

[2017] NZSSAA 039

Reference No. SSA 056/16

**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**

**S Pezaro** - Deputy Chair

**K Williams** - Member

## **DECISION**

### **Background**

- [1] XXXX was born in Ethiopia in 1939 and arrived in New Zealand in 2004 when she was 65. She was granted New Zealand citizenship in 2008. Between 2004 and 2008 she received emergency, unemployment, sickness and invalid's benefits, the latter paid from 5 February 2008 to 14 September 2008.
- [2] On XX August 2008 Ms XXXX moved to Australia to be with her family. It is agreed that the Ministry advised her that her invalid's benefit would be suspended from 15 September 2008 if she did not return. Ms XXXX has not returned to New Zealand. She is supported by her family in Australia.
- [3] On 29 April 2013 Ms XXXX applied for an Australian Age pension but was rejected because she did not meet the residency rules. On 6 August 2015 the Ministry received an application for Supported Living Payment while resident in Australia – referred to in this decision as Supported Living Payment – Overseas (SLPO). This application was incorrectly treated as an application for New Zealand Superannuation and was declined as Ms XXXX did not meet the criteria for payment in Australia. The Ministry then reviewed this decision and considered the application as being for SLPO. The application was declined because Ms XXXX had no

working age residence in New Zealand. This decision was upheld by a Benefits Review Committee.

- [4] Ms XXXX now appeals the decision of the Chief Executive not to grant her application for a SLPO under the Social Welfare (Reciprocity with Australia) Order 2002 (the Order) which gives effect to the Agreement on Social Security between the Government of New Zealand and the Government of Australia (the Agreement) in New Zealand law. The appellant also appeals the decision not to grant her an emergency benefit.
- [5] Ms XXXX authorised Ms Z of the Benefit Rights Service to file this appeal on her behalf and act as her agent. Ms Z states that she is a retired community worker who has had close contact with Ms XXXX since she arrived in New Zealand. She is a friend of Ms XXXX's family who visits the appellant in XXXX annually and maintains contact by telephone.
- [6] The appeal was filed on 6 May 2016 in the form of a brief letter from Ms Z stating that the grounds of appeal are that Ms XXXX 'qualifies for SLP under the reciprocal agreement and thus for Disability Allowance and TAS (Temporary Additional Support) also'.
- [7] The Ministry filed its s 12K report on 1 July 2016. On 23 August 2016 Peter McKenzie QC filed submissions for Ms XXXX, a statement from Ms Z and submissions from Māmari Stephens. Submissions on behalf of the appellant were filed by Māmari Stephens who is an enrolled barrister and solicitor but who, at the relevant time, did not hold a practising certificate. While s 12K(8) of the Social Security Act permitted Ms Stephens to appear as an "advocate" for the appellant, under s 21 of the Lawyers and Conveyancers Act 2006 she was not entitled to hold herself out as "counsel" for the appellant. Accordingly the submissions have been treated as submissions by Mr McKenzie QC.
- [8] The Ministry filed its response to these submissions on 5 September 2016.
- [9] The parties agreed to this appeal being determined on the basis of their written submissions.

### **The case for the appellant**

- [10] Mr McKenzie's submissions focus on two legal points:
  - a) That there are inconsistencies between the articles of the Order and that to avoid discrimination against Ms XXXX these ambiguities should be interpreted in light of the purpose of the Order and be given a construction which is consistent with the New Zealand Bill of Rights Act 1990 (NZBORA).

- b) The Order is ultra vires the Social Security Act 1964 (the Act) and the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990 (the Reciprocity Act) as it is inconsistent with the Act, if it is interpreted as not extending Emergency benefit to Australian residents, and for being discriminatory on the basis of age and disability.

[11] Ms Z's statement does not address the criteria for granting SLPO or an emergency benefit. She says that:

- a) the Agreement (presumed to refer to the Order) has unintended consequences and is discriminatory.
- b) the Ministry incorrectly states that Ms XXXX has not been assessed to determine whether she is severely disabled because she has not applied for a disability allowance in Australia; she applied in July 2013 but there has been no assessment.
- c) the question of whether there was discretion to grant an emergency benefit was raised at the BRC hearing.
- d) Ms XXXX is severely disabled, in hardship and urgently needing assistance.

#### **The case for the Ministry**

- [12] The Ministry accepts that Ms XXXX qualifies on residency grounds for SLPO under the Order, subject to medical evidence that she is severely disabled. However, pursuant to Article 10, the rate of SLPO payable to an Australian resident is calculated in accordance with the number of whole months of working age residence in New Zealand. Article 5 of the Order defines working age residence as residence between the ages of 20 and 64 years. As the appellant was 65 when she came to New Zealand she has no whole months of working age residence and therefore a nil entitlement to SLPO.
- [13] The Ministry submits that there is no discrimination in the decision to decline the appellant's application for SLPO. In order to establish discrimination under s 19 of BORA the appellant must establish that she is treated differently on the basis of a prohibited ground. While age and disability are prohibited grounds, the reason the appellant does not receive SLPO is that she does not meet the working age residence qualification.
- [14] In relation to the emergency benefit, the Ministry says that s 77(1) of the Act provides that a benefit, including an emergency benefit, is not payable while a beneficiary is absent from New Zealand unless one of the exceptions apply. The Ministry's position that the exceptions do not apply appears to be accepted by the appellant.

- [15] The Ministry submits that the emergency benefit is not subject to the Order because it is not included in the legislation identified in Article 2 of the Order as being subject to the Agreement.

### **The issues**

- [16] The appellant is not contending that she meets the criteria for SLPO of having working age residence in New Zealand; it is submitted that the applicable provisions are inconsistent and ambiguous, and discriminatory. Therefore we have addressed the following issues:
- a. The purpose of the Order;
  - b. Whether there are inconsistencies between Articles 6, 8, and 10 of the Order;<sup>1</sup>
  - c. Whether the Order extends entitlement to Emergency Benefit to Australian residents;
  - d. Whether the Order is discriminatory; and
  - e. Whether the Order is ultra vires.

### **The purpose of the Order**

- [17] Generally, benefits are not payable to beneficiaries who are absent from NZ other than in certain circumstances for example when the absence is temporary. To qualify for Supported Living Payment (SLP), as a New Zealand resident, an applicant is generally required to be ordinarily resident and present in NZ on the date that their application is made and must have resided in NZ for any continuous period of 2 years. International social security agreements provide an exception to these requirements; the Order brings NZ's Agreement with Australia on social security into force in NZ. This Order allows Australian residents, who qualify under the Order, access to specified NZ benefits such as SLPO.
- [18] The Order giving effect to the Agreement contains articles which deem an Australian resident who makes an application for a specified NZ benefit to be ordinarily resident and present in NZ on the date that they make the application. The Order also allows for the totalisation of periods of residency in NZ and Australia for the purposes of meeting residential qualifications. This allows persons to apply for and receive a rate of NZ benefit which they would not qualify for under NZ law alone.
- [19] One of the primary objectives of the Agreement between NZ and Australia was to ensure equivalency of treatment between Australian residents receiving an Australian benefit and

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<sup>1</sup> Renumbered 8, 9 and 12 due to the inclusion of further Articles 5 and 6; henceforth referred to using their original numbering to avoid confusion when reading the Order.

Australian residents receiving a NZ benefit under the Order, and vice versa in regards to NZ residents. However the benefits provided to Australian residents under the Order are generally more restrictive than the benefits provided under NZ social security laws.

- [20] The purpose of the Order is to give effect to the Agreement in NZ law. Section 19 of the Reciprocity Act provides:

**19 Adoption of reciprocity agreement with other countries**

- (1) For the purpose of giving effect to any agreement or Convention with the government of another country providing for reciprocity in respect of matters relating to social security monetary benefits, or to any alteration thereto, the Governor-General may, by Order in Council,—
- (a) declare that the provisions contained in any agreement or Convention or alteration thereto set out in a schedule of the Order in Council shall have force and effect so far as they relate to New Zealand:
  - (b) declare that the provisions of this Act and of the Social Security Act 1964 and Part 6 of the War Pensions Act 1954 and of Part 1 of the New Zealand Superannuation and Retirement Income Act 2001 and of the regulations and orders in force under those Acts shall have effect subject to such modifications as may be required for the purpose of giving effect to the agreement or Convention or alteration thereto:

- [21] The purpose of the Agreement is provided in the preamble to the Articles of the Agreement under schedule 1 of the Order; it states:

The Government of New Zealand

and

The Government of Australia

...

WISHING to strengthen the existing friendly relations between the two countries,

and

DESIRING to coordinate the operation of their respective social security systems and to enhance the equitable access by people covered by this Agreement to specified social security benefits provided for under the laws of both countries,

- [22] As the Agreement is an international bilateral treaty, Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 apply to its interpretation. Article 31 provides that a treaty must be interpreted in good faith and in accordance with the natural meaning of the terms in their context and in light of its purpose. Article 32 provides that interpretive assistance may be gained from outside sources in order to confirm the meaning established

under Article 31 or to determine the meaning when interpretation in accordance with Article 31 leaves the meaning ambiguous.

- [23] The history of New Zealand's and Australia's agreements on social security was canvassed in the case *Bredmeyer v Chief Executive of the Ministry of Social Development* [2008] NZCA 557 (the Supreme Court declined leave to appeal from this decision). In *Bredmeyer* the Court found that:<sup>2</sup>

...under both the 1988 and 1994 Agreements, a New Zealand citizen living in Australia was only eligible for an Australian age pension if he or she met the eligibility requirements under the relevant Australian legislation. Therefore, if the age pension was means tested the New Zealander would only be entitled to the benefit if his or her income or assets were below the cut-off point. There is nothing to suggest there was any change in policy in this respect when the Agreement now in issue was made.

- [24] Under the Order, benefit payments to a recipient of a benefit under the Order are comprised of payments from both NZ and Australia. The Court stated that:<sup>3</sup>

This change explains the need to introduce a cap in Article 9(3) because now benefit recipients are being paid a proportion of an Australian age pension and a proportion of New Zealand superannuation. Article 9(3) applies so that where there is nil entitlement to the Australian age pension, there is no entitlement to a portion of New Zealand superannuation.

- [25] Finally, the Court observed that there has been a 'gradual winding back of the arrangements, for example, a reduction in the range of benefits covered like the widows benefit no longer part of the reciprocal arrangement'.<sup>4</sup> The Court noted that the Agreement originated from a political compact and that the Agreement needed to be construed in this context.

- [26] The Court observed that it was clear from the Parliamentary materials that the New Zealand government intended the arrangements with Australia to 'coordinate the relevant social security laws to provide for residence in one country to "count" as residence in the other'.<sup>5</sup> The objective was to ensure equivalence so that an Australian beneficiary is not advantaged over a New Zealand beneficiary and vice versa.<sup>6</sup>

- [27] Article 4 of the Order is expressly subject to the other provisions in the Agreement and provides that:

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<sup>2</sup> *Bredmeyer v Chief Executive of the Ministry of Social Development* [2008] NZCA 557 at [51].

<sup>3</sup> *Bredmeyer* at [52].

<sup>4</sup> At [53].

<sup>5</sup> At [59].

<sup>6</sup> At [31].

Except as provided for in this Agreement, the persons to whom this Agreement applies shall be treated equally by each of the Parties in regards to rights and obligations that arise under the social security law of that Party or as a result of this Agreement.

This Article is expressly subject to the other provisions of the Agreement.

**Are there inconsistencies between Articles 6, 8, and 10 of the Order?**

*Submissions of the appellant*

[28] Mr McKenzie submits that there are inconsistencies between the articles of the Order relating to SLPO and totalisation. It is submitted that Article 6 is the operative provision relating to entitlement to SLPO while a person resides in Australia. Mr McKenzie argues that the appellant satisfies the criteria of Article 6 and is qualified to receive SLPO because:

- a) she was present in Australia on the date of her application;
- b) she is an Australian resident and has the intention of remaining there for at least one year and has been residing there for at least 26 weeks; and
- c) she has been a New Zealand resident at some time during her life for a period greater than 1 year since she attained the age of 20 years.

[29] Mr McKenzie submits that Article 8 provides that when determining whether a person meets the residential qualifications for SLP, a person's periods of residence in Australia are deemed to be periods for which that person was a New Zealand resident and present in New Zealand. Mr McKenzie submits that the appellant qualifies for SLPO as neither Articles 6 nor 8 introduce working age residence as a qualifier in relation to SLPO.

[30] Article 10 is the provision dealing with the rate of SLPO payable to a beneficiary who is resident in Australia; it introduces the element of working age residency. Mr McKenzie contends that Articles 6, 8 and 10 are inconsistent and ambiguous because:

Under Art 6.1 a person who is entitled to receive a benefit, including Invalids benefit (SLP), under the social security law of New Zealand except for the fact of that person not being ordinarily resident or resident and present in New Zealand, that person is treated as being deemed to be ordinarily resident and resident and present in New Zealand if the criteria set out in the Article are satisfied. In that event the person is treated as though she had never left New Zealand and is still ordinarily resident and resident and present there, and so continues to be entitled to the benefits to which she is entitled in New Zealand...

Nothing is said in Art 6.1 or Art 8.2 about working age residence. These Articles are framed in terms of ordinary residence or residence and presence without any reference to working age. The introduction into Art 10 of the qualification in relation to working age and stipulating for a period of working age residence introduces a fundamental inconsistency with Art 6.1 and 8.2, and has the effect of taking away with the one hand what is granted under Articles 6 and 8 on the other hand.

*Interpretation of Articles of the Order relevant to SLP*

- [31] We are not satisfied that the Articles of the Order are inconsistent in the way that counsel for the appellant suggests. We now set out the Articles of the Order which are relevant to SLPO and explain their effect.

*Article 2 – Legislative Scope*

- [32] Article 2.2 of the Order is the primary qualifier for the receipt of SLPO. It provides:

For the purposes of this Agreement an Australian disability support pension and a New Zealand [Supported Living Payment] shall be limited to cases where:

- (a) the person is severely disabled;
- (b) the person was a resident of one of the Parties at the date of severe disablement; and
- (c) the person, prior to the date of severe disablement, was residing in the territory of the other Party for a period of not less than one year at any time.

- [33] 'Severely disabled' is defined in Article 1 of the Order as being totally unable to work for a period of at least two years and unable to benefit from participation in rehabilitative or assistance programmes for a period of two years, or being permanently blind.

- [34] This qualification is considerably more restrictive than the qualification to receive SLP in New Zealand under s 40B of the Act. That section requires that an applicant be permanently and severely restricted in their capacity for work, meaning he or she is unable to work more than 15 hours per week in open employment for a period of at least 2 years, or is totally blind.<sup>7</sup>

- [35] Article 2 also considerably limits the class of persons who may receive SLPO relative to the class of persons eligible for SLP under Part 1E of the Act.

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<sup>7</sup> Social Security Act 1964, s 40B(2) & (3), and Social Security (Supported Living Payments Benefit) Regulations 1998, reg 2.



- [36] The description of the appellant's health condition would seem to support the conclusion that she is severely disabled and totally unable to work however it does not appear from the evidence that this has been verified for the Ministry by medical evidence.

*Article 6 – Residence in Australia*

- [37] Article 6 .1 of the Order provides that:

Where a person would be entitled to receive a benefit under the social security law of New Zealand... except that he or she is not ordinarily resident or resident and present in New Zealand on the date of application for that benefit, that person shall be deemed, for the purposes of that application, to be ordinarily resident and resident and present in New Zealand on that date...

- [38] This provision allows a person to apply for a NZ benefit specified in the Order despite not being ordinarily resident or resident and present in NZ on the date of the application for that benefit. Where the applicant satisfies the criteria of Article 6 they will be considered ordinarily resident in New Zealand for the purposes of an application for SLPO.
- [39] Article 6 replaces the residential qualification of SLP provided in s 74AA of the Act relating to NZ resident applicants for SLP. Section 74AA(1) provides that an applicant for SLP must be a NZ citizen or holder of a NZ residence class visa, be ordinarily resident in NZ when he or she first applied for SLP, and have resided continuously in NZ for 2 years at any one time.
- [40] According to s 74AA(1A) a person does not need to be a NZ citizen or hold a NZ residence class visa, or be ordinarily resident in NZ when they first apply for SLP where there is a reciprocal agreement in force under s 19 of the Reciprocity Act (in this case, the Order). However the requirement to have resided in NZ for a continuous period of 2 years at any one time before the application for SLP is made or a decision is made by the Ministry does apply.
- [41] Accordingly where a person satisfies the criteria in Article 6 of the Order and the criteria to receive SLP in NZ under part 1E of the Act (ss 40A to 40K) they will still not be entitled to receive SLPO. They must also meet the more restrictive qualification of being 'severely disabled' under Article 2.2 of the Order and have continuously resided in NZ for a period of at least 2 years at any time prior to their application for SLP in Australia or before a decision is made on that application.

*Article 8 – totalisation for New Zealand*

- [42] Article 8 of the Order provides for totalisation of periods of residence in NZ and Australia when determining whether a person meets the residential qualifications for SLPO by requiring

the Ministry to deem a period where a person is an Australian resident as a period in which that person was both a NZ resident and present in NZ.

- [43] This Article would apply to an applicant who did not have two continuous years of residency in NZ but was resident in Australia immediately after being resident in NZ. Pursuant to Article 8 the total period of residence would be taken into account for assessing whether the residential qualification in s 74AA(1)(c) of the Act is met. As the appellant received SLP in NZ and had 2 years continuous residence in NZ Article 8 has no bearing on her case.

*Article 10 – rate of New Zealand [Supported Living Payment] in Australia*

- [44] Article 10 of the Order introduces further qualifications to the receipt of SLPO. Article 10.1 provides a formula for calculating an Australian resident's entitlement to SLP. The formula uses the concept of 'working age residence in New Zealand', defined in Article 5.5 of the Order as:

... a period of residence between the ages of 20 and 64 years inclusive... but does not include any period deemed pursuant to Article 8 [totalisation]... to be a period in which that person was an Australian resident or a New Zealand resident.

- [45] Article 10.2 provides for the entitlement of an Australian resident to SLP to be calculated in accordance with Article 10.1 however it must not exceed the amount of Australian disability support pension that would have been payable to that person if they were entitled to receive an Australian disability support pension but not SLP.
- [46] Counsel for the appellant argues that the introduction of the concept of working age residence is inconsistent because the appellant was entitled to SLPO after satisfying the residential and severely disabled criterion and that the calculation incorporating working age residence subsequently took away her entitlement.
- [47] However the criteria for SLP entitlement as an Australian resident are criteria leading to an entitlement to a rate of SLP determined in accordance with Article 10; there is nothing inconsistent between Articles 6, 8 and 10. Article 10 simply limits the amount of benefit to which a person may be entitled. Similarly Article 2 limits the class of Australian residents who may receive SLP.
- [48] In this case the appellant is entitled to receive a rate of SLP calculated in accordance with Article 10 however, as she has no working age residency in New Zealand, her rate of entitlement under Article 10 is nil.
- [49] Counsel for the appellant submits that:

It makes no sense to talk of an aged applicant for [SLPO] being required to have a period of working age residence in New Zealand. Applicants are invalids over the age of 65 who cannot work, and the purpose of the benefit is to assist persons who cannot support themselves because of sickness, injury or disability. A possible reason for the confusion is that in Australia [working age residence] is required in calculating the rate of Disability Support Pension but is not required in relation to NZ SLP. Art 10 wrongly attempts to introduce equality of treatment as between Australian beneficiaries and New Zealand beneficiaries by introducing the requirement for [working age residence], but in doing so, has removed from NZ beneficiaries an entitlement they have under the [Social Security Act] 1964 where [working age residence] is not taken into account in determining the rate of benefit.

- [50] The appellant's submission that Article 10 should be interpreted in such a way so as to exclude the requirement to calculate the rate of entitlement using working age residence in NZ is inconsistent with the clear meaning and purpose of the Order. If the assertion of Mr McKenzie were correct, that Australian disability support pension does take into account working age residence, then his submission fails to take into account Article 10.2 which provides that an Australian resident recipient must not receive an amount of SLP that exceeds the amount of Australian disability support pension that would have been payable to him or her if they were entitled to receive an Australian disability support pension but not SLP.
- [51] The purpose of Article 10.2 must be to ensure equivalency between NZ and Australian residents who are recipients of a specified benefit from the other country, and the residents of that country who are only entitled to a benefit from the country in which they reside.
- [52] Taken as a whole we do not consider that the Articles of the Order relating to SLP are inconsistent or ambiguous. The Agreements with Australia and therefore the Orders which give effect to them are an extension of rights rather than a curtailment. The restrictions on eligibility are justified by nature of the Agreement as an international political compact which extends restricted entitlements to social security of a jurisdiction a person no longer resides in, and the need to ensure that a resident of Australia or New Zealand, who is entitled to receive a benefit from the country in which they no longer reside in, does not receive a benefit which is more advantageous than that available to their fellow residents who are not entitled to a benefit from the other country.

#### **Does the Order extend entitlement to Emergency Benefit to Australian residents?**

- [53] Mr McKenzie submits that if the Authority does not accept that the appellant is entitled to a rate of SLPO at a rate above nil then she is entitled to an Emergency Benefit under s 61 of the Act. Mr McKenzie describes an Emergency Benefit as a third tier discretionary benefit intended to alleviate need in certain statutory circumstances such as special need or hardship.

[54] Mr McKenzie submits that references in the Order to the SLPO must be read as including the Emergency Benefit where in the exercise of the Chief Executive's discretion this benefit is granted instead of or in substitution of the SLP.

[55] It is also submitted that s 61 of the Act [Part 1G -Emergency Benefits] is a provision that 'provide[s] for appl[ies] to, or affect[s]' the supported living payment and therefore 'must *prima facie* be imported by way of the Order as one of the laws for the purposes of [s] 19(1)(b) [of the Reciprocity Act]. In support of this submission counsel contends that:

- a) Section 19(1)(b) of the Reciprocity Act states that the Governor-General of NZ may for the purpose of giving effect to any social security agreement or Convention:

declare that the provisions of this Act and of the Social Security Act 1964... and of the regulations and orders in force under those Acts shall have effect subject to such modifications as may be required for the purpose of giving effect to the agreement or Convention...

- b) The nature of the Agreement was to:

coordinate the operation of their perspective social security systems and to enhance the equitable access by people covered by this Agreement to specified social security benefits provided for under the laws of both countries.

- c) Article 2 of the Order states that the Agreement applies to the Social Security Act 1964 in so far as it provides for, applies to or affects NZ superannuation, veteran's pension, and SLP; these are the specified social security benefits.
- d) Article 2 does not identify the specific provisions which provide for, apply to, or affect NZ SLP. Section 61 [Part 1G – Emergency Benefits] is a provision which provides for, applies to, or affects SLP as the 'chief executive has the power... to substitute an *existing SLP payment* with an emergency benefit, or grant such an emergency benefit *instead of* an SLP, including a fresh entitlement.
- e) 'Section 61 is clearly a provision that affects the implementation of the supported living payment under Article 2(1)(b) of the Order' and 'neither the language of the enabling Act, including 'modifications' in section 19(1)(b) of [the Reciprocity Act], not the language of the order (including 'modifications' in Article 4 and 'specified social security benefits' in the preamble) ought to be read in such a way that fetters the discretion under s61.'

- [56] The Emergency Benefit is a discrete main benefit and is not made available to Australian residents under the Order. Pursuant to s 61(1)(b) an Emergency Benefit is granted when an applicant is not qualified to be granted a main benefit under the Act. Therefore Emergency Benefits are granted where there is a need that qualifies and no other main benefits are available.
- [57] In certain circumstances the Chief Executive has the discretion to grant an Emergency Benefit instead of or in substitution for SLP or other specified benefits. While it may be argued that these provisos apply or affect NZ SLP, they only do so in the sense that they give a discretion to decline to grant SLP and instead grant an Emergency Benefit.
- [58] The order refers to 'specified social security benefits' in the preamble to the Agreement but only SLP, superannuation, and veteran's pension are specified in the Order. This contrasts with the Act where Emergency Benefit is specified when the Act refers to a range of benefits, for example in s 77 which refers to benefits which are not payable while a beneficiary is absent from New Zealand, subject to exceptions.
- [59] The assertion that the Order should be interpreted as making Emergency Benefits available to Australian residents contradicts the purpose of the Order. In *Bredmeyer* the Court of Appeal noted that there has been a 'gradual winding back' of benefit entitlements; the restrictions in Article 10 relating to the rate of SLP are clear and unambiguous. To override that clear purpose by reading in Emergency Benefits would not be a good faith interpretation that aligns with the wording or the purpose of the Agreement.
- [60] Section 77 of the Act applies; it provides that Emergency Benefits are not payable to a beneficiary while they are absent from NZ unless it is payable subject to an exception provided in that section. There is no exception that applies in the circumstances of the current case. For these reasons we conclude that the Order does not extend Emergency Benefit entitlement to Australian residents.

### **Is the Order discriminatory?**

- [61] Mr McKenzie submits that the Order is discriminatory on the grounds of age, employment status and disability because it incorporates working age residence in the calculation of the rate of SLP payable and excludes emergency benefit to Australian residents. Mr McKenzie submits that the Order breaches the appellant's right to freedom from discrimination, affirmed in s 19 of NZBORA and that discrimination on the basis of disability, age, and employment status is prohibited pursuant to s21 of the Human Rights Act 1993.
- [62] Mr McKenzie submits that the two-stage test for discrimination relevant to s 19 of NZBORA is satisfied because there is differential treatment between groups in comparable situations

which has resulted in a material disadvantage to the person differentiated against.<sup>8</sup> Mr McKenzie says that Ms XXXX has been materially disadvantaged under Article 10 in comparison to persons of working age, non-disabled persons, and NZ residents applying for SLP for whom working age residence qualifications do not apply.

- [63] Any social security system which provides targeted benefits and assistance must have criteria for assessing the need for that assistance. New Zealand's social security laws apply qualifying criteria on the basis of income, disability, relationship status, number of dependents, age, and employment. In order to breach s 19 of NZBORA any discrimination must be improper and not the result of a justified limit to the right of freedom from discrimination.
- [64] In *Bredmeyer* the Court held that any disadvantage based on residence or location was not a ground of discrimination in terms of s 19 of the Bill of Rights.<sup>9</sup> Accordingly we conclude that distinguishing this appellant from NZ resident applicants for SLP and emergency benefit is not prohibited discrimination.
- [65] While the requirement in Article 10 for a period of working age residence does discriminate against applicants who are 65 years and over when they emigrate to Australia, this is a justified limit to the right to freedom from discrimination. But for the Order, the status quo is that SLP is not payable whilst a beneficiary is absent from NZ.
- [66] While the requirement that an applicant for SLPO be severely disabled is more restrictive than the relevant requirements in s 40B of the Act, this discrimination based on disability is a justified limit to the right to freedom from discrimination. Furthermore it was accepted that Ms XXXX met the residential criteria for qualifying for SLPO, subject to medical evidence that she is severely disabled. There does not seem to be documentary evidence provided to the Ministry which has verified that the appellant is severely disabled.
- [67] The entitlements that Australian residents have to NZ benefits are more restrictive than the entitlements of NZ residents. As discussed above at paragraph [52] this is justified by the nature of the Order and Agreement as an international political compact between two sovereign states.

#### **Is the Order ultra vires of the Act and the Reciprocity Act?**

- [68] For the reasons discussed above the argument that the Order is ultra vires the Act or the Reciprocity Act fails; the Order has not been unlawfully interpreted by the Ministry.

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<sup>8</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

<sup>9</sup> *Bredmeyer* at [63].

**Decision**

[69] The appellant is not entitled to SLPO or an emergency benefit.

[70] The appeal is dismissed.

**Dated** at **Wellington** this 20<sup>th</sup> day of July 2017

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**S Pezaro**  
Deputy Chair

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**K Williams**  
Member