the Applicants and Respondents as well as the views expressed by the amicus and I propose to do so now.

The Applicants' case

42. The primary argument made on behalf of the applicants is that, on a proper interpretation of the 2006 Regulations, the applicants have their normal residence in this State and, properly construed, the 2006 Regulations do not require the applicants to provide evidence of a residency entitlement which is materially different to that of a person in their situation who has received permission pursuant to s.16 of the 2015 Act. It was made clear that the foregoing was the primary issue and that it was only if the court took the view that the 2006 Regulations excluded an international protection applicant from obtaining an Irish driving licence that the question of unlawful discrimination with regard to such an exclusion would arise. With that proviso, the applicants submitted that the issuing of driving licences falls within the scope of EU law. It was further submitted that the applicants' application for international protection and the conditions upon which they reside in this State, including their acquired entitlement to work, is governed by EU law, with reference to Ireland having opted into Directive 2013/33/EU and having transposed it into domestic law by virtue of the European Communities (Reception Conditions) Regulations, 2018 (S.I. 230 of 2018). The applicants submit that the Charter of Fundamental Rights ("the Charter") is applicable to Member States when they are implementing European Union law (Article 51.1 of the Charter). Reference is also made by the applicants to the statement by the CJEU that "*...the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European law*" (*Akerberg Fransson, C-617/10, 26th February, 2013, para. 21*). The applicants refer to Article 21 of the Charter in respect of "non-discrimination" and to the The Explanations to the Charter (14th December, 2007) with regard to Article 21. The applicants submit that guidance can be obtained from Article 14 of the European Convention on Human Rights ("ECHR"). The applicants submit that, like Article 14 ECHR, Article 21 of the Charter is not broad and not closed and refers to any discrimination based "*on any ground such as ...*". The applicants submit that the European Court of Human Rights ("the ECtHR") has held that "immigration status" can be a ground for the purpose of Article 14 of the ECHR, with reliance placed *inter alia* on *Bah v. United Kingdom* (App. No. 56328/07, 27th September, 2011, paras. 45/47).
43. Relying on Article 14 of the ECHR, the applicants submit that they are clearly in an analogous situation with other non-EU citizens who wish to exchange their domestic driving licences for Irish driving licences and who, like the applicants, are lawfully resident in Ireland pursuant to statute. The applicants submit that the respondents have made a fundamental error in pleading, at para. 21 of their statement of opposition, that "*the appropriate comparator is an individual who is living in the State without lawful permission or whose permission to be in the State is on the limited basis of permitting the determination of their status*". The applicants submit that to compare them to persons who are unlawfully in the State is not an appropriate, accurate, or fair comparator. The applicants emphasise that they are in this State lawfully. The applicants go on to submit that it is equally inappropriate and unfair to use, as a comparator, others who are in this State in the context of seeking international protection. The applicants submit that everyone in international protection is in this "bracket" and those in identical situations are bound to be treated alike. The applicants submit that the effect of such a comparator

would be to negate any proper comparison with others. By analogy the applicants submit that the approach argued for by the respondents would permit women to be paid less than men, provided all women were subject to the discriminatory pay rate, because it would focus only on whether women themselves are treated the same way. This, submits the applicants, is the consequence of the inappropriate and unfair comparator identified by the respondents. The applicants submit that this error approach on behalf of the respondents is that same as that critiqued by Ms. Aileen McColgan in "*Cracking The Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparisons*" (European Human Rights Law Review (2006), 6, pp. 650 – 677) from which the applicants quote.

44. The applicants make submissions in respect of Article 14 of the ECHR as guidance in respect of Article 12 of the Charter and submit that the fundamental rights protected by the ECHR, or the Charter, do not have to be violated. Rather, they simply need to be engaged, according to the applicants. The submission is also made that the applicants' right to work (protected by Article 15 of the Charter) and their right to respect for their private and family lives (protected by Article 7 of the Charter) are clearly engaged and interfered with adversely. It is also submitted that an aspect of a person's private life is their work and that professional life is part of a zone of interaction between a person and others which, even in a public context, may fall within the scope of "private life" (*Fernandez Martinez v. Spain*, App. No. 5603/07, Grand Chamber, 12th June, 2014, para. 110; *Volkov v. Ukraine*, 9th January, 2013 (rectified on 9th April), App. No. 21722/11. The applicants also submit that work is part of the sphere within which a person can freely pursue the development and fulfilment of his personality (per *Sidabras v. Lithuania* (2004) 24 EHRR 104, paras. 43 – 50).
45. The applicants submit that the onus rests on the State to justify the difference of treatment. Considerable emphasis is laid on the submission that the respondents' opposition papers make no attempt whatsoever to justify the prohibition on the applicants exchanging their licences. Instead, submits the applicants, there is simply a plea made by the respondents as to what the 2006 Regulations require, without any "*objective and reasonable justification*" (as required by Article 14 of the ECHR) being advanced. It is submitted that, in the absence of any purported justification, the prohibition constitutes an unlawful form of discrimination contrary to the Charter and EU law.
46. A further aspect of the applicants' case, if the court were to hold that the 2006 Regulations exclude the applicants from obtaining an Irish driving licence, are submissions based on the provisions of Bunreacht na hÉireann. Reference is made to Article 40.1 and, whilst the applicants are not citizens of this State, reference is made to the decision of the Supreme Court in *NHV v. Minister for Justice* [2018] 1 I.R. 246, wherein certain constitutional rights were found to apply to non-citizens, including the right to seek work. In that case, the Supreme Court struck down the statutory absolute prohibition (which had no temporal limit) on an international protection applicant seeking work. The applicants also refer to an analysis of Article 40.1 in "*Kelly: The Irish Constitution*" (5th ed., Bloomsbury, 2018, Hogan, White, Kenny and Walsh) which

describes the domestic jurisprudence on Article 40.1 as “*remarkably underdeveloped*” (para. 7.2.05, p. 1562). The applicants acknowledge that their discrimination case under the Constitution is less easily resolved than under what they characterised as the well-developed and established jurisprudence of the ECtHR to which they refer. The applicants go on to submit that, in essence, Article 40.1 should protect the applicants, as persons lawfully in this State, and with a statutory right to work, from the impediments to the exercise of that right, and to other aspects of their private and family life, caused by the authority’s refusal to exchange their driving licences, unless the less favourable treatment imposed upon them is justified.

47. The applicant’s referred to the decision of the Supreme Court (O’Donnell J.) in *Minister for Justice and Equality v. O’Connor* [2017] IESC 21 (in particular, paras. 20-21 thereof). Reference is also made by the applicants to the test applied by the Supreme Court in *Re Art. 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 I.R. 321, in respect of proposed statutory classifications based on age and the applicants submit that, by contrast, the respondents in the present proceedings have advanced no justification for treating the applicants differently to other non-Irish citizens who wish to exchange their domestic driving licences for Irish ones.

48. The applicants also submit that in the absence of any justification for the difference in treatment imposed on them, the 2006 Regulation are incompatible with the ECHR.

Submissions by the amicus curiae

49. By order made on 14 July 2020 the Irish Human Rights and Equality Commission (“the Commission”) was given liberty to appear as *amicus curiae* in the proceedings. The submissions made by the Commission characterise the present proceedings as raising important issues of principle concerning the exclusion of applicants for international protection from access to driving licences in this State. According to the Commission, the first named respondent has erred in law in interpreting and applying the 2006 Regulations in such a way as to impose additional, and discriminatory, requirements on applicants for international protection which go beyond what is required under the driving licence Regulations themselves. The Commission also submits that if this court finds that, properly interpreted, the 2006 Regulations permit the exclusion of persons in the applicant’s position from access to driving licences, the 2006 Regulations would, to that extent, be ultra vires and/or contrary to European Union law and/or the Constitution.

50. The Commission submit that the term “*normal residence*” is defined in Regulation 3 in terms identical to those in Art. 12 of Directive 2006/126/EC. The Commission emphasises that, contrary to what is pleaded in the Statement of Opposition, this definition is not confined to situations “*where a person’s normal residence will be when he lives in more than one place*”.

51. The Commission submits that the respondents are arguing for a departure from the literal meaning of the words used in the 2006 Regulations. The Commission characterised the respondents as imposing upon “normal residence” an additional condition, the effect of

which is to exclude all those seeking international protection, despite them being persons lawfully present in this State who reside nowhere else.

52. The Commission also submits that the law should be clear and that one should not have to look for, or find, changes in the law in "unusual places". The Commission goes on to submit that, not only do the "checklist" and "guidelines" constitute such unusual places, they cannot alter the law as laid down in the 2006 Regulations which, they say, simply do not mean what the respondents contend for. The Commission goes on to submit that the law with regard to residence is very clearly set out in the Court of Appeal's decisions in the *Chubb European Group S.E. v The Health Insurance Authority* [2020] IECA 91 and *U.M. (a Minor) v Minister for Foreign Affairs and Trade* [2020] IECA 154 cases and that the applicants qualify as ordinarily resident having regard to the analysis set out by Murray J.
53. The Commission emphasises that the first named respondent's "guidance notes" have no legal status. The Commission submits that, following the substitution of the application form in the 2006 Regulations, the first named respondent purported to impose a requirement on applicants, via non-statutory guidelines, to prove "*residency entitlement*" and further to provide that this requirement could be satisfied only by the provision of certain types of proof of residency entitlement listed in its guidance notes. The Commission submits that the first named respondent did this, notwithstanding the fact that, under the 2006 Regulations themselves, which Regulations transposed EU law, all that was required was that the applicants have their "*normal residence*" in this State.
54. The Commission submits that, by virtue of their status, applicants for international protection, no matter how long they have been resident in this State, cannot have the GNIB card or Irish Residence Permit which the first named respondent insists upon. Instead, applicants for international protection receive a Temporary Residence Certificate. The Commission points out that such applicants may hold the TRC for a number of years and the Commission refers to the September 2020 "*Report of the Advisory Group on the provision of support including accommodation to persons in the International Protection Process*" wherein it was stated, as of July 2020, c. 3,590 people had spent more than 2 years in the international protection process.
55. The Commission submits that, as a matter of factual residence, the applicants are *normally resident* in this State and are lawfully in this State yet, despite the foregoing, their application to exchange driving licences was refused on the basis that they had not provided valid evidence of "*residency entitlement*".
56. The Commission refers to the judgment in *A.B. v Road Safety Authority* [2021] IEHC 217 para. 102 wherein the learned judge found that "*the actions of the respondent as they relate to the appellant are required by legislative enactment and cannot be the subject of an adverse finding pursuant to the Equal Status Acts*". As regards the foregoing, the commission emphasises that, in the present proceedings (and unlike the situation in A.B.), the Authority has expressly acknowledged that the Guidance Notes "*are not and are not intended to be legally binding*" (per para. 11 of the Affidavit sworn by Ms. Scott).

The Commission also submit that in updated guidance provided on the first named respondent's website, the references to "*residency entitlement*" have been replaced with references to "*normal residence*", but the forms of proof accepted by the first named respondent remain the same as those in the earlier guidance notes (i.e. GNIB and IRP cards).

57. Counsel for the Commission emphasised the importance of having regard to the context in which *normal residence* is used and it is stressed that, in an immigration context, it may well mean lawful residence, but that would not necessarily be so in other contexts such as for tax purposes or for the purposes of being a defendant in civil proceedings. With reference to the decisions in the *GAG (G.A.G. v. Minister for Justice & Ors.* [2003] I.R. 442]) and UM cases, the Commission stressed that the present context involves an application for a driving licence, not a determination of lawful residence. It was emphasised by the Commission that there is no question, in the present proceedings, of the applicants trying to use the results of an application to exchange a driving licence as a "springboard" for residency rights. The Commission also emphasised that the applicants are not living "furtively" or "underground". They are not unlawfully resident at all, but the status of their lawful residence has nothing to do with immigration law and, for present purposes, does not arise in the immigration context, submits the Commission.
58. The Commission also emphasises that the Oireachtas has not decided to limit normal residence in the manner contended for by the respondents and the submission is made that the Oireachtas could have, but plainly did not do so. Counsel for the Commission also submitted that there is nothing in EU law or in the primary domestic legislation which creates the requirement that a person applying to exchange driving licence must have a *residency entitlement* of a particular type in the manner contended for by the respondents. That being so, where is the vires to lay down such a requirement on the part of a Minister?, asks the Commission. The Commission goes on to ask what purpose is served by the need for a residency entitlement of the type contended for by the respondents? The Commission also asks what relevance a certain type of lawful residency has to what is being legislated for, namely the regulation of driving, not immigration? The Commission stresses that what is at issue concerns competence to drive and questions arise in this context such as the health of a driver, not rights to remain in this State.
59. The Commission submits that, in order to interpret normal residence, one must look to the Directive and to the primary act in order to see if there is anything which renders it necessary to interpret normal residence in the manner contended for by the respondents. The Commission submits that there is nothing and that a straightforward, literal interpretation produces a meaning which the applicants plainly satisfy.
60. As well as submitting that there is nothing to suggest a difference between EU law and Irish law on the question of residence for the purposes of the 2006 Regulations, counsel for the Commission emphasised that an objective approach to the question of residence emerges from a consideration of the relevant authorities. The Commission submits that

any objective analysis of the evidence, which is not in dispute, results in a finding that the applicants, in fact, normally reside in this State for the purposes of the 2006 Regulations.

61. The Commission argues that, while the amended form appended to the 2016 Regulations makes reference to "*residency entitlement*" such an application form cannot serve to amend the requirement of "*normal residence*" as laid down in the Regulations themselves. The Commission also argue that, despite the acknowledgment on the part of the first named respondent that the guidance notes concerning the practical application of the Regulations are not, and are not intended to be, legally binding, the evidence before the court suggests that the guidance notes, and the specific forms of proof "of residency entitlement" are treated by the first named respondent as if they are binding. Thus, the first named respondent rejects applications even where an applicant for international protection can provide an alternative form of proof that he or she is, in fact, resident in the State and lawfully so.
62. The Commission submits that the imposition of this additional requirement goes beyond the requirements actually laid down in the Regulations and is unlawful. First, the Commission submits that there is a fundamental lack of legal certainty in the legal basis for the purported exclusion which interferes with the fundamental rights of applicants for international protection. Second, the Commission submits that, as a matter of Irish law, the imposition of an additional restriction of this kind is *ultra vires* the powers of the respondents in adopting and applying the regulations; and, third, the Commission submits, that as a matter of EU law, neither the Minister, nor the Authority, is entitled to impose additional requirements in respect of normal residence which go beyond those provided for in Art. 12 of the Directive. The Commission also submits that even if the Regulations, properly interpreted, imposed such an additional requirement, the Authority would be bound to disapply such a requirement insofar as it went beyond what was permitted under Art. 12 of the Directive.
63. The Commission also submits that if, and insofar as, the proper interpretation of the Regulations excludes applicants for international protection from access to driving licences, the 2006 Regulations are incompatible with the Constitution and/or EU law (including the Charter of Fundamental Rights). In this regard, the Commission relies on the decision in *NVH* wherein the Supreme Court confirmed that, in light of the guarantee of equality before the law under Art. 40.1, the fundamental right to work, guaranteed under Art. 40(3), could not be "*withheld absolutely from non-citizens*" (*NVH v Minister for Justice* [2018] 1 IR 246, 315 – 316). The Commission submits that, although the difference between citizens and non-citizens could justify significant distinction on the part of the State in the field of employment, the Supreme Court concluded that it could not justify an absolute prohibition on employment, particularly where there was no temporal limit on the asylum process.
64. The Commission submits that the general principles laid down in *NVH* are equally relevant in the present context. It submits that, in the application of the 2006 Regulations, there is a clear difference of treatment in respect of a vulnerable group of non-citizens, i.e.

applicants for international protection, compared to other groups of non-citizens lawfully resident in the State. The Commission submits that, although the requirement of “*normal residence*” may be neutral on its face, the requirement as interpreted and applied by the respondents, excludes this category of non-citizens – very many of whom are likely to be of a different race or ethnicity – from access to what it characterises as a basic public service. In this regard the Commission cites O’Donnell J. (as he then was) in *Minister for Justice and Equality v O’Connor* [2017] IESC 21, at para. 20: “*differences of treatment referable to immutable human characteristics such as race, gender or sexual orientation ... are to be carefully scrutinised.*”

65. The Commission goes on to submit that, although the Supreme Court in *NVH* recognised that the State may distinguish between citizens and non-citizens where there are legitimate grounds for doing so, the respondents have not put forward any justification for the differential treatment at issue in the present proceedings. In this regard, the Commission submits that, although it is pleaded at para. 18 of the statement of opposition, that there is “*a justified and legitimate distinction*”, no objective rationale or justification, or evidence to this effect, has been put forward by the respondents. The Commission also points out that, at para. 21 of the statement of opposition, the respondents deny that “*to negate alleged discrimination it is incumbent on the Respondent as a matter of law to advance and objective, reasonable or proportionate justification for treating the applicants differently from such persons*”.
66. The Commission submits that it is particularly telling that, while a person who has been studying in the State “*for at least six months*” may apply for a driving licence (see Regulations 12 and 20, as amended), an applicant for international protection is entirely excluded from access to this basic service, even if he/she has been lawfully resident in the State for a number of years pending the determination of his/her application (if, that is, the proper interpretation of the 2006 Regulations is the one which the respondents contend for).
67. With regard to a driving licence being described by the respondents as a “*privilege*”, the Commission submits that, in a society based on the rule of law, access to basic public services, including driving licences, is governed by a detailed legal framework which must itself respect fundamental rights. The Commission goes on to submit that, like other non-citizens lawfully residing in this State, applicants for international protection, particularly where they are resident in the State for a lengthy period of time, may wish to access a driving licence in order to learn or maintain an important life skill, to travel within the State, to access other basic services, or to access education or employment.
68. The Commission submits that, for many applicants for international protection, the ongoing exclusion from access to driving licences represents a significant limitation on their ability in practice to access employment. In this way, submits the Commission, their exclusion from access to driving licences can interfere with the other fundamental rights of applicants for international protection, including the right to work recognised in *NVH* and as legislated for in the European Communities (Reception Conditions) Regulations

2018 (S.I. No. 230 of 2018) when the State agreed to be bound by the recast Reception Conditions Directive.

69. The Commission also submits that, insofar as the 2006 Regulations absolutely exclude applicants for international protection from access to driving licences, the Regulations are based on legal uncertainty, contrary to the guarantee of equality before the law under Art. 40.1 and, additionally, to the extent that they may in effect exclude such persons from access to employment, the right to work guaranteed under Art. 40.3.
70. The Commission submits that the Regulations, as interpreted and applied by the Respondents, run contrary to the right to work and the prohibition on discrimination enshrined in Arts. 15 and 21 of the Charter of Fundamental Rights. In particular, the Commission submits that a policy of excluding applicants for international protection from access to driving licences is, by its nature, liable to place a particularly vulnerable category of non-citizens, very many of whom will be of a different race or ethnicity, at a particular disadvantage compared to others, including other non-citizens who are lawfully resident in the State.
71. The Commission submits that the defining issue in the present proceedings is not whether a driving licence is a privilege as opposed to a right. Rather, the issue concerns access to it. The Commission also submits that, as the respondents acknowledge, once given, a driving licence grants access to a statutory right to drive. The Commission also submits that this Court can take judicial notice of the fact that driving is important and the need to drive can arise in a range of circumstances, including in emergencies.
72. The Commission submits that, although the interpretation of the concept of "*residence*" may depend on its specific statutory context, the concept of normal residence in the driving licence regulations must be interpreted, first and foremost, in accordance with its plain meaning. The Commission goes on to submit that, in accordance with its plain meaning, a person's normal residence, for the purposes of the Regulations, is a question of fact (reliance being placed on para. 18 of the decision in *Mohamed v Hammersmith and Fulham LBC* [2002] 1 AC 547 and para. 40 of the decision in *U.M. (a Minor)*). The Commission emphasised that the definition of normal residence in the 2006 Regulations makes no reference to the particular legal status or character of that reference or the nature or form of a person's "*residency entitlement*", still less to particular forms of proof which are essential proofs for this purpose.
73. The Commission submit that the purpose of the driving licence regulations is to regulate access to driving licences and this is a wholly different character to access to permanent residence or citizenship in the State. Thus, submits the Commission, the interpretation of "normal residence" for the purposes of the immigration code cannot simply be transposed to the driving licence regulations. Under the immigration code, argues the Commission, the particular character of a person's residence, including, specifically, whether it has been lawful or unlawful, will often be material to determining a person's entitlement to be present in the State or whether a person has sufficient reckonable residence in order to apply for naturalisation (with reference being made by the Commission to the decisions in

G.A.G. v Minister for Justice [2003] I.R. 442; *Sofroni v Minister for Justice and Equality and Law Reform* (unreported, High Court, Peart J., 9 July 004); and *Simion v Minister for Justice, Equality and Law Reform* [2005] IEHC 298).

74. The Commission submits that, in more recent jurisprudence, there has been a recognition that it is “*perhaps not helpful to try and shoe-horn particular categories of migrants into one of a number of differently labelled boxes in order to discover the extent of rights to which they may be entitled*” (with reference made to *Rughnoonth v Minister for Justice* [2018] IECA 392, para. 59; and *Luximon v Minister for Justice* [2018] 2 IR 542, 550).
75. The Commission emphasises that, in the present case, there does not appear to be any dispute that the applicants are, in fact, resident in the State. If and insofar as it may be relevant, the Commission go on to submit that it does not appear to be in dispute that the applicants are lawfully resident in the State.
76. The Commission submits that, although, by implication, the court in A.B. interpreted the requirement for “*normal residence*” as encompassing a requirement to provide evidence of *residency entitlement*, neither in the judgment of the High Court, nor of the Circuit Court, is there any detailed or reasoned engagement with the concept of *normal residence*. Moreover, in both judgments, the court emphasised that the issue before the court was a claim under the Equal Status Acts, as opposed to a challenge to the lawfulness of the Regulations (of the kind before the court in the present proceedings), with the Commission citing, in particular, para. 84 of the High Court’s decision. The Commission submits that the judgment cannot be regarded as providing a definitive interpretation of “*normal residence*” for the purposes of the driving licence regulations.
77. The Commission also submits that, in circumstances where the 2006 Regulations give effect to this State’s obligations under EU law, the concept of “*normal residence*” in the Regulations must be interpreted in a manner consistent with EU law. The Commission makes submissions with reference to the *Nimanis* Case C:6644/13, wherein the CJEU observed that, while Art. 12 defined the criteria for determining what is meant by “*normal residence*” for the purposes of the application of the Directive, the Directive does not specify the conditions for proof of normal residence. The Commission rely on the Court’s view that “*accordingly, the conditions for proving compliance with the normal residence condition must not go beyond what is necessary to enable the Member State Authorities responsible for issuing and renewing driving licences to satisfy themselves that the person concerned meets that condition in the light of the criteria set out in Art. 12 of the Directive 2006/126.*” (reference being made to *Nimanis*, para. 46).
78. The Commission submits that, in light of the foregoing, Member States cannot impose additional formal requirements which go beyond the definition in Art. 12 of the Directive. The Commission also submits that the Directive applies to Member States’ systems of issuing of driving licences generally and does not differentiate according to whether those licences are issued to a Member State’s own nationals, other EU nationals or third-country nationals. Accordingly, submits the Commission, the legal definition of “*normal residence*” for the purposes of the Directive does not change according to the particular

type of applicant. The Commission also submits that, both on the basis of its plain meaning and the binding interpretation of that term by the CJEU, the requirement of "normal residence" is a question of fact and does not imply a particular type of lawfulness in respect of the residence or residency entitlement, still less only the specific types of lawful residence which, in the case of non-EU/EEA/Swiss nationals, could only be satisfied by producing a GNIB or IRP card.

79. The Commission also submits that, in accordance with well-established principles, the Regulations and the legislation under which they have been adopted, and which enjoy the presumption of constitutionality, must be interpreted in a manner consistent with the Constitution and the Charter of Fundamental Rights (reference being made to *McDonald v Bord na GCon* [1965] IR 217; *East Donegal Co-Operative Livestock Mart Ltd. v Attorney General* [1970] IR 317; and *The State (Lynch) v Cooney* [1982] IR 337).
80. The Commission argues that if applicants for international protection are, as a matter of course, excluded from access to driving licences in this State, no matter how long they have resided here, this would constitute a serious interference with the rights to equality before the law under Art. 40.1 as well as the right to earn a livelihood guaranteed under Art. 40.3, and the analogous rights protected under Arts. 15 and 21 of the Charter. It is further submitted that applicants for international protection would be deprived of access to a basic service which in many cases may in turn significantly limit their access to the labour market. The Commission argues that, at a minimum, such an interference would require clear and unambiguous legislation. If and insofar as more than one reasonable interpretation is open on the text of the 2006 Regulations, the courts should adopt that interpretation which is consistent with the protection of the rights under the Constitution and the Charter, the Commission argues. It is also submitted that there is no need to create an artificial distinction between EU and domestic law. It is argued that it is untenable for the respondents to say that normal residence equates to residency entitlement and that residency entitlement requires a specific type of residency entitlement which those who have been living here on foot of a residence entitlement in the context of an application for international protection, cannot satisfy.
81. With reliance on the *Chubb* decision, it is submitted that the applicants satisfy the criteria for ordinarily resident, or normally resident. Emphasis was laid on the literal meaning of the words and the fact that normal residence is equated with usual residence in Regulation 3. The Commission submits that normal residence is not a term of art and that, on a literal meaning, if one were to ask where a person normally lives, the answer is where they usually live at the time the question is asked, not where they used to live and not where they might go if as yet unknown things occur. The Commission stress that, in the present case, where the applicants lived, as a matter of fact, at the time of their application, is this State. Indeed, they must remain in this State and cannot leave without the Minister's permission.

The Respondents' case

82. The respondents submit that the 2006 Regulations have been properly interpreted by them and submit that the applicants do not have their normal residence in the State for

the purposes of the 2006 Regulations. It is the Respondents' case that no person living in the State pursuant to s. 16 of the 2015 Act can have normal residence for the purposes of the 2006 Regulations.

83. The respondents acknowledged that the decision to refuse to exchange the applicants' South African driving licences for Irish ones may cause them inconvenience in their personal lives and in their pursuit of employment. However, the respondents submit that this decision flowed from the proper application of the statutory requirement. The respondents submit that the applicants have permission to be in the State solely for the purpose of the examination of their protection application and they refer to the text of s. 16 of the 2015 Act and that this does not amount to normal residence. Reference is made to the concept of international protection as defined in s. 2 of the 2015 Act and the respondents submit that the outcome of a successful application is that the applicants would acquire the status of a refugee, or someone entitled to subsidiary protection (with an additional Executive power to grant leave to remain on humanitarian grounds). The respondents accept that the "*normal residence*" requirement has been imported into the Irish Regulations from the 2006 EU Directive, but the respondents assert that the applicants simply do not meet the test of normal residence, insofar as Irish domestic law is concerned, having regard to the nature of their limited permission to be in this State. The respondents submit that the definition of *normal residence* in the 2006 Regulations does not preclude the policy adopted by the respondents. The respondents emphasise that it is well-established that applicants for international protection have a limited right to remain and the respondents submit that this limited right does not amount to normal residence for the purpose of the 2006 Regulations.
84. It is emphasised on behalf of the respondents that their case is based squarely on what normal residence means pursuant to the 2006 Regulations. Reference is made to the normal residence requirement as it appears in Regulation 12 and to the definition of normal residence in Regulation 3 and the respondents acknowledge that in all material respects, the latter is the same definition as provided by Art. 12 of the EU Directive. The applicants acknowledge that the first and principal issue in the present proceedings is whether the applicants have their normal residence in the State. The respondents submit that, in circumstances where their permission to be in the State is solely for the purpose of their international protection application, they do not meet the normal residence requirement.
85. The respondents submit that *residence* is a term that must be understood from the context in which it is used. Reference is made to *The State (Goertz) v Minister for Justice* [1948] IR 45, which concerned s. 5(5) of the Aliens Act, 1935 and the requirement to give a non-national three months' notice before deportation if they had been "ordinarily resident" in the State for more than five years. In that case, Maguire CJ held:

"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."

86. The respondents go on to submit that there is nothing in the context of driving licences which would suggest protection applicants are normally resident in the State. The respondents also submit that it is well-established that persons who are allowed to reside in the State "for the sole purpose" of seeking international protection do not enjoy the status of non-nationals who are resident in the State pursuant to the "normal" immigration channels.
87. Reference was made by the respondents to the GAG case, which came before the Supreme Court in circumstances where the relevant applicants issued proceedings in the High Court seeking leave to judicially review the decisions of the relevant Minister to deport them. The High Court (Smyth J.) refused leave to apply for judicial review and certified three points of law of exceptional public importance to the Supreme Court for determination pursuant to s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2012. Counsel for the respondents drew this court's particular attention to the following passages from the judgment of Murray J.:

"Status of the applicants

A fundamental argument of the applicants is that they are in the same position as any other person who has been authorised as an immigrant to enter and stay in the State. They too, it is claimed, are lawfully in the State. It is important, therefore, to consider their status as persons so permitted to be physically present in the State. Although there are particular facts and circumstances which differentiate each of the applicants from the others, they all have certain common elements. All were permitted to enter and/or stay for the purpose of pursuing an application for asylum in the State which they had expressly stated they wished to do. All have had their applications for asylum refused (in the third case, in the sense of it being transferred) and have been made the subject of deportation orders.

Entry to the State by the applicants for the purposes of making an application for asylum was the consequence of the exercise by the State of its inherent power to determine for what purposes and subject to which limitations non-nationals may be allowed to physically enter the State. Persons seeking asylum status are permitted pursuant to s. 9 of the Act of 1996 to enter the State solely for the purpose of having their application for asylum examined by a fairly elaborate independent procedure, so that those genuinely entitled to asylum may be granted permission to enter and stay in the State on those grounds.

Persons allowed to enter the State for such a limited purpose are subject to a variety of restrictions ...

It seems to me quite clear that the foregoing restrictions highlight and confirm that persons who are allowed to enter the State for the purpose of making an

application for asylum fall into a particular category and never enjoy the status of residence as such who have been granted permission to enter and reside in the State as immigrants. Even though such immigrants may be subject to certain limitations as to time and requirements as to renewal of work permits, they nonetheless enjoy legitimate residence status. In fact the very purpose of an application for refugee status is to seek permission to be allowed to enter and reside in the State as an immigrant and benefit from such a status."

88. It is fair to say that the thrust of the respondents' submission was that the fact that the applicants in *G.A.G.* were the subject of deportation orders and the obvious factual differences between that and the facts in the present case did not detract from what the respondents' counsel characterised as important statements of general principle.
89. The respondents also cited passages from the Court of Appeal's decision in *U.M.*, wherein the issue of "reckonable residence" for the purposes of naturalisation applications was at issue and the court looked at the meaning of "residence". The Court of Appeal's decision in *Chubb* was also referred to. Having regard to the analysis both in *Chubb* and in *U.M. (a Minor)*, the respondents submit that the applicants have transferred their normal residence to Ireland for the purpose of "applying" for international protection and the respondents went on to submit that this court should not accept the purpose of applying for international protection as sufficient for establishing normal residence. It was submitted that it would be entirely contrary to the international protection process to accept, as sufficient, the mere intention of *applying* for international protection. The submission was made by the respondents that this would encompass every protection applicant, no matter how devoid of merit the application.
90. It was also submitted that this would tacitly condone the circumvention of the normal system of applying for permission to be present in the State reference being made to (*F.P. v Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164). The respondents also submit that a *bona fide* intention to obtain international protection status could not be a settled purpose. The submission is made that this purpose is too uncertain, contingent and transitory to constitute a settled purpose for the purpose of establishing residence. The respondents submit that the continued presence of a protection applicant in the State is contingent on a certain result and on matters outside of their control and does not amount to a settled intention of remaining in the State. The submission is made that, leaving aside protections claims which are either untrue or baseless, a credible and truthful applicant might fail in their protection application for technical legal reasons. The respondents submit that it is not possible to say that all protection applicants can have a settled purpose of obtaining protection status.
91. The respondents further submit that it would be inappropriate to deploy subjective and personal factors to determine normal residence. In this regard, reference was made to the *Chubb* decision, wherein the Court of Appeal held that the interpretation of *ordinary residence* should be of general application and should eschew the focus on individual circumstances in favour of objective factors. The respondents characterise the applicants'

argument as being to say that all protection applicants have a settled intention of remaining in the State and the respondents argue that this cannot be held to be the case, given the nature of the protection system.

92. Among the respondents' submissions was to say that the "guidance notes" are a "*red herring*" in the present case. On behalf of the respondents, it was submitted that the "Checklist" which is included in the Schedule to the 2016 Regulations is no more than a spelling-out of what normal residence is.
93. It was also said that if the Authority were to insist that an applicant who is normally resident in the State (*i.e.*, according to the respondents, someone with permission which is not strictly limited to a purpose such as applying for international protection) was required to produce by way of establishing residency entitlement the documents listed in the Guidance Notes (*i.e.* a GNIB or IPR card) the State would fall foul of the decision in *Nimanis* (Case C – 664/13). In that case, the court held *inter alia* that:
- "[44] ... the conditions for approving compliance with the normal residence condition must not go beyond what is necessary to enable the Member State authorities responsible for issuing and renewing driving licences to satisfy themselves that the person concerned meets that condition in the light of the criteria set out in Article 12 of Directive 2006/126."
94. The respondents emphasise that in the *Nimanis* case, the applicant was a Latvian national and the complaint was against the Latvian authorities. The respondents submit that it is not true that *Nimanis* is authority for the proposition that the Directive covers the issue of driving licences across the EU, irrespective of whether the applicants are citizens of the Member State or third – country nationals. According to the respondents, *Nimanis* goes no further than saying that a Member State of the EU cannot defeat the provisions of the Directive by imposing bureaucratic requirements which are not provided for in the Directive. According to the respondents, the crucial distinction between the facts in the present case and those in *Nimanis*, is that the judgment in *Nimanis* proceeded on the basis that, in fact, Mr. Nimanis was normally resident in Latvia, but had been denied a driving licence due to bureaucratic requirements imposed by the Latvian authorities which went beyond what was permissible under the Directive. The respondents submit that *Nimanis* is limited to that and does not constitute any acceptance by the ECJ that the issue of driving licences, especially to third – country nationals, is other than a matter for the national court of the Member State in question.
95. The respondents also submit that *Nimanis* was decided on quite a narrow factual issue, where there was no dispute but that Mr. Nimanis was normally resident in Latvia. The respondents submit that it cannot be argued that *Nimanis* represents a radical enlargement of the scope of the Directive on the part of the Court of Justice. The respondents also submit that the issue in the present proceedings is an anterior issue (*i.e.* it would be as if the *Nimanis* case was at an anterior stage and there was a factual dispute over whether Mr. Nimanis had normal residence in Latvia. The respondents characterised the *Nimanis* decision as of limited scope in circumstances where the Court

did not decide whether, or not, Mr. Nimanis was normally resident in Latvia, but accepted what the Latvian authorities had concluded – that issue being left to the domestic court. The respondents emphasise that *Nimanis* is not authority for the proposition that an international protection seeker is normally resident for the purposes of the Directive.

96. It was submitted that a breach would occur if the Authority was rigidly insisting on a bureaucratic requirement with no foundation in the Directive in order to satisfy the normal residence condition. It was emphasised by the respondents that this does not arise and that the respondents do not accept that the applicants are normally resident in this State. For the respondents, it was emphasised that the present case is not concerned with the failure to produce evidence of normal residence. Rather, according to the respondents, this case is concerned with the absence of residency entitlement on the part of the applicants.
97. It was submitted that there are very clear enunciations of the law regarding normal residency in Irish authorities. According to the respondents, the starting point is that there is nothing *prima facie* wrong with treating persons who are in the State only on the basis of seeking international protection in a different way to others who have authority to be in the State. Reference was made to the decision in *O. v Minister for Social Protection* [2019] IESC 82 being a case pertaining to Child Benefit. By way of a brief summary of the background, the relevant benefit was paid to the parent of the dependent child with a “habitual residence” requirement which precluded those seeking international protection. The Supreme Court considered two cases both of which concerned the question of when a payment of Child Benefit arises to parents whose immigration status had not yet been determined finally by the State, but where a child of the relevant family had either status as an Irish citizen or as a refugee. In overturning what the Supreme Court described as a thoughtful judgment by the Court of Appeal, O’Donnell J. (as he then was) made clear that the claim which succeeded in the Court of Appeal “*was one which might be described as a claim of indirect discrimination*”. Counsel for the respondents went on to quote para. 18 of the decision in the *O.* case as follows:

“18. The starting point is that the direct object of the provisions (in common with other provisions in the social welfare code) is to determine that a person whose immigration status has not been positively resolved cannot be treated as having a right to reside, and capable of being habitually resident, and therefore a qualified person for the purpose of a claim to any benefits. In its own terms, that is not asserted to be, and in my view is not, a discrimination forbidden by Article 40.1. No distinction is made on any impermissible ground, or any issue or on any distinction, which should attract the close scrutiny of the court. The Act does not limit benefit to citizen claimants. The distinctions it does make are between those habitually resident, and those who are not, and at a further level, between those with a right to reside here, and those who do not have, or who have not yet acquired such a right. Such distinctions are rational, and moreover are obviously directed towards both the purpose for which benefit is made available to those habitually resident, and limitations upon it, which are clearly within the decision-

making power of the Oireachtas. Nor can it be suggested that the definition of those who have and have not a right to reside is itself impermissibly discriminatory either on its terms or in its effect. The starting point, therefore, that the terms of the legislation itself do not in their direct application breach Article 40.1”.

98. The respondents submit that the applicants’ case is difficult to reconcile with the jurisprudence in this jurisdiction as to what constitutes “residence”. The gravamen of the respondents’ submissions was that two difficulties confront the applicants; firstly, that Irish authorities as to what constitutes “*residence*” mean that those in the applicants’ position cannot be considered to be normally resident; and, secondly, the limited basis of the applicants’ authority to be in Ireland, when one construes the phrase normal residence as a matter of Irish law.
99. For the respondents it was also submitted that the judgment in the *A.B.* case cannot properly be characterised as turning upon the court’s reliance upon the guidance notes. It was also emphasised that the respondents are not relying on the guidance notes as creating any legal obligation for the purposes of the present proceedings.
100. With regard to the *Chubb* decision, it was submitted on behalf of the respondents that the applicants have not identified what they say is inherent in the nature of a driving licence which would displace the ordinary meaning of *residence* which, according to the respondents, clearly requires more than presence in the State for the purpose of seeking international protection. The submission was made that a “*limited purpose*” and “*contingent*” are concepts of much broader application and do not cover what the respondents characterise as “*such a limited and uncertain purpose*” as an application to seek international protection.
101. The respondents asked, rhetorically, why the construction of the term *normal residence* should be given what the respondents describe as “*an unusual or special meaning*” because of the nature of an application for a driving licence? Having put the question, it was submitted on behalf of the respondents that there is nothing in the legislative context to modify the general principles which emerge from Irish authorities and which exclude someone who has come to this State for the purpose of seeking international protection, from having a settled abode here.
102. As regards what the respondents characterise as the impermissible reliance by the applicants on EU law, it was emphasised on behalf of the respondents that the scope of the Directive is not concerned with a standardisation of regimes across the EU and the position of third-country nationals and “*asylum seekers*” is outside the Directive’s scope.
103. The respondents submitted that it could not be contended on behalf of the applicants that they have an entitlement to a driving licence as a matter of EU law. It was also submitted that, although conceptually possible that the phrase “normal residence” could have a different meaning in Irish law to its meaning in the Directive (even though the respondents fully accept that the phrase in the Irish Regulations comes from the

Directive) the respondents do not accept that the meaning the Regulations is inconsistent with the Directive.

104. The submission was also made on behalf of the respondents that the applicants had not identified some European "consensus or norm" in respect of which Ireland is an "outlier" and counsel for the respondents ventured to suggest that the proposition that those seeking international protection had an entitlement to a driving licence is something which would attract contesting opinions across the European Union.
105. It was submitted by the respondents that it is clear that applicants for international protection are not normally resident within the meaning of the 2006 Regulations interpreted as a matter of domestic law. The respondents also submitted that this interpretation accords with European Union law in circumstances where the normal residence requirement gives effect to the Directive. It was submitted that the applicants do not derive under the Directive, any right to obtain a driving licence merely by their presence in the State as protection applicants.
106. The respondents accept that persons who hold a valid EU driving licence have a right under the Directive to be issued with an Irish driving licence if they are resident in Ireland (Art. 2.2) but submit that the Directive does not generally regulate when licences should be issued. Rather, submits the applicant, the Directive is concerned with when licenses should not be issued. This distinction is, say the respondents, demonstrated by the facts in the present case, because the applicants are applying for an Irish driving licence by way of exchange of a third-country driving licence. The respondents state that this is not a matter governed by the Directive and is exclusively within the competence of Member States. Thus, say the respondents, the applicants do not enjoy a personal right under the Directive to apply for a driving licence.
107. In addition, the respondents submit that the normal residence requirement is directed towards determining where a person's residence is, when there are two possible Member States, so as to ensure only one authority may issue a licence. The respondents submit that the Directive is not concerned with regulating, in individual Member States, the categories of third-country nationals who are eligible to obtain driving licences.
108. The respondents also submit that international protection law is regulated to a considerable extent by EU law and that EU law clearly and expressly distinguishes the residency status of protection applicants from that of persons who are otherwise resident. The respondents cite, by way of example, Art. 9.1 of Directive 2013/32 on common procedures for granting and withdrawing international protection, which provides that an applicant is to be allowed to remain until the application has been determined and which provides *inter alia* that "*This right to remain shall not constitute an entitlement to a residence permit*". The respondents also submit that Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 which lays down standards for the reception of applicants for international protection (recast) makes no reference to driving licences. The respondents submit that there is nothing in European Union law that requires that protection applicants be eligible to obtain driving licences.

109. Further to the proposition that Irish interpretative principles are determinative, was the respondents' submission that, although the normal residence requirement in the 2006 Regulations gives effect to Irish law, the Regulations themselves represent a comprehensive legislative code for the grant of driving licences which applies outside the field of application of European Union law. In that regard, the respondents submit that it is significant that those aspects of the 2006 Regulations which give effect to European Union law are enabled by s. 2 of the Road Traffic Act, 2006. Thus, submit the respondents, the normal residence condition is enacted under the broader auspices of the Road Traffic Acts and must be interpreted accordingly.
110. The respondents also submit that, although the issue of protection applicants being eligible for driving licences is outside the scope of European Union law, the normal residence requirement continues to apply and is applicable and interpreted as a domestic statutory provision. The respondents submit that an analogous scenario arose in *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 20, a case in which Auden LJ considered the situation where a British citizen challenged a refusal of income support which had been on the basis that she was not habitually resident in the UK because she had not been residing there for a sufficiently long period. Subsequent to the House of Lords decision, the ECJ held that, for the purposes of community law, the length of residence in the Member State in which payment of benefit is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Regulation 1408/71 on the application of social security schemes to employed persons and their families. If Ms. Gingi could bring herself within the scope of the said Regulation, the term residence in the domestic legislation would have to be interpreted in accordance with the ECJ decision and she would be entitled to succeed. The applicant argued that because the term "residence" would have to be interpreted consistently with the ECJ decision where a worker was involved, the same interpretation should be applied to her because it was the same legislative provision and should be given a uniform interpretation. The respondents refer *inter alia* to the following passage from the decision of Auden LJ, quoting from *Bennion on Statutory Interpretation* as follows:
- "It is legitimate for the national court, in relation to a particular enactment of the national law, to give it a meaning in cases covered by the Community law which is inconsistent with the meaning it has in cases not covered by the Community law."*
111. The respondents emphasise, however, that they do not envisage a scenario where Regulation 12 would be interpreted differently, depending on whether European Union law applied. The point emphasised by the respondents is that, because the applicants fall outside of the scope of the Directive and acquire no right to a driving licence through it, the interpretation of normal residence as a matter of Irish law is determinative.
112. The respondents went on to submit that *Gingi* is authority for the proposition that one does not have to apply European meanings when one is not applying European law. It was submitted that this is crystal clear because, if it were not, there would be what the respondent's counsel characterised as a massive enlargement of European law,

abrogating the limitations imposed by the Treaty. It was emphasised that *Gingi* involved a social security issue, the context being the arrival in the United Kingdom of a British citizen coming from Cyprus. The respondents emphasise that the present proceedings comprise a case with no Community Connection. Again, the respondents emphasised that they are not to be taken to accept that the meaning of normal residence which they say arises from the proper interpretation of the Irish Regulations is in any way prohibited by, or at odds with, the Directive to which the Regulations give effect.

113. The respondents also submit that the applicants have not cited any express provisions in the Directive, or any ECJ authority stating that it is illegitimate to differentiate between persons present in Member States for the purposes of seeking international protection and persons whose status could, as the respondents put it, "truly be described as settled".
114. The respondents submit that if one looks at the Directive and considers the position of applicants for international protection, Article 12's definition of normal residence is not exhaustive or comprehensive and simply does not address the issue. Rather, the respondents submit, it leaves to the Member States the policy choice on whether or not applicants for refugee status are eligible for driving licences.
115. The respondents also submit that one would not readily think in terms of personal ties, occupational ties, and close links between the person seeking international protection and the country in which they are seeking it. The respondents also submit that it is not self-evident that, because Article 12 of the Directive is silent as to the status of someone required to prove normal residence, that this supports what the applicants contend for.
116. The respondents submit that physical presence which is not unlawful does not equate to normal residence and to show that someone is not here unlawfully obscures the key issue. According to the respondents, it leads to a proposition that physical presence which is not a continuing criminal offence is normal residence. If that were so, submits the respondents, it means that there is, across the European Union, conferred on those seeking refugee status or subsidiary protection, a right to a driving licence.
117. The respondents also submit that the applicants' argument based on alleged discrimination is fundamentally misconceived because of what they characterise as the applicants' failure to identify an appropriate comparator. The respondents stress that persons present in this State as applicants for protection are in a fundamentally different position to non-residents who reside in the State pursuant to a "normal immigration permission". The respondents go on to submit that, for this reason, a South African national who is "in the State generally" is an incorrect comparator because, say the respondents, they are present in the State on a fundamentally different basis.
118. The respondents submit that the applicants' true complaint relates to the drawing of distinctions on the basis of immigration status and, relying on the Supreme Court's judgment in the "O" case, the Respondents submit that immigration status is a legitimate and permissible basis upon which to characterise groups and to provide for differences in

treatment. The respondents go on to submit that a distinction on the basis of immigration status is permissible; that those in the applicants' position are in a fundamentally different position to those in the State under a "normal" permission; and that there is nothing in the particular context of driving licence that would change this position.

119. The respondents also rely on the decision in *NVH v. Minister for Justice* [2018] 1 I.R. 246 as an illustration of what they characterise as the misconceived nature of the applicants' discrimination arguments. The respondents emphasise that, while the right to work aspect of the Court of Appeal's decision was subsequently overturned, the central premise that protection applicants are a separate and distinct category of migrant was maintained in the Supreme Court's decision and particular reliance is placed on the following paragraph (para. 18):-

"There are a number of legitimate considerations justifying a distinction between citizens and non-citizens who are asylum seekers and in particular permitting a policy of restriction on employment. First, the State is entitled to take account that the number of successful asylum seekers is a small minority of those who apply for that status. The State has argued that if there was a capacity to work, that would create a strong 'pull factor' for potential applicants. On one previous occasion where there had been a limited period during which applicants had been entitled to seek employment, there had been a significant upsurge in applications for asylum. This is precisely the type of judgment which the Government and Oireachtas are required to make, and it is a judgment which courts should be extremely slow to second guess, even by reference to a proportionality standard. Given the limited basis upon which an asylum seeker is entitled to be present in the country, it is also legitimate to seek to maintain the situation in some form of status quo so that if the application is determined adversely to the applicant, that no development has occurred which makes it more difficult to remove the unsuccessful applicant from the State even if some employment is permitted after some time, it does not follow that any employment should be permitted: It may be legitimate to limit that to defined areas of the economy, perhaps where there is a demonstrated need".

120. In the *NVH* case, the Supreme Court found the absolute prohibition of "asylum seekers" entering employment to be impermissible. The respondents submit that *NVH* raises a very serious problem for the applicants, given their status, and the submission is made that neither the applicants, nor the *amicus*, have acknowledged the distinction drawn between those with what the respondents characterise as 'a general authority to remain in the State' and those with 'a limited permission', such as the applicants.
121. It is also argued by the respondents that the applicants' arguments premised on the Charter are untenable. The respondents submit that the applicants' application to exchange South African driving licences for Irish ones is not governed by EU law and the respondents emphasise that the applicants are applying for an Irish licence by way of exchange of a third-country driving licence, a matter not governed by the Directive and exclusively within the competence of member states. The respondents also reject the

discrimination arguments advanced on behalf of the applicants based on the Charter in circumstances where the respondents submit that the alleged discrimination is not based on a "...ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". The respondents submit that no relevant ground of discrimination is identified by the applicants.

122. With regard to the ECHR, the respondents acknowledge that Article 14 does not pre-suppose a breach of a substantive right but submit that, in order for Article 14 to apply, the facts of the case must fall "within the ambit" of one or more of the Convention articles (reference being made to *Burden v. The United Kingdom* [GC], No. 13378/05). The respondents emphasise that there is no Convention right to a driving licence. The respondents submit that it would be stretching the bounds of credulity to conclude that this is a case which falls within the ambit of Article 8.
123. The respondents submit that the effect of the applicants' claims premised on the right to earn a livelihood/right to seek employment would be a positive obligation to facilitate the applicants in obtaining employment. They further submit that this is contrary to the right as expressed by O'Donnell J (as he then was) in the *NVH* case at para. 12: -

"If there was some general and unspecified right to work, it would arguably be engaged if not infringed, when an economy did not provide for full employment, when a person who was in employment was dismissed or, when someone was precluded from working because of a strike. I find it difficult to believe that the Constitution imposes on the Government an obligation (presumably enforceable by action in court) to pursue policies directed towards full employment, as was suggested in some of the international material submitted on behalf of the appellant. It is easier I think to conceive of any constitutional protected interest as a freedom, and in this case, freedom to seek work which however implies a negative obligation not to prevent the person from seeking or obtaining employment, at least without substantial justification."

124. The respondents argue that the applicants misconceive the nature of driving licences, in arguing that their ineligibility for Irish licences breaches their right to seek employment and/or their family and private lives. With reference to the decision in *Conroy v. Attorney General & Anor.* [1965] IR 411, the respondents characterise the requirements for a driving licence as being the regulation, in the public interest of the grant of a privilege which, once granted, gives a statutory right to drive. The respondents also refer to the decision in *Muldoon v. Minister for the Environment and Local Government* [2015] IEHC 649 wherein (at para. 174), Peart J held: -

"Fundamentally, a licence issued under a statutory scheme of regulation to a person or legal entity is a permit which allows that person or legal entity to do something or possess something which the person may not lawfully do or possess without such a permit. One can readily think of simple examples of such licences. Gun licences, dog licences, television licences, driving licences, planning

permissions, intoxicating liquor licences, solicitors' practising certificates, auctioneers' licences, and street traders' licences are but a few that readily come to mind. Each permits its holder to lawfully do or possess something, and in some cases to earn a living thereby...".

125. The respondents submit that the applicants are not restricted from doing something that they would otherwise be free to do. Rather, argue the respondents, the applicants simply do not qualify for the grant of a privilege made under criteria established in the public interest. According to the respondents, there is no interference with their pre-existing rights, whether under the Constitution or statute.

126. The respondents also rely on the decision in *Casey v. Minister for Arts* [2004] 1 I.R. 402, which concerned the refusal of a landing permit to a boat operator in respect of Skellig Michael. The respondents refer to the Supreme Court's analysis (Murray J) at p. 421: -

"Since neither the appellant, nor any other person engaged in similar business activities, including those who have been granted permits to land on Skellig Michael, are entitled as of right (hence the requirement of such permits) to land their customers for business purposes on the island, it cannot be said that there has been an 'attack' on his constitutional right to earn a livelihood. Nothing is taken away from that liberty. Although the fundamental issue as to whether the respondent acted intra vires her statutory powers remains to be considered, I do not consider that there is any basis for impugning her actions on the grounds of a denial of a right to earn a livelihood."

127. The respondents submit that the applicants do not have any "right" to drive in this State so it cannot be said that there has been an attack on their constitutional rights by a refusal to issue a licence, or that those constitutional rights otherwise require vindication. The respondents also submit that the applicants have conflated their right to earn a livelihood with the ability to engage in a particular occupation, with reference being made to the Court of Appeal's appeal in *White v. Bar Council of Ireland* [2017] IR 249. As regards the applicants' private and family life, the respondents submit that it is difficult to exclude the possibility of the ineligibility for a driving licence interfering with Article 8 rights, but submit that this could only arise in the most unusual of cases. Contrasting the situation in the present case with the observations by Birmingham J (as he then was) in *Director of Public Prosecutions v. Skillington* [2016] IECA 289, the respondents submit that the applicants have not adduced sufficient evidence on which any claim premised on their right to seek employment and/or their private and family life claims could succeed. The respondents submit that the applicants do not point to anything unique or exceptional in their circumstances which would suggest their eligibility for a driving licence interferes with their substantive rights.

128. Reliance was placed by the respondents on the decision in the *O* case, it is submitted that the necessary starting point is that it is permissible to make distinctions and that no ground of discrimination is identified by the applicants, beyond the attempt to rely on "immigration status". The respondents submit that this is a category which does not come

within those in respect of which discrimination is impermissible such as age, race, etc. It is also submitted that there is no Convention right to a driving licence, nor could it be said that it falls within the ambit of any Convention right. The respondents submit that it strains credulousness to assert that this case falls within the ambit of Article 8. The respondents contend that the applicants have no right to a driving licence under Article 8 and any connection with Article 8 is so tenuous that it cannot be said to fall within the ambit of Article 8. According to the respondents, this is one of the major distinguishing features insofar as the *NVH* decision is concerned.

129. According to the respondents, the submissions by the applicants with reference to constitutional rights are both radical and unsustainable and, if upheld, would preclude this State from legislating to exclude international protection applicants. Insofar as reliance on the Charter is concerned, the respondents acknowledge that benefits of the Charter do not only accrue to EU citizens but emphasise that, in many instances, EU citizens are treated differently from third – country nationals. The respondents submit that the applicants are precluded from invoking the Charter by reason of Article 51.1 which is concerned with the field of application of the Charter.
130. The respondents submit that certain arguments made on behalf of the *amicus curiae* are not pleaded in the proceedings. A particular emphasis was made on the contention that there was any lack of vires with regard to the making of the 2006 Regulations. Insofar as it is asserted that driving vehicles has nothing to do with immigration, the respondents submit that areas of policy are not “tightly compartmentalised”. The respondents go on to submit that policies are typically those of a government, with one government department entitled to take account of others. The respondents further submit that the policy in respect of excluding international protection applicants from an entitlement, is not one which the respondents must justify. The more correct approach, according to the respondents, is to ask whether the policy is capable of justification. The respondents submit that if the applicants were correct, Acts of the Oireachtas would be burdened with enormously lengthy recitals for the purposes of justification of policies for which the legislation provides. According to the respondents, the suggestion that what is at issue is simply an application for a driving licence, represents a “facile” way of “sidestepping” relevant authorities which make clear the legitimacy of distinguishing between those who are present in the State seeking international protection, from others in this State who enjoy what the respondents describe as a “settled” status. The respondents also submit that the definition of normal residence strays into a definition and a territory which is obviously related to immigration and the submission is made that there is nothing inappropriate about the interpretation applied by the respondents.

Replying submissions by the Applicants

131. Among the submissions made by Mr. Lynn, in response, was to take issue with the characterisation by Mr. Callanan of the “guidance note” being a “red herring” in the proceedings. Mr. Lynn emphasised that it is the requirements detailed in the guidance note which actually prohibit the applicants from successfully exchanging their driving licences.

132. He went on to emphasise that the applicants have a residency entitlement. He submitted that the imposition of a residency requirement in the relevant driving licence application form is impermissible but, notwithstanding the foregoing, the applicants have in fact such a residency entitlement. On behalf of the applicants it was submitted that what the guidance note does is to exclude impermissibly the type of residency entitlement which the applicants enjoy.
133. With regard to the *A.B.* case, it was submitted that, insofar as the respondents contend that the Authority did not rely on the guidance note, para. 76 of the *A.B.* case makes it clear that the contrary is the case. The applicants submit that the Authority plainly relied on the guidance note in the *AB* case and that it was such a reliance by the Authority on the guidance note which led the learned judge into error in that case, according to the applicants.
134. For the applicants, it was submitted that, in contrast to the position adopted by the Authority in *AB*, Ms. Scott, at para. 11 of her affidavit, has acknowledged that the guidance note enjoys no legal status. The submission was also made that the GNIB and IRP cards, which the guidance note and the respondents find acceptable, are invariably time – limited. The same can be said with regard to the Temporary Residence Certificate issued to a third – country national seeking international protection, submitted the applicants. The applicants argue that all the foregoing amount to time – limited permissions, the gravamen of the submission being that the proper interpretation of the Regulations does not entitle the respondents to accept the first two, but disregard the third type of permission to reside in this State.
135. On behalf of the applicants the submission was also made that, if one compares Mr. Breetzke to a South African who is married to an Irish citizen: both in fact reside in the State; both have a right to work; Mr. Breetzke has a permission to reside and the South African spouse of an Irish national has permission to remain in this State at the Minister's discretion. What - counsel for the applicants rhetorically asks - is the policy justification for treating Mr. Breetzke differently to the spouse of an Irish citizen who could lose their temporary and limited permission to reside in this State (e.g. if they separated from their Irish spouse or if the Irish citizen moved from this State)? What - the applicants ask - is the policy for treating them differently in respect of the exchange of a driving licence, recognised as impliedly demonstrating competence to drive, in circumstances where South Africa is a recognised State for the purposes of exchanging driving licences?
136. With regard to the decision in the *O* case, it was emphasised on behalf of the applicants that *O* was concerned with child benefit in the context of the social welfare code. It was stressed that the social welfare code requires a very particular form of residence namely "habitual residence" as that term appears in statute. On the facts of that case, the parent in question had no right of residence and immigration status was plainly relevant insofar as decisions concerning benefits under the social welfare code were concerned. It was emphasised on behalf of the applicants that the facts and context in the *O* case were very different to those in the present proceedings.

137. In relation to the *GAG* case, the applicants stressed that what was at issue concerned the right of establishment under EU law. The relevant parties in that case were in this State unlawfully and were the subject of deportation orders. The context in which Murray J. made the comments in *GAG* was, say the applicants, entirely different having regard to the facts and the relevant legislative backdrop. The applicants characterise the position in *GAG* as a situation where persons were seeking to rely on their previous and unlawful residence in this State as a "springboard" to an alternative form of residence. Thus, say the applicants, the case involved wholly different facts and issues than whether the applicants have their normal residence in this State for the purpose of exchanging a driving licence.
138. Regarding the *NHV* decision, wherein the Supreme Court struck down the absolute prohibition on work, counsel for the applicants emphasised that the proposed justifications advanced did not "carry the day". Moreover, there are no policy justifications advanced to the court in the present proceedings, stressed the applicants. The submission was also made on behalf of the applicants that there is simply no policy justification for not exchanging driving licences.
139. Insofar as *Chubb* was concerned, counsel for the applicants emphasised that, with regard to the term *residence*, the proper approach is to give the term its ordinary meaning in its statutory context. The applicants submit that normal residence is a simple matter of fact which should only be restricted if the legislative purpose requires this. According to the applicants, there is nothing in the present proceedings which would require a narrowing of, or a departure from, the literal meaning of the words used in the Regulations.
140. On behalf of the applicants, it is acknowledged that presence alone does not amount to normal residence, but the applicants went on to emphasise that, on the facts in this case, the applicants meet all the elements of the analysis detailed by Murray J. both in the *Chubb* and *M (a minor)* decisions. In addition to their presence in this State, as a matter of fact, counsel for the applicants pointed to additional factors including their residence being lawful throughout the entire period; their permission to reside here being a statutory entitlement; the fact that they moved here "lock stock and barrel" from South Africa; that the applicants plainly intend to live here and to stay here; the fact that their young child attends school here; that all three have been living here for in excess of two years; that both applicants have been issued with Personal Services Cards; that both applicants have been issued with PPS numbers; that both can work and pay tax and contribute to the economy; that the applicants live nowhere else; and that the applicants have been at all material times prevented from leaving the State without the Minister's permission. On behalf of the applicants, the submission is made that it would be "almost absurd" if they were not considered to be normally resident here.
141. With regard to *Nimanis*, counsel for the applicants agreed that it was decided on a narrow factual basis, with no dispute in that case as to where the particular Latvian national resided. The applicants submitted that the *ratio* is that additional qualifying criteria, other than the simple requirement of normal residence, cannot be imposed. The applicants

submit that an additional requirement of a particular type of normal residence is being imposed impermissibly by the first named respondent.

142. With regard to the issue of comparators, the applicants submit that there is no point in having a comparator in the very same category as the applicants. It was submitted that a comparator is a comparable, not identical, group, for the purposes of the comparison of different treatment and ascertaining whether such different treatment is justified. It was submitted that no such justification has been advanced in the present case.
143. It was also submitted that the *Bah* decision is good authority that immigration status can be a status for the purposes of Article 14 and it was emphasised that the applicants rely on Article 14 as per how Article 21 would be applied. The applicants also emphasised that the categories of status in Article 21 are not exhaustive.
144. It was also submitted that the applicants are not contending that there exists a Convention right to a driving licence. The applicants went on to submit that, on the facts in the present case, there is a clear interference with the right to work, as protected by Article 15. It was submitted that Mr. Breetzke cannot take up work as a heavy goods vehicle driver and this constitutes an impermissible interference, in circumstances where the Charter has an express right to work under Article 15. It is acknowledged that the European Convention does not, but the applicants submit that Article 8 can embrace the right to work. It was also submitted that the applicant's support of their family and provision for a child depends on income derived from work. Furthermore, even "ferrying a child around" is an aspect of family life and the submission was made that the relevant rights were not to be lightly dismissed or interfered with.
145. As to the proposition that access to a driving licence is merely a privilege, the submission was made that Article 14 jurisprudence does not require a breach of a substantive right, but applies where privileges are given to some, but not to others. This, submits the applicants, raises the question of discrimination as to how a benefit is conferred and amounts to something which the Convention can consider.
146. It was made clear on behalf of the applicants that they do not contend that the policy to justify discrimination needs to be made clear on the face of relevant legislation. The point emphasised by the applicants is that there has been no justification in the present proceedings for the difference in treatment of the applicants as opposed to others, such as other South African nationals or students. The applicants' submission is that the position articulated in the Guidance Notes, as operated by the first named respondent Authority, excludes the applicants. This, say the applicants, is not permitted if the Regulations are properly interpreted. It is submitted that the applicants do have their normal residence in this State.
147. By way of subsidiary argument, if the court finds that the proper interpretation of the 2006 Regulations excludes the applicants, the applicants submit that there has been a difference in treatment amounting to discrimination for which no justification has been

advanced and that there has been a breach of the applicant's rights, including rights protected by the Charter of Fundamental Rights and Bunreacht na hÉireann.

Discussion and decision

148. The respondents placed considerable reliance on this court's decision in *A.B. v The Road Safety Authority* [2021] IEHC 217 in which the learned judge held that the Circuit Court did not err in law in its interpretation of the 2006 Regulations (wherein the Circuit Court concluded that these regulations imposed "requirement to provide evidence of residency entitlement in Ireland"). *A.B.* concerned a complaint by the appellant under the Equal Status Acts 2000-2015. The appellant succeeded before the Workplace Relations Commission ('WRC') but was unsuccessful on appeal to the Circuit Court. This Court dealt with an appeal from the Circuit Court which was described in the following terms at para. 3 of the judgment in *A.B.*: -

"3. *By notice of appeal dated the 6th August, 2020, the appellant has, pursuant to s. 28 (3) of the Equal Status Act, appealed the whole of the Circuit Court decision to this Court on the points of law enumerated therein as follows: -*

- (i) the Circuit Court erred in law in its interpretation of the Road Traffic (Licensing of Driver's) Regulations 2006 (as amended). More particularly:*
 - (a) The Circuit Court erred in law in concluding that the said regulations imposed a 'requirement to provide evidence of residency entitlement in Ireland';*
 - (b) the Circuit Court erred in law in its interpretation of the concept of residence for the purposes of the regulations, including by adopting, expressly or by implication, an interpretation of the concept of 'normal residence' that is contrary to its plain meaning and contrary to EU law."*

149. Paragraph 13 of the judgment in *A.B.* emphasises that the core issue in the case concerned discrimination: -

"13. *The appellant emphasised both at first instance, before the W.R.C and on appeal before the Circuit Court, that the claim is a claim of discrimination under the Act and not a challenge to the validity of the 2006 Regulations. The Appellant stated that the issue in the case does not lie in the 2006 Regulations themselves, but rather in the application and the interpretation of the 2006 Regulations by the respondent. The appellant argued that the respondent's practice and policy in this regard constitutes discrimination on the ground of race contrary to the Equal Status Acts."*

150. It is also appropriate to quote para. 16 of the judgment to better understand the arguments raised in that case: -

"16. *The appellant argued that Regulation 20 (1) of the 2006 Regulations requires that an applicant for a learner permit have his or her 'normal residence' in the State, a concept that derives from the EU law governing driving licences. Notwithstanding*

the terms of the regulations, for non-nationals the RSA imposes a requirement which goes beyond normal residence, that is a requirement of 'residency entitlement' which the appellant argues is not found in the Regulations themselves."

151. It is sufficient for present purposes to move to the end of the decision in the A.B. case and to quote the following: -

"98. Statutory Instrument S.I. no. 656 of 2016 (the 2016 Regulations) contains the current form D201 at Schedule 2 which requires evidence of residency entitlement by reference to guidance notes referred to in the statutory instrument. Those guidance notes as set out above state that to make an application for a driving licence or learner permit you must be able to show that you are a national of the European Union, European Economic Area or Switzerland or have leave to remain in Ireland and further provides a detailed list of documents which can be accepted as evidence of residency entitlement as set out earlier.

99. The Respondent is a public authority with responsibility for the issuing of driving licenses in this jurisdiction in accordance with law. The respondent lawfully and indiscriminately applied the statutory requirements to the appellant. The statutory requirements do differentiate between nationals of the European Union, European Economic Area or Switzerland and nationals from other areas. It is this distinction which lies at the centre of the appellant's case.

...

102. The court finds that the actions of the respondent as they relate to the appellant are required by legislative enactment and cannot be the subject of an adverse finding pursuant to the Equal Status Acts. The court therefore agrees with the respondent that the complaint under the Equal Status Acts made herein is misconceived as to what is in issue, which is the meaning and effect of the statutory enactments and not the individual treatment of the appellant by the respondent."

152. At the heart of the decision in A.B. was the question of discrimination and that case involved an appeal to this Court on a point of law. The present proceedings do not constitute a claim under the Equal Status Acts, nor do they come to this Court by way of an appeal from the Circuit Court. Furthermore, wholly unlike the position in A.B., the respondents acknowledge in the present proceedings, both by way of submissions and averments, that the guidance notes are not legally binding. This seems to me a fundamental difference between the position which pertains in the present proceedings and that in A.B. and, in my view, entitles me to distinguish that decision from the position here. It seems entirely fair to say that, had the learned judge in A.B. been informed that the relevant guidance notes were of no legal effect (being something the respondent in the present case fully acknowledges), different views may have been expressed. For these reasons I do not regard A.B. as determinative of any issue which arises in the

present proceedings. I am entirely satisfied that this court's decision in *A.B.* could not fairly be regarded as a definitive interpretation of "*normal residence*" for the purposes of the 2006 Regulations. I say this for at least three reasons. Firstly, it seems to me that the Authority's reliance upon its "Guidance Note" played a material part in the *A.B.* case and in the decision. Secondly, the claim in *A.B.* comprised one under the Equal Status Acts and was of a different character and with a very different focus to the claim brought in the present proceedings. Thirdly, and given the foregoing context in which *A.B.* arose and was decided, it does not seem to me that there was a detailed engagement with the concept of "*normal residence*" for the purposes of the 2006 Regulations.

153. It is not in dispute that the applicants and their school aged son arrived in Ireland on 12th September 2019 and have resided here ever since. The evidence demonstrates that they came to this State for the purposes of seeking international protection here. They made the relevant application and it is a matter of fact that they have resided in this jurisdiction ever since. As of 14 October 2021, when this case came for hearing, the applicants and their son have resided in this State for over two years. It is not in dispute that the steps in the process of seeking international protection include (a) completing a questionnaire; (b) being interviewed; (c) a decision by the international protection office; and (d) a right of appeal to the relevant Tribunal. It is a matter of fact that, through no fault of theirs, the applicants have only reached the first stage in the foregoing process. They promptly completed the relevant questionnaire, but have not yet even been called for interview.
154. This country opted into Directive 2013/33/EU and the said Directive was transposed into Irish law by the European Communities (Reception Conditions) Regulations 2018. The effect of the foregoing is that, after a certain time, an applicant for international protection can receive a right to work. Earlier in this decision I referred to the permissions to access the labour market which were issued to each of the applicants. When these were first granted, the relevant period was nine months. Thus, the applicants who arrived on 12 September 2019 received permission to access the labour market which was valid as and from 12 June 2020, precisely nine months after their arrival. Copies of the foregoing were exhibited and it is a matter of fact that the Department of Justice and Equality sent the relevant permission to the first named applicant on 05 June 2020 in a letter addressed as follows:

"Amanda Magret Landsburg

Eglinton Hotel

The Promenade

Salthill

Co. Galway"

155. At the risk of stating the obvious, the Department of Justice and Equality wrote to her there because that is where she lived. She lived nowhere else. At that time, the

applicants were residing in the foregoing direct provision accommodation and, on foot of the aforementioned permission to access the labour market, it is a fact that the first named applicant found work as a cleaner in "Caesar's Palace" Casino in Salthill which she performed until September 2020 until she was forced to give up that job in the circumstances I have referred to (*i.e.* as a direct consequence of not being able to get an Irish Driving Licence). It is also a matter of fact that when the relevant Department renewed the first named applicant's permission to access the labour market, with effect from 11 December 2020, it did so by writing to the first named applicant at the following address:

"Amanda Magret Landsburg

Apartment 16

Burke's Lane

Dominick Street Upper

Galway

H91 D688

Galway City"

156. Again, it is entirely obvious that the relevant Department wrote to the first named applicant at the foregoing address because this is, in fact, where she resided (after being moved from the direct provision accommodation in Salthill). She resided nowhere else, so this is where the letter was sent. Similar comments apply in relation to the second named applicant. In short, the evidence incontrovertibly demonstrates that, for over two years, the applicants and their young son have lived together as a family exclusively in this jurisdiction, having chosen to come here, intending to remain here, and having done everything required of them in the context of pursuing that aim. They have not left or attempted to leave this State since their arrival over two years ago. Given the objective fact of having completed applications seeking international protection, coupled with the fact that neither applicant has sought to leave the State since arriving, I am entitled to find as a fact that both want their applications for international protection to be successful and both applicants wish to remain in this State with their dependent child. It is also incontrovertible that they have, throughout the period since their arrival, resided in this State on an entirely lawful basis. Earlier in this judgment, I have made reference to s. 16 of the International Protection Act, 2015 but, for the sake of convenience, it is appropriate to set that provision out, in full, as follows:

"Permission to enter and remain in the State

16. (1) *An applicant shall be given, by or on behalf of the Minister, a permission that operates to allow the applicant to enter and remain or, as the case may be, to*

remain in the State for the sole purpose of the examination of his or her application, including any appeal to the Tribunal in relation to the application.

(2) *A permission given under subsection (1) shall be valid until the person to whom it is given ceases under section 2(2) to be an applicant.*

(3) *Subject to subsection (6), an applicant shall –*

(a) *not leave or attempt to leave the State without the consent of the Minister,*

(b) *not seek, enter or be in employment or engaged for gain in any business, trade or profession,*

(c) *inform the Minister of his or her address and any change of address as soon as possible, and*

(d) *comply with either or both of the following conditions, as may be notified in writing to him or her by an immigration officer:*

(i) *that he or she reside or remain in a specified district or place in the State;*

(ii) *that he or she report at specified intervals to –*

(I) *an immigration officer, or*

(II) *a specified Garda Síochána station...”*

157. It is not in dispute that the applicants have been granted permission in accordance with s. 16 of the 2015 Act. On any analysis, such a permission entitles the applicants, as a matter of law, to reside in this State for so long as the permission remains operative. Indeed, not only does a s. 16 permission have the effect of authorising residence, s. 16 makes explicit that a recipient of a permission must comply with conditions concerning where he or she “reside” within this State as may be notified to them by an immigration officer. Moreover, not only have the applicants been, in fact, residing on a lawful basis in this jurisdiction for over two years, their permission to reside here makes explicit that they shall not leave or attempt to leave this State without the consent of the relevant Minister. There is no question of either of the applicants having breached any of the conditions which apply to their s. 16 permission.

158. As regards s. 16(3)(b), the evidence is that the first named applicant’s employment was entirely lawful, authorised on foot of the relevant permission to access the labour market to which I referred earlier. On that topic of employment, the evidence is that both of the applicants wish to work in this State, the first named applicant having been able to gain some employment and the second named applicant having received a job offer (but the efforts of both having been frustrated by the inability to obtain an Irish Driving Licence). There is no evidence whatsoever of either of the applicants working outside of this State, whether “remotely” or otherwise. In other words, their efforts at work and such work as has been obtained to date, has exclusively been in this State.

159. Earlier in this decision I quoted from Regulation 12 of the 2006 Regulations (S.I. No. 537/2006) but, for convenience, it is useful to repeat it as follows:

"Application for driving licence"

12.(1) A person making an application for a driving licence shall have his or her normal residence in the State.

(2) The application shall –

(a) be made on scheduled form D.401,

(b) contain the information requested,

(c) contain the declaration indicated on that form duly completed by the applicant, and

(d) unless the application is accompanied by a medical report under paragraph (4)(a)(vi), contain a declaration by the applicant that ..."

160. The definition of "normal residence" is found in Regulation 3 and, once again, it is useful to repeat that, at this juncture, as follows:

" 'normal residence' means the place where a person usually lives, that is for at least 185 days in each year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he or she is living. However, the normal residence of a person whose occupational ties are in a different place from his or her personal ties and who consequently lives in turn in different places situate in 2 or more Member States shall be regarded as being the place of his or her personal ties where the person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attending a university or school does not imply transfer of normal residence..."

Where the applicants usually live

161. The definition in Regulation 3 equates "normal residence" with where a person "usually lives". The evidence entitles me to hold that the place where the applicants and their son usually live is this State. They live nowhere else. They wish to live nowhere else. They wish to work here. They wish to educate and care for their young son here. All of this is objectively established by their actions. It is uncontroversial to say that the nature of an application for international protection is that the applicants cannot return to their country of origin out of a well-founded fear of persecution. That being so, it is clear that by virtue of seeking international protection here the applicants have made a conscious, explicit and objectively clear, severing of ties in relation to their country of origin, including previous employment and personal ties. Leaving the foregoing aside, not only have the applicants evidenced, by their actions, no intention to return to South Africa, they are

prohibited from leaving this State without the relevant Minister's permission and this has been the case throughout their entire residence here for over two years. As previously discussed, when the relevant Department wrote to the applicants in the context of their right to work in this State, each letter was sent to where the applicants usually live, *i.e.* their Galway address.

The applicants do not divide their time between different States

162. In the context of the definition contained in Regulation 3, the applicants do not fall into the category of persons who divide their time between two different States. They have lived in this jurisdiction continuously and lawfully since their arrival on 12 September 2019. Their young son has been with them this entire time and attends school here. There is an obvious and extremely close personal tie between the applicants, as parents, and their young son who attends school in this State. There is no question of the applicants having occupational ties in a different place from their personal ties to their son. Nor is there any question of either of the applicants having any occupational ties other than in this State. The only evidence of work or intention to work is in this State. I previously referred to the first named applicant's employment situation that it is also useful to recall the uncontested averments made with regard to the second named applicant who previously worked as a crane driver and delivery driver in South Africa and who wishes to drive heavy vehicles in this State but, to do so, must hold a valid CPC card. As the first named respondent has averred, in order to complete CPC training, the second named applicant must hold a European licence which, in turn, requires the second named applicant to exchange his South African licence to an Irish licence (currently impossible given the stance adopted by the Respondents).
163. The current "Application form for a driving licence D.401" comprises Schedule 2 to the 2016 Regulations (S.I. No. 656 of 2016). Those regulations also contain what is described as an "*Application Checklist for Driving Licence*". With regard to the additional information required, the following is stated under "Option 7" concerning an exchange of a foreign licence: "***Evidence of Residency Entitlement (see list 4 of page 2 of guidance notes)***". It is not in dispute that the aforesaid "*guidance note*" does not comprise part of the Regulations.

Normal residence / residency entitlement / regular immigration status

164. The issue of immigration status does not appear in the relevant Directive or in the 2006 Regulations which transpose it. Nor does it feature in the 2016 Regulations which introduced an amended Form D. 401. The only reference in the "*Checklist*" (which appears at the end of the 2016 Regulations after the latest version of Form D.401) is to what the Checklist calls evidence of "*residency entitlement*". There is nothing in the Regulations which creates a requirement for what the first named respondent refers to in the present proceedings as "*regular immigration status*". The applicants have a statutory entitlement to reside in this State until their international protection application has been determined. On the evidence, they are normally resident in this State in the sense that this is where they usually live (and in the manner discussed in this judgment such a finding of fact seems to me to be entirely consistent with the approach to ordinary residence as determined by factors clarified by the Court of Appeal). Under the 2006

Regulations it is normal residence which the applicants are required to demonstrate, not “regular immigration status”, whatever that phrase might mean (a phrase, as I say, found nowhere in the Directive, the Road Traffic Acts or the 2006 Regulations).

165. If the applicants do not normally reside in this State, where do they normally reside for the purposes of the 2006 Regulations? I reject the proposition that the applicants reside nowhere at all. Can this court, properly interpreting the wording used in the 2006 Regulations, hold that the applicants are normally resident in, say, South Africa, in circumstances where the facts demonstrate *inter alia* that (i) they consciously left that country, (ii) they assert they are in danger should they return, (iii) they deliberately came to this State to seek international protection and, as well as having applied for same, (iv) the applicants live here, month in, month out, as a family and do so (v) caring for their young son whom they quite obviously wish to receive an education in this State, which purpose they have prioritised, including at the expense of having to forego a job and the attendant income from same, as well as (vi) wishing to work in this State, for which they have permission, and (vii) having no permission to leave this State without the relevant Minister’s consent? To my mind, it would fly in the face of the evidence and it would be to utterly ignore the plain meaning of the words used in the 2006 Regulations to hold other than that the applicants’ normal residence is in this State insofar as the 2006 Regulations are concerned.
166. I reject as incorrect the proposition that the definition in Regulation 3 of “*normal residence*” (mirroring, as it does, the wording in Article 12 of Directive 2006/126/EC) is only confined to situations “*where a person’s normal residence will be when he lives in more than one place*”. The latter situation is, of course, addressed, in Regulation 3 but the definition is not confined in any way to that situation. Furthermore, there is no minimum requirement in order for someone to be capable of having a “*normal residence*” as defined in Regulation 3. For this Court to interpret the definition in Regulation 3 as being concerned *only* with situations where a person divided their time between two or more States would be to ignore the words used in the definition. Furthermore, to interpret Regulation 3 as laying down a minimum requirement (in terms of days or years) below which a person cannot be said to have normal residence would also be to do violence to the words used in the 2006 Regulations.
167. The power conferred on the relevant Minister to make the 2006 Regulations derives from an Act of the Oireachtas. Neither the Road Traffic Acts, nor the Regulations themselves, specify that, in order to be considered normal resident, such residence must be lawful or, for that matter a particular species of lawful residence. The definition in Regulation 3 is entirely silent about the legal status of residents and says nothing whatsoever about the issue. Regulation 3 reflects wording found in the Directive, but it seems uncontroversial to say that, had the Oireachtas, or the Minister, intended that, in order to satisfy the normal residence requirement, an applicant’s residence had to be in accordance, not only with a permission, but in accordance with a specific type or types of permission, this could have been stated explicitly. To put it another way, it seems to me entirely possible to interpret the words actually used in the 2006 Regulations (in particular Regulation 12(1), as

defined in Regulation 3) without “importing” a status condition on top of the residence requirement.

168. Insofar as Regulation 3 gives clear guidance as to what normal residence means, specific reference is made to where one “*usually lives*”. That concept speaks to the idea of where an applicant routinely lives. Thus, it rules out the proposition of such an applicant usually living elsewhere. However, the notion of where someone usually lives seems to me to be directed to an objective assessment of where they normally lay their head at night and greet the day each morning. The concept of where one usually lives is not a concept which speaks to the legal *basis* for that residence or the status of that residence (which might well be of major significance in an entirely different context e.g. from, an immigration or taxation perspective). Regulation 3 most certainly does not state or imply that there are gradations of lawful residence – some but not others of which meet a condition which is nowhere expressed in the wording used in the 2006 Regulations – yet that proposition is at the heart of the Respondents’ case.

169. Had the Oireachtas or the Minister wished to make, not only legal status, but a sub-category of legal status (which excludes those lawfully resident in this State on foot of a permission, the conditions of which were being satisfied in full) an essential requirement of normal residence, it seems to me that this could and would have been done. In circumstances where it was not done, I cannot derive such an intention from the plain meaning of the words actually used in the 2006 Regulations and I am mindful of the separation of powers and the illegitimacy of this Court usurping the role of the legislature, be that in respect of primary or secondary legislation.

Normal residence / usual residence / ordinary residence

170. In my view there is an equivalence between the literal and commonly understood meaning of the phrases ‘normal residence’, ‘usual residence’ and ‘ordinary residence’. The close connection between the first two terms is explicitly recognised in the definition set out in Regulation 3 of the 2006 Regulations, whereas the third was analysed in the Court of Appeal’s decision in *Chubb*, a case which featured heavily in submissions made during the hearing.

Chubb European Group SE v. The Health Insurance Authority [2020] IECA 91

171. As the headnote makes clear, the appellant (‘Chubb’) sold a particular health insurance policy to non-EEA students attending a course of education in Ireland. The respondent (the ‘HIA’) adopted the position that, where a student is undertaking an educational course of more than one year’s duration, they are “*ordinarily resident in the State*”. It was the HIA’s position that because *Chubb* were providing health insurance to such persons, it was carrying on a health insurance business and the HIA contended that Chubb was subject to certain obligations and restrictions imposed by the Health Insurance Act 1994, as amended. Against that backdrop, the HIA served an enforcement notice on Chubb pursuant to s.18B of the foregoing Act.

172. From para. 79, onwards, Mr. Justice Murray examined the case law in relation to “ordinary residents”. It is appropriate to quote a number of passages from his analysis, beginning with para. 81:-

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.*

...

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 County 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'.

....

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)."*

173. The foregoing guidance given by Mr. Justice Murray is particularly useful in the present case, in my view. As is clear from para. 81 in *Chubb*, two concepts were highlighted; firstly, "*the plain and ordinary meaning of the words*" and; secondly, "*the specific legislative context in which it appears*". In the present case, the legislative context concerns driving licences. That seems to me to be particularly important. The legislative context does not concern immigration rights or such issues or the qualification for any entitlement to social welfare payments. There is no question of the receipt of a driving licence entitling the applicant to any particular residency status which the applicant could assert in a different context (i.e. no question of an entitlement to an Irish driving licence being a 'springboard' in respect of immigration rights or status). Nor is the legislative context, for example, concerned with taxation issues, where a decision concerning residence or domicile could have a significance, one way or the other, in terms of tax payable by an applicant and receivable by the State. Similarly, the entitlement to exchange a South African driving licence for an Irish one does not trigger any entitlement to social welfare payments or establish status insofar as same are concerned.

174. The present case and the 2006 Regulations at its heart purely concern driving licences. In the manner previously examined in this judgment, the relevant application form, very understandably, deals with issues such as the health and fitness of the applicant to drive, being issues quite obviously important in the context of driving. Plainly, it is necessary to identify the applicant and to know where they live and, very understandably, the applicant's name and address are required on the relevant form. Drawing together the two strands identified in *Chubb*, I am entirely satisfied that if one looks at the term *normal residence*, its plain and ordinary meaning in the legislative context in which it appears, means an applicant's then-current address, being the place where they normally or usually live at the time. The foregoing seems to me to be entirely consistent with the definition in Regulation 3. This is not a complicated concept, nor does it need to be given the legislative context in which the words *normal residence* are used in Regulation 12(1). Both the relevant Directive and the 2006 Regulations use the words "*normal residence*". It is undoubtedly a fact that the applicants were, when they made the relevant application to exchange their driving licences, normally, usually and ordinarily residing at an address in Galway and were living nowhere else. That has remained the case for over two years.
175. With regard to paras. 89-98 of the Court of Appeal's decision in *Chubb*, I have no hesitation in saying that the statutory framework or legislative context in which the words are used does not require a departure from the literal and common-sense of the words *normal residence*, which Regulation 3 makes clear is equivalent to the concept of where an applicant *usually lives*.
176. The evidence demonstrates that the applicants have chosen to come to this State, a fact objectively clear from their having travelled here and having applied here for international protection. They undoubtedly came to this State for a settled purpose, being to seek international protection. This was, and is, not their only purpose, however. The evidence entitles me to hold that, not only was the *application* for protection a purpose, the *obtaining* of same was, and remains, a purpose. The application was made in the obvious hope that it would be granted. The applicants' residence is neither casual nor uncertain. It arises from a deliberate choice to come here and seek international protection and the evidence demonstrates that the applicant's purpose is not limited to simply the making of an application. They plainly hope that their application will be successful and the objective facts demonstrate that their intention is to remain. Nor is there any uncertainty, factual or legal, as to the lawfulness of their residence. As a matter of fact, they have been here, and nowhere else, for over two years. Far from ceasing to reside here at any stage during that period, they are not permitted to leave this State without the consent of the relevant Minister, something they have never sought. Nor is there any question of any breach of the terms which apply to their permission and govern the basis upon which they reside here.
177. The evidence demonstrates, beyond doubt, that the applicants adopted an abode in this State for a settled purpose as part of the regular ordering of their life for the time being. In addition to seeking international protection, the applicants are also anxious to work in this State and one of them has been able to secure some work in the manner I have

explained. The second applicant has secured a job offer and I am entitled to hold that he obtained such an offer because he was seeking employment, being desirous of working here. The first applicant's work was carried on lawfully with the relevant permission having been granted.

178. On any reasonable analysis, the applicants' purpose could fairly be described as settled. The applicants' intention and purpose is clear and objectively verifiable, including by their arrival in this State; their seeking of international protection; their residing exclusively in this State ever since; their efforts to secure employment; their cohabitation together in this State with their young son as a family unit while he engages in education in this State and they seek employment, all the foregoing being with permission.
179. As to their permission to reside being contingent, there is no evidence whatsoever that the applicants have breached any condition which relates to their permission, which permission continues to remain valid and, irrespective of how many conditions apply, the fact of residence remains. The applicants and their son live nowhere else. The applicants and their son have one, and only one, address and it is in this State. My earlier look at the provisions of s. 16 of the 2015 Act insofar as the applicants are concerned is of relevance and illustrates both the fact of their residence and its lawfulness.
180. Insofar as the respondents argue that the purpose of applying for or a *bona fide* intention to obtain international protection cannot be considered a settled purpose, I take a different view. It seems to me that to decide to come to this State in order to seek international protection can fairly be said to constitute a settled purpose. Furthermore, the evidence allows me to conclude that the foregoing is not the only purpose which the applicants have. To care for and educate a child in this country is a purpose and it is plain from the evidence that this is a purpose the applicants have pursued. To work is a purpose and it seems to me that there is ample evidence that this is a purpose which was pursued by both applicants. It is equally clear from the evidence that two legitimate purposes, namely, (1) ensuring their son received an education in this State and (2) carrying out work in this State, came into conflict and forced the first named applicant into an invidious position whereby she had to make a choice between the two. Prioritising the purpose of educating her son, she had to forego the purpose of working (and, I am entitled to conclude, earning money thus improving the family's financial position, not to mention the contribution to the wider economy). As I touched on earlier, I am also entitled to hold that, as well as the purpose of *applying* for international protection, the applicants have as a purpose the *obtaining* of such protection *i.e.* by the objective acts (which include leaving their home country, coming here with their young son, applying for international protection here, complying fully with the terms of their permission to *remain* here, not leaving this State, not seeking permission to leave, working and seeking work here, educating their son here and residing exclusively in this State together since 12 October 2019) the applicants plainly have, as other purposes, to *obtain* international protection here; to remain here; to *reside* and to work here; and to care for and *educate* their son here. That obtaining international protection is contingent on things beyond their control does not, it seems to me, mean that it is any less a purpose. Many purposes are

pursued, the ultimate outcome of which will be determined by factors outside of, as well as within, the control of the person who has the purpose(s) in question. Such is the position here.

181. It is also clear from the guidance given by the Court of Appeal in *Chubb* that an objective, rather than a subjective test is to be favoured in the context and manner Murray J. explained (see para. 98 (v) – (vii)). Any objective analysis of the facts which emerge from the evidence in this case demonstrate that at the time when the applicants sought to exchange their South African driving licences for Irish ones, their normal residence was in this State. They lived here. Their address was here. They and their son live nowhere else. I am conscious that physical presence alone is not determinative, but looking at the facts through the lens of the factors identified by Murray J. at paras. 98 (v) – (vii) in *Chubb*, I am entirely satisfied that the applicants' *normal residence* is in this State for the purposes of the 2006 Regulations.

182. In the context of a consideration of housing legislation in England, the House of Lords in *Mohammed v. Hammersmith and Fulham LBC* [2002] 1 AC 547 stated (at para. 18):

"It is clear that words like 'ordinary residence' and 'normal residence' may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides."

183. Although the foregoing observations were made in the context of housing legislation in another jurisdiction, in my view they are appropriate to quote. I say this because it seems to me that, in light of the legislative context in which the words "*normal residence*" is used, there is no need for an over-complicated analysis. The matter is capable of being determined by a literal interpretation of the Regulations and doing so points to the objective ascertainment of the normal residence of an applicant, as a matter of fact, at the time when the application is made. This approach is entirely consistent with the definition in Regulation 3. Thus, it seems to me to be entirely impermissible (because neither the Directive nor the wording in the 2006 Regulations provide for it) to import concepts such as the legal *status* of residents, still less a particular type of lawful status, as opposed to the *fact* of their normal or usual residence.

184. The Road Safety Authority is, as the name makes clear, concerned, and very properly so, with issues of road safety. It is not tasked with making decisions as to immigration status. Despite this, there has been a very explicit attempt by the first named respondent to insist on what it calls "*regular immigration status*" or "*regular immigration permission*" in order to satisfy what seems to me to be the fundamentally different and far more

straightforward concept of “normal residence”. Regardless of how bona fide the first named respondent’s intention may be, it represents a flawed approach which is not provided for in the 2006 Regulations. Nor is there any support for such an approach found as a result of a proper interpretation of the words “*normal residence*” in light of the very helpful guidance provided by the Court of Appeal in *Chubb*.

185. The Court of Appeal returned to the concept of “*residence*” in its decision in *U.M.*. By way of background, the applicant in that case was born at a time when his father and next friend had been physically present in this jurisdiction for the period required by s. 6A of the Irish Nationality and Citizenship Act, 1956, as amended (“the 1956 Act”). That presence was based on a declaration of refugee status which was subsequently revoked, in circumstances where it had been given following the provision by the applicant’s father of false and misleading information. At issue was whether the applicant’s citizenship was valid, and it is fair to say that at the core of the case was the proposition that unlawful residence was not reckonable for the purposes of the applicant’s citizenship claim. It is appropriate to quote several passages from the court’s judgment in *U.M.* as follows:-

“32. *I will address these various arguments of supporting policy in due course. However, at the core of the case lie a number of issues arising from a single question: does the 1956 Act, as amended, and properly construed have the effect that a residence status conferred by the State on a parent on the basis of information that was false and misleading falls to be included or excluded in the calculation of the period required to confer an entitlement to citizenship? To answer that question it is necessary to place s.6A(1) in context, and to examine the meaning of the term ‘residence’ as it is understood in immigration and citizenship law.*”

Residence and the 1956 Act

33. *It goes without saying that where the term ‘residence’ (or common variations thereon such as ‘ordinary residence’ or ‘habitual residence’) is used in a statute, it should be interpreted by reference to the ordinary meaning of the words used viewed in light of the statute as a whole (see Chubb European Group SA v. Health Insurance Authority [2020] IECA 91 at para. 81). It is also clear that for the purposes of many statutory provisions, unlawful residence is not ‘residence’ at all. As Lord Scarman said in R (Shah) v. Barnet LBC [1983] 2 AC 309, at p. 343 ‘[i]f a man’s presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence’. This, of course, is merely a general proposition – a specific statutory context may compel a different outcome. So, a person unlawfully resident in the State may nonetheless be ordinarily resident for the purposes of revenue legislation (see Re Abdul Manan [1971] 1 WLR 859, 861) or indeed for the purposes of private international law rules based on residence (Robertson v. Governor of Dochas Centre [2011] IEHC 24 at para. 12). The critical consideration is that ‘residence’ may have different meanings in different legislative contexts, and that the structure, text and*

purpose of the legislation in which the phrase is used presents the initial point of reference for any analysis of the specific meaning of the term.

...

The case law

40. *While ultimately dependant on the specific legislative context in which the issue arises, the general principles applied in determining the meaning of 'residence' or (insofar as there is any material difference) 'ordinary residence', are clear. They have been recently summarised in Chubb Insurance SA v. Health Insurance Authority at para. 98. Residence cannot be simply equated to physical presence. The critical distinction between the two is defined by the fact that 'residence' 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. 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 or her life for the time being, whether of short or long duration. 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. As I have said, these general principles are dependent on the specific legislative context which may by its terms or necessary implication modify or exclude some or all of them.*
41. *Many of these principles derive from the leading decision in this jurisdiction on the issue, that of the Supreme Court in The State (Goertz) v. Minister for Justice [1948] IR 45. There, the Court addressed the meaning of the term 'ordinary residence' as it appeared in s.5(5)(c) of the Aliens Act 1935, a provision which conferred upon an alien so resident for five years the entitlement to three months' notice of deportation.*
42. *In Goertz, 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. He was subsequently interned for five years, following which an order was made for his deportation. The Court held he was not 'ordinarily resident' in the State for the purposes of s.5(5)(c). Maguire CJ. (with whom Murnaghan, Geoghegan and O'Byrne JJ. agreed) said that these words 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) (emphasis added). UM 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.

43. *Similarly, Murnaghan J. emphasised (at p.57) the need to look at the nature of the residence in a manner that clearly out-ruled an unlawful presence:*

'A person who came here and who remained in hiding, or who lived here under various disguises, could not reasonably be held to be ordinarily resident, although physically in the country. The phrase should, I think refer to the character, as well as to the duration, of the residence.'

44. *Goertz has been consistently interpreted in the context of immigration legislation as demanding the conclusion that 'residence' or 'ordinary residence' when used in that legislation refers exclusively to residence obtained lawfully, with (in particular) residence that has been procured by fraud or misrepresentation excluded from that calculation. That is, in my view, the inevitable consequence of the majority decision in the case.*

...

51. *Finally, it is important, if unsurprising, that the interpretation of the term ordinary residence as it appears in immigration legislation has been readily applied to the construction of the 1956 Act and, in particular, to the meaning of 'residence' as it appears in s.15(1)(c) as a condition to naturalisation. In *Simion v. Minister for Justice, Equality and Law Reform* [2005] IEHC 298 MacMenamin J. held that a period spent in the State while making and awaiting a decision on an application for asylum did not have the character of 'residence' for the purposes of that provision. The conclusion was based inter alia on the analysis in *Goertz*, and a decision of Peart J. (*Sofroni v. Minister for Justice Equality and Law Reform*, Unreported, High Court, 9th July 2004) in which the same view was reached in respect of an asylum seeker's presence in the State for the purposes of notification prior to deportation under the Immigration Act 1999. In *Roberts and Muresan v. Minister for Justice, Equality and Law Reform* [2004] IEHC 348, Peart J. had reached the same conclusion in construing the 1956 legislation. That reflects the position adopted by the English courts: in *R. v. Home Secretary ex parte Margueritte* [1983] QB 180, the reference to 'ordinary residence' in s.5A(3) of the British Nationality Act 1948 was held to exclude an unlawful residence partly by reference to case law there similarly construing the phrase as it appeared in immigration legislation, and partly because it would involve granting a benefit to a person who had breached that state's immigration laws."*

Commenting on the particular legislation at issue in the case, Murray J in UM went on to state the following:

- "54. *The legislature has put in place a specific statutory structure addressing the circumstances in which residence can and cannot be taken into account for the*

*purposes of the calculation of the relevant period. These include presence in the jurisdiction other than in accordance with a permission obtained under s.5 of the 2004 Act. The Oireachtas having thus defined the zone within which physical presence characterised by illegality should operate to preclude reckonable residence from accruing, I do not see how it can be said to have, at the same time, left room for the implication of any other exclusion on the ground of illegality. Were the provision to be construed so that there was a residual category of excluded presence arising where presence in the State was unlawful, s.6B(4)(a) would be surplusage, as all presence in breach of s.5 of the Immigration Act 2004 is itself unlawful. If the only 'residence' referred to in s.6A(1) was a residence that was bona fide, lawful and regular, there would have been no need to exclude from reckoning a residence in contravention of s.5(1) of the 2004 Act, as it is none of these. The Courts must strive to avoid an interpretation of legislation that renders provisions of the Act in question otiose (see *Cork County Council v. Whillock* [1993] 1 IR 231); 'every word or phrase, if possible, should be given effect to' (*Dunnes Stores v. Revenue Commissioners* [2019] IESC 50 at para. 66).*

55. *The usual application of the maxim expressio unius would support this conclusion. In Rodis Humphreys J. said (at para. 30) :*

'It is clear that these applicants were not present in the State in contravention of the 2004 Act because that Act does not apply to them (see s. 2(1) of the 2004 Act). Neither were they present in the State for the purposes of education or study or while awaiting a refugee decision. Thus it is entirely clear that they fell outside of the terms of s. 16A, which is the express statement by the Oireachtas of the types of presence in the State which do not constitute 'residence' for the purposes of s. 15. The principle of expressio unius clearly has a significant relevance here.'

56. *Applying the same analysis, it appears to me that the proposition that there is now a general and implicit requirement that presence be 'lawful' overhanging the definition of 'residence' in s.6A(1) cannot be sustained having regard to the decision of the Oireachtas to expressly enumerate periods which will be excluded from reckoning for that purpose and, in particular, to include within that exclusion a specific category of unlawful presence."*

186. In light of the foregoing, it seems appropriate to ask, for present purposes, whether the words *normal residence* found in Regulations 12(1) and 3 of the 2006 Regulations, as amended, properly construed, exclude the period of time which the applicants have, as a matter of fact, spent residing in this State, with permission so to do for the purposes of seeking international protection? To put it another way, does the proper interpretation of *normal residence* under the 2006 Regulations, which makes no reference to the *status* of such residence, necessarily mean that the *fact* of their residence, which has, at all material times, been lawful, is insufficient and that a different category of lawful residence is required to satisfy the requirements of ordinary residence (being what the first named

respondent refers to variously as “*regular immigration status*” or “*regular immigration permission*”)? In my view, the answer to these questions is undoubtedly in the negative.

187. The context in which the words *normal residence* arise is in respect of the regulation of driving on Irish roads. In that context, normal residence speaks to the question of where the applicant usually lives, as a matter of fact. Thus, the starting point is to determine where the applicant usually lives. In the present case, this has been established as an objective fact and I have already considered the detailed guidance given by the Court of Appeal, in *Chubb*, in particular, at para. 98(i) to (vii). I am satisfied that if one approaches the meaning of normal residence for the purposes of the 2006 Regulations by having regard to the issues detailed at (i) to (vii) of para. 98 in *Chubb*, it results in the inescapable conclusion that the applicants are ordinarily resident in this State for the purposes of an application to exchange their South African driving licences.
188. The legislation at issue in the present case is concerned with the regulation of driving, not with the determination of immigration status. Thus, it seems to me, wholly unnecessary, for the purposes of a literal interpretation of the words used in the 2006 Regulations, to import the proposition that a specific type of lawful residence in the State must be excluded, whereas other types of lawful residence in the State are to be accepted, for the purposes of determining normal residence. In short, what is contended for by the respondent seems to me to require both an impermissible departure from the literal and common-sense meaning of the words used in the 2006 Regulations as well as a departure from the guidance given by the Court of Appeal in both the *Chubb* and *U.M.* cases as to the proper approach to the determination of the meaning of normal residence as those words appear in the 2006 Regulations.
189. The applicants’ presence in this State has, at all material times, been, as a matter of fact, lawful. Their permission to remain may well be on very strict terms and for a specific purpose but it is nonetheless lawful. Thus, it is not unlawful and, to the extent that it is urged on the court, I feel obliged to reject the proposition that someone who, in fact, resides in this State month after month and with permission so to do and who complies with all conditions of that permission should not be considered, for the purposes of exchanging their driving licence, lawfully resident in the context of the legislative scheme at issue in the present proceedings.
190. The respondents characterise the nature of the applicants’ current situation as being “*physical presence which is not a continuing criminal offence*”, and the foregoing, according to the respondents, cannot equate to normal residence. In my view, an analysis of the nature of someone’s presence in the State can produce only a binary result as to lawfulness. In other words, either an applicant is *unlawfully* in this State or they are *lawfully* present. To my mind, there cannot be a third option. Yet it seems to me that implicit in the respondents’ submissions is that there is a third category; namely, persons who are not unlawfully in this State but, being in receipt of ‘merely’ a permission pursuant to s. 16 of the 2015 Act, to remain in the State for the purpose of their international protection application, should not be considered to be lawfully residing here such that

their residence would meet the requirement in Regulation 12, regardless of the objective evidence as to the fact and purpose of their residence here. If, by describing the applicants' status as "*physical presence which is not a continuing criminal offence*", the suggestion is made that this presence is something less than lawful, I reject that proposition.

191. In my view, the proper interpretation of the 2006 Regulations does not give rise to a third category, existing in some 'grey area' between lawful and unlawful, for the purposes of whether the person in question meets the normal residence requirement in the context of seeking a driving licence. Plainly, the particular status of the applicants' residence may well be of fundamental relevance in other contexts, most obviously immigration law. Indeed, the principles which the respondents urge on the court as to the meaning of normal residence for which they contend are largely, if not exclusively, derived from cases concerned with immigration, or citizenship, or rights to remain; in particular, where efforts were made to use unlawful residence as a 'springboard' to attain residency rights. No such issue arises in the present case, however. The applicants have never lived in this State unlawfully, in contradistinction to the factual position in several of the authorities relied upon by the respondents which, as I say, were cases decided in the context of a determination of immigration citizenship or residency rights, not a *normal residence* requirement for the sole purpose of a driving licence exchange. The applicants' presence in this State is lawful, not unlawful. Furthermore, it could be said of every person present in this State, including Irish-born citizens, that their physical presence here is not a continuing criminal offence. This is because the presence of a citizen in this State is lawful. The legal basis for the applicants' presence is in the context of seeking international protection here, but it is not unlawful.

192. It is fair to say that *G.A.G, NVH* and *O* were cases decided in the context of immigration rights, naturalisation conditions and/or rights to financial benefit, where specific residence requirements had been laid down. It seems to me to be important that the present proceedings are concerned with interpretation of legislation in an entirely *different* context *i.e.* with regard to an application to exchange a driving licence (which, whether granted or not, cannot alter the legal status of the applicants for immigration purposes or qualify them for financial benefit). At the heart of the situation in *G.A.G.* was an attempt by the applicants to rely on unlawful residence as a "springboard" to assert residency entitlements. What Murray J. went on to say (at p. 475) seems to me to highlight a very specific factual context in which the *G.A.G.* judgment was given:

"If the applicants are correct in their contentions, then it would mean that persons who are allowed to enter for no other purpose than having their application for asylum examined could seek to do so when their real purpose was to apply for establishment rights. In those circumstances any legitimate system of prior control could be circumvented. As the High Court judge found in the first case, the applicant there continued to work illegally after his work permit expired. This demonstrates how the non-application of a system of prior control in such cases

could be abused by persons relying on cliental or business assets which he or she might build up while unlawfully working in the State..."

193. The facts in the present case are wholly different. There is no question of either of the applicants ever having been here unlawfully or ever having worked here unlawfully. The status of the residence of the applicants in *G.A.G.* was plainly of fundamental importance to the decision which involved materially different facts and a wholly different legislative context than in the present case. It is also appropriate to observe that the *O.* case concerned eligibility requirements in respect of the Social Welfare Consolidation Act, 2005 and the analysis of habitual residence was in that particular context. The facts and legislative context in respect of which the present proceedings come to this court are wholly different.
194. It seems to me that the very height of what emerges from the authorities relied on by the respondents, in the context of this Court's task in interpreting the 2006 Regulations, is to permit this Court to interpret the words "*normal residence in this State*" as carrying with them an implied requirement that such residence not be unlawful. I reach this conclusion with some trepidation, as the concept of *usual* or *normal* residence does not seem to me to necessarily require a consideration of legal *status* and the literal and common sense meaning of the words used in the 2006 Regulations do not, it seems to me, import a status requirement on top of a normal residence requirement. On balance, however, to interpret the words used as impliedly requiring that the applicants' residence not be unlawful seems to me to be a legitimate interpretation which does not do violence to the words used and which is entirely consistent with the principles which emerge from the authorities the respondents rely upon. Such an interpretation also seems to me to be wholly consistent with the Court of Appeal's decision in *U.M.*. It will be recalled that in *U.M.* (see para. 56) the Court of Appeal rejected the proposition that a general and implicit requirement that the relevant presence be 'lawful' overhung the definition of 'residence' in s.6A(1) of the Irish Nationality and Citizenship Act 1956, in circumstances where the Oireachtas had decided both to explicitly enumerate periods which would be excluded from reckoning and to include within that exclusion a specific category of unlawful presence. By contrast, the 2006 Regulations neither include nor exclude any specific category, or of residence whether lawful or unlawful. Although *U.M.* was decided against a materially different backdrop and in a very different context (and concerned whether the applicant's father's presence in the State was reckonable for the purposes of the applicants' claim of citizenship), it seems legitimate to interpret the 2006 Regulations as implicitly requiring that *normal* residence not be *unlawful* residence. In the manner already analysed, if residence is not unlawful, it is lawful for the purposes of the 2006 Regulations and the applicants' residence has been at all material times lawful, not unlawful. The foregoing is, however, the very most which the principles urged on the Court by the respondents can do, as regards the proper interpretation of the words used, in the context in which they appear.
195. Thus, it seems to me that once an applicant clears the hurdle of their *normal residence* not being unlawful, it would be to strain beyond breaking-point the literal meaning of the

words used in the 2006 Regulations, and it would be for this Court to engage in policy judgments and impermissible judicial law-making, to interpret the words used in the 2006 Regulations, in the context in which they are used, as excluding a category of residence which was lawful and which, as well as being a matter of objective fact, constituted *normal residence* entirely consistent with both the Regulation 3 definition and the principles outlined by the Court of Appeal in the *Chubb* and *U.M.* decisions.

196. Although not determinative of the proper interpretation of the 2006 Regulations, I also find it useful to look at certain consequences of the interpretation contended-for by the Respondents, as compared to the effect of the literal interpretation of the words used in the 2006 Regulations, in the legislative context in which they appear. The interpretation which the first named respondent has been applying has, without doubt, adversely affected the applicants in a material way, both in their personal lives and in their pursuit of employment. That is not, however, determinative of anything; nor is it the end of the analysis. It will be recalled that both applicants were granted explicit permission to access the labour market in this State, whether by way of employment or self-employment. The absence of a driving licence forced the first named applicant to make the invidious choice between getting her young son to school and getting to a job in Salthill on time to perform it. As I commented earlier (in the context of noting that both constitute *purposes* and, in my view, *settled purposes*) it is entirely clear that both are legitimate and lawful purposes. Despite the manner in which the respondents characterise the first named applicant's status, she has, since June 2020, been granted the freedom to seek and to carry out work here. Yet a direct consequence of the interpretation contended for by the respondents has been a very real interference with that freedom. On the evidence before this Court, but for the interpretation of the 2006 Regulations adopted by the respondents, the first named applicant would *not* have to have given up her job (presumably resulting in lost income to a family as well as lost taxation revenue to the State and the loss of the first named applicant's contribution to Irish society in general by her efforts). As regards the second applicant, the evidence before this Court is that his freedom to seek work as a driver has been frustrated by the interpretation contended for by the respondents. This is despite the second named defendant also having had permission to access the labour market since June 2020 and, indeed, having received a job offer. Leaving aside concepts such as the relationship between paid employment and personal dignity, a cold economic reality of the consequence of the interpretation adopted by the Respondents includes prejudice to the applicants' entitlement to access the labour market in this State, a poorer family (including a school-age child who depends on the applicants), and less tax revenue for the State in which the applicants currently live, on a lawful basis, and wish to remain. All of the foregoing can be contrasted with the consequences of a literal interpretation of the words used in the 2006 Regulations in the legislative context in which they arise and which, for the reasons set out in this judgment, I am satisfied is the correct approach. The latter approach would see two people no longer frustrated in their efforts to secure work and, therefore, having the prospect of an increase in their, and in their young son's, standard of living as well as an increase in tax revenue to the State and the prospect of their labour contributing to society generally. Moreover, the consequences of the respondents' interpretation would be wholly compatible with the explicit permission which

both applicants had been given (in a different context, namely by virtue of their particular lawful status as international protection seekers) to access the labour market.

197. Thus, the consequences of the interpretation of the 2006 Regulations contended for by the respondents prejudice and/or prevent the engagement by the applicants in work which they have been given permission to seek and carry out and with a range of negative effects; whereas the correct interpretation sees a removal of that prejudice with knock-on positives. It is also worth emphasising that, notwithstanding the fact that the applicants possess 'only' the status conferred on them as the seekers of international protection, this status was plainly sufficient for them to be permitted by the State to seek and engage both in employed and self-employed work here. It cannot be in doubt that the applicants can lawfully engage in such work despite the status of their permission to reside here, yet the respondents argue that, in view of this self-same status, the applicants cannot be regarded as normally or usually living here for the purposes – not of immigration rights, but of exchanging driving licences - irrespective of the objective fact of such residence, which at all material times has been on a lawful basis.
198. The consequences of the correct interpretation of legislation cannot 'trump' or override the meaning of the relevant words properly interpreted in context, but the foregoing look at the consequences of the contended-for interpretations fortifies me in the view as to the correctness of the interpretation of the words used in the 2006 Regulations which I have explained in this decision. Given what I am satisfied is the correct interpretation of the 2006 Regulations, the subsidiary arguments canvassed by the applicants do not fall for determination. I do not accept that this judgment as to the proper interpretation of *normal residence* in the 2006 Regulations undermines in any way the international protection regime or has any relevance for legislation which arises in entirely different contexts, such as immigration, naturalisation, citizenship or social welfare entitlements. What this Court has decided concerns the proper interpretation of *normal residence* in the context only of the 2006 Regulations, specifically, insofar as the normal residence requirement arises in the context of an application for an Irish Driving Licence (in this case being the exchange of South African for Irish licences).
199. For the reasons set out in this judgment, I am entirely satisfied that the applicants are entitled to *declaratory* relief that the 2006 Regulations do not require them to establish any further right of residence than they currently have. The applicants are also entitled to orders of *certiorari* quashing the decision of the first named respondent of 30 November 2019 refusing their applications to exchange their South African driving licences for Irish ones.
200. By way of a preliminary view on the issue of costs, it is fair to say that the applicants have been entirely successful and the respondents entirely unsuccessful in respect of the claim made and it is equally uncontroversial to say that costs should 'follow the event' unless justice requires a departure from what might be called that 'general rule' (Section 169(1) of the 2015 Act and the recast Order 99 of the Rules of the Superior Courts being of relevance).

201. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”* Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.