[2019] NZSSAA 8

Reference No. SSA 065/18

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 Auckland on 14 December 2018

Appearances

The appellant and her daughter, XXXX, by audio visual link from Queensland
P Siueva, agent for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appealed the decision not to backdate her entitlement to New Zealand superannuation (NZS) to 2 October 2013, the date on which she reached 65 years of age, and the decision that she was not entitled to receive payment of NZS when she left New Zealand to live in Australia.

[2] In the course of preparing its report, the Ministry reconsidered its decision on the date from which NZS should be paid to the appellant. The Ministry decided that it was satisfied that she qualified for NZS from 2 October 2013 because her first contact to apply for NZS was in August 2013 and her residence in the United Kingdom counted towards the residential requirements.

[3] The Ministry therefore paid the appellant arrears of $24,319.45, being NZS for the period from 2 October 2013 to 17 November 2016, the date from which it originally granted NZS.

[4] The remaining issue to be determined in this appeal is whether when the appellant left New Zealand on 2 December 2016 to live with her daughter in Australia she met the requirements in s 8(b) and (c) of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI) such that she is entitled to NZS in Australia.

Relevant law

[5] Section 8 of the NZSRI provides the residential requirements 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 for a period or periods aggregating not less than 5 years since attaining the age of 50 years in any 1 or more of—
> (i) New Zealand:
> (ii) the Cook Islands:
> (iii) Niue:
> (iv) Tokelau.

[6] Article 10 of 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.

[7] In *S v the Chief Executive of the Ministry of Social Development*[1] the High Court held that to meet the requirement to be both resident and present in New Zealand for prescribed periods, a person must both lawfully have his or her home in New Zealand and be physically present for the specified periods. The Court observed that while residence is not broken by temporary absences overseas, Parliament explicitly inserted the additional requirement of presence and a person is required to be physically present for the specified periods.

The case for the Ministry

[8] At the hearing, the appellant asked to hear the Ministry's case first which we considered appropriate and we have followed this approach in our decision.

[9] In the Ministry's report, it submitted that the issue for determination was whether the appellant met the residency requirements for NZS on 2 October 2013. However, Ms Siueva accepted that the issue was whether the appellant qualified for NZS when she left the country permanently on 2 December 2016. If we find she did qualify, she is entitled to be paid NZS in Australia at the rate equivalent to the Australian age pension which is means tested.

[10] The Ministry's submission is that once the appellant left New Zealand she was no longer entitled to have her residency in the United Kingdom treated as if she had been resident in New Zealand for that period. The Ministry relies on Customs records on the appellant's travel movements to demonstrate that by the time she left New Zealand the appellant had a total number of days present in New Zealand of 3,078, and did not meet the requirement for 3,650 days (10 years) present in New Zealand to qualify for NZS.

[11] The Ministry started its calculation of the appellant's residency in New Zealand from February 2005 because it considered that she was visiting New Zealand, and not resident here, when she was present for two periods in 2000 and 2004. The appellant did not challenge this aspect of the decision.

[12] The Ministry's calculation of the dates on which it says the appellant was in New Zealand between 5 February 2005 and 2 December 2016 is set out in its report.

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1 *S v the Chief Executive of the Ministry of Social Development* HC Auckland CIV-2011-485-60, 19 May 2011.

[13] The Ministry accepts that in May 2017 one of its officers made an error in an email to the appellant's daughter by including the entire period between 8 November 2006 and 3 August 2007 when the appellant was absent for part of that period. However, the Ministry contends that even if this period were included, the total days present would be 3,359 days which is still short of the requirement.

[14] In summary, Ms Siueva said that the Ministry accepts that the appellant met the requirement for residency but submits that she has not been physically present for the required time to qualify for NZS, other than under the reciprocal order with the United Kingdom which does not entitle her to payment once she leaves New Zealand. In order to avail herself of the reciprocal agreement with Australia, the appellant must be entitled to NZS before she leaves New Zealand to reside there.

[15] Ms Siueva pointed out that although the appellant was not entitled to NZS when she left New Zealand to reside in Australia, the Ministry continued her payments of NZS for 26 weeks.

The case for the appellant

[16] The appellant accepts that the Customs records are correct, however her daughter makes some novel arguments. She submits that from 20 September 2006 when her mother bought a house in New Zealand she should be deemed to be resident in New Zealand. She also argued that the entire period between 17 February 2005 and 19 September 2006 should be counted as if the appellant was present despite the Customs records showing that she left New Zealand on 16 February 2005 and returned on 25 January 2007. The appellant's daughter also suggested that the Authority should "extrapolate" out the dates from January 2007 to the date of departure.

[17] She protested against the heavy reliance on dates and said that it was her mother's intention to reside and be resident in New Zealand until she left in December 2016.

[18] The appellant and her daughter were very dissatisfied that the appellant was not credited with the 3,359 days stated in error by the Ministry in its email, despite accepting that this total was incorrect. They consider that the shortfall of days is not significant and the Ministry should take account of the appellant's residency status in New Zealand and the fact that she owned a house here.

[19] The appellant's daughter said that her mother had been required to work three years longer than anticipated until the Ministry overturned its decision regarding the date of commencement of her NZS and she received the arrears payment.

Discussion

[20] The issue for us to determine is whether the appellant had been resident and present in New Zealand for 10 years on 2 December 2016, the date she left permanently.

[21] The Customs records, which are the best evidence, are not disputed by the appellant. We accept that she owned a house in New Zealand and was granted residency in 2004. However, entitlement to NZS is not based on status for immigration purposes or whether a person owns property in New Zealand. We must apply the law which is clear and has been unequivocally interpreted by the High Court as requiring both residence and physical presence in New Zealand for the required time. We therefore reach the inevitable conclusion that on the date she left New Zealand the appellant did not qualify for NZS.

Order

[22] The appeal is dismissed.

Dated at **Wellington** this 19th day of February 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member