

[2019] NZSSAA 26

Reference No. SSAA 39/18

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Whangarei 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 Whangarei on 20 March 2019

Appearances

The appellant by audio-visual link from the United States of America

A Katona, agent for the Ministry of Social Development, by telephone from Auckland

DECISION

Background

[1] XXXX (“the appellant”) appeals the decision to decline his application for portable New Zealand Superannuation (“NZS”) to the United States. The Ministry declined the appellant’s application because it said that at the time he applied for portability he was not ordinarily resident and present in New Zealand.

[2] The appellant was born in the United Kingdom and reached 65 years on 27 August 2016. On 29 November 2016, when he was in New Zealand, he applied for NZS. In his application, he indicated that he spent substantial time overseas.

- [3] This application was granted, based on the Social Welfare (Reciprocity with the United Kingdom) Order 1990 (the Reciprocity Agreement). However, the Ministry subsequently did a data match exercise with Customs and found that the appellant had left New Zealand on 14 March 2017 without notification. The appellant's NZS was suspended from 4 October 2017 and an overpayment established of \$11,302.59. The appellant has repaid this sum.
- [4] On 30 November 2017, the appellant attended an appointment at the Service Centre in Whangarei to apply for portable NZS payments to the United States. He said that he was leaving New Zealand the next day.
- [5] Based on updated travel movements provided by Immigration New Zealand, the Ministry declined this application.

Relevant law

- [6] Section 8 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act) 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
...

- [7] Section 26 of the Act provides for payment of NZS overseas. Section 26B of the Act sets out the requirements for entitlement to portable NZS. A person must make an application stating where they will be living or travelling; be ordinarily resident and present in New Zealand on the date of making the application; and either be entitled to receive NZS at the time of application or become entitled to receive NZS before leaving New Zealand.

The case for the appellant

- [8] The appellant accepts that the Customs records produced by the Ministry are accurate. His submission is that his case is unique and the fact that he is only

“a few hundred days short” of the requirement for residency in New Zealand should be overlooked in his case.

- [9] The appellant states that his heart is in New Zealand and if he had family here he would live here. In that sense, he states that it is his intent to reside in New Zealand.
- [10] We asked the appellant what factors indicated that his life is in New Zealand. He said that he owns a house in Whangarei which is rented. He stated that between November 2014 and November 2016 he lived in Washington DC. When he arrived in New Zealand prior to applying for NZS, in November 2017, he had a return ticket to the US.
- [11] The appellant suggested that it would be appropriate to pay him NZS on a proportional basis. He said that he had no idea that his time living overseas would adversely affect his right to NZS. As he had paid tax in New Zealand, and owned property here since 1973, he should be entitled to pro rata NZS payment.
- [12] The appellant also referred to various attempts he had made to find work in New Zealand which had not been successful. He said that he is a New Zealander and believed that after working two jobs during the 1970s and 1980s he should be entitled to NZS.

The case for the Ministry

- [13] The Ministry refers to its record of the appellant's presence in New Zealand from age 50 and submits that his short stays in New Zealand between April 2005 and September 2011 and April 2014 onwards indicate that the appellant conducted his everyday life in the United States and was not ordinarily resident in New Zealand during these periods.
- [14] However, the Ministry considered two periods which might be relevant to his potential qualification under the Reciprocity Agreement which provides for NZS by virtue of residence in the United Kingdom. The appellant has not provided the required information to verify that he spent the relevant periods in the United Kingdom however, even if he did qualify for NZS under the Reciprocity Agreement, NZS payable under this Agreement ceases to be payable when a person is no longer usually resident in New Zealand.

[15] The Ministry indicated that it would recalculate the duration which the appellant was resident and present in New Zealand for if the appellant was able to provide proof that he had income tax deducted or withheld on earnings from his employment overseas after April 2005. However, he had not done so at the date of hearing.

[16] The Ministry says that, based on the Immigration New Zealand records, the appellant was physically present in New Zealand for 63 days in the three and a half years prior to his application for NZS. The Ministry therefore submits that when he applied for NZS the appellant had not achieved the required five years resident and present in New Zealand since attaining the age of 50 and, when he applied for portable NZS, the appellant was not ordinarily resident in New Zealand.

[17] Discussion

[18] The appellant did not meet the requirements in s 8 of the Act at the time of his application for NZS. These requirements are mandatory and there is no provision for waiving them or paying NZS on a pro rata basis as the appellant suggests. Therefore, when he applied for portable NZS the appellant did not meet the requirement in s 26B(b) of the Act to be entitled to receive NZS.

[19] There is nothing exceptional in the appellant's circumstances. He has chosen to spend the majority of his life out of New Zealand since April 2005. Factors such as difficulty in obtaining employment in New Zealand or lack of family ties here are not exceptional circumstances, and, even if the appellant's circumstances were exceptional in some way, there is no discretion to take personal circumstances into account when determining entitlement to NZS or portable NZS. Accordingly, this appeal fails.

Order

[20] The appeal is dismissed.

Dated at Wellington this 29th day of April 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member