

[2018] NZSSAA 43

Reference No. SSAA 42/18

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

Hearing at Auckland on 29 August 2018

Appearances

The appellant in person and counsel, B So. XXXX, support person

N Jaura, agent for the Chief Executive

DECISION

Background

[1] XXXX (the appellant) appeals the decision of 13 July 2017 to decline his application for New Zealand Superannuation (NZS) on the basis that he did not meet the residency requirements. This decision was upheld by a Benefits Review Committee.

[2] The appellant arrived in New Zealand in 1990 and has been a New Zealand citizen since 1995. He has raised four children in New Zealand and educated them here. He states that his home is in New Zealand. He confirmed that he is self-employed, assisting the family business. He has not worked for anyone else or any other company, either in New Zealand or in Hong Kong. He has

paid company tax, GST, and interest. He has invested in the stock market, as well as buying and selling property and establishing a Family Trust.

- [3] However, the appellant has spent a significant amount of time out of New Zealand, mostly in Hong Kong. He accepts that the travel records presented by the Ministry are correct. These records are based on Customs data and show that between 8 January 1990 and 10 July 2017 the appellant spent only 2,805 days in New Zealand.
- [4] The Ministry declined his application for NZS because he did not meet the residential threshold for entitlement under s 8 of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI Act).

Relevant law

- [5] Section 8 of the NZSRI Act sets out the residential qualifications for NZS. Section 8(b) requires a person to be resident and present in New Zealand for a period of not less than 10 years (3650 days) since attaining the age of 20 years. Section 8(c) requires a period of not less than five years since attaining the age of 50 years.
- [6] There are exceptions to the requirements in s 8 but they do not assist the appellant. However, although the appellant confirmed in his written submissions that he had not worked overseas or paid PAYE, at the hearing he raised the exception provided in s 79 of the Social Security Act 1964 (the Act). This provision allows any period when a person has been employed outside New Zealand and paid PAYE on that income to count towards the requirements in s 8 of NZSRI Act.
- [7] In evidence, the appellant confirmed that he did not meet this requirement but suggested that he could arrange for his mother, for whom he has provided care in Hong Kong, to retrospectively pay tax so that he qualified under s 79. However, after we suggested that he take a brief adjournment and discuss this with Ms So, the appellant accepted that this was not a viable proposition.

Discussion

- [8] The accepted travel records demonstrate that the appellant does not meet the requirement in s 8(b) of NZSRI Act and the appellant accepted that he did not

meet any of the exceptions to s 8. The outcome is therefore inevitable but we make the following observations.

- [9] We reject the suggestion that made at the hearing that time that the time he spent in flight should count towards his residency. Clearly, it is the dates of departure and arrival from New Zealand, as recorded by Customs, that must be the appropriate measure.
- [10] We commented at the hearing that the Ministry's discussion in its report of authorities on the meaning of "resident and present" under s 8 was irrelevant and confusing for the appellant. The Ministry recorded that, in its view, the appellant had spent only 150 days since 1990 "resident and present" in New Zealand. The Ministry did not explain what criteria it used to make this assessment but the appellant was understandably confused by this figure.
- [11] Any consideration of the meaning of "ordinarily resident" or "resident and present" is only relevant to people who first meet the requirements of ss 8(b) and 8(c) of NZSRI Act; that is that they have been resident and present in New Zealand for 10 years since the age of 20 and 5 years since the age of 50. Once these thresholds have been reached, it is appropriate to consider whether the person demonstrates a pattern of being resident and present for the required time.
- [12] Ms So made no submissions on behalf of the appellant. She did not address the law nor did she assist the appellant to make a coherent case. While we accept that counsel was instructed very recently, it would have been appropriate to ensure that the appellant was not in a position of suggesting a course of action which is clearly against the law, such as his PAYE proposal.
- [13] We accept that XXXX considers his life is in New Zealand. He is a citizen and he is entitled to a Gold Card but the requirements for NZS are very clear and he does not meet them. Nor does he fall within any of the exceptions to those requirements.
- [14] As we explained to XXXX, he may at some point in the future meet the requirements and could then test his entitlement to NZS. However, at this stage we are satisfied that the Ministry's decision was correct and this appeal must be dismissed.

Order

[15] The appeal is dismissed.

Dated at Wellington this 3rd day of September 2018

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member