[2019] NZSSAA 7

Reference No. SSAA 161/17

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 AUCKLAND on 16 January 2019

Appearances

The appellant in person

P Suieva for the Ministry of Social Development

DECISION

Background

[1] XXXX ("the appellant") appeals the decisions of 30 May 2017 to suspend payment of his New Zealand Superannuation (NZS) and decline his application for portability of NZS to Germany.

[2] The appellant turned 65 years on 7 January 2016. On 18 February 2016, when he was in New Zealand, he applied for NZS. This application was declined because he said that since he turned 51 years he had lived and worked in the United Kingdom and Germany. Therefore he did not meet the

requirement for five years resident and present in New Zealand after the age of 50 years to be eligible for NZS.

[3] On 8 February 2017, the appellant requested an appointment with the Ministry to apply for NZS, stating that he had just moved to New Zealand. On his application form, the appellant said he had lived in the United Kingdom from December 2001 until 1 February 2017. Although he had not been resident and present in New Zealand for five years after the age of 50 years, necessary to qualify for NZS, the Ministry included his periods of United Kingdom residence so that he met this requirement.

[4] The Ministry then granted the appellant NZS from 8 February 2017 at the half-married rate, taking into account the amount of his United Kingdom pension.

[5] On 27 February 2017, the appellant made another appointment to discuss portability of his NZS to Germany. He said he was leaving New Zealand permanently on 15 March 2017 to take up a job offer in Germany. He gave an address in Germany.

[6] In the course of investigating the application for portability, the Ministry obtained Customs New Zealand records of the appellant's travel to and from New Zealand. Based on these records, the Ministry concluded that it made an error when it granted the appellant's application for NZS because he was not ordinarily resident in New Zealand at the date of application. The Ministry therefore declined the appellant's application for portable NZS and cancelled his NZS.

The issues

[7] The primary issue in this case for the Authority is whether the appellant was ordinarily resident and present in New Zealand when he applied for NZS. If we are not satisfied that he was, we do not need to consider whether he met the requirements in s 8(b) and (c) of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI).

[8] If we find that the appellant qualifies for NZS, we must then consider his application for portability.

Relevant law

Eligibility for NZS

[9] Section 8 of the NZSRI sets out the residential qualifications for entitlement to NZS:

> **8 Residential qualification for New Zealand superannuation**
>
> No person is entitled to New Zealand superannuation unless the person—
>
> (a) is ordinarily resident in New Zealand on the date of application for New Zealand superannuation, unless section 31(4) of this Act or section 191(4) of the Veterans' Support Act 2014 applies; and
>
> (b) has been both resident and present in New Zealand for a period or periods aggregating not less than 10 years since attaining the age of 20 years; and
>
> (c) has also been both resident and present in New Zealand for a period or periods aggregating not less than 5 years since attaining the age of 50 years.

[10] The relevant provision is s 8(a), which requires an applicant to be ordinarily resident in New Zealand on the date of application for NZS. The phrase is not defined in the NZSRI or the Social Security Act 2018 (the Act), however the meaning of "ordinarily resident in New Zealand" was considered by the Supreme Court in *Greenfield v Chief Executive of the Ministry of Social Development*[1] where the court noted that several New Zealand statutes contain the expression "ordinarily resident".[2]

[11] The Supreme Court rejected the High Court's interpretation of "ordinarily resident" as being established if there is an intention to return because it considered that such an interpretation would detract from the practical purpose of s 74(1)(a) of the Act to terminate or reduce benefits for those beneficiaries who are not ordinarily resident in New Zealand. The Court concluded that the context in which the expression "ordinarily resident" appears in the NZSRI makes it clear that the legislature did not envisage a person could be simultaneously ordinarily resident in New Zealand and another country.[3]

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[1] *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139; [2016] 1 NZLR 261.
[2] At [30].
[3] At [34].

[12] The Court considered that the enquiry into ordinary residence must address where the person's home has been prior to the relevant date, where that person was living at the critical date, and their intentions for the future. The person's intentions as to their future residence are material where the person is not living in New Zealand but has lived in New Zealand in the past. However, the Court observed that the state of mind of the person is only one consideration and must be assessed alongside the domestic realities of that person's life, including the length of time they have lived out of New Zealand.[4] The Court therefore concluded that an intention to return to New Zealand is not necessarily determinative of ordinary residence, although it may be relevant.[5]

[13] Section 9 of the NZSRI qualifies s 8 by providing that "no account" is to be taken of absences from New Zealand for the purposes of obtaining specialist medical treatment or vocational training, work on New Zealand ships, military service or work for Volunteer Service Abroad Inc. Section 10 of the NZSRI provides that that "no account" is taken of time spent overseas as a missionary.

> **10 Periods of absence as missionary also not counted**
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> (1) In determining the period an applicant has been present in New Zealand, no account is taken of any period of absence while engaged in missionary work outside New Zealand as a member of, or on behalf of, any religious body or, as the case may be, during any period that the applicant was absent from New Zealand with his or her spouse or partner while that spouse or partner was engaged in that missionary work.
>
> (2) Subsection (1) applies only if the chief executive is satisfied that the applicant was either born in New Zealand or was ordinarily resident in New Zealand immediately before leaving New Zealand to engage in the missionary work or, as the case may be, to accompany or join his or her spouse or partner.
>
> (3) Unless otherwise expressly provided in the agreement, the provisions of subsection (1) are not modified by the provisions of any agreement entered into by the Government of New Zealand with the government of any other country, whether before or after the commencement of this section, providing for reciprocity in social security benefits between their respective countries or the provisions of any Act or Order in Council giving effect to the agreement.

[4] At [37].
[5] At [38].

> (4) In this section, missionary work includes the advancement of religion or education and the maintenance, care, or relief, of orphans, or the aged, infirm, sick, or needy.

[14] In *Greenfield*, the Court was satisfied that the legislative scheme required the exceptions in ss 9 and 10 of the NZSRI to be treated as correlating precisely with the eligibility rules in s 8(b) and (c). Therefore, a missionary who was ordinarily resident in New Zealand before leaving to carry out missionary work is entitled to count the time spent out of New Zealand on missionary work against the requirements in s 8(b) and (c).

Portability of NZS

[15] The Social Welfare (Reciprocity with the United Kingdom) Order 1990 provides that a person who is usually resident in New Zealand may have residency in the United Kingdom count towards the residency requirements for NZS. However, a person who becomes entitled to NZS by virtue of residence in the United Kingdom is not entitled to payments of NZS when they cease to be usually resident in New Zealand.

[16] Section 26 of NZSRI provides for payment of NZS overseas when certain criteria are met. These include being ordinarily resident in New Zealand on the date of application for portability.

The case for the appellant

[17] The appellant contends that there are two issues that the Authority needs to resolve. The first issue is whether he was ordinarily resident in New Zealand when he applied for NZS on 9 February 2017, having arrived in New Zealand on 3 February 2017.

[18] The second issue is whether his work between 2004 and 2011 for the Methodist Church in Cambridge, United Kingdom, was missionary service such that the exemption in s 10 of NZSRI applies to him. The appellant argues that, as he was working as a missionary, he was entitled to count this time towards the requirement in s 8(c) of NZSRI for 5 years resident and present in New Zealand after age 50. The appellant put forward a third argument based on the Social Welfare (Reciprocity with the United Kingdom) Order 1990. As the second and third limbs of his appeal cannot succeed, we record them first with our reasons for rejecting them.

[19] The appellant interprets s 10(2) of NZSRI as providing two alternatives for missionary work counting towards the residency requirement — either being born in New Zealand or being ordinarily resident in New Zealand immediately before leaving to engage in the missionary work. The appellant submits that, as he was born in New Zealand, he was not required to be ordinarily resident here before he left to undertake missionary work. His argument is that his time in the United Kingdom after age 50 when he was a missionary, qualifies him to meet all requirements in s 8 of the NZSRI.

[20] However, this submission is inconsistent with the Supreme Court's interpretation of the legislation as requiring the exceptions in s 9 to correlate with the eligibility rules in s 8 of the NZSRI.[6] The Court found that in order to satisfy the s 8(b) and (c) criteria a person seeking to rely on their time overseas as a missionary was required to be ordinarily resident in New Zealand before leaving to undertake missionary work. As the appellant was not ordinarily resident and present in New Zealand before the period when he says he worked as a missionary, his period of work in the United Kingdom between 2004 and 2011 does not assist him to meet the requirements in s 8(b) and (c) of the NZSRI.

[21] The appellant's submission that the Social Welfare (Reciprocity with the United Kingdom) Order 1990 entitles him to NZS also lacks merit. He argues that the Reciprocity Order allows someone who would qualify for a full pension in the United Kingdom while living in the United Kingdom, and who would qualify for a full pension in New Zealand while living in New Zealand, to be given that pension whichever of the two countries that they are living in. He submits that, therefore, even if he was not ordinarily resident in New Zealand on the date of his application for NZS, he qualifies on the basis of being ordinarily resident in the United Kingdom at that time. This submission is contrary to the NZSRI and we reject it.

[22] In support of his submission that he was ordinarily resident in New Zealand when he applied for NZS on 9 February 2017, the appellant said that he decided to come and live in New Zealand permanently after Christmas Day 2016 when he was told that his granddaughter had a serious illness.

[23] The appellant said that, in addition to the room in his friend's house that he has used for some years when in New Zealand, the domestic realities of his

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[6] *Greenfield*, above n 1.

life in New Zealand in February 2017 are demonstrated by having family here, a relationship with the University of Auckland, a network of friends, a bank account, voting in New Zealand, and a gym membership.

[24] In evidence, he said that in addition to his granddaughter's health, the relationship difficulty between his daughter and her partner was another reason for his decision to stay in New Zealand. We asked the appellant why he did not mention this issue when he referred to the health of his granddaughter. He said that he felt his daughter's relationship issue was more personal.

[25] In evidence, the appellant could not identify any preparation he had made to move permanently to New Zealand, although he said he had closed his Kiwisaver account which had approximately $5,300 in it. He accepted that he had booked a return ticket to New Zealand with no intention of staying more than six weeks and did not change the date of his departure.

[26] He was unable to explain why he left as scheduled on 15 March 2017 when his granddaughter's health had not changed. He said that his daughter's relationship problem was resolved by the time he left.

[27] The appellant also said he was unable to afford a house in Auckland but was unable to explain why he could not stay in his friend's home. We found this evidence that the cost of housing was a major reason for his decision to leave was inconsistent with his assertion that the room in his friend's house was a key factor demonstrating that New Zealand was his place of residence.

[28] A further contradiction was the appellant's evidence that he "lives internationally", has worked in both Germany and the United Kingdom for many years and has houses in both countries.

[29] In response to a question from Ms Siueva, the appellant said that it was a mistake that he had not mentioned Germany when he gave the Ministry his own record of his travel dates.[7] The appellant's record of travel dates cover the period between 1976 and February 2016 and there is no reference to Germany after 1991 despite his written and oral evidence that he works mainly in Germany and the United Kingdom and that since 2012 he has been

[7] Page 51 of the Ministry of Social Development's report.

ordinarily resident in both Cambridge, United Kingdom, and Aachen, Germany.

The case for the Ministry

[30] The Ministry submits that the appellant was not ordinarily resident at the date of his application for NZS and therefore does not qualify for NZS.

[31] In support of this submission, the Ministry refers to the appellant's email query on 27 October 2015 where he stated that he lived in Germany and was eligible for German citizenship, which he said "would make many aspects of living here easier". The appellant asked whether obtaining German citizenship would affect his NZS.

[32] The Ministry also submitted that the appellant's application for portable NZS demonstrates that he did not intend to live in New Zealand when he applied for NZS less than three weeks earlier. On his application for portability, the appellant stated that he was indefinitely moving to Germany for a job offer and confirmed that he had arrived in New Zealand with a return ticket

[33] The Ministry argues that from 2009 onwards the appellant has used a room at a friend's house in Auckland and there is no evidence that he moved any personal or household effects to New Zealand in 2017 in preparation for living here permanently. Further, his wife arrived nine days after him and left New Zealand a week before he did.

Discussion

[34] New Zealand law is clear that a person may only be ordinarily resident in one country. The appellant submitted that it is relevant that the United Kingdom has a different definition from New Zealand of "ordinarily resident". He said that in the United Kingdom a person can be ordinarily resident in more than one country at the same time. This submission is without merit; there is no basis for looking to another jurisdiction when the governing legislation is unequivocal.

[35] For the purposes of eligibility for NZS, s 8(a) requires a person to be ordinarily resident in New Zealand on the date of their application for NZS.

[36] For the reasons given, we found the appellant's evidence inconsistent in relation to whether he was ordinarily resident in New Zealand at the relevant time and his reasons for leaving. We found it implausible that he would have forgotten to include his time in Germany when preparing a record of his travel movements for the Ministry. In the absence of any evidence that he took steps to make a life in New Zealand in February 2017, we do not accept that it was his intention to do so.

[37] The appellant does not dispute that on 27 February 2017, after the Ministry found him eligible for NZS, he said that he was leaving New Zealand because he had a job offer in Germany. On his own evidence, at that time he lived and worked in both Germany and the United Kingdom. The inevitable conclusion is that the appellant intended to leave New Zealand once his application for NZS had been granted, and expecting that his application for portability would also be granted.

[38] For these reasons, we are not satisfied that the appellant was ordinarily resident in New Zealand on 8 February 2017 when he applied for NZS. Therefore he is not entitled to NZS and the Ministry was correct to cancel his payments. As the appellant was not entitled to NZS at that time, his application for portability must fail.

Order

[39] The appeal is dismissed.

Dated at **Wellington** this 14th day of February 2019

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S Pezaro
Deputy Chair

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K Williams
Member

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C Joe
Member