

THE HIGH COURT

REVENUE

[2017 294 R]

BETWEEN

MICHAEL O'NEILL

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 29th day of June, 2018

1. Who is liable to pay the income tax chargeable on the increased pension payable in respect of a qualified adult pursuant to the Social Welfare Consolidation Act, 2005? This is the central issue raised by the Tax Appeal Commission in a case stated dated the 20th December, 2017.

Material legislative provisions

2. Pursuant to the provisions of s. 108 of the Social Welfare Consolidation Act, 2005 (SWCA) a person becomes entitled to an old age (contributory) pension where he or she has attained pensionable age and satisfies the contribution conditions prescribed by SWCA in s. 109. Section 112 of the SWCA provides:

"(1) Subject to this Part, the weekly rate of old age (contributory) pension shall be increased by the amount set out in column (3) of Part 1 of Schedule 2 for any period during which the beneficiary has a qualified adult, subject to the restriction that a beneficiary shall not be entitled for the same period to an increase of pension under this subsection in respect of more than one person.

(1A) The amount of the increase of pension referred to in subsection (1), in respect of any claim for State pension (contributory) made after 24 September 2007, shall be paid—

(a) directly to the qualified adult concerned, or

(b) to such other person as may be nominated by the qualified adult for the purpose of receiving the increase of pension referred to in subsection (1) on behalf of the qualified adult.

(1B) Where a beneficiary ceases to be entitled to State pension (contributory) the payment to a qualified adult of the increase of pension referred to in subsection (1) shall also cease."

3. Subsections (1A) and (1B) were inserted into s. 112 by the Social Welfare and Pensions Act, 2007 s. 14.

4. Section 2 of the SWCA provides that a "qualified adult" means in relation to a person (a) a spouse who is wholly or mainly maintained by that person (with certain specified exceptions which do not arise in this case), or "(b) a person over the age of 16 years being wholly or mainly maintained by that person and having the care of one or more than one qualified child who normally resides with that person" subject to certain qualifications. The financial means of the potential qualified adult are relevant in determining the entitlement to the increase of pension.

5. Section 126 (2) of the Taxes Consolidation Act, 1997 provides that the payment of old age (contributory) pension is deemed to be emoluments chargeable to income tax under Chapter 4 of Part 42.

6. Section 126 was amended by the Finance (No. 2) Act, 2013 s. 12 by the insertion of a new subs. after subs. (2A) as follows:

"(2B) Notwithstanding the provisions of section 112(1), where an increase in the amount of a pension to which section 112, 113, 117 or 157, as the case may be, of the Social Welfare Consolidation Act 2005 applies is paid in respect of a qualified adult (within the meaning of the Acts), that increase shall be treated for all the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary referred to in those sections of that Act."

Material facts

7. The appellant satisfied the conditions prescribed by the SWCA and thereupon became entitled to the old age (contributory) pension amounting to €11,975 per annum (the principal pension). The appellant was married and his wife was a qualified adult as defined by s. 2 of the SWCA as she was a spouse who was "wholly or mainly maintained" by the appellant and did not fall within any of the exclusions in the Act. During the years 2012 and 2013 the appellant qualified for an increase in pension in the sum of €10,728 as he had a qualified adult within the meaning of the SWCA.

8. The old age (contributory) pension was paid to the applicant and the amount of the increase in pension was paid directly to the qualified adult, the appellant's spouse, for the years under appeal.

9. By letter dated 23rd August, 2013 the respondent refused to apply the standard rate of tax to the increase in pension and also denied the entitlement to the employee tax credit on the grounds that the emoluments did not arise to the appellant's spouse. The appellant appealed the determination. The Appeal Commissioner found in favour of the appellant and the respondent requested the Tax Appeal Commission to state a case to the High Court.

Point of law

10. The question of law for the opinion of the High Court is whether "on the basis of the evidence given and the facts proved or admitted in the submissions of the parties and the law the beneficial interest in the increased pension is vested in the appellant, as opposed to his spouse, the "qualified adult" the recipient of the pension?"

Discussion

11. Consideration of the decision of the Supreme Court in *Ó'Síocháin (Inspector of Taxes) v. Neenan* [1999] 1 I.R. 533 is central to determining the issue raised in the case stated. In that case the respondent received a widow's (contributory) social welfare pension totalling £6,482.10 from the Department of Social Welfare. The pension of £6,482.10 consisted of an amount of £2,704.50 in respect of the respondent and £3,777.60 by way of increase to the pension for her five dependent children. The appellant assessed the respondent to income tax on the full amount of the pension. The respondent appealed the assessment on the ground that the widow's (contributory) social welfare pension was over stated by £3,777.60 in the assessment. In that case the widow's contributory pension was payable pursuant to s. 92 of the Social Welfare (Consolidation) Act, 1981. Section 95 of the Act provided for three cases in which the sum payable under s. 92 was increased. The section provided:

" 95(1) The weekly rate of widow's (contributory) pension shall be increased by the amount set out in column (4) or (5) of Part I of the Second Schedule in respect of each qualified child who normally resides with the beneficiary. "

(2) The weekly rate of widow's (contributory) pension, in the case of a person who has obtained pensionable age, shall be increased by the amount set out in column (6) of Part I of the Second Schedule for any period during which-

(I) the beneficiary is so incapacitated as to require full time care and attention.

(II) there is residing with the beneficiary for the purpose of providing that care and attention a prescribed relative of the beneficiary, and

(III) such conditions as may be prescribed are fulfilled.

(3) The weekly rate of widow's (contributory) pension shall be increased by the amount set out in column (7) of Part I of the Second Schedule where the person entitled to the pension has attained a pensionable age and is living alone."

12. It was agreed that the entire annual social welfare payment was taxable and the argument between the parties was the identity of the persons on whom the burden of taxation fell. It was agreed that the burden, irrespective of the person to whom the assessment might be made, is on the person or persons beneficially entitled to the increased amounts. The court held that it was the respondent who was entitled to the full amount of the payment of £6,482. Murphy J. giving the decision of the court, held as follows:

"Section 92(1) of the Act of 1981 expressly provides that it is the widow who is "entitled" to the widow's pension. It is that same pension which is "increased" by reference to all or any of the contingencies identified in section 95. No children's benefit is identified in sub-s. (1) of that section nor is a prescribed relatives benefit referred to in sub-section (2). Section 95(1) and (2) describe particular circumstances which clearly impose financial burdens on the pensioner and sub-s. (3) recognises the special needs of a pensioner living alone and of pensionable age. It seems to me to be clear beyond debate that the scheme of the legislation was to "increase", and that is the word used, the pension of the widow to meet those particular circumstances. No doubt a widow or any other parent would be expected to make provision for his or her children and the Oireachtas in enacting the Act of 1981 was satisfied to rely on the moral obligations which that relationship imposes. The legislation contains no words of trust in favour of all or any of the children nor is there any specific indication that any part of the increase should be applied for their benefit. In my view the increases to the basic pension which may be made under s. 95 of the Act of 1981, and in this case made by reference to the number of qualified children residing with the widow, are no more than that: increases in the pension to which the pensioner is herself entitled."

13. The judgment went on to distinguish the facts in the *Ó'Síocháin* case from those in *Ó'Coidealbháin (Inspector of Taxes) v. O'Carroll* [1989] I.R. 229. On p. 546 of the report Murphy J. said:

"It follows, therefore, that the Garda Síochána Pensions Order expressly identified "a children's contributory pension" and not merely an increase in the pension to which the widow was entitled. Again having provided that the children's contributory pension should be paid to the widow the Order expressly provided that that pension was "to be applied for the benefit of the children for whom it is granted". Again there is express provision that in certain circumstances the children's contributory pension might be paid to the child itself.

In broad terms the Garda Síochána Pensions Order and the Social Welfare Act both achieved the purpose of making additional resources available in circumstances where there were increased needs. But this purpose was met by different procedures in the two schemes. The Garda pension scheme provided what was described as a contributory pension for the children whereas the Social Welfare scheme merely increased the widow's pension."

14. The judgment concluded on p. 547 as follows:

"The absence of any comparable terminology in the social welfare code and the express provisions entitling the widow to the pension and the failure to draw any distinction between the entitlement to the pension and the increases thereon are coercive evidence of an intention that the beneficial entitlement to the entire of the social welfare payment should vest in the widow."

15. A comparison between the regime in *Ó'Síocháin's* and the regime with which this judgment is concerned reveals the following:

(1) In Ó'Síocháin there were no words of trust in favour of the children, while in this case, s. 112 (1A) provides that the amount of the increase of pension shall be paid directly to the qualified adult or to another person nominated by the qualified adult on behalf of the qualified adult.

(2) In Ó'Síocháin there was an express provision entitling the widow to the pension. Similarly, by virtue of s. 108 of SWCA the appellant is entitled to the old age (contributory) pension.

(3) In *Ó'Síocháin* there was no specific indication that any part of the increase should be applied for the benefit of the children. It is different in this case. The amount of the increase of pension is ring fenced. Section 109 subsections (9) and (10) provides:

"(9) Regulations under subsection (8) shall provide, subject to subsection (10), that old age (contributory) pension payable by virtue of those regulations shall be payable at a rate less than that specified in Schedule 2, and the rate specified by the regulations may vary by reference to the yearly average so calculated, but any increase of that pension payable under section 112 (2) shall be the same as if the claimant had a yearly average of not less than 48.

(10) In the case of person who, on 5 April 2001, is entitled to or in receipt of a pension by virtue of regulations under subsection (8) which includes an increase under section 112 (1), subsection (9) shall not operate so as to reduce the rate of the increase payable under section 112 (1) below the rate that may be prescribed."

This shows that the increase in the amount payable by reference to the qualified adult is protected and not to be reduced even if the provisions of subs. 9 would otherwise prescribe that a lower rate should be payable. Further, the 2007 amendment mandates that all of the monies referable to the increase of pension "shall be paid" directly to the qualified adult concerned or to such other person as may be nominated by the qualified adult for the purpose of receiving the increase of pension on behalf of the qualified adult. To my mind this is a specific indication that the increase of pension referable to the qualified adult should be applied for the benefit of the qualified adult. This conclusion is underscored by the contrast in the treatment of the payment of increase of pension in respect of a qualified child pursuant to SWCA to that in respect of a qualified adult. The amount of increase of pension in respect of a qualified child is paid to the beneficiary of the pension, as occurred in *Ó'Síocháin*, but the increase in respect of the qualified adult is either paid to the qualified adult concerned or to a person nominated by the qualified adult concerned. The qualified adult has full discretion as to how the monies are expended. Further, if the amount of the increase of pension is not paid directly to the qualified adult concerned or in accordance with the qualified adult's direction, the qualified adult would be entitled to require the department to discharge the sums to her (or him) and not to pay the monies to the beneficiary. In effect the beneficiary is not entitled to receive the amount of the increase of pension payable in respect of a qualified adult.

(4) In *Ó'Síocháin* the Oireachtas was relying upon the moral obligation which the relationship imposes upon the recipient of the pension with the children in respect of whom the increase of pension is payable to use the money for the benefit of the children. In contrast, since the amendment in 2007, the increase in pension in respect of a qualified adult is to be paid directly to the qualified adult concerned. The Oireachtas is not relying upon any moral obligation of the pensioner to use the money for the benefit of the qualified adult.

(5) In *Ó'Síocháin* the Supreme Court referred to the failure to draw a distinction between the entitlement to the pension and the increase thereon. In this case the distinction is clearly drawn. The beneficiary of the pension has no right to receive the amount of the increase of pension following the amendment of 2007.

16. In addition to these similarities and differences between the instant case and *Ó'Síocháin's* case, two further points are worth noting. In 2007 s. 112 was amended by the insertion of subs. (1B) which states that when a beneficiary ceases to be entitled to the state pension (contributory) the payment to the qualified adult of the increase of pension shall also cease. This underscores the fact that the entitlement to receive an increase to pension is inextricably linked to the entitlement to receive an old age (contributory) pension pursuant to s. 108.

17. Secondly, s. 126 of the Taxes Consolidation Act, 1997 was amended by the Finance (No. 2) Act, 2013 by the insertion after subs. (2A) of the following:

"(2B) Notwithstanding the provisions of s. 112 (1), where an increase in the amount of a pension to which s. 112, 113, 117 or 157, as the case may be, of the Social Welfare Consolidation Act, 2005 applies is paid in respect of a qualified adult (within the meaning of the Acts), that increase shall be treated for all the purposes of the Income Tax Acts as if it arises to and is payable to the beneficiary referred to in those sections in that Act."

18. Counsel for the appellant argued that this was a deeming provision and it was only necessary to have such a deeming provision if the increase of pension was not the income of the beneficiary. He said that it therefore constituted recognition of the fact that the increase of pension is not the income of the beneficiary, the appellant in this case, but was the income of the qualified adult. Counsel for the respondent argued that the amendment of 2013 should not influence the interpretation of s. 112 prior to the enactment of the 2013 Act. He referred to *Revenue Commissioners v. Droog* [2016] IESC 55 where Clarke J. said at para. 5.1:

"However, the trial judge noted that this Court had, in Cronin (Inspector of Taxes) v. Cork and County Property Company Limited [1986] I.R. 559, held that a subsequent amendment can at best be neutral in the context of the interpretation of the relevant legislation in its pre-amendment form and cannot be used to construe the statute as it was before the amendment in question."

In light of these two decisions it is not appropriate to refer to the amendment from 2013 when construing the legislation enacted prior to that amendment.

19. The respondent argued that the SWCA used the word beneficiary by reference to the person entitled to the old age (contributory) pension and referred to the increase of pension. A qualified adult has no independent entitlement to a separate pension. The pension is inextricably linked to the old age (contributory) pension. This is statutory architecture, as it was described, was not altered by the amendment in 2007.

20. While there are undoubtedly many similarities to the scheme construed by the Supreme Court in *Ó'Síocháin*, there are, in my opinion, marked differences between that scheme and the scheme under the SWCA providing an old age (contributory) pension and increases to pension which are paid to the qualified adult. Once the beneficiary applies for the increase to pension the right to receive it is conferred by statute on the qualified adult concerned. He or she only loses that right if the beneficiary ceases to be entitled to the old age (contributory) pension. In essence, this is a qualifying provision in the sense that the pensioner must have reached a certain age or the qualified adult must not be in receipt of certain level of income. It should not distract from the fact that the right to receive the increase to pension is conferred by statute on the qualified adult. The amendment effected in 2007 makes clear the fact that the Oireachtas intended that the beneficiary of the old age (contributory) pension should remain beneficially entitled to any increases of pension referable to qualified children but not to those which were referable to qualified adults. The beneficiary of the old

age (contributory) pension has no entitlement to receive the payment of the increase to pension in respect of a qualified adult. This is not a statutory dedication of income to which the beneficiary of the old age (contributory) pension is entitled. If the money must be paid to somebody else and that other person has full power of disposal of those monies, it is difficult to see how, in any meaningful sense, the beneficiary could be said to be entitled to those monies.

Conclusion

21. For the reasons set out above the qualified adult is beneficially entitled to the amount of the increase of pension payable pursuant to s. 112 (1) of the SWCA as the person to whom the monies are to be paid either directly or to such other person as the qualified adult may nominate to receive the increase of pension on his or her behalf.

22. Accordingly the answer to the question " whether on the basis of the evidence given and the facts proved or admitted in the submissions of the parties and the law the beneficial interest in the increased pension is vested in the appellant, as opposed to his spouse, the "qualified adult" the recipient of the pension ?" is "No".