

1985 No. 448Sp.

THE HIGH COURT

IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS  
OF SECTION 299 OF THE SOCIAL WELFARE (CONSOLIDATION)  
ACT 1981

BETWEEN:

ALBERT KINGHAN

APPELLANT

AND

THE MINISTER FOR SOCIAL WELFARE

RESPONDENT

Judgment of Mr. Justice Lynch delivered the 25<sup>th</sup> day of  
November 1985.

This appeal relates to the provisions of the Social Welfare (Consolidation) Act 1981 and prior social welfare legislation dealing with old age (contributory) pensions.

The Appellant in this case was a non-manual worker. Prior to the year 1974 he was therefore insurable or not insurable under the then Social Welfare Acts depending on the level of his remuneration. At the time of the coming into operation of the Social Welfare Act 1952 which came into operation on the 5th of January 1953 the Appellant was employed by Aer Lingus and was in insurable employment both under the provisions of the 1952 Act and under the provisions of the previous National Health Insurance Acts which were repealed by the 1952 Act.

In the year 1954 the Appellant entered the employment of the Gouldings Chemicals Limited and he ceased to be insurable under

the Social Welfare Act 1952 because his salary exceeded the then ceiling for salaries of non-manual workers. He remained outside the ambit of the Social Welfare Acts until 1974 when he became insurable again by virtue of the abolition of the ceiling on non-manual workers' income for the purposes of the Social Welfare Acts by Section 12 of the Social Welfare Act, 1973. The Appellant continued to be insurable until he attained pensionable age, namely 66 years, on the 28th of July 1984. He had in the meantime changed employers with the closure of a Gouldings factory and he was employed by the National Coal Company from about 1982 until his retirement on reaching pensionable age.

If the Appellant were to be assessed for old age (contributory) pension purposes from the year 1974 only, when he became insurable again after a lapse of some twenty years, he would qualify for such a contributory old age pension. However, because the Appellant entered insurable employment prior to 1953 under the old National Health Insurance Acts and was in insurable employment on the 5th of January 1953 when the 1952 Act came into operation the number of years by which his total of contributions paid or credited has been divided by the Respondent is thirty-one years, whereas if the calculation commenced in 1974 the number of years by which his total contributions paid or credited since that time would have to be divided would be only ten years in order to arrive at an average of yearly contributions.

The Appellant has put the merits of his own case very clearly in his letter of appeal to the Department of Social Welfare dated July 1984, exhibit B in his affidavit. It is clear that the merits of the case all rest on the side of the Appellant. He would

qualify for contributory old age pension if he had entered into insurable employment and commenced contributions only in the year 1974. The Respondent however says that he is disqualified from such pension because in fact he was insured prior to 1953 and in fact therefore paid further and extra contributions in those years down to 1954 and notwithstanding such extra payments he forfeits his right to benefit because the number of years by which his total contributions have to be divided leaps from ten to thirty-one years in order to arrive at his average yearly contributions.

The first point that arises for decision in this case is as to whether an appeal can be brought at all. The appeal is purported to be brought pursuant to Section 299 of the 1981 Consolidation Act. This section excludes from appeal questions to which Section 298 (6) applies. The only relevant question in Section 298 (6) would be the question referred to in Section 111(1)(a) namely:-

"Every question arising in relation to a claim for benefit".

This is an extremely wide exclusion and could be construed to exclude from appeal the vast majority of questions that might arise under the provisions of the 1981 Act, leaving only a minority of cases where persons claim not to be within the Act and therefore not liable to pay contributions under the Act nor entitled to benefits thereunder. I think one must construe the exclusion narrowly so as not to oust the jurisdiction of the High Court save where such ouster is clear. Moreover, if one were to construe paragraph (a) as widely as might at first sight be thought possible then it would render paragraphs (b) and (c) of Section 111 (1) of

the 1981 Act superfluous because they would already have been covered by paragraph (a). The inclusion of paragraphs (b) and (c) indicates that the Act does not envisage that paragraph (a) should be given the widest possible construction.

The question raised on this appeal is as to the true construction of the statutes and regulations insofar as they relate to qualification for old age (contributory) pension. It would be strange if the High Court were not to be allowed to assist in resolving such a question although in a wide sense it could be said to be a question arising in relation to a claim for benefit. I think that I have jurisdiction to deal with the question of the true construction of the statutes and regulations relating to the necessary qualifications for old age (contributory) pension and to refer the matter back to the Minister and the Department for reconsideration in the light of such construction if such construction so warrants.

Turning then to the true construction of the 1981 Act the former Acts and the Regulations. Counsel for the Appellant in the course of her submissions pointed out that the Social Welfare Act 1952 contained no definition of "contribution year". However, the Social Welfare (General Benefit) Regulations 1953, S.I. No. 16 of 1953 defined contribution year in relation to a man as the period commencing on the first Monday in a year to the period ending on the last day before the first Monday in the following year. She further pointed out that the Social Welfare (Old Age (Contributory) Pension) (Transitional) Regulations, 1960 S.I.No. 255 of 1960 by Article 2 provided that the contribution year prior to the 5th of January, 1963 means a contribution year for the purposes of the National Health Insurance Acts and by Article 5 provided that contributions under the

National Health Insurance Acts could be taken into account in certain circumstances for the purposes of the 1952 Act. She also referred to Section 13 of the Social Welfare Act 1960 which made provision for taking into account payments under the National Health Insurance Acts in certain cases arising under the 1952 Act.

Counsel for the Appellant further pointed out that Section 4 of the Social Welfare (Amendment) Act, 1978 amended the meaning of contribution year as defined in S.I. No. 16 of 1953 to mean the same as the financial year for the purposes of income tax, that is to say from the 6th of April to the 5th of April in the following year. She submitted that the effect of this amendment in the meaning of contribution year was that one should in the circumstances of the present case take into account all contributions paid by the Appellant from the 6th of April 1952 until the 5th of January 1953, (that is to say contributions under the National Health Insurance Acts) as well as contributions thereafter. She pointed out that this definition of contribution year is repeated in Section 2 of the 1981 Act and she submitted that Section 78 (3) of the 1981 Act overrode the 1960 regulations so that the yearly average should be calculated from the beginning of the contribution year in which the Appellant's entry into insurable employment occurred. She submitted that his entry into insurable employment for the purpose of the Social Welfare Act 1952 was the 5th of January 1953 and the beginning of that contribution year was the 6th April 1952.

Counsel for the Respondent submitted that the Appellant entered into insurable employment prior to the 5th of January 1953 and that accordingly his position was regulated by S.I. No. 255 of 1960 and in particular Article 6 (2) (a) of those regulations. He submitted that this Article provides for the calculation of the average yearly contributions by the Appellant in the circumstances

of this case from the 5th of January 1953 to the 5th of April 1984. He also referred to section 312 of the 1981 Act as continuing in force the Transitional Regulations S.I. number 255 of 1960.

I have come to the conclusion that the case largely turns on the meaning of entry into insurance. This term is defined in section 2 of the 1981 Act and when this definition is read in conjunction with the definition of "insured person" and with the provisions of section 5 the term "entry into insurance" would mean the date of the coming into operation of the 1981 Act. This is however subject to section 311 of the 1981 Act by virtue of which an earlier date of entry into insurance under the previous legislation is maintained in the case of any person who entered into insurance under such previous legislation prior to the 1981 Act. There was a similar definition of the term "entry into insurance" in the 1952 Act and similarly for the purposes of that Act by the combination of the definition of "insured person" therein and by the provisions of section 4 thereof the term "entry into insurance" meant the date of coming into operation of the 1952 Act that is to say the 5th day of January 1953.

"Entry into insurance" is defined in the Transitional Regulations S.I. number 255 of 1960 as meaning entry into insurance under the Acts or in the case of a person who had been insured under the National Health Insurance Acts his last entry into insurance as an employed contributor under the latter Acts before he attained the age of sixty years. The reference to "the Acts" in this definition in the Transitional Regulations is to the Social Welfare Acts 1952 to 1960.

There is no definition of the term "former contributor" in either the 1952 Act or the 1981 Act. That term is defined in the

Transitional Regulations S.I. number 255 of 1960 as "former contributor means a person who was insured under the Acts or under the National Health Insurance Acts at any time prior to the 2nd of January 1961".

It is quite clear that the appellant in this case is a former contributor within the meaning of these Transitional Regulations and that his entry into insurance occurred under the National Health Insurance Acts. In these circumstances it seems to me to be clear that the provisions of Article 6 (2) (a) of these Transitional Regulations applied to the Appellant in this case and provide:-

"(2) the said contribution condition shall be deemed to be satisfied in relation to a former contributor whose entry into insurance occurred before the 5th day of January 1953.... where the average per contribution year of contributions paid in respect of or credited to him is not less than forty-eight -

(a) in the period beginning on the 5th day of January 1953 as respects a man .... and ending at the end of the last complete contribution year before he attained pensionable age."

The appellant's case really hangs on the proposition that these provisions of the Transitional Regulations S.I. number 255 of 1960 are impliedly overridden or repealed by the provisions of section 78 (3) of the 1981 Act which is as follows:-

"(3) For the purposes of this chapter yearly average means in relation to any claimant the average per contribution year of contribution weeks in respect of which that claimant has qualifying contributions voluntary contributions or credited contributions in the period commencing at the beginning of the contribution year in

which his entry into insurance occurred and ending at the end of the last complete contribution year before the date of his attaining pensionable age."

The Transitional Regulations at Article 6 (2) (a) are quite clear that so far as the facts of this case are concerned one has to start counting from the 5th day of January 1953 up to the end of the last complete contribution year before the appellant attained pensionable age that is to say up to the 5th day of April 1984. The Appellant contends that one should start at the beginning of the contribution year in which the 5th day of January 1953 occurs that is to say by reference to the 1981 definition of contribution year the 6th day of April 1952. I do not think that this is so however. If one were to regard the Transitional Regulations as impliedly overridden or repealed by section 78 (3) of the 1981 Act this would require one to go back to the date of entry into insurance under the National Health Insurance Acts and then calculate from the beginning of that contribution year down to the 5th day of April 1984. I do not think however that this was at all in the minds or intention of the legislature. The Transitional Regulations are quite clear in making provision for persons who had entered into insurance under the National Health Insurance Acts and may work either favourably or as in this case unfavourably in respect of such persons by taking a starting point as the 5th of January 1953. They could work favourably in the case of a person who had entered into insurance in let us say 1945 under the National Health Insurance Acts but had very low yearly contributions during that period of eight years up to 1953. In this case they work very harshly against the Appellant and it is with considerable regret that I feel compelled to reach this decision because as I have already said all the merits of the

case appear to lie with the Appellant. Nevertheless it seems to me that the provisions of the Acts and the regulations are clear and in particular the provisions of the Transitional Regulations S.I. number 255 of 1960 are quite clear as to the manner in which the average yearly contributions are to be calculated and cannot be regarded as impliedly overridden by section 78 (3) of the 1981 Act which does not in my opinion contain any clear indication that that was the intention of the legislature.

Signed

Kevin Lynch

A handwritten signature in black ink, appearing to read "Kevin Lynch", is written over a horizontal line. The signature is stylized and cursive.

THE HIGH COURT

1985 No. 44b

IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS OF  
SECTION 299 OF THE SOCIAL WELFARE (CONSOLIDATION) ACT 1981

BETWEEN:-

ALBERT KINGHAN

Appellant

and

THE MINISTER FOR SOCIAL WELFARE

Respondent

For the Appellant:- Senator Mary Robinson S.C. and

Gerard Durkan B.L.

Instructed by Sheedy Hickey & Co. Solicitors

For the Respondent:- Dermot McGuinness B.L.

Instructed by Chief State Solicitor

Cases cited:-

Williams and Glynn's Bank .v. Boland (1980) 2 A.E.R. 408

Benyon on Statutory Interpretation (1984 Edition) Page 300

Maxwell on Statutes