

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Spain against a decision of
a Benefits Review
Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams Member

Mr C Joe - Member

Hearing at **WELLINGTON** on 20 June 2017

Appearances

Mr Z for the appellant

For Chief Executive of the Ministry of Social Development: Ms E Kirkman

DECISION

Background

[1] The appellant (Ms XXXX) and her husband (Mr XXXX) were both receiving New Zealand superannuation, and the Ministry cancelled the appellant's superannuation from 4 November 2015. The appellant and her husband are the parents of an adult child who established a family in Spain. Their son's partner is Spanish and the couple had twins, born in Spain on 26 March 2015.

[2] When the twins were three or four weeks old, the appellant and her husband, being the grandparents of the twins, travelled to Spain to spend time with their son and his family.

- [3] As events have evolved, the appellant has never returned to New Zealand; she and her husband are now living indefinitely in Spain.
- [4] The issue raised in this appeal concerns the appellant's entitlement to superannuation. The general principle is that a person can leave New Zealand for 26 weeks and continue to receive New Zealand superannuation without complications. If they do not return at that point, they may lose their entitlement to New Zealand superannuation; including for the first 26 weeks if they do not return within 30 weeks. However, a person can generally arrange for New Zealand superannuation to be paid, even if they permanently relocate to another country. There are various rules relating to making the application to be paid New Zealand superannuation outside of New Zealand.
- [5] At the hearing, the Ministry and Ms XXXX agreed that there are two issues the Authority is required to determine:
- [5.1] Whether the appellant lost her entitlement to the first 26 weeks of New Zealand superannuation because she did not return in time.
- [5.2] Whether the appellant is entitled to continue her entitlement to New Zealand superannuation, having regard to her relocation to Spain.

Legal issues

- [6] It is unnecessary to traverse all of the relevant legal principles. The parties agree that the outcome of the appeal turns on specific statutory provisions.
- [7] The first is s 22 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act). The overall effect of s 22 is to provide that New Zealand superannuation that would otherwise be payable to a person is paid for the first 26 weeks of any absence from New Zealand. It is, however, subject to a qualification that it ceases to be payable if the person remains absent for 30 weeks or more. There is an exception, and applying that exception is contentious in the present case. Specifically, section 22(b) allows the first 26 weeks to be paid notwithstanding absence beyond 30 weeks if:

The Chief Executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond that person's control that he or she could not reasonably have foreseen before departure.

- [8] The Ministry say Ms XXXX's circumstances did not come within those criteria, and she contends that they do.
- [9] The next provision of the Act in contention relates to the ability to have New Zealand superannuation paid, notwithstanding the recipient's relocation outside New Zealand. There are a range of rules relating to the rate of payment in those circumstances and a requirement to obtain approval for the continued payment of national superannuation when a person has relocated. The provision in issue in this case is s 27 of the Act, which governs how an application may be made after a person has left New Zealand.
- [10] The primary provision governing applications for persons relocating is s 26B. Generally, it requires a person to be "ordinarily resident and present in New Zealand" at the time of making the application. That is to say, the person has to make the application before they relocate, while still resident in New Zealand. Section 27 makes provision for persons who did not make the application before leaving and intended to be absent from New Zealand only for 26 weeks or less. Section 27(2) provides that the Chief Executive may accept an application for payment, notwithstanding that the applicant failed to make the application before leaving. The contentious part of s 27 in this case is s 27(2) which provides:
- The Chief Executive may accept an application for payment in accordance with s 26 if satisfied that the absence for more than 26 weeks is or was due to circumstances beyond the applicant's control that could not reasonably have been foreseen before leaving New Zealand.
- [11] Again the Ministry and Ms XXXX dispute whether her circumstances come within that provision. It can be seen that the essential question relating to the availability of superannuation for the first 26 weeks, and eligibility to apply after leaving are essentially the same. That is, was the absence due to circumstances beyond the appellant's control that could not reasonably have been foreseen before she left New Zealand?

Discussion

The issue

- [12] The parties agree that the factual issue identified, namely why Ms XXXX did not return to New Zealand, is the only contentious issue.
- [13] The Authority conducted its hearing at Wellington and heard from three witnesses. Ms XXXX and Mr XXXX both gave evidence via a telephone link as they are in Spain. Mr Z, the appellant's agent and cousin by marriage, attended the hearing in Wellington and also gave evidence.

The facts

- [14] The evidence established that Mr and Ms XXXX left New Zealand intending to return after a period of less than 26 weeks. Ms XXXX had on a previous occasion reported to the Ministry that she was going to be absent from New Zealand for a period, but had understood from the Ministry's website that it was not necessary for her to report her travel provided she was not away for more than 26 weeks. Ms XXXX and her husband had return tickets; they had looked at renting out their home on a short-term basis. They had temporary accommodation in Spain. Furthermore, their son's wife's family had a holiday home located approximately an hour's travel from where their son and his family live; they were to stay in the holiday home for the time they were in Spain. They intended the trip would be a lengthy trip, but that they would return to New Zealand to resume their normal life here in less than 26 weeks.
- [15] Mr and Ms XXXX did provide support for their son's family; the demands with the young twins were considerable. However, the other grandparents also provided a great deal of support. In the period following their arrival in Spain, Ms XXXX developed a bowel disease. She has undergone numerous medical tests and has been prescribed various medications in the intervening period, but has not been able to obtain a definitive diagnosis. The symptoms of the disease are that Ms XXXX has to use a toilet some 10 times a day, and do so in circumstances of urgency. The symptoms are most acute in the early part of the day. Ms XXXX does not believe that she could endure the long distance flight from Spain to New Zealand without soiling herself, given the restrictions on the use of toilets on such flights. The toilets may not be used during critical phases of the flight or in turbulence, and they are not always

vacant. Ms XXXX says she has been in this situation since soon after her arrival in Spain and it has continued to the present time.

- [16] Ms XXXX and her husband have considered their options taking account of all the family circumstances, including their contribution to supporting their grandchildren and Ms XXXX's health. They have decided to remain in Spain indefinitely and rent an apartment there. Ms XXXX explained that the decision had been a difficult one for them, particularly, as they do not have a good command of the local language.
- [17] In October 2015, Mr XXXX returned to New Zealand to make arrangements consequent to their decision to remain in Spain indefinitely. Ms XXXX did not accompany Mr XXXX on this trip because of the difficulties caused by her bowel disease. When he was in New Zealand, Mr XXXX went to the Ministry's office near where their New Zealand home is located and made an application to have his New Zealand superannuation paid in Spain. He also took a corresponding application relating to Ms XXXX. The Ministry granted Mr XXXX's application as from 15 October 2015, but declined to process Ms XXXX's application. In the Ministry's view, she too should have returned to New Zealand so that her application could be processed.
- [18] We accept those facts have been established; the three witnesses confirmed them as far as their knowledge extended. In the case of Mr Z, he had relatively recently been to Spain and he was in a position to give evidence about Ms XXXX attending medical appointments, and the obvious manifestations of her condition. The evidence is inherently plausible; Ms XXXX left New Zealand with a return ticket. There is no evidence to suggest that there were any reasons that would have prevented her returning to New Zealand with her husband in October 2015 had she been in a position to do so. Ms XXXX has been on notice of the potential consequences of not returning to New Zealand for her New Zealand superannuation; it would be most surprising if she had chosen not to return had she been in a position to do so without the difficulties she has described.

Applying the relevant tests

- [19] The issues under s 22 and s 27 both turn on whether Ms XXXX's failure to return to New Zealand, before 26 and 30 weeks respectively, was due

to circumstances beyond her control, which she could not reasonably have foreseen before leaving New Zealand. Ms XXXX had no control over developing a disease. She had no reason to anticipate she would develop bowel disease, or that she would be prevented from travelling to New Zealand without the obvious and acutely unpleasant circumstances that would be caused by long distance travel after developing the condition.

[20] Accordingly, we are satisfied that Ms XXXX was entitled to be paid New Zealand superannuation for the first 26 weeks during which she was absent, and that the Ministry should have processed her application on 15 October 2015 when her husband presented it to the Ministry on her behalf.

[21] If necessary the Authority will decide whether Ms XXXX should be granted entitlement to be paid New Zealand superannuation while living in Spain, and the rate of New Zealand superannuation she should be paid if granted. However, the Ministry did not indicate that was a contentious issue, and it had no difficulty allowing payment of her husband's superannuation. The parties agreed that these issues were unlikely to be contentious.

[22] We observe that there should be no difficulty in processing the application, given that we heard this appeal relying on evidence from Ms XXXX while living in Spain. However, if there are any issues that arise, the Authority will deal with them and reserves leave to do so.

Decision

[23] The appeal is allowed, in the respects identified, namely:

[20.1] Ms XXXX is entitled to be paid New Zealand superannuation for the first 26 weeks of her absence from New Zealand; and

[20.2] she is entitled to have her application to be paid New Zealand National Superannuation in Spain processed and for it to be paid as from 15 October 2015 when she presented her application to the Ministry.

[24] We reserve leave to determine the amount of any payments and adjustment following from these orders. We also reserve leave to apply for the Authority to make a determination as to the outcome of Ms XXXX's application to be paid New Zealand superannuation in Spain.

Dated at Wellington this 25th day of August 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member