[2018] NZSSAA 40

Reference No. SSAA 160/17

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Hearing at Wellington on 5 July 2018

Appearances

Mr N Ellis, agent of Wellington for the appellant

Ms P Siueva for Chief Executive of the Ministry of Social Development:

DECISION

Decision Subject to Appeal

[1] First, it is necessary to identify, with some clarity, what decision this appeal relates to. The issues started when the appellant left New Zealand to travel to Denmark, via Sweden, on 15 February 2017. While he was still in Denmark, about four weeks upon arriving, the Chief Executive[1] suspended his benefit (a Supported Living Payment). That is the decision that is subject to this appeal. The appellant says his benefit should not have been suspended, and if it was properly suspended, then it should have been reinstated as soon as possible. In fact, it remained suspended

[1] By his delegate

until the appellant returned to New Zealand, resuming soon after that on 24 August 2017.

[2] When he arrived in Denmark, the appellant was there for about seven weeks. He then travelled through other parts of Europe before coming back to New Zealand in August 2017.

[3] We must therefore decide whether the appellant should have received a Supported Living Payment for some, or all, of the time between 15 February 2017 and August 2017.

[4] Our duty is to identify the decision that the Chief Executive should have made in respect of the appellant's benefit, and if different from the Chief Executive's decision, then to make the correct decision as the outcome of this appeal[2].

Background

[5] While our specific decision concerns the period between February and August 2017, the background is important. Further, the decision will also likely affect the appellant's future entitlements. The appellant lived in Europe for some years receiving a benefit payment from New Zealand prior to the trip in issue (the first trip to Europe). The time we are concerned with involved a return trip there after he was deported at the end of the first trip to Europe. He is about to return to Europe again, and gave evidence that he intends to remain there permanently.

[6] During the first trip to Europe, the appellant says he was based in Denmark, though he frequently lived in other parts of Europe. He is a citizen of New Zealand and not a citizen of any country in Europe. He has never held a long-term or resident visa to allow him to live in Europe. He has an itinerant lifestyle. He either sleeps on the streets, or alternatively takes advantage of shelter provided by charitable organisations. His lifestyle is the same whether he is in New Zealand or Europe.

[7] The appellant has a record which may affect his ability to obtain a long-term visa to enter Europe. At the end of the first trip to Europe, he had been deported from Norway. The decision considering his appeal against deportation noted that the appellant had been:

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[2] *Arbuthnot v Chief Executive of the Department of Work and* Income [2007] NZSC 55, at [20] and [21]

[7.1] detected shoplifting in Europe;

[7.2] found in possession of illicit drugs at the Norwegian border;

[7.3] indicted for narcotics offences and violence, though not convicted of those matters in Sweden.

The decision also noted that New Zealand authorities through Interpol had issued a notice that the appellant would likely commit sexual crimes against minors, and had previously been convicted for such matters in New Zealand and Australia.

[8] The appellant disputed some of the history of offending reported by the Norwegian authorities, and generally downplayed the gravity of their concerns. It is not necessary to reach any conclusion as to the accuracy of the record; for present purposes, it is sufficient to conclude that a long-term residence visa may not be available to the appellant. Certainly, he produced no evidence pointing to any decision that he could gain a long-term visa of any kind in Europe. His potential to do so is apparently slight. He is approximately 60 years of age, his health status, he says, makes working impossible, and he did not identify any family links or the like with Denmark. Those circumstances would usually be adverse when seeking residence in another country.

[9] When the appellant was deported from Norway the Immigration Appeals Board considered whether he should be expelled with a five year entry prohibition and record of that prohibition against entry to the Schengen Zone. The Immigration Appeals Board reached the conclusion that the prohibition and record of a prohibition was not warranted, as the appellant had failed to understand the visa requirements. However, the deportation proceeded regardless, and the appellant was escorted back to New Zealand.

[10] Despite those circumstances, the appellant claims he is entitled to live in Europe indefinitely, and live in Denmark 90 out of every 180 days. Given that the appellant successfully re-entered Europe after his deportation, we cannot dismiss his contention out of hand. It appears he could visit Europe without inquiries into his immigration and criminal history. He was planning to return to Europe shortly after the time this appeal was heard and proposes to remain in Europe permanently, living in Denmark for half of the time.

Can the Appellant Live in Denmark Indefinitely?

[11] The appellant says that when he went to Denmark in February 2017 he intended to remain there permanently, despite not holding any long-term visa and without any decision that he could gain a visa of that kind.

[12] We must of course give weight to the fact that the appellant was deported from Norway, notwithstanding the fact he was apparently doing what he was intending to do when he went to Denmark in February 2017. However, the appellant says the Norwegian authorities made a mistake and he would have been able to continue living in Europe had the authorities understood their immigration laws. He says the only reason he returned to New Zealand in August 2017 was the lack of money after his Supported Living Payment was suspended.

[13] We now examine whether it is possible for a New Zealand national to remain in Europe relying on what would be called a visitor visa in New Zealand. Generally, without a long-term visa the rules are that a person cannot work in the country they visit and can, at most, remain there only three out of six months.

[14] We received some internet research and an email from the Danish Embassy. This material indicates the appellant (and other New Zealand citizens) do have some potential to remain indefinitely in parts of Europe relying on a status equivalent to a visitor visa. That arises as there are two parallel regimes of visa waiver in Europe:

[14.1] The first and simplest is that the members of the European Economic Area (with some member countries excepted) have what is known as the Schengen Zone. For immigration purposes, this functions as though the Zone were a country. Under those rules, when a New Zealander enters the Schengen Zone, they can obtain entry as a visitor and freely move within the whole zone, but must not stay longer than 90 out of 180 days.

[14.2] The second regime is bilateral visa waiver agreements. New Zealand had these agreements with some European countries. The agreements pre-date the time when the other country party became part of the Schengen Zone. Those visa waiver agreements remain live. Denmark is one of the countries with an agreement of that kind with New Zealand. That means that a New Zealand citizen can enter Denmark and stay for 90 days, even

when they are coming from another Schengen Zone country and could have been in the other country (or countries) for up to 90 days. They may then travel to another one or more countries with a bilateral visa waiver agreement for 90 days or more and return to Denmark for another 90 days. They may keep up a cycle of countries moving from one country to the other indefinitely.

[15] Accordingly, a New Zealander can stay in Europe indefinitely. The appellant says that was his intention when he travelled to Europe, and he intended to remain there.

[16] There are some uncertainties regarding the law in Denmark and other countries with bilateral visa waiver arrangements with New Zealand. Foreign law is a question of fact; it is not necessary to reach a definitive conclusion relating to the conflict of law regarding the Schengen Zone rules and the bilateral agreements with New Zealand and countries within that region. As a question of fact, on the evidence in this case, we are satisfied on the balance of probabilities that:

[16.1] The appellant left New Zealand in February 2017. He did not intend to return to New Zealand.

[16.2] The appellant had no legal right to remain in Denmark for more than 90 days in any 180-day period, and could only be in that country as a visitor. He neither had, nor had any established prospect of gaining, a long-term visa allowing him to reside in Denmark.

[16.3] The appellant intended to be a *de facto* resident of the Schengen region, or parts of it, without holding a visa allowing more than an itinerant status as a visitor. If the appellant continually moved between countries at not more than 90 day intervals, he could probably do that lawfully and indefinitely.

[17] We note the appellant had previously lived in Europe on a *de facto* basis and been deported. The legality of his status in Europe depended on him moving from country to country, and likely complying with the laws of those countries. He had probably failed to comply and that was the reason he was deported from Norway. However, he apparently had better information regarding what he had to do to comply when he returned in February 2017, and could have achieved his objective of living in Europe

indefinitely. The appellant says the only thing that prevented him from continuing to live in Europe when he went there in February 2017 was the Ministry suspending his benefit payment.

[18] The appellant has supplemented his benefit payment by collecting bottles and exchanging them for the refund available. After the suspension of his benefit, he collected bottles so that he could purchase an airfare to return to New Zealand. Commercial activity of that kind is typically prohibited for persons who do not have a long-term visa. However, the issue is incidental given that the appellant only has the status of a visitor, whether he complies with the rules or not. He has recently purchased a one-way ticket to Europe and intends to travel there and remain there while receiving a Supported Living Payment from New Zealand. Those facts confirm the appellant's claimed intention to live in Europe permanently when he left in February 2017, as he asserts. We also accept he could remain there indefinitely, moving between certain European countries.

The Legal Issues

The reciprocal order between Denmark and New Zealand

[19] Before setting out the relevant legislative provisions, the background can be explained relatively simply. New Zealand and Denmark have an agreement between the two countries relating to social security entitlements. The general effect of the agreement is that if a person from either country is living in the other, or visiting, their social security support from their home country can continue without interruption. It is not necessary for the Ministry to make a discretionary decision for that to occur, rather the agreement is to the effect that as of right residents of the respective countries can come and go between them without interruption in relation to the social security arrangements. However, there are boundaries in the agreement, and it is not as simple as treating a person located in one country as being equivalent to being in the other country.

[20] The first provision to consider is s 19 of the Social Welfare (Reciprocity Agreements and New Zealand Artificial Limb Service) Act 1990, which provides for reciprocal agreements with other countries. One of those agreements is recorded in New Zealand legislation as the Social Welfare (Reciprocity with Denmark) Order 1997 (the Order). This is the agreement the appellant relies on.

[21] Section 77 of the Social Security Act 1964 (the Act) provides that a benefit is not payable while a beneficiary is not in New Zealand unless it is allowed under the section, or there is an agreement or convention adopted under s 19 of the Social Welfare (Reciprocity Agreements) and New Zealand Artificial Limb Service) Act 1990.

[22] The Ministry accepts that the appellant's Supported Living Payment is covered by the Order. Accordingly, the dispute centres on whether that Order prevented the Chief Executive from stopping payment of the Supported Living Payment.

[23] Two operative provisions in the Order must be taken into account.

Article 5 of the Order

[24] The first provision to consider in the Order is Article 5 of the Agreement on social security between the Kingdom of Denmark and the Government of New Zealand (the Agreement). The key wording of that article says that where the Order applies, a benefit:

> shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides or stays in the territory of the other Contracting Party, and the benefit shall be payable in the territory of the other Contracting Party.

[25] The effect of that provision appears to be relatively straightforward. It means that presence in Denmark will not justify the suspension or other adverse consequence of the appellant's Supported Living Payment. I note that the word "stays" is used as well as a reference to residence. The word "stay" is defined in Article 1(p) of the Order and means "temporary sojourn". Of course, the provision does not make a New Zealander entitled to a benefit because they are in Denmark.

[26] The meaning of "residence" is discussed below.

Article 16 of the Order

[27] The second relevant article in the Order is Article 16 of the Agreement which is concerned with persons who are resident in Denmark. Before exploring the terms of Article 16, it is to be noted that Article 1(m) of the Order defines "residence" as ordinary residence which is lawfully established. It is not necessary to explore the details of the meaning, as it is obvious that a person does not become lawfully resident in a country by

entering for periods with the immigration status of a visitor. The words "lawfully established" make it clear that the person must comply with Danish law and establish residence; it is quite different from regularly visiting under the immigration provisions that apply to visitors.

[28] The effects of Article 16 for New Zealanders with lawfully established residence in Denmark are:

[28.1] Article 16(1) deems that where a person is ordinarily resident in Denmark, and present in either Denmark or New Zealand, they will be deemed to be ordinarily resident in New Zealand. There is an additional requirement to intend to remain in Denmark for at least 26 weeks, and to have resided in New Zealand for at least one year since obtaining the age of 20 years.

[28.2] Where a person meets the requirement of Article 16(1), Article 16(2) deems a person to also be present in New Zealand for the purpose of benefit entitlement. They can therefore apply for a benefit, and continue a benefit, notwithstanding absence from New Zealand.

[28.3] Article 16(3) allows a person to be temporarily absent from Denmark without interrupting their entitlement to a New Zealand benefit.

[29] There are some other provisions relating to entitlement of New Zealand Superannuation which do not arise in the present case.

[30] Article 16 has no application to the appellant unless and until he has "ordinary residence which [was] lawfully established" in Denmark.

Application of Order to the Appellant

[31] We accept the evidence establishes that the appellant probably spent the first seven weeks after arriving in Denmark in that country in February 2017. However, he did not go direct to Denmark, he flew to Sweden first. He owns property in Sweden (it is a dilapidated building mainly used for the storage of goods). The appellant's evidence about where he went lacks the usual documentary support, but it was not significantly challenged by the Ministry.

[32] During the seven weeks when he was in Denmark, the appellant was living there temporarily; he had no right or expectation to reside there. He could not stay there except as a visitor, and not for periods exceeding 90 days in 180 days. The appellant neither had, nor could he expect, to lawfully establish residence in Denmark.

[33] We need to apply the Act and the Order to those circumstances.

[34] When the appellant left New Zealand, s 77 of the Act applied. Subject to the effect of the Order, he no longer qualified for a benefit because of s 77(1)(a). It provides a benefit is not payable when the appellant is absent from New Zealand. Section 80BD provides that every benefit shall end on a date the Chief Executive sets. In our view, the correct date to end the appellant's benefit was the day he left New Zealand and did not intend to return. The Act prohibits paying benefits to New Zealand citizens who migrate to another country, subject to specific circumstances.

[35] Section 77 does provide some discretionary powers to pay benefits when a person is temporarily absent. We do not consider it was appropriate to exercise any discretion in section 77. The appellant left New Zealand intending to migrate elsewhere, and when he put that into effect, in our view, his benefit should have ended at the point he left New Zealand. The only provision that can properly alter that outcome, in our view, is the Order.

[36] Had the appellant been travelling to Denmark as a visitor, and travelling via Sweden, we would have had little difficulty applying the discretion in s 77 relating to short-term absences. However, we see no justification to apply that at the point of departure for a person who is intending to migrate permanently, as was the case with the appellant.

[37] The next question is whether the appellant's arrival in Denmark revived his benefit due to the effects of the Order. In our view, that is not how the Order applied to the Appellant's circumstances. The material effect of Article 5 is that there can be no "reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides or stays in the territory of the other contracting party".

[38] Article 5 simply does not apply to the appellant. We consider his benefit ended when he left New Zealand. When he visited Denmark, he had no benefit to reduce or otherwise alter. He left New Zealand permanently to

live as a *de facto* resident in several European countries. Subsequent visits to Denmark neither improved nor adversely affected his benefit entitlements; he lost his benefit entitlements when he left New Zealand.

[39] There was no question of an adverse effect "by reason of … stay[ing]" in Denmark. To avail himself of the Order, the appellant would have had to rely on Article 16. That article has the effect of allowing New Zealanders who have qualified for a benefit to apply for it, despite residing in Denmark. However, Article 16 only applies to persons lawfully resident in Denmark. The appellant has never had that status.

[40] The way the Order applied to the appellant is unsurprising. Article 5 is of no assistance to a person who ceased to qualify when they left New Zealand. If it were otherwise, the effect would be that a person who migrated to, say, Sweden, would have their benefit revived when they visited Denmark for the weekend. That is not so, as they lost their entitlement by migrating to Sweden.

Decision

[41] We exercise the discretion to end the appellant's benefit at the point he left New Zealand on 15 February 2017. He was not entitled to a benefit until he returned to New Zealand and applied for a benefit after returning.

[42] The appeal is dismissed. We reserve leave to make any orders regarding the financial effect of our determination, including establishment and recovery of a debt, if the parties cannot agree.

Dated at **Wellington** this **31** day of **July 2018**

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G Pearson
Chairperson

_____
K Williams
Member