[2019] NZSSAA 10

Reference No. SSA 106/18

IN THE MATTER of the Social Security Act 2018

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 Hamilton on 22 January 2019

Appearances

The appellant in person

P Siueva as agent for the Ministry of Social Development

DECISION

Background

[1] XXXX ("the appellant") appeals the decision to deduct the amount of her husband's United States pension from her entitlement to New Zealand Superannuation ("NZS").

[2] The appellant reached 65 years of age on 2 March 2018. She was born in the United States and immigrated to New Zealand in her thirties. In 2014 she married an American man who has lived in New Zealand since 2009. He is entitled to a US pension which the Ministry estimates at NZD 670.28 per week. The appellant's entitlement to NZS at the half-married rate is NZD 340.80 gross per week. As the appellant's husband's US pension exceeded the amount of the appellant's entitlement to NZS, the result is a nil entitlement.

[3] The issue we must decide is whether s 70 of the Social Security Act 1964[1] ("the Act") which was in force at the time requires the appellant's husband's US pension to be deducted from her entitlement to NZS.

Relevant law

[4] Section 70(1) of the Act provides that:

> **70 Rate of benefits if overseas pension payable**
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> (1) For the purposes of this Act, if—
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> (a) any person qualified to receive a benefit under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand; and
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> (b) the benefit, pension, or periodical allowance, or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under this Act or under the New Zealand Superannuation and Retirement Income Act 2001 or under the Veterans' Support Act 2014 which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received—
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> the rate of the benefit or benefits that would otherwise be payable under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3), be reduced by the amount of such overseas benefit, pension, or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act:
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> …

[5] The Act provides that certain benefits or pensions payable for injury, disability, death or war pensions are exempt, but these exemptions do not apply to the appellant.

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[1] Replaced by ss 188 and 189 of the Social Security Act 2018.

[6] In *Boljevic v the Chief Executive of the Ministry of Social Development*[2] the High Court observed that the focus of the inquiry in s 70(1)(b) is whether the overseas programme includes payments for any of the same contingencies as the New Zealand scheme. In *Boljevic* the contingency was attaining a certain age. It is sufficient that the entitlements in each country are payable in similar circumstances; it is not necessary to conduct a close comparative analysis between the New Zealand and overseas entitlement.[3]

[7] Nor is it necessary to distinguish between contributory and non-contributory schemes; all funds are contributory whether the contribution is direct or indirect through income taxation.[4] In *Boljevic*, Kós J concluded that whether the programme is administered by the state is the crucial criteria, not whether it is state funded.

[8] In *T v Chief Executive of the Ministry of Social Development* the High Court considered the nature of payments from a Singaporean fund to which the plaintiff and his employers contributed, as required by Singaporean law.[5] The Court concluded that these payments were a pension because the fund was held by the Government for defined purposes and disbursed incrementally to the plaintiff to provide for his retirement or old age.

[9] The Court also considered whether an overseas pension in the nature of Kiwisaver fell within the provision of s 70(1)(b). Brewer J concluded that as Kiwisaver is a particular creation of New Zealand statute it stands apart from the regime created by s 70 of the Act.[6]

[10] Section 70(2) of the Act gives the chief executive the discretion to decide the date on which to give effect to a decision that an overseas pension must be deducted.

[11] The High Court has confirmed that pension payments from the United States Social Security Administration meet the criteria for deduction under s 70(1).[7]

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2 *Boljevic v the Chief Executive of the Ministry of Social Development* [2012] NZAR 280.
3 *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267.
4 *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267 at [38]-[39].
5 *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711.
6 *T v Chief Executive of the Ministry of Social Development* [2017] NZHC 711 at [13]-[15].
7 *Roe v Social Security Commission* High Court Wellington M 270-86, 10 April 1987.

The case for the appellant

[12] The appellant's position on whether she challenged the Ministry's categorisation of her husband's US pension as falling within the s 70 criteria for deduction was not clear. She said in evidence that she did not question this decision however she argued that her husband's pension should not be deducted because it was paid by employee and employer contributions only with no government contribution, in contrast to NZS.

[13] The appellant's main submission was that the deduction of her husband's overseas pension under s 70 of the Act is a discriminatory income policy. She said that she has paid tax in New Zealand as an individual for over 30 years and it is discriminatory for her to be treated as a "marital economic unit" for the purpose of determining her entitlement to NZS. In her view, the policy that one spouse's income is available to the other and should be used to support the other spouse is outdated.

The case for the Ministry

[14] The Ministry submits that benefits paid under the United States Social Security Administration system fall within the s 70 deduction regime. The Ministry argues that the Authority is bound by the decision in *Roe* where the High Court concluded that this pension was of the type that provided for the contingencies that NZS provides and therefore must be deducted under s 70 of the Act.

[15] Ms Siueva said that the Ministry had considered whether, if the appellant included her husband as a non-qualifying spouse for the purpose of her NZS, there would be any advantage to her. The Ministry concluded that there was no benefit to the appellant in pursuing this option.

[16] Ms Siueva said that the Ministry also considered whether to exercise the discretion available under s 70(2), to set the date that the deduction takes effect. She said that, while there have been occasions where the Ministry and the Authority have exercised this discretion, these occasions have been limited to instances where an injustice has occurred that is inconsistent with the purpose and intention of s 70 of the Act.

[17] In this case, the Ministry submits that there is no injustice nor any ambiguity about the application of s 70 because the appellant's situation falls clearly within the purpose and of this provision of the Act.

Discussion

[18] We are satisfied that the United States pension received by the appellant's husband falls within the deduction regime of s 70(1) of the Act. The High Court has been clear that the source of pension funds is not a relevant factor. If the fund meets the criteria of being administered by or on behalf of the government of the country paying the overseas pension, and the fund provides for any of the same contingencies for which NZS provides, the overseas pension must be deducted.

[19] We accept that the appellant did not expect to be in a situation where her entitlement was reduced to nil as a result of her husband's overseas entitlement. We also accept that she and her husband have maintained a degree of financial independence however we are bound by the law and there is no ambiguity in its interpretation. The Authority does not have the power to change the law or to make policy decisions.

[20] We note that, although the appellant did not make an argument for deferring the date of deduction, we considered this issue which the Ministry appropriately raised. We are satisfied that there are no unexpected consequences for the appellant as a result of the application of s 70(1) of the Act. The situation in which she finds herself is that which was intended and therefore her appeal cannot succeed.

Order

[21] The appeal is dismissed.

Dated at **Wellington** this 1st day of March 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member