[2015] NZSSAA 070

Reference No. SSA 045/15

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member
Lady Tureiti Moxon - Member

HEARING at WELLINGTON and by telephone link with the appellant in Japan on 10 September 2015

APPEARANCES

Mr G Howell for the appellant
Ms E Kirkman for Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee declining his application for New Zealand Superannuation to be paid to him in Japan.

[2] His application was declined on the basis that he was not ordinarily resident in New Zealand on the date of his application.

Background

[3] The appellant is aged 79 years.

[4] He was first granted New Zealand Superannuation at the single sharing rate from 3 January 2002.

[5] The appellant met his wife XXXX, who is from Japan, approximately 21 years ago. Initially, they each made reciprocal visits to the other's country. On XXXX they married. The appellant said they had no intention of getting married but Japan's immigration rules made it more practical for him to get married to his wife for residence purposes.

[6] The appellant said that he and his wife had originally intended to move to New Zealand but his wife could not initially move to New Zealand because her mother was very unwell. Despite her mother's poor prognosis at the time they married, she had lived for much longer than had been anticipated. She eventually passed away in 2010. Following her mother's death, his wife was not able to travel to New Zealand because she needed to settle her mother's affairs. More recently, his wife has been unwell and is now too old to move to New Zealand with the appellant.

[7] The appellant lives in his wife's home in Japan. He belongs to a local tennis club and enjoys dancing. He does not maintain a home in New Zealand. When he comes to New Zealand he stays with his daughter or friends. He has bank accounts in both New Zealand and Japan. His doctor and dentist are in Japan. The appellant says that he will return to New Zealand if his wife dies before him. He feels that he should not be penalised for his living situation.

[8] The appellant confirmed that at one stage he did have work, teaching English in Japan part-time, but that is no longer the case. He was not specific as to precisely when this was. He is not entitled to a pension in Japan.

[9] Questions were first raised by Ministry staff as to whether or not the appellant was ordinarily resident in New Zealand in 2007. As a result of further information in 2011, the appellant's New Zealand Superannuation was cancelled and he was advised to apply for portability. The appellant applied for portability but his application was declined. The appellant sought a review of decision at that stage but the Ministry did not action the review appropriately.

[10] In July 2014 the appellant returned to New Zealand specifically to challenge the decision not to grant his application to be paid New Zealand Superannuation in Japan. The appellant informed the Ministry that, in fact, he and his wife had divorced and it was his intention to live permanently in New Zealand. The appellant then left

New Zealand in October 2014 before his review was processed. He left New Zealand because he had received advice that his wife was in hospital. He has not returned to New Zealand since that time.

[11] The Ministry's analysis of the appellant's Customs arrival and departure information shows that between 2 January 1997 and 2 January 2002 (five years prior to him applying for New Zealand Superannuation) the appellant was in New Zealand for 517 days out of 1,825 – 28.33% of the time. Between 3 January 2002 and 19 April 2011, the date of his application for portability, he was present in New Zealand for approximately 521 days out of a possible 3,058 days or 17.03% of the time. Moreover his average stay in New Zealand between 3 January 2002 and 19 April 2011 was 27 days. In summary, the Ministry say that at the time of his application for portability the appellant had spent around 82% of the previous nine years and three months outside of New Zealand.

Decision

[12] The application that is the subject of this appeal was made in 2011. That is the date at which we must consider whether or not the appellant was ordinarily resident in New Zealand.

[13] Section 21 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act), provides that a person is not entitled to New Zealand Superannuation while that person is absent from New Zealand, unless they can bring themselves within one of the exceptions to that rule contained in ss 22-35 of the Act, or there is an agreement between New Zealand and the overseas country which covers the particular person's situation. New Zealand does not have an agreement on social security with Japan.

[14] Section 26 of the Act provides for a person who is intending to reside for a period longer than 26 weeks in a country (or two or more countries) or intending to travel for a period longer than 26 weeks, to be paid New Zealand Superannuation overseas. However, certain conditions are attached to this entitlement.

[15] Section 26B provides that:

> A person is not entitled to be paid New Zealand superannuation under section 26 unless he or she—
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> > (a) has made an application for the payment of New Zealand superannuation under that section stating either (as the case may be)—
> >
> > ...

> (b) is ordinarily resident and present in New Zealand on the day he or she makes the application, and—
>
> (i) is entitled to receive New Zealand superannuation on that day; or
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> (ii) will become entitled to receive New Zealand superannuation before he or she leaves New Zealand.

[16] The term "ordinarily resident" in the context of the New Zealand Superannuation and Retirement Income Act 2001 has recently been considered by the New Zealand Supreme Court in *Greenfield v Chief Executive of the Ministry of Social Development*.[1] The Court found:

> [36] ... the enquiry into ordinary residence should logically address where the subject person's home had been up until the critical date, where that person was living at the critical date and that person's then intentions as to the future.
>
> [37] In a case where the subject person is not living in New Zealand but has in the past lived in New Zealand, that person's intentions as to future residence will be material to whether he or she remains ordinarily resident in New Zealand. ... The stronger and less equivocal the intention to return, the more likely it is that ordinary residence in New Zealand has been retained. The state of mind of the subject person, however, is only one consideration and must be assessed alongside the domestic realities of that person's life including the length of time that person has lived out of New Zealand. Other considerations may include the age of the subject person and family connections with New Zealand and the other country.

[17] In addition the Court was in no doubt that for the purposes of the New Zealand Superannuation and Retirement Income Act 2001; a person could not be ordinarily resident in two places.[2] The appellant cannot claim to be ordinarily resident in both New Zealand and Japan.

[18] The evidence in this case is that for at least seven years prior to his application for portability in 2011, the appellant's day-to-day life was lived in Japan. His wife is Japanese and although he is a foreigner in Japan, the appellant has residence status which allows him to live there on a long-term basis. The appellant lives in his wife's house. He has joined the local tennis and dance clubs and participates in those activities while he is living in Japan. He has a bank account in Japan.

[19] From the time New Zealand Superannuation was granted to him in 2002 until 2011, he visited New Zealand regularly every 26 weeks, primarily because he

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1 [2015] NZSC 139.
2 See also Carmichael v Director-General of Social Welfare [1994] 3NZLR 477 (HC).

believed he needed to do this to maintain his entitlement to New Zealand Superannuation. He still has friends and family in New Zealand but has no property here and does not belong to any particular organisation which engages his attention while he is in New Zealand. For the short periods that the appellant was in New Zealand he was, in effect, clearly a visitor. His average visit to New Zealand was for 27 days. His ordinary day-to-day life was, and is, in Japan. This has been the situation since at least 2002 but probably longer.

[20] The appellant says that if his wife dies before him he will return to New Zealand. His wife is six years younger than him. Clearly there is no certainty about the appellant returning to live in New Zealand at any time or in the near future.

[21] Taking into account the length of time the appellant has lived his day-to-day life in Japan, and the uncertainty about any permanent return to New Zealand, we are not satisfied that the appellant was ordinarily resident in New Zealand at the time of his application for portability in 2011.

[22] The Chief Executive was correct to decline the appellant's application for portability in September 2011. It was also appropriate that the Chief Executive suspend the appellant's entitlement to New Zealand Superannuation.

[23] For the purposes of this appeal it is not strictly necessary to consider the events which occurred when the appellant returned to New Zealand in July 2014. New Zealand Superannuation was further granted to him from 16 July 2014. At that time the appellant advised that he had divorced his wife and intended to live permanently in New Zealand. The Ministry accepted this advice and granted the appellant's application. The precise legal status of the appellant's "divorce" is unclear. The appellant has provided a document dated 23 July 2014. It is not clear who this document has been issued by, or in the event that the parties were both living together up until the appellant's departure from Japan, what the basis of the "divorce" might have been. In any event, no further application to be paid overseas was made at this time. The appellant returned to Japan in October 2014 and has not returned to New Zealand since then.

[24] We note, in passing, that it was highly unsatisfactory that the Ministry failed to process the appellant's application Review of Decision promptly. While the appellant may not have provided the information sought by the Ministry, that should not have stopped the review from proceeding.

[25] We appreciate that this is a difficult situation for the appellant, but neither the Chief Executive nor this Authority has any discretion in the matter.

[26] The appeal is dismissed.

DATED at WELLINGTON this 19th day of October 2015

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member

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