

(2024) NZSSAA 02

Reference No. SSAA  
80/2022

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

AND

**IN THE MATTER**  
of an appeal  
by XXXX of  
Auckland  
against a  
decision of a  
Benefits  
Review  
Committee

## **BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**R Palu** Chairperson

**J Ryall** (Member)

**Date of hearing:** 15 December 2022 and 15 February 2023

**Appearances:** XXXX

E Holmes, counsel, and P Siueva and A Katona, appeals officers,  
for the Ministry of Social Development

**Decision:** 31 January 2024

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### **Decision**

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1. After the hearing of this appeal, the need for further information was identified and this involved a further process where further submissions were requested.

Overall, this decision has taken considerably longer than anticipated and I, the Chairperson, apologise to XXXX for the delay.

### **Introduction**

2. XXXX is a pensioner entitled to New Zealand Superannuation (NZS). She is originally from Russia and she is also entitled to a Russian age pension (Russian pension). XXXX's entitlement to NZS has been reduced by the amount of her Russian pension.
3. XXXX accepts that her Russian pension, when received, should be deducted from her NZS. However, since November 2021, as a consequence of the Russian invasion of Ukraine, related sanctions, and the suspension of Russian pension payments by the Russian Government, XXXX has not received her Russian pension.
4. XXXX appeals against the Ministry's decision to continue the direct deduction of her Russian pension from her NZS. The Ministry's decision was reviewed and upheld by a Benefits Review Committee (BRC).

### **Background**

5. It is useful to set out the general background to the payment and subsequent suspension of XXXX's Russian pension, which is not contentious.
6. Until November 2021 XXXX received her Russian pension into her New Zealand bank account in quarterly instalments.
7. In response to the Russian invasion of Ukraine in February 2022, New Zealand alongside other countries adopted sanctions against Russia via the Russian Sanctions Regulations 2022.<sup>1</sup> While these Regulations allow for some payments to be received from sanctioned banks, the Authority understands that Russian banks are also prohibited from using the International Money Transfer System, SWIFT, to transfer money overseas.<sup>2</sup>
8. In response to the restrictions, the Russian Government issued Decree No. 757 on 26 April 2022 formally suspending all Russian pensions paid overseas. This

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<sup>1</sup> The Russian Sanctions Regulations 2022 came into force on 18 March 2022. Regulation 10 prevents New Zealanders from dealing with an asset that is owned or controlled by a sanctioned person. Regulation 11 prohibits New Zealanders from dealing with a service that is provided by a sanctioned person. Sberbank is a sanctioned person under Schedule 2 of the Regulations.

<sup>2</sup> From 12 March 2022 most Russian banks were prohibited from using the SWIFT service to send payments to any other bank or institution in the world.

Decree and subsequent Decrees which replaced it,<sup>3</sup> allow a person to apply to reinstate their Russian pension if they can meet certain bank account conditions. The conditions require a person to have a Russian bank account in the Russian Territory or a bank account outside of Russia which could accept a transfer in roubles.

9. In March 2023 Decree No. 493 superseded earlier Decrees and restated that pension entitlements are suspended by law unless and until the bank account conditions are met, or 'restrictive measures of an economic nature' which prevent the transfer of payments outside of Russia are lifted. In such event Russian pension payments would be restarted and backdated. Decree No. 493 applies indefinitely.
10. XXXX is unable to open a bank account in Russia or a bank account with a credit institution outside the Russian Territory which can accept payment in roubles.
11. It is not disputed that XXXX is not receiving and is unable to access her Russian pension. We accept that XXXX's Russian pension has been suspended since her last payment in November 2021.
12. As already stated, the Ministry has continued to deduct XXXX's Russian pension from her NZS. The deduction is made under ss 187 to 189 of the Social Security Act 2018 (the Act).
13. XXXX's NZS is paid at the single living alone rate. The average amount deducted from XXXX's NZS is approximately \$71 per week. This varies depending on the exchange rate.

#### **Case for the appellant**

14. XXXX considers that more flexibility is required to cover the type of situation arising out of the Russian invasion of Ukraine to ensure that those who rely on NZS and Russian pension payments, receive them.
15. As a pensioner, XXXX is acutely affected by the continued deduction of the Russian pension. Her evidence is that:
  - (a) The situation has affected her mental wellbeing.

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<sup>3</sup> Decree No. 1483 replaced Decree No. 757. Decree No. 1483 was replaced by Decree No. 493.

- (b) Her income related rent calculation also takes into consideration her entitlement to a Russian pension, which she does not currently receive.<sup>4</sup>
- 16. XXXX is happy for her Russian pension to be transferred to the Ministry if and when it is received, and she is willing to enter into an arrangement to commit to that.
- 17. XXXX wants the Ministry to reimburse her for amounts deducted since January 2022.

### **Case for the Ministry**

- 18. The Ministry empathises with XXXX's situation. However, it considers that as XXXX remains entitled to receive a Russian pension, it is required to deduct her Russian pension from her NZS under the applicable provisions in the Act and the Social Security Regulations 2018 (the Regulations).
- 19. In the Ministry's view, although XXXX's Russian pension payment has been paused while the disruptions are in place, XXXX could access her Russian pension if she had an account that met the bank account conditions.
- 20. The Ministry also confirmed that the ability for an alternative arrangement under s 190, known as the 'special banking option', which allows full payment of NZS in exchange for an election that an overseas pension is paid to the Ministry, is not possible in XXXX's case. This is because such arrangements can only be made in relation to pensions from specified countries which do not include Russia.
- 21. The Ministry also submits that the legislation only provides for the default method and the special banking option,<sup>5</sup> and it has no ability to enter into any other arrangements to address XXXX's situation.

### **Issues**

- 22. The general issue in this appeal concerns whether the Ministry is required to continue the direct deduction of XXXX's Russian pension despite the fact that it has been suspended due to circumstances beyond XXXX's control. Further information filed by XXXX after the hearings identified the essential question underlying that issue as whether she is still "entitled to receive" an overseas

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<sup>4</sup> The appeal does not concern the Ministry's decision on the calculation of XXXX's income related rent.

<sup>5</sup> *Sheffield-Lamb v The Chief Executive of the Ministry of Social Development* [2017] NZHC 2201 at [14].

pension under s 188 of the Act. The parties were given the opportunity to make submissions on this specific question. Neither did so.

23. If continued deduction is required, a further issue of whether the Ministry can enter into an alternative arrangement under s 190 of the Act is also relevant.

### **Relevant Legislation**

#### *The Act's purpose and principles*

24. The purposes of the Act are set out in s 3. Relevant to this appeal the purposes include:
- (a) To enable the provision of financial and other support as appropriate—  
...
  - (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
  - (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account—
    - (i) that, where appropriate, they should use the resources available to them before seeking financial support under this act; and
    - (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:  
...
25. Section 4 provides general principles that every person exercising a duty, function or power under the Act must have regard to. The provision includes the following principle:
- (d) People for whom work is not appropriate should be supported in accordance with the Act.

#### *Reduction of benefit due to overseas pension*

26. The direct deduction provisions in the Act provide a mechanism for assessing the amount of New Zealand benefit payable to people who are eligible for both a New Zealand benefit and a state-administered pension from another country.
27. Part 4 sets out factors that may affect or reduce a benefit. In Subpart 2 of Part 4, ss 187 to 191 cover the situation where a benefit is reduced due to an overseas pension.
28. The provisions provide for two methods of reducing a benefit where a person is entitled to receive a New Zealand benefit and an overseas pension, the default method and the special banking option.

29. The default method is for the person's New Zealand benefit to be reduced by the amount of the overseas pension. This is the method applied in XXXX's case. This method is set out in ss 187-189.
30. Section 187 defines an "overseas pension".
31. Section 188 defines a "person affected by the receipt of an overseas pension". Relevant to this appeal s 188 provides:

**188 Persons affected by receipt of overseas pension**

A person (P) is a person affected by the receipt of an overseas pension if P is a person who is qualified to receive a benefit under the NZ benefits legislation and –

- (a) P is entitled to receive or receives an overseas pension in respect of any of the following persons:
  - (i) P:
  - ...
32. Section 189 provides that the rate of a benefit paid to a person affected by the receipt of an overseas pension must be reduced by the amount of the overseas pension as determined by the Ministry under regulations made under section 434.
33. Section 190 allows the Ministry to enter into an arrangement with a person affected by receipt of an overseas pension. The arrangement must be in accordance with the regulations made under s 434 of the Act. The arrangement is referred to above as the 'special banking option'. It allows the Ministry to pay a person their full rate of New Zealand benefit in consideration of an authority from the person for their overseas pension to be paid to the Ministry.
34. The regulations are made pursuant to s 434 of the Act.
35. Part 4 of the Regulations provides for factors affecting benefits. Subpart 3 (regs 118 to 123) deal with the effect of an entitlement to an overseas pension. Subpart 4 (regs 124 to 128) deal with overseas pension deductions. This subpart includes the reduction formula (reg 125), calculation rate (effectively the exchange rate) (reg 126) for the default method under s 189 of the Act.
36. For regs 119 to 123, reg 118 provides that a "person affected by the receipt of an overseas pension" has the same meaning as in s 188 of the Act.
37. Regulations 129 to 136 (in subpart 4) also provide further detail to enable the 'special banking option' under s 190 of the Act.

38. Regulation 130 specifies that an alternative arrangement is one made with an eligible overseas pensioner. Under reg 129 an overseas pensioner is one who meets the criteria in reg 133.
39. The criteria in reg 133 requires that the overseas pensioner is not an undischarged bankrupt and is entitled to receive an overseas pension from one of several specified countries. The Government of Russia is not included in the list of specified countries.

### Discussion

40. As stated above, the first issue essentially concerns whether XXXX remains “entitled to receive” an overseas pension under s 188 of the Act. This issue concerns the interpretation of s 188 of the Act and whether, within the context of the applicable legislation, “entitled to receive” a pension requires entitlement to actual receipt.

### *Statutory interpretation – general approach*

41. Orthodox principles of statutory interpretation require the meaning of the legislation to be ascertained from its text and in the light of its purpose and context.<sup>6</sup>
42. The High Court has referred to adopting a “generous and unniggardly” interpretation.<sup>7</sup>
43. In *Brosnahan v Chief Executive of the Ministry of Social Development*, Kos J confirmed the relevance of this approach for social policy legislation:  
[33] I do not think that interpretative approach should be confined to that Act, as if it were *sui generis*. In my respectful opinion it is applicable to social policy legislation generally. The reason for that is obvious. In a context such as the present Act, Parliament is dealing with the expectations of the poor and disadvantaged. Small individual sums of money may have very significant personal consequences. Where those expectations are the fair and reasonable product of statutory language, and are consistent with the overall statutory purpose, they are not, I think, to be read down except by language of the clearest kind. Lines of exclusion in a welfare context need to be drawn clearly.
44. Ultimately, this involves interpreting the text of the enactment in light of its purpose in the usual way.<sup>8</sup>

### *The statutory scheme and purpose*

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<sup>6</sup> Legislation Act 2019, s 10(1).

<sup>7</sup> *Beneficiary AP v Chief Executive of Ministry of Social Development* [2019] NZHC 2208 at [8]; *Brosnahan v Chief Executive of the Ministry of Social Development* [2013] NZHC 2618 at [32]; and *McKeefry v Accident Compensation Corporation* [2019] NZHC 612 at [7].

<sup>8</sup> *Brosnahan v Chief Executive of the Ministry of Social Development* as above, at [33]; and *Beneficiary AP v Chief Executive of Ministry of Social Development* as above at [9]. *McKeefry v Accident Compensation Corporation* as above, at [8].

45. It is useful to consider the purpose of the direct deduction provisions, the specific purpose of s 188 and the Act's broader purposes expressed in s 3.
46. As a starting point, the general purpose of NZS is to assure qualifying New Zealand residents a basic standard of living in their retirement.<sup>9</sup>
47. The rationale for the direct deduction policy is to ensure that all qualifying New Zealand residents, including those who have spent all their working lives in New Zealand and those who have lived overseas for a proportion of their life, receive an equitable level of state administered pension, whether the amount of that pension is fully funded by New Zealand, partially funded by New Zealand and another country, or fully funded by another country.<sup>10</sup> The policy ensures that someone who is entitled to payment from a scheme run by an overseas country should not be advantaged over a person who has spent all of their life, in New Zealand. The policy also helps to reduce funds required to support NZS.
48. The direct deduction policy and provisions of the Act work to ensure that a person receives a total amount equivalent to NZS, but no more, and no less, than their New Zealand benefit entitlement.
49. The purpose of s 188 within the context of the deduction provisions is to define 'a person affected by the receipt of an overseas pension'. As stated above such a person's New Zealand benefit is to be reduced by an overseas pension under s 189.
50. The phrase "a person affected by receipt of an overseas pension" in ss 188 and 189 was not included in the comparative provision that preceded the Act, s 70(1) of the Social Security Act 1964.
51. The 2018 Act rearranged, rewrote and replaced the 1964 Act to achieve better coherence and consistency. The provisions of the 2018 Act in rewritten form are intended to have the same effects as the corresponding provisions in the 1964 Act.<sup>11</sup> In our view, the phrase reflects the overall purpose of the direct deduction provisions, which are concerned with those affected by the receipt of an overseas pension.
52. In terms of the more general broader purposes of the Act in s 3, the social welfare regime is set up to help people in XXXX's situation.<sup>12</sup> There are also limits to

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<sup>9</sup> *McKeogh v Attorney General* [2020] NZHRRT 39 (2020) 12 HRNZ 289, at [35].

<sup>10</sup> *McKeogh v Attorney General* (2020) 12 HRNZ 289; [2020] NZHRRT 39 at [43]; *SSA 80/16* [2016] NZSSAA 110 at [18]; *SSA 151/16* [2017] NZSSAA 037 at [28].

<sup>11</sup> Social Security Act, s 9(3).

<sup>12</sup> Social Security Act 2018, s 3(a)(i).



assistance and where appropriate, a person should use alternative resources available to them.<sup>13</sup> The scheme of the Act balances these general purposes.

53. Against that background and the context of s 188 set out above, we approach the text of the provision.

#### *Section 188*

54. The Ministry's position is that even though XXXX is not currently receiving a Russian pension, she is still "entitled to receive" it and XXXX therefore comes within s 188. The Ministry acknowledges that the legislation was not drafted with XXXX's situation in mind, however, in its view the legislation is prescriptive and it has no discretion not to deduct the Russian pension.
55. The Ministry also referred to this Authority's decision in *SSAA 32/16*,<sup>14</sup> in its submissions concerning the ability to enter into an alternative arrangement under s 190. In *SSAA 32/16* the Authority referred to s 70(1) of the 1964 Act, the comparative provision to s 188 in the 2018 Act, and stated:

"[22] It is entirely unsurprising that s 70(1) is triggered both where a person in fact receives a pension (without having to be satisfied they had a legal entitlement), and where a person is entitled to a pension even if they have not received it. There is nothing in the words that suggest their function or effect is to create a discretionary power as to when deductions will be made against New Zealand Superannuation. On the contrary, s 70(1) has the mandatory word "shall"; that demands that New Zealand Superannuation will be reduced if either condition exists."

56. However, that decision concerned when the exchange rate should be applied and whether an overseas pension could be deducted when it was actually received, instead of when each NZS instalment was made. The Authority found that the alternatives in s 188 were not related to the timing of the deductions of an overseas pension from NZS, but concerned when the requirement to deduct was triggered.<sup>15</sup> The decision did not concern or comprehensively consider when the requirement to deduct was triggered and the decision has limited relevance to interpretation of s 188 in the context of this case.
57. We consider that an interpretation that there is entitlement to receive actual payment is reasonably available and is not inconsistent with the language in the s 188.
58. The phrase "entitled to receive" uses both the words "entitled" and "receive", not just the word 'entitled'. In our view, the plain meaning of both words allow an understanding that the entitlement will be received.

<sup>13</sup> Social Security Act 2018, s 3(c)(ii).

<sup>14</sup> [2018] NZSSAA 24

<sup>15</sup> At [20].

59. It is also necessary to consider the purpose or point of the phrase “entitled to receive” as an alternative to “received”, within s 188.
60. We consider that “entitled to receive” addresses the situation where people may have little incentive to test for or obtain an overseas pension, a concern also addressed in s 173. This covers the situation where a person is entitled to an overseas pension but for a variety of reasons the person may have chosen not to receive it or not to receive it directly.
61. Section 188 could also cover the situation where a person’s entitlement to an overseas pension is being processed, but temporarily unpaid, or where someone is unaware, they could be eligible for an overseas pension and receive it years later. In the latter, deduction of the overseas pension is unlikely to be considered until entitlement to an overseas pension is established.
62. Overall, we consider that the phrase “entitled to receive” is intended to operate where a person is entitled to receive an overseas pension but does not access their entitlement due to circumstances of their choosing or within their control, or where entitlement has been confirmed and actual receipt is imminent. In other words where there is entitlement to actual receipt. This is a different situation to one where a person is not able to receive their overseas pension entitlement due to reasons well beyond their control, as is the situation in this case.
63. Such an interpretation is consistent with the Regulations made under s 434 which contemplate the actual receipt of an overseas pension, and, prescribe the mechanics of receipt of that pension, the deduction from the NZ benefit, and payment to the beneficiary.
64. This interpretation is also consistent with the overall purpose of the direct deduction provisions, which stop a beneficiary from receiving more than their entitlement by deducting the amount of an overseas pension from a person who is affected by receipt of an overseas pension, and is aimed at actual receipt.
65. The broader purposes of the Act concern the provision of financial support where appropriate and require people to use resources available to them, where that is also appropriate. In the situation where a person’s entitlement is not available to them due to reasons outside their control, it is not possible or appropriate for them to use these resources, or appropriate to decline support.
66. Accordingly, as the provision does not preclude an interpretation encompassing entitlement to actual receipt, a purposive approach requires such an interpretation in the circumstances we have identified.

*Does s 188 apply to XXXX's situation?*

67. In XXXX's situation, where actual receipt of entitlement is well beyond her control and is uncertain, she cannot be said to be "entitled to receive". In reaching this conclusion we note that it is not appropriate for us to extend our consideration beyond the situation in this case.
68. If and when a date for payment or a back payment can be ascertained, the Ministry has the power to review XXXX's entitlement under s 304 of the Act. The Ministry's ability to review, would also address any concern around XXXX receiving more than a person who has spent all of their life in New Zealand. XXXX has also expressed her willingness to pay her Russian pension to the Ministry if and when it is received.

*Conclusion*

69. On a purposive approach, the words "entitled to receive" in s 188 require an entitlement to actually receive and excludes circumstances where a person is unable to receive their entitlement due to reasons well beyond their control.
70. XXXX is not able to receive her Russian pension due to reasons well beyond her control, and she is not a person affected by the receipt of an overseas pension as defined in s 188.
71. Given this finding it is not necessary to consider the second issue which concerns the Ministry's ability to enter into an alternative arrangement under s 190 of the Act. However, we accept that the Ministry may only enter into an arrangement that is in accordance with the Regulations made under s 434 of the Act. The Regulations are prescriptive and make it clear that only arrangements which meet the conditions in the Regulations apply. As XXXX does not receive an overseas pension from one of the listed countries, there is no ability to enter into an arrangement under s 190.

**Decision**

72. For the reasons given above the appeal is allowed. XXXX is entitled to unabated NZS from the time she stopped receiving her Russian pension.
73. Leave is reserved for either party to apply for directions regarding any incidental matters necessary to fully resolve the appeal.

**Costs**

74. The Authority may allow the appellant the costs of bringing all or part of the appeal when an appeal is allowed, either in whole or in part, or if the matter is referred back to the Ministry.<sup>16</sup>
75. Unless costs are resolved by agreement:
- (a) XXXX is to file information on any costs incurred in bringing this appeal within 15 working days of the date of this decision.
  - (b) The Ministry is to provide any response within ten working days of receipt of any cost information filed for XXXX.
  - (c) The parties may seek to vary the timetable by agreement by email addressed to the case manager.

**Dated at Wellington** this 31<sup>st</sup> day of January 2024

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**R. Palu**  
Chairperson

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**J. Ryall**  
Member

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<sup>16</sup> Social Security Regulations 2018, reg 255.