

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

**AND**

**IN THE MATTER** of an appeal by **XXXX** of  
Porirua 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 6 September 2017

**Appearances**

The Appellant in person

For Chief Executive of the Ministry of Social Development: R J Shaw, lawyer.

**DECISION**

**Introduction**

[1] The matter in issue in this appeal is narrow. The Appellant is entitled to receive New Zealand Superannuation; he meets the age and residence requirements. However, he is married and that is a factor that can affect his entitlement. He accepts that as he is married he is only entitled to New Zealand Superannuation paid at half the married rate.

[2] Part of the application process required by the Chief Executive is that applicants must submit information relating to their spouse. The Appellant submitted his application, which included a good deal of information regarding his wife. It included her name, date of birth,

gender, contact details, citizenship, where she was born in New Zealand, ethnicity, her maiden name and her benefit history. It also included details of the extent to which she had lived in other countries, which in her case was some 6 months in Scotland studying bagpiping. He provided this information with her consent and on her behalf.

[3] In the covering letter, the Applicant said:

You have required me to collect the personal information of my wife and to provide you with proof of her maiden name and other personal items including her bank account. I am not in a position to provide you with any further personal information relating to my wife.

[4] The letter went on to say that:

[4.1] the Appellant's wife did not qualify for New Zealand Superannuation, and the Appellant's own entitlement to New Zealand Superannuation could not be affected by his wife's circumstances;

[4.2] his wife was not obliged to provide further information;

[4.3] there was an obligation in law to pay New Zealand Superannuation to the Appellant;

[4.4] the Chief Executive could not properly exercise power over the Appellant's wife by demanding that she supply irrelevant information and by refusing to make New Zealand Superannuation payments to the Appellant which the law required him to make; and

[4.5] the Chief Executive had given notice he would or could use information relating to the Appellant's wife to share with other agencies, including her employer.

[5] Correspondence continued and eventually it emerged that, whatever her circumstances were, there was only one aspect relating to the Appellant's wife that could adversely affect the Appellant's entitlement to New Zealand Superannuation (aside from the uncontested entitlement at half the married rate). That is, if she was receiving or entitled to an overseas pension. If so, then the Appellant's entitlement to New Zealand Superannuation could be abated for that reason. Of course, the information already supplied indicating that she had only lived outside

New Zealand for some 6 months to study bagpiping made that unlikely. However, potentially a qualifying superannuation entitlement could arise if, for example, there was a former marriage from which a right to an overseas pension devolved.

[6] The Appellant offered to provide a statutory declaration from his wife dealing with the issue of a potential overseas pension. The Ministry said it was “not prepared to accept a statutory declaration in lieu of a completed application form.” The offer to provide sworn evidence from the Appellant’s wife was repeated before the Benefits Review Committee, and she provided a statement to the Authority. The Chief Executive did not seek to cross-examine her when she attended the hearing before the Authority.

[7] The respective position of the parties is:

[7.1] The Appellant says his wife is justified not signing the form the Chief Executive demands that she sign.

[7.2] The Chief Executive refuses to pay the Appellants’ New Zealand Superannuation entitlement unless and until his wife signs the form he has provided for assessing eligibility for New Zealand Superannuation.

[8] In our view, both parties are mistaken as to the issues on which this appeal must be determined. Either, the Appellant meets the statutory criteria for New Zealand Superannuation, or he does not. If he does, then the Chief Executive has a legal duty to pay it to him, and if not, he is not entitled to pay it. Of course, there is an issue as to whether the Chief Executive has sufficient evidence to establish entitlement, and whether any mandatory application process has been completed.

#### **The Chief Executive’s position**

[9] The Appellant’s position is largely responsive to the Chief Executive’s position; accordingly, we will first discuss the Chief Executive’s case.

[10] The Chief Executive’s starting point is the qualifications for New Zealand Superannuation contained in sections 7 and 8 of the New Zealand Superannuation and Income Retirement Act 1990. The provisions are integrated with processes in the Social Security Act 1964, as New

Zealand Superannuation is defined as one of the benefits administered under that Act.

[11] The Chief Executive relies on section 11D of the Social Security Act 1964, which governs the application process for benefits. Key elements are that:

[11.1] there must be an application completed to the Chief Executive's satisfaction;

[11.2] supporting evidence reasonably required by the Chief Executive must also be held by him; and

[11.3] the Chief Executive may waive all or part of a requirement to provide information where the Ministry already holds information, or holds enough information to determine the matter.

[12] He says:

... there is no discretion, Section 11D (2)(a) of the Social Security Act 1964 requires that both the appellant and his wife complete the application form provided by the Chief Executive for the purpose.

[13] Section 11D (1) and (2)(a) state:

(1) A benefit must not be granted to an applicant unless the requirement stated in subsection (2) has been complied with.

(2) The requirement referred to in subsection (1) is that the department has received —

(a) an application form (provided by the chief executive for the purpose) completed by or on behalf of the applicant and his or her spouse or partner (if any) to the chief executive's satisfaction; and

...

[14] The Chief Executive also asserted that to the extent the Appellant and his wife took issue with Privacy and Human Rights issues, they were matters for the Privacy Commissioner and the Human Rights Commission.

### **The Appellant's Position**

[15] As noted, the Appellant's argument is largely responsive to the Chief Executive's position.

[16] The Chief Executive claims that unless the Appellant's wife signs the form the Chief Executive has devised, there is no discretion, and he cannot pay the Appellant New Zealand Superannuation. The Appellant says the form is not proper or reasonable. He says:

[16.1] The form breaches privacy principles 1 and 4 of the Privacy Act 1993, section 21 of the New Zealand Bill of Rights Act 1990, and amounts to the tort of intrusion into seclusion (*C v Holland* [2012] NZHC 2155).

[16.2] The form includes a privacy waiver, and seeks information that is unreasonable, disproportionate and unnecessary.

[16.3] The Ministry has no legal right to impose a condition on the Appellant's wife, which includes sharing her personal information with any New Zealand government and non-government agency, and any foreign government or non-government social agency.

[16.4] Some of the information is highly personal and irrelevant.

[16.5] The Chief Executive is only authorised to require information under section 11D (2) of the Social Security Act 1964 to establish the Appellant's eligibility for New Zealand Superannuation.

[17] The appellant sought to have the Authority find he was entitled to New Zealand Superannuation payments.

### **Discussion**

#### *The scope of this appeal*

[18] The function of this Authority is to decide whether the Appellant is entitled to New Zealand Superannuation. When doing so, we are in exactly the same position as the Chief Executive was when he decided not to pay New Zealand Superannuation.

- [19] The Authority's functions are determined by section 12I of the Social Security Act 1964. Section 12I (2) provides:

In hearing and determining any appeal, the Appeal Authority shall have all the powers, duties, functions, and discretions that the chief executive had in respect of the same matter.

- [20] The question is, did the Appellant meet the legal requirements to be paid. In making that decision any factors the Chief Executive was required to consider must also be considered by this Authority.

- [21] Prior to the hearing, the Chief Executive sent an email to the Authority stating:

The Ministry wishes to re-emphasise the position that it has taken in the section 12K report that the scope of the appeal should be limited to the decision not to grant the appellant's New Zealand Superannuation pursuant to provisions of the Social Security Act 1964. Determinations under the Privacy Act 1993 are a matter for the Privacy Commissioner and not within the jurisdiction of the Social Security Appeal Authority.

- [22] The email appeared to confuse the difference between jurisdiction to make decisions on entitlements, under the New Zealand Superannuation and Income Retirement Act 1990, and factors that might be relevant to a decision within a particular jurisdiction. If the Privacy Act 1993 is relevant to whether the Appellant is entitled to receive New Zealand Superannuation, then the Chief Executive was required to take it into account, and so too must this Authority. There was never any question of this Authority making standalone decisions on privacy issues.

- [23] The other apparent element of confusion in the email is that this appeal concerns the general application of privacy principles. The key issue in this appeal is that the Chief Executive is effectively saying unless the Appellant's wife acquiesces and signs a form that the Chief Executive devised, he will not pay the Appellant New Zealand Superannuation. Whether that is correct in this case does not involve a general inquiry into whether the form is necessary or appropriate for other persons. This Authority does not conduct general reviews of the administration of the Ministry of Social Development; it does and is required to consider how practices and processes apply to the particular case before it. The

Chief Executive has the same obligation when he is dealing with particular applications for benefits.

- [24] Accordingly, this decision will consider privacy matters, and other legal principles only to the extent they affect the Appellant's application and no more or less than that.

*No mandatory requirement that the Appellant's wife sign a form*

- [25] A foundation for the Chief Executive's argument is that he has no discretion, section 11 D (2)(a) requires that both the appellant and his wife complete an application form.

- [26] The submission cannot be correct, first because the requirement is plainly made subject to the Chief Executive's discretion, the requirement is for:

... an application form (provided by the chief executive for the purpose) completed by or on behalf of the applicant and his or her spouse or partner (if any) **to the chief executive's satisfaction** ... (emphasis added)

- [27] The need for discretion is obvious; some applicants do not have the mental capacity to complete a form, and there may be nobody who has the information to fully complete the form. Some applicants may not know where their spouse or partner is. Some forms request information that is not available or is irrelevant to a particular applicant's circumstances.

- [28] It would be a different matter if the Act prescribed a form, and mandated completion as a condition of entitlement to a benefit. However, that is not the relevant mechanism; the Act allows the Chief Executive to develop forms that are intended to deal with the myriad circumstances of potential applicants for benefits. He is then required to evaluate whether the form is completed in a manner satisfying him that he can properly determine statutory entitlements in each case. This Authority makes the same decisions on appeal.

- [29] Furthermore, the discretionary approach to the contents of forms is reinforced by section 11D (5) which provides that the Chief Executive may waive all or part of a requirement to provide information that is already held, and where there is "enough other information to determine the matter for which the information concerned is needed".

- [30] Plainly, section 11D does not impose a mandatory requirement that forms are completed wholly. A badly designed form could frustrate the Act itself if that were the case. The Act provides a mechanism where the Chief Executive is required to gather the information to make a decision regarding entitlement. There is a necessary and important requirement that the Chief Executive ensures he has sufficient information in each particular case.
- [31] It is appropriate to emphasise that the words in section 11D (2) requiring an application form to be completed “by or on behalf of the applicant and his or her spouse or partner”, cannot amount to a mandatory requirement that is necessary in every case. If it were so then, for example, a person seeking a benefit when fleeing serious domestic violence would typically be obliged to obtain the cooperation of the perpetrator. They could not complete the form on behalf of the perpetrator if the perpetrator refused. The words “to the Chief Executive’s satisfaction” in section 11D (2)(a), and the entitlement to waive compliance when there is enough information allow the Chief Executive to deal with such cases in an appropriate manner.

*The information required to decide on the Appellant’s entitlement*

- [32] Whether an applicant for New Zealand Superannuation is married, in a relationship in the nature of marriage, meets the residential requirements to qualify for New Zealand Superannuation, is, or will be, outside New Zealand, and other factors can all be critical to entitlement to New Zealand Superannuation. The Chief Executive is obliged to take steps to ensure that all these factors are covered off in a manner appropriate to each case. It is necessary to get it right: first, because the Chief Executive has a legal obligation to only pay persons who are entitled to receive payments; and second, an overpayment may create a serious repayment burden for a recipient.
- [33] In the present case, in correspondence and at the hearing before this Authority, all potential issues relating to the Appellant’s entitlement were explored. The Appellant’s circumstances are quite simple:
- [33.1] He meets the age requirement.
- [33.2] He is a New Zealand national who has essentially lived and worked in New Zealand through his life so meets the residential requirements.



- [33.3] He is married to a woman who is too young to qualify for New Zealand Superannuation. She is also a New Zealand national who has lived and worked in New Zealand through her life with a minor and irrelevant exception for present purposes.
- [33.4] The Appellant and his wife claim no benefits other than the Appellant's claim for New Zealand Superannuation.
- [33.5] The Appellant accepts his New Zealand Superannuation is abated to the maximum degree possible on account of him having a wife or partner; that is to half the married rate.
- [33.6] There is only one potential exception to the significance of his wife's circumstances, that is if she receives or is entitled to receive an overseas pension of a kind that causes New Zealand Superannuation to abate.
- [34] The appellant and his wife have provided all the relevant details relating to the Appellant's wife. Her identity has been disclosed, together with all relevant personal information, and she has stated that she neither has nor is entitled to claim any overseas pension. She offered to provide a sworn statement regarding any matters material to the Appellant's entitlement to New Zealand Superannuation.
- [35] The Chief Executive refused to accept a statutory declaration, but seems not to take issue with the evidence that the Appellant qualified for New Zealand Superannuation and, apparently, accepts the Appellant's wife has no overseas pension and no claim to one. There was an opportunity to dispute that at the hearing, it was not pursued.
- [36] We find that all the material facts, including the Appellant's wife's circumstances have been proved and the Appellant is entitled in law to receive New Zealand Superannuation. We observe that not only have these matters been proved as facts to our satisfaction, the evidence relating to them is far more certain than is the case for the vast majority of persons to whom the Chief Executive pays New Zealand Superannuation. The circumstances have been explored in depth, and it is clear this case does not raise complex issues relating to entitlement. Usually people submit a form, which they complete having little knowledge of the potentially complex subject matter, and the Chief

Executive has limited resources to investigate and scrutinise the information provided.

*We are satisfied that the application form completed by and on behalf of the Appellant and his wife is satisfactory*

[37] In our view, because we are satisfied that the information provided proves that the Appellant is entitled to New Zealand Superannuation, we allow the appeal. Our reasoning is:

[37.1] We are satisfied that the information on the application form completed in respect of the Appellant and his wife is sufficient and appropriate in relation to their personal circumstances (section 11D (2)(a) of the Social Security Act 1964);

[37.2] We consider that the supporting evidence is all that could be reasonably required (section 11D (2)(b) of the Social Security Act 1964); and

[37.3] Given the evidence before us, we would waive any further requirement for proof due to the evidence already held, and we consider that information is all that is needed to assess the Appellant's entitlement to New Zealand Superannuation (section 11D (5) of the Social Security Act 1964).

[38] However, given the positions taken by the parties, we reinforce that view by considering the disputed matters a little further. The first thing to observe is that the adequacy of information regarding entitlement to New Zealand Superannuation is not the central element of the dispute between the Chief Executive and the Appellant. Instead, the Appellant and his wife particularly object to what they describe as a "privacy waiver" contained in the form that the Chief Executive sought to have the Appellant's wife sign.

[39] There is no authority in the Social Security Act 1964 or the New Zealand Superannuation and Income Retirement Act 1990 to demand that anyone sign a "privacy waiver" to qualify for New Zealand Superannuation. Accordingly, we requested that counsel explain the Chief Executive's position. She said that indeed that was the Chief Executive's position, stating:

There are privacy waiver obligations you are signing up to on the form. Yes, that is my submission.

- [40] When questioned further, counsel for the Chief Executive said that the privacy waiver was required so that the Ministry could “check with overseas Ministries” to see if there was relevant information relating to the Appellant’s wife.
- [41] However, counsel for the Chief Executive could not explain why that could be necessary or appropriate. In effect, the proposition was that if the Appellant’s wife provided false information, it was necessary to have her existing approval to make inquiries into what would be a criminal deception. The proposition is unsound. If anyone provides false information to obtain New Zealand Superannuation, New Zealand authorities are entitled to make lawful inquiries. They do not need a privacy waiver from the person who potentially fraudulently procured a benefit. Of course, the Chief Executive may consider it appropriate to provide information to the Appellant warning her of the importance of providing accurate information, that she must update information, and that appropriate inquiries could be made regarding information provided. The Appellant and his wife provided her contact details so there was no obstacle to doing that. In reality, the information before the Authority and the Chief Executive showed there was no relevant issue concerning offshore authorities, and the Appellant and his wife are very aware of their obligations.
- [42] Counsel for the Chief Executive also sought to advance the argument on a more general basis that the form was reasonable. We expressly make no general findings regarding the form as a whole. The form runs to 24 pages, and it is designed to elicit the information needed for any person to establish whether they are entitled to New Zealand Superannuation, and if so, the commencement date and rate for payment. It also provides a foundation for the Chief Executive to verify entitlement.
- [43] However, the proposition advanced before us is that regardless of circumstances, the form must be completed in full and signed by a spouse or partner. For the reasons discussed, we do not accept that proposition. The form is not determinative, section 11D sets out the discretionary elements, and the New Zealand Superannuation and Income Retirement Act 1990 sets out the circumstances when the Chief Executive must pay New Zealand Superannuation to a person lawfully entitled to it.

- [44] Subject to the previous caveat, our view of the form is that it is more innocuous than either the Appellant or counsel for the Chief Executive claimed in their submissions. A key statement in the section the Appellant's wife was expected to sign is the following wording:

I understand that International Services (a service of the Ministry of Social Development) will release such information as necessary to an overseas social security agency.

I am also aware of and understand the Privacy Act statement contained in this application, and that it applies to the information about me.

- [45] Despite the position taken by counsel for the Chief Executive, that this is a "privacy waiver", in our view it is not. It is no more than a notice of how the Ministry may act. It does not on its face give consent to the release of information in circumstances that would otherwise breach of any aspect of New Zealand law. However, the form does contain some statements that many, perhaps most, people could not agree to. For example, that they "understand the conditions for receiving New Zealand Superannuation", and they "understand the Privacy Act statement". The reality is that they are complicated legal issues, and the difference between the parties and the Authority as to whether the form contains a "privacy waiver" illustrate the unreality of expecting many people to agree to those statements. It is not necessary to have the capacity to understand those matters to be entitled to, and paid New Zealand Superannuation.
- [46] The Chief Executive contended that *SSAA Decision 161/02* supports his position. In that case, an applicant failed to complete certain sections of the then current form to apply for New Zealand Superannuation, and in particular parts that related to her partner. She refused to complete questions relating to her husband's name, date of birth, country of birth and whether he had lived outside New Zealand. As it transpired, the applicant's partner ultimately provided the information when he applied for New Zealand Superannuation himself.
- [47] In that case, this Authority found that the Appellant had been unaware of the issues relating to overseas pensions that affected the entitlement of a partner to receive New Zealand Superannuation. Unsurprisingly, the Authority accepted that an application, without the name of the applicant's partner and information relating to his eligibility for an overseas pension was a proper basis for refusing to pay New Zealand

Superannuation. There was simply insufficient information to determine entitlement.

- [48] We agree with the Authority's previous decision. However, it does not support the Chief Executive's position in the present case. On the contrary, in *SSAA Decision 161/02*, the Chief Executive ultimately paid the pension despite the applicant's partner not completing the section of the form the applicant submitted. The information was provided in a different way; namely, in his own separate application at a later time. That is an appropriate application of the Chief Executive's discretion in section 11D of the Social Security Act 1964, already discussed.
- [49] Furthermore, if the Appellant and his wife in the present case refused to disclose the identity of his wife, and her eligibility for an overseas pension we would not have allowed this appeal. In this case, the circumstances are quite different, all the material information relating to the Appellant's wife has been provided; with an offer to provide it on oath, and be subjected to cross-examination. The level of compliance with the provision of the relevant information greatly exceeds the usual level.
- [50] The Appellant referred to *Powell v ACC* [2014] NZACC 89 a decision of the District Court regarding the effect of an ACC claimant refusing to sign a particular medical consent form. The issue was whether the refusal disentitled the appellant from receiving compensation payments. The Court found that the form was more extensive than the statutory authorisation to which it related. The form provided for information to be "collected, used and disclosed", without being limited to the statutory purposes for which the information was provided. ACC refused to accept a qualified version of the form. The Court found that it was reasonable for the Appellant to refuse to complete the form.
- [51] In our view, the *Powell* case is of some, but limited, relevance. It does demonstrate that constructing a form that goes beyond a statutory power may well disentitle officials from withholding an entitlement because a claimant has refused to complete the form. However, in each case the statutory context will usually be important and likely determinative. Had the contested form in this case contained a "privacy waiver", as counsel for the Chief Executive contends, the principles in the *Powell* case may be more relevant. There is no statutory authority for refusing to pay a person with a legal entitlement to New Zealand

Superannuation unless and until they procure a third party to sign a “privacy waiver”. A statutory power cannot be exercised only in favour of persons who give up their rights to privacy, which they enjoy under New Zealand law.

[52] However, in our view, this is a more mundane case. There is a wide discretion in section 11D to determine whether the Chief Executive holds sufficient information to make a decision on the Appellant’s entitlement to New Zealand Superannuation. The Appellant signed the form on behalf of him and his wife, and gave a principled explanation for some reservations regarding what was asked of his wife and why she would not sign a “privacy waiver”. When the Ministry identified the only area of relevance outstanding, the necessary information was provided in full and in a satisfactory way.

[53] In principle, this case is no different from a myriad of situations where having a spouse complete the form or completing it on their behalf is problematic. Where spouses have lost mental capacity, they cannot complete the form. Spouses who take a hostile position (as in *SSAA Decision 161/02*) need to be considered. A range of other circumstances also arise where fully completing the form and having the applicant and spouse sign (or someone on behalf of either or both) is not possible.

[54] Where a person raises a reasonable objection to an element of an application form, and ensures that the Chief Executive has all the necessary information, the Social Security Act 1964 does not authorise the Chief Executive to simply refuse to assess the applicant’s entitlement and refuse to make payments the applicant is entitled to receive.

### **Decision**

[55] For the reasons discussed, we exercise the discretions contained in section 11D of the Social Security Act 1964, and we are satisfied that:

[55.1] the Appellant has complied with his obligation to apply for, and provide information in support of his entitlement to New Zealand Superannuation; and

[55.2] the evidence before us establishes that the Appellant was entitled to New Zealand Superannuation as from reaching the age of 65 years, payable at half the married rate.

[56] The appeal is upheld.

[57] The Authority reserves leave for either party to apply if any quantification of entitlement is required.

**Costs**

[58] If the Appellant seeks an order for costs, he should file a memorandum with the Authority setting out his claim, and serve a copy on the Ministry. The Ministry may provide a reply.

[59] The Authority notes that the usual principle is that a self-represented litigant cannot recover costs for their own time, but will be entitled to recover any expenditure (such as photocopying).

[60] The timetable will be:

[60.1] The Appellant is to submit any memorandum within 15 working days of this decision, and

[60.2] The Ministry is to provide any memorandum in reply within 25 working days of this decision.

**Dated at Wellington** this 9<sup>th</sup> day of November 2017

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**G Pearson**  
Chairperson

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**K Williams**  
Member

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**C Joe JP**  
Member