[2019] NZSSAA 6

Reference No. SSAA 005/18

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

Mr G Pearson - Chairperson

Mr K Williams Member

Mr C Joe - Member

Hearing at **CHRISTCHURCH** on 24 January 2019

Appearances

The appellant with Mr P M James

For Chief Executive of the Ministry of Social Development: Ms R J Shaw (counsel)

DECISION

Background

[1] The appellant was receiving New Zealand superannuation (NZS), and he travelled to Australia. As a preliminary step, we need to identify the Ministry's position. It says that due to the appellant being in Australia he lost his entitlement to receive NZS. At earlier points in this process, the Ministry took a different approach to the relevant legislative provisions. Its approach at the hearing was:

[1.1] Up until 14 June 2016, the position is conceded (that date is the end of a 26-week period of absence from New Zealand).

[1.2] From 14 June 2016 to 25 January 2018, the Ministry says the appellant should not have received NZS.

[1.3] In terms of statutory processes, the concession up until 14 June 2016 relates to s 22 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act). It allows up to 26 weeks of NZS to be paid while a person is outside New Zealand.

[1.4] From 14 June 2016 (or later), the Ministry says that the appellant's NZS should have been terminated, as he was not ordinarily resident in New Zealand.

[1.5] If we do not find that the appellant's NZS should have been terminated, then we need to consider whether the 26-week limitation arose during the period from 26 March 2017 until 18 November 2017 (more than 33 weeks) when the appellant was outside New Zealand.

[2] Accordingly, we need to determine:

[2.1] Was the appellant at any point between 14 June 2016 and 25 January 2017 "not ordinarily resident in New Zealand", and, if so, should we apply the discretion to terminate his NZS? That is determined by exercising a discretion under s 74(1) of the Social Security Act 1964 (the Social Security Act). More recently the Social Security Act 2018 has come into effect, but its provisions only govern the procedural matters relating to this appeal. The correctness of the exercise of the discretion is determined under the then current legislation, which was the 1964 Act.

[2.2] If the answer to the above question is in the negative and we do not terminate the appellant's NZS, then did he lose some of his entitlement to NZS due to the application of the 26-week provision? (s 22 of the Act). We note that the loss of NZS after 26 weeks for a person in Australia is absolute for present purposes, as none of the exceptions apply; further, that where the absence is for more than 30 weeks, the first 26 weeks is allowed only if the absence for 30 weeks was due to circumstances beyond their control. Regardless of satisfying that requirement it is only the first 26 weeks where entitlement remains in this case.

[3] The appellant's response is:

[3.1] Throughout the period he was ordinarily resident in New Zealand, so there was no power to terminate his NZS, and his circumstances were such that it would not be appropriate to do so.

[3.2] He did exceed 30 weeks absence when he was away from New Zealand between 26 March 2017 and 18 November 2017 (accordingly entering the 34th week of absence), but it was due to circumstances beyond his control, as the Ministry did not give him notice of the effect of absence.

Legal issues

[4] It is unnecessary to traverse all the relevant legal principles. The parties agree that the outcome of the appeal turns on specific statutory provisions in the manner described.

[5] Section 74 of the Social Security Act provides the Chief Executive may terminate a benefit, where the person is not ordinarily resident in New Zealand. It is a discretionary power, and the term "ordinarily resident in New Zealand" is not defined in any way that is helpful. It is clear that s 74 of the Social Security Act applied to NZS. The meaning of the term "ordinarily resident in New Zealand" is discussed in *Greenfield v Chief Executive of the Ministry of Social Development*.[1] It should, however, be borne in mind that decision concerned s 8 of the Act, not s 74 of the Social Security Act 1964. Nonetheless, the phrase does appear in both sections. One of the core elements relating to entitlement to NZS is the concept "ordinarily resident in New Zealand", and it could not lightly be supposed its meaning varied from section to section in the provisions of the two Acts that govern entitlement. The Court does also refer to s 74(1)(a) of the Social Security Act 1964 in its discussion of the meaning of the phrase.

[6] As to the essential concept of ordinary residence, the Supreme Court in *Greenfield* said:[2]

> … 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

[1] *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139.
[2] At [36].

> 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.

[7] Accordingly, the Court directed that to determine a place of ordinary residence it is necessary to have regard to how the affected person regards the place they are currently located, their circumstances there, and their intentions for the future. The Court went on to emphasise that if a person is not living in New Zealand, their intentions as to their future residence will be material when considering if they are ordinarily resident in New Zealand, despite currently being absent. The Court said the stronger and less equivocal the intention to return, the more likely ordinary residence in New Zealand is to be retained. That, however, is only one factor; a broad evaluation is required of the person's connections with New Zealand.

[8] The facts in the *Greenfield* case were quite different from the present case. Ms Greenfield had lived in Singapore for 19 years, where she saw herself as living and having her home. As she was ordinarily resident there, the Court concluded she could not be ordinarily resident in New Zealand at the same time. The phrase indicated only one place could have that status at a given point, in this statutory context.

[9] The Court's references to s 74(1)(a) of the Social Security Act 1964 are brief and do no more than support the construction of the phrase "ordinarily resident in New Zealand". The discussion does not explore how the discretion in s 74(1) of the Social Security Act should be exercised. There are previous decisions that refer to s 74 and the discretion to terminate benefits. However, none of the authorities explore the principles on which the discretion in s 74(1)(a) should be exercised. Generally, the facts have been ones where that issue has not been determinative, or turns on reasonably obvious facts.

[10] We must also consider s 22 of the Act. Its overall effect is to provide that NZS that would otherwise be payable to a person is paid for the first 26 weeks of any absence from New Zealand. It is, however, subject to a qualification that payments are made for none of the time if the person remains absent for 30 weeks or more. There is an exception to the 30 week provision that we must

consider in the present case. Specifically, s 22(b) of the Act allows the first 26 weeks to be paid notwithstanding absence beyond 30 weeks if:

> The Chief Executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond that person's control that he or she could not reasonably have foreseen before departure.

[11] That issue arises only between 26 March 2017 and 18 November 2017, where the Ministry says the appellant's circumstances did not come within those criteria, and he contends they do.

Discussion

The facts

[12] We have already identified the extent of the issues, and the contentious periods when the appellant was in Australia. He provided an outline of his reasons for being in Australia, how matters developed there and the intentions he and his wife had regarding where they would live.

[13] The essential features of the narrative are:

[13.1] The appellant and his wife lived in New Zealand all their lives. They had owned and operated businesses in New Zealand, and continued to do so throughout the relevant period.

[13.2] In 2011, the Christchurch earthquake largely destroyed the home where the appellant and his wife lived. They eventually sold their home in December 2015 in an "as is" state. At about that point, they purchased a unit in a holiday resort in Australia, and purchased the management rights of the building where the unit was located. The appellant and his wife moved to the unit in Australia. Their intentions were:

[13.2.1] They would acquire a home in Queenstown New Zealand, and would live part of the year there and part in Australia.

[13.2.2] To make their objective possible, they sought an investor to share the management rights in the building in Australia, and anticipated managing the building in rotation with the other investor. The management rights involve a "hands on" commitment.

[13.2.3] The appellant and his wife continued to maintain interests in New Zealand. Those interests included:

(a) a share in a house in a New Zealand city (with their daughter);

(b) ownership of two properties in a nearby town (mostly rented, but they had occupied one of them for a time);

(c) ownership of a company which owned about 100 acres of farmland;

(d) ownership of another company in the same general area which also owned about 100 acres of land and was in the process of subdivision of that land; and

(e) ownership of another company with about 25 hectares of land, it too was in the process of subdivision.

[13.2.4] The appellant also remained a New Zealand tax resident, and consequently committed to paying tax on his worldwide income in New Zealand throughout the time he was in Australia. He was taxed in Australia as a tax non-resident, paying only tax on income sourced in Australia.

[13.2.5] The appellant and his wife also had family in New Zealand. During the whole of the time they were in Australia, they retained their business interests in New Zealand, and family members remained in New Zealand. While one of their daughters was in Australia, it was not geographically close to where they were located there.

[13.2.6] The appellant and his wife regularly returned to New Zealand to attend to business interests, and to see family. However, in early 2016 the appellant developed some health issues and that made travel problematic, and he preferred to continue with the care he received in Australia.

However, he did return and engaged with the Ministry during that time.

[13.2.7] The appellant and his wife were not able to attract an investor to join them with operating the management rights in Australia. One of the subdivision projects in New Zealand reached a critical phase, and the local authority was considering demanding a bond of $1.2M to ensure timely completion of the project.

[13.2.8] At this point, in late 2017, the appellant and his wife sold the management rights of the building in Australia at a loss, as they abandoned hope of getting an investor to share the day to day work, and decided they needed to be present to deal with their business interests in New Zealand; particularly, the subdivision operations that had been neglected due to commitments in Australia.

[14] The Ministry did not put in issue the critical elements of the narrative regarding the circumstances of the appellant's time in Australia. We have no reason to doubt he gave a frank account. Accordingly, we conclude:

[14.1] The appellant went to Australia believing he would live part of the time in Australia and the balance in New Zealand, having residential accommodation in both.

[14.2] The appellant and his wife were frustrated in their objectives regarding living in Australia, as they could not get day-to-day support for the business in which they invested in Australia.

[14.3] The appellant and his wife could not quickly extricate themselves from the business in Australia, it took some three years from the start to retuning to live fulltime in New Zealand. The process was extended due to health factors, further the appellant and his wife had to accept a capital loss to dispose of the Australian investment and they did so reluctantly and only after deciding there was no reasonable alternative.

[14.4] Spending most of their time in Australia was never the intention held by the appellant and his wife. Their true intentions were reflected in the

arrangements they made, they had far more substantial business investments in New Zealand than Australia, including multiple investment properties and subdivisions that were in progress. They had family in New Zealand. They remained New Zealand tax residents. Significantly, the appellant and his wife did ultimately return to New Zealand to continue with their business activities, and chose to live in a provincial city to be close to family members.

The appellant remained ordinarily resident in New Zealand

[15] We are satisfied that the appellant remained ordinarily resident in New Zealand. The present case is far removed from a case like *Greenfield*, where the appellant made her home in Singapore for many years and had no clear intention of returning to New Zealand. It is also far removed from a case where a person "sells up" and moves from New Zealand. In this case, there is no element of intending to relocate permanently and performing the actions required to do so. In this case, there was never even a short-term intention of ceasing to live in New Zealand for a large portion of the year, beyond what circumstances dictated. We applied the approach approved by the Supreme Court in the *Greenfield* case:

[15.1] In terms of how the appellant's viewed their residence in Australia, it was intended to be for part-time occupation only. Unforeseen circumstances required modification of the short-term plans.

[15.2] The appellant and his wife did not purchase the business in Australia either because they had established connections (such as nearby family), or because of an intention to develop connections in that community to make it their permanent home. The reason for remaining in Australia, as they did, was due to their failure to get the support they expected to operate their Australian business, and some health issues affecting travel between New Zealand and Australia.

[15.3] Given the absence of deep ties to the Australian community where they operated their business, and the consistent intention to maintain their ties with New Zealand, we are satisfied the appellant and his wife regarded New Zealand as their home and ordinary place of residence. That is confirmed by their intention to establish a home in Queenstown, and the fact they did return to a provincial city in New Zealand when they were able to dispose of their business in Australia.

[15.4] We have considered the fact that for a period the appellant and his wife did not have exclusive occupation of a home in New Zealand (though they did spend time in the home they partly owned with their daughter). We accept the limited time spent in New Zealand was due to the home where they lived being destroyed by the Christchurch earthquake. The delay in replacing the home was due to the difficulties with the business in Australia. We find no equivocation in the intention to return to New Zealand, and rely particularly on the evidence that their principal business interests remained in New Zealand; they consistently had plans to resume living principally in New Zealand (though still intending to spend time in Australia), and needed to be in New Zealand for substantial periods to attend to their New Zealand business interests. When sharing their time between New Zealand and Australian could not be realised, they changed their plans to live in New Zealand fulltime, which reflected their dominant choice of home.

[15.5] Throughout the time in Australia the appellant and his wife had their principal business interests in New Zealand, they remained New Zealand tax residents, they did not have family living in the community where they were located in Australia (their daughter and her family did live in another part of Australia), and another daughter and her family remained in New Zealand (a part of New Zealand with which they had lifelong connections and to which they ultimately returned).

[16] We are satisfied that given this broad evaluation, the appellant was only in a temporary situation in Australia, he and his wife never abandoned New Zealand as their home, and by applying the *Greenfield* case we must conclude New Zealand was their ordinary place of residence throughout.

Alternatively, the appellant should not have his benefit terminated

[17] If we are wrong in regarding New Zealand as the appellant's ordinary residence, we would nonetheless not terminate his benefit. There is no doubt the appellant qualified for NZS. However, if we are wrong and he ceased to be ordinarily resident in New Zealand, then we would have to consider whether we should exercise the discretion to terminate his NZS under s 74(1) of the Social Security Act.

[18] We need to consider the discretion throughout the time the appellant was in Australia. In the absence of binding authority examining this discretion in detail, we have had regard to the following:

[18.1] The factors we have already relied on to conclude the appellant remained ordinarily resident in New Zealand. They include the temporary nature of living in Australia, strong ties to New Zealand and consistent determination to return to New Zealand, which are all relevant.

[18.2] We also take account of the economic ties with New Zealand; the appellant remained a New Zealand tax resident, had the majority of his business interests here, and needed to return to manage those business interests regularly as they ultimately required considerable attention. That resulted in him abandoning hope of living in Australia part-time.

[18.3] We have regard to the length of time in Australia, there was a substantial period in Australia. However, we also weigh the regular trips to New Zealand, the health and business factors impeding a return to New Zealand, and the fact that the appellant did return.

[19] Given the overall circumstances, our view is that in this case it is not appropriate to terminate the appellant's benefit; his consistent economic ties to New Zealand, regular visits to New Zealand, and the understandable reasons that delayed his return mean that at no material point should his benefit have been terminated. His close and enduring ties to New Zealand militate against termination.

The discretion in respect of s 22 of the Act

[20] The discretion in s 22 of the Act which applies in this case is limited. If a person is absent from New Zealand for up to 30 weeks they receive NZS for up to 26 weeks that they were absent. After 30 weeks of absence, they are entitled to the first 26 weeks only if their "absence beyond 30 weeks is due to circumstances beyond their control", and they "could not have reasonably foreseen" those circumstances before their departure.

[21] In this case, the only period in issue is from 26 March 2017 to 18 November 2017 (more than 33 weeks)[3]. It occurred because the appellant knew the Ministry considered he should not be receiving NZS. He also says the Ministry failed to communicate with him effectively to put him on notice. He decided in those circumstances not to return within 30 weeks.

[22] For the purpose of considering the issue, we will assume there was an official error. At least in considering the appellant was not entitled to NZS, and we will assume the error resulted in not giving correct notice regarding the expiry of the 30-week period. However, in our view, that cannot justify concluding that an absence for more than 30 weeks was beyond the appellant's control. He accepts he decided not to return, given the Ministry's then view. It is not appropriate to attempt to determine the boundaries of what is "beyond control", and what "could not reasonably be foreseen". In this case, the appellant made a choice not to return to New Zealand within 30 weeks; being aware of the rules, he previously did return to comply with s 22. Accordingly, the discretion cannot apply in this case, his delayed return was neither beyond his control nor unforeseeable.

The effect of our conclusions

[23] Given our conclusions, the appellant's NZS will not be terminated. However, he is affected by the 26-week restriction in s 22 of the Act. The effect is:

[23.1] The appellant is not entitled to NZS from 14 June 2016 until he returned to New Zealand on 15 October 2016 (he has received the maximum benefit for this period on the Ministry's concession).

[23.2] The appellant is not entitled to NZS from 26 March 2017 until 18 November 2017, when he returned to New Zealand. He was absent for more than 30 weeks, cannot take advantage of any discretion and is accordingly not entitled to any NZS in that period.

[23.3] At all other times in contention, the appellant was entitled to NZS payments.

---

[3] He was allowed the full 26 weeks ending on 14 June 2016, there is no discretion to allow more time for that period of absence, and the only other material period exceeding 30 weeks is from 26 March 2017 to 18 November 2017.

Decision

[24] The appeal is allowed, the appellant is entitled to NZS in the periods identified.

[25] We reserve leave for either party to seek orders relating to quantification of the entitlement, if they are unable to agree.

Dated at **Wellington** this 11th day of February2019

_____
G Pearson
Chairperson

_____
K Williams
Member

_____
C Joe JP
Member