[2017] NZSSAA 045

Reference No. SSA 158/16

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

S Pezaro - Deputy Chair

K Williams - Member

Hearing at **Auckland** on 26 July 2017

Appearances

The appellant in person

R Shaw, counsel, and I Ji for the Ministry of Social Development

DECISION

Background

[1] Mr XXXX appeals the decision of the Chief Executive, upheld by the Benefits Review Committee, to change the rate of his New Zealand Superannuation (NZS) from the single sharing rate to the half married rate from 13 July 2016, the date on which his wife who is Chinese was granted a New Zealand residence visa.

[2] Mr XXXX became eligible for NZS from 5 December 2007. On 22 May 2013 he advised the Ministry that he had married in China but that his wife would remain in China until her father died. There was no change to the rate of his NZS which was paid at the single living alone rate.

[3] On 12 November 2014 Mr XXXX told the Ministry that his wife arrived in New Zealand on 10 November 2014 on a visitor visa. As a result of this information the Ministry changed Mr XXXX's NZS to the single sharing rate.

[4] On 13 March 2015 the Ministry advised Mr XXXX that if his wife obtained a residence visa his NZS entitlement would be the half married rate. The Ministry also told Mr XXXX that when his wife had a resident visa he could apply to test his eligibility to include her as a non-qualified partner in his NZS. If she was included his NZS would be paid at the full married rate but would be subject to an income test. Mr XXXX decided that he would not take this option as their combined income exceeded the applicable income limit.

[5] When Mr XXXX advised the Ministry that his wife's residence visa was granted, it changed the rate of his NZS to the half married rate.

The case for the appellant

[6] Mr XXXX believes he is entitled to remain on the single sharing rate for NZS. He argues that his wife's residence visa is not equivalent to a permanent visa and therefore his rate of NZS should not be affected. In support of this submission Mr XXXX referred to a Ministry policy document entitled 'Partners residence status' which states: *Where the partner is in New Zealand unlawfully or is not a permanent resident, pay the client at the single rate of New Zealand Superannuation*.

[7] Mr XXXX also referred to the Ministry's reliance on s 70 of the Immigration Act 2009 which identifies two class of visas - residence class visas which include permanent resident visas and residence visas, and temporary entry class visas. Mr XXXX says that the different visas are not clearly defined in immigration law but that there is a difference between a resident visa and a permanent visa because they do not grant the same entitlement or have the same status.

[8] Mr XXXX acknowledges that the residence class visa allows his wife to stay in New Zealand indefinitely however he points out that the residence class visa is subject to travel conditions whereas a permanent resident visa entitles the holder to indefinite travel to and from New Zealand. Mr XXXX contends that the Ministry has incorrectly re-interpreted 'indefinite' to mean the same as 'permanent'.

The case for the Ministry

[9] The Ministry submits, pursuant to s 74A(2) of the Act, that while Mr XXXX's wife held only a temporary entry class visa Mr XXXX was entitled to a single rate of benefit by virtue of s 74A (3)(b)(ii). However once she was granted a residence class visa this provision ceased to apply and Mr XXXX's NZS was payable in accordance with s 12 of the New Zealand Superannuation and Retirement Income Act and, clauses 1 and 2 of Schedule 1. In accordance with this schedule, the rate of entitlement is either the half married rate or the full married rate which is subject to an income test. As Mr XXXX declined the option of the full married rate, the Ministry says that the only option was the half married rate.

[10] The Ministry refers to the definition of a residence class visa in sections 4 and 70 of the Immigration Act 2009 as applied by the Court of Appeal in *Aziz v The Chief Executive of the Ministry of Social Development*[1] and the High Court in *Rajabian v The Chief Executive of the Ministry of Social Development.*[2] In both cases the courts held that the terms in s 74A are defined in accordance with the Immigration Act 2009. On this basis, the Ministry submits that although a resident visa is not permanent, it is not a temporary entry class visa. Accordingly, it is not within the class of "temporary entry class visa" for the purpose of section 74A(3)(b)(ii) of the Act.

Discussion

[11] At the hearing we asked Ms Shaw to explain how s 74A(3)(b)(ii) applied to the appellant. After some discussion of the purpose and interpretation of this section of the Act, she considered it was not relevant to a person in Mr XXXX's situation. However on reflection we do not consider that this interpretation is correct.

[12] Section 74A(1) of Social Security Act 1964 (the Act) provides that persons who are unlawfully resident or present in New Zealand or lawfully resident or present only by virtue of holding a temporary entry class visa are not entitled to receive a benefit. Sections 74A(1A) – (5) allow the chief executive to grant certain benefits in specified circumstances.

[13] Section 74A(3)(b)(ii) provides that subsection (2) applies to a person who is married to a person who is lawfully resident in New Zealand by virtue of holding a temporary entry class visa. The visitor visa which the appellant's wife held initially falls within this category. Once she arrived in New Zealand, the appropriate rate of Mr XXXX's NZS entitlement was the single sharing rate. We note that s 74A(2)(b) provides that this rate is subject to an income and asset test of both the beneficiary and their spouse or partner, which does not appear to have been applied by the Ministry.

---

[1] *Aziz v The Chief Executive of the Ministry of Social Development* [2011] NZCA 364.
[2] *Rajabian v The Chief Executive of the Ministry of Social Development* HC Auckland CIV 2004-485-671, 12 October 2004.

[14] Based on the authorities cited, we are satisfied that the residence visa is not a temporary entry class visa. The Immigration Act distinguishes a residence visa from temporary entry class visas and, although it does not carry the same entitlements as a permanent visa, we conclude that it is not within the class of temporary visas that are subject to s 74A(3)(b)(ii).

[15] Accordingly we find that once Mr XXXX's wife was granted a residence visa Mr XXXX's NZS was payable in accordance with s 12 of the New Zealand Superannuation and Retirement Income Act and clauses 1 and 2 of Schedule 1.

[16] Pursuant to s 12(1) of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI) the standard rate of NZS is set in accordance with either clause 1 or 2 of Schedule 1 of NZSRI.

[17] Section 12(2) provides that a person who is married or in a civil union or de facto relationship with a person who is not entitled to receive NZS may elect to receive NZS at either the applicable rate in clause 1 or clause 2 of Schedule 1. Payment under clause 1(c) is referred to as the half married rate and is less than the single sharing rate. Payment under clause 2 allows palyment at the full married rate but this entitlement is subject to an income test. As Mr XXXX elected not to receive the full married rate, the only option is payment at the rate set in clause 1(c).

Orders

[18] The correct rate of payment of NZS to Mr XXXX is in accordance with the New Zealand Superannuation and Retirement Act 2001, Schedule 1, clause 1(c).

Dated at **Wellington** this 7th day of August 2017

_____
S Pezaro
Chairperson

_____
K Williams
Member