[2018] NZSSAA 009

Reference No. SSA 063/17

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

Hearing at Auckland on 17 January 2018

Appearances

The appellant in person

I Ji for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision on 14 October 2016, upheld by a Benefits Review Committee, to decline her application for New Zealand Superannuation (NZS) on the grounds that she was not ordinarily resident in New Zealand on the date of her application.

[2] The appellant applied for NZS on 22 June 2016. The Ministry of Social Development (the Ministry) declined her application because it considered that the amount of time she spends outside of New Zealand means that she is not ordinarily resident here.

Relevant law

[3] Section 8 of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI) sets out the residential qualifications for entitlement to NZS:

> **8 Residential qualification for New Zealand superannuation**
>
> No person is entitled to New Zealand superannuation unless the person—
>
> (a) is ordinarily resident in New Zealand on the date of application for New Zealand superannuation, unless section 31(4) of this Act or section 191(4) of the Veterans' Support Act 2014 applies; and
>
> (b) has been both resident and present in New Zealand for a period or periods aggregating not less than 10 years since attaining the age of 20 years; and
>
> (c) has also been both resident and present in New Zealand for a period or periods aggregating not less than 5 years since attaining the age of 50 years.

[4] The relevant provision is s 8(a), which requires an applicant to be ordinarily resident in New Zealand on the date of application for NZS. The Ministry accepts that the appellant meets the requirements of s 8(b) and (c).

[5] Neither of the exceptions in s 8(a) apply to the appellant. Section 31(4) allows NZS to be paid to people who met the residential qualifications for NZS before they left New Zealand to reside in specified Pacific countries, however Fiji is not one of those countries.

[6] The meaning of "ordinarily resident in New Zealand" was considered by the Supreme Court in *Greenfield v Chief Executive of the Ministry of Social Development.*[1] The Court noted that a number of New Zealand statutes contain the expression "ordinarily resident".[2] The phrase is not defined in NZSRI or the Social Security Act 1964 (the Act).

[7] The Supreme Court rejected the High Court's interpretation of "ordinarily resident" as being established if there is an intention to return. The Supreme Court considered that such an interpretation would detract from the practical purpose of s 74(1)(a) of the Act to terminate or reduce benefits for those beneficiaries who are not ordinarily resident in New Zealand. The Court concluded that the context in which the expression "ordinarily resident" appears in NZSRI makes it clear that the legislature did not envisage a person could be simultaneously ordinarily resident in New Zealand and another country.[3]

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

[2] At [30].

[3] At [34].

[8] The Court considered that the enquiry into ordinary residence must address where the person's home has been prior to the relevant date, where that person was living at the critical date and their intentions for the future. The person's intentions as to their future residence are material where the person is not living in New Zealand but has lived in New Zealand in the past. However, the Court observed that the state of mind of the person is only one consideration and must be assessed alongside the domestic realities of that person's life, including the length of time they have lived out of New Zealand.[4] The Court therefore concluded that an intention to return to New Zealand is not necessarily determinative of ordinary residence, although it may be relevant.[5]

The case for the appellant

[9] The appellant referred to the Court of Appeal decision in *Chief Executive of the Ministry of Social Development v Greenfield* where the Court concluded that the purpose of the requirement an applicant for NZS be ordinarily resident on the date of their application was to ensure a degree of connection with New Zealand.[6] She says she has a strong connection to New Zealand because it is her home, she owns a house here, her income is earned here and she holds cash assets in New Zealand and pays tax. The house she owns is not rented and she uses it when she is in New Zealand. In response to questions, the appellant confirmed that the income she earns is from cash deposits and the tax paid is on this income.

[10] The appellant submits that the Ministry assesses "ordinarily resident" based on individual circumstances and her circumstances are relevant. She said she left New Zealand because of an employment dispute that arose in her workplace in 2006/2007. She provided supporting information about this dispute and said that she was driven from New Zealand by intimidation and fear despite being cleared by her Board of Trustees and authorities of any wrongdoing.

[11] The appellant states she comes back to New Zealand at least once a year but now stays in Fiji because her husband, whom she met in Fiji, is working there as an engineer. As soon as her husband retires she will live in New Zealand with him. They both have children in New Zealand. Her husband is now 59. While the appellant did work in Fiji, she no longer does.

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[4] At [37].
[5] At [38].
[6] *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611, [2015] 3 NZLR 177 at [29].

[12] In evidence the appellant stated that her husband had worked outside of New Zealand for most of his working life and that she is committed to being with him wherever his working life is. She accepted that her day-to-day life is in Fiji.

[13] The appellant stated that when she applied for NZS she thought she was eligible for portability. She now understands that portability is dependent in her case on being ordinarily resident in New Zealand at the time of application.

The case for the Chief Executive

[14] The Ministry accepts that on 31 July 2016 when the appellant turned 65 she met the age requirement for NZS. On 19 February 2016 she requested an appointment with the Ministry to apply for NZS but did not attend the appointment on 1 March 2016.

[15] On 22 June 2016, the appellant made an online application and an appointment was booked for 26 July 2017, but she did not attend. The Ministry requested her travel movements from Immigration New Zealand and submits that these travel movements indicate that the appellant appeared to be living primarily in Fiji. The Ministry made another appointment in August however the appellant asked that this be rescheduled to the first week of October.

[16] On 4 October 2016 she attended an interview and discussed her residency situation with the Ministry. On 14 October 2016 she emailed a Personal Details Form to the Ministry stating that she considered herself to be ordinarily resident in New Zealand and visited Fiji only to be with her husband. The Ministry declined her application.

[17] The Ministry produced the travel movement records from 13 March 2008 to 22 May 2017. Between the date this record started and the date of the Ministry's decision, the appellant was present in New Zealand for 427 days out of 3,138 (13.61%). Therefore, the Ministry submits that the appellant does not meet the requirement of s 8(a) of NZSRI to be "ordinarily resident" in New Zealand.

Discussion

[18] We accept that the appellant feels a strong connection to New Zealand. We also accept that she has an intention to return once her husband retires. The fact that she maintains a property in New Zealand supports that intention. We also accept that she may not have chosen to leave New Zealand in 2007 if it

were not for the distress caused by the employment related issues in her workplace. However the events that caused her to leave occurred some 9 years before she reached the age of entitlement for NZS. By that time she had met and married her husband in Fiji. We do not accept that the reason that the appellant decided to leave New Zealand in 2007 continued to be a significant factor in her decision to reside in Fiji through to 2016.

[19] An intention to return to New Zealand was relied on by the appellant in *Greenfield,* as it is in the case before us. Although the Court of Appeal considered that Parliament intended there to be a demonstrable degree of connection because of the cost of NZS, the Supreme Court did not agree with the Court of Appeal's reasoning that the cost of NZS was material to the application of ordinary residence and its emphasis on a degree of connection.[7]

[20] The Supreme Court observed the requirement in s 8 for being "resident and present" together with "ordinarily resident". The Court considered that these terms denote a place in which someone resides. While it accepted that degrees of permanence or habituality sufficient to amount to residence are not able to be precisely defined, the Supreme Court considered that the enquiry into ordinary residence must address where the person's home has been up until the critical date, where the person was living at the critical date and their intentions as to the future.[8] The state of mind of the person is only one consideration and must be assessed together with the domestic realities of that person's life, including the length of time they have been out of New Zealand.[9]

[21] This approach requires balancing the factors of residency, connection and intention. It is in this light that we have considered the appellant's application.

[22] Between 1 January 2016 and the date of application, 9 October 2016, the appellant spent 53 days in New Zealand. That is less than 19% of the time. Her day-to-day life is in Fiji with her husband and she acknowledged this at the hearing.

[23] The fact that the appellant has a house in New Zealand, money invested here, family, and belongs to clubs here is not sufficient to persuade us that she was ordinarily resident in New Zealand in June 2016 when she applied for NZS, nor

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[7] *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261 at [33].
[8] At [36].
[9] At [37].

at the date the decision was made on 14 October 2016. Her ordinary, day-to-day life was in Fiji at that time.

[24] Applying the approach of the Supreme Court in *Greenfield*, we have no hesitation in finding that the appellant did not meet the requirements of s 8(a) of NZSRI and therefore was not entitled to NZS on 14 October 2016.

[25] However, we note that as the appellant meets the requirements of s 8(b) and (c) of NZSRI, she may qualify for NZS in the future if her place of residency changes.

Dated at **Wellington** this 5th day of February 2018

S Pezaro
Deputy chair

K Williams
Member

C Joe JP
Member