[2020] NZSSAA 5

Reference no: NZSSAA 009/17

IN THE MATTER of the Social Security Act 1964.

AND

IN THE MATTER of an Appeal by **XXXX** of **Auckland** against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee**.**

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

G Pearson (Chairperson)

C Joe (Member)

Hearing: Auckland, 16 March 2020.

Decision: Wednesday, 15 July 2020

Counsel: Mr G C Jenkin for the Appellant.

Ms S Prasad for the Chief Executive.

DECISION

Background

Procedural History

[1] This is a rehearing of *SSAA Appeal* [2018] NZSSAA 10, it follows after the High Court allowed an appeal from that decision by consent. That was because the case had been argued and decided on s 8 of the New Zealand Superannuation and Income Retirement Act 2001 (NZSRI). The Ministry had taken the position in the original hearing that since 2004 XXXX had not been resident in New Zealand. If the Ministry had been correct about XXXX's status since 2004, he would not have been entitled to New Zealand Superannuation when he applied for it in 2007. Section 8 requires that a person must be

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Representatives: Bruce Dell Law, solicitor, for the appellant.

Ministry of Social Development for the Chief Executive

"ordinarily resident in New Zealand on the date of application for New Zealand Superannuation", otherwise they are not entitled to receive it.

[2] When it conceded the appeal in the High Court, the Ministry accepted XXXX had been resident in New Zealand after 2004 and was "ordinarily resident in New Zealand" when he applied for New Zealand Superannuation in 2007. Accordingly, it accepted he was granted and paid New Zealand Superannuation in accordance with the NZSRI requirements in 2007.

[3] The proceeding was remitted back to the Authority to conduct a *de novo* hearing, making factual findings relevant to, and then applying, s 74(1)(a) of the Social Security Act 1964 (the Act) and such other provisions as may apply. The Ministry no longer supported its former factual position.

[4] The Authority sought a transcript of the previous hearing, but the recording was lost. One panel member was part of the original panel (Charles Joe), the other (the Chairperson) had not participated in the original appeal. The only reason for having a transcript was to assist the parties and allow counsel to put any inconsistent prior testimony to witnesses. The Authority made it clear that prior oral testimony would not be considered beyond that limited purpose. Given that one panel member had not heard the oral evidence in the first hearing, that was essential for a fair hearing. Accordingly, the hearing was fully *de novo*, and the existing record of documentary material could be used or replaced as the parties considered appropriate.

[5] XXXX filed a supplementary brief of evidence, which updated his circumstances and included his earlier evidence. He also filed a new brief of evidence from Mr Brown, who owns the home where XXXX lived for several years, when he was in New Zealand.

The issue before the Authority

[6] The issue before the Authority is the Ministry of Social Development's decision to suspend XXXX's New Zealand Superannuation payments as from 18 November 2015. He had applied for New Zealand Superannuation and the Ministry granted it as from mid-2007 when he turned 65.

[7] The parties now agree XXXX qualified for and was entitled to New Zealand Superannuation in 2007, as he met the residential qualifications in s 8 of the New Zealand Superannuation and Income Retirement Act 2001 (NZSRI).

[8] Where a person is physically absent from New Zealand they may, for that reason, lose their entitlement to New Zealand Superannuation during some or all their period of absence. There is a complex regime including:

[8.1] Physical absence regardless of ordinary residence can suspend payment,[1]

[8.2] Generally, absence from New Zealand of 26 weeks or less does not interrupt entitlement to New Zealand Superannuation,[2]

[8.3] A regime where certain people who reside outside New Zealand may receive New Zealand Superannuation indefinitely; but they need to apply for it,[3] and

[8.4] Different provisions for people located in certain Pacific countries, and countries with a reciprocity agreement.[4]

[9] The Ministry has not raised any of the restrictions in the NZSRI arising due to XXXX's physical absence from New Zealand. It now relies solely on what it says was its decision to "suspend" his New Zealand Superannuation under a discretionary power in s 74(1) of the Act. The provision arises only when a person "is not ordinarily resident in New Zealand". In that situation the Ministry has the power to "terminate or reduce any benefit already granted". The Ministry says that as from 18 November 2015 XXXX was not ordinarily resident in New Zealand, and it stopped paying his New Zealand Superannuation using that discretion.

[10] Section 74(1) does not give power to suspend a benefit as the Ministry says it did, the power is to terminate or reduce. However, that is not of great momentum in this appeal, as the Authority's duty is to consider what decision should have been made, not simply review the decision that was made.

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1 NZSRI, ss 21 – 25.

2 NZSRI, s 22.

3 NZSRI, ss 26 and 29.

4 NZSRI, s 30, they include exceptions to the ordinary residence requirement as an exception to s 8(a); there is also a regime where reciprocity agreements affect entitlements; but they do not apply in XXXX's circumstances.

[11] The Social Security Act 1964 (the Act) and the Social Security Act 2018 constitute the Authority "as a judicial authority"[5]. It is deemed a commission of inquiry, with corresponding information gathering powers.[6] In *Arbuthnot v Chief Executive of the Department of Work and Income,*[7] the Supreme Court determined the Authority is required to reach the correct view as to the support the law allows on the facts, rather than being constrained by the earlier processes.[8]

[12] It follows that we must consider whether the discretion in s 74(1)(a) could be applied to XXXX, and if so determine what action should have been taken.

Discussion

The facts – XXXX's evidence

[13] XXXX's evidence was that he was born in New Zealand, he went to school, worked, was in business and brought up a family here. He had been very involved in carrying out volunteer work in the community. He did not begin to travel extensively until about 2005, that was about the time he approached retirement. Since then, he has spent much of each year travelling around the world. He stays in budget accommodation or with friends; but does not stay in any country or place for very long.

[14] XXXX has maintained substantial business interests in New Zealand. He holds commercial property through a company in which he is the sole shareholder and director. He currently owns a house in New Zealand, which is tenanted (though that was purchased after the time the Ministry suspended his New Zealand Superannuation). When in New Zealand, since about 2007, he lived in Mr Brown's home. He is a friend and business associate who lives in Auckland. A room was kept there for XXXX, where he had his own furnishings, bathroom, personal possessions and a car. About a year ago he moved to his daughter's property in the South Island. XXXX did not pay Mr Brown for his accommodation, but shared expenses and gave him some assistance with business matters, including representing his company at

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5 Section 12I of the 1964 Act, and s 401(2) of the 2018 Act.

6 Section 12M(6) of the 1964 Act, and cl 12(1) of Schedule 8 of the 2018 Act.

7 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55.

8 Ibid at [20]–[26].

international events. When in New Zealand XXXX would also travel to visit family and friends, and to supervise his property investments.

[15] XXXX emphasised the importance of his New Zealand social and personal network including:

[15.1] Family, particularly, his three children and five grandchildren who all live in the same region in New Zealand.

[15.2] A network of friends, including through membership of a service club and sports club.

[15.3] Being an active Justice of the Peace.

[15.4] Consulting health professionals in New Zealand.

[15.5] Voting in every general election.

[16] XXXX said he had never had a home outside New Zealand, he did travel extensively throughout the world during the decade or so before the Ministry's decision to suspend his New Zealand Superannuation. He had visited not less than 25 countries, but never stayed in any of them for more than three months in a given visit, and never more than one month in any city before moving on. He had visited some of the countries and cities many times. His approach was to use low cost travel and accommodation, typically flying to an Asian airport that served as a regional hub to secure low cost travel and fly from there to other destinations.

[17] The Ministry did not challenge XXXX's account in any significant way. It produced some Immigration New Zealand records, but they were not proved by a witness, aside from XXXX who doubted their accuracy. Regardless, there was nothing that challenged any fundamental element of his account. The records only covered flights in and out of New Zealand. There is no reason to doubt XXXX spent a lot of time travelling as a retirement interest. However, the Ministry has not suggested that XXXX lost entitlement due to being physically absent from New Zealand under the provisions of the NZSRI. As noted, unless XXXX came within the exceptions to s 21 of the NZSRI, simple physical absence from New Zealand would suspend his New Zealand Superannuation payments.

The Ministry's approach – down to the previous hearing

[18] A Ministry official first suspended XXXX's New Zealand Superannuation on 9 April 2008 and recorded it was because XXXX

was “not living in NZ". A Benefits Review Committee overturned the Ministry’s decision. The legislation changed after that time.

[19] On 5 February 2010 XXXX gave notice he was leaving New Zealand on 8 February 2010 for 9 to 12 months and sought to have his New Zealand Superannuation payments continue. The regime in s 26, 26A and 26B of the NZSRI, which allows payment of New Zealand Superannuation to people travelling or living outside New Zealand had come into effect on 5 January 2010.[9] The Ministry instead of evaluating XXXX’s request suspended his payments of New Zealand Superannuation. It apparently did so as XXXX was leaving New Zealand intending that he would stay overseas for more than 26 weeks.[10] XXXX apparently decided it was easier to return to New Zealand every 26 weeks rather than pursue the application process. He phoned the Ministry on the day he was due to leave and gave notice he would return in August that year, apparently within the 26 weeks permitted under s 22 of the NZSRI without making an application under s 26. It appears he did return within the 26 weeks. However, the Ministry continued to suspend the payments on the basis XXXX was not ordinarily resident in New Zealand. The Ministry did resume the payments but questioned whether XXXX was ordinarily resident in New Zealand.

[20] After 2010, the Ministry continued inquiries. Between 2011 and 2015 XXXX notified the Ministry when he was leaving for overseas holidays, and of his return from those holidays. The Ministry concluded XXXX would regularly leave New Zealand, return within 26 weeks, and leave again after a few weeks. On 28 November 2015 his payments were suspended, as the Ministry decided he was not ordinarily resident in New Zealand. A letter of that date gave XXXX notice of the decision and said his New Zealand Superannuation was temporarily stopped due to him having left New Zealand. It is not apparent that the Ministry focused on s 74 of the Act, and the exercise of the discretion that arises if XXXX was in fact not ordinarily resident in New Zealand. On 18 November 2015 an official recorded the apparent reasoning for stopping payments “client has been travelling way too often & would

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9 New Zealand Superannuation and Retirement Income Amendment Act 2009 Commencement Order 2009 (SR 2009/362).

10 The Ministry seems not to have been satisfied with the form of the request XXXX made. However, several authorities emphasise it is the Chief Executive’s duty to identify statutory entitlements, not withhold them on the basis of the form of an application: *Scoble v Chief Executive of the Ministry of Social Development* [2001] NZAR 1011 (HC), *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 (HC), and *Taylor v Chief Executive of the Department of Work and Income* [2005] NZAR 371 (HC).

be deemed as Not 'ordinarily resident'" (sic), and said he had "left New Zealand on 09/10/2015, with no mention of return date".

[21] At the hearing Ms Prasad was unable to identify any basis on which the Ministry had or could have exercised the discretion to terminate or reduce New Zealand Superannuation for XXXX, if he was not ordinarily resident in New Zealand. We can only rely on the notes in the Ministry's records that say the official took the view XXXX's New Zealand Superannuation should be suspended if he was travelling a lot, by deeming him to be not ordinarily resident in New Zealand, without any further consideration.

[22] In its statutory report to the Authority under s 12K of the Act, the Ministry produced travel records from 2 August 2004 to 9 October 2015 and claimed: XXXX was evasive regarding what he did outside New Zealand, he lacked any real connection with New Zealand other than business interests in New Zealand, had no permanent residence in New Zealand, and spent only small periods of time in New Zealand.

[23] The Ministry went on to claim in its report to the Authority that:

> "the appellant's time since 2004 in New Zealand was that of a temporary visitor, making short visits to his birth country mostly for business purposes. The appellant lived his day to day life elsewhere.

[24] In this report the Ministry said it had exercised its discretion under s 74(1)(a) of the Act to suspend payment of New Zealand Superannuation. However, at the first hearing the Ministry took the position that XXXX did not comply with s 8 of the NZSRI and did not qualify for New Zealand Superannuation. If the Ministry's assessment that XXXX was only a temporary visitor since 2004, s 8 of the NZSRI was the determinative provision as XXXX failed the residential qualification[11] when he applied for New Zealand Superannuation.

[25] The Ministry's position regarding XXXX's ordinary residence from 2004 was also its position before the Benefits Review Committee's decision. The Committee summarised the Ministry's position as: "It Is clear that the Applicant has not been ordinarily resident in New Zealand since 1 April 2005." However, the Benefits Review Committee somewhat inexplicably concluded XXXX was "deemed to be residentially qualified as per section 8 of the [NZSRI]"; and that after 2007 when he applied for New Zealand Superannuation due to

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11 *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139.

absence from New Zealand he "is deemed not to be ordinarily resident".

[26] Against this background, after making factual findings the Authority concluded after the first hearing that XXXX did not meet the residential requirements under s 8(a) of the NZSRI.

The Ministry's approach at this hearing

[27] At the present hearing, as seemed to be inherent in the grounds on which it conceded XXXX's appeal to the High Court, the Ministry accepted XXXX did qualify for New Zealand Superannuation when he applied for it and was granted it in mid-2007. In doing so, it necessarily resiled from its assertion in its report to this Authority that since 2004 XXXX was "a temporary visitor, making short visits to" New Zealand. It is a fundamental part of the New Zealand Superannuation regime that a person must be "ordinarily resident in New Zealand on the date of application for New Zealand Superannuation".[12] In *Greenfield v Chief Executive of the Ministry of Social Development*,[13] the Supreme Court observed that has always been a prerequisite to entitlement to New Zealand superannuation and its predecessors.[14]

[28] The Ministry also abandoned the factual foundation for regarding XXXX as a temporary visitor who lacked connection with New Zealand. The extent of the cross-examination at the hearing was concerned with XXXX's change from living in Auckland when in New Zealand, to living with his daughter in the South Island, and details of his travel overseas and in New Zealand. It did not challenge XXXX's evidence that he had never had a home outside New Zealand, never stayed outside New Zealand in any one place for an extended time, and continuously had a home and possessions in New Zealand to which he regularly returned.

Our evaluation of the facts

[29] XXXX was clear, he lived in New Zealand all his life until approaching retirement age. Since then he has chosen to travel extensively, but never:

[29.1] Had a home outside New Zealand; and neither

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12 NZSRI, s 8(a).

13 *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139.

14 At [35].

[29.2] stayed more than a month at a time in any city when travelling; nor

[29.3] stayed more than 3 months in any other country when travelling.

[30] We have no basis for rejecting XXXX's evidence. It is plausible, and the Ministry put no inconsistency to him in the course of evidence.

[31] XXXX does spend much of his time outside New Zealand, as a traveller in his retirement. He was very frank regarding that, and his movements in and out of New Zealand are documented, subject to some details possibly not being accurate.

[32] XXXX was equally clear regarding his ties with New Zealand. He said his only place of residence during his life is New Zealand, he has never had a home elsewhere. He points to having his own room at Mr Brown's house constantly; where he kept his furniture, vehicle and possessions. Mr Brown had spare accommodation in his home, there was nothing implausible regarding the arrangements Mr Brown and XXXX described. The Ministry did not challenge this evidence at the hearing in any way.

[33] XXXX has more recently lived with his daughter, and purchased a residence rented month to month so he can occupy it at short notice, if Mr Brown or his daughter's circumstances change. He purchased the home after the Ministry suspended his New Zealand Superannuation, so we do not rely on that development. However, it is consistent with New Zealand having been and remaining his only home.

[34] We have no reason to doubt XXXX's evidence regarding his children and grandchildren being in New Zealand, and that he is close to them. We similarly cannot doubt XXXX's evidence of being an active New Zealand Justice of the Peace, membership of a library, service club, sports club, and that he has a network of friends in New Zealand. He spent all his life in New Zealand until starting to travel, his connections in New Zealand are ordinary and to be expected for someone who has had his home in New Zealand for all his life.

[35] XXXX did provide Mr Brown with some business support when travelling offshore, but he has not engaged in employment or commerce outside New Zealand beyond that. He has continuously owned commercial property through a company, and managed those

investments, as well as more recently owning a residential property he has rented out.

[36] It follows, that we must conclude on the facts that:

[36.1] If XXXX has any place of residence it is New Zealand.

[36.2] When he is out of New Zealand it is solely as a resolutely peripatetic traveller, he has no residence elsewhere.

[36.3] For many years, including 2015, when the Ministry suspended XXXX's New Zealand Superannuation, XXXX spent much of his time out of New Zealand as a traveller.

[37] We find no evidence that XXXX was ever "a temporary visitor" to New Zealand, who "lived his life elsewhere"; and conclude the Ministry's former position was wrong as this description does not accurately described any period of XXXX's life on the evidence before us at the rehearing.

Applying the law to the facts

[38] The parties agree we should determine this appeal solely on s 74(1) of the Act, and the section applies only if XXXX was not "ordinarily resident" in New Zealand at the material time in 2015. Section 74 of the Act provides the Chief Executive may terminate or reduce a benefit, where the person is not ordinarily resident in New Zealand. It is a discretionary power.

[39] In the Social Security Act 1964 and the 2018 Act, "ordinarily resident" is defined solely in terms of excluding a person unlawfully resident in New Zealand. There is no definition as to who is included in the term. Section 74 of the Act applies to New Zealand Superannuation[15].

[40] The meaning of the term "ordinarily resident in New Zealand" is discussed in *Greenfield v Chief Executive of the Ministry of Social Development*.[16] It should, however, be borne in mind that decision concerned s 8 of the NZSRI, not s 74 of the Act. Nonetheless, the same phrase does appear in both sections. One of the core elements relating to entitlement to New Zealand Superannuation is the concept "ordinarily resident in New Zealand", and it could not lightly be

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15 Section 3 of the Act includes New Zealand superannuation in the definition of "benefit". Section 81 of the Act gives the Chief Executive power to review entitlement to benefits.

16 *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139.

supposed its meaning varied from section to section in the provisions of the two Acts that govern entitlement to New Zealand Superannuation.[17] The Court in *Greenfield* does also refer to s 74(1)(a) of the Social Security Act 1964 in its discussion of the meaning of the phrase.[18]

[41] As to the essential concept of ordinary residence, the Supreme Court in *Greenfield* said:[19]

> … Both "ordinary residence" and "residence" denote a place in which someone resides. In this sense, both refer to the place which is regarded as home for the time being. The differing levels of permanence or habituality sufficient to amount to residence and ordinary residence are not susceptible of precise definition. Where, as here, concepts of both ordinary residence and residence (and in the latter case, associated presence) are in play in a statutory scheme, a person might be thought to be resident in the place currently regarded as home and ordinarily resident in the place that usually is so regarded. A person who leaves a place intending never to return will, from that moment, no longer be resident or ordinarily resident there. But where, as here, no such intention can be discerned, the inquiry into ordinary residence should logically address where the subject person's home had been up until the critical date, where that person was living at the critical date and that person's then intentions as to the future.

[42] The factual context for the *Greenfield* case is different from the present case. It concerned a person who had lived for many years in Singapore, but claimed she was ordinarily resident in New Zealand. She was formerly a New Zealand resident, and anticipated returning to New Zealand in the future. Accordingly, while the principles expressed in *Greenfield* are pivotal, it is not an authority with analogous facts.

[43] The present case concerns a person who lived in New Zealand all his life, then embarked on travel, had regular and lengthy periods of absence from New Zealand, but never sought to or established a home elsewhere, he always returned to New Zealand at regular intervals (he was never absent for more than 26 weeks for any expedition), and maintained a range of enduring connections in New Zealand.

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17 It appears at least implicit in [34] of *Greenfield* that "ordinarily resident in New Zealand" in both s 8 of the NZSRI and s 74 of the Act carry the same meaning.

18 At [34].

19 At [36].

[44] The following observation in *Greenfield* is relevant, after referring to the statutory framework in the NZSRI the Court said:[20]

> These requirements suggest an understanding on the part of the legislature that (a) temporary absences of the kind addressed in s 9 are not inconsistent with the person concerned continuing to be ordinarily resident in New Zealand; but (b) during periods of longer absences, particularly in circumstances in which that person may regard the other country as home, the person concerned will not be ordinarily resident in New Zealand.

[45] Section 9 of the NZSRI concerns people who are absent for specified purposes, potentially regularly and for extended periods.[21] A mariner who could be on regular voyages, a Volunteer Service Abroad worker who could be on an extended posting; but, the legislation apparently recognises the regular and possibly lengthy absences are compatible with a person being ordinarily resident in New Zealand.

[46] It is perhaps best to start our evaluation in this case in terms of whether XXXX ever ceased to be ordinarily resident in New Zealand. The usual circumstance that causes that change in status is a person becoming ordinarily resident somewhere other than New Zealand. The Supreme Court in *Greenfield* left no doubt that a person cannot be both ordinarily resident in New Zealand and somewhere else at the same time.[22] It follows that had XXXX ever established a place where he was ordinarily resident, other than New Zealand; then, he would have ceased to be ordinarily resident in New Zealand. In some circumstances, it may be necessary to make an evaluation between two places. In the present case XXXX never established a place where he was ordinarily resident outside New Zealand or took any steps of that kind. His unchallenged evidence is that he never had a home outside of New Zealand, did not stay in any other country outside of New Zealand for more than three months at a time, and never stayed in one city outside of New Zealand for more than one month. We must conclude XXXX's ordinary residence in New Zealand did not cease due to him being resident elsewhere.

[47] Accordingly, it is necessary to consider whether XXXX ceased to be ordinarily resident in New Zealand without becoming ordinarily

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20 At [34] referring to ss 8, 9, 10 and 26B.

21 People seeking medical treatment, vocational training, mariners, military personnel and Volunteer Service Abroad Inc personnel.

22 *Greenfield,* above n 15, at [34] and [39].

resident elsewhere. We accept that could happen. The Court in *Greenfield* identified that:[23]

> A person who leaves a place intending never to return will, from that moment, no longer be resident or ordinarily resident there.

[48] It must follow that departure without intention to return could terminate ordinary residence and be followed by continual travel for a period. For that period a person may not be ordinarily resident anywhere. However, that never applied to XXXX. His evidence was that he invariably intended to return to New Zealand, and he did return. The Ministry accepts on each trip he returned within the 26-week periods of absence the NZSRI allows without abating New Zealand Superannuation due to absence from the country.

[49] Accordingly, for the Ministry to be correct in its claim XXXX ceased to be ordinarily resident in New Zealand it must be based on temporary absences. As noted the Supreme Court is clear ordinary residence in New Zealand is compatible with periods of absence from New Zealand. The Court particularly referenced[24] s 9 of the NZSRI and an indication that temporary absences of the kind identified in that section are compatible with ordinary residence. If it were otherwise the section would not be effective, as it only applies where a person is simultaneously ordinarily resident and has periods of temporary absence. The temporary absences include seeking medical treatment, vocational training, types of work, and military service. The Court also specifically references the instance of a person working in Australia, noting a case of temporary absence where a person retains ordinary residence in New Zealand:[25]

> By way of example, a person who takes a temporary job for six months in Australia but whose family and house remain in New Zealand would remain ordinarily resident in New Zealand despite entertaining the possibility of remaining in Australia depending on the way circumstances pan out. The stronger and less equivocal the intention to return, the more likely it is that ordinary residence in New Zealand has been retained.

[50] XXXX only left New Zealand for holidays. There is no evidence of him ever entertaining the possibility of leaving New Zealand permanently, or establishing a home outside New Zealand. The only remaining possibility is that XXXX's frequent travel left him with insufficient connection with New Zealand to retain ordinary residence in New

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23 At [36].

24 *Greenfield,* above n 15, at [34].

25 At [37].

Zealand. XXXX says that New Zealand remained his home and place of residence, his trips were for the specific purpose of recreational travel, and he maintained his life in New Zealand. He points to:

[50.1] Constantly having a home available for him, where he kept his furniture, personal possessions and a vehicle;

[50.2] Having his children and grandchildren in New Zealand;

[50.3] Having substantial business interests in New Zealand, which give rise to a need for management and compliance obligations including taxation;

[50.4] Having social networks in New Zealand, through friends he has had through a life lived in New Zealand, membership of clubs and the like.

[51] There is nothing in the Supreme Court's reasoning in *Greenfield* that supports a conclusion that a person with a matrix of connections of that kind in New Zealand lacks a foundation for being ordinarily resident, if they have no other home, and have not decided to leave permanently. The Court said being ordinarily resident denotes the place where someone resides, it is "the place which is regarded as home for the time being".[26] New Zealand has been XXXX's only home, and he travels from here for recreational purposes. There can be no doubt that if XXXX was asked either casually, or by officials, when travelling where he resided or where his home was, he would have replied New Zealand. Indeed, it would be difficult to accept any other answer would have been correct.

[52] For completeness we consider the nature of the residential accommodation XXXX had at Mr Brown's house. We have taken care not to draw conclusions from the authorities that deal with residence in other statutory contexts. The *Greenfield* case demonstrates the statutory context is important, and in our view, it is sufficient to apply the principles in the *Greenfield* case. We have not placed any substantial weight on the nature of XXXX's tenure at Mr Brown's house. We have found that over many years he constantly had a bedroom available to him, with his personal effects there. We are unaware of any authority dealing with the concept of residence that does place significance on the type of legal tenure a person has in respect of their living space. Different countries more or less commonly have homeownership, leasing, licences and the like.

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26 *Greenfield,* above n 15, at [36].

Equally people have residential arrangements where they live alone, as part of a family, or in communal living and other arrangements. We do not regard XXXX's circumstances as different in principle from others who live with family and friends. We are satisfied the exclusivity of use, length of tenure and stability of the arrangements all support rather than detract from XXXX's claim he had his home in New Zealand.

[53] In our view the principles in *Greenfield* fully resolve this appeal. XXXX has only left New Zealand for recreational travel, and always intended to return to his residence in New Zealand at the end of each trip and done so. He has never stayed in one place outside New Zealand for more than a short period of time. The Ministry has not identified any authority that would support him not being ordinarily resident in New Zealand in those circumstances.

[54] We find that XXXX was ordinarily resident in New Zealand at all material times, and accordingly the Ministry could not exercise the discretion under s 74(1)(a) of the Act. XXXX's entitlement to New Zealand Superannuation was governed by the regime in NZSRI which regulates New Zealand Superannuation where a person is absent from New Zealand. The Ministry takes no issue with his entitlement based on physical absence.

The merits of the Ministry's approach

[55] To give some perspective to the merits of this appeal after the Ministry's concession that XXXX was ordinarily resident in New Zealand when he applied for NZS, it is appropriate to consider his situation in a wider statutory context.

[56] As noted the official who apparently made the decision did not refer to s 74 of the Act. He reached the value judgment that XXXX had "been travelling way too often" and would accordingly be "deemed as Not 'ordinarily resident'" (sic); apparently without any regard to the statutory provisions. A person is not deemed as ordinarily resident or not ordinarily resident, it is an important factual and legal evaluation. Furthermore, if XXXX qualified for New Zealand Superannuation and later intended to either live somewhere else or travel for more than 26 weeks, there is no reason to suppose his New Zealand Superannuation should be terminated or reduced. The primary regime to consider was not s 74 of the Act, it was the regime in the NZSRI that specifically deals with a recipient of New Zealand Superannuation ceasing to be resident in New Zealand or travelling for an extended period.

[57] We put to one side the provisions that apply when there is a reciprocity agreement and specified Pacific countries,[27] we have no evidence they applied to XXXX's situation. The NZSRI contains a regime that would have applied had XXXX chosen to travel for more than 26 weeks or take up residence outside New Zealand. The key features of the regime in the NZSRI applying to those circumstances are ss 21 to 29 of that Act. For XXXX, importantly:

[57.1] Anyone receiving New Zealand Superannuation must come within a statutory exception in the NZSRI to receive New Zealand Superannuation payments for any time they are outside New Zealand.[28]

[57.2] Absences of up to 26-week periods from New Zealand do not abate New Zealand Superannuation.[29]

[57.3] There is no requirement to give notice to the Ministry of absences of up to 26 weeks, so absence of notice does not affect entitlement.

[57.4] There is a general provision that requires social security beneficiaries to give notice when absent from New Zealand, but that provision does not apply to New Zealand Superannuation recipients.[30]

[57.5] However, had XXXX proposed to reside out of New Zealand for more than 26 weeks,[31] or proposed to travel for longer than 26 weeks,[32] then he had to a apply for his New Zealand Superannuation to continue. The application had to be made while XXXX was "ordinarily resident and present in New Zealand", otherwise only in unforeseen circumstances.[33]

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27 NZSRI, ss 26(1)(a) and (b) and the supporting legislation.

28 NZSRI, s 21.

29 NZSRI, s 22, after 26 weeks it stops and after 30 weeks the first 26 weeks entitlement is lost, subject to certain exceptional circumstances NZSRI 22(b).

30 Beneficiaries are generally required to notify absence from New Zealand s 114 of the Social Security Act 2018, and s 77(6) of the Act, but persons only receiving New Zealand Superannuation are exempt under s 114(b) (2018 Act) and s 77(9) (1964 Act). Presumably persons receiving support other than New Zealand Superannuation and other exempted support must report absences.

31 NZSRI, s 26(1)(b)(i).

32 NZSRI, s 26(1)(b)(ii).

33 NZSRI, s 26B and s 27.

[58] The short point is that if XXXX intended to be away for more than 26 weeks, he had to undergo the formality of an application.[34] Otherwise he did not need to, and indeed could not make an application. An application meets the statutory grounds only when predicated on an intention to be absent for more than 26 weeks. In 2010, XXXX did apply to be paid New Zealand Superannuation when he intended to travel for more than 26 weeks.[35] However, instead of granting it, the Ministry suspended his New Zealand Superannuation. XXXX's unsurprising response was to change his plans before he left, and he notified the Ministry he would return within 26 weeks. He has apparently never intended to be absent or been absent for more than 26 weeks since then.

[59] Where a person does intend to be away for more than 26 weeks, the regime that allows their New Zealand Superannuation to continue is centred on s 26 of the NZSRI.[36] The key feature is that if a person has not resided all of their life in New Zealand between the age of 20 and 65 years, then their New Zealand Superannuation entitlement is abated. They are paid in direct proportion to the percentage of their life they were resident in New Zealand during those years.[37]

[60] In this case it appears an unabated payment would be required, as the Ministry conceded XXXX resided in New Zealand in the years leading up to 65 years of age, and otherwise he was born in New Zealand and lived in New Zealand all his life here.

[61] Accordingly, it is difficult to see how s 74 was material. The Ministry accepts XXXX did not intend to be outside New Zealand for more than 26 weeks at any time. If so, there was nothing he could or should have done to be entitled to New Zealand Superannuation. He could only apply for payment of New Zealand Superannuation if he was to be away from New Zealand travelling or residing elsewhere for more than 26 weeks. The Ministry rightly or wrongly refused his request for extended travel, so he stayed within the 26-week statutory safe harbour.

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34 NZSRI, s 26B, the application is generally to be made when a person is resident and present in New Zealand s 26B(b), but see s 27 for exceptions.

35 See paragraph [19] of this decision.

36 That is aside from countries with reciprocity agreements and specified Pacific countries that have other regimes, that are not relevant to this appeal.

37 NZSRI, ss 26(6) and 26A(1), and Schedule 1, there are some provisions relating to absences that come within s 9 and other circumstances in s 26(2)

[62] When the Ministry conceded it was wrong to say XXXX was not ordinarily resident in New Zealand from 2004, and he did qualify for New Zealand Superannuation in 2007 there was no justification to do anything other than pay his full New Zealand Superannuation.

[63] The only basis the Ministry has ever advanced for failing to pay New Zealand Superannuation to XXXX, which has any legal merit, was that he was not resident in New Zealand after 2004. If that was true, he was in the same position as the appellant in the *Greenfield* case. It is a complete bar to receiving any New Zealand Superannuation and justified terminating payments.

[64] When the Ministry abandoned its position that XXXX was not resident in New Zealand since 2004 and accepted he was entitled to New Zealand Superannuation in 2007, it is difficult to see how it could continue to deny XXXX's entitlement to New Zealand Superannuation:

[64.1] XXXX was ordinarily resident in New Zealand and qualified for New Zealand Superannuation;

[64.2] After that he was never away for more than 26 weeks from New Zealand; and apparently did not intend to be, so could not apply for portability;

[64.3] When he applied to be away for more than 26 weeks he was entitled to general portability and regardless of where he chose to live could have expected to receive 100% of his New Zealand Superannuation entitlement.

[65] At the present hearing the Ministry could not provide any explanation as to how and why it had exercised the discretion in s 74 to deny XXXX New Zealand Superannuation; or say why the Authority should do so. We are unable to identify any reason for exercising the discretion either regardless of his residential status in 2015. It would be a wholly different matter had XXXX never qualified for New Zealand Superannuation due to the residential requirement.[38]

Decision

[66] The Authority allows the appeal, the Ministry was wrong to stop paying New Zealand Superannuation to XXXX as it had no grounds for exercising the power in s 74(1)(a) of the Act, because XXXX always has been ordinarily resident in New Zealand.

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[38] *Greenfield*, above n 15, at [35] identifies the important of residence at the date of application.

[67] XXXX has been entitled to unabated New Zealand Superannuation since he was first entitled to it after applying in 2007.

[68] The Authority reserves leave to determine the amount of accrued New Zealand Superannuation payable, if the parties do not agree.

[69] It also reserves leave to determine costs. The Authority refers the parties to the High Court's decision in *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541, in which the High Court indicated the default position when costs are awarded in this Authority is to award full indemnity costs. The parties should address the costs of both hearings, any costs of the appeal to the High Court would be a matter for that Court.

Timetable

[70] Unless costs are resolved by agreement:

[70.1] The Appellant is to provide a draft memorandum on costs to the Respondent on or before 1 May 2020;

[70.2] The Respondent is to provide a draft memorandum in reply on or before 15 May 2020;

[70.3] The final memoranda are to be filed and served on or before 22 May 2020.

[71] If necessary, the Authority will convene a telephone conference to deal with costs.

[72] The parties may seek to vary the timetable by agreement by email addressed to the Case Manager.

DATED at Wellington 28 April 2020

Grant Pearson
Chairperson

Charles Joe JP
Member