



THE SUPREME COURT

**S:AP:IE:2021:000025
High Court Record No. 2020/335 JR**

**O'Donnell C.J.
MacMenamin J.
Dunne J.
O'Malley J.
Baker J.**

Between/

SHARDA SOBHY

Respondent/Applicant

- AND -

**THE CHIEF APPEALS OFFICER,
MINSTER FOR EMPLOYMENT AFFAIRS AND SOCIAL
PROTECTION, IRELAND AND THE ATTORNEY GENERAL**

Appellants/Respondents

-AND-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

Judgment of Ms. Justice Baker delivered on the 16th day of December, 2021

1. This appeal raises the net question of law of whether social welfare benefits under the Social Welfare Consolidation Act 2005 (“the Act of 2005”) can accrue to a person who makes the relevant statutory contributions, but who does not have a work permit or permission to be in the State.
2. While in essence the question is a net one, it does raise the rather more complex issue as to whether or not there is any interplay between the common law doctrine of illegality as set out in *Quinn v. IBRC* [2015] IESC 29, [2016] 1 I.R. 1 and its effect on the correct interpretation of the statutory scheme.
3. This appeal has potentially far-reaching consequences as to the entitlement of individuals to benefits under social welfare legislation in circumstances where they have paid PAYE and PRSI, but did not work with the correct authorisation.

Background facts

4. The respondent, Ms. Sharda Sobhy is a national of Mauritius who arrived in Ireland on 5 March 2008 under a scheme designed to attract foreign students, and she studied and worked here lawfully until 2012. A change in the scheme under which she was present in the State required that she apply for a change of status, but her two applications to be allowed to remain were unsuccessful. She remained, and continued to work in Ireland as a chef, but without a work permit. For the purposes of the present appeal, the relevant period is that running from 26 June 2012 to 3 March 2019 when Ms. Sobhy was resident in and working in the State but without permission to remain or any form of work permit.
5. During the entire period in which the respondent worked in Ireland, including that period when she did not have permission to work in the State, she paid PAYE. She and her employer made PRSI contributions into the Social Insurance Fund.
6. Following the delivery by this Court of judgment in *Luximon and Balchand v. Minister for Justice and Equality* [2018] IESC 24, [2018] 2 I.R. 542, a scheme was

established under which she was granted permission to remain and work in the State on 3 March 2019.

7. On 15 December 2018 Ms. Sobhy, who then was eight months pregnant, took maternity leave from her employment. On 11 April 2019, after her status was regularised, she applied for maternity benefit under the Act of 2005. On 4 June 2019, her application was refused by a deciding officer in the Department of Employment Affairs and Social Protection who took the view that, as it was illegal for her to engage in employment in the State during the period when she did not have a valid work permit, her contributions could not validly afford her entitlement to social welfare payments under the Act of 2005.

8. That decision was affirmed on appeal by the first appellant, the Chief Appeals Officer (the “CAO”) on 5 March 2020.

9. It is not in dispute that the respondent, and her employer, had each made the qualifying number of PRSI contributions, nor that the respondent met the other relevant eligibility criteria. The question in the appeal is whether contributions made by her when she did not have a work permit or permission to remain in the State can give rise to entitlement under the Act of 2005.

The High Court decision

10. This is the appeal by the State parties of the order of *certiorari* made by Heslin J. on 10 March 2021, which quashed the decision of 5 March 2020, and remitted the matter to the CAO for further consideration for the reasons set out in his written judgment delivered on 11 January 2021 ([2021] IEHC 93) in which he determined that the CAO had erred in law.

11. The High Court judge determined the legal question arising in the light of the decision of this Court in *Quinn v. IBRC*, and the appellants argue that in so doing he applied the wrong test as that authority concerns the circumstances in which an unlawful contract may be enforced between the parties to that contract. In the alternative it is argued that, if the test in *Quinn v. IBRC* provides an appropriate legal framework, the trial judge erred in

failing to recognise that, in the absence of Ms. Sobhy having a work permit, the legislative framework made illegal for all purposes the contract under which the respondent worked.

12. The trial judge in a careful and detailed judgment did not himself conclude that the respondent had the necessary qualifying contributions, but rather remitted the matter for decision because it was not “self-evident” that a contract of employment made by a person who did not have permission to work in the State under the Employment Permits Act 2003 (as amended) (“the Act of 2003”), could not meet the requirements of the Act of 2005, and nor was it self-evident that a contract made by such a person was unenforceable and void for all purposes, and in particular for the purposes of the Act of 2005.

13. He considered that it was therefore not correct for the deciding officer and the CAO to take as a starting point the proposition that a person working without a permit should be treated for the purposes of the Act of 2005 as not having made qualifying contributions.

The appeal

14. This Court gave leave for a so-called leapfrog appeal by determination on 11 May 2021 ([2021] IESCDET 55).

15. The State parties contend that by reason of the legislative provisions and purpose, PRSI contributions made by a person who does not have permission to work in the State may not be treated as valid contributions for the purpose of obtaining benefits under the Act of 2005.

16. The respondent argues that the trial judge was correct and that the approach to the question of entitlement must have regard to the nuanced test in *Quinn v. IBRC*, and in the light of what is contended to be a broader approach to the accrual of benefits under illegal contracts generally apparent from that judgment of this Court.

The legislative background

17. The legislative provisions are relatively recent or have been recently amended, and are found in three primary Acts, none of which refers to the other. The relevant legislation

concerns non-EU or EEA nationals who work or reside in the State, called generally “foreign nationals”, and the largely unrelated social welfare code.

Employment Permits Act 2003 (as amended): requirement for a work permit

18. Section 2(1) of the Act of 2003 requires that a foreign national who wishes to work in the State shall have the benefit of a work permit granted under its provisions:

“2.— (1) A foreign 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 under section 8 of the Employment Permits Act 2006 that is in force.

19. I will here use the general term “work permit”. Non-EU/EEA students who are permitted to reside in the State to study may hold a Stamp 2 permission to work up to a maximum of 20 hours per week. The respondent did have the benefit of a student work permit but it expired by effluxion of time in 2012 and she remained in the State without permission, and worked without a permit thereafter.

20. Section 2(2) prohibits an employer from employing a non-national who does not have a work permit:

“(2) A person shall not employ a foreign national in the State except in accordance with an employment permit granted by the Minister under section 8 of the Employment Permits Act 2006 that is in force.”

21. Section 2(3) provides that a foreign national who works without a permit, and a person who employs a foreign national without a permit, shall be guilty of an offence:

(3) A person who contravenes subsection (1) (2) or (2C) or fails to take the steps specified in subsection (2B) 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) or (2C) or a failure to take the steps specified in subsection (2B), on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both.

22. Section 2(3A) of the Act of 2003, inserted by the Employment Permits (Amendment) Act 2014, provides that in each case a defence of taking reasonable steps is open to a person charged with the offence, and before that amendment that defence was available only to a person employing a foreign national, and not to the person working without a permit

23. It is accepted for the purpose of this litigation that Ms. Sobhy did not have a work permit for part of the relevant years when she worked in the State, and that without the inclusion of contributions made in that period, she would not meet the qualifying requirements in the social welfare code to obtain maternity benefits.

The Immigration Act 2004: control of entry into the State

24. Control of entry into, and the conditions for residence in, the State is primarily governed by the Immigration Act 2004 (“the Act of 2004”) and for the present purposes the provisions of s. 5 of the Act of 2004 govern entry into and residence in the State of non-EU and EEA nationals.

25. A person who wishes to obtain leave to be in the State must apply under s. 4 of the Act of 2004 for permission under s. 4(1) and the criteria applicable are set out in s. 4(3). One of the reasons for which an immigration officer is entitled to refuse entry into the State is that the non-national “intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the Employment Permits Act, 2003)”.

26. Ms. Sobhy did not have permission to be in the State during the relevant years.

27. Section 5 of the Act of 2004 provides that a non-national, other than a refugee or an asylum seeker, who is in the State without ministerial permission under s. 4 is “for all purposes” unlawfully present in the State:

“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 given under this Act after such passing, by or on behalf of the Minister.

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

Social Welfare Consolidation Act 2005: social welfare benefits and contributions

28. The claim for maternity benefit is made under Chapter 9 of Part 2 of the Act of 2005. Section 47(1) sets out the requirement for eligibility for maternity benefit:

“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.”

29. Maternity benefit is payable by reason of the provisions of s. 47(5) of the Act of 2005

“(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)” (emphasis added)

30. The phrase “employed contributor” is key to the issue at the heart of this appeal, and is found again in s. 48 which provides for the qualifying contributions required in the relevant periods:

“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)”

31. Accordingly, the requirements for entitlement to maternity benefit are that a person be an “employed contributor” under s. 47(5) of the Act of 2005 and have made the necessary number of “qualifying contributions” under s. 48. Ms. Sobhy did make contributions and were it not for the fact that she worked without having the benefit of a work permit during the relevant years, her contributions would have entitled her to maternity benefit. The net question for consideration is whether her employment was insurable under the social welfare legislative provisions or whether her employment, being as it was without a work permit, is capable of being treated as insurable or her contributions treated as qualifying.

32. The question of law in this appeal arises by reason of the contribution conditions set out in s. 48 which requires that contributions be by an “employed contributor”. Section 12 of the Act of 2005 defines an “employed contributor” as a person over the age of 16 and under pensionable age employed in any of the employment specified in Part 1 of Schedule to the Act of 2005. Section 12(1) states:

“(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.”

33. The difficulty presenting arises from the definition of “employment” in Part 1(1) of Schedule 1 to the Act of 2005:

“Employment in the State under a contract of service or apprenticeship, written or oral, whether expressed or implied [...]”

34. The qualifying requirements for the receipt of maternity benefit, therefore, are that the person be employed in the State under a contract of service or apprenticeship, and that PRSI contributions are made or otherwise credited for the qualifying period. The appellant argues that the respondent did not have a lawful “contract of service” to qualify for benefit.

35. The question of statutory interpretation presenting concerns the meaning and effect of ss. 2, 2B and 2C of the Act of 2003 and how that is to be read in conjunction with ss. 4 and 5 of the Act of 2004, and the provisions of the Act of 2005 insofar as they relate to maternity benefit.

Some observations regarding the legislation

36. Save as noted above, the three Acts, enacted within a short period of the other, do not make express reference to the others. The Act of 2005 is silent on the effect of any illegality in the contract of employment. The provisions of the Act of 2003 requiring a non-EU/EEA national to have a work permit can be read in conjunction with the provisions governing the entry into and residence in the State of such persons, as the two statutory schemes have the broad objective of regulating the residence and employment of non-EU/EEA persons and taken together they form a broadly complete statutory scheme for such regulation. Accordingly, in case of interpretative difficulty, they can be read in *pari materia*.

37. However, to make an interpretative connection with the broad social welfare code is more difficult in the absence of an express link. The appellants argue that the trial judge fell into error in failing to recognise the overriding principle stated in s. 5 of the Act of 2004 which is that a person unlawfully present in and working in the State is to be treated as unlawful “for all purposes”, and that this broad and unconditional statutory provision must

be taken to mean that each and every activity in the State by a person who does not have permission to be present in the State is to be treated as incapable of conferring rights on that person. Such a broad proposition is unlikely to be correct at the level of principle. For example, it seems wrong to state as a proposition that a person present in the State without permission could not lawfully enter into a simple contract or sue in negligence arising from, for example, a road traffic accident.

38. Further, as will appear later in this judgment, some limited statutory savers exist by which a person can rely on an illegal contract of employment. For the present, I simply note that the limited statutory intervention would suggest that the Oireachtas was alive to the sometimes harsh consequences of illegality in the employment and social welfare context and the statutory response has not extended to expressly relieving against such arguably harsh consequences for a person in the position of the respondent.

The arguments of the parties

39. Section 2(3) provides that breach of the Act of 2003 creates a criminal offence on the part of both the employer and employee. The State parties accept that the Act does not expressly state that a contract to work made by a person who does not have the benefit of a work permit is illegal, but say that conclusion follows inexorably from the legislative framework: a person working without a work permit commits a crime, and a person without permission to remain is unlawfully present in the State “for all purposes”.

40. The State parties argue that the respondent did not have a “contract of service” within the meaning of Part 1 of Schedule 1 to the Act of 2004, and therefore, irrespective of the amount of contributions she made, she did not have a contract which entitled her to be treated as a “employed contributor” for the purposes of the Act of 2005.

41. The respondent argues that the definition of a “contract of service” in the Act of 2005 does not in its terms exclude an employment contract entered into by a foreign national who does not have a work permit or permission to be in the State.

42. Ms. Sobhy accepts for the purposes of the appeal that her contract with her employer was tainted by illegality by reason of s. 2 of the Act of 2003, but argues that this is not the end point of the consideration. She argues that the choice of the Oireachtas was by s. 2 of the Act of 2003 to create a criminal offence and provide penalties for breach, and that the Act is silent on other possible consequences. She argues that, as a consequence of the decision in *Quinn v. IBRC*, a contract which is illegal is not to be treated as unenforceable or void for all purposes.

43. To consider that argument it will be necessary in due course to examine the decision in *Quinn v. IBRC* as the State parties argue its reach is confined to governing the approach to the enforcement of contracts between the contracting parties, and cannot have wider application.

44. But first I propose examining the few of the older authorities that offer some assistance

Case law on illegality

45. The judgment in *Foras Áiseanna Saothair v. Abbott* (unreported, Supreme Court, Egan J., 23 May 1995) (“*FÁS v. Abbott*”) was relied on by the CAO in coming to her decision. Egan J. held that, under the then relevant provisions of the Social Welfare legislation, a contract which was prohibited by statute could not be termed a “contract of service” under the Labour Services Act 1987 or the Social Welfare Consolidation Act 1981 (“the Act of 1981”). There is no material difference between that provision contained in s. 5(1)(a) of the Act of 1981 and the equivalent provision in the Act of 2005.

46. *FÁS v. Abbott* is a case of some complexity. It concerned a case stated regarding the question of whether Mr. Abbott was engaged by An Chomhairle Oiliúna as an independent contractor or under contract of service. If the employment was as a contractor, the contract was arguably *ultra vires*. The case is most useful for the observations regarding the question as to the correct interpretation of the term “contract of service”, and whether it comprehends

either an illegal contract or *ultra vires* contract. In the High Court, Lardner J. had found that the contract was illegal as it infringed a statutory prohibition against FÁS entering into contracts for the appointment of staff without the consent of the Minister for Labour and the Minister for Finance, but that it was not *ultra vires*, as the relevant provision did not expressly declare that contracts for the appointment of staff without such consent was to be considered illegal.

47. Egan J. approached the question by first considering whether the phrase “contract of service” under the legislation excluded illegal contracts. It is a statement of Egan J. regarding what he described as the “general position” that formed part of the argument in the present case. I will quote it in full:

“If a contract is expressly or impliedly prohibited by statute, the Court will not enforce the contract. In addition, as a question of statutory interpretation, it would seem that if under the Labour Services Act, 1987, a particular type of contract is prohibited then it cannot be regarded as coming within the definition of “Contract of Service” under the 1981 Act. This would seem to be self-evident. If the Oireachtas has decided to prohibit expressly and absolutely a particular type of contract by statute, it would be anomalous if reliance were to be placed on that contract for the purpose of Social Welfare contributions and benefits.” (at p. 8-9)

He then continues in following paragraph:

“In other words, the general position is that where a contract is found to be illegal, whether by reason of the fact that its object is the committing of an illegal act or that it is expressly or impliedly prohibited by statute, it will not be recognised at law.” (at p. 9)

48. That statement expresses, in broad terms, the consequence of illegality for the enforcement of a statutory entitlement. It is *obiter*, as the concern was whether the contract was illegal or *ultra vires*, but reflects the general common law position that a right cannot

flow from an illegal contract or a contract “tainted” by illegality expressed by Lord Ellenborough C.J. in *Langton v. Hughes* (1813) 1 M. & S. 593 and the often quoted old *dicta* of Lord Tenterden in *Wetherell v. Jones* (1832) 3 B. & Ad. 221 that:-

“Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend assistance to give it effect” (at p. 225).

49. This old case law supports the general proposition, long established in the authorities, that the court will not lend itself to the enforcement of an illegal contract.

50. *Martin v. Galbraith Ltd.* [1942] I.R. 37 was decided against the backdrop of the relatively simple claim by the plaintiff for overtime pay, and the Supreme Court considered a number of questions including whether a bread van was a “shop” within the relevant legislation, but it is the question concerning the payment of overtime in respect of time worked in excess of the permitted periods that is relevant here. The decision of the Court was not unanimous. Sullivan C.J., Murnaghan and Geoghegan JJ. considered that an employer could not be said to have entered into an agreement to pay overtime in respect of the excess hours, Meredith and O’Byrne JJ. dissented, on the grounds that the employee had not infringed the law as it was not an offence for an employee to work in excess of the permitted hours. That context was quite different from that prevailing in the present case, where the legislation creates an offence on the part of both employer and employee, with the effect that the employment was itself illegal and a breach of the criminal law.

51. Murnaghan J. at p. 54 considered the case to be answered by reference to the general proposition that parties to a contract which produces illegality cannot sue on foot of that contract, unless the legislation had given a right to sue.

52. Meredith and O’Byrne JJ. dissented. Meredith J. did not regard the contract *per se* as void or illegal, as in no sense could the employee be said to have acted in contravention of the law. O’Byrne J. relied on the fact that the offence was committed by the proprietor of

the business and that the employee should in the circumstances not be penalised by being prevented to recover overtime, especially as the express intention of the legislation was to make provision for ensuring the payment of wages at fair rates to employees.

53. The question of illegality was also the focus of the question in *Gavin Low Ltd. v. William Field* [1942] I.R. 86, where the Supreme Court was considering a cheque paid for a cow later found by a sanitary inspector to be unfit for human consumption. The same majority as had earlier given its judgment in *Martin v. Galbraith Ltd.* considered that the cheque had not been given for an illegal consideration, with Sullivan C.J. concluding that there was no “unity of design and purpose” such that the contract for sale of the cow was part of an unlawful scheme to sell an animal unfit for human consumption. Murnaghan J. considered that no illegality had been established. O’Byrne J., with whom Meredith J. agreed, analysed the common law approach to a civil action on foot of an illegal contract and quoted *Wetherell* and the earlier decision of *Forster v. Tayler* (1834) 5 B. & Ad. 887 and, notwithstanding that he dissented in this case, expressed the general proposition that a contract wholly prohibited by statute would not be enforced by the Court. He considered that the case should be decided by a consideration of the purpose of the legislation and whether enforcement of the contract defeated that purpose.

54. Heslin J. in his judgment held that whilst *FÁS v. Abbott* stated an “important principle” that it was not “the only principle at play”, and considered that the legal landscape had changed as a result of the decision of this Court in *Quinn v. IBRC*. For reasons explained later in this judgment I do not consider that he was correct.

Hussein v. The Labour Court

55. The unfairness and potential exploitative consequence of statutory illegality in the enforcement of an employment contract was highlighted by the judgment of Hogan J. in *Hussein v. The Labour Court* [2012] IEHC 364, [2012] 2 I.R. 704 (“*Hussein v. The Labour Court*”) and it is useful to spend some time on that decision. The notice party was a foreign

national who worked in the State without a permit for a number of years, and the action arose from his complaints for arrears of wages under the relevant statutes made to the Rights Commissioner. The Rights Commissioner upheld the notice party's complaint, and following non-payment by Mr. Hussein, the notice party referred the matter to the Labour Court which upheld the Rights Commissioner findings. Mr. Hussein had relied in defence on the fact that the employee did not have a work permit. On judicial review to the High Court, Hogan J. held that the contract was illegal as the notice party did not have a work permit, and that the Court could not enforce any entitlement to unpaid wages from that contract.

56. As subsequently determined by this Court ([2016] 1 I.R. 180), the true legal question arising concerned the decision of the High Court on a judicial review from the Labour Court, not the background facts. However, the judgment of Hogan J. highlighted the disquiet resulting from an application of the prohibition on working without a work permit, when the statutory illegality was used as a defence by an employer seeking to resist a claim by a former employee who did not have a work permit for wages, holiday and claims founded primarily on the National Minimum Wage Act 2000 and statutory schemes that regulated the conditions of his employment. Hogan J. noted the vulnerability of the employee and the risk that an undocumented migrant in his position could be exploited by an unscrupulous employer against whom no legal recourse was available at law. Nonetheless, he felt constrained by ss. 2(1) and 2(2) of the Act of 2003 and the prohibition thereby created which applies to both employer and employee and by which a criminal offence was created. At the time that judgment was delivered, a defence of reasonable steps was available only to the employer, but that has been remedied by the insertion of s. 3A by the Act of 2014. In passing I note that no argument is made by Ms. Sobhy that she might have avoided prosecution by a defence under s. 3A, but that factor does not have a bearing on this appeal.

57. Hogan J. considered that the contract was void, partly because of the fact that as regards an employee the offence was a strict liability one in respect of which no statutory defence was available. That position has changed, as I have noted, but his reasoning remains valid. I agree with him that the employment contract in that case did not involve what he described as an “incidental illegality” in its performance, but rather the contract of employment was substantively illegal in the absence of a permit. In its clear terms, s. 2 creates an offence of working without a permit, and whether the contract be void or illegal may not matter, as the central question is whether a person who has worked illegally in the State can avail of other statutory remedies available to employees under the social welfare code.

58. The unfair consequences identified by Hogan J. were subsequently remediated in part by legislative intervention: s. 2B of the Act of 2003 inserted by the Employment Permits (Amendment) Act 2014 provides for limited circumstances in which an employee who did not have the benefit of a work permit could nonetheless sue his or her employer for work done or services rendered that have gone unpaid.

59. Other legislative interventions have further ameliorated the position of unlawfully employed persons and reduce the possible incentive for employers to hire them. In particular, I would mention the following:

- (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.

60. In each of these instances, the statutory intervention gives some protection to employees by permitting them to enforce aspects of the contractual relationship with the employer. The State's obligations, however, even under the Protection of Employees (Employers' Insolvency) Act 1984, are limited to helping the employee to get what he/she should have got under a valid contract.

61. Section 73 of the Act of 2005 providing for the payment occupational injuries benefit notwithstanding that the employment contract was illegal might seem to be different, in that the State has imposed upon itself an obligation to pay a benefit. However, even there, the event giving rise to entitlement to the benefit is one that occurred within the employment relationship, whether that relationship was lawful or not. It is relevant that the saver provisions of s. 73 do not render the contract legal or give rise to other entitlements, but rather make an exception for a limited purpose. There are no other provisions that provide for an entitlement to social welfare payments when a person was working or even paying contributions under a contract made illegal by the work permits legislation.

62. Maternity benefit is in fact quite different in that the event - the birth - has nothing to do with the employment. It might well be that an employer could be proceeded against for

refusing to give maternity leave to an unlawfully employed woman, but there is no indication that the State has taken on any obligation with respect to payment of the benefit.

63. Each of these legislative interventions gives some protection to the employees in question, and permits the employee to enforce certain contractual rights such as the right to payment, overtime, holiday pay etc., notwithstanding that the contract is so tainted by illegality that the common law would not enforce it. However, there is no context in which the legislature has bound the executive to accept an unlawful employment relationship as valid for the purpose of founding an entitlement to something outside the employment relationship.

Some comments on contract law: this appeal does not concern the enforcement of a contract

64. The authorities considered above concern the question of the enforcement of a contract by a party to that contract, but the broad sweep of the principles emerging at common law is that, save and insofar as statutory exemptions apply, a court will not lend assistance to an illegal contract. That principle has been understood to have a wide reach even to enforcement questions only tangentially or indirectly contractual.

65. The present appeal does not directly concern the enforcement of the contract of employment, but the respondent argues that there exists a “triangular relationship of mutual obligation” involving her, her employer, and the State. Ms. Sobhy worked for her employer, and on the basis of her wages, made PRSI contributions to the State; the employer was obliged to pay Ms. Sobhy for her work and also to pay PRSI contributions to the State; and the State received the PRSI contributions, on foot of which, providing that the qualifying conditions were met, it was obliged to pay certain benefits in defined circumstances e.g. the birth of Ms. Sobhy’s baby.

66. It is argued therefore that the formation of a contract of service creates a nexus between the employee, the employer and the State. The nexus is part-contractual, part-

statutory, but in every aspect, it is premised on relationships of reciprocal obligation. In that context therefore, the respondent argues that the trial judge was correct and that the common law approach to illegality has been altered by the judgment in *Quinn v. IBRC* to the effect that the illegal formation of the contract does not prevent it having legal effect.

67. In Ms. Sobhy's submission, this nexus is impossible to reconcile with the appellant's position that the State is entirely a stranger to Ms. Sobhy's contract of service, and that the position of the appellants ignores the reality of the various mutual obligations involved.

68. I am not persuaded by the argument that there is a contractual "nexus". It cannot be said, nor has counsel for the respondent sought to argue, that the State has entered into a contract with Ms. Sobhy to pay her maternity benefit provided she meets certain contribution qualifications. The statutory scheme has none of the indicia of a contract.

69. The precise legal relationship between the State and a contributor to a social welfare scheme, or the payment by a person of a contribution mandated by statute was considered in the decision of this Court in *P.C. v. Minister for Social Protection* [2017] IESC 63, [2017] 2 I.L.R.M 369. That appeal concerned the entitlement of the Minister for Social Protection to cease paying the State contributory pension to a person while he was detained in prison. In the course of his judgment, MacMenamin J. with whom the other members of the Court agreed, considered the nature of the entitlement to a State pension and whether, as contended by the State the payment of a State pension was a form of "privilege", or whether on the other hand it was a property right.

70. MacMenamin J. considered that the benefit could not be a "property right" in the constitutional sense, because legislative policy could be varied from time to time in the exercise by the Oireachtas of the distribution of State resources. Under that legislation, in provisions broadly similar to those at issue in the present appeal, a person making contributions is entitled to the State pension when he or she reaches pensionable age and satisfies the contribution conditions identified in the Act. The distinction found helpful by

MacMenamin J. was that between a private pension, deriving from a contractual agreement to make contributions in consideration of the payment of a pension at an identified future time, and a statutory entitlement to payment. MacMenamin J. also referred to a decision of the US Supreme Court in *Flemming v. Nestor* 363 U.S. 603 (1960), and to the decision of the majority of that Court that the social security code did not create a contract between the plaintiff and the State, although he noted there was among the strong dissents a view that the deprivation of that statutory right was in violation of the US Constitution.

71. While the appeal was decided ultimately on the grounds that the withdrawal of a pension amounted to an additional punishment, imposed outside the domain of court proceedings in an indiscriminate way, the decision was not based on a view that the relationship between the appellant and the State sounded in contract, but rather that the social welfare code created a statutory entitlement and not a contractual right (at para. 34).

72. This recent consideration by this Court of the question of the nature of social welfare payments and the right of those making contributions to receive payments is a helpful indicator of the correct view. In my view, none of the indicia of a contract can be said to exist between a person paying social welfare contributions which he or she is obliged to pay by statute, and the obligation of the State to make payments at a rate set by the Oireachtas from time to time to contributors.

73. The essential element of a contract is missing, as it cannot be said that either the employer or the employee have chosen to enter into a contract with the State, and the entire social welfare code and the structure of payments, of contributions and benefits created thereby falls outside any contractual nexus but rather arises from the imposition of an obligation and the creation of a fund (the Social Insurance Fund provided by s. 9 of the Act of 2005) where payments are made at a level and subject to conditions and qualifications determined by legislation from time to time.

74. Obligations are imposed by statute on every person employed to pay PRSI, other social contributions, and income tax. The entitlement to benefits derives from a parallel legislative scheme by which the State provides benefits to those who qualify under the relevant statutory scheme, be they unemployment benefit, maternity benefit, contributory or non-contributory pensions. The obligation of the State to pay is one imposed on the State not by agreement with the individual citizen but by statute.

75. In a very broad sense there might exist a “contract” in the sense in which Rousseau used the expression “social contract”, but the concept of a contract at common law, or even a contract recognised by statute, is of one between parties who freely by the exchange of promises, or a mutuality of payments, agree that a certain state of affairs is binding upon each of them, and that each of them is entitled to enforce those agreed obligations and rights.

76. The element of mutual promises, whether supported by separate consideration or the mutuality of the promises, is missing.

77. Therefore, no coherent argument exists to support a general proposition that Ms. Sobhy is entitled by reason of a contract or so called contractual ‘nexus’ with the State to receive maternity benefits notwithstanding that she has met the qualifying contributions.

Analysis of statutory provisions

78. The legislation makes illegal a contract of employment when the employee does not have a work permit, and provides for a criminal sanction for breach. On a plain reading of the legislation then, the contract of employment is one prohibited by statute, although to borrow the language used by Murray J. (as he then was) in *Hussein v. The Labour Court*, the contract itself did not have an inherently unlawful subject matter, and it is the absence of a work permit rather than any illegal purpose or object that creates the criminal offence.

79. There is nothing in the definition of a contract of employment in the Act of 2005 that expressly precludes a person from being an employee under a contract of service merely on account of the fact that that person does not have a work permit. The Act of 2005 is

concerned with the payment by an employee under such a contract of social welfare contributions and the benefits that accrue from such payment.

80. In addition there is nothing in the Act of 2003 in express terms to suggest that the contract of employment made by a person who does not have the benefit of a work permit is unenforceable generally, but the Act makes it illegal and in breach of the criminal law for a person to work without such permit. It adds nothing to the question of whether the contract of employment is otherwise enforceable or void.

81. The legislative amendments created by s. 2B following the decision in *Hussein v. The Labour Court* create limited rights, but neither those amendments nor the other relieving measures referred to above, are predicated on the existence of a contract of employment. Those amendments create extra-contractual entitlements so that a person suing on foot of its provisions does not need to establish that he or she was lawfully employed in the State. Further, they do not in their terms make the otherwise illegal contract legal. Therefore, it seems to me that the decision in *FÁS v. Abbott* is correct and that a person without a work permit is excluded from the social welfare code, both as regards the obligation to pay PRSI or other social contributions, and any entitlement that might arise therefrom.

82. Further, the legislation expressly provides in s. 2B(12) of the Act of 2003 (inserted by s.4 Employment Permits (amendment) Act, 2014) that any award made in favour of an undocumented foreign national under the amending legislation is not to be treated as reckonable emoluments for the purposes of the Social Welfare Consolidation Act 2005:

“(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.”

83. This is an important provision and suggests the Oireachtas was alive to the possible claim to social welfare or other benefit by reason of the receipt of redress payment, and that it did not intend that an employee who obtained the redress could thereby be deemed to have

made qualifying contributions. the fact that the Oireachtas thought to make these interventions support a view that, in other respects, no rights can flow from the contracts of employment made without a necessary work permit or by a person unlawfully present in the State.

Impermissible implication into the statutory phrase “contract of service”?

84. I am not persuaded by the argument of the respondent that the appellant asks the Court to impermissibly read into the Act of 2005 a requirement that the contract be “legal”. It is argued by the appellants that the decision in *Moyne v. Londonderry Port and Harbour Commissioners* [1986] I.R. 299 was an example of a court finding by implication that a power carried a corresponding duty, an uncontroversial proposition generally, but that the meaning for which the appellants contend would have the effect of altering the meaning of the statutory provisions. It is argued also in that context that the approach to the contribution legislation must have regard to a general presumption said to be found at common law that statutes authorising taxes or charges must be stated in express terms, and strictly construed.

85. I do not consider that in the interpretation of the legislation the Court must add the word “lawful” to properly interpret the legislative phrase “a contract of service”. To require that the legislation expressly states that the contract must be lawful is to ask that the legislation state the obvious. By rendering a contract illegal, the Oireachtas implicitly means that other contracts not governed by the provision are regarded as lawful. The default position must be that a contract is lawful unless the statute provides otherwise.

86. By way of illustration, ss. 51-55 of the Land and Conveyancing Law Reform Act 2009 makes provision for the enforcement of a contract for the sale of land. It does not say, nor in my view does it need to say, that the contract must be lawful. The lawfulness or illegality of the contract might come to be raised as a defence in proceedings, but the starting point must be that any statutory provision regulating that contract seeks to regulate contracts which are otherwise lawful.

The legislative choice: criminal sanction

87. Counsel for the respondent argues that the Oireachtas, by creating a criminal sanction within the Act of 2003, opted for these limited consequences and that its silence as to any other consequences, including consequences that might flow from a payment by an undocumented person and his or her employer of PRSI contributions must be relevant to a consideration of the overall purpose of the legislation, and that her contract of employment is not to be treated as tainted with “serious criminality”.

88. The argument is that the legislative purpose is met by the imposition of a sanction and it does not need to be extended to exclude all undocumented workers from entitlements, as its purpose is to prohibit the employment of a person outside the tax and social contributions net.

89. That argument fails to account for the fact that the Act creates an illegality and the appeal is not met by a simple argument that the illegality carries a consequence and that is the only consequence intended by the Oireachtas.

90. The prohibition in s. 2 of the Act of 2003 which prohibits a foreign national from being in employment in the State without a permit is unconditional and is quite clear in its terms.

91. Still further confirmation of the importance and absolute nature of the prohibition on working without a work permit, or employing a person who does not have the benefit of one, is provided by the creation of an offence by either an employer or employee who contravenes the work permit requirements. Section 2C, inserted by the Act of 2014 extends the prohibition such that a person shall not permit a foreign national to carry out duties for or participate in a training programme without a work permit. The offence may be triable summarily or on indictment, and s. 3A provides that it is a defence to such criminal charge to show that the person concerned took all steps reasonably open to insure compliance with

the requirement to obtain a work permit, or to employ only persons who had the benefit of such permit.

Conclusion on the interpretation of the legislation

92. This analysis leads me to the view that the Oireachtas intended to designate a contract of employment entered into without a work permit by a person unlawfully in the State as illegal for all practical purposes, save as expressly provided by statute. The contract of employment cannot therefore be a qualifying “contract of service” for the purpose of the entitlement to maternity benefit. The Oireachtas intended that only contributions made by persons in employment whose contracts are made or to be performed in a legal manner could obtain benefit under the code.

93. The Act of 2003, by prohibiting both the employer and employee from entering into a contract of employment without a work permit, does reflect a public policy which is part of the overall regulation of immigration and working in the State. The legislation has created a complex structure of visas, permission for students to work in limited circumstances, work permits granted in certain conditions etc. Ms. Sobhy could not meet any of the conditions to obtain a work visa in her circumstances, and the policy of the legislation would be frustrated if a person, having failed to obtain a permit under the very schemes by which this is possible, could still obtain the benefit of social welfare payments or entitlements derived from working in the State notwithstanding.

94. I cannot accept the argument of the respondent that the contract between Ms. Sobhy and her employer was one that was “tainted” by illegality, if by that it is meant the contract was partly legal and partly illegal. This contract was illegal as a matter of statute law. Because of the legislative intervention which permits an action on foot of that contract in certain circumstances, some of the harshness of this conclusion is abated but absent statutory intervention, the contract cannot be regarded as meeting the test that it be a “contract of service” within the meaning of the schedule to the Act of 2005.

95. Much time was taken in the course of the submissions of the respondent to an argument that the decision in *Quinn v. IBRC* used the words “unenforceable” and “void” interchangeably with regard to a contract that was illegal or had been rendered thus by statute. My view is that the respondent is correct that to speak of the contract being void, if by that it is meant that the contract does not exist for any purpose, is both an oversimplification and cannot readily be discerned from the meaning of the Act. Further, the Act makes it illegal to enter into such a contract, which presumes that for a successful prosecution entry into a contract must be established, in the sense in which common law would understand the test for a complete contract, and whilst some imprecision in the language in the Act might be discerned, the purpose of the Act is not to render the contract void but rather to create a criminal offence and thus to make the contract illegal.

96. The analysis is best done not by looking at the enforceability of the contract of employment itself, the exercise engaged by the trial judge, but by analysing the conditions that are to be satisfied by a person before the statutory entitlement to maternity benefit is to be paid.

97. In summary, this appeal is concerned with the narrow question of whether contracts which are unlawful by reason of the Act of 2003, and which are entered into by a person unlawfully in the State by virtue of the Act of 2004, could be regarded as “contracts of service” for the purposes of the contribution requirements in the Social Welfare Code.

98. It is true that the Act of 2003 does not expressly provide that the employment contract is either void or unenforceable. Nevertheless, the conclusion in *FÁS v. Abbott* and later in *Hussein v. The Labour Court* was that such an inference is inescapable and flows as a matter of first principle and from policy that the courts refrain from enforcing an illegal contract. This conclusion seems unavoidable in the present context as the contract of employment was to do that which the legislation sought to prohibit. Ms. Sobhy in essence accepts this.

99. Further, there is nothing in either the Act of 2003 which implies that the criminal sanction is insufficient but rather the broad provision in the Act of 2004 that makes presence in the State without a visa invalid for all purposes favours a strict approach. This leads me to the view that the construction of the phrase “contract of service” in the Act of 2005 must exclude from its ambit a contract of employment made by a person who required, but did not have, either a visa or a work permit, and that the Court will not lend assistance to a claim for social insurance when the policy of the Act of 2003 could be frustrated thereby. Any other view would in my view fail to respect the general terms of the Act of 2003, and those of the Act of 2004.

100. It bears repeating that the present case is not about the enforcement of a contract between Ms. Sobhy and the State, nor about the enforcement of the initial employment contract, but rather whether the Oireachtas intended that contracts which are illegal by reason of the absence of a work permit were properly to be treated as contracts of service for the purposes of the social welfare code.

101. It is true, as is argued by counsel for Ms. Sobhy, that her contract of employment was not void for all purposes, but the exceptions all arise from statutory amendments, particularly that in Part 2 of the Act of 2014. In the event, she had no need to call in aid that amendment, but the exception thereby made cannot be implied to mean that the Oireachtas has not intended to render the contract void. In fact, the creation of statutory exceptions would suggest the opposite to be the case, and that the Oireachtas recognised that *FÁS v. Abbott and Hussein v. The Labour Court* were correct but led to an unjustifiable harshness and could result in an unscrupulous or exploitative employer gaining the benefit of employing an undocumented worker and then relying on a statutory illegality to defend any claim for unpaid wages or other statutory entitlements.

102. This conclusion would seem to resolve the issue in this appeal, and the exercise of construing the legislation leads me to the view that the Oireachtas did not intend to treat as

qualifying contributions those made by a person working under an illegal contract of employment. That conclusion is supported by the fact that a number of legislative amendments have been made to relieve the harshness of such an approach to illegal employment contracts generally, but the Oireachtas has not seen fit to provide any saver provisions to permit Ms. Sobhy to be regarded as having a legal contract of employment or as having made qualifying contributions.

A more nuanced approach to illegality? *Quinn v. IBRC*

103. The trial judge decided the judicial review on the basis of an argument from *Quinn v. IBRC* where this Court favoured a nuanced and complex approach to the enforceability of illegal contracts, and to arrangements which are connected to or could be said to be tainted in one way or another by that illegality. The decision led Heslin J. to conclude that contracts which are illegal are not necessarily void for all purposes.

104. *Quinn v. IBRC* concerned the enforceability of contracts of guarantee entered into in breach of s. 60 of the Companies Act 1963 (as amended) and an argument made by the defendants that certain loans and guarantees were made for a purpose made illegal by statute and therefore, that neither the loans nor the guarantees were enforceable.

105. This appeal does not concern the enforcement of Ms. Sobhy's contract with her employer and for that reason the decision in *Quinn v. IBRC* is irrelevant to the issue of statutory entitlement in the present case. However, I propose to briefly examine the principles from the judgment of this Court as the trial judge drew his answer from those principles and because *Quinn v. IBRC* contains some commentary regarding the correct approach to claims "connected" to an illegal contract, albeit the comments were *obiter*.

106. The complexity of the common law doctrine of illegality is readily apparent from a reading of the judgment of this Court in *Quinn v. IBRC*. The principle articulated by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp 341, is that a court would not "lend its aid to a man who found his cause of action upon an immoral or an illegal act", but as a result a

defendant might obtain an unfair advantage by being able to rely on the principle of illegality, as it is often put “the loss lies where it falls”.

107. As *Quinn v. IBRC* made clear, the modern approach to illegality is more nuanced and a more broad approach is adopted which seeks to do justice between the parties and which asks whether public policy is best served by treating a contract as void for all purposes. Clarke J. (as he then was) put the question thus in *Quinn v. IBRC* at para. 197:

“Taking the two legislative provisions which are at the heart of these proceedings, can it be said that a proper analysis of the respective statutory regimes leads to the conclusion that, as a matter of policy, a court should regard contracts which are tainted by any illegality arising under those two regimes as being unenforceable? Answering that question requires considering the policy of the relevant legislation, but also the important policy requirement which suggests that courts should be slow to become involved in the enforcement of tainted contracts.”

108. Clarke J., in reference to an approach adopted in the case law of England and Wales, thought that the statutory regime should be “independently” assessed to determine whether policy requires particular types of contracts to be treated as unenforceable. The focus is “statute specific but is not case specific”, in that the adverse consequences for the parties in their circumstances is not the focus, but rather the purpose and underlying intention of the legislation in creating the illegality (at paras. 142 *et seq.*)

109. This appeal does not fit neatly into the analysis in *Quinn v. IBRC* because, as I have concluded above, the appeal does not concern an *inter partes* contract claim. In a real sense, the question in this appeal is one concerning a matter collateral to the illegal contract of employment. Notwithstanding this it highlights the need to carry out an analysis of the purpose of the legislation to ascertain whether that is adequately met by a particular treatment of a contract or collateral arrangement.

110. Before I draw a conclusion from the reasoning in *Quinn v. IBRC*, I will briefly refer to two jurisdictions where the question of entitlement to benefit was considered.

The approach in other jurisdictions

111. UK legislation, while it excludes undocumented workers from certain social welfare entitlements, does not exclude them from maternity benefit, and the respondent argues that access to maternity allowance by undocumented workers does not always have to be seen as inconsistent with the general purpose of immigration legislation, because the protection of families as well as young mothers and their babies is socially important. That legislative choice was not made by the Oireachtas.

112. For completeness I note the Canadian case of *Still v. Minister for National Revenue* [1998] 1 F.C. 549 which grappled with a question broadly similar to that in this appeal. That plaintiff was lawfully present in Canada awaiting a decision of her immigration application. She *bona fide* entered into a contract of employment, but because of her failure to obtain a work permit under the Canadian immigration code it was argued that her contract was illegal and could not be treated as giving rise to an entitlement to social security payments when she was out of work. Canadian immigration regulations expressly prohibited a person from entering into and pursuing employment without a work permit, with the effect that the contract was to be treated as prohibited in its formation.

113. The Canadian Federal Court of Appeal took as its starting point that the contract entered into by Ms. Still was one which was illegal on the basis that its performance was expressly prohibited by statute and therefore was void *ab initio*. But Ms. Still was not an illegal immigrant and, the lower Court had found that she had acted in good faith and took into consideration that government documents suggested that she was eligible to apply for employment and/or student authorisations. To deny her the right to unemployment benefits was regarded as disproportionate to the statutory breach where no express penalty was provided for that breach and where a conviction under general criminal law was unlikely

because a good faith defence might have been available. The conclusion drawn by the Canadian Federal Court of Appeal relied on the central fact that she was not an illegal immigrant, and the legislation did not seek to discourage her from working in Canada. That judgment offers little support for the adoption of the same approach to a person who was illegally in the State. It cannot provide an answer to this appeal.

Conclusion from *Quinn v IBRC*

114. In the light of the guidance from the judgment of this Court in *Quinn v. IBRC*, it is appropriate to ask whether, even if the contract of employment is illegal and even if the statutory remedy which provided for the infringement is self-contained (to use the language of Charleton J. in his High Court judgment in *Quinn v. IBRC*), a claim in a matter collateral to that contract and which does not seek to enforce the illegal contract could still be maintained.

115. In part the question is that asked by Charleton J.: is the remedy for infringement contained in the Act of 2003 sufficient to meet the aim of the prohibition on working without a visa? To put it another way, even if the contract of employment is illegal, can social security contributions made in the course of that employment, and where the amount to be paid is calculated in accordance with the remuneration payable under that contract, be capable of qualifying as a contract of service in a wholly different statutory context? Or does the exclusion of Ms. Sobhy from maternity benefit operate as a form of double penalty? Is it unnecessary to achieve the purposes of the Act of 2003, is it in some way disproportionate, or is it to be seen as an additional sanction neither derived from nor expressed in the statutory provisions contained in the Act of 2003?

116. One could say that Ms. Sobhy is not seeking to benefit from her illegal contract of employment but rather from the fact that she made the necessary PRSI contributions which she says are properly treated as qualifying contributions. Although her counsel did not present the case this way, she must in that regard be seeking to argue that the Act of 2003

and the creation thereby of a criminal sanction is self-contained, and that equally the entitlement to maternity benefit under the Act of 2005 is also self-contained and complete.

117. As thus presented the proposition is that the entitlement to maternity benefit is one which must properly be seen as lying outside of the contractual arrangements between Ms. Sobhy and her employer.

118. The question then becomes this: can the entitlement to maternity benefit be seen as a furtherance of the illegal contract, or does it in a way frustrate the operation of the Act of 2003, or to an extent that of 2004?

119. Adopting the approach favoured by Clarke J. in *Quinn v. IBRC*, the statutory regime created by the Acts of 2003 and 2004 contain, and seek to further, the public policy of the regulation of immigration and employment of undocumented persons in the State. That statutory purpose is directed towards the common good and the furtherance of the protection of the borders of the State. I am satisfied that that purpose would be significantly frustrated by a reading of the Act of 2005 that permitted the payment of maternity benefit on foot of PRSI contributions made by a person employed in the State who did not have the benefit of a work permit. I am satisfied that public policy does require that the contract of service to which the Act of 2005 refers must be treated as an illegal contract and that public policy does require that the courts not encourage persons employed in the State who require a permit but who work without one to nonetheless be entitled to the benefit of social welfare payments.

120. I come to this view notwithstanding the approach of McHugh J. in the Australian authority quoted with approval and at some length by Clarke J. in *Quinn v. IBRC* that a court should not always refuse to enforce legal or equitable rights simply because they are connected to an unlawful purpose.

121. However, it is useful to quote, as Clarke J. did, from the judgment of McHugh J. in *Nelson v. Nelson* [1995] H.C.A. 25, [1995] 132 A.L.R. 133 as follows at:

“Importantly, McHugh J. held that a court should not refuse to enforce legal or equitable rights simply because they were connected to an unlawful purpose unless:-

- (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or
- (b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;
- (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and
- (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.” (at para. 132)

122. The important guiding principle for the present appeal is that at b(ii) and it seems to me that the approach of this Court must be to protect the objects or policies of the Acts of 2003 and 2004, and that doing so requires that the Court refuse to enforce any claim by Ms. Sobhy to maternity benefit.

123. For these reasons, even on the nuanced approach adopted by this Court in *Quinn v. IBRC*, the appeal must be allowed.

Consequence of the decision: remit?

124. The High Court judge took the view that the CAO was incorrect to confine the approach to the facts to the test explained in *FÁS v. Abbott* and/or the judgment of Hogan J. in *Hussein v. The Labour Court*. Heslin J. therefore remitted the matter for decision on the basis that Ms. Sobhy had an arguable case that the test applied was overly narrow and failed to recognise that the classic approach to illegality had been varied and had found a new and more nuanced approach in *Quinn v. IBRC*.

125. The respondent says that it was never obvious that, in the light of the judgment of this Court in *Quinn v. IBRC*, the mere fact that the respondent was an undocumented worker

without a work permit excluded her from maternity benefit. Her contract was not itself tainted with criminality or inherently against the public interest. It is also argued that the Act of 2003 provides its own sanction, and that it would be wrong in principle to impose a sanction from a broad interpretation of social welfare entitlements generally.

126. In those circumstances it is argued that the matter is to be returned for further consideration, that she does have an arguable case to make, and that the correct approach for this Court is also to remit the matter for decision to the social welfare appeals officer, but it seems to me that that result is not justified in the circumstances.

127. I agree with the statement taken in its most general sense that the approach of the respondent to the question of whether Ms. Sobhy had made reckonable contributions did not admit of a straightforward answer which could be met by the application of *FÁS v. Abbott* and/or *Hussein v. The Labour Court*, and that whether the legislature intended the consequence of her having worked without a work permit to render her contributions not reckonable was not obvious. However, in the light of the conclusion to which I come, it seems pointless to remit the appeal to the CAO as it flows as a necessary consequence that Ms. Sobhy's contributions could not be treated as reckonable even on a more broad approach to the legislation and a less formulaic application of the classic doctrine.

Comment

128. Ms. Sobhy did not hide her employment in the State during the years when she was working and residing in the State with neither permit to stay nor a work permit. She and her employer paid PRSI and PAYE tax was deducted from her earning and transmitted to Revenue. The appellants have agreed that a necessary consequence of the position they advocate for in the appeal is that the PRSI contributions made by both employer and employee are to be refunded. While this offers some comfort to Ms. Sobhy, the maternity benefit is undoubtedly more financially advantageous to her.

129. But the statutory provisions, and those enacted to provide limited redress to employees, all proceed on the basis that a contract in breach of the express criminal prohibition is not a contract of service for the purposes of qualifying under the social welfare code, and therefore Ms. Sobhy is not entitled to the benefit of maternity payments under that code.

130. The result of this appeal could perhaps unwittingly make it once again attractive for an employer to employ an undocumented person, as employer's PRSI will not have to be paid. In many cases that would be a sufficient attraction even allowing for the possibility that the employer could face criminal sanction and many employers might simply take that chance. In the event of a prosecution, many employees might not be available or in a position to give evidence. That is a consequence that may need further legislative clarity or intervention.