

[2020] NZSSAA 20

Reference no: NZSSAA106/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an Appeal to the Social Security Appeal Authority by **XXXX** of XXXX, against a decision of a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

G Pearson (Chairperson)

C Joe (Member)

J Ryall (Member)

Indicative Decision: Monday, 09 November 2020

Representation: The Appellant in person

Mr Pieter Engels, appeals officer for the Chief Executive

DECISION

The indicative decision

[1] The Authority issued an indicative decision, explaining that on the information it had it would dismiss the appeal. However, it gave XXXX the opportunity to challenge the indicative view of factual and legal matters that are set out below. The Authority said:

[1.1] She had the opportunity of requesting a hearing, or

[1.2] providing any further written material.

[2] She provided further material but did not request a hearing.

[3] Accordingly, we now issue this final decision, taking the further material into account.

Background

[4] XXXX was born in South Africa. She arrived in New Zealand in 2005 when she was 50 years old.

[5] Between 2005 and 2019 XXXX was present in New Zealand for approximately seven years. During this time, she also spent periods of time in South Africa and in Australia.

[6] XXXX turned 65 years old in May 2019 and applied for New Zealand Superannuation. The Ministry declined her application because she did not meet the minimum time she needed to have been “resident and present” in New Zealand.

The Law

Residential qualification for New Zealand Superannuation

[7] The primary provision relating to the residential criteria for obtaining the New Zealand Superannuation is s 8 of the New Zealand Superannuation and Income Retirement Act 2001 (the Act).

[8] The provision sets out three residential criteria that must be met before a person can receive New Zealand Superannuation. In short, these criteria are:

[8.1] Be ordinarily resident in New Zealand at the time of application for New Zealand Superannuation; and

[8.2] Be both resident and present in New Zealand for at least 10 years in total since turning 20; and

[8.3] Be both resident and present in New Zealand for at least five years in total since turning 50.

Law relating to absences from New Zealand that are not deducted from residential criteria

[9] Sections 9 and 10 of the Act provide for specific situations where a person can be absent from New Zealand, and this is not deducted from the required periods in s 8 residential criteria.

[10] These provisions include a discrete list of situations that consist of absences for:

[10.1] the purpose of medical treatment not available in New Zealand;

[10.2] time served on a ship;

[10.3] any time spent with the navy, military, air force; or

[10.4] voluntary or missionary work.

International Agreements

[11] New Zealand has bilateral social security agreements with some countries. However, there is no agreement that is apparently relevant to XXXX’s circumstances.

Discussion

Facts

[12] We understand that XXXX's essential circumstances are not controversial. As we noted, she was born in South Africa, came to New Zealand in 2005 when she was 50 years old, but spent much of her time in South Africa and Australia. Accordingly, when she applied for New Zealand Superannuation in 2019, she had turned 65 years old and spent about seven years in New Zealand in total.

Issues

[13] The contentious issue arises from the applicability of the law based on these facts. We understand the issues are primarily legal:

[13.1] The determinative issue is whether the Ministry erred by declining XXXX's New Zealand Superannuation based on s 8 of the Act.

[13.2] Whether XXXX's absences can be treated as part of the qualifying period of "residence and presence" in New Zealand for her to be entitled to New Zealand Superannuation.

XXXX's Position

[14] In relation to the residential criteria in s 8 of the Act, XXXX asserts that she has been resident in New Zealand for 14 years. She believes that it is unfair that she is not granted New Zealand Superannuation because her periods absent were for family related matters.

[15] After the Authority issued its indicative decision XXXX stated:

"I honestly am horribly disappointed with your decision, which lacks compassion and consideration.

I am wanting to know, how do the authorities of New Zealand expect me to survive in the event of the divorce I am being faced with. He does not earn enough to support me and the pathetic benefit I will be granted to live on will not even cover a week's rent.

I have wasted all these precious years of my life here, I gave up everything to make a new life here in New Zealand. I had good reason to return to South Africa, and my parents needed me far more than New Zealand did.

I have explained to you all already that there is no work in a beach resort, which [the town where I live in New Zealand] is.

I do not drive either.

I am very disillusioned and I am also horrified to see so many young hooligans roaming around, looking for trouble and being granted a benefit!!

Where is the fairness and honesty in all this.

But I knew when you all started throwing the famous "red tape clauses" which New Zealand is so famous for, and I knew NOTHING of all these "red tape clauses"

I realized you had it in for me then already.

[16] In a further email she said:

I am very offended and my response will remain the same, I was NOT informed of all the ruling/clauses to being granted superannuation and did not even know it existed until a friend asked me if I am receiving one!!

Regarding proof of being my parents carer, I certainly did not expect a written contract and payment from them, so that is an absurd demand from the ministry and they both are very sadly, deceased for 2 years now!!

In fact this whole ridiculous report is totally absurd and discriminatory, as so many people (New Zealanders too) have stated.

I plead not guilty.

The Ministry's position

[17] With regard to the s 8 residential qualifications, the Ministry's position is as follows:

[17.1] XXXX appears to meet s 8(a) and s 8 (c), but not s 8(b) of the Act. The criteria are cumulative and because s 8(b) is not fulfilled it could not grant New Zealand Superannuation to XXXX.

[17.2] XXXX's circumstances do not meet any of the situations in ss 9 and 10 of the Act, which are periods not deducted from periods of resident and present.

[18] In short, XXXX has not 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 that is determinative.

Evaluation - Section 8 – Residential qualification

[19] Based on the information we have, it appears XXXX meets the criteria under s 8(a) and s 8(c) of the Act. We do not need to discuss them further. The determinative provision is s 8(b), because each of the paragraphs must be met.

[20] We cannot identify any basis for XXXX to claim she was both resident and present in New Zealand for a period or periods that total 10 years since she attained the age of 20 years. Section 8(b) requires that she was, before having any entitlement to New Zealand Superannuation. In the absence of meeting that qualification the Ministry has no legal authority to pay New Zealand Superannuation to her.

[21] In total, it appears that XXXX has spent just over seven years in New Zealand.

Evaluation - Resident and present in New Zealand

[22] The requirement to be “present” means physically present in New Zealand for the specified period. In *S v the Chief Executive of the Ministry of Social Development*,¹ Faire J observed:

The result, then, is by requiring a person to be both resident and present in New Zealand for the prescribed periods, a person must both lawfully have his or her home in New Zealand and be physically present in New Zealand for the specified periods.

[23] Residence is required in addition to presence. The Supreme Court’s decision in *Greenfield v The Chief Executive of the Ministry of Social Development*,² reviews what amounts to “residence” in this context. It is not necessary to consider when XXXX was resident in New Zealand, as she was not present for the required period of 10 years.

Evaluation - absences from New Zealand that are not deducted from residential criteria

[24] Sections 9 and 10 of the Act offer a discrete list of circumstances where periods of absences from New Zealand do not affect a person’s qualification under the residence and presence requirements in s 8.³

[25] XXXX’s reasons for absence from New Zealand include house sitting for her son while he was honeymooning and supporting her parents. The reasons for absence that do not affect a person’s qualification under the residence and presence provisions are clearly defined and they do not include leaving New Zealand to support family members.

[26] It follows that on the information we hold, XXXX has not shown any of the exceptions apply. Her period of being present in New Zealand was approximately seven years.

Evaluation - Fairness

[27] XXXX has suggested there is something unfair about taking account of her absences from New Zealand as she was engaged in virtuous activities. However, New Zealand’s requirement for ten years “residence and presence” in New Zealand is generally regarded as a low and generous threshold for New Zealand taxpayers to accept the cost of supporting a person in their old age. It is unsurprising there is no capacity for the Chief Executive or this Authority to exempt XXXX from the minimum requirements.

¹ *S v the Chief Executive of the Ministry of Social Development* [2011] NZAR 545 (HC) at [35].

² *Greenfield v The Chief Executive of the Ministry of Social Development* [2015] NZSC 139 [2016] 1 NZLR 261.

³ The Supreme Court’s observations regarding the interpretation of those provisions is important.

- [28] As Faire J observed in the case the *S case*,⁴ the requirement for physical presence was a clear legislative choice by the New Zealand Parliament.
- [29] After considering the indicative decision explaining the law, XXXX added to her arguments that:
- [29.1] Her financial circumstances are not good.
- [29.2] She has wasted years of her life living in New Zealand and could have remained in South Africa.
- [29.3] She disapproves of young people in New Zealand being granted benefits.
- [29.4] She referred to the terms on which she cared for her aged parents in South Africa.
- [30] Her comments are not relevant to what we have said regarding the law of New Zealand that requires people to be in New Zealand 10 years before this country accepts financial responsibility for supporting them in their old age. In our view it does not advance XXXX's arguments the outcome is unfair either. New Zealand requires people to be present in New Zealand for 10 years before accepting that financial responsibility and does not require any history of contribution through taxes or otherwise. Using international comparisons, it is difficult to characterise that policy as unfair, unreasonable or lacking in generosity.
- [31] Furthermore, XXXX made her own choices regarding the time she spent in New Zealand, Australia and South Africa respectively. The information regarding the consequences for New Zealand Superannuation eligibility were readily available, and it is not evident why XXXX would expect New Zealand to support her in her old-age before she has been present in New Zealand for 10 years.
- [32] Her criticism of young New Zealand people receiving benefits is unimpressive. New Zealand Superannuation is the most generous benefit available in New Zealand's welfare system, and it is not means tested. It appears XXXX is entitled to benefits on the same basis as the young people living in her community. It is difficult to discern any reason to think that a person who has lived in New Zealand for less than 10 years should receive more support than those young people.

Conclusion

- [33] On the information before us, we conclude that the Ministry was correct in applying s 8 of the Act to XXXX's circumstances. She is not entitled to receive New Zealand Superannuation until she has been present in New Zealand for 10 years.

⁴ *S v the Chief Executive of the Ministry of Social Development*, above at n 1, at [32] – [35]

Decision

[34] We accordingly dismiss the appeal.

DATED at Wellington 09 November 2020

Grant Pearson
Chairperson

Charles Joe JP
Member

John Ryall
Member