

[2018] NZSSAA 60

Reference No. SSA 97/18

**IN THE MATTER** of the Social Security Act 1964

**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

**C Joe** - Member

**Hearing** at Auckland on 26 November 2018

### **Appearances**

The appellant in person

P Siueva for the Ministry of Social Development

## **DECISION**

### **Background**

- [1] XXXX (the appellant) was born in Indonesia. He came to live in New Zealand in October 1998 and was granted permanent residency in November 1999. On 20 January 2018, the appellant turned 65 years of age and applied for New Zealand Superannuation (NZS). He appeals the decision of the Ministry of Social Development, upheld by a Benefits Review Committee, to decline this application because he had not been present in New Zealand for 10 years.
- [2] On the date that he turned 65, the appellant had been in New Zealand for a total of 3,108 days, not the 3,650 days required for entitlement to NZS.

## Relevant law

- [3] Section 8 of the New Zealand Superannuation and Retirement Income Act 2001 (NZSRIA) sets out the residential qualifications 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 in New Zealand for a period or periods aggregating not less than 5 years since attaining the age of 50 years.
- [4] The Ministry accepts that at the date of his application for NZS the appellant met the requirement in s 8(a) to be ordinarily resident in New Zealand at the date of application, and the requirement in s 8(c) to have been present for 5 years since attaining the age of 50 years.
- [5] The appellant accepts the Ministry's calculation, based on Customs records, of the number of days that he has been present in New Zealand.
- [6] The issue that we must decide is whether he was entitled to NZS at the time that he applied, even though he did not meet the requirement in s 8(b) of NZSRIA to be present in New Zealand for a period of 10 years.

## The case for the appellant

- [3] The appellant says that New Zealand has been his home for 20 years and he has worked and lived here consistently. He explained that the only reason he spent a significant amount of time out of New Zealand when he first arrived was to visit Indonesia to care for his elderly mother who was not well. The appellant stated that this was expected of him by his culture and he was the only son who could take this role. He did not work overseas and when he was away felt that New Zealand was his home. He said that after his mother died he did not leave New Zealand.
- [4] The appellant believes that an exception should be made in his case because of the length of time he has been a New Zealand resident and because he left New Zealand only to fulfil family duties.

## The case for the Ministry

- [5] It is the Ministry's position that it must apply the law strictly in this case. Ms Siueva said that, although exceptions are provided in ss 9 and 10 of

NZSRIA, the appellant does not fit within any of them. Therefore, he will not be eligible for NZS until he has physically been present for the required number of days.

### **Discussion**

[6] As the Ministry accepts, the appellant's home is in New Zealand and he has made a life for himself and his family here which includes a commitment to his church and the business community. We accept that he is a valued member of those communities and considers that New Zealand is his permanent home. We appreciate that it would have been a shock to the appellant that, after some 20 years as a resident, he did not qualify for NZS when he turned 65.

[7] However, NZSRIA does not provide the Ministry with any discretion to vary or waive the specific requirement in s 8(b) for physical presence in New Zealand. As the High Court concluded in *S v The Chief Executive, Ministry of Social Development*,<sup>1</sup> the residential qualification in s 8 of NZSRI is a mandatory requirement. As the High Court observed, a person must be physically present in New Zealand for the specified periods in order to qualify for NZS.

[8] Therefore, we conclude that, at the date of his application for NZS, the appellant did not meet the requirement in s 8(b) of the NZSRI to have been present in New Zealand for 10 years. The Ministry was correct to decline his application for NZS. As the appellant understands, he can reapply for NZS when he meets the 10 year requirement.

### **Order**

[9] The appeal is dismissed.

**Dated at Wellington** this 28<sup>th</sup> day of November 2018

**S Pezaro**  
Deputy Chair

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<sup>1</sup> *S v The Chief Executive, Ministry of Social Development* [2011] NZAR 545.

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**C Joe**  
Member