[2016] NZSSAA 014

Reference No. SSA 072/15

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Auckland 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

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to decline an application for New Zealand Superannuation made by the appellant on 30 October 2014.

[2] The application was declined on the basis that the appellant did not meet the residence criteria of 10 years' lawful residence in New Zealand so as to be granted New Zealand Superannuation.

Background

[3] The appellant is a 78 year old widow from China.

[4] A decision of the Immigration and Protection Tribunal (IPT)[1] records that she first visited New Zealand on 4 September 2002. She departed New Zealand in April 2003 and returned to New Zealand on 12 September 2004. She has not left New Zealand since then. At the time of her arrival in 2004 she was granted a visitor visa which expired at the end of March 2005. She did not leave New Zealand. She lived

[1] [2014] NZIPT 501244.

here unlawfully until she was granted a visitor visa under s 61 of the Immigration Act 2009 in March 2012. She was granted a further visitor visa in August 2012. That visa expired on 5 December 2012 and at that point she again became unlawfully present in New Zealand. She was liable for deportation.

[5] The appellant appealed to the IPT in January 2013. In its decision delivered on 25 June 2014, the Tribunal found that the appellant's particular circumstances constituted exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for her to be deported from New Zealand. It also found, in all the circumstances, it would not be contrary to the public interest for the appellant to remain in New Zealand on a permanent basis. The appellant was granted a resident visa. The IPT's findings were made primarily on the basis of her daughter's circumstances.

[6] The IPT decision records that in 2008 the appellant's daughter was treated for endometriosis and later developed major depression. A suicide attempt brought the daughter to the attention of the mental health services and she was admitted to hospital as an in-patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 in 2010 and 2012. The decision records that the appellant's daughter's mental health has not been fully stable since her first admission to hospital and she has developed a sense of paranoia. As a result of her paranoia, the daughter has withdrawn herself from her friends and neighbours and refuses their help. Given her distrust of other people the daughter relies heavily on her mother (the appellant) for physical, psychological and emotional support. The appellant is regarded by her daughter's various medical and psychological clinicians as a vital factor in her daughter's recovery from severe major depression.

[7] On 30 October 2014 the appellant made application for New Zealand Superannuation. Her application was declined on the basis that she did not meet the eligibility criteria for New Zealand Superannuation. In particular, she had not been resident and present in New Zealand for 10 years since attaining the age of 20 years.

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

[9] In submissions made to this Authority it is submitted that the appellant has now been resident in New Zealand for over 10 years as the caregiver of her sick daughter. Her situation should be considered as a special or rare and exceptional circumstance, and New Zealand Superannuation granted on humanitarian grounds. She requests that her exceptional circumstances be considered to outweigh her unlawful presence in New Zealand. In addition, the appellant considers that the number of days counted for the periods of presence and residence in New Zealand by the Ministry is incorrect.

Decision

[10] New Zealand Superannuation is paid pursuant to the provisions of the New Zealand Superannuation and Retirement Income Act 2001.

[11] To meet the eligibility requirements a person must be:

- 65 years of age.
- Resident and present in New Zealand for 10 years since attaining the age of 20 years.
- Resident and present in New Zealand for 5 years since attaining the age of 50 years.
- Ordinarily resident in New Zealand on the date of application.

[12] In this case it is accepted that the appellant meets the age qualification and was ordinarily resident in New Zealand on the date of her application. The Chief Executive does not accept that she meets the criteria of having been resident and present in New Zealand for 10 years since attaining the age of 20 years.

[13] Section 3(1) of the Social Security Act 1964 defines the term "resident" in relation to any person, as not including anyone unlawfully resident in New Zealand. As a result, the Authority has on a number of occasions concluded that periods of residence in New Zealand without a permit or visa to be here cannot be included in the calculation of the 10-year residence requirement.[2] Periods during which a person is in New Zealand on a visitor visa or other temporary visa, living the settled life of a resident on a long-term basis, might qualify to be included. In this case the Ministry included the following periods:

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[2] [2009] NZSSAA 4.

- 12 September 2004 to 30 March 2005,[3] when the appellant was on a visitor visa,
- 5 March 2012 to 5 September 2012 when the appellant was present in New Zealand on a visitor visa.
- 6 September 2012 to 5 December 2012 when the appellant was present in New Zealand on a visitor visa.
- 1 September 2014 to 16 September 2015 when the appellant was present in New Zealand on a resident visa.

[14] The appellant has drawn attention to periods where she says the Ministry's assessment is incorrect. First, she drew attention to her first visit to New Zealand in the period 4 September 2002 to 9 April 2003.

[15] The appellant was in New Zealand on a visitor visa during this period. She was here for six months. When she left in April 2003 it was more than a year before she returned in 2004. The Authority has previously found that to be resident in New Zealand means to have one's home in New Zealand on a long-term basis as opposed to simply being a visitor.[4] We infer given the time the appellant was present in New Zealand and the length of her subsequent absence that the appellant was not living the settled life of a resident during her first visit. She was simply a visitor. This was not a period of residence in New Zealand which should be included in the assessment.

[16] Although the appellant held temporary permits in subsequent years, she was living the settled existence of a resident during those periods. The Chief Executive was correct to include those periods as periods of residence in New Zealand.

[17] The second point made by the appellant is that she was granted a residence visa to be in New Zealand on 25 June 2014, according to the IPT decision. Her residence in New Zealand should be counted from that date and not the date the visa was entered in her passport which was 1 September 2014. We agree with the point made. The IPT decision reads not as a direction to grant a visa, but as the grant of an actual visa. The number of days should therefore be calculated from 25 June 2014. The Chief Executive has now accepted this is correct and a further 68 days should be added to the calculation.

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[3] Paragraph 6 of the Section 12K Report states 31 January 2005 is the end date but the number of days allowed indicates this is a typographical error and that the number of days allowed is up to and inclusive of 30 March 2005.

[4] See decision 36/2008 30 June 2008 approved by the High Court in *S & K v Chief Executive of the Ministry of Social Development* [2011] NZAR 545.

[18] We note for the appellant's information that periods of residence after the decision to which the appeal relates are not taken into account for the purposes of the appeal, but will of course be taken into account in assessing a future application.

[19] The periods the appellant has been resident and present in New Zealand do not add up to 10 years. The appellant does not therefore meet the eligibility criteria for New Zealand Superannuation.

[20] The appellant urges that her particular circumstances be considered. The eligibility criteria for New Zealand Superannuation do not allow the decision-maker to take into account the special, unusual or exceptional humanitarian circumstances of an applicant. The criteria are quite clear. Neither the Chief Executive nor this Authority nor any other person has any discretion in the matter.

[21] The fact that the appellant is not eligible for New Zealand Superannuation does not mean that she is not now eligible for other benefits. She has been invited to apply for an Emergency Benefit. She has declined to make an application. If the appellant is genuinely in need of financial support it is still open to her to make an application for Emergency Benefit.

[22] The appeal is dismissed.

DATED at WELLINGTON this 2nd day of March 2016

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member