

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

**AND**

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

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**R Palu** (Deputy Chair)

**P Singh** (Member)

**Representation:** XXXX and YYYY presenting their own appeal

**Counsel:** T. Kanji, counsel, and N Jaura, appeals officer, for the  
Ministry of Social Development

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**DECISION**

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**Introduction**

[1] XXXX and YYYY, appeal the decision of the Chief Executive of the Ministry of Social Development (the Ministry), upheld by a Benefits Review Committee. They raise the commonly traversed issue as to whether a person who receives an overseas pension should have their entitlement to New Zealand Superannuation (NZS) reduced.

[2] A person entitled to NZS will have that entitlement reduced to the extent of their overseas pension in circumstances where the overseas pension has certain attributes. This appeal concerns whether XXXX and YYYY's United Kingdom State Pension (UK pension) falls within the category that must be offset against NZS.

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## Background

- [3] XXXX and YYYY are New Zealand citizens and have lived in New Zealand for the past 50 years. They have paid taxes in New Zealand and have contributed to the New Zealand economy for a large part of their working lives.<sup>1</sup>
- [4] Originally XXXX and YYYY are from the United Kingdom. While they lived and worked in the United Kingdom, they made contributions to the United Kingdom National Insurance Fund (NIF). As a consequence, they are both entitled to a Basic UK pension, dependent on contributions made.
- [5] The UK pension is paid to XXXX and YYYY at a reduced amount. This is because not enough United Kingdom National Insurance contributions were paid to get the full amount of a Basic UK pension. XXXX's entitlement is £43.59 per week and YYYY receives £25.79 per week. Their UK pension is paid into a trust account in the United Kingdom set up for the benefit of their children.
- [6] XXXX and YYYY were granted NZS on turning 65 years, in March 2011 and February 2014, respectively. They receive the married rate of NZS less a deduction for their UK pension. It is understood that the annual NZS deduction is \$4,563 p.a for XXXX and \$2,699.84 p.a. for YYYY.

## Legal provisions

- [7] The key provision is s 70 of the Social Security Act 1964 (the Act),<sup>2</sup> which was in force at the time the issue arose. It provides that New Zealand pension or benefits will be reduced where a person receiving that pension or benefit also receives a "benefit, pension, or periodical allowance" from overseas.
- [8] Section 70(1)(b) states that offshore pensions that are offset against NZS by identifying a:
- ... benefit, pension, or periodical allowance or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under ... the New Zealand

<sup>1</sup> During this time XXXX also spent two years working in Australia. Neither XXXX nor YYYY are entitled to an Australian pension.

<sup>2</sup> Replaced by ss 188 and 189 of the Social Security Act 2018. Section 9(3) of the Social Security Act 2018 states that the provisions of that Act are the provision of the Social Security Act 1964 Act in rewritten form and are intended to have the same effect as the corresponding provisions of the Social Security Act 1964.

Superannuation and Retirement Income Act 2001 ... which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received.

- [9] Section 70(1) also provides that certain benefits or pensions payable for injury, disability, death or war pensions are exempt, but these exemptions do not apply to XXXX and YYYY.
- [10] The scope of s 70 of the Act is very broad.<sup>3</sup> The language of s 70 does not distinguish between contributory and non-contributory schemes.<sup>4</sup> It is also not necessary to conduct a close comparative analysis between the New Zealand and overseas entitlement.<sup>5</sup> The comparison is not between individual types of pensions but a comparison between schemes of social assistance.
- [11] A genuine private saving scheme will not generally be caught by s 70 and would not be compulsory.<sup>6</sup>
- [12] The High Court and Court of Appeal have confirmed that pension payments from the United Kingdom meet the criteria for deduction under s 70(1).<sup>7</sup>
- [13] Article 15(1) of the Convention attached to the Social Welfare (Reciprocity with the United Kingdom) Order 1990 (the Reciprocity Order) is a provision to the same effect as s 70 and reinforces the provisions of s 70. It provides that the amount of any benefit which a claimant is entitled to receive under the legislation of the United Kingdom shall be deducted from the amount of benefit which would otherwise be payable under the New Zealand social security legislation. The term “benefit” is defined in s 3 of the Act and includes NZS.
- [14] Article 15 is set out as follows:

#### **Section 9**

Duplicate rights to benefit in New Zealand

#### **Article 15**

- (1) Subject to the provisions of paragraphs (3) and (4) of this Article, for the purpose of any claim to receive benefit under the legislation of New Zealand, whether by virtue of the provisions of this Convention, the former Agreements, or otherwise, the amount of any benefit which the

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<sup>3</sup> *Malster v Chief Executive of the Minister of Social Development* [2014] NZHC 1368; *Hogan v Chief Executive of the Department of Work and Income New Zealand* HC Wellington AP49/02, 26 August 2002 at [25].

<sup>4</sup> *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267 at [38] – [39].

<sup>5</sup> As above.

<sup>6</sup> *Hogan v the Chief Executive of the Department of Work and Income*, as above n 3.

<sup>7</sup> *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZCA 436; *Malster v The Chief Executive of the Ministry of Social Development*, as above n 3; and *Sheffield-Lamb v Chief Executive of Ministry of Social Development* [2017] NZHC 2201.

claimant is entitled to receive under the legislation of the United Kingdom shall be disregarded in the computation of his income and shall be deducted from the amount of benefit which would otherwise have been payable to him under the legislation of New Zealand. Provided that, in the case of a married claimant, the amount to be deducted shall be the aggregate amount of any benefit which the claimant and the claimant's wife or husband are entitled to receive under the legislation of the United Kingdom, or such part of that aggregate amount as may be determined by the competent authority of New Zealand.

- (2) For the purpose of applying the provisions of paragraph (1) of this Article, "benefit" under the legislation of the United Kingdom includes any increase of or additional amount payable therewith.
- (3) Notwithstanding any other provision of this Convention, a person—
  - (a) who is in receipt of New Zealand national superannuation otherwise than by virtue of this Convention or the former Agreements; and
  - (b) who was usually resident in New Zealand on 1 January 1970; and
  - (c) was, while so resident in New Zealand prior to that date, a contributor to National Insurance under the legislation of the United Kingdom,
 shall be entitled to receive that national superannuation without diminution, notwithstanding that he is also entitled to receive a retirement pension under the legislation of the United Kingdom.
- (4) For the purpose of any claim to receive benefit under the legislation of New Zealand, whether by virtue of the provisions of this Convention, the former Agreements or otherwise, an industrial disablement pension payable under the legislation of the United Kingdom shall be treated as if it were accident compensation payable under the legislation of New Zealand.

[15] There are two exceptions to the requirement that a UK pension be deducted. The first is that Government Occupational pensions are exempt from the regime contained in s 70.<sup>8</sup> The second exception, based on the Reciprocity Order, concerns cases where a person, resident in New Zealand on 1 January 1970 made, while resident in New Zealand, contributions to the NIF under United Kingdom legislation.<sup>9</sup> The information available does not suggest that either of these two exceptions apply to XXXX and YYYY.

[16] Section 70 also provides for two methods of reducing a person's New Zealand pension or benefit by the amount of their overseas pension. The direct payment method and the special banking option. Under the direct payment method, a person who has their overseas pension paid directly into their account, will have their New Zealand benefit reduced by the amount of overseas pension paid. The amount reduced is determined by the Chief Executive in accordance with the Social Security (Overseas Pension Deduction) Regulations 2013 (the deduction Regulations). Under the special banking option, weekly payment of UK pension is paid into a special bank account, and then to the Chief Executive.

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<sup>8</sup> The term "overseas pension" in s 70 of the Act excludes a Government Overseas Pension as defined in s 3 of the Social Security Act 1964.

<sup>9</sup> Social Welfare (Reciprocity with the United Kingdom) Order 1990, Article 15(3).

## Issue

- [17] The issue before the Authority concerns whether XXXX and YYYY's UK pension comes within the class of offshore pensions that must be deducted from NZS under s 70 of the Act.

## XXXX and YYYY's position

- [18] XXXX and YYYY strongly disagree with the direct deduction of their UK pension, which they refer to as their overseas retirement savings fund.
- [19] They consider that they have contributed to, and are entitled to, full NZS in addition to their UK pension.
- [20] They have confirmed that their UK pension is a Tier 2, Category A United Kingdom pension. They have described it as follows:
- (a) A contributory scheme with monthly contributions met from an employee's wages and a support contribution from the employer. The contributions are fully tax exempt and managed by the NIF.
  - (b) Tier 2 pensions are held in an individual account with the NIF in the owner's name and a specific account number. At no time is funding added by the United Kingdom Government from the consolidated fund. The amount paid into the fund is later paid to a person upon reaching 65 years as a retirement savings plan.
- [21] They consider that their Tier 2, Category A, United Kingdom pension does not come within s 70 of the Social Security Act 1964. The basis for this view is as follows:
- (a) Their pension is not "granted" but is earned as a result of contributions paid from wages.
  - (b) Even though the fund to which their contributions had been made was controlled by the United Kingdom Government, the pension received is not a state funded pension, and is their personal property.
  - (c) The fund is from the NIF and not from a Consolidated Revenue account into which general taxation receipts go.
  - (d) As their UK pension is a payment of their own contributions, they do not gain a "benefit" and would not disadvantage any New Zealanders by receiving both their UK pension and NZS.

- (e) Further, they do not receive their UK pension in New Zealand as it is paid into a trust account in the United Kingdom for their children and they cannot access it. As such, they consider that they have never personally received their UK pension.
- (f) Their position is claimed to be supported or acknowledged by senior officials, politicians and the judiciary. XXXX and YYYY provided a number of articles, extracts and video footage, which they consider illustrate this. This includes what they refer to as a warning to the New Zealand Government by the Ministry's former CEO, Peter Hughes, that self-funded Tier 2 retirement savings funds were not similar to NZS and were being falsely deducted under the Act; and a 2004/05 MSD Treasury Retirement Commissioner's review of s 70 direct deductions policy which XXXX and YYYY submit concluded was "Unfair, Discriminatory, Inequitable, Out of Date and Step with Other Countries Social Security Systems".

[22] XXXX and YYYY consider that the removal of any of their UK pension from their NZS is grossly unfair, unlawful and fraudulent. Deduction of their UK pension is also considered to amount to discrimination of immigrants in New Zealand, an infringement of personal property rights, and a contravention of various international instruments and the Human Rights Act 1993 and the Bill of Rights Act 1990, which provide protection from discrimination when accessing social services from Government Agencies. The reasons for these views are as follows:

- (a) XXXX and YYYY consider that the Ministry have purposely misinterpreted the provision to remove their retirement saving funds. This conduct is considered similar to the prior deductions by the Ministry of overseas pension received by a NZS recipient's spouse, the spousal deduction, and deductions of United Kingdom voluntary SERP (state earnings related pension) scheme, which they submit were both illegal, have since been cancelled, and are now being refunded by the Ministry.
- (b) The fact that they would not be entitled to their NZS if they moved overseas.
- (c) There is no information given when people emigrate or return to New Zealand, and they received no information about the effect of their UK pension on NZS until they came to pension age. If they were better informed, they would have made other decisions.

- (d) They consider that despite s 70 having been acknowledged as “unfair, discriminatory, out of date and inequitable” and unlawful, this has been consistently ignored by the Ministry, members of Parliament and the judiciary.
  - (e) The rationale and wording used by the Ministry and members of Parliament to describe the direct deduction process misinforms the New Zealand public about the true reasons why the funds are confiscated. In XXXX and YYYY’s view the funds are confiscated to subsidise NZS.
  - (f) Although, they have been told that the direct deduction applies consistently to all foreign countries they consider that it does not apply to some countries. China, Fiji, Niue and Chile have been referred to as examples.
  - (g) The fact that their UK pension is being removed from their NZS despite the fact that they have not received it personally, is considered to be a further injustice.
  - (h) The idea that receipt of both an overseas pension and NZS disadvantages other New Zealanders is contradictory to allowance for members of Parliament to receive multiple retirement schemes.
  - (i) Deduction of their UK pension has further diminished their financial position and they are living close to the breadline.
  - (j) The practice of having their contributions deducted while others, including immigrants who have spent less time in New Zealand, are able to receive full NZS, disadvantages those in XXXX and YYYY’s situation and is considered discriminatory.
- [23] XXXX and YYYY consider that the injustice could be easily resolved by paying out NZS on a pro rata basis dependent on actual years of New Zealand residency. For example, for five years of residency a person would receive 5% of NZS, 10% for 10 years and so on. It is understood that this would address the unfairness suffered by XXXX and YYYY, who have lived and paid taxes in New Zealand for the majority of their lives.
- [24] XXXX and YYYY require payment of full NZS and the return of all monies deducted since 2014.
- [25] XXXX and YYYY raised a number of issues regarding perceived deficiencies in the Benefits Review Committee process, and the

Ministry's decision-making and evaluations generally. We put that to one side as this appeal is a rehearing that determines the material issues afresh.<sup>10</sup>

### **The Ministry's position**

- [26] The Ministry submits that the United Kingdom State Pension is paid for the same contingency, being old age, for which NZS is paid and the pension scheme is administered as part of a programme of social security by the United Kingdom Pension Service, a division of the United Kingdom Department for Work and Pensions. It meets the criteria in s 70.
- [27] It submits that s 70 is designed to identify overseas pension schemes that are similar in nature to the New Zealand social security scheme. The policy does not distinguish between pensions funded by compulsory contributions and pensions funded by taxation as long as they are administered by or on behalf of the government responsible for paying the pension.
- [28] While there may be differences to the way NZS and state pensions in other countries are funded, both schemes provide state pensions that are paid for the same or similar reasons. The Authority and New Zealand Courts have also determined that the UK pension meets the criteria of s 70. The Ministry also referred to the High Court decisions in *Dunn v Chief Executive of the Ministry of Social Development*,<sup>11</sup> *Malster v Chief Executive of the Ministry of Social Development*,<sup>12</sup> and *Sheffield-Lamb v The Chief Executive of the Ministry of Social Development*.<sup>13</sup>

### **Discussion**

- [29] In enacting s 70, Parliament has determined that those who qualify for a pension in another jurisdiction, and the pension is that jurisdiction's way of providing for the same contingencies as New Zealand benefits, the offshore entitlement will be offset against the entitlement in New Zealand.
- [30] The key considerations under the provision are whether or not the payments are for "the contingencies" for which NZS (or other social

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<sup>10</sup> The functions of the Authority are discussed in the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*. [2007] NZSC 55.

<sup>11</sup> As above n 4.

<sup>12</sup> As above n 3.

<sup>13</sup> As above n 7.



welfare) is paid, and whether the payments are administered by, or made on behalf of, the government of the country in question.

- [31] This direct deduction policy has been in place in New Zealand since 1938. The policy reason is so New Zealand taxpayers are not expected to expend money to provide a retirement superannuation that is greater than what a New Zealand taxpayer would receive if they lived and worked for their entire life in New Zealand.
- [32] United Kingdom retirement pensions are covered under the Social Security Contributions and Benefits Act 1992. This provides for a program of benefits and pensions that include both contributory benefits (Category A and B retirement pensions) and non-contributory benefits (Category C and D retirement pensions).
- [33] XXXX and YYYY's contributions to the NIF were compulsory contributions made under the legislation which applied in the United Kingdom at the time. There is no evidence that any of the contributions made by XXXX or YYYY were voluntary.
- [34] XXXX and YYYY's overall position is that their Category A payments from the NIF has been incorrectly classified as a state pension under the direct deductions policy in s 70 of the Act. They say that the NIF is not a second pension and is a personal retirement savings fund which is built up from contributions made from their wages and contributions by their employer. XXXX submits that it is not a tax or paid from the United Kingdom Government consolidated fund and its characteristics include a personal bank account in their names with a specific account number. XXXX contends that it is similar to KiwiSaver with the exception that there is no Government contribution and the contributor does not receive interest or benefit from monies invested into NIF. In essence it is considered that the payments they receive are simply disbursements of their own money.
- [35] The High Court, the Court of Appeal, and the House of Lords in the United Kingdom, have expressed the view that personal contributions to the NIF are no different to general taxation, with the difference being only a matter of public accounting and not one of substance.<sup>14</sup>
- [36] In response, XXXX considers that their NIF contributions are different as they do not go into the consolidated fund are not a tax. He referred to a Department of Works and Pensions letter and confirmation in a

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<sup>14</sup> *Dunn v Chief Executive of the Ministry of Social Development*, as above n 4; *Dunn v Chief Executive of the Ministry of Social Development*, as above n 7, at [7] and [8]; and *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 [2006] 1 AC 173.

2016 letter from the United Kingdom HM Treasury, which he submitted confirmed that the contributions were not a tax in law. However, the letters relied on by XXXX do not alter the view that contributions into the NIF fund are for United Kingdom benefits and pensions in the same way that the New Zealand Government uses general tax revenue to finance New Zealand benefits and pensions. The United Kingdom HM Treasury letter confirms that the income from NIF also goes to the United Kingdom National Health Service.

- [37] The documentation available also makes it clear that the pension paid to the XXXX and YYYY are paid to them by the Pension Service which is part of the Department for Work and Pensions, which is a department of the United Kingdom Government.
- [38] The NIF is administered by the United Kingdom Government. There is no foundation for any doubt that the scheme is administered by or on behalf of the Government of United Kingdom.
- [39] The UK pension in issue is part of a compulsory scheme to ensure United Kingdom residents have an income when they are of an age when they not be in paid work. It is the United Kingdom's means of meeting retirement needs and, accordingly, it corresponds with the contingencies for which NZS is paid under the New Zealand Superannuation and Retirement Income Act 2001.
- [40] Furthermore, XXXX and YYYY have not established that they have a personal property right to withdraw their money from the scheme, or of any other kind. The evidence is that their employee pension is an unexceptional compulsory public pension scheme, where funds are pooled, and participants are entitled to pensions that reflect their time of participation and contributions. Regardless, that is not the criterion on which the New Zealand legislation turns. *Appellant v Chief Executive of the Ministry of Social Development*<sup>15</sup> demonstrates that personalisation of entitlements does not exclude a pension scheme from the obligation to offset entitlements against NZS entitlements.
- [41] [The applicant's witness], who is also personally affected by the direct deduction of his UK pension, gave evidence for XXXX and YYYY. Like XXXX and YYYY, [The applicant's witness] has spent many years campaigning against the personal unfairness of the direct deduction policy in s 70 of the Act and is well familiar with it and related law and commentary. [The applicant's witness] expressed similar views to XXXX and YYYY and referenced similar information. He considered

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<sup>15</sup> [2017] NZHC 711

that a Tier 2 contributory UK pension was privately funded and required different treatment to a state funded asset. [The applicant's witness] referred to various High Court cases and a case in the Human Rights Review Tribunal which concerned either government occupational pensions and/or spousal deduction.

[42] [The applicant's witness] also considered that the Reciprocity Order should not apply to social security pensions. He also considered that the word "benefit" in Article 15 of the Reciprocity Order referred to Class C State pensions and not Class A contributory pensions received by XXXX and YYYY.

[43] The High Court in *Dunn* considered a Category A pension and had little difficulty finding that it came within the meaning of s 70(1)(b).<sup>16</sup> [The applicant's witness]'s material provided no basis to depart from this. There is also no basis for the argument that the Reciprocity Order does not apply to contributory benefits. In *Dunn*, the High Court found that it is plain from Article 2 of the Reciprocity Order that its provisions apply to the United Kingdom legislation.<sup>17</sup> The High Court also found that the UK pension is clearly a "benefit" as that term is used in Article 15(1).<sup>18</sup>

[44] In the course of their submissions XXXX and YYYY and [The applicant's witness] referred to various international instruments. They consider that removal of their UK pension contravenes and breaches a number of international instruments, including the International Convention on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights, and the right not to be arbitrarily deprived of property or means of subsistence.

[45] It is well established that statutes should be interpreted in a way that is consistent with New Zealand's international obligations, where possible.<sup>19</sup> The consequence is that any statutory discretion should be exercised in a way that is consistent with applicable international obligations.<sup>20</sup> However, there is no discretion to override the criteria expressly required under the Act under international instruments referred to or in the Bill of Rights Act 1990 or the Human Rights Act

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<sup>16</sup> As above n 4, at [29] – [30].

<sup>17</sup> A [44].

<sup>18</sup> As above.

<sup>19</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 265-266; (1993) 1 HRNZ 30 at 40-41; *Huang v Minister of Immigration* [2008] NZCA 377 at [34]; *Ye v Minister of Immigration* [2009] NZSC 76 at [21] - [24].

<sup>20</sup> *Huang*, as above, at [34].

1993. That is the case despite perceptions of unfairness arising from application of the relevant legal provisions.

- [46] Furthermore, XXXX and YYYY's personal property is not taken from them, their UK pension is merely taken into account when assessing their entitlement to NZS. They come within the relevant legislative provisions. That treatment is the outcome demanded by the unsurprising policy that persons who were absent from New Zealand for part of their adult lives should not be in a better financial position than people who were in New Zealand for all their adult lives, under the NZS regime.

#### *Deduction rates*

- [47] As their UK pension is paid into a United Kingdom trust account, XXXX and YYYY's NZS is reduced via the direct deduction method. XXXX and YYYY consider that the Ministry use a conversion rate that disadvantages them and further reduces their NZS. They consider that the conversion rate applied by the Ministry is on a constant downward trend, benefits the Ministry, and is applied incorrectly. The deductions they see do not correlate with exchange rates they have plotted over a six-month period, which fluctuate up and down.
- [48] Regulation 4 of the deduction Regulations set out a reduction formula. This requires factoring in the rate of the overseas pension. Regulation 5 determines which exchange rate is used. The Ministry has confirmed that it follows the calculation in accordance with the deduction Regulations and formula and uses an exchange rate that is most advantageous to the pensioner. The deduction Regulations are prescriptive. The evidence does not establish an error in the way the Ministry has applied the rates.

#### **Decision**

- [49] We are satisfied that the appeal must be dismissed as s 70 of the Act applies to the UK pension received by XXXX and YYYY.

**DATED** at Wellington 15 May 2023

**Rachel Palu**  
Deputy Chair

**Pravina Singh**  
Member