

**Casebase Number: G0126**

**Title of Payment: Maternity Benefit**



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**Date of Final Decision: 16 December 2021**

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**Organisation who represented the Claimant:** N/A

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**Case Summary:**

This case concerns PAYE and PRSI contributions made while working in Ireland without a valid work permit, and whether they should be taken into account by the Department of Social Protection when assessing eligibility for social insurance payments, such as maternity benefit.

Ms. Shardha Sobhy, a citizen of Mauritius, arrived in Ireland on 5 March 2005, and registered with the Garda National Immigration Bureau (GNIB). From the time she arrived in Ireland until the 26 June 2012, she was granted five consecutive Stamp 2 visas. During that time she was a student and worked in a part-time job. She was lawfully in the State until 26 June 2012. On 21 November 2011, Ms. Sobhy applied to change her Stamp 2 to a Stamp 4. She received a letter from the Irish Naturalisation and Immigration Service (INIS), dated 11 May 2012, refusing her request to change to a Stamp 4. Ms. Sobhy sought an extension of her visa on 20 July 2016.

On 5 August 2016, the Residents Division of the INIS refused to extend her visa, reasoning that the visa had already expired by the time the application for an extension had been received. This letter outlined her rights under the Immigration Act 2004, highlighting that it is illegal to reside in the State without permission from the Minister for Justice and Equality, and the penalties that went with failing to follow the law under The Immigration Act of 2004. This letter also specified that, without her visa, Ms. Sobhy was not entitled to work.

A firm of solicitors representing Ms. Sobhy wrote to the Residents Division of the INIS, in a letter dated 23 November 2016, requesting a review of the decision. It is unknown whether a response was received to this letter.

In 2018, the Minister for Justice introduced a scheme that allowed certain non-EEA nationals, who had a valid student permission during the period of 01 January 2005 to 31 December 2010 and who had not acquired an alternative immigration permission in the intervening period, to apply for permission in the State. Ms. Sobhy applied to the scheme and the INIS addressed this application on 26 February 2019, granting her temporary permission to reside in the State under Stamp 4s conditions for a period of two years from the date of the letter.

Between 2008 and 2019, Ms. Sobhy made numerous social welfare contributions. The respondent and her employer made all of the necessary PRSI and PAYE contributions necessary to receive maternity benefit. The case turns on the period of 26 June 2012 to 03 March 2019 when Ms. Sobhy was a resident of and working in the State without permission to remain or work.

The following is the number of paid contributions Ms. Sobhy made during the specified years:

Year	Paid Contributions	Reckonable Paid Contributions for Pension
2008	38 A, 1 J	38
2009	26 A	26
2010	29 A	29
2011	48 A	48
2012	44 A, 1 J	44
2013	33 A	33
2014	52 A	52
2015	53 A	52
2016	48 A	48
2017	51 A	51
2018	37 A	37

Ms. Sobhy went on maternity leave on 15 December 2018 and gave birth on 9 January 2019. On 11 April 2019, while a lawful resident in the State, Ms. Sobhy applied for maternity benefit. On 04 June 2019, a Deciding Officer refused her claim for maternity benefit on the basis that she did not have a valid work permit, making her employment uninsurable.

Ms. Sobhy appealed this decision on 23 June 2019. The Appeal was disallowed.

#### **High Court Decision:**

Ms. Sobhy then appealed this issue to the High Court, seeking judicial review and an order of certiorari. She argued that she was entitled to maternity benefit due to her PAYE and PRSI contributions. The High Court held that it is not enough for an Appeals Officer to simply determine a contract formed illegally to be void. The High Court held that the test in *Quinn v. IBRC* [2015] IESC 29, [2016] 1 I.R. 1 is to be used in such circumstances. The test is as follows:

2. *Where, however, the relevant legislation is silent as to whether any particular type of contract is to be regarded as void or unenforceable, the court must consider whether the requirements of public policy (which suggest that a court refrain from enforcing a contract tainted by illegality) and the policy of the legislation concerned, gleaned from its terms, are such as require that, in addition to whatever express consequences are provided for in the relevant legislation, an additional sanction or consequence in the form of treating relevant contracts as being void or unenforceable must be imposed. For the avoidance of doubt, it must be recalled that all appropriate weight should, in carrying out such an assessment, be attributed to the general undesirability of courts becoming involved in the enforcement of contracts tainted by illegality (especially where that illegality stems from serious criminality) unless there are significant countervailing factors to be gleaned from the language or policy of the statute concerned (para.148);*

3. *In assessing the criteria or factors to be taken into account in determining whether the balancing exercise identified at 2 requires unenforceability in the context of a particular statutory measure, the court should assess at least the following matters: -*

- (a) *Whether the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent (para. 171);*
- (b) *whether the wording of the statute itself might be taken to strongly imply that the remedies or consequences specified in the statute are sufficient to meet the statutory end. (para. 173)*
- (c) *whether the policy of the legislation is designed to apply equally or substantially to both parties to a relevant contract or whether that policy is exclusively or principally directed towards one party. Therefore, legislation which is designed to impose burdens on one category of persons for the purposes of protecting another category may be considered differently from legislation which is designed to place a burden of compliance with an appropriate regulatory regime on both participants. (para. 176);*
- (d) *whether the imposition of voidness or unenforceability may be counterproductive to the statutory aim as found in the statute itself (para. 178);*
- 4 *the following further factors may well be properly taken into account in an appropriate case: -*
- (a) *whether, having regard to the purpose of the statute, the range of adverse consequences for which express provision is made might be considered, in the absence of treating relevant contracts as unenforceable, to be adequate to secure those purposes (para. 183);*
- (b) *whether the imposition of voidness or unenforceability may be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general (para. 186);*
5. *Doubtless other factors will come to be defined as the jurisprudence develops.*

The High Court granted an order of *certiorari*, quashing the decision of the Chief Appeals Officer and referring the decision back to the Chief Appeals Officer for further consideration. The High Court reasoned that the Supreme Court's decision in *Quinn* made it clear that a contract illegally formed can be enforced in order to avoid injustice. Thus, illegality does not necessarily make a contract void.

### **Supreme Court Decision:**

The Supreme Court allowed for a leapfrog appeal on 11 May 2021. In a unanimous decision the Supreme Court held that the applicant's work during the relevant time (26 June 2012 through 3 March 2019) did not amount to a "contract of service." As a result, Ms Sobhy was not eligible for the social insurance contributions to be taken into account in her application for maternity benefit.

- The Supreme Court found that a contract of service does not create a nexus between the employee, the employer, and the State. The Court went further by saying that the State does not enter into a contract with people to pay their maternity benefits provided that they meet

the certain contribution qualifications and that a statutory scheme does not have the “indicia of a contract.” (pg. 20) Thus, there is no reason by contract in which a person can receive maternity benefits notwithstanding that they have met the qualifying contributions. (pg. 22)

- The Employment Permits Act 2003 does not expressly suggest that a contract of employment made by a person without a work permit is generally unenforceable. However, the Act does make it illegal and in breach of the criminal law for someone to work without such a permit.
- The provisions in the Social Welfare Consolidation Act 2005 demonstrate that “the Oireachtas did not intend that an employee who obtained the redress could thereby be deemed to have made qualifying contributions” (pg. 28-29) and, thus, there are no rights derived from the contracts of employment made without a work permit or “no rights can flow from the contracts of employment made without a necessary work permit or by a person unlawfully present in the State.” (pg. 24)

### **Relevant Legislation:**

#### **The Employment Permits Act 2003**

**2.—(1)** A non-national shall not—

(a) enter the service of an employer in the State, or

(b) be in employment in the State,

except in accordance with an employment permit granted by the Minister (an “employment permit”).

(2) A person shall not employ a non-national in the State except in accordance with an employment permit.

(3) A person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable—

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) if the offence is an offence consisting of a contravention of subsection (2), on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both.

(3A) It shall be a defence for a person charged with an offence under subsection (3) consisting of a contravention of subsection (1) to show that he or she took all such steps as were reasonably open to him or her to ensure compliance with subsection (1)

**2B. – (12)** The amount of money paid to a foreign national pursuant to an order under subsection (3) shall not be treated as reckonable emoluments within the meaning of the Social Welfare Consolidation Act 2005 for the purposes of that Act.”

### **The Immigration Act of 2004**

5.—(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission F10[given to him or her] after such passing, by or on behalf of the Minister.

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

(3) This section does not apply to—

(a) a person whose application for asylum under the Act of 1996 is under consideration by the Minister,

(b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force,

(c) a member of the family of a refugee to whom section 18(3)(a) of that Act applies, or

(d) a programme refugee within the meaning of section 24 of that Act.

### **Social Welfare Consolidation Act 2005**

12.—(1) Subject to this Act—

(a) subject to paragraph (b), every person who, being over the age of 16 years and under pensionable age, is employed in any of the employments specified in Part 1 of Schedule 1, not being an employment specified in Part 2 of that Schedule, shall be an employed contributor for the purposes of this Act, and

(b) every person, irrespective of age, who is employed in insurable (occupational injuries) employment shall be an employed contributor and references in this Act to an employed contributor shall be read accordingly, and

(c) every person becoming for the first time an employed contributor shall thereby become insured under this Act and shall thereafter continue throughout his or her life to be so insured.

47.—(1) Subject to this Act, a woman shall be entitled to maternity benefit where—

(a) it is certified by a registered medical practitioner or otherwise to the satisfaction of the Minister that it is to be expected that the woman will be confined in a week specified in the certificate (hereafter in this section referred to as “the expected week of confinement”) not being more than the prescribed number of weeks after that in which the certificate is given,

(b) in the case of an employed contributor, it is certified by the woman's employer that she is entitled to maternity leave under section 8 of the Maternity Protection Act 1994, and

(c) subject to subsection (2), she satisfies the contribution conditions in section 48.

(5) Subject to this Chapter, maternity benefit shall be payable to—

(a) a woman, who is an employed contributor, for the period of maternity leave to which she is entitled under section 8 of the Maternity Protection Act 1994 (including any extension of that period by virtue of section 12 of that Act)

**48.**—The contribution conditions for maternity benefit are—

(a) in the case of an employed contributor—

(i)

(I) that the claimant has qualifying contributions in respect of not less than 39 contribution weeks in the period beginning with her entry into insurance and ending immediately before the relevant day, and

(II) (A) that the claimant has qualifying contributions or credited contributions in respect of not less than 39 contribution weeks in the second last complete contribution year before the beginning of the benefit year in which the relevant day occurs or in a subsequent complete contribution year before the relevant day, or

(B) that the claimant has qualifying contributions in respect of not less than 26 contribution weeks in each of the second last and third last complete contribution years before the beginning of the benefit year in which the relevant day occurs, or

(ii) that the claimant has qualifying contributions in respect of not less than 39 contribution weeks in the 12 months immediately before the relevant day, or having been in insurable self-employment, she satisfies the contribution conditions in paragraph (b)

**Other Legislative Intervention:**

*(i) Breach of social welfare or tax law no longer debars an employee from making a claim for redress under the s. 8(11) of the Unfair Dismissals Act 1977 (as inserted by s. 7 of the Unfair Dismissal (Amendment) Act 1993), although the relevant authorities will be notified.*

*(ii) The Protection of Employees (Employers' Insolvency) Act 1984 provides for the payment of any arrears of pay, holiday pay, unpaid court or tribunal awards etc. to employees who are insurable under the Social Welfare Acts. The Minister has, at least on some occasions overlooked social welfare and tax breaches for the purpose of the Act (see Laffoy J. in Re Red Sail Frozen*

*Foods Ltd. (In receivership) [2006] IEHC 328, [2007] 2 I.R. 361). Where this happens, the Minister then becomes a preferential creditor;*

*(iii) Section 73 of the Act of 2005 makes express provision for the payment of occupational injuries benefit by requiring the contract to be treated as having been insurable employment, notwithstanding that the contract purporting to govern the employment was void, or the employed person was not lawfully employed in that employment at the time when, or in the place where, the accident happened or the disease or injury was contracted or received.*

### **Key Arguments:**

The Appellants argued:

1. Ms. Sobhy did not have a lawful “contract of service” in order to qualify for maternity benefit.
  - a. Under Part 1 of Schedule 1 to the Act of 2005, the respondent did not have a “contract of service” thus, despite, having made contributions, the respondent did not have a contract that entitled her to be treated as an “employed contributor” for the purposes of the Act of 2005.
2. The legislative framework has made the contract the which Ms. Sobhy worked under illegal without a work permit, and the trial judge erred in this.
3. Section 5 of the Act of 2004 provides that any person who is illegally present and working in the State is to be treated as “unlawful for all purposes.” Thus, every activity in the State by a person who is not legally permitted “to be present in the State is to be treated as incapable of conferring rights on that person.” (pg. 11)
4. “The decision in *Moyne v. Londonderry Port and Harbour Commissioners* [1986] I.R. 299 [is] an example of a court finding by implication that a power carried a corresponding duty” which would alter “the meaning of the statutory provisions.” (pg. 24)

The Respondent / Ms Sobhy argued:

1. The trial judge was correct, and the question of entitlement must be approached with the test given in *Quinn v. IBRC*. In that judgment, the Supreme Court had a broader approach to the accumulation of benefits under an illegally formed contract than that which was argued by the applicant. This altered the common law approach, deeming that an illegally formed contract does not prevent said contract from having a legal effect. (pg. 20)
2. The definition of a “contract of service” in the Act of 2005 does not expressly “exclude an employment contract entered into by a foreign national who does not have a work permit or permission to be in the State.” (pg. 11)
3. There is a “triangular relationship of mutual obligation,” between the respondent, her employer, and the State. Therefore, there is a nexus that is part-contractual, part-statutory, though wholly “premised on relationships of reciprocal obligation” between the respondent (the employee), the employer, and the State. (pg. 19-20)



## **Decision of the Supreme Court:**

Justice Baker of the Supreme Court gave the final decision in the case and it was agreed by the four other judges sitting.

Justice Baker held that:

- A contract with someone who has no valid work permit is a crime, and therefore it is not a valid contract for the qualification of social welfare. It is because of this reasoning that Ms. Sobhy is not entitled to maternity benefit.
- The State agreed that the PRSI contributions that were made by Ms. Sobhy and her employer would be refunded.
- Under section 5 of the Immigration Act 2004, if a person's presence in the State is not legal then their presence is not legal for all purposes.
- Section 2 of the Employment Permits Act 2003 does not allow people to work in the State without a valid work permit and makes it a crime to make an employment contract without one.
- If a contract is illegal then it will not be considered a "contract of service."
- A contract of service is an employment contract. Therefore, if a contract is illegal, it will not be considered an employment contract.
- There is no existing legislation that would allow a person working under an employment contract without a valid work permit to make or receive social welfare payments.
- If someone pays for social welfare benefits, those payments do not create a contract between the person and the State.
- Since people are obligated to make social welfare payments because of legislation, they are not entering into that relationship with the State of their own free will. The State is also required to provide the social welfare benefits that people pay for, through legislation and did not enter into that relationship freely. In order to create a contract, both parties must enter into it freely.
- Ms. Sobhy's lawyers relied on the *Quinn v. IBRC* case, where the Supreme Court said that just because a contract was illegal did not mean it could not be enforced in order to avoid injustice. This argument does not apply to Ms. Sobhy's case, because there was no contract between someone paying for social welfare benefits and the State.
- The way that current legislation has been written (specifically s.B (12) of the Employment Permits Act 2003), makes it clear that law makers did not want people to receive social welfare benefits if they did not have a valid work permit.

## **Observations:**

The Court highlighted that the decision made may compel employers to employ undocumented workers in order to avoid paying their portion of the PRSI contribution. Where employees are working illegally, they may not be available or in the position to give evidence, thus making it more difficult to persecute employers for such hirings.

This decision also has the potential to prevent all persons who are illegally present or do not have a work permit from accessing any social benefits, despite making the qualifying payments. This may result in these workers having to go to court in order to receive their payments back, while also making it known that they are not legally present or legally working in the State. This could lead to employees never being recompensated for their payments out of fear for the consequences for their illegal status

as a worker and possibly their illegal presence in the State, even if some people may be protected through statutory exceptions.

The decision has far-reaching consequences for many workers in the State who do not have a valid work permit. The implication that persons who are illegally present or do not have a work permit are precluded from accessing maternity benefits can even have an adverse effect on Irish-born children as it may affect the benefits that undocumented immigrants are able to receive during their pregnancy or with an injury etc.

Moreover, this decision may dissuade people from trying to gain the necessary legal permits and visas, as even after obtaining a visa, Ms. Sobhy still did not have access to the maternity benefit because part of the qualifying payments were made while she was not legally present in the State.

Notes:

[pdf \(courts.ie\)](#) – dated April 3 2022- on the rewards of the case

Cases cited to in the decision:

- *Quinn v. IBRC* [2015] IESC 29, [2016] 1 I.R. 1 (pg. 2)
- *Foras Áiseanna Saothair v. Abbott* (unreported, Supreme Court, Egan J., 23 May 1995) (“FÁS v. Abbott”) (pg. 12)
- *Langton v. Hughes* (1813) 1 M. & S. 593 (pg. 14)
- *Lord Tenterden in Wetherell v. Jones* (1832) 3 B. & Ad. 221 (pg. 14)
- *Martin v. Galbraith Ltd.* [1942] I.R. 37 (pg. 14)
- *Gavin Low Ltd. v. William Field* [1942] I.R. 86 (pg. 15)
- *Martin v. Galbraith Ltd* (pg. 15)
- *Wetherell v. Jones* (1832) 3 B. & Ad. 221 (pg. 14)
- *Forster v. Tayler* (1834) 5 B. & Ad. 887 (pg. 15)
- *Hussein v. The Labour Court* [2012] IEHC 364, [2012] 2 I.R. 704 (pg. 15)
- *P.C. v. Minister for Social Protection* [2017] IESC 63, [2017] 2 I.L.R.M 369 (pg. 20)
- *Flemming v. Nestor* 363 U.S. 603 (1960) pg. 21
- *Moyne v. Londonderry Port and Harbour Commissioners* [1986] I.R. 299
- Canadian case of *Still v. Minister for National Revenue* [1998] 1 F.C. 549 (pg. 31)
- *Nelson v. Nelson* [1995]
- H.C.A. 25, [1995] 132 A.L.R. 133 (pg. 34)

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