[2016] NZSSAA 102

Reference No. SSA 060/16

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

**AND**

**IN THE MATTER** of an appeal by **XXXX** of Australia 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, declining his application for payment of New Zealand Superannuation in Australia.

[2] The appellant's application was declined because he does not fall within the definition of Australian resident in the reciprocal agreement between the Governments of New Zealand and Australia.

### Background

[3] The appellant was born in the United Kingdom in 1950. He immigrated to New Zealand with his parents when he was three years old. He remains a citizen of the United Kingdom. He has permanent residence in New Zealand but has apparently not applied for citizenship in New Zealand.

[4] On XX August 2015, he moved to Australia to be closer to family living there.

[5] Prior to moving to Australia, the appellant obtained an Australian visa known as a 461 visa. He received advice that this was the appropriate visa for his situation. This visa allows a non-New Zealand citizen family member of a New Zealand citizen to live and work in Australia for up to five years.[1]

[6] The appellant attained the age of 65 years on XX October 2015 and made an application for New Zealand Superannuation a few days later.

[7] The appellant's application was declined on the basis that he was not an Australian resident as defined in Articles 1 & 5 of the Reciprocal Agreement with Australia and Australian Social Security Act 1991.

[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] The appellant points out that to all intents and purposes he is a New Zealander. He is living in Australia to be close to the only family he has. He is having difficulty obtaining work in Australia. Returning to New Zealand does not appear to be an option and after 63 years of living in New Zealand he finds it disturbing that he is not regarded as a New Zealander and therefore not eligible for New Zealand Superannuation. His situation comes about primarily as a result of being provided with incorrect or incomplete advice in the past, which he has relied on in good faith. He requests that the Authority grant New Zealand Superannuation to him.

## Decision

[10] New Zealand Superannuation cannot be paid overseas unless the recipient can bring themselves within one of the exceptions contained in ss 22 to 35 of the New Zealand Superannuation and Retirement Income Act 2001, or an agreement or convention adopted under s 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.

[11] In this particular case, New Zealand has a reciprocal agreement on social welfare with Australia.[2] This agreement governs the way in which New Zealand Superannuation can be paid in Australia.

[12] Article 6 of the agreement provides that a person who would be entitled to New Zealand Superannuation under the social security law of New Zealand shall be

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1 www.border.gov.au/Trav/Visa-1/461.
2 See Schedule 1 of the Social Welfare (Reciprocity with Australia) Order 2002, Schedule 1.

deemed to be ordinarily resident and present in New Zealand on the date of that application if he or she is an Australian resident.

[13] Because the appellant had ceased to be ordinarily resident in New Zealand at the time of his application but was instead living in Australia, this article would allow for the appellant to be paid New Zealand Superannuation in Australia provided amongst the other criteria he is an Australia resident. Under the reciprocal agreement the term "Australian resident" has a special meaning.

[14] Article 1(1)(a) provides that the term "Australian resident" has the meaning given to it under Article 5. Article 5 provides that the term "Australian resident" has the meaning given to that term in the social security law of Australia, but for the purposes of the agreement also includes a New Zealand citizen who is not the holder of an Australian permanent visa but is lawfully resident in Australia. The provision goes on to set out criteria for determining whether or not a person is residing in Australia but that is not relevant in this case. The appellant is not a New Zealand citizen so it is necessary to refer to the definition in the social security law of Australia.

[15] The definition of Australian resident in the Australian Social Security Act 1991 is critical in this case. It defines Australian resident as follows:[3]

> An Australian resident is a person who:
> (a) resides in Australia; and
> (b) is one of the following:
> (i) an Australian citizen.
> (ii) the holder of a permanent visa;
> (iii) a special category visa holder who is a protected SCV holder.

[16] The appellant is not an Australian citizen. The visa he holds is referred to on the Australian Government website (see footnote 1) as "New Zealand Citizen Family Relationship (Temporary) visa (subclass 461)". The website states "this visa allows a non-New Zealand family member of a New Zealand citizen to live and work in Australia for up to five years". It is a temporary visa not a permanent visa.[4]

[17] Nor is the appellant a special category visa holder who is a protected SCV holder. In order to be a person who is eligible under this category the appellant would need to have been residing in Australia on 28 February 2001.

[18] In short, the appellant does not meet the criteria of Australian resident provided for in the social security law of Australia.

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[3] Section 7(2A).
[4] See Section 30 of the Australian Migration Act 1958.

[19] Neither the Chief Executive nor this Authority have power to waive the requirement that the appellant meet the definition of “Australian resident” in the reciprocal agreement.

[20] Furthermore, we note for the information of the appellant that Article 9(3) of the reciprocal agreement effectively means that the appellant must have applied for and been granted an Australian Age Pension before he can be paid New Zealand Superannuation in Australia. In the event that he applied and was not granted an Australian Age Pension, then the rate of New Zealand Superannuation payable to him would be nil, as Article 9 requires the amount of New Zealand Superannuation payable must not exceed the amount of the Australian Age Pension payable.

[21] In the circumstances, the Chief Executive was correct to decline the appellant’s application for New Zealand Superannuation.

[22] The appeal is dismissed.

**DATED** at WELLINGTON this 25th day of November 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