

[2015] NZSSAA 08

Reference No. SSA 131/14

**IN THE MATTER** of the Social Security Act 1964

**AND**

**IN THE MATTER** of an appeal by **XXXX** of **XXXX**  
against a decision of a Benefits  
Review Committee

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

Ms M Wallace - Chairperson  
Mr K Williams - Member

**HEARING** at AUCKLAND on 9 December 2014

**APPEARANCES**

The appellants in person  
Ms N Jaura for the Chief Executive of the Ministry of Social Development

**DECISION**

***Introduction***

[1] The appellants appeal against a decision of the Chief Executive upheld by a Benefits Review Committee declining to pay a funeral grant in respect of their mother's funeral costs.

[2] The issue in this case is whether the appellants' mother was ordinarily resident in New Zealand at the time of her death.

***Background***

[3] The appellants are the sons of **XXXX**. Both the appellants and their mother come from **XXXX**. The appellants immigrated to New Zealand approximately 15 years ago.

[4] **XXXX** first arrived in New Zealand in 1999. She was granted permanent residence in New Zealand on 24 April 2004.

[5] New Zealand Customs Service records indicate that she spent 296 days in New Zealand from April 2004 to February 2005 and 204 days in New Zealand from October 2005 to April 2006. Since that time she has spent only short periods in New Zealand and did not visit New Zealand at all between 30 April 2006 and 2 November 2008 and 7 February 2009 and 27 November 2011.

[6] We understand that shortly after **XXXX** returned to **XXXX**, after a visit to New Zealand in April 2013, she caught Meningitis. Her family from New Zealand and her daughter in **XXXX** travelled to India to care for her but eventually it was decided to bring her to New Zealand for treatment and care while she recovered, as this would be easier

for family members living in New Zealand. The Authority was told that it was anticipated that she would recover from her illness and that she would then return to India to continue caring for her mother. XXXX was taken to hospital as soon as she arrived in New Zealand. This had been pre-arranged. Sadly, while she was in hospital she suffered a stroke and died.

[7] The appellants then made the application for a funeral grant which is the subject matter of this appeal. The application for a funeral grant was declined by the Chief Executive on the grounds that XXXX was not ordinarily resident in New Zealand.

[8] The appellants sought a review of the decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellants then appealed to this Authority.

[9] The appellants' position is that their mother was ordinarily resident in New Zealand prior to her death. They say her family was in New Zealand, she had a room in her son's house in New Zealand and kept belongings there. When she came to New Zealand her luggage was limited to carry-on baggage. When she was in New Zealand she attended the XXXX for various medical checks and she belonged to the XXXX. The only reason she returned to India from time to time was to care for her elderly mother. It was her intention to settle in New Zealand once her mother had passed on.

[10] XXXX maintained a flat in XXXX and received a pension in XXXX according to the application completed by her sons. The funeral grant application lodged by the appellants disclosed \$76.60 in a bank account in New Zealand. The balance of her bank account in XXXX was not initially disclosed but is now said to be \$2,954.07.

### ***Decision***

[11] Section 61DC of the Social Security Act 1964 (the Act) provides for the payment of funeral grants where there is no surviving spouse or dependent children. It provides for a funeral grant not exceeding \$1,971.37 to meet the deceased's reasonable funeral expenses if those funeral expenses cannot be paid from the deceased's assessable estate before the payment of any other debts.

[12] Section 61DA of the Act imposes certain restrictions on the payment of funeral grants. This includes the provision that a funeral grant will not be payable if the deceased person is not ordinarily resident in New Zealand on the date of death.

[13] The deceased had lived in New Zealand for the following periods:

<b>Arrival</b>	<b>Departure</b>	<b>Days in country</b>
1 Dec 1999	29 Jan 2000	60
24 April 2004	13 Feb 2005	296
9 Oct 2005	30 April 2006	204
2 Nov 2008	7 Feb 2009	98
27 Nov 2011	17 March 2012	112
25 Nov 2012	14 April 2013	141
16 Aug 2013	20 Sep 2013	36

[14] In short, the only period where XXXX had lived in New Zealand for any length of time was between 2004 and 2006. It is submitted on behalf of the Chief Executive that the inference that can be drawn from this particular period of residence is that XXXX

needed to spend a certain amount of time in New Zealand to obtain indefinite permanent residence. Once she left New Zealand, in April 2006, she did not return for approximately 2½ years at which time she came to New Zealand for a period of 98 days. There was then a further gap of almost three years before she returned to New Zealand on 27 November 2011. The Ministry's analysis of the deceased's presence in New Zealand is that out of a period of 11.25 years she has spent only 2.59 years in New Zealand. This was not challenged by the appellants.

[15] Shortly after the hearing of this matter, the Court of Appeal delivered a decision on the meaning of "ordinarily resident" in the context of the New Zealand Superannuation and Retirement Income Act 2001.<sup>1</sup>

[16] The Court found:

"[26] The New Zealand Oxford dictionary gives the following relevant definitions:

"ordinarily" – normally; customarily, usually  
 "resident – a permanent inhabitant"

[27] When the two definitions are read together, the expression refers simply to the place where a person usually lives. The concept of permanence is reinforced by the definition of 'reside' which includes 'to dwell permanently'.

[28] Questions whether absences, temporary, lengthy or indefinite, and whether intentions, subjectively or objectively ascertained, are relevant and, if so, to what extent, are not answered by the text of the expression. They need to be considered therefore in the light of the purpose of the provision.

[29] The purpose of the requirement that an applicant for New Zealand superannuation be 'ordinarily resident in New Zealand' on the date of their application is to provide a degree of connection between the applicant and New Zealand. Parliament has decided that only applicants with the requisite degree of connection should be entitled to apply for New Zealand Superannuation.

[30] It is not uncommon for statutes to use expressions such as 'ordinarily resident' to provide a connection of this nature. The Court must then enquire what degree of connection was envisaged by Parliament when enacting the particular provision.

[31] When a practical approach is adopted taking into account the following factors we have little difficulty in concluding that Parliament intended the degree of connection to be close and easily able to be determined:

...

[32] Adopting a practical approach here, we are satisfied that in order to implement the purpose of the Act by requiring a close and clear connection between an applicant and New Zealand, the expression 'ordinarily resident' should be interpreted to cover the following further elements:

- (a) Physical presence here other than casually or as a traveller;
- (b) Voluntary presence;
- (c) Some intention to remain in the country for a settled purpose;
- (d) Continuing residence despite any temporary absences; and

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<sup>1</sup> *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611 (12 December 2014).

- (e) Residence in New Zealand rather than anywhere else. The Act is not one which permits residence in two countries simultaneously.

[33] We also consider that 'ordinarily' means something more than 'residence', indicating the place where a person regularly or customarily lives, as distinct from temporary residence in a place for holiday or business purposes.

[34] Finally, whether a particular applicant is within the expression as we have interpreted it will be a question of fact in each case. In other words, an objective determination will be required based on an assessment of all the relevant factors in the particular case."

[17] In this instance, the deceased had never lived in New Zealand for a full year. She visited New Zealand for relatively short periods. She was born in XXXX and lived the ordinary course of her life in XXXX.

[18] The context of the Court of Appeal's decision in *Greenfield* is the New Zealand Superannuation and Retirement Income Act 2001. The appellants' application for a funeral grant is made pursuant to the Social Security Act 1964. It is therefore relevant to consider the purpose of the requirement in s 61DA that the deceased be ordinarily resident in New Zealand at the time of death.

[19] Other provisions of the Social Security Act 1964 require that (in general) benefits can only be paid to persons who have resided continuously in New Zealand for a period of two years at any one time, in addition to being ordinarily resident.

[20] While s 61DA does not require any particular period of residence, it requires something more than simple residence.

[21] The requirement suggests that the grant is not to be paid for the funerals of people who have been in New Zealand temporarily. Rather, it is intended for people who have made New Zealand their home; people who customarily live in New Zealand with the result that the New Zealand Government has a responsibility towards them.

[22] This case raises the issue of how and when someone becomes ordinarily resident in New Zealand. A person immigrating to New Zealand, who has given up their home in their homeland and brought their possessions to New Zealand with the intention of establishing themselves permanently in New Zealand, and who shows by their conduct that they intend to reside permanently in New Zealand, may be regarded as ordinarily resident in New Zealand at a very early stage, following their arrival in New Zealand.

[23] A person who arrives in New Zealand with the intention of returning to their home country after the purpose of their initial trip to New Zealand has been achieved, whether it be for a visit, a holiday, business or simply to obtain a particular immigration status, and who resumes day-to-day life in their home country is unlikely to be regarded as having become ordinarily resident in New Zealand.

[24] We have first considered whether XXXX became ordinarily resident in New Zealand in the period April 2004 to February 2005 and October 2005 to April 2006. We accept the submission made on behalf of the Chief Executive that an inference can be drawn from this period of residence that XXXX was in New Zealand for these periods to secure her permanent residence. It is evident that she had not given up her home in XXXX and intended to return to India when the purpose of her presence in New Zealand had been achieved. We are not satisfied that she became ordinarily resident in New

Zealand during this period. It seems clear that the subsequent visits were simply periods of temporary residence for the purpose of visiting family rather than taking up settled residence in New Zealand. The fact that she had possessions in a room in her son's house in New Zealand, she has family in New Zealand, and has had medical checkups and belonged and participated in a religious organisation in New Zealand, does not alter this proposition.

[25] We have also considered whether XXXX last visit may have resulted in her becoming ordinarily resident in New Zealand. The evidence was that the specific purpose of the trip was to enable her to receive medical treatment and to regain her health. We were told that had this occurred she would have returned to India to continue caring for her mother. We are not satisfied that XXXX became ordinarily resident in New Zealand during her last trip to New Zealand.

[26] XXXX was a citizen of XXXX. She maintained a flat in XXXX and she received a pension in XXXX prior to her death. We accept that it was XXXX intention to take up residence in New Zealand when her mother had passed on but we are not satisfied that she had at any time prior to her death taken up residence in New Zealand in such a way that it could be said that she customarily resided in New Zealand and therefore had become "ordinarily resident" in New Zealand.

[27] We are not satisfied that XXXX was "ordinarily resident" at the time of her death, nor had she been ordinarily resident in New Zealand at any time previously. The Chief Executive was correct to decline the application for a funeral grant.

[28] The appeal is dismissed.

**DATED** at WELLINGTON this 13<sup>th</sup> day of February 2015

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member