THE HIGH COURT

JUDICIAL REVIEW

[2021] IEHC 93

[Record No. 2020 / 353 JR]

IN THE MATTER OF THE CONSTITUTION OF IRELAND AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

SHARDHA SOBHY

PLAINTIFF

AND

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

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice Heslin delivered on 12th day of January, 2021

Introduction

1. It is not in dispute that, pursuant to s. 300 (2) (iv) of the Social Welfare Consolidation Act, 2005, a deciding officer is entitled to decide on a question as to whether an employment is or was "*insurable employment*" for the purposes of that Act. In the present case, the applicant seeks judicial review of a decision of 05 March 2020 whereby the first named respondent determined that the applicant's employment was not "*insurable*" employment for the purposes of an entitlement to maternity benefit. In circumstance where the applicant was not the holder of a valid Garda National Immigration Card (GNIB) or work permit while working in Ireland during a certain period of years, during which she made PRSI contributions, the first named respondent took the view that such employment is not considered to be legally valid and any PRSI contributions made from this employment are also not considered to be valid. Thus, the first named respondent decided that the applicant could not satisfy the contribution criteria associated with the relevant scheme to qualify for maternity benefit. The first named respondent took the view that, where a non-EU national is employed without a valid work permit, such employment is not legal and, therefore, the employment will not be insurable. Relying on a 1995 decision by the Supreme Court, in *FAS v. Abbot*, (Unreported, 23 May 1995), the first named respondent decided that a contract of employment which contravenes work permit legislation is an illegal contract of employment and, therefore, does not come within the definition of a "*contract of service"* for the purposes of the Social Welfare Consolidation Act 2005, as amended and, thus, is not insurable employment for the purposes of the 2005 Act. It is this decision that the applicant challenges.

A summary of relevant facts

2. The applicant is a citizen of Mauritius. She arrived in Ireland on 05 March 2008 and registered with the Garda National Immigration Bureau ("GNIB").

Lawfully in the State from 2008 - 2012

3. The applicant was lawfully in this State until 26 June 2012, having been granted five consecutive "Stamp 2" permissions to reside during the following periods: -

03 June 2008 to 10 March 2009;

19 May 2009 to 31 January 2010;

10 May 2010 to 10 August 2010;

17 August 2010 to 30 April 2011; and,

30 June 2011 to 26 June 2012.

21 November 2011 letter from the applicant seeking "Stamp 4"

4. In a letter dated 21 November 2011, addressed to the Irish Naturalisation and Immigration Service ("INIS") of the Department of Justice and Equality, the applicant wrote as follows: -

> *"Dear Sir/Madam,*
>
> *I, Mrs. Shardha Mooruth, living in Republic of Ireland since March 2008. I am a citizen of Mauritius, married to Mr. Thirag Mooruth (but separate for 5 years). I have 2 children living in Mauritius. I am a student here bearing the GNIB No. 403279. I have a part – time job here. I do not have any complaints at work, or have committed any offence against the law of Ireland or in Mauritius. I would like to make a request to general immigration section for a Stamp 4. Please do not hesitate to contact me . . . if you need any further information.*
>
> *Kind regards".*

11 May 2012 letter to the applicant refusing application for Stamp 4

5. By letter dated 11 May 2012, the foregoing application to change from Stamp 2 to Stamp 4 status was refused and the INIS letter noted that the applicant currently had permission to remain in the State on Stamp 2 conditions until 26 June 2012. The letter concluded by stating that: -

> *"The onus remains on you to keep your permission to remain in the State up to date at all times".*

20 July 2016 letter from the applicant

6. In a letter received on 20 July 2016, the applicant again sought to change her immigration status, stating, *inter alia*, the following: -

> *"I am writing to you in relation to my visa. For the time being my visa has expired. I came to Ireland on the 5th March 2008. Ever since, I've been working and contributing towards Irish economy. I have been paying my PAYE and PRSI taxes on regular basis. I was expecting a new law to be out for the undocumented in this country but unfortunately this has not happened to date yet. I am living in this country for the past nine years and I highly consider Ireland as my home country. I would like to continue living in this country with all my paperwork in order. Sir/Madam, it would be highly appreciated and I would be very grateful if you can*

grant me my visa extension so that I could stay in this country legally. I apologise for any and all inconvenience as I had and I have no intention to remain in the country without a visa. It was my situation who forced me to do so. You will find photocopy of my P60, P21 and all my visa stamps since I entered the country. I look forward to your reply.

Regards".

05 August 2016 letter to the applicant

7. By letter dated 05 August 2016, the foregoing application was refused in a letter from the Residents Division of the INIS which stated *inter alia*: -

> "Because you did not have permission when the application was received, the question of amending or extending it does not arise. Accordingly, your case will not be dealt with under s. 4 of the 2004 Immigration Act".

The said letter concluded with the following paragraph: -

> *"Please be informed that it is illegal under the Immigration Act 2004 to reside in the State without permission from the Minister for Justice and Equality. A person found guilty of such an offence is liable, under s. 13 of the Act of 2004, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding twelve months, or both. As you do not have current immigration permission you are not entitled to work".*

23 November 2016 letter from applicant's solicitors

8. By letter dated 23 November 2016 a firm of solicitors who were then representing the applicant, wrote to the Residents Division of the INIS requesting a review of the decision communicated in the letter from the INIS dated 05 August 2016. Among other things, the 23 November 2016 letter submitted that the applicant completed only four years on student conditions in the State. The letter also referred, *inter alia*, to a report entitled "New immigration regime for full-time non-EEA students: final report and recommendations of the interdepartmental committee" as well as to "Guidelines for non-EEA national students registered in Ireland before 1 January 2011". The said letter concluded with the following: -

> *"Nothing in either the Report nor the Guidelines specifically addresses the situation of persons who became undocumented after completing less than the maximum time allowed on student conditions. We therefore respectfully submit that your decision was flawed, and request a review of same".*

9. At this juncture it is appropriate to point out that it is unknown whether a response was ever provided to this 23 November 2016 letter and nothing turns on any absence of any response for the purposes of the decision which this Court has to make.

October 2018 Scheme

10. In or about October 2018 the Minister for Justice launched a scheme to allow certain non-EEA nationals, who held a valid student permission during the period 01 January 2005 to

31 December 2010 and who had not in the intervening period acquired an alternative immigration permission, to apply for permission to remain in the State. The applicant applied under the said Scheme.

26 February 2019 letter granting temporary permission to reside on "Stamp 4S"

11. On 26 February 2019 the INIS wrote to the applicant, referring to her application which was made under the Special Scheme for Students from 01 January 2005 to 31 December 2010. The said letter informed the applicant that the Minister for Justice and Equality had decided to grant her temporary permission to reside on Stamp 4S conditions for a period of two years from the date of the letter. The permission granted as of 26 February 2019 was on the basis of conditions set out in the said letter including the requirement that the applicant register with her local Immigration Officer as soon as possible. It is not pleaded in the case before this Court that the applicant has breached any of the conditions in respect of the Stamp 4S permission granted with effect from 26 February 2019. The applicant's passport shows her Stamp 4S, the applicant having attended at Kildare Garda Station. It is not in dispute that the applicant has been lawfully residing in this State from 26 February 2019 onwards and that the applicant is permitted to reside in the State up to 26 February 2021.

The applicant's employment – 2008 to 2019

12. It is not in dispute that, between 2008 and 2019, at a time when the applicant did not have permission to reside or work in the State, she engaged in paid employment. Among the documents exhibited by the applicant is a "P60 Certificate of pay, tax, Pay Related Social Insurance, Universal Social Charge and Local Property Tax year ended 31 December. 2018" naming her as the employee and naming her employer as "Cross Retail Supervalu Ltd." Among other things, this P60 specifies the applicant's PPS number and details *inter alia*, total pay, tax, USC and "PRSI in this employment", identifying both the "employee's PRSI" as well as "Total (employer plus employee) PRSI". The P60 certificate concludes with the following words: -

> "TO THE EMPLOYEE - This is a valuable document.
>
> You should retain this document carefully as evidence of tax, PRSI, Universal Social Charge and LPT deducted.
>
> Note: There is a four – year time limit on claiming refunds of tax or Universal Social Charge.
>
> You may also require this document as evidence if you claim social welfare benefits within the next two years".

13. It is not in dispute that, between 2008 and 2019, inclusive, the applicant made numerous social welfare contributions. Among the applicant's exhibits is a 31 May 2019 letter from the Department of Employment Affairs and Social Protection which sets out the applicant's social insurance record. The said letter from the second named respondent's department confirms that the applicant made the following number of paid contributions during the following 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

The applicant's maternity leave and application for maternity benefit

14. The applicant commenced maternity leave on 15 December 2018 and gave birth on 09 January 2019. On 11 April 2019, the applicant applied for maternity benefit. It is not in dispute that the application for maternity benefit was made at a time when the applicant was lawfully resident in the State.

Eligibility criteria for maternity benefit

15. The relevant eligibility criteria for maternity benefit can be found in ss. 47 – 51 of the Social Welfare Consolidation Act, 2005. The first of these is that a doctor has certified that the woman in question has been confined, namely, that she has undergone labour resulting in the birth of a living child. This is not disputed. Another condition is that her employer has certified that she is entitled to maternity leave under the Maternity Protection Act 1994. This is not in dispute. A third condition is that the applicant has paid 39 PRSI contributions in the twelve months prior to the first day of maternity leave. This is not disputed. A fourth condition is that the applicant was an employed contributor, namely, that she was employed under a contract of service.

"employed contributor"

16. As the Interpretation section of the 2005 Act makes clear: - " '*employed contributor' has the meaning given to it by section 12(1) of the 2005 Act".* Section 12(1) which is quoted, verbatim and in full elsewhere in this judgment, states *inter alia* that every person over the age of sixteen and under pensionable age who 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 the 2005 Act. It is accepted by the respondent that nothing in the 2005 Act or in any Schedule thereto states that, where the employee lacks permission to reside or to work in the State, they are not to be treated as employed or are not to be treated as an employed contributor for the purposes of the 2005 Act. Part 1 of Schedule 1 refers *inter alia* to employment in the State under a contract of service. It cannot be disputed that, at all material times, the applicant's employment comes *prima facie* within the definition in Schedule 1, Part 1.

17. The respondent says that the applicant's contract of employment was an "illegal" contract but acknowledges that nowhere in Schedule 1, Part 1 does it say that a person who is employed under a contract of service at a time when they lack the relevant permission to reside and to work in the State is someone whose contract of employment is illegal or void or unenforceable or that such a contract falls outside Schedule 1 Part 1 of the 2005 Act. It is accepted that the applicant's situation does not come within any of the categories of "Excepted Employments" which are specified in Schedule 1, Part 2 of the 2005 Act. It is also common case that nowhere is it stated in Schedule 1, Part 2 that "Excepted Employments" include contracts of service where the employee in question does not, at the time of the employment, have permission to reside or work in the State.

04 June 2019 decision by Deciding Officer to refuse application for maternity benefit

18. On 04 June 2019 one of the second named respondent's deciding officers refused the applicant's claim for maternity benefit. The sole basis for the refusal was that, because the applicant did not have a valid work permit, her employment was not insurable.

23 June 2019 appeal by the applicant

19. On 23 June 2019, the applicant appealed this decision to the Social Welfare Appeals Officer within the second named respondent's Department. The grounds of appeal were stated as follows: "*The Department erred in law in determining that the appellant was not in 'insurable employment'. Further grounds to follow*". It is not in dispute that no further submissions were made by or on behalf of the applicant prior to the decision in respect of the aforesaid appeal.

05 March 2020 decision

20. By letter dated 05 March 2020, sent by the social welfare appeals office to the applicant's solicitors, the decision of the first named respondent was set out and, being the decision challenged in the present proceedings, it appropriate to quote same verbatim and in full, as follows: -

> *"Dear Sirs,*
>
> *The Chief Appeals Officer has asked me to write to you about the Maternity Benefit appeal of Ms. Shardha Sobhy . . . and to tell you that the appeals officer's decision is as follows: -*
>
> *The appeal is disallowed.*
>
> *The text of the Appeals Officer's formal decision is set out below.*

The appellant's claim for Maternity Benefit was received in the Department of Employment Affairs and Social Protection on 11/04/2019 via the online application process. The appellant confirmed in the application that her baby was born on 09/01/2019. The appellant went on to confirm she commenced her leave on 15/12/2018 and that the leave was to end on 15/06/2019.

On the file provided by the Department to the Appeals Office, the Appeals Officer has noted that the appellant submitted a one – page colour photocopy of her Republic of Mauritius. There are no GNIB stamps on the passport copy provided.

On 12/04/2019 the Department wrote to the appellant requesting further information as detailed below,

(1) A copy of your most recent and valid GNIB (Garda National Immigration Bureau) card/work permit. If you have recently become an EU citizen you can provide a copy of your current EU passport instead.

(2) A copy of your current and/or previous passport, which includes all stamps relating to any GNIB cards held within the last 3 years or to the date of naturalisation.

(3) A copy of all work permits held within the last 3 years (if applicable).

Mrs. Sobhy's claim was disallowed on 14/06/2019 and the Deciding Officer gave the following reasons for the decision:

> *'I regret to inform you that your claim has been disallowed as you do not satisfy the employment conditions for the scheme.*
>
> *Maternity Benefit is paid to a person who takes maternity leave from work. You must have a certain number of paid PRSI contributions on your social insurance record and be in insurable employment up to the first day of your maternity leave. The last day of work must be within 16 weeks of the end of the week in which your baby is due.*
>
> *As you do not have a valid work permit while you were working in Ireland, your employment was not insurable and you are not entitled to Maternity Benefit'".*

The Department also issued another letter, also dated 04/06/2019 to the appellant stating:-

> *"We have been unable to establish that you were the holder of a work permit while you were working in Ireland and therefore you were not engaged in insurable employment in accordance with the Social Welfare Consolidation Act 2005.*

Since we have been unable to determine that the employment you engaged in was insurable, I regret to inform you that your claim for Maternity Benefit has been disallowed.

Abbey Law Solicitors made an appeal submission on behalf of the appellant dated 23rd July 2019 and explained the delay in submitting the appeal was due to the appellant's solicitor changing firm and hoped that the appeal would be accepted. They also provided a signed Authority to act form and the appellant's appeal submission dated the 22nd July 2019 which stated,

'The Department erred in law in determining that the appellant was not in 'insurable employment' for the grounds to follow".

The next correspondence received from Abbey Law on file is their letter dated 09 October 2019 to the Appeals Office in Dublin stating: -

'We refer to the above matter and to our appeal dated 23rd July 2019. We have not received any acknowledgment to date. We would be obliged if you could acknowledge this and our appeal'.

No further evidence or information was provided by way of supplement to the appeal of 23/07/19.

I have noted the appellant's grounds of appeal and the decision issued by the Department of Employment Affairs and Social Protection.

The appellant in this case has failed to submit confirmation that she was the holder of a valid Garda National Immigration Card (GNIB) or work permit while working in Ireland. Without a GNIB card/work permit, Ms. Sobhy's employment during the period of employment is not considered to be legally valid and any PRSI contributions made from this employment are also not considered to be valid.

Consequently, she could not satisfy the contribution criteria associated with the Scheme as she did not have the requisite number of valid contributions needed to qualify in any of the required contribution combinations as set out hereunder:

To qualify for Maternity Benefit, a claimant must satisfy one of the following contribution conditions:

(a) 39 PRSI contributions paid in the 12 months prior to the first day of maternity leave (25/07/2017 in this case), OR

(b) 39 PRSI contributions paid since first started work AND 39 PRSI contributions paid or credited in the Relevant Tax Year (2015 in this case) or in the tax year subsequent to the relevant tax year (2016) OR

(c) 26 PRSI contributions paid in the Relevant Tax Year (2015) AND 26 PRSI contributions paid in the tax year prior to the Relevant Tax Year (2014 in this case).

PRSI classes A, E, H and S are reckonable for Maternity Benefit.

Where a non-EU national is employed without a valid work permit neither the employer nor the employed person is free to enter into a contract of employment. Such employment is not legal and therefore the employment will be ruled by Deciding Officer not to be insurable as has happened in this instance.

The reason why such contributions are not valid is because a contract of employment which contravenes the work permit legislation is an illegal contract of employment and therefore does not come within the definition of a 'contract of service' for the purposes of the Social Welfare Consolidation Act 2005 as amended. The employment is therefore not insurable for the purposes of this Act

This is the position as set out in the decision of the Supreme Court in the case of FAS v. Minister for Social Welfare, Abbot and Ryan, (Unreported, 23 May 1995). In that case, the Supreme Court had to consider whether the term 'contract of service' in the corresponding section of the Social Welfare (Consolidation) Act 1981 included an illegal contract or an ultra vires contract.

The Supreme Court held that "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 . . .".

The Court found that in the absence of any statutory extension of the definition of 'contract of service' under the social welfare legislation to include an illegal contract, no contribution or benefit could accrue under the social welfare legislation.

Having considered the evidence before me and the context of the legislation and the attendant case law I find that the appellant has not provided confirmation that she was the holder of a valid contract of service for the period in question and consequently cannot satisfy the contribution requirements of the Maternity Benefit scheme for her claim of 11/04/2019.

In the circumstances, the appeal is disallowed . . .." (emphasis added)

Relevant Legislation

21. A number of statutory provisions are of relevance to the present proceedings and for the sake of clarity these are set out as follows:

"SOCIAL WELFARE CONSOLIDATION ACT 2005

Interpretation.

…

"employed contributor" has the meaning given to it by section 12(1);

"employer's contribution" has the meaning given to it by section 6(1)(a);

…

CHAPTER 2

Employed Contributors and Employment Contributions

Employed contributors and insured persons.

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.

(2) Regulations may provide for including among employed contributors persons employed in any of the employments specified in Part 2 of Schedule 1.

…

CHAPTER 9

Maternity Benefit

Entitlement to and duration of 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, or it is certified by a registered medical practitioner or otherwise to the satisfaction of the Minister that a woman has been confined,

(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.

…

Conditions for receipt.

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),

…

Disqualifications.

50. - Regulations may provide for disqualifying a woman for receiving maternity benefit where –

(a) during the period for which the benefit is payable, she engages in any form of insurable employment, insurable (occupational injuries) employment, insurable self-employment, any employment referred to in paragraph 1, 2, 3 or 6 of Part 2 of Schedule 1 or any self-employment referred to in paragraph 1 or 5 of Part 3 of Schedule 1, or

(b) she fails, without good cause, to attend for or to submit herself to any medical examination that may be required in accordance with regulations made under this section.

…

SCHEDULE 1

EMPLOYMENTS, EXCEPTED EMPLOYMENTS AND EXCEPTED SELF-EMPLOYED CONTRIBUTORS

PART 1

EMPLOYMENTS

1. *Employment in the State under a contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise or without any money payment.*

2. *Employment under such a contract referred to in paragraph 1—*

   (a) as master or a member of the crew of—

      (i) any ship registered in the State, or

      (ii) any other ship or vessel of which the owner or, where there is more than one owner, the managing owner or manager, resides or has his or her principal place of business in the State, or

   (b) as captain or a member of the crew of—

      (i) any aircraft registered in the State, or

      (ii) any other aircraft of which the owner or, where there is more than one owner, the managing owner or manager, resides or has his or her principal place of business in the State.

2A. *(a) Employment, between 1 January 2007 and 31 December 2011, under a contract referred to in paragraph 1 by—*

   (i) a national of the Republic of Bulgaria or Romania, or

   (ii) a permitted family member or qualifying family member of a national of the Republic of Bulgaria or Romania, whether or not such employment was in accordance with an employment permit referred to in section 2(1) of the Employment Permits Act 2003.

…

SCHEDULE 1

PART 2

EXCEPTED Employments

1. *Employment in the service of the husband, wife spouse or civil partner of the employed person.*

2. *Employment of a casual nature otherwise than for the purposes of the employer's trade or business, and otherwise than for the purposes of any game or recreation where the persons employed are engaged or paid through a club.*

3. *Employment by a prescribed relative of the employed person, being either employment in the common home of the employer and the employed person or employment specified by regulations as corresponding to employment in the common home of the employer and the employed person.*

4. *Employment specified in regulations as being of such a nature that it is ordinarily adopted as subsidiary employment only and not as the principal means of livelihood.*

5. *Employment specified in regulations as being of inconsiderable extent.*

6. *Employment under a scheme provided by the Minister and known as Community Employment, where that employment began before 6 April 1996.*

7. *Employment in the State in a company under a written or an oral contract of service, whether expressed or implied, where the employed person is—*

   (a) the beneficial owner of that company, or

   (b) able to control 50 per cent or more of the ordinary share capital of that company,

   either directly or through the medium of other companies or by any indirect means.

…

EMPLOYMENT PERMITS ACT 2003

…

Employment of non-nationals.

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.

(1A) Subsection (1)(b) applies whether the employment concerned results from —

   the foreign national ' s being employed in the State by a person,

(aa) the foreign national being employed outside the State by a foreign employer and being required by the foreign employer to carry out duties for, or participate in a training programme provided by, a person in the State who is connected to the foreign employer,

(b) his or her being employed by a person outside the State (the ' contractor ') to perform duties in the State, the subject of an agreement between the contractor and another person, or

(c) any other arrangement.

(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.

(2A) Where a person (the ' first person ') enters into an agreement with another person (the ' second person ') whereby the second person agrees to cause, or arrange for, services (whether of a specific or general kind) to be rendered on behalf of the first person and either —

(a) it is customary in the trade or business in which the agreement is entered into, or

(b) the circumstances in which the agreement is entered into are such that it must reasonably have been in the contemplation of the parties to the agreement,

that the means to be used by the second person for complying with the agreement would consist of or involve, in whole or part, the services being rendered by persons employed by a person other than the second person (and whether or not that person is in a contractual relationship with the second person) then, if those means are used, it shall be the duty of the first person to take the following steps.

(2B) Those steps are all such steps as are reasonable to ensure, in so far as one or more of the persons so employed is or are a foreign national or foreign nationals employed in the State for the purpose of rendering those services, that that foreign national or each of those foreign nationals is employed in accordance with an employment permit granted by the Minister under section 8 of the Employment Permits Act 2006 that is in force.

(2C) A person shall not permit a foreign national who is employed outside the State by a foreign employer to carry out duties for, or participate in a training programme provided by, that person where that person is connected to the foreign employer, except in accordance with an employment permit granted by the Minister under section 8 of the Employment Permits Act 2006 that is in force.

(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.

(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).

(4) It shall be a defence for a person charged with an offence under subsection (3) consisting of a contravention of subsection (2) or (2C) to show that he or she took all such steps as were reasonably open to him or her to ensure compliance with subsection (2) or (2C).

…

Civil proceedings

2B. (1) This section applies to a foreign national who, in contravention of section 2(1) —

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

(b) was in employment in the State,

without an employment permit granted by the Minister under section 8 of the Act of 2006 that was in force and who is no longer in such service or employment.

(2) Where an employer referred to in section 2(1)(a) or, in the case of employment referred to in section 2(1)(b), a person referred to in section 2(1A)(a) or a contractor referred to in section 2(1A)(b) —

(a) has not paid a foreign national to whom this section applies an amount of money in respect of work done or services rendered during the period for which the foreign national was in the employment or service without an employment permit, or

(b) has paid an amount of money that was, having regard to the work done or services rendered during such period, an insufficient amount of money,

the foreign national or, in accordance with subsection (5), the Minister, may institute civil proceedings for an amount of money to recompense the foreign national for such work done or services rendered.

…

(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.

…

IMMIGRATION ACT 2004

…

Permission to land.

4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").

Presence in State of non-nationals.

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 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.*

The relief sought by the applicant in the present proceedings

22. It is the aforementioned decision of 05 March 2020 which the applicant seeks to quash in the present proceedings. By order made on 03 June 2020, the applicant was granted leave to apply for the reliefs set out in para. D of the applicant's statement of grounds, as filed on 03 June 2020, on the grounds set out at para. E of the said statement. The relief sought by the applicant is as follows:

1. An order of Certiorari quashing the decision of the first named Respondent, of 5 March 2020, disallowing the Applicant's Maternity Benefit appeal.

2. A declaration that the first named Respondent erred in law in the decision of 5 March 2020, in determining that the Applicant's employment was not insurable, in the premises that the Applicant had a valid contract of employment in respect of which Pay Related Social Insurance (PRSI) was discharged.

3. *A Declaration that the first named Respondent's Appeals Officer erred in law and/or exceeded her/his jurisdiction in the decision of 5 March 2020, by determining that the Applicant's contract of employment was not legal, in the premises that such a finding is reserved by the Constitution and statute to a judge or jury, following prosecution by the relevant authorities. And even in the event of such a finding and conviction, the additional loss of entitlement to Maternity Benefit would constitute an impermissible and unlawful punishment.*

4. *A Declaration that Superior Court precedent, cited by the first named Respondent in the decision of 5 March 2020, is no longer good law, and/or was incorrectly applied in the premises that respectively: the Applicant's entitlement to Maternity Benefit must be viewed in the context of the modern regulatory environment and applied with the principle of proportionality and; there was nothing inherently immoral or inherently against the public interests in recognising the Applicant's employment.*

5. *In the alternative and without prejudice to the foregoing, a Declaration that Superior Court precedent, cited by the first named Respondent in the decision of 5 March 2020, applied on its own, as it was, in such a restrictive manner, with no regard to any other factors, such as the modern regulatory environment, proportionality and more recent precedent, gave rise to a fettering of discretion on the part of the first named Respondent, in the premises that the first named Respondent's Appeals Officer clearly believed himself/herself to be bound by it and it alone.*

6. *A Declaration that the first named Respondent's Appeals Officer erred in law in the decision of 5 March 2020 in determining that the Applicant was not entitled to Maternity Benefit, in the premises that the Applicant had a valid contract of employment in respect of which Pay Related Social Insurance (PRSI) was discharged and accepted by this State and it is a general principle of EU law that a Member State cannot take such social security contributions in respect of which there is no return for the worker and, pursuant to EU law, where PRSI and income tax are accepted by a Member State, that Member State, that Member State ought to honour those contributions.*

7. *In the alternative and without prejudice to the foregoing, a Declaration, that if the Applicant's employment is excluded from* inter alia *Part 1 of Schedule 1 of the Social Welfare Consolidation Act 2005, the said provision, and any other such provision, is repugnant to the Constitution, in the premises that Maternity/Benefit PRSI contributions are a property right for the purpose of Articled 40 and 43 of the Constitution and/or the imposition by statute of a prohibition on such a payment/recognition constitutes an unlawful and impermissible punishment contrary to Article 34 and 38 of the Constitution.*

8. *In the alternative and without prejudice to the foregoing, a Declaration, pursuant to s. 5 of the ECHR Act 2003, that if the Applicant's employment is excluded from* inter alia *Part 1 of Schedule 1 of the Social Welfare Consolidation Act 2005, then*

the said provision, and any other such provision is incompatible with the ECHR Act 2003, in the premises that Maternity Benefit is within inter alia *the scope or ambit of Article 1 of Protocol 1 and Article 8 of the ECHR Act 2003 and therefore must be administered without discrimination on any of the grounds identified in Article 14 of the ECHR Act 2003 and/or is disproportionate, arbitrary and contrary to reason and fairness and/or constitutes an unlawful punishment contrary to Article 6 of the ECHR Act 2003.*

9. *If necessary, an order pursuant to Order 84, Rule 27(4) of the Rules of the Superior Courts, remitting the matter to the Respondent with a direction to reconsider it and reach a decision in accordance with the findings of this Honourable Court.*

10. *Damages.*

11. *Further or other order.*

12. *Liberty to apply.*

13. *Costs.*

The applicant's case

23. Detailed written legal submissions were prepared on behalf of the applicant and I am very grateful for same which I have carefully considered. These were supplemented by skilled oral submissions. It is fair to say that, in bringing the present case, the primary contention on behalf of the applicant is that the first named respondent's decision of 05 March 2020 is vitiated by error of law and should be quashed, with particular reliance being placed on the Supreme Court's decision in *Quinn v. IBRC* [2016] 1 IR 1. Given how fundamentally important it is to the applicant's case, the Quinn decision is one I will examine in considerable detail during the course of this judgment. For present purposes, it is appropriate to say that, among the submissions made on behalf of the applicant is that, relying on the *Quinn* decision, an illegal contract is not necessarily void as a matter of Irish law and that the proper approach which the first named respondent should have taken, but did not take, was an approach which took into account the principles and the test outlined by the Supreme Court in *Quinn*, rather than the first named respondent having based their decision on a principle derived from an earlier Supreme Court decision of May 1995 in the case of *FAS v. Abbot* (Supreme Court, Unreported, Egan J., 23 May 1995). In addition to the primary argument made on behalf of the applicant, a range of other submissions were made, including with reliance on Article 40.3.2 of Bunreacht na hÉireann as well as with reference to ECHR Act 2003 provisions, in addition to arguments based on Article 34.1 of the Constitution.

The respondents' case

24. As is clear from the statement of opposition, dated 30 November 2020, and from the comprehensive written submissions furnished on behalf of the respondent as well as the oral submissions made with such skill by Ms. Meenan SC, the respondent's position can be summarised as follows. The applicant did not have a valid GNIB card or work permit while working in the State and, without the foregoing, her employment was not considered to

be legally valid and, consequently, any PRSI contributions made from the employment were also not considered to be valid. Accordingly, the applicant could not satisfy the contribution criteria associated with the Maternity Benefit scheme as she did not have the requisite number of valid contributions needed to so qualify. The respondent relies on s. 4 of the Immigration Act 2004, subs. (1) of which provides that an immigration officer may, on behalf of the Minister, give a non-national a document or stamp on her passport authorising her to be in the State whereas subs. (2) imposes a duty on non-nationals to apply for such permission and subs (3) entitles an immigration officer to refuse a non-national entry to the State on the basis of, *inter alia*, failure to have a valid employment permit within the meaning of the Employment Permits Act 2003. The respondent submits that the operation of such powers was described by MacMenamin J. as *"a fundamental aspect of State sovereignty"* in para. 22 of the Supreme Court's decision in *Luximon v. Minister for Justice* [2018] 2 IR 542 at 554. The respondent also relies on s. 5 of the Immigration Act 2004 which provides that a non- national who is in the State without such ministerial permission, other than an asylum seeker or refugee "*…is for all purposes unlawfully present in the State".*

25. The respondent also submits that s. 2 of the Employment Permits Act, 2003, as amended, provides that a foreign national shall not enter the service of an employer or be in employment in the State except in accordance with an employment permit granted by the Minister pursuant to s. 8 and that a person shall not employ a foreign national without such a permit. The respondent points out that persons who have been granted a stamp for permission to remain in the State are granted a concession whereby they do not require a work permit for the duration of the permission, whereas non-EEA students who are permitted to reside in the State on a Stamp 2 immigration permission are allowed to avail of a concession whereby they may work without a work permit up to a maximum of 20 hours per week. The respondent submits that, in circumstances where it is acknowledged that the applicant did not have permission to work in the State between 27 June 2012 and 25 February 2019, her contract of employment was "illegal", being a prohibited contract rendered illegal by operation of the Employment Permits Act.

26. The respondent points out that, in order to qualify for Maternity Benefit, an employed claimant must be employed pursuant to a "contract of service" and submits that, because her contract was rendered illegal by the Employment Permits Act it was, therefore, *not* a contract of service for the purposes of the Social Welfare Acts. Accordingly, the respondent submits that the applicant was not engaged in insurable employment during the relevant period prior to the birth of her child and, therefore, has no entitlement to maternity benefit.

The respondents' reliance on the FAS decision

27. The decision of 05 March 2020, which is challenged in the present proceedings, is one in which the deciding officer referred to *FAS v. Abbott and Ryan* (Supreme Court, Unreported, Egan J., 23 May 1995). It is clear from the respondents' pleaded case and from the submissions on behalf of the respondents that the *FAS* decision remains the principal authority on foot of which the respondents' stance is based. The respondents

point out that, in considering the question of whether the phrase "contract of service" under the social welfare legislation excludes illegal contracts, Egan J. stated *inter alia* that "*If a contract is expressly or impliedly prohibited by statute, the Court will not enforce the contract*". The respondent submits that although not expressly prohibited by the terms of the Social Welfare Consolidation Act 2005 ("the 2005 Act"), the applicant's contract of employment is impliedly prohibited by statute. The respondents also rely on the following analysis by Egan J in the FAS case.: -

> *"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 the contract for the purpose of social welfare contributions and benefits. 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. In the absence of any statutory extension of the definition of 'Contract of Service' under the social welfare legislation, it would seem that, were the finding that the contracts in question were prohibited under the Labour Services Act 1987 to be upheld, no contribution or benefit could accrue under the 1981 Act".*

28. Relying on the foregoing dicta, the respondents submit that the applicant's contract of employment was "fundamentally illegal" and, in skilled and sophisticated submissions, counsel for the respondents asked, rhetorically, how can the State recognise a contract and recognise PRSI contributions made in respect of that contract in circumstances where the employee was unlawfully in the State for some seven years during which such contributions were made? It is submitted that the present situation is a "classic case" of an illegal contract. It is also submitted on behalf of the respondents that the *FAS* decision is a case which is directly "on point". It is submitted that there is no other case which directly addresses this situation which counsel for the respondents described as a "stand alone" situation. It is submitted that the Supreme Court's decision in the *FAS* case has not been overturned or amended, nor have there been any different views expressed on the fundamental point that a contract is illegal if it is expressly or impliedly prohibited by statute and, as such, it will not be recognised at law. It is submitted that it would be a radical departure from a principle clearly established by the Supreme Court if this Court was to grant the reliefs sought by the applicant. It is submitted that the *FAS* case amounted to an accurate statement of the law when the first named respondent made the decision on 05 March 2020 and it is submitted that the *FAS* case remains an accurate statement of the law disentitling the applicant to relief.

The respondents' reliance on the High Court's decision in the Hussein case

29. The respondents also rely on Hogan J.'s decision in *Hussein v. The Labour Court* [2012] 2 IR 704 in which the notice party was a foreign national employed by the applicant from

2002 to 2009, in circumstances where the employee in question did not have an employment permit after July 2003. The notice party made claims against the applicant in respect of remuneration which was owing and a Rights Commissioner found for the notice party, directing the applicant to pay to the notice party sums totalling approximately €91,000. The applicant failed to pay these sums and matters were referred to the Labour Court which upheld the findings of the Rights Commissioner. The applicant, who had not appeared at either hearing, did not pay the sums and the notice party brought Circuit Court enforcement proceedings. Before those were heard, the applicant applied for and was granted leave to seek judicial review in the form of an order of certiorari of the determination of the Labour Court. It was that issue which came before the High Court where Hogan J., in granting the relief sought by the applicant, held that the court had no alternative but to hold that the contract in question was rendered substantively illegal by statute. The respondents rely, *inter alia*, on the following analysis by Hogan J. at para. 13 of his judgment:-

> *"13. At the heart of the applicant's case is that the notice party has no standing to invoke the protection afforded by the employment legislation of this State, since by definition any contract of employment was an illegal one in the absence of an employment permit. So far as illegal contracts are concerned, the courts must, where possible, avoid applying too severe an approach, still less some formalistic approach which assumes that the enforcement of an illegal contract always presents insuperable public policy objections: see, e.g., the comments of Geoghegan J. in Downing v. O'Flynn [2000] 4 I.R. 383 at p. 399. In some cases, however, the court has no alternative but to hold that the contract in question is rendered substantively illegal by statute. This, as we shall see, is one such case".*

30. In *Hussein*, Hogan J. held that the notice party had no standing to invoke the protection afforded by the employment legislation since, by definition, the alleged contract of employment was an illegal one in the absence of the applicant having an employment permit. In the present case the respondents submit that a similar issue arises. The respondents also cite Hogan J.'s analysis of the relevant provisions of the Employment Permits Act, referring in particular to para. 16 onwards of the judgment: -

> *"16. The very fact that the Oireachtas must be taken to have intended that a non-national employee to whom the prohibition applies (i.e., non-EU and non-EEA nationals) automatically commits an offence if he or she does not have a work permit irrespective of the reasons for that failure necessarily has implications so far as the civil law is concerned, in that such a contract of employment must also be taken to be void. In other words, this is not simply a case of where there was some incidental illegality in the performance of the contract. . .*
>
> *17. the Oireachtas has declared that a contract of employment involving a non-national is substantively illegal in the absence of the appropriate employment permit, so that, accordingly, a contract of this kind has been expressly prohibited by statute. It would scarcely be a sensible construction of the Act of 2003 if it is admitted that*

such a contract is expressly prohibited by statute and yet the courts permitted administrative bodies such as the Labour Court to give appropriate remedies to the parties as if the contract were perfectly lawful. Specifically, in view of the fact that s. 2(4) of the Act of 2003 due diligence defence is unavailable to an employee, one is coerced to the conclusion that the reasons for the employee's failure to secure a work permit are irrelevant to that substantive illegality".

18. *To my mind, therefore, the present case cannot be sensibly distinguished from the decision of the Supreme Court in Martin v. Galbraith, Ltd. [1942] I.R. 37. Here the plaintiff sued to recover overtime payments which had been earned in circumstances where he had worked in excess of a statutory prohibition contained in s. 20 of the Shops (Conditions of Employment) Act 1938. Murnaghan J. rejected the claim, saying, at p. 54) :-*

> *"Parties to a contract, which produces illegality under a statute passed for the benefit of the public, cannot sue upon the contract unless the Legislature has clearly given a right to sue."*

19. *The Act of 2003 was plainly enacted in the public interest and for the public benefit in order to regulate the employment market. It may also be noted that the Act of 2003 contains no saving clause such as obtains in the case of unfair dismissals . . .*

20. *Of course, this type of saving clause as contained in the Act of 1977 - which is precisely the type of clause envisaged by the Supreme Court in Martin v. Galbraith, Ltd. [1942] I.R. 37 - is directed to a situation where the contract of employment is not substantively illegal, but rather that a term of the contract involved some fraud upon the public revenue in the manner of its performance. Here the case is much more compelling, as it cannot realistically be suggested here that the contract of employment was not substantively illegal, as, for the reasons already given, to hold otherwise would be to ignore the substance and effect of both s. 2(1) and s. 2(2) of the Act of 2003. There is, moreover, no saving clause which might operate in favour of the employee in such circumstances by allowing him or her to seek effective redress where the administrative agency in question was satisfied that the failure to obtain an employment permit was not their personal fault".*

31. It is clear from the facts in the *Hussein* case that the employer sought to avoid liability to pay an employee on the grounds that the relevant employment contract, to which the employer was a party, was illegal. Commenting on the situation, Hogan J. stated, at para. 23, that, if the notice party's account was correct, an account which both the Rights Commissioner and Labour Court accepted, the employee was: -

> *" … the victim of the most appalling exploitation in respect of which he has no effective recourse… While I am bound to apply the policy as articulated by the Oireachtas via the Act of 2003, there must be some concern that this legislation will produce (and, perhaps, has produced) consequences which were not foreseen or envisaged. Specifically, it may not have been intended by the Oireachtas that*

undocumented migrant workers - not least a vulnerable migrant such as the notice party - should be effectively deprived of the benefit of all employment legislation by virtue of his illegal status, even though he or she may not be responsible for or even realise the nature of the illegality".

Section 2B of the 2003 Act inserted by the Employment Permits (amendment) Act 2014

32. The respondents acknowledge that Hogan J.'s decision in *Hussein* resulted in the Employment Permits Act of 2003 being amended in order to give employees the right to sue their employer on an illegal contract in certain circumstances and the respondents refer, in this regard, to s. 2B of the 2003 Act, as inserted in 2014. I have quoted that section, verbatim elsewhere in this judgment. The respondents emphasise that the foregoing amendment simply gives an employee in such circumstances redress as against the other party to an illegal contract. The respondents submit that the foregoing amendment resulting in s. 2B does not render an illegal contract valid or legal. According to the respondents, it merely provides a limited right for an employee to sue upon an illegal contract. The respondents also submit that s. 2B does not give any such employee any rights as against the State, which is not a party to the illegal contract. The respondents also emphasise that s. 2B (12) makes it clear that money paid to a foreign national pursuant to an order in respect of proceedings brought against their employer by a foreign national without an employment permit should not be treated as reckonable emoluments within the meaning of the Social Welfare Consolidation Act 2005.

The Supreme Court's decision in Hussein

33. The respondents acknowledge that the decision of Hogan J. in *Hussein* was overturned on appeal to the Supreme Court, but point to the fact that the Supreme Court did not address the issue of the illegality of the contract in question. It is not in dispute that, in allowing the appeal and setting aside the High Court order, the Supreme Court held that the Labour Court, in enforcing the decision of a Rights Commissioner, was not concerned with the merits or lawfulness of the decision of the Rights Commissioner but was concerned, instead, that a decision of the Rights Commissioner in relation to a complaint had been made and that the decision had not been carried out by the employer concerned, in accordance with its terms. The Supreme Court also went on to hold that, in enforcing the decision of the Rights Commissioner, the Labour Court had acted within the ambit of its statutory power and, as such, the legality of the underlying contract of employment was irrelevant. The respondents in the present case submit that the decision of Hogan J. in the High Court remains good law and accords with the Supreme Court's decision in the *FAS* case which was relied upon by the first named respondent in the present case.

34. The respondents also submit that the authorities relied upon by the applicant are not relevant to the present position and do not affect the validity of the High Court's decision in Hussein or the Supreme Court's decision in *FAS*. The respondents also submit that the authorities relied upon by the applicant concern the issue of whether one party to an illegal contract is entitled to *enforce* that contract against the *other party*, notwithstanding that the contract is tainted by illegality. The respondents submit that the applicant's

reliance on such authorities, in particular on the Supreme Court's decision in *Quinn v. IBRC* is misconceived. The respondent submits that the situation in the present case is fundamentally different to the situation which was before the Supreme Court in *Quinn*. The respondents submit that the *Quinn* case involved the enforceability of a contract where one party raised a defence of illegality. The respondents submit that the present case involves a situation in which the contract is illegal. The respondents submit that illegality, not enforceability, is the key issue and that, as such, the Supreme Court's decision in *Quinn* is not relevant. However, the respondents also submit that the *Quinn* decision supports the position of the respondents. That said, it should be pointed out that nowhere is it pleaded that the first named respondent relied on the decision in *Quinn* or applied any principles or test derived from the *Quinn* decision.

35. It is fair to say that both the decision taken by the first named respondent on 05 March 2020 and the position adopted by the respondents at the hearing before this Court was based squarely on *FAS* representing an entirely accurate and a comprehensive setting out of the relevant legal principles on foot of which the impugned decision was made. In essence, relying on *FAS*, the respondents submit that any contract of employment made in contravention of the Employment Permits Act is illegal and unenforceable. There is no suggestion that, were the decision to come before the first named respondent again that, based on a consideration of the principles emerging from the *Quinn* decision, the first named respondent would or could make a different decision. On the contrary, *Quinn* is said by the respondents to be irrelevant to the present case and is also said to support the position of the respondents, with the impugned decision have been made squarely on the basis that the *FAS* decision represents the accurate and a complete setting out of the relevant legal principle underpinning the decision of 05 March 2020.

36. The respondents also argue that Maternity Benefit is not a property right protected by Bunreacht na hÉireann or by the ECHR, citing the Supreme Court's decision *in PC v. Minister for Social Protection* [2017] 2 ILRM 369 and the decision in *Carson v. The United Kingdom* [2010] 51 EHRR 13. The respondents also deny that the first named respondent trespassed into the administration of justice or outside of s. 300 of the 2005 Act in circumstances where s. 300(2)(iv) and (v) provides that every question in relation to whether an employment is or was insurable employment or whether a person is or was employed in insurable employment is to be decided by a deciding officer. Section 311 provides that where a person is dissatisfied with a decision given by a deciding officer the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an Appeals Officer. It is denied that the refusal of the application on the grounds that the contract was illegal by virtue of being in breach of the Employment Permits Act of 2003, was a finding that may only be determined by a court of law. With regard to the foregoing, the respondents again placed reliance on the Supreme Court's decision in the *FAS* case. The respondents refer, in particular, to the following passage from Egan J,'s decision in which the Supreme Court referred to the decision of Lardner J. in the High Court, as follows:

"Mr. Justice Lardner found the Contract was an illegal one; it infringed a statutory provision against An Foras 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 an ultra vires contract.

The learned trial judge further held that this illegality was a matter which the Appeals Officer should have had regard to when considering whether or not the contracts in question gave rise to insurable employment: -

> *'In these circumstances the Appeals Officer is obliged to take into account this factor of illegality which existed if the contracts being considered were regarded as Contracts of Service. He was not entitled to decide the issue before him on the basis that Mr. Abbott was employed under a contract of service. Any such contract was struck down by the Statutory Prohibition. From the terms of his decision it appears that this factor, the illegality of the Contract of Service, was never addressed by the Appeals Officer at all with the result that the conclusion which he reached was in my view erroneous. Having regard to the illegality of any Contract of Service, the Appeals Officer should then have considered whether Mr. Abbott was properly to be regarded as employed under a Contract for Services and also whether that contract was struck down by the statutory prohibition'".*

37. The respondents submit that the Supreme Court in *FAS* did not disagree that the Appeals Officer in question was obliged to consider whether the contracts in question were illegal. The respondents submit that the question for the court in *FAS* was whether the appeals officer had misdirected himself on that point. The respondents point to the following passage from the Supreme Court's decision in *FAS* (from page 21 onwards) which touches on the issue:-

> *"No challenge seems to have been taken either to the principles of law applied by the Appeals Officer with respect to the distinction between a contract for services and a contract of service, or the manner in which he applied those principles to the facts of this particular case. The sole issue of law seems to have related to the effect of illegality or ultra vires on the contract. It seems to have been the submission of An Foras that the Appeals Officer misdirected himself in law on this point. If it were to be found that the contract was not an illegal one and that the issue of ultra vires did not arise on the facts of the case, then the Appeals Officer did not misdirect himself in law. And accordingly, his decision should stand.*
>
> *Thus, it would seem that Lardner J. regarded the Appeals Officer as having applied the correct principles, but as having ignored the separate issue of illegality. If Lardner J.'s decision on the question of illegality is overturned, then it would seem that the Appeals Officer's decision was correct in all respects".*

38. In essence, the respondents submit that the Supreme Court, in the *FAS* decision, found that it was self-evident that a prohibited contract cannot be regarded as coming within

the definition of a contract of service and that it would be anomalous if a contract prohibited by statute could be relied upon for the purposes of social welfare contributions and benefits. The respondent submits that the applicant's contract of employment was a prohibited contract, rendered illegal by the Employment Permits Act of 2003 and, therefore, was not a contract of service for the purposes of the Social Welfare Consolidation Act of 2005. The respondents submit that the applicant was in breach of the Immigration Act, the Employment Permits Act, the Maternity Protection Acts and the Social Welfare Consolidation Act and it is submitted that the impugned decision was and remains valid, with the principles in the *FAS* decision putting matters beyond doubt.

Discussion and decision

39. It is not disputed that the applicant was lawfully resident in this State at the date of her application for Maternity Benefit. At the heart of the respondents' case, relying on the *FAS* decision, is that, where a contract is found to be illegal, it will not be recognised by law. The respondents contend that matters are that simple and that there are no exceptions to the foregoing proposition. In other words, the respondents argue that a finding of illegality in respect of a contract will, of necessity, render it void, unenforceable and invalid for all purposes. Thus, submit the respondents, an illegal contract can neither be relied upon by one of the parties who seeks to enforce it, nor can such an illegal contract be relied upon for the purposes of social welfare contributions and benefits.

40. Given the respondents' reliance on the High Court's decision in the *Hussein* case, it is appropriate to observe that, although the Supreme Court set aside Hogan J.'s High Court order because the it found that the Labour Court had not erred in law, Murray J. made it clear that the jurisprudence relating to illegal contracts required re-examination. It is appropriate to quote the following from paras. 52 and 53 of the judgment of Mr Justice Murray:-

> *"52. With so many regulatory measures in the modern economy concerning employment relationships and the supply of goods and services, the circumstances in which a contractual relationship which gives rise to some form of illegality might be considered a ground for not enforcing it, is a complex one. Traditional judicial dicta, in the older cases in particular, may have to be reviewed or nuanced in the light of the modern regulatory environment, and applied with the principle of proportionality in mind. Since any issue of illegality concerning the employment relationship between the relevant parties in this case does not arise within the proper parameters of this judicial review, it is not necessary to address those issues (or other contingent issues) in any way.*
>
> *53. I would, however, add, even though it is entirely hypothetical, that if the subject matter of the liability to be enforced involved something which was inherently immoral or inherently against the public interests, such as an agreement to rob or to distribute the proceeds of a robbery, then the issue of illegality and public policy would arise from a different perspective. Obviously, that is not the case and unlikely to be the kind of thing which would be attributed to a Rights Commissioner by statute to decide. In this case one is dealing with an inherently lawful subject*

matter, namely, the relationship of employer and employee, a relationship which the Rights Commissioner, in his Determination, found to exist and give rise to a liability of the applicant. Again, there was no appeal or judicial review of that decision".

41. A number of observations can be made in light of the foregoing obiter comments by the Supreme Court in *Hussein*. The Supreme Court made clear that the older authorities were ripe for review and it cannot be disputed that Hogan J.'s decision in *Hussein* relied, to a material extent, on authority going back some seven decades, *specifically Martin v. Galbraith Ltd.* [1942] IR 37. Nor can it be disputed that, due to the enactment of primary and secondary legislation, the regulatory regime and context in which a particular contract falls to be considered is markedly different to that which pertained in the middle of the last century. This is something which Murray J. drew particular attention to. The opportunity to examine older dicta in light of the modern regulatory environment is one the Supreme Court took in *Quinn v. IBRC* [2016] 1 IR 1 and I will presently examine that decision in some detail. Before doing so, it is also appropriate to observe that, as the head note of the Supreme Court's decision in Hussein makes clear, the Supreme Court held, *inter alia*, as follows: -

"3. That the High Court erred in finding, as a fact, that the absence of a work permit rendered the contract of employment illegal. The High Court was confined to determining the lawfulness of the decision of the Labour Court to enforce the determinations of the Rights Commissioner. No appeal had been brought against, and no judicial review was sought in respect of, the determinations of the Rights Commissioner. Therefore, no findings could be made in relation to the merits of the determination of the Rights Commissioner".

42. In *Quinn*, Clarke J. (as he then was) considered the appropriate modern approach to be applied when determining whether to enforce a contract, notwithstanding that it had been tainted by illegality. In the *Quinn* decision, no reference is made to *Hussein* and that might well be due to the timing of the respective decisions, *Quinn* being a judgment delivered on 25 March 2015, whereas the Supreme Court's decision in *Hussein* was delivered on 25 June 2015. Before quoting from the judgment of Clarke J. (as he then was), it is appropriate to observe that this is the principal authority upon which the applicant relies in the present case, whereas the respondents submit that the *Quinn* decision is not relevant and, to the extent that it is relevant, the respondents argue that it supports the respondents' position and does not alter in any way the applicability of *FAS*, upon which the decision challenged in the present proceedings was based.

43. By way of context for the *Quinn* decision, s. 60 of the Companies Act 1963 prohibited a company from giving financial assistance for the purpose of purchasing any shares in that company. Furthermore, s. 33 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 provided for several consequences where there had been a breach of Irish market abuse law that concerned market manipulation. The plaintiffs claimed that certain loan transactions were tainted by illegality and/or were for an illegal purpose and

maintained that their personal guarantees and share pledges were unenforceable and had no legal effect and that, as a consequence, the appointment of a share receiver was invalid. In the High Court, Kelly J. (as he then was) directed that a preliminary issue be tried as to whether the plaintiffs had an entitlement to rely on any such alleged breaches in aid of the claims made concerning the invalidity of guarantees given by the plaintiffs and the security put in place by them and the High Court (Charleton J.) held that the plaintiffs had an entitlement to rely on such breaches. The defendants appealed that decision to the Supreme Court, the first named defendant being Irish Bank Resolution Corporation Ltd., formerly known as Anglo Irish Bank plc. ("Anglo"). In paras. 3.2 and 3.3 of his decision in *Quinn*, Clarke J. (as he then was) explained the relevant background in the following terms: -

"3.2 Kelly J. did, however, direct the trial of the first preliminary issue raised, which concerned the Quinn's standing or entitlement to rely upon the alleged breach of the MAR or section 60. This issue was set out in the following terms in the order of Kelly J. of that date: -

> *'Do the Plaintiffs or any of them have the standing or entitlement to rely upon the alleged or any breach:*
>
> *(a) of the Market Abuse Regulations; or*
> *(b) Section 60 of the Companies Act, 1963,*
>
> *in aid of any of their claims for declarations of invalidity, unenforceability or no legal effect in respect of any Charge [on] Shares or any Personal Guarantees herein?'*

3.3. It was this issue with which Charleton J. was solely concerned at the substantive hearing. It was, of course, an issue which Anglo had requested be tried on a preliminary basis. It follows that, for the purposes of deciding that issue, it was and remains necessary to assume that Anglo was guilty of the illegality alleged. Anglo denies any illegality but the whole point of the preliminary issue is that Anglo also argues that the Quinns cannot escape liability on foot of the relevant loans, guarantees and security even if illegality is proven. In addressing this preliminary issue, Charleton J. was satisfied that '[i]t would be contrary to public policy were the Quinns …to be shut out from responding to the flagrant illegality which they allege against Anglo and Seán Quinn'. ([2012] IEHC 36 at p. 23). . ."

44. In para. 4.7 of his judgment, Clarke J. (as he then was) addressed certain findings made by Charleton J. in the High Court as follows: -

"4.7. Turning to section 60, Charleton J. found that this section embodies 'a fundamental rule of company law' that a company should not buy its own shares. Section 60(15) provides the penalties for breaches of the rule, but Charleton J. found at p.19 that these penalties 'are hardly sufficient responses to the situation alleged in this case'. Subsection (14) provides that a transaction in breach of section 60 is voidable at the instance of the company against any person who had notice of the facts which

constitute the relevant breach. On that basis, Anglo argued that the relevant transaction is valid unless the company in question treats it as void. It follows, it was said, that the illegality rule was deliberately excluded by the legislature. On that question, and having analysed subs. (1) and (14) of section 60 and the arguments of Anglo, Charleton J. concluded, at para. H6 p.20: -

> *'I am not persuaded that s. 60 of the Companies Act 1963, which forbids a company from purchasing its own shares, or from offering financial assistance in that regard, is self-contained in its remedies and cannot impact on public policy. In a case such as that pleaded herein, the general law of illegality of contracts is entitled to respond in an appropriate and proportionate way so that loss caused through the manipulation of the share price of Anglo to those directly at the receiving end of that conduct, namely the Quinns, can be appropriately responded to'".*

45. It is clear from the foregoing that an issue identified by the court in the context of examining the consequences of illegality, was whether relevant legislation imposed penalties and the extent to which such penalties constituted a sufficient and what might be called "self-contained" response, the proposition being that if a self-contained response was found in statute, the general law of illegality of contracts would not have a role to play. At this juncture, it is appropriate to recall that s. 2(3) of the Employment Permits Act, 2003, provides that where a non-national is employed without a valid work permit, both the employer and the employee are guilty of criminal offences which may be tried summarily or on indictment.

46. Before embarking on a comprehensive review of relevant case law, commencing with the 18th Century decision in *Holman v. Johnson* (1775) 1 COWP 341, Clarke J. (as he then was) made the following clear under the heading "Discussion", from para. 72, onwards of the Supreme Court's decision in *Quinn*:-

> *"72. It will be necessary to review the jurisprudence from a number of jurisdictions in due course. However, I think it would be fair to say that the underlying problem, with which all of the case law is concerned, stems from an attempt to reconcile or balance two competing but potentially equally legitimate principles. On one side there is the understandable reluctance of the courts to be seen to be coming to the aid of a person in relation to a transaction which was in breach of the law. Old maxims about 'clean hands' are at the heart of the issue. The Latin maxim 'ex turpi causa non oritur actio' explains this aspect of the Court's jurisprudence. A party should not, in accordance with that principle, be entitled to come to court and seek to enforce a transaction which is tainted with illegality in some form.*
>
> *73. There is, however, another, and potentially conflicting, consideration, which is of considerable importance. Since the early case law on illegal contracts was developed, the extent of regulation by statute has expanded to an exceptional extent. The number of regulatory regimes is significant. The areas of life which are subject to regulation are corresponding large. The number of ways in which a party*

might be said to be in breach of some element of a regulatory regime is many and varied. Furthermore, the range of breaches which can arise stem across a spectrum from the minor and technical to the substantive and extremely grave. At one end of the spectrum, a party may simply not have a licence to conduct a particular activity in circumstances where they were clearly entitled to the licence concerned, and perhaps had held one in the past, where the failure of the relevant party was simply a short term oversight in renewing the relevant licence. Strictly speaking, the carrying on of the activity concerned may well, in those circumstances, be illegal, for the relevant statute may well specify that it is unlawful to carry on the activity concerned without the relevant licence.

74. *At the other end of the spectrum, there may be a deliberate and serious breach of important obligations imposed in the public interest by the relevant regime. Furthermore, it is necessary to recognise that, depending on the nature of the regulatory regime concerned, all or many parties to a relevant transaction or series of transactions may either be culpable or may be aware of the illegality concerned, or at least of the facts which render the relevant activity illegal. It must also be kept firmly in mind that the broad application of the law in relation to illegal contracts also extends to cases where the relevant illegality derives from the ordinary criminal law. This can, of course, be so even where it might be said that the contract is illegal by statute, for much criminal activity is now covered by statutory offences. The weight to be attached to the public policy requirement that the courts refrain from enforcing contracts tainted by illegality is obviously very significant in such cases where they involve serious criminality.*

75. *As a review of the case law will reveal, it has always been acknowledged that the application of a strict rule of unenforceability can give rise to potential injustice. However, such an approach has, at least in the past, been taken to be justified as being required as a matter of public policy, both to deter illegality and to prevent the courts from being seen to act in aid of those who might be found guilty of illegal activity.*

76. *However, there is at least the potential of a real risk of injustice if the courts were to continue to adopt an absolute 'hands off' policy to all cases of illegality by reason of the breach of a regulatory regime. It must be recognised that, where a court decides that it will not entertain any legal proceedings solely because it can be said that there was some element of illegality about the transaction which underlies the proceedings concerned, this, in effect, means that, for the parties, the results must lie where they fall. If, for example, one party has already obtained most of the benefit which it was intended to obtain as a result of the relevant transaction, but the other party has received little or none, then the consequences of a 'hands off' approach by the court is that the party who is lucky enough to have obtained the benefit of the transaction gets a very significant gain at the expense of the party who, often as a matter of chance, has not as yet obtained the benefit. That consequence may well have little to do with the degree of blame which might be*

said to attach to the respective parties and a lot to do with luck. It may be that such a result can simply be regarded as a consequence of the parties engaging in a contract which is tainted with illegality. However, in a highly regulated age, it is clear, also, that there is significant potential for injustice in a system which automatically adopts a hands off approach and which recognises, as a necessary consequence, that some parties to an illegal transaction may benefit and others lose out.

77. But reconciling those two competing principles, that is the reluctance of the courts to become involved in being seen to enforce contracts which might be said to be tainted by illegality, on the one hand, and the recognition that a complete 'hands off' approach might lead to serious injustice, on the other, is not necessarily an easy task.

78. It also needs to be recalled, as a review of the jurisprudence will disclose, that much of the initial development of the law concerning illegal contracts as a matter of common law was concerned with contracts which were considered by the common law itself to be illegal as a matter of policy or to involve criminal activity. It is the evolution of the approach of common law courts to the concept of illegality by statute which gives rise to the competing considerations which I have just sought to address. In that context, it must also be noted that there have been questions over the precise type of illegality which engages the doctrine of ex turpi causa so as to render affected contracts unenforceable. For reasons which will be touched on in due course, the modern view would appear to be that the relevant illegality must either involve a breach of the criminal law or be quasi criminal in nature. However, that, to some extent, begs the question. Very many regulatory regimes create technical offences or quasi criminal technical breaches for a whole range of activities. Such measures may well be taken to be a necessary part of the enforcement of the regulatory regime concerned. However, the wide range of breaches which may give rise to an offence or other public illegality potentially leads to the very difficulty with which this Court is now faced, being that courts are consequently required to consider whether such breaches ought to lead to the relevant contracts being treated as unenforceable. In order to gain assistance as to how the questions thus raised should be answered, it is of assistance to conduct a review of the relevant jurisprudence".

47. Having regard to the foregoing, a number of observations can be made in relation to the position in the present case. It can fairly be said that the State was made aware, including by the applicant, that she was working without the relevant permission. The applicant's 21 November 2011 letter made it clear she had a part-time job in the context of the applicant's request for a Stamp 4, which request was unsuccessful. It is not in dispute that, at all material times, the applicant's employer paid both employer's PRSI and the employee's PRSI contributions in respect of the applicant and did so throughout 2012 to 2019, inclusive. The applicant's letter, received by the respondents on 20 July 2016, was also explicit that the applicant's visa had expired, that she had been working

and paying PAYE and PRSI and that she wished to remain in the country legally. In the present case, there is no question of what Clarke J. (as he then was) referred to in Quinn as "*serious criminality*". It could not be said that the purpose of the applicant's contract of employment involved an illegal aim. A contract between an employer and an employee is not, of itself, an illegal contract in the sense that its purpose is not unlawful. Furthermore, if one looks at the "*spectrum*" in the sense explained by the Supreme Court in paras. 73 and 74 in the *Quinn* decision, it is uncontroversial to suggest that the relevant contract is very far away from the top end of the spectrum where illegality derives from criminal activity or serious criminality. Insofar as the applicant's position is concerned, it can fairly be said that her contract of employment was entirely lawful and valid at the outset and was entirely lawful and valid at the time she applied for Maternity Benefit. Moreover, the nature of the applicant's contract remained the same at all material times and throughout the period between those two points. It is not in dispute that, between 2012 and 2019, the employee ceased to have the relevant permission to work but the *nature* of the contract of employment, insofar as its purpose was concerned, never altered. It was the *status* of the employee which altered in that, at the outset, she had permission to reside in the State, then she ceased to hold such permission and at the time she applied for maternity benefit she again had the requisite permission.

48. It can also be said that the reference by Clarke J. (as he then was) to the "*highly regulated age*" and the significant potential for injustice, were the courts to adopt a "*hands off approach*" to the consequences of an illegal contract, very much echoes the comments made by Murray J. in the Supreme Court's decision in *Hussein*. In my view, the reference by Clarke J. (as he then was) to the significant potential for injustice were the court to adopt a "hands off" approach, is clear authority for the proposition that there can be no hard and fast rule and no universally applicable rule to the effect that a contract tainted by illegality is always and of necessity and regardless of a consideration of any other factors, void and, thus, automatically ceases to be, a contract of service for the purposes of the Social Welfare Acts. It is clear from the Supreme Court's decision in *Quinn*, that the position is far more nuanced and that, although the principle identified in the *FAS* decision, to the effect that it would be anomalous if a contract prohibited by the Oireachtas could be relied on for the purposes of social welfare contributions and benefits is one principle at play, a potentially equally valid but competing principle which is also at play is that a strict rule of the "*hands off*" sort can give rise to potential injustice. To properly chart the course between these competing principles, as the Supreme Court explained in *Quinn*, involves an analysis which goes very considerably further than the strict application of an inflexible rule of the type which the High Court felt obliged to apply in *Hussein* and which the Supreme Court identified a quarter of a century ago in the *FAS* decision and which provided the basis for the decision challenged in this case.

49. From para. 140 onwards of the Supreme Court's decision in *Quinn*, Clarke J. (as he then was) gave detailed guidance in respect of what the court referred to as "*The proper approach"* to the question of whether and in what circumstances a court in this jurisdiction should enforce a contract notwithstanding the fact that it may in some way

have a connection with illegality. It is instructive to quote the following from paras. 143 and 144 of the court's decision:-

"143. It must also be emphasised that the court must, in deciding whether public policy requires relevant contracts to be treated as unenforceable in the context of a particular statutory provision, place appropriate weight on the first principle, being the undesirability of courts being seen to enforce contracts which may be tainted by illegality and thereby failing to discourage such illegality. The weight to be attached to that principle in the context of an assessment of where the balance lies in relation to any particular statutory regime may depend on the nature of the statutory regime concerned and the type of activity which is thereby rendered unlawful. There might well be cases where the nature of the relevant illegality involves very serious criminal activity and where, therefore, the policy requirement that courts refrain from enforcing illegal contracts may be such as would manifestly override any other consideration. A contract to commit murder or to rob a bank would be obvious examples. There will, however, be other cases, not least in the regulatory area, where it may be necessary to assess, in the context of each relevant statutory provision, whether the policy requirements of the statute concerned, when taken in conjunction with the general policy requirement which leans against the enforcement of illegal contracts, may lead to a conclusion which favours enforceability".

50. Again, it is appropriate to observe that the foregoing guidance makes clear that, having regard to the competing principles at play, there is no single inflexible approach which can be taken insofar as determining the consequences flowing from the fact that a contract is tainted by illegality or could be said to be illegal. In the foregoing passage the Supreme Court explicitly acknowledged, not only the policy requirement that courts refrain from enforcing illegal contracts, but also the existence of other considerations. The example cited, namely of a contract where the relevant illegality involved very serious criminal activity such as would manifestly override any other consideration, plainly suggests that, in other instances, other considerations may override the principle that courts should refrain from enforcing illegal contracts. It need hardly be repeated that the applicant's contract of employment did not have, as its purpose, any criminal activity whatsoever. At para. 144 of the decision in *Quinn*, the court provided further guidance as follows: -

"144. However, once it is determined that policy requires that contracts which are deemed unlawful by reference to a particular statutory provision are to be regarded as unenforceable, no assessment of the merits of the individual case arises. The consequences lie where they fall. While there might be some uncertainty arising prior to the time when a court has the first opportunity to consider whether a particular statutory regime renders contracts unenforceable, such uncertainty stems from the silence of the relevant statute and any uncertainty will be removed once the matter is first determined. The application of the rule, as a rule of law, would then have been decided to apply in all cases under the relevant statutory provision so as to render appropriate contracts unenforceable. Likewise, if a court

were to determine that contracts were not to be regarded as unenforceable by reference to a particular form of statutory illegality, then, again irrespective of the merits of any individual case, such contracts would be enforceable. The focus of the approach must, therefore, to be to determine whether public policy requires, in the context of a particular statutory provision, that contracts which may be tainted by illegality by reference to that specific statutory provision, are to be treated as unenforceable. While that approach is not entirely consistent with that adopted by the Supreme Court of the United Kingdom in Tinsley v. Milligan [1994] 1 AC 340, it seems to me to be broadly supported by the approach adopted in Australia, and to be more appropriate in attempting to balance the public policy requirements involved in a highly regulated age.

145. If the statute makes clear what the consequences for relevant contracts are to be, then that is an end of the matter. The real problem arises where, as here, the statute is silent . . ..".

51. The foregoing makes clear that if a statutory provision explicitly states, for example, that a contract of employment entered into by an employee who lacked the relevant permission to reside and work in the State is not to be treated as a "contract of service" for the purposes of the Social Welfare Consolidation Act, 2005, as amended, that would be an end to the matter. If that were the situation, there could be no assessment of the merits of any individual case. In the present case, that is not the position. Nowhere is it stated in legislation that a contract of employment entered into by an employee who lacked permission to reside in the State is not to be treated as, or cannot be considered to be a "contract of service" for the purposes of the 2005 Act. Nowhere is it stated in statute that such a contract is "not legal". In the present case, the applicant lacked the relevant permission to work in the State for some seven years, but if any statutory provision made it clear that a contract of employment which contravenes the work permits legislation is excluded from the definition of a "contract of service" for the purposes of social welfare legislation, it would not matter whether the relevant period was seven years, seven months or seven days. The existence of a statutory provision to the foregoing effect would be determinative. There is, however, no such statutory provision.

52. Nothing in the Immigration Act 2004, or in the Employment Permits Act 2003, as amended, or in the Maternity Protection Acts 1994 and 2004, or in the Social Welfare Consolidation Act 2005 states that a contract of employment entered into without a valid work permit shall be treated as "not legal" and/or as "void" and/or as "unenforceable" and/or "shall not be considered to be a contract of service for the purposes of the Social Welfare Consolidation Act". Nowhere in statute is it stated that PRSI contributions made by or on behalf of an employee who, for the time being, lacks the requisite permission to work in the State, are not reckonable social welfare contributions. In the present case, the statutes are silent and the fact that Clarke J. (as he then was) makes clear in *Quinn*, that this is where "*the real problem arises*" plainly indicates that matters were and are not as clear – cut as the first named respondent understood them to be when delivering the 05 March 2020 decision which is challenged in the present proceedings.

53. From para. 194 onwards, the Supreme Court in *Quinn*, in effect, identified what can fairly be said to be a test which, I am satisfied, must be applied. This test identified the principal criteria and gave clear guidance on the factors to be taken into account in determining a balancing exercise which must be conducted in each case. That test and that balancing exercise plainly arises because, unlike the stance adopted by the first named respondent, I am satisfied that there is not a single principle which will, of necessity, always govern the outcome. In other words, the principle identified by the first named respondent with reference to the decision in *FAS*, is one of two competing principles, the latter being to guard against a real risk of injustice if the court were to adopt an inflexible "hands off" approach in all cases of illegality and were the court to adopt an inflexible rule that a contract tainted by illegality will, in every case be, void and unenforceable. It is appropriate to quote, verbatim, the clear guidance given by the Supreme Court from para. 194 onwards of the *Quinn* decision, as follows: -

"…1. The first question to be addressed is as to whether the relevant legislation expressly states that contracts of a particular class or type are to be treated as void or unenforceable. If the legislation does so provides then it is unnecessary to address any further questions other than to determine whether the contract in question in the relevant proceedings comes within the category of contract which is expressly deemed void or unenforceable by the legislation concerned (para. 148);.

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. "

54. It is clear from the Supreme Court's decision in *Quinn* that the foregoing constitutes the proper approach to the determination, in a given case, of the consequences flowing from the fact that a contract may be tainted by illegality. Regardless of the skill with which counsel for the respondents suggested that the Supreme Court's decision in *Quinn* was exclusively concerned with the issue of *enforceability*, I am satisfied that this is not the case. On the contrary, in *Quinn*, the approach so carefully outlined by Clarke J. (as he then was) is one which explicitly addressed, not only potential "*unenforceability*" but also the potential imposition of "*voidness*" and the consequences of the foregoing.

55. At the heart of the respondents' case is to suggest that, relying on the dicta in the *FAS* case, the applicant's contract of employment, during the period 26 June 2012 to 25 February 2019, was illegal and void and, thus, could not constitute a valid contract of service for the purposes of the Social Welfare Consolidation Act 2005 or for any other purpose. The principles outlined in *Quinn* undermine that proposition. Furthermore, despite claiming that *Quinn* is only concerned with enforceability, the issue of enforceability is an issue also at the heart of the respondents' case. The respondents explicitly plead (at para. 15 of their statement of opposition) that, because the applicant did not have the requisite status to reside and work within the State, the applicant's "…*contract of employment/contract of service is unenforceable and therefore, she is not entitled to maternity benefit*". Despite the submissions by the respondent to the effect

that Quinn is not relevant, in my view, an analysis of the judgment makes it clear that the approach identified by the Supreme Court in *Quinn* is of fundamental and direct relevance to the decision which the first named respondent made on 05 March 2020. The relevance of *Quinn* is also borne out by the pleas made by the respondents.

56. Despite the foregoing, the first named respondent did not adopt the proper approach identified in *Quinn*. Rather, the first named respondent relied exclusively on a principle derived from the much earlier 1995 decision in the *FAS* case and took the view, which the respondents still hold and maintain, that *FAS*, not *Quinn*, represented and represents the accurate and comprehensive setting out of the relevant legal position insofar as the impugned decision is concerned. By so doing, I am satisfied that the first named respondent fell into error.

57. Returning to the test or approach so clearly identified by the Supreme Court in *Quinn*, it is uncontroversial to say that no statutory provision expressly deemed the applicant's contract of employment void or unenforceable in respect of the relevant period, being from 27 June 2012 to 26 February 2019. The legislation is silent on that issue, but nowhere does any legislative provision state that the applicant's contract of employment is *not* to be considered a contract of service for the purposes of the 2005 Act. It is uncontroversial to say that it was open to the Oireachtas to provide that contracts of employment entered into without a valid work permit be treated as void and unenforceable as well as illegal, but the Oireachtas plainly decided against such a course.

58. Earlier in this judgement, reference was made to sections 2B and 2C of the Employment Permits Act 2003. Sections 2B and 2C provide a mechanism which enable contracts of employment which are *prima facie* illegal to be treated as not only valid but enforceable in a specific context (namely, permitting a foreign national or the second named respondent Minister, to sue for unpaid monies due to the foreign national in respect of services rendered during the course of employment or service where the foreign national was without an employment permit). It is entirely true to say that the Employment Permits Act explicitly provides that the amount of money paid to a foreign national which is recovered pursuant to an order made on foot of proceedings, per s. 2B (3) shall not be treated as reckonable emoluments within the meaning of the 2005 Act for the purposes of that Act. The foregoing, submits counsel for the respondent, makes it clear that the Employment Permits Act of 2003 does not recognise any illegal contract of employment and does this "impliedly" in s. 2B (12). I cannot agree with that submission, regardless of the skill with which it is made. There is no express prohibition on a contract of employment which is entered into by an employee without a permit being considered to be a contract of service and in my view it would be to trespass on the preserve of the Legislature for this court to hold that a proper interpretation of s. 2B of the 2003 Act is that such contracts are rendered automatically void and unenforceable by implication, in the absence of an express provision to that effect. It is also clear from the guidance provided by the Supreme Court in *Quinn* that the first question to be addressed is whether relevant legislation "*expressly*" states that contracts of a particular class or type are to be treated as void or unenforceable. It is beyond doubt that there is no such

express or explicit statement in any relevant statute which would be determinative of matters. That being so, further engagement is required, with appropriate weight to be given to various factors in carrying out an assessment of the type explained in para. 2 of the test outlined in *Quinn*, which I have quoted, verbatim, above.

59. It is not for this Court to substitute its own decision for that which is impugned in the present proceedings. It is, however, appropriate to make certain observations given the proper approach identified by the Supreme Court in *Quinn* and having regard to the position in the present case, in circumstances where the respondents' attitude was, and is, that only the principle derived from *FAS* and set out in the 05 March 2020 decision is relevant and determinative and that the Supreme Court's *Quinn* decision is not at all relevant (or, to the extent that it relevant, supports the respondents' position). It is appropriate, for example, to observe that the Employment Permits Act does not say that a contract entered into by an individual who does not have the relevant work permit is void or is voidable. It is uncontroversial to say that an employment contract is not, per se, unlawful. An employment contract is *prima facie* enforceable and an employee who has not been paid for work done at the behest of their employer will, under normal circumstances, be able to sue for the recovery of those monies. The Employment Permits Act of 2003 goes no further than to say that monies obtained in such a suit cannot be treated as reckonable emoluments if the employee in question lacked a valid permission to work. That category does not extend to the present circumstances insofar as the applicant is concerned. There is no question of her employer having failed to pay her, and no question of any legal proceedings of the type referred to in s. 2B (3). Nor, as I have stated elsewhere in this decision, is there any question of there being serious or any criminality.

60. On any analysis, very serious consequences for both employer and employee are set out in s. 2(3) of the Employment Permits Act 2003 in the form of criminal offences, triable summarily or on indictment. Section 2(3) makes clear that penalties, on summary conviction, amount to a fine of up to €3,000 or imprisonment for a term of up to 12 months, or both. The Act provides for even greater potential punishment of an employer with the potential for a fine of up to €250,000 or imprisonment for a term of up to ten years, or both. On any analysis, the potential penalties detailed in s. 2(3) are significant. Given the fact that s. 2(3) of the Employment Permits Act 2003 specifies criminal sanctions in the form of fines (which could be as much as €250,000) or imprisonment (which could be as much as for a term of ten years), or both, it seems clear that the Oireachtas considered the appropriate deterrent against working without the relevant permission, and employing someone who did not have the relevant permission to work, as taking the form of the criminal sanctions as set out in s. 2(3) of the Employment Permits Act 2003 and self-contained therein. It cannot be doubted that the prohibitions contained within the 2003 Act apply equally to the worker who does not have a permit and the employer for whom they work in that both parties to such a contract of employment may be subject to criminal sanction, with the employer in that scenario potentially facing even harsher penalties. The existence and nature of the remedies and potentially very serious consequences contained in the Employment Permits Act of 2003

in respect of working without a permit or employing someone without a permit strongly implies that the remedies or consequences specified in the statute are sufficient to meet the statutory end.

61. Insofar as the criminal sanctions and penalties set out in s. 2(3) of the Employment Permits Act 2003, are concerned, it is appropriate to recall that the final paragraph of the letter sent to the applicant on 05 August 2016 by the Residence Division of the INIS stated as follows:

> *"Please be informed that it is illegal under the Immigration Act 2004 to reside in the State without permission from the Minister for Justice and Equality. A person found guilty of such an offence is liable under s. 13 of the Act of 2004, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding twelve months or to both. As you do not have current immigration permission you are not entitled to work".*

Thus, it is clear that there are also serious criminal sanctions which the State can decide to pursue in light of the provisions of the Immigration Act 2004, just as and there are serious criminal sanctions created by virtue of the Employment Permits Act 2003. It might also be observed that the reference made by the INIS to a fine not exceeding €3,000 or to imprisonment for a term not exceeding twelve months, or to both, in respect of offences under s. 13 of the 2004 Act mirrors the criminal penalties set out in s. 2(3) (A) of the Employment Permits Act 2003 with regard to contraventions of s. 2(1), s. 2(2) or s. 2(2)(c) or in respect of failure to take specified in s. 2(2)(B) where the sanction is opposed on summary conviction (with more serious consequences for a conviction on indictment).

62. It is not in dispute that, as a matter of fact, the State did not commence any criminal prosecution against the applicant under either the 2004 Immigration Act or the 2003 Employment Permits Act, but that fact takes nothing away from the existence of and seriousness of the penalties and consequences under both pieces of legislation.

63. It is also uncontroversial to suggest that the statutory aim of the Employment Permits Act 2003 is to regularise access of non-nationals to the labour force in this State. It cannot be doubted that the 2003 Act criminalises both employer and employee, with potentially greater penalties facing an employer who breaches the terms of the Act. That being so, it seems uncontroversial to suggest that an aim of the legislation is to deter the exploitation of undocumented workers by unscrupulous employers. The fact that an employer who breaches the terms of the Act faces potentially far greater sanction would clearly seem to be a recognition on the part of the Oireachtas that an undocumented worker is likely to be in a more vulnerable position than someone who employs them. It might be said that to deny an otherwise payable Maternity Benefit on the grounds that an undocumented worker's contract is, of necessity, void for illegality, undermines a purpose of the 2003 Act, insofar as a purpose is to prevent exploitation of vulnerable workers and encourage same to engage with the State in a positive fashion. It could hardly be argued that the mother of a very young child is not someone in need of support which Maternity Benefit

legislation had as a statutory aim to provide. An imposition of voidness such as to deny a Maternity Benefit entitlement, otherwise payable, plainly defeats a statutory aim of Maternity Benefit provisions, in my view.

64. The factors identified by the Supreme Court in *Quinn* include whether, in the absence of treating a relevant contract as void or unenforceable, the adverse consequences specified in the legislation itself are adequate to secure its statutory purpose. In the manner explained above, there are undoubtedly criminal sanctions available to the State, both custodial and non – custodial which, *prima facie*, certainly appear adequate to secure the relevant statutory purposes without the need to treat a relevant contract as void or unenforceable in addition to those criminal sanctions which the Oireachtas decided were appropriate, including when enacting the 2003 Act.

65. Another factor identified by the Supreme Court is a consideration of 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. The posing of this important question speaks to the principle that a contract should not be treated as void where doing so would lead to injustice and consequences disproportionate to the illegality concerned. In the manner examined, the contract of employment at the heart of the discussion is not one which is *prima facie* illegal or which ever had an illegal purpose, yet the consequences of considering such a contract to be "illegal" and "void" would plainly be extremely significant for the mother of a young child deprived of a benefit for which she contributed and to which she was otherwise entitled.

66. It might be added that the ultimate finding in *Quinn* was a conclusion by the Supreme Court that the underlying lending contracts were enforceable, notwithstanding their illegality, starkly illustrating that it is not the position in Irish law that illegality necessarily renders a contract unenforceable or void, yet it was that proposition, relying on *FAS*, which underpinned the first named respondent's decision which is challenged in the present proceedings.

67. In legal submissions made with great skill by Mr. Shortall SC on behalf of the applicant, it was made clear that if the court were to find in favour of the applicant on the basis that the impugned decision involved a failure to apply the principles and criteria identified in the *Quinn* decision and involved an exclusive and erroneous application of the *FAS* decision, it would be unnecessary and inappropriate for the court to address arguments made with reference to constitutional and ECHR provisions. In light of the Supreme Court's decision in *Quinn* which has been examined in this judgment, this Court is satisfied that the first named respondent's Appeals Officer erred in law with regard to the 05 March 2020 decision which is challenged in the present proceedings and the applicant is entitled to an order of certiorari quashing the said decision. Thus, it is not necessary to address arguments which touch on Article 40.3.2 of Bunreacht na hÉireann or Articles in the ECHR Act of 2003 or arguments made with reference to Article 34.1 of the Constitution.

Summary of decision

68. Despite the undoubted skill with which counsel for the respondents makes the submissions, and for the reasons explained in this decision, I take the view that it is not self-evident that a contract entered into in contravention of the Employment Permits Act 2003 - 2014 could not be a valid and enforceable contract. In my view, it is not self-evident that a contract of employment, where the employee lacked the requisite employment permit or permission, cannot constitute a "contract of service" for the purposes of social welfare contributions and benefits, in this case Maternity Benefit, in the context of the 2005 Social Welfare Consolidation Act. It is not the case that, as the respondents submit, it is self – evident that a contract made in breach of the Employment Permits Act 2003 is illegal, unenforceable, and void for the purposes of the Social Welfare Consolidation Act 2005.

69. A quarter of a century ago, the Supreme Court, in the FAS decision, made clear *inter alia* that if the Oireachtas has decided to prohibit a particular type of contract by statute, it would be anomalous if reliance were to be placed on that contract for the purposes of social welfare contributions and benefits. That remains an important principle but it is not, however, the only principle at play. This is because, as the Supreme Court has made clear far more recently, in *Quinn*, there are other principles to be considered, including the fundamentally important but competing principle that the application of a strict rule of unenforceability can give rise to potential injustice.

70. The correct legal position is not what the first named respondent understood it to be when making the 05 March 2020 decision. The decision of the Supreme Court in *Quinn* means that *FAS v. Abbott* is not a comprehensive and is, therefore, not an adequate statement of the current law. For the respondent to have relied, exclusively, on a principle derived from FAS as the basis for the decision taken on 05 March 2020, was to fall into error.

71. Recognising the competing principles at play, the Supreme Court in *Quinn* has given very clear guidance as to the various factors which must be taken into account in order to determine, in any given case, whether a particular type of contract is to be regarded as unenforceable or void, rather the Supreme Court also having "left the door open" for other factors to be defined. In error, the first named respondent did not apply the test identified in *Quinn* and which can be found at para. 194 of the Supreme Court's decision and did not regard itself as obliged to do so. Instead, the respondents regarded and continues to regard, those principles derived from *FAS* which were quoted in the 05 March 2020 decision, as the only relevant ones, as well as being the principles which determined the matter, thereby falling into error.

72. Given the submissions which were made to the court with regard to whether huu remained good law or not, it needs to be emphasised that the principle in the FAS decision upon which the respondent placed reliance for the impugned decision is a principle which the Supreme Court in *Quinn* explicitly acknowledged as being valid. This is clear, including from the analysis by now – Chief Justice Clarke in paras. 72 and 143 of the *Quinn* decision, both of which I have quoted verbatim earlier in this judgment. The

critical point, however, is that it is one, but not the only relevant principle and the Supreme Court's decision in *FAS* no longer represents a comprehensive setting out of the current legal position. Rather, the Supreme Court's decision in *Quinn* is in my view fundamentally relevant to the present situation and details the correct approach to be taken, but which was not taken, in respect of the 05 March 2020 decision.

73. In stark contrast to the way in which Hogan J. felt obliged to decide *Hussein* in the High Court, there is no longer a "hands off" rule adopted by courts in this jurisdiction to the effect that a contract tainted by illegality will necessarily result in unenforceability and voidness in all circumstances. The position is far more nuanced and far more sophisticated and involves a weighing up of competing principles and factors in the manner the Supreme Court have explained in *Quinn*.

74. It is acknowledged by the applicant that, pursuant to s. 300 (2) (iv) of the 2005 Act, a deciding officer is entitled to decide on a question as to whether an employment is or was "*insurable employment*". However, in light of the Supreme Court's decision in *Quinn*, it was not enough for the first named responded simply to identify illegality in respect of the relevant contract of employment and to take the view that illegality necessarily resulted in such a contract being void and not being recognised at law. By so doing, the first named respondent erred in law in the decision of 05 March 2020.

75. Insofar as it falls to the first named respondent to reconsider the matter, the correct approach is that which is detailed in the *Quinn* decision, not an approach which relies on a single principle derived from *FAS* in the manner set out in the decision of 05 March 2020.

76. For the reasons set out in this judgment, I am satisfied that the first named respondent's Appeals Officer erred in law in their 05 March 2020 decision and, that being so, I am satisfied that the applicant is entitled to an order of certiorari, quashing the decision of the first named respondent of 05 March 2020 disallowing the applicant's Maternity Benefit appeal, satisfied also that it is an appropriate exercise of this Court's discretion to grant such an order.

77. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: -

> *"The parties will be invited to communicate electronically with the court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the office of the court within fourteen days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate".*

78. Having regard to the foregoing, the parties should correspond with each other with regard to the precise form of order which requires to be made, flowing from the decision of this Court and with regard to any questions concerning costs. In default of agreement between the parties in respect of any of the foregoing matters, short written submissions should be filed in the Central Office. To ensure that the parties have sufficient time both to correspond with each other and, in default of agreement, to make necessary submissions, I am directing that any submissions which may be required should be filed within 28 days of the delivery of this judgment.