

[2017] NZSSAA 022

Reference No. SSA 057/16

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

DECISION ON THE PAPERS

The case for the appellant

- [1] XXXX appeals the decision of the Benefits Review Committee to suspend his New Zealand Superannuation ("NZS") from 18 October 2015 and to decline his application for portable NZS to be paid to him in the USA. Mr XXXX filed a notice of appeal on 20 March 2016, before he applied to the Benefit Review Committee for a review of the decision. He was advised of the correct process

and after the BRC determination was issued on 21 April 2016 he re-filed the same notice.

- [2] In his letter dated 20 March 2016 Mr XXXX states that he no longer wishes to live in New Zealand, that he is at present at his daughter's in California but intends to settle in China as soon as possible and therefore cannot provide a physical address. Mr XXXX provided an email address only for contact. He agreed to this appeal being determined on the papers.
- [3] Mr XXXX was born in the United Kingdom on XX April 1938. He resided in New Zealand between August 1985 and August 1995. Since 1995 he has lived in the USA, the United Kingdom and New Zealand. Mr XXXX states that he originally planned to retire to New Zealand but no longer wants that option so has applied for portability.
- [4] Mr XXXX states that he has paid tax in New Zealand for over thirty years. He says he was given inaccurate information regarding the length of time he needed to spend in New Zealand to be eligible for NZS. He states that the outcome he wants is to 'receive justice'.
- [5] Mr XXXX was given an opportunity to comment on the Ministry's s 12K report. On 10 August 2016 he confirmed he had nothing to add to his earlier submissions.

The case for the Ministry

- [6] The Ministry accepts that Mr XXXX was in New Zealand when he applied for portable New Zealand Superannuation payments but does not accept that he is ordinarily resident in New Zealand because since 2011 he has spent the majority of his time elsewhere. The fact that he is regarded as a New Zealand resident for tax purposes does not mean that he meets the requirements for residency under the New Zealand Superannuation and Retirement Income Act 2001 (NZSRIA).
- [7] The Ministry produced a schedule of Mr XXXX's movements in and out of New Zealand since 31 May 1989. He has not disputed this record.

- [8] As Mr XXXX has no intention of returning to New Zealand to live, the issue we need to consider is whether Mr XXXX is entitled to portable NZS under s 26 of the NZSRIA. The first step is for Mr XXXX to establish that he is eligible for NZS. Only if Mr XXXX proves he is eligible will he be entitled to apply for portable NZS. Section 26B of the NZSRIA states that:

A person is not entitled to be paid New Zealand superannuation under section 26 unless he or she

...

(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

(ii) will become entitled to receive New Zealand superannuation before he or she leaves New Zealand.

- [9] The residential qualifications for NZS are provided in s 8 of NZSRIA. Section 8(a) requires a person to be ordinarily resident in New Zealand on the date of application. In *Greenfield v Chief Executive of the Ministry of Social Development*¹ the Supreme Court considered how this provision should be interpreted. The Court held that the meaning to be attributed to the words “ordinarily resident in New Zealand” turned on the particular statutory context. The Court focussed on where an applicant’s home had been prior to the time in question, where the person was living at the relevant time, and the person’s intentions as to the future. The Court of Appeal in *Greenfield* held that the purpose of requiring an applicant for NZS to be ‘ordinarily resident’ was to ensure a ‘close and clear connection between an applicant and New Zealand’.²

- [10] In light of these decisions, an applicant’s temporary absence from New Zealand is not inconsistent with being considered ‘ordinarily resident’ but during periods

¹ *Greenfield v Chief Executive of the Ministry of Social Development* [2016] 1 NZLR 261; [2015] NZSC 139.

² *Chief Executive of the Ministry of Social Development v Greenfield* [2015] 3 NZLR 177; [2014] NZCA 611 at [29] and [32].

of longer absences, particularly where the person may regard another country as home, the person will not be ordinarily resident in New Zealand.³

- [11] An intention to return was seen by the Court as relevant but not determinative. Conversely, an intention never to return to New Zealand would preclude a finding of ordinary residence in New Zealand.⁴

Conclusion

- [12] Mr XXXX complains that he paid tax in New Zealand and should be entitled to NZS as a result. However the requirement to pay tax on income earned in New Zealand is not a matter which is relevant to a person's entitlement to New Zealand Superannuation.

- [13] The undisputed records produced by the Ministry of the dates on which Mr XXXX has been in and out of New Zealand show that, at the date of application for NZS, Mr XXXX was only present in New Zealand for approximately 532 days out of a possible 1456 days or 36.54% of the time.⁵ These records indicate that at the date of application Mr XXXX was not ordinarily resident in New Zealand. However the factor that conclusively precludes our finding that Mr XXXX is ordinarily resident in New Zealand is his statement that he no longer wishes to live here.

- [14] For these reasons, the Authority is satisfied that Mr XXXX is not ordinarily resident in New Zealand and therefore that he does not meet the requirements for New Zealand Superannuation. As he does not qualify for NZS, he cannot qualify for portable payments of NZS.

- [15] Accordingly this appeal is dismissed.

Dated at Wellington this 9th day of May 2017

³ *Greenfield* (SC) at [34].

⁴ *Greenfield* (SC) at [37].

⁵ At [6.11] of the s 12K report.

S Pezaro

Deputy Chair

K Williams

Member

C Joe JP

Member