

**IN THE MATTER** of the Social Security Act 2018

**AND**

**IN THE MATTER** of an Appeal by **XXXX** of **Auckland** against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**G Pearson** (Chairperson)

**R Palu** (Deputy Chairperson)

**M Dodd** (Member)

**R Aston** (Member)

**Hearing:** Auckland, 16 March 2023.

**Decision:** Friday, 17 November 2023

**Representation:** XXXX, with his wife.

Ms Kanji and Ms Katona for the Chief Executive.

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**DECISION**

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**Background**

[1] XXXX and his wife have had a home in New Zealand since 2003. They came to New Zealand with their son, who was then in secondary school. This case concerns XXXX's entitlement to New Zealand superannuation. The Ministry of Social Development (Ministry) has only raised one obstacle to XXXX's entitlement. It says that until 2 September 2013, he was not ordinarily resident in New Zealand. The time an applicant for New Zealand superannuation must have to qualify for New Zealand superannuation involves a count of the days the person is "resident and present in New Zealand". There is no dispute over the days XXXX was present, but the

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**Representatives:** XXXX in person.

Ministry of Social Development for the Chief Executive

Ministry says that none of the days before 2 September 2013 count towards qualifying as he was not resident in New Zealand until then.

### **The issue before the Authority**

- [2] The Authority must identify the legal test for being "resident" under Section 8 of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRI).
- [3] Then we must determine whether XXXX's circumstances establish he was resident in New Zealand for any period before 2 September 2013, applying the legal test.

### **Discussion**

#### *The law*

- [4] The law relating to residence was not contentious. The Supreme Court in *Greenfield v Chief Executive of the Ministry of Social Development* considered the concept of being "resident" for s 8 of the NZSRI.<sup>1</sup> In that case, the issue primarily concerned being "ordinarily resident" under s 8(1)(a). In this case, the question arises only under s 8(2), being "resident" in the phrase "resident and present". The Court did reference the phrase "resident and present"<sup>2</sup>, it observed:<sup>3</sup>

In s 8, the expression "resident and present" occurs alongside "ordinarily resident". 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 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 ...

- [5] Accordingly, we consider the analysis of "residence" in the *Greenfield* case equally applicable to s 8(2).
- [6] There have been some changes to s 8 since the *Greenfield* decision, but they do not make a material difference to the reasoning of the Supreme Court as it applies to this case. The Supreme Court noted many New Zealand statutes contain the expression "ordinarily resident", and in some cases, the phrase is defined in the Act using the term; in other cases, it is not.

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<sup>1</sup> *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261.

<sup>2</sup> As above, at [6], [9], [13], [14] and [36].

<sup>3</sup> At [36].

- [7] In the *Greenfield* case, the High Court found the Appellant was ordinarily resident in New Zealand because it interpreted s 8(a) to include an intention to return to New Zealand. The Supreme Court considered whether the High Court was correct to construe s 8(a) that way.
- [8] The Supreme Court rejected the High Court's interpretation of "ordinarily resident" as being established if there is an intention to return to a former place of residence because it considered that such an interpretation would detract from the practical purpose of s 74(1)(a) of the Social Security Act 1964 (the Act) to terminate or reduce benefits for those beneficiaries who are not ordinarily resident in New Zealand. The Supreme 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.<sup>4</sup>
- [9] The Supreme Court considered the enquiry into ordinary residence must address where the person's home was before 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. However, the Supreme Court observed that the person's state of mind is only one consideration and must be assessed alongside the domestic realities of their life, including the length of time they have lived outside of New Zealand.<sup>5</sup> The Supreme Court concluded that an intention to return to New Zealand is not itself determinative of ordinary residence, although it may be relevant.<sup>6</sup>
- [10] There are provisions for exceptional circumstances affecting some refugees, people undertaking charitable work and a range of other circumstances. None of those provisions are relevant in this present case.
- [11] In this case, applying the Supreme Court's decision to this case reduces it to a straightforward factual inquiry because:
- [11.1] At material times, XXXX was either resident in Malaysia or in New Zealand. He cannot have been resident in both at any given time.
- [11.2] We must identify any days before 2 September 2013 when XXXX resided in New Zealand.

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<sup>4</sup> At [34] and [39].

<sup>5</sup> At [37].

<sup>6</sup> At [38].

- [12] We must consider XXXX's overall personal circumstances to make that evaluation. Every case has its unique circumstances to weigh.

*The Ministry of Social Development's position*

- [13] The Ministry's position is that XXXX was not a resident in New Zealand until 2 September 2013; accordingly, he did not meet the "resident and present" requirement until then. The Ministry provided a table showing the times XXXX was in New Zealand and absent from New Zealand from 13 November 2002 until 2 September 2013.
- [14] In summary, it shows that XXXX was in New Zealand for some 33% of the time. The Ministry says that XXXX was generally in Malaysia when he was not in New Zealand. Malaysia is the country where he is a national, and that was his home due to family reasons. His stays in New Zealand were short, and on balance, XXXX had a more settled life in Malaysia.

*XXXX's position*

- [15] XXXX strongly emphasised his affinity with New Zealand, his commitment to living here, and his ties to the New Zealand community. Important elements were:
- [15.1] Prior to becoming a permanent resident, he visited New Zealand to be sure that he wanted to become a resident in New Zealand.
- [15.2] They sold their home in Malaysia to relocate to New Zealand.
- [15.3] He has been living in New Zealand continuously since 2003; he has been the holder of a permanent residence visa since then.
- [15.4] New Zealand was his home, and any challenge to that was something he found emotionally troubling.
- [15.5] He and his wife have owned homes in New Zealand since 2004.
- [15.6] Their son completed part of his education in New Zealand during the disputed years and XXXX attended his son's sports and school events.
- [15.7] XXXX was involved in social and community activities in New Zealand, participating in elections and the like, in addition to social clubs and church groups.
- [15.8] He had registered with Inland Revenue in 2004.
- [15.9] He had banking facilities in New Zealand.
- [15.10] He registered with a GP.

[15.11] He voted in the general election and completed the Census.

[15.12] His friends and family attested to his connection and affinity for New Zealand.

[15.13] If New Zealand was not his home, he would have travelled more.

*Our view*

- [16] XXXX has had a connection with New Zealand since 2003. However, he also connected with Malaysia, where he is a national. He could live permanently in New Zealand since 2003, as he had a residence visa that allowed him to travel to and from New Zealand as he chose. The principal applicant for the family visas was XXXX's wife; her occupational skills made her eligible for the visa. After obtaining the visa, she worked regularly in New Zealand, but XXXX only had casual work here.
- [17] We have identified the fundamental principle that XXXX could not be a resident in both New Zealand and Malaysia at any given time. It follows our task is to determine from 2003 which of the two countries XXXX was resident in until 2 September 2013. The Ministry and XXXX agree he was resident in New Zealand from the latter date,
- [18] The Ministry has pointed out that XXXX was only in New Zealand for about 33% of his time in the relevant period. We cannot regard the respective times as definitive, as people can have a place that is their home and spend a lot of time in other places on assignments such as work or dealing with some personal matter requiring their attention. We must evaluate which country was more truly XXXX's home. XXXX has emphasised his commitment to New Zealand, and we do not doubt he is genuine. However, XXXX had less to say about Malaysia, where he was and is a national. Malaysia was his only home until a significant way through his working life. In our view, in this case, we must focus on the reasons why XXXX spent most of his time in Malaysia from 2003 until 2013.
- [19] During that period, XXXX, when he was in Malaysia, usually lived at his parents' home and sometimes stayed with other family members. He accepted that the primary purpose of being in Malaysia in the disputed period was to provide care and support for his parents. He would accompany them on the regular exercise routine, attend appointments with health professionals, and provide support.
- [20] Before 2003, XXXX was working full-time in Malaysia. After that time, he prioritised supporting his parents and worked intermittently. He said that when coming to New Zealand in 2003, he intended to have his parents also

migrate to New Zealand, but that was not possible due to his mother's failing health (starting in 2004 or thereabouts).

- [21] XXXX has an uncle, aunt, cousins and nephews in New Zealand and other family members in Australia. His wife was in New Zealand more continuously after 2003 because she had work commitments in New Zealand. Their son was pursuing his education in New Zealand, too.
- [22] One of the striking things about XXXX's time spent in New Zealand was the relatively short duration he stayed on each occasion from 2003 to 2013. He came to and left New Zealand about 30 times. He remained in New Zealand for two months or more on only three occasions. Many of these visits to New Zealand were for about a month. In contrast, XXXX remained out of New Zealand for three months or more on ten occasions, sometimes for nearly six months. When we inquired at the hearing regarding this pattern, XXXX explained that much of his travel was using family travel privileges available through a family member employed by an airline. There were restrictions on the time between the outbound and return travel for a person to get the discounted travel. That, XXXX said, was a factor in the duration of his trips to New Zealand.
- [23] While we have no difficulty accepting that XXXX had intended to migrate to New Zealand and have his parents also migrate that is not the reality of how he lived his life from 2003 to 2013. XXXX was not regularly working in New Zealand, and he and his wife decided that he should be in Malaysia as necessary to support his aging parents. XXXX lived in Malaysia during those years and visited New Zealand. Undoubtedly, he intended to move to New Zealand and make it his home when he could. However, that did not occur until 2 September 2013; only then did his connections with New Zealand make it his home. In contrast, until then, XXXX chose to live as a part of his family in Malaysia and visit New Zealand. XXXX's wife supported that by making trips to Malaysia during those years to assist with the care of his parents, and he made trips to New Zealand.
- [24] We can only conclude by a clear margin that in this case, the time that XXXX spent in Malaysia from 2003 to 2013 (about 67% of his time) reasonably reflects where he had his home. When XXXX no longer had the family commitments that kept him in Malaysia, he made his home in New Zealand.

### **Decision**

- [25] The appeal is dismissed, we are satisfied that the Ministry was correct to determine that XXXX was first resident in New Zealand from 2 September 2013.

[26] We reserve leave to determine any issues relating to the date XXXX qualified for New Zealand superannuation to the extent they are within the scope of this appeal. However, we note that aside from the uncontentious day count down to 2 September 2013, there are no apparent further issues within the scope of this appeal.

**DATED** at Wellington 17 November 2023

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**G Pearson**  
Chairperson

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**R Palu**  
Deputy Chairperson

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**R Aston**  
Member

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**M Dodd**  
Member