[2018] NZSSAA 010

Reference No. SSA 009/17

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of XXXX 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 27 July 2017

Appearances

The appellant in person

G C Jenkin, counsel for the appellant

R Stainthorpe, counsel for the Chief Executive; A Katona, agent

DECISION

Background

[1] XXXX (the appellant) was granted New Zealand Superannuation (NZS) on 15 July 2007 when he turned 65. He now appeals the decision of 18 November 2015, upheld by a Benefits Review Committee, to suspend his NZS payments from that date on the basis that he was not ordinarily resident in New Zealand. The Ministry had previously suspended the appellant's NZS payments in January 2008 for the same reason but subsequently overturned this decision after an internal review.

[2] On 5 February 2010, the Ministry received a letter from the appellant stating that he was leaving New Zealand on 8 February 2010 for nine to twelve months and expected his payments to continue. However, the Ministry suspended NZS payments because he intended to be overseas for more than 26 weeks. Although he contacted the Ministry to say that he would return in August 2010, the Ministry continued the suspension of his payments as it considered he was not ordinarily resident in New Zealand.

[3] The Ministry subsequently resumed payments although it says the question of whether the appellant was ordinarily resident in New Zealand at that time was not clarified. At the same time the Ministry requested information from New Zealand Customs about the appellant's travel movements in and out of New Zealand.

[4] The issue for the Authority to determine is entitlement under section 8(a) of the New Zealand Superannuation and Retirement Income Act 2001 (the Act), and in particular whether the appellant was "ordinarily resident in New Zealand on the date" he applied for NZS. We have concluded he was not; and accordingly it is not necessary for us to consider the discretion to allow payment of NZS overseas after a person has qualified. The discretion to allow payment overseas after a successful application is contained in section 26 of the Act.

Relevant law

[5] 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.

[6] Section 22 of NZSRI provides for payment of NZS for the first 26 weeks of any absence from New Zealand provided that the absence does not exceed 30 weeks or, if it does, that the chief executive is satisfied that the extended absence was due to circumstances beyond the person's control.

[7] The Ministry accepts that the appellant meets the requirements of s 8 (b) and (c) of NZSRI. The relevant provision in this appeal is s 8(a) which provides that unless an applicant is ordinarily resident in New Zealand on the date of application for NZS they are not entitled to NZS unless two exceptions apply. Neither of the exceptions assist the appellant.

[8] 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).

[9] The Supreme Court rejected the High Court's conclusion that "ordinarily resident" is 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]

[10] 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]

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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].
[4] At [37].
[5] At [38].

The case for the appellant

[11] Mr Jenkin submits that the Ministry has placed too much weight on the amount of travel that the appellant undertakes as a tourist and is in error in finding that the appellant is not ordinarily resident in New Zealand. He submits that time spent travelling is only one factor and not conclusive. The implication in the Ministry's s12K report that the appellant's home is overseas and his sole purpose for returning to New Zealand is to comply with s 22 of NZSRIA is not accepted. At the relevant time the appellant had no home overseas and it was his intention to return home regularly.

[12] Mr Jenkin cites the Supreme Court case of *Greenfield v Ministry of Social Development*[6] as authority that the objective of an enquiry into ordinary residence is to assess the degree of connection with New Zealand. However, his reference to [32] of that judgment is not correct. The passage that Mr Jenkin relies on is cited by the Supreme Court from the Court of Appeal judgment in *Greenfield*[7] and the Supreme Court disagreed with the Court of Appeal's emphasis on a degree of connection as being relevant.

[13] Mr Jenkin argues that the appellant returns to New Zealand on a regular basis and his accommodation overseas is temporary. There is no evidence that the appellant puts down roots such as might be expected when a person makes their home overseas. Mr Jenkin submits that *Greenfield* can be distinguished from the appellant's situation because, unlike the appellant who has no home overseas, Mrs Greenfield had a home in Singapore and was resident there for tax purposes.

[14] The appellant gave evidence at the hearing and filed an affidavit sworn 14 March 2017. He considered 'this was his time to become a nomad'; his perception is that he is having a 10 year overseas holiday. He states that he visits family for about two weeks a year, staying with each of his children for a few nights.

[15] He is a Justice of the Peace and although he does not volunteer as such he participates in training sessions. He belongs to the [X] Working Men's Club and follows the rugby and cricket. In the relevant period the appellant stayed with a friend in XXXX when he was in New Zealand and kept a car and other personal

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6 [2016] 1 NZLR 261, [2015] NZSC 139.
7 At [27].

possessions there. He owned factories in XXXX which were managed by his daughter and in 2015 had properties in XXXX managed by an agent.

[16] The appellant produced his 2015 and 2016 financial statements in his affidavit. These accounts show that in 2015 he claimed $7,094 for travelling expenses. In evidence he confirmed that he claimed the cost of his travel to New Zealand as a tax-deductible expense on the basis that he travelled to inspect his rental properties.

[17] When asked how he spends his time in New Zealand for what are generally two week periods, the appellant responded that he goes to XXXX to get another visa and his family usually meet him there; he relaxes with friends and family. Since purchasing a house in XXXX he travels there to inspect it.

[18] The appellant disputes some factual matters in the Ministry's s 12K report. Although the Ministry's submissions address only the question of whether he meets the requirements of s 8(a) of NZRIA, its report cites s 26 of NZRIA which provides for overseas payments of NZS as relevant. The appellant says he has never taken up the option of applying for portability under s 26 because he has never intended to stay away from New Zealand for more than six months and has never lived overseas.

[19] Whereas the Ministry indicates that he lived in one address for six months in Thailand, the appellant says he was at this address for a total of approximately six months over a two-year period prior to the interview. He said most of his time was split between Thailand and Cambodia and to a lesser extent Vietnam. Thailand is a hub for travel to other destinations in Asia and elsewhere.

[20] The address in Thailand was the address for service and registered office of one of his companies for a brief period around 2011. Mr Jenkin argues that the address for service and the location of a registered office of a New Zealand company have no significant bearing on the question of where the person who owns the company ordinarily resides. He submits that there is no prescribed limit to the amount of travel a superannuitant may enjoy and the Authority has previously accepted that a temporary absence overseas may be for weeks, months, or years without affecting entitlement.

[21] The appellant says that he has been completely open about his travel movements and the Ministry has not asked him for details. He does not accept

the Ministry's claim that it had to rely on travel movement records and his answers to questionnaires because he did not provide his passport when requested. He says that he did not have it with him when asked to provide it.

[22] In his view, New Zealand is his home and he is a tourist overseas. He has no home in Thailand or anywhere else. He disputes the Ministry's conclusion that his ties in New Zealand focus on his business activities and that he has no real involvement with the community during his time in New Zealand. He says that he has strong family and cultural ties with New Zealand and that his three children and his five grandchildren all live in New Zealand.

The case for the Chief Executive

[23] In assessing where the appellant spent his day-to-day life, the Ministry said it had only fragmented information about his domestic realities. The Ministry submits that the appellant has failed to prove that he leads a settled existence in New Zealand or was usually or regularly resident here in the past 10 years.

[24] The Ministry produced an email it sent to the appellant on 5 February 2010 asking him to provide his passport along with other documents. The Ministry states that the appellant maintained correspondence with the Ministry by email but failed to scan and send a copy of his passport.

[25] On 29 August 2011 a case manager interviewed the appellant. He stated that he visited Thailand every year and in the past two years had spent approximately six months there. The Ministry produced New Zealand Customs travel records for the appellant from 2 August 2004 to 9 October 2015. In this period the appellant spent 11% of his time in New Zealand. As he was not eligible for NZS until 15 July 2007 and was found eligible on that date, the earlier records are irrelevant.

[26] The records from 2011 to 2015 show that the appellant informed the Ministry when he was leaving New Zealand for a holiday and when he returned. The Ministry submits that the Customs records indicate a pattern of the appellant being absent from New Zealand and returning shortly before reaching the 26-week date, remaining in New Zealand for a few weeks and then repeating the cycle.

Discussion

[27] Counsel for the appellant analysed each factor considered by the Benefit Review Committee. However, the Authority is required to rehear a matter on appeal; it is not reviewing the matters considered by the BRC or the process it adopted in reaching its decision.[8]

[28] The question we are required to answer is whether as at 18 November 2015 the appellant was ordinarily resident in New Zealand. We do not accept his argument that, if he does not have a fixed home out of New Zealand, New Zealand must be his place of residence.

[29] For us to conclude that the appellant was entitled to NZS we must have evidence that the appellant was "ordinarily resident in New Zealand on the [date he applied] for New Zealand superannuation". That is the requirement in section 8 of the Act. In this case the Ministry has justifiably challenged the paucity of evidence adduced by the appellant. His task in this appeal was to provide evidence he was resident in New Zealand. That is the basis on which we have approached this appeal.

[30] The conclusion of the Supreme Court in *Greenfield*, that a person cannot be ordinarily resident in two places simultaneously, does not necessarily demand an enquiry into how a person is living overseas. The issue is whether they are ordinarily resident in New Zealand. To prove they are resident in New Zealand, a person may well provide evidence that when absent from New Zealand they were travelling as a tourist. However, that is no more nor less than part of their evidence as to where they were ordinarily resident. For the reasons that follow, we do not consider the evidence before us establishes the appellant was ordinarily resident in New Zealand when he applied for NZS.

[31] The Supreme Court considered that the terms "resident and present" and "ordinarily resident" in s 8 of NZSRI denote a place in which someone resides.[9] 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.[10] The state of mind of the person is

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8 Social Security Act 1964, s 12M(1).
9 n 6 at [36].
10 At [36].

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.[11]

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

[33] In the final paragraph of his affidavit the appellant states:

> [33] Although the days I spent overseas in the last 12 months total more than the days I spent in New Zealand for that period I am still a tourist, I am not domiciled anywhere outside New Zealand. New Zealand is my only home. I do not have any have any residence anywhere else. I do not have a relationship with any other person overseas or in New Zealand, although I do have many friends. There is nowhere overseas that I would call home, although I do stay with friends more than once a year. Although I do travel a lot my home is ordinarily in New Zealand. Now that I have a house in XXXX I intend to stay there.

[34] First, we note that the concept of "domicile" is quite different from where a person is ordinarily resident. In some cases, a person may be ordinarily resident in another country for decades, and retain their domicile of origin. Some instructive remarks on the distinction between domicile and residence are found in the decision of the Federal Court of Australia in *FC of T v Applegate* 79 ATC 4307. In New Zealand the Domicile Act 1976 has altered the common law rules relating to domicile. In our view the appellant has correctly characterised his evidence as being in the nature of a domicile test. However, that is not how the Supreme Court applied the test of "ordinarily resident".

[35] Neither the house in XXXX nor the appellant's recent change of his New Zealand address to his daughter's house in XXXX are relevant to this appeal. These events occurred after the date of the decision under appeal. The issue we are required to determine is whether the appellant was ordinarily resident in New Zealand in November 2015 and so entitled to NZS at that time.

[36] After the hearing the High Court issued its judgment in *Pridmore v Chief Executive of the Ministry of Social Development*[12]. The Court found that Mr

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11 At [37].

12 [2017] NZHC 2434 4 October 2017.

Pridmore was not ordinarily resident in New Zealand despite a clear intention to return to New Zealand from Japan.

[37] Although *Pridmore* concerned portability of NZS, the factors considered are relevant to this decision. The High Court noted that Mr Pridmore spent approximately 82% of the previous nine years and three months outside of New Zealand. He had no property in New Zealand and did not belong to any particular organisation which engaged his attention whilst in New Zealand. Like the appellant Mr Pridmore had personal effects stored in New Zealand. The High Court considered that for the short period he was in New Zealand Mr Pridmore was in effect a visitor.

[38] Although the appellant arguably has a stronger connection to New Zealand than Mr Pridmore because he was a Justice of the Peace, owned property and invested money in New Zealand, there is no evidence of a pattern of living in New Zealand that supports the appellant's contention that he resided in New Zealand at the relevant time.

[39] From 10 February 2011 to 9 October 2015 the appellant spent 179 days in New Zealand; approximately 10% of the time. The fact that in that period he had family here, invested in commercial and residential property and paid tax does not satisfy us that the domestic reality of his life was in New Zealand during that period.

[40] A significant factor is the appellant's claim in 2015 for the cost of his travel to and from New Zealand. It would of course be dishonest to claim a tax deduction for travel if it related to being offshore for a holiday. The claim could only be justified if the appellant resided outside New Zealand and had to travel here for business purposes. The appellant has been unable to explain the discrepancy.

[41] We are satisfied the appellant has failed to provide evidence from which we can conclude he was ordinarily resident in New Zealand at the material time. Accordingly, we must conclude he did not meet the requirements of section 8(a) of the Act and decline this appeal.

Order

[42] The appeal is dismissed.

[43] The decision of the Chief Executive on 18 November 2015 to suspend payment of New Zealand Superannuation to the appellant is upheld.

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

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S Pezaro
Deputy chair

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K Williams
Member

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C Joe JP
Member