[2020] NZSSAA 4

Reference No. SAA 26/17

IN THE MATTER of the Social Security Act 2018

AND

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

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DECISION

Background

[1] In 1993 XXXX and his wife went to Singapore as missionaries, where they lived and worked for about 19 years. After packing up and leaving Singapore, they travelled internationally for a few months, including staying in New Zealand for less than a month. Then they took up work and lived in Cambodia for some four and a half years. To be eligible to apply for New Zealand Superannuation (NZS) a person must be ordinarily resident in New Zealand. If a person later ceases to be ordinarily resident in New Zealand, the Ministry of Social Development (the Ministry) may terminate or reduce NZS payments.

[2] While in Singapore both XXXX and his wife applied for New Zealand Superannuation. His wife was the first to apply after reaching 65 years of age in early 2012. The Ministry declined her application as it considered she was not ordinarily resident in New Zealand on the date she applied. She successfully appealed this decision to the High Court; however, the Court of Appeal and the Supreme Court upheld the decision of the Ministry.

[3] While his wife's dispute concerning her entitlement was in progress, XXXX turned 65. He applied for NZS on 5 December 2012, and the Ministry granted his application. However, when the Supreme Court dismissed his wife's appeal and supported the Ministry's view that she was not ordinarily resident in New Zealand when she applied for NZS, it reviewed XXXX's entitlement to NZS.

The Ministry decided that XXXX was not ordinarily resident in New Zealand when he applied for NZS and stopped his NZS payments from 7 October 2015. It established an overpayment of $40,376.47 for the period from 5 December 2012 to 6 October 2015 but decided not to recover that overpayment.

[4] XXXX was not satisfied with that outcome and commenced the process that led to this appeal. A Benefits Review Committee upheld the Ministry's decision to suspend XXXX's NZS payments, this appeal followed that decision. The Authority delayed hearing this appeal to allow XXXX to return to New Zealand so he could attend the hearing.

[5] After commencing the review and appeal process, XXXX made another application for NZS which was granted from 8 January 2018. At that point XXXX had ended his period of working and living overseas and lived in New Zealand. There is no dispute that XXXX was ordinarily resident in New Zealand from 8 January 2018. We are only concerned with whether XXXX was entitled to NZS before that time.

[6] The Supreme Court's decision resolved his wife's situation. XXXX says he was in a different position, and he was entitled to NZS notwithstanding the outcome of his wife's appeal. In this appeal we must apply the principles of law determined by the Supreme Court; however, first we must determine the facts as they relate to XXXX's situation. We make that evaluation of the facts on the evidence in this case, independently of the earlier proceedings relating to his wife. One of the important principles the Supreme Court established is that a person can only be ordinarily resident in one country at a given time. At any time, XXXX was ordinarily resident in Singapore or Cambodia, he could not be ordinarily resident in New Zealand.

Absences offshore and visits to New Zealand

[7] We need to consider XXXX's absences from New Zealand, and the reason for them before we reach a conclusion as to where he was ordinarily resident at material times. As noted, aside from a short interval between the two, XXXX has lived and worked in Singapore and Cambodia during the period we must consider. While XXXX lived and worked in Singapore between 6 October 1998 and 12 December 2012, he did periodically return to New Zealand.

[8] On 5 December 2012, while in Singapore, XXXX booked an appointment with the Ministry. The Ministry treated that date as the point he first applied for NZS. He travelled to New Zealand on 12 December 2012 and attended the appointment with the Ministry on 18 December 2012. At that time XXXX had been away from New Zealand for a continuous period of some 17 months since his previous visit. When a Ministry staff member interviewed XXXX, he indicated he had returned to New Zealand permanently, though he would have to travel to Singapore and pack up his possessions.

[9] XXXX apparently anticipated returning to New Zealand and living here permanently when he told the Ministry of his intentions in December 2012 but that was not what happened. He returned to Singapore on 7 January 2013 and did not return to New Zealand until 24 April 2013. He then left on 20 May 2013, not returning until 29 October 2013. In June 2013 XXXX moved to Cambodia to live and work there. In the period from 7 January 2013 to 22 June 2013 between returning to Singapore and moving to Cambodia XXXX was in New Zealand, Australia, Cambodia, and Switzerland. He was in New Zealand for less than a month during that period.

[10] The Ministry calculated that between 12 December 2012 and 3 June 2015 XXXX spent 193 days of the 904 days in New Zealand, it was 21 per cent of the time.

[11] There is no controversy regarding the periods of time XXXX was outside New Zealand, aside from an inaccuracy he acknowledged,[1] or that he lived and worked in Singapore and Cambodia in the respective periods.

The scope of this appeal

[12] For this appeal, XXXX's NZS entitlement is best analysed in three time periods:

(a) He applied for NZS on 5 December 2012 and received it until 7 October 2015. While the Ministry says NZS should not have been paid during this period it is not seeking to recover the payments made. Potentially we could determine he was entitled to payment in that period but, if he was, the only monetary effect would be to XXXX's entitlements after 7 October 2015.

[1] See [40] below.

(b) Between 7 October 2015 and 7 January 2018, the Ministry made no payments of NZS as it said XXXX was not qualified on 5 December 2012 when he applied.

(c) After 8 January 2018 XXXX started receiving NZS. Neither XXXX nor the Ministry dispute the payments after this date.

[13] It follows that we must consider the position from 5 December 2012 but the critical period in terms of the monetary outcome for XXXX is his status between 7 October 2015 and 7 January 2018.

[14] XXXX's case is that he was ordinarily resident in New Zealand when he applied for NZS on 5 December 2012, because the circumstances upon which the Supreme Court based its conclusion in his wife's case had changed significantly by the date of his application. He argues that he retained his status of being ordinarily resident in New Zealand when he went to Cambodia in 2013 and remained entitled to NZS through to 8 January 2018 when his NZS payments were reinstated.

[15] The Ministry says that even if XXXX was ordinarily resident in New Zealand and qualified for NZS, if he subsequently ceased to be ordinarily resident in New Zealand the Ministry was obliged to review the situation. It could stop or reduce XXXX's NZS payments. Accordingly, the Ministry's position is that, even if XXXX was entitled to NZS from 5 December 2012, his circumstances should have been reassessed by June 2013, at the latest, when he went to Cambodia and was not ordinarily resident in New Zealand.

[16] The Ministry contended that the Authority had no jurisdiction to determine XXXX's entitlement for the period between 7 October 2015 and 7 January 2018 because he did not raise this issue until he filed submissions on his appeal. That is not correct:

(a) XXXX's application for review put in issue both his entitlement from 5 December 2012 and the cessation commencing 7 October 2015;

(b) The Benefits Review Committee's decision recognised both of those matters as the issues before it and determined them on the basis that XXXX never

established he was ordinarily resident in New Zealand during the material times to qualify for NZS.

(c) In his notice of appeal XXXX included reinstatement of his NZS payments from 7 October 2015; his submissions expanded on this ground. In its report the Ministry said:

> It must also be remembered that, although NZS was granted, S.81 and S.74(1)(a) of the SSA allow the Ministry to reassess a person's NZS entitlement to ensure that they remain ordinarily resident in New Zealand and eligible for that payment.

[17] In our view it is inescapable that XXXX's entitlement to NZS from 5 December 2012, and his ongoing entitlement after 7 October 2015, were raised clearly throughout the process.

[18] Regardless, the Authority has an unusual role that requires it to consider any support a person is entitled to when they apply, whether their application refers to the benefit or other support to which they are entitled. The policy reasons for the Ministry and this Authority having a duty to identify the support a person is entitled to, rather than depriving a person of support because they do not know what to ask for are obvious. The law in this regard is settled.

[19] Under both the Social Security Act 1964 (the Act) and the Social Security Act 2018 the Authority sits "as a judicial authority",[2] and is deemed to be a commission of inquiry with the powers to gather information contained in the Commissions of Inquiry Act 1908.[3] The Supreme Court considered the role of the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income.*[4] It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:[5]

> There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.
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2 Section 12I of the 1964 Act, and s 401(2) of the 2018 Act.
3 Section 12M(6) of the 1964 Act, and cl 12(1) of Schedule 8 of the 2018 Act.
4 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55
5 At [20]–[26].

> In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.
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> …
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> The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC …

[20] As Williams J observed in *Chief Executive of the Ministry of Social Development v Genet*[6] the Authority, like other statutory tribunals, is intended to provide "simpler, speedier, cheaper and more accessible justice", and "the Authority is undeniably a paradigm case". Reflecting that policy, the Supreme Court has made it clear that the procedural history will not preclude the Authority, or indeed the Courts, from reaching the correct determination when dealing with appeals.

[21] XXXX has throughout made it clear that he says he is entitled to NZS from 5 December 2012, and to have payments continue from that time. In our view our duty is to determine whether he was entitled to NZS when he applied for it and, if not, whether he was entitled to it at any time material to the appeal. It appears unnecessary to decide whether the material period is down to 8 January 2018, or some earlier point in time such as the time when XXXX first requested a review of the 7 October 2015 decision, or the commencement of this appeal. XXXX clearly put in issue the Ministry's decision to stop payments from 7 October 2015. We can discern no material change of circumstances for XXXX after that point prior to his successful application for NZS on 8 January 2018, and there was no new decision on the part of the Ministry that could trigger a new review process.

[22] We note the Ministry decided to stop payments of NZS to XXXX from 7 October 2015. The Act provides that a person is not entitled to assistance until they apply for it.[7] In a strict literal sense XXXX did not reapply after his NZS payments were suspended. However, we take the view that an overly literal interpretation is not appropriate. In *Greenfield* the Supreme Court cautioned against a "very literal approach" to interpreting the Act[8] which could lead to perverse outcomes. It is necessary to consider an application once

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6 *Ministry of Social Development v Genet* [2016] NZHC 2541 at [15].
7 Section 80 of the Social Security Act 1964 applies.
8 *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261 at [9]

lodged as standing, at least while it is still operative. So, for example, if we concluded that XXXX was not ordinarily resident in New Zealand on 5 December 2012 when he first applied for NZS, but was some weeks later after packing up and leaving Singapore, we would regard the initial application as still live.

[23] Accordingly, we will approach this appeal on the basis the scope properly includes XXXX's entitlement from 5 December 2012 including the period after the Ministry suspended payments, 7 October 2015, through to 8 January 2018 when the Ministry reinstated his NZS. In our view the issues should be framed as:

(a) Was XXXX ordinarily resident in New Zealand at any point on or after 5 December 2012, and if so when?

(b) If he was ordinarily resident in New Zealand at any point, was he entitled to NZS at that time?

(c) If he ceased to be ordinarily resident, then potentially we need to consider exercising the discretion to terminate or reduce XXXX's entitlement.

The issues

[24] For the reasons identified, the scope of our inquiry is, whether XXXX was "ordinarily resident in New Zealand" at any point between 5 December 2012 and 8 January 2018 and, if so, when.

[25] There are two distinct statutory issues that arise:

(a) Unless XXXX was ordinarily resident in New Zealand when he applied for NZS, he was not entitled to receive NZS (Section 8 of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI)); and

(b) If he did meet that test, but at a later point ceased to be ordinarily resident in New Zealand, then the Authority must consider whether it should exercise a discretionary power to suspend or terminate XXXX's entitlement to NZS (s 81 and s 74(1)(a) of the Act).

Relevant law

Requirements for NZS to commence

[26] Section 8 of the NZSRI sets out the residential qualifications for entitlement to NZS:

> **8 Residential qualification for New Zealand superannuation**
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> 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.

[27] The Ministry accepts that XXXX meets the requirements of ss 8(b) and (c),[9] the sole issue in that section is the application of s 8(a). In the Act and the 2018 Act, "ordinarily resident" is defined solely as excluding a person unlawfully resident in New Zealand. There is no positive definition of the term.

[28] 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*.[10] The Supreme Court observed that there are a large number of New Zealand statutes which contain the expression "ordinarily resident" and in some cases the expression is defined and in other cases it is not.

[29] In Mrs Greenfield's case, the key factor in the High Court's finding that she was ordinarily resident in New Zealand was that it interpreted s 8(a) to include an intention to return to New Zealand. The Supreme Court considered whether s 8(a) is to be construed in this way.

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[9] He did not meet the tests by being resident and present, but by virtue of s 10 of the NZSRI that deemed him to have that status - [32] below.

[10] Above n 8.

[30] The Supreme Court rejected the High Court's interpretation of "ordinarily resident" as being established if there is an intention to return to a former place of residence because it 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 the NZSRI makes it clear that the legislature did not envisage a person could be simultaneously ordinarily resident in New Zealand and another country.[11]

[31] The Court considered the enquiry into ordinary residence must address where the person's home was 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.[12] The Court therefore concluded that an intention to return to New Zealand is not itself determinative of ordinary residence, although it may be relevant.[13]

[32] Sections 9 and 10 of the NZSRI qualify s 8. Section 9 is not relevant to this appeal. Section 10 provides that "no account" is taken of time spent overseas as a missionary when determining the period that an applicant has been present in New Zealand. The relevant provision is s 10(1):

> **10**
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> **Periods of absence as missionary also not counted**
>
> (1)
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> In determining the period an applicant has been present in New Zealand, no account is taken of any period of absence while engaged in missionary work outside New Zealand as a member of, or on behalf of, any religious body or, as the case may be, during any period that the applicant was absent from New Zealand with

11 At [34] and [39].
12 At [37].
13 At [38].

> his or her spouse or partner while that spouse or partner was engaged in that missionary work.

[33] The Supreme Court was satisfied that the legislative scheme required the exceptions in ss 9 and 10 of the NZSRI to be treated as correlating precisely with the eligibility rules in s 8(b) and (c). Therefore, a missionary who was ordinarily resident in New Zealand before leaving to carry out missionary work is entitled to count the time spent out of New Zealand on missionary work against the requirements in s 8(b) and (c). The Ministry accepts that XXXX met those requirements.

The power to terminate or reduce New Zealand Superannuation if a person ceases to be ordinarily resident in New Zealand

[34] The Ministry[14] has the power to review entitlements and request information for that purpose under s 81 of the Act.[15] Section 74(1)(a) of the Act gives the Ministry a discretion to terminate a benefit when a person has ceased to be ordinarily resident in New Zealand, and s 77 and related provisions affect payment of benefits when a person is absent from New Zealand. The Ministry has referred to those provisions but has taken the view that they did not arise because XXXX was not ordinarily resident in New Zealand until 8 January 2018.

[35] Section 3 of the Act includes NZS in the definition of "benefit". Section 81 of the Act gives the Chief Executive power to review entitlement to benefits. Section 74(1)(a) of the Act provides:

> **74 Limitation in certain other cases**
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> (1) Notwithstanding anything to the contrary in this Act or Part 6 of the Veterans' Support Act 2014 or the New Zealand Superannuation and Retirement Income Act 2001, the chief executive may, in the chief executive's discretion, refuse to grant any benefit or may terminate or reduce any benefit already granted or may grant a benefit at a reduced rate in any case where the chief executive is satisfied —
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> (a) that the applicant, or the spouse or partner of the applicant or any person in respect of whom the benefit or any part of the benefit is or would be payable, is not ordinarily resident in New Zealand; or

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[14] This Authority when determining an appeal has all the powers, duties, function, and discretions that the Chief Executive of the Ministry had in respect of the matters in the appeal.

[15] Relevant provisions in 2018 Act ss 304 and 204.

[36] The provision confers a discretionary power to terminate XXXX's entitlement to NZS if he ceased to be ordinarily resident in New Zealand after qualifying for it.

The case for the XXXX

Overview

[37] Mr McGurk submitted that:

(a) Based on the circumstances at the time of his application, XXXX was ordinarily resident in New Zealand when he applied for NZS.

(b) When XXXX left Singapore, he was ordinarily resident in New Zealand because he did not take up residence elsewhere.

(c) XXXX's ordinary residence status in New Zealand continued from the time he left Singapore until July 2013 when he left New Zealand to take up the assignment in Cambodia.

(d) His absences from New Zealand between January and July 2013 did not affect his ordinary residence status because those absences were short and temporary.

(e) While living in Cambodia between July 2013 and December 2017, XXXX retained ordinary residence status in New Zealand.

[38] Mr McGurk submitted that the distinction the Supreme Court made in *Greenfield*[16] between residency, where a person is living, and ordinary residence, the place where they usually live, supports XXXX's contention that he was ordinarily resident in New Zealand while out of the country. Where a person lives or resides is not the same necessarily as their place of ordinary residence. Mr McGurk suggested that the Ministry conflated the concepts of residence and ordinary residence when it decided that XXXX was not ordinarily resident in New Zealand when he applied for NZS while in Singapore.

[39] Mr McGurk submits that while the Supreme Court indicated that an intention to return to New Zealand is not an overriding factor, it is clearly important. Mr McGurk contends that XXXX's intention

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16 *Greenfield* above n 8 at [36].

to return to New Zealand was 'more than merely subjective' and that until June 2013 when the XXXXs accepted an assignment in Cambodia, their intention was to live and remain in New Zealand.

[40] However, Mr McGurk was relying on the chronology that XXXX filed in evidence which showed that he was in New Zealand for a month in June/July 2013.[17] As XXXX accepted under examination, this chronology was not accurate. The chronology indicated that he was in New Zealand between 7 June 2013 and 7 July 2013 and moved to Cambodia on 22 June 2013. XXXX accepted that, as the New Zealand Customs records show, he left New Zealand on 7 January 2013 and returned on 24 April 2013, then departed on 20 May 2013 and returned on 29 October 2013. He was not in New Zealand at any time in June or July 2013.

The circumstances of XXXX's application

[41] XXXX said that when he and his wife decided to return to New Zealand in December 2012, their intention was that New Zealand would be their home. He said that the crucial difference between the circumstances of his application for NZS and those of his wife is that when he applied he was "no longer living in Singapore with no end date in sight". He said the following factors were particularly relevant:

(a) There was a termination date for the missionary assignment and for their return to New Zealand and the move to New Zealand was underway.

(b) Their residential lease in Singapore had terminated and arrangements were made to ship their possessions to New Zealand.

(c) Plans had been made to finance building their retirement home in Auckland.

(d) All his travel outside of New Zealand between January 2013 and June/July 2013 was related either to holidays or ending the assignment in Singapore.

(e) He did not take up residence anywhere other than New Zealand until June/July 2013.

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[17] At page 98 of the s 12k report.

[42] XXXX's evidence was that the missionary assignment in Singapore officially ended on 31 December 2012. He said their replacements were found some months earlier and in early December 2012, when all practical arrangements were made, they left Singapore for New Zealand. In January 2013 they returned to Singapore to finalise arrangements such as the lease on their flat and say goodbye. They then attended pastoral care events and professional counselling in Geneva and a debriefing session in Perth. They had two family holidays on the Gold Coast and in Cambodia with their son.

[43] When they visited their son in Cambodia he asked XXXX to assist with his work there. They accepted the assignment in Cambodia on the basis that it would not continue for more than four years and would end in mid-2017 when they would return to New Zealand however, the assignment was extended until December 2017.

[44] The decision to go to Cambodia in 2013 was made for two reasons. The first was that their son, who had cancer in his thirties and worked in Cambodia, wanted XXXX to work with him. The second reason was that they had reviewed their plans for the house they intended to build in Bucklands Beach to include an investment property on the section. XXXX said this decision delayed the building work which influenced his decision to accept the position in Cambodia.

[45] XXXX said that the building plans were not finalised until 2016 and construction began in July 2016. The Code Compliance Certificate was issued in October 2018. At the date of hearing, he said they did not live at Bucklands Beach and the three houses they built on that section were rented.

[46] Although the project was protracted, we do not accept that a change of purpose or plans for the site influenced XXXX's decision to go to Cambodia. The resource consent decision issued on 16 September 2011 approved three new dwellings on the property which have now been built. This resource consent issued over a year before XXXX decided to go to Cambodia.

Retention of ordinary residence

[47] Mr McGurk argues that, assuming XXXX was ordinarily resident and entitled to NZS at the date of his application, he retained ordinary residence status in New Zealand while residing in

Cambodia. In contrast to the work in Singapore, the Cambodia assignment was for a finite period and therefore did not affect XXXX's status as ordinarily resident in New Zealand. Mr McGurk relied on the Supreme Court's observation in *Greenfield* at [37] that a person might reside temporarily in one country for the purposes of work but retain ordinary residence in New Zealand, and the Court's distinction between the concepts of residence, ordinary residence and presence.[18]

[48] Mr McGurk cited *Fowler v The Minister of Social Welfare*[19] as authority that short absences from a place of ordinary residence do not affect residency status. He argued that the time XXXX spent out of New Zealand after leaving Singapore, before going to Cambodia, did not affect his ordinary residence status in New Zealand because the absences were short and temporary, and there was no intention to reside elsewhere. However, the factual basis for this submission was XXXX's incorrect chronology. Based on the Customs records XXXX spent approximately 27 per cent of his time in New Zealand between 12 December 2012 and 7 July 2013; his time in New Zealand was shorter than his absences from the country.

The case for the Chief Executive

[49] The Ministry accepts that XXXX met the residency criteria under ss 8(b) and (c) of the NZSRI but does not accept that he met the requirement in s 8(a) to be ordinarily resident on the date of his application. If he is found to be entitled to NZS from the date of application, the Ministry submits that XXXX failed to retain ordinarily resident status from at least June 2013 onwards when he moved to Cambodia.

[50] The Ministry submits that although XXXX took steps to return to New Zealand prior to applying for NZS, intention is only one relevant factor to determining eligibility and must be assessed alongside the domestic realities of his life. The Ministry says that he was largely absent for 19 years prior to applying for NZS and for another four years after making the application. XXXX's ordinary settled life was not in New Zealand at the date of application and he did not establish his life here during the relevant period. While he may have had a fixed plan to leave

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18 Paragraph [36] of the Supreme Court decision above n 8.

19 *Fowler v The Minister of Social Welfare* (1984) 4 NZAR 347.

Singapore when he applied for NZS, the Ministry does not accept that he had a fixed plan to reside in New Zealand.

[51] The Ministry argues that XXXX's decision in June 2013 to relocate to Cambodia was clear evidence that he was not ordinarily resident in New Zealand when he applied for NZS. We note the assessment we must make is at the date of application. Accordingly, we can at best treat the later move to Cambodia as some evidence of a lack of settled determination to return to and live in New Zealand after leaving Singapore.

Discussion

Was XXXX ordinarily resident in New Zealand on the date of his application?

[52] We do not accept Mr McGurk's submission on the importance of intention. Where a person is ordinarily resident is not usually determined by intentions, particularly when they do not reflect the person's actual choices and where their life is based. XXXX freely chose to live and work in Singapore and Cambodia for a period of more than two decades. There is no element of him having intentions he could not act on due to external circumstances, such as a person detained in a warzone who is unable to escape.[20] XXXX, on the evidence before us, is in a situation that is very similar to the facts considered by the Supreme Court in *Greenfield*.

[53] When the Supreme Court considered Mrs Greenfield's situation, it robustly rejected her claim that her intentions relating to New Zealand while living in Singapore overrode the reality she lived in Singapore and was accordingly ordinarily resident there. The Supreme Court did not consider it was enough that a person had an affinity and connection with New Zealand and planned to ultimately return there if they are living their life somewhere else. The Court also observed the legislative history which showed actual residence at the date of application has always been a prerequisite to entitlement to NZS and "is distinctly against construing 'ordinarily resident' as if it bore the extended meaning (applied by the High Court)".[21] To be ordinarily resident in New Zealand a person must demonstrate that the domestic realities of

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[20] While it was not relevant to the case, the Court of Appeal did recognise voluntariness may be relevant in *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611, [2015] 3 NZLR 177 cited at [27] of the Supreme Court report, and [32](b) of the Court of Appeal report.

[21] *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611, [2015] 3 NZLR 177 at [35].

their life are here at the relevant time. The Supreme Court considered that when a person has lived in New Zealand in the past, an intention to return is relevant but does not determine that they are ordinarily resident when that is not the reality of their life.

[54] When XXXX applied for NZS, he had not lived in New Zealand for 19 years. He had not left Singapore either. He applied for NZS from Singapore, came to New Zealand primarily to attend his daughter's wedding and returned to Singapore. He says his primary purpose in returning to Singapore was to pack up personal possessions and attend to other matters. Whatever his intentions were, what he did after returning to Singapore and then leaving was travel internationally, take up a new position in Cambodia and visit New Zealand for less than a month between leaving Singapore and taking up residence in Cambodia.

[55] Notwithstanding the fact his work, social connections, and physical presence were centred in Singapore and Cambodia, XXXX says he was none-the-less ordinarily resident in New Zealand from the time he decided to leave Singapore, as:

(a) His daughter lives here,

(b) He intended to build a retirement home in Auckland on a property that he had owned for some years,

(c) He engaged in a building project where he and his wife commissioned the construction of three dwellings that they rented out,

(d) He had medical tests when visiting New Zealand, in May 2013, June 2014 and April 2015.

[56] Constructing or owning rental properties, even with an intention to live there in the future, is not the type of settled domestic life which the Supreme Court considered the central component for ordinary residence status. As the Court observed, an emphasis on intention to return would undermine the purpose of the requirement for ordinary residence, reinforced by s 74(1)(a) of the Act which provides that benefits can be terminated or reduced once a person is no longer ordinarily resident. Whatever long term intentions XXXX may have had, it is beyond argument that what he did and intended to do was live his life in Singapore and Cambodia over some two decades.

[57] We do not accept the submission that when XXXX ceased to be ordinarily resident in Singapore he reverted to being ordinarily resident in New Zealand. That could only happen under the Act if he took the actions required to in fact be ordinarily resident in New Zealand. There was formerly a principle of revival of a domicile of origin, where loss of an acquired domicile triggered the revival of a domicile of origin. However, the Supreme Court in *Greenfield* did not equate "ordinarily resident" with domicile,[22] and revival of a domicile is now historic.[23]

[58] It must follow that for XXXX to be ordinarily resident in New Zealand after ending his ordinary residence in Singapore he must have met the requirements the Supreme Court identified; it could not happen by default. Key elements in the Supreme Court's reasoning we must apply to XXXX's circumstances were:

(a) The Act does not permit residence in two countries simultaneously.[24]

(b) The meaning of the words "ordinarily resident" mean "a place in which someone resides", "home for the time being".[25]

(c) The necessary degree of permanence or habituality for a place to amount to the person's home cannot be precisely defined. However, "where the subject person's home had been set up", "where that person was living" and their "intentions as to the future" are relevant considerations.[26]

(d) Temporary absences may not change where a person's home is. For example, absence for a temporary job in Australia for six months, where the worker's family and house remain in New Zealand may not alter their ordinary residence in New Zealand. However, the strength of, or equivocation in, the intention to return are important.[27]

(e) When considering the state of mind of the subject person, that is to be "assessed alongside the domestic realities of

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22 At [25]

23 Paragraph [27] refers to the Court of Appeal's reference to "domicile", neither Court found it relevant. Section 11 of the Domicile Act 1976 provides a domicile of origin does not revive when a new domicile acquired under s 9 of the Act, instead the new domicile continues until a further new domicile is acquired.

24 At [34] and [39].

25 At [36].

26 At [36].

27 At [37].

that person's life including the length of time that person has lived out of New Zealand".[28]

(f) Mrs Greenfield lived in Singapore which was the "location of her everyday domestic life". It followed she was "therefore, plainly resident in Singapore". Given her preceding 19 years of residence and she had no fixed plan to leave, she was obviously ordinarily resident in Singapore "on any conceivable approach to the legal test".

[59] Applying those principles there can be no doubt in our view that XXXX was ordinarily resident in Singapore until he gathered his belongings and left, and it is similarly clear that he was ordinarily resident in Cambodia when he moved there.

[60] We are satisfied that for the reasons the Supreme Court identified that XXXX was ordinarily resident in Singapore and Cambodia. Those places were the location of his everyday domestic life; when that was so, he could not be simultaneously ordinarily resident in New Zealand.

[61] The question we need to determine is whether XXXX was ordinarily resident in New Zealand for any period in the interval between being ordinarily resident in Singapore and Cambodia. We are satisfied the answer to that question is clear, he did not establish ordinary residence in New Zealand. He visited New Zealand for less than a month, that was not the location of his everyday domestic life. In the months between Singapore and Cambodia XXXX travelled, New Zealand was one of the places he visited. What XXXX says he did, what he did; and, in our view, his intentions, were all consistent. He travelled, took advice and considered the next phase of his life, vacationed, decided to accept a position in Cambodia and moved to live there. He did not settle in New Zealand and then change his plans. It follows he was not ordinarily resident in New Zealand during that time.

Application of section 74(1) if XXXX did become ordinarily resident in New Zealand

[62] If we are wrong and XXXX did become ordinarily resident between being ordinarily resident in Singapore and ordinarily

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[28] At [37].

resident in Cambodia, we would need to consider the effect of s 74(1) of the Act.

[63] In our view when considering the discretion in s 74 of the Act, we should consider the statutory function of the requirement that a person is ordinarily resident in New Zealand to be entitled to NZS. In *Greenfield* the Supreme Court, when considering the effect of the words "ordinarily resident", said the "residential qualification for New Zealand Superannuation is the principal eligibility criterion", and it applies to everyone.[29] A material factor in the exercise of the discretion is maintaining the effectiveness of the legislation's principal eligibility requirement.

[64] The NZSRI, contains a regime that does allow payment of NZS to certain people who are not ordinarily resident in New Zealand. There is a complex regime including:

(a) physical absence, regardless of being ordinarily resident, can suspend payment,[30]

(b) a payment regime for certain people who are outside New Zealand,[31] and

(c) some specific provisions for certain Pacific countries.[32]

[65] We do not consider s 74 generally applies where the NZSRI provisions relating to absence from New Zealand deal with the situation. Our concern in this case is different. XXXX has had the benefit of special statutory provisions, including s 10 of the NZSRI as he has engaged in "missionary work". However, none of these provisions relieve him of the requirement for "ordinary residence" in New Zealand to qualify for NZS. The Supreme Court decision is clear in that regard.

[66] If XXXX meets the residential provisions in s 8(a) he can only do so based on a fleeting period of ordinary residence in New Zealand between lengthy periods of residence in Singapore and Cambodia. We do not consider it was within the legislative contemplation that a person could come to New Zealand for a brief period, meet the residential requirements and then resume their life overseas. To the extent that s 74 of the Act has a role

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29 At [38](a).
30 NZSRI, s 21 – 25.
31 NZSRI, s 26 and 29.
32 NZSRI, s 30, they include exceptions to the ordinary residence requirement as an exception to s 8(a).

when a person ceases to be ordinarily resident in New Zealand, protection of the principal eligibility criterion is a material consideration.

[67] If, contrary to the conclusion we have reached, XXXX was ordinarily resident in New Zealand between living in Singapore and taking up residence in Cambodia; in our view, the discretion in s 74 should be exercised to terminate his NZS from the time he took up residence in Cambodia.

[68] Our reasoning is:

(a) XXXX was ordinarily resident in Singapore until he left never intending to return.[33] He left Singapore on 5 February 2013, after packing up and ending his tenancy about the end of January 2013.[34]

(b) New Zealand could not have been the place where XXXX resided[35] until he was in New Zealand. That was on 24 April 2013, and he left on 20 May 2013.

(c) He took up his assignment in Cambodia on 22 June 2013, working and living there from that point.

[69] If XXXX was ordinarily resident in New Zealand between leaving Singapore and relocating to Cambodia, it was for a matter of days. Given his actions we are satisfied that during that period XXXX had not abandoned his missionary work outside New Zealand. At the very least, he was plainly open to continuing it, and pursued the opportunity to do so. A fleeting period of ordinary residence of that kind was not in the contemplation of the legislature when it set the residential requirements. We would, in these circumstances, terminate XXXX's NZS as from 20 May 2013 when he left New Zealand to take up residence in Cambodia.

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[33] *Greenfield v Chief Executive of the Ministry of Social Development* above n 8 at [36].

[34] The evidence identified an arrangement for packing personal effects in Singapore on 29 January 2013, termination of the Singapore tenancy on 31 January 2013, and shipment of personal effects to New Zealand with an estimated date of arrival in port of 21 March 2013.

[35] *Greenfield v Chief Executive of the Ministry of Social Development* above n 8 discussed the meaning of ordinary residence being where a person resides.

Conclusion

[70] For the reasons given, we are satisfied that XXXX was not ordinarily resident in New Zealand at any time between 5 December 2012 and 22 June 2013 when he commenced living in Cambodia. He was ordinarily resident in Singapore until he left there permanently, so could not be ordinarily resident in New Zealand before that point. He did nothing before taking up residence in Cambodia that we could regard as centering his life in New Zealand. On the contrary, he was largely absent from New Zealand apart from a visit of less than a month. For that reason we will dismiss this appeal.

[71] If XXXX did meet the residential requirements of s 8(a) of the NZSRI, he did so in circumstances not contemplated by the legislature, and we would exercise the discretion in s 74(1) of the Act to terminate his NZS as from 22 June 2013 when he became ordinarily resident in Cambodia.

Decision

[72] As XXXX was not ordinarily resident in New Zealand on 5 December 2012, the date of his application for NZS (or at any other time that application could be considered operative), accordingly he did not meet the criteria in s 8(a) of the NZSRI and was not entitled to NZS.

[73] As XXXX did not attain ordinary residence status in New Zealand by 7 October 2015 his NZS payments were correctly terminated.

Order

[74] The appeal is dismissed.

Dated at **Wellington** this 28th day of April 2020

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member