IN THE COURT OF APPEAL OF NEW ZEALAND

CA351/2014
[2014] NZCA 611

BETWEEN	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Appellant
AND	DAWN LORRAINE GREENFIELD Respondent

Hearing: 30 October 2014

Court: Wild, White and French JJ

Counsel: M J Andrews and N E Gray for Appellant
P D McKenzie QC and A J McGurk for Respondent

Judgment: 12 December 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The High Court erred in answering the following questions of law "Yes" when in both cases the answer should have been "No":

(i) Question: Did the Social Security Appeal Authority (the Authority) err in law by holding that a missionary must show that her settled life is in New Zealand and absences from New Zealand are temporary, in order to be "ordinarily resident" in New Zealand [under s 8(a) of the New Zealand Superannuation and Retirement Act 2001]?

Answer: No.

(ii) Question: Did the Authority err in law in its application of the meaning of "ordinarily resident in New Zealand" to Mrs Greenfield's situation?

Answer: No.

B The appeal is allowed.

C There is no order for costs.

REASONS OF THE COURT

(Given by White J)

Introduction

[1] The respondent, Mrs Greenfield, is a New Zealand missionary who with her husband has lived in Singapore since 1993. Her 2012 application for New Zealand superannuation was declined by the appellant, the Chief Executive of the Ministry of Social Development (the Chief Executive), on the ground that in terms of s 8(a) of the New Zealand Superannuation and Retirement Act 2001 (the Act) she was not "ordinarily resident" in New Zealand.

[2] The Chief Executive's decision was upheld by a Benefits Review Committee and by the Social Security Appeal Authority (the Authority).[1]

[3] To assist Mrs Greenfield to exercise her right of appeal to the High Court on questions of law under s 12Q of the Act, the Authority posed the following three questions for the Court:

(1) Did the Authority err in law when holding s 10 of the Act is directed towards determining residence requirements in s 8(b) and (c) of the Act?

(2) Did the Authority err in law by holding that a missionary must show that her settled life is in New Zealand and absences from New Zealand are temporary, in order to be considered "ordinarily resident" in New Zealand?

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[1] *An appeal against a decision of the Benefits Review Committee* [2013] NZSSA 14 [Authority's decision].

(3) Did the Authority err in law in its application of the meaning of "ordinarily resident in New Zealand" to Mrs Greenfield's situation?

[4] With the parties in agreement that the first question should be answered "Yes", the High Court after deliberation answered all the questions "Yes".[2] By consent, leave to appeal to this Court in respect of the three questions was granted by the High Court.[3]

[5] As the parties remain in agreement that the first question should be answered "Yes", it is only necessary for us to answer the second and third questions.

Factual background

[6] The undisputed factual background is conveniently summarised in the Authority's decision:

> [3] The appellant [Mrs Greenfield] and her husband are missionaries. They have lived in Singapore since 1993. They work for an international missionary organisation.
>
> [4] The appellant attained the age of 65 years on 1 February 2012.
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> [5] She made application for New Zealand Superannuation on 9 March 2012 during the course of a visit to New Zealand. In her application the appellant noted that she did not normally live in New Zealand. Her application was declined.
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> [6] The appellant meets the eligibility requirements for New Zealand Superannuation that she has lived in New Zealand for 10 years since attaining the age of 20 years and five years since attaining the age of 50 years. Her application was declined because it was considered that she did not meet the requirement of s 8(a) of the New Zealand Superannuation and Retirement Income Act 2001 namely that she be ordinarily resident in New Zealand on the date of her application.
>
> [7] The appellant confirmed in evidence to the Authority that the base for her work is in Singapore but that she and her husband travel to other countries in South East Asia on a regular basis. They have residence in Singapore and renew their visas every five years. They are eligible to apply for Singapore citizenship but as they intend to return to New Zealand when they finish their missionary work they have not done so. Their present Singaporean residence visa has two more years to run.

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2 *Greenfield v Chief Executive of the Ministry of Social Development* [2013] NZHC 3157 [High Court judgment].

3 *Greenfield v Chief Executive of the Ministry of Social Development* [2014] NZHC 1199.

[8] The appellant and her husband pay tax in Singapore and non resident tax on their income from New Zealand in New Zealand. They are required to declare their income from New Zealand in Singapore.

[9] They live in rented accommodation in Singapore. They could have purchased property in Singapore but chose not to do so. Until 2006/2007 they retained ownership of their family home at Bucklands Beach in Auckland. Around 2006/2007 they sub-divided their land at Bucklands Beach. They sold part but retained a section with a small house on it. They use this property when they are in New Zealand. The appellant said that she and her husband endeavour to return to New Zealand at least once a year, usually for a period of approximately three weeks. The appellant and her husband have children living in New Zealand. In 2009 the appellant spent the year in New Zealand when her daughter had her second child.

[10] The appellant said that whilst their work in Singapore was originally supported by people in New Zealand, the project they are involved in is now supported by people and organisations from a variety of countries.

[11] The appellant and her husband retain their doctor in New Zealand the telephone him from Singapore for advice if required. In 2003 when the appellant broke her leg badly she flew to New Zealand for treatment and remained in New Zealand for three months while it healed.

[12] The appellant said that she and her husband have always intended to retire in New Zealand. They are currently training their replacements in Singapore. However when they are replaced in their present position there is a possibility they may more to the Myanmar border to build up the leadership for their work in that are rather than return to New Zealand.

The statutory provisions

[7] The relevant statutory provisions are contained in Part 1 of the Act under the heading "Entitlements to New Zealand Superannuation" and the subheading "Standard New Zealand superannuation entitlements."

[8] The starting point is s 7(1) which provides that the age qualification for New Zealand superannuation is 65 years.

[9] Then s 8, which is the crucial provision in this case, provides:

> **8 Residential qualification for New Zealand superannuation**
>
> No person is entitled to New Zealand superannuation unless the person—
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> (a) is ordinarily resident in New Zealand on the date of application for New Zealand superannuation; 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.

[10] Then there are two provisions that deal with periods of absence that are not counted for the purpose of determining the period an applicant has been present in New Zealand under s 8(b) and (c). The first of these provisions is s 9 which excludes, from the period an applicant has been present in New Zealand, any period of absence:

(a) for the purpose of obtaining any special medical or surgical treatment or vocational training;
(b) serving as a mariner on any New Zealand registered or owned ship engaged in the New Zealand trade;
(c) serving as a member of any naval, military or airforce of any Commonwealth country or in any war in which New Zealand forces were involved; and
(d) serving in any capacity as an accredited volunteer appointed by Volunteer Service Abroad Inc.

Those exceptions apply only if the Chief Executive is satisfied the applicant remained ordinarily resident in New Zealand during the absence.

[11] The second of these provisions is the one that applies to a missionary. It is s 10 which provides:

10 Periods of absence as missionary also not counted

(1) In determining the period an applicant has been present in New Zealand, no account is taken of any period of absence while engaged in missionary work outside New Zealand as a member of, or on behalf of, any religious body or, as the case may be, during any period that the applicant was absent from New Zealand with his or her spouse or partner while that spouse or partner was engaged in that missionary work.

(2) Subsection (1) applies only if the chief executive is satisfied that the applicant was either born in New Zealand or was ordinarily resident in New Zealand immediately before leaving New Zealand to engage in the missionary work or, as the case may be, to accompany or join his or her spouse or partner.

(3) Unless otherwise expressly provided in the agreement, the provisions of subsection (1) are not modified by the provisions of any agreement entered into by the Government of New Zealand with the government of any other country, whether before or after the

> commencement of this section, providing for reciprocity in social security benefits between their respective countries or the provisions of any Act or Order in Council giving effect to the agreement.
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> (4) In this section, **missionary work** includes the advancement of religion or education and the maintenance, care, or relief, of orphans, or the aged, infirm, sick, or needy.

[12] There are also provisions relating to the payment of New Zealand superannuation to persons who are overseas. Persons who are entitled to receive New Zealand superannuation and who leave New Zealand to reside in a country which New Zealand has no agreement with are entitled to receive a proportion of their New Zealand superannuation.[4] They are required, however, to be "ordinarily resident and present" in New Zealand at the time they apply for payment overseas of New Zealand superannuation.[5]

[13] Determination of eligibility for New Zealand superannuation is made under the Act in the first instance by the Chief Executive. An applicant then has a right of appeal against the Chief Executive's decision to a Benefits Review Committee and a further right of appeal to the Authority.[6]

The Authority's decision

[14] The Authority upheld the decisions of the Chief Executive and the Benefits Review Committee on the grounds that:

(a) Both ss 9 and 10 are specifically directed towards determining the period an applicant has been resident and present in New Zealand for the purposes of calculating the residence criteria in s 8(b) and (c).[7]

(b) Section 10 did not provide that a missionary must also be treated as being ordinarily resident in New Zealand during any period of

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4 New Zealand Superannuation and Retirement Income Act 2001 [Superannuation Act], s 26. If a person who moves overseas is entitled to a pension in that overseas country, the rate of benefit that would otherwise be payable in New Zealand is reduced by the amount of the overseas benefit: Social Security Act 1964, s 70.

5 Compare Superannuation Act, ss 26B(b) and 27(1).

6 Social Security Act, ss 10A, 12J(1)(d) and 81(1).

7 Authority's decision, above n 1, at [21].

absence from New Zealand.[8]

(c) This interpretation will not present problems for missionaries seeking to apply for New Zealand Superannuation if they return to live in New Zealand on a long term basis when they attain 65 years of age.[9]

(d) There is nothing in the legislative history of the s 10 exemption to alter this view.[10]

(e) The term "ordinarily resident" means the place or places where a person leads a settled existence broken only by temporary absences.[11]

(f) Applying the decision in *Wilson v Social Security Commission*,[12] Mrs Greenfield clearly retained strong connections with New Zealand and there was no doubt that she intended to return to New Zealand when her missionary work came to an end.[13]

(g) Mrs Greenfield does not lead a settled life in New Zealand. Her day to day life is lived in Singapore where she holds a residence visa, works and is a resident for tax purposes. While she visits New Zealand regularly, her presence in New Zealand is primarily to visit.[14]

(h) Mrs Greenfield's absence from New Zealand could not be regarded as temporary.[15]

The High Court judgment

[15] In the High Court Collins J noted that the parties agreed that the Authority had erred when it held that s 10 was specifically directed towards deciding the period

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8 At [22].
9 At [23].
10 At [24].
11 At [25]–[30].
12 *Wilson v Social Security Commission* [1988] 7 NZAR 361 (HC).
13 Authority's decision, above n 1, at [32]–[33].
14 At [34].
15 At [35]–[39].

an applicant had been present *and resident* in New Zealand for the purpose of calculating the residence criteria under s 8(b) and (c).[16] The Authority was in error because the words in s 10 do not refer to residence in New Zealand.

[16] Collins J agreed with the parties that the Authority was in error on the first question because s 10 was confined to the calculation of the period a person is absent overseas undertaking missionary work.[17]

[17] On the second question, Collins J, after summarising the submissions for the parties,[18] undertook an analysis of the statutory provisions, including their legislative background and purpose.[19] He concluded that Parliament had drawn a clear distinction between being "resident" and "present" in New Zealand and that it would be wrong to conflate those two concepts.[20]

[18] He also disagreed with the distinction the Authority had drawn between missionaries who have spent large periods of their life overseas and who had returned to settle in New Zealand at age 65 and those who wish to continue their missionary work overseas after they turn 65. In the Judge's assessment this distinction was not consistent with the objectives of s 10.[21]

[19] Collins J accepted that missionary status was not relevant to the "ordinarily resident" requirement in s 8(a), but he saw no reason why an applicant's intentions could not be considered relevant in determining if they were ordinarily resident in New Zealand at the time they applied for New Zealand superannuation.[22]

[20] Then, after referring to the decisions in *Wilson v Social Security Commission* and *Clarkson v Chief Executive of the Ministry of Social Development*,[23] the Judge gave his reasons for concluding that the Authority had erred in respect of both questions 2 and 3:

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16 High Court judgment, above n 2, at [23].
17 At [24]–[27].
18 At [29]–[38].
19 At [39]–[51].
20 At [47].
21 At [50].
22 At [52].
23 *Wilson v Social Security Commission*, above n 12; and *Clarkson v Chief Executive of the Ministry of Social Development* [2010] NZAR 657 (HC).

[54] In my assessment, a plain reading of s 8(a) of the Act requires an assessment of Mrs Greenfield's residency status at the time she made her application for New Zealand superannuation. That depends on a number of factors including:

(1) where she ordinarily spends most of her time;

(2) the reasons why she spends the majority of her time outside of New Zealand;

(3) her residency status in Singapore;

(4) her clear and unequivocal intention to return to New Zealand to retire in due course.

[55] In my judgement, the correct question to ask in Mrs Greenfield's case is whether or not her absence from New Zealand is temporary. An applicant's intention is relevant to whether his or her absence from New Zealand is temporary or permanent. If Mrs Greenfield has an unequivocal intention to return to New Zealand at a future point of time, then that suggests her current absence is only temporary, which should be considered when assessing whether or not she is ordinarily resident in New Zealand at the time of her application.

[56] The approach which I have taken recognises that s 8 refers to three distinct concepts. Section 8(a) refers to an applicant being "ordinarily resident in New Zealand". Section 8(b) and (c) refer to an applicant having been both resident and present in New Zealand for specific periods of time prior to applying for New Zealand superannuation. It is significant that Parliament has drawn a distinction between a person being both resident and present. This leads me to conclude that the text of s 8(a) requires a decision-maker to bear in mind that a person may be resident in New Zealand without having been present in this country for considerable periods of time.

[57] On the basis of this analysis, I am driven to the conclusion that the Authority erred when it failed to place sufficient weight upon Mrs Greenfield's genuine intention to resume living in New Zealand and placed too much reliance on the period of time that she has been absent from New Zealand.

[58] In reaching this conclusion, I record the Authority was correct when it said that it needs to be satisfied that Mrs Greenfield's absence from New Zealand is temporary in order for her to be considered ordinarily resident. However a temporary absence in this context could be for an extended period of time, so long as there was an intention to return.

Submissions for the parties

[21] For the Chief Executive, Mr Andrews submits that the High Court Judge erred in placing too much weight on Mrs Greenfield's subjective intention to return to New Zealand in due course and not enough weight on the fact that, apart from temporary visits, she has not in fact lived in New Zealand for the past 19 years.

Mr Andrews emphasised that the Court's decision on the interpretation of s 8(a) will affect all applicants for New Zealand superannuation, not only those who happen to be missionaries. Mr Andrews seeks to uphold the decision of the Authority.

[22] For Mrs Greenfield, Mr McKenzie QC submits that the High Court judgment should be upheld. He takes issue with the suggestion that the Judge applied a subjective rather than an objective test to the ascertainment of Mrs Greenfield's intention to return to New Zealand. He emphasised that the Authority had made a finding of fact in respect of her intention. Mr McKenzie also emphasised the legislative history relating to the addition of the expression "present" in s 8(b).

The meaning of "ordinarily resident in New Zealand"

[23] The principal issue in this appeal is the meaning of the expression "ordinarily resident in New Zealand" as it appears in s 8(a) of the Act. The answers to both questions of law before this Court depend on the meaning to be given to that expression in that provision.

[24] The relevant principles of statutory interpretation guiding the Court in ascertaining the meaning of the expression are well-established. The focus is on the text of the provision interpreted in light of its purpose.[24] In determining purpose, the Court must have regard to both the immediate and the general legislative context.[25] The wider objectives of the enactment may also be relevant.

[25] Unlike the expression "domicile", the expression "ordinarily resident" does not have a fixed meaning.[26] This means that, in the absence of any statutory definition in the Act, the starting point will be, as both the Authority and Collins J recognised,[27] the meaning of the expression ascertained from dictionary definitions.

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24 Interpretation Act 1999, s 5.

25 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Company Ltd* [2012] NZSC 15, [2012] 2 NZLR 184; and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 201.

26 Compare Domicile Act 1976, s 9; and *Laws of New Zealand* Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [89], Extradition at [106]; and *Halsbury's Laws of Australia* (online ed) vol 4 Conflict of Laws at [85–210].

27 Authority's decision, above n 1, at [26]; and High Court judgment, above n 2, at [40].

[26] The New Zealand Oxford Dictionary gives the following relevant definitions:[28]

> "ordinarily" – normally; customarily, usually
>
> "resident" – a permanent inhabitant

[27] When the two definitions are read together, the expression refers simply to the place where a person usually lives. The concept of permanence is reinforced by the definition of "reside" which includes "to dwell permanently".

[28] Questions whether absences, temporary, lengthy or indefinite, and whether intentions, subjectively or objectively ascertained, are relevant and, if so, to what extent, are not answered by the text of the expression. They need to be considered therefore in the light of the purpose of the provision.

[29] The purpose of the requirement that an applicant for New Zealand superannuation be "ordinarily resident in New Zealand" on the date of their application is to provide a degree of connection between the applicant and New Zealand. Parliament has decided that only applicants with the requisite degree of connection should be entitled to apply for New Zealand superannuation.

[30] It is not uncommon for statutes to use expressions such as "ordinarily resident" to provide a connection of this nature.[29] The Court must then inquire what degree of connection was envisaged by Parliament when enacting the particular provision.[30]

[31] When a practical approach is adopted taking into account the following factors we have little difficulty in concluding that Parliament intended the degree of connection to be close and easily able to be determined:

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[28] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 797 and 955.

[29] *Laws New Zealand* Extradition at [106]; and *Laws of Australia* (online ed) vol 4 Conflict of Laws at [85–210].

[30] *Laws of Australia* (online ed) vol 4 Conflict of Laws at [85–210] and *Re an Infant* [1981] Qd R 225 (SC).

(a) As at 2013 New Zealand superannuation cost the New Zealand taxpayer annually some $8.8 billion in after tax costs ($10.2 billion before tax) or between four and five per cent of GDP;[31]

(b) As at June 2013 some 653,247 people were in receipt of New Zealand superannuation (and another 8,445 receive veteran's pensions) with the number estimated to increase to over 1,100,000 by 2031.[32]

(c) In each of the last two years approximately 27,000 people have applied for New Zealand superannuation;[33]

(d) Administration of New Zealand superannuation involves significant costs to the Ministry of Social Development.

[32] Adopting a practical approach here, we are satisfied that in order to implement the purpose of the Act by requiring a close and clear connection between an applicant and New Zealand, the expression "ordinarily resident" should be interpreted to cover the following further elements:[34]

(a) Physical presence here other than casually or as a traveller;

(b) Voluntary presence;

(c) Some intention to remain in the country for a settled purpose;

(d) Continuing residence despite any temporary absences; and

(e) Residence in New Zealand rather than anywhere else. The Act is not one which permits residence in two countries simultaneously.[35]

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31 University of Auckland – New Zealand Superannuation's real costs: http://docs.business.auckland.ac.nz.

32 National level data tables: /www.msd.govt.nz.

33 New Zealand Institute for Economic Research – Superannuation Dilemma http://nzier.org.nz.

34 Compare *Akbarali v Brent London Borough Council* [1983] 2 AC 309 (HL); *Matalon v Matalon* [1952] P 233 (CA); and *Sinclair v Sinclair* [1968] P 189 (CA).

35 *Carmichael v Director-General of Social Welfare* [1994] 3 NZLR 477 (HC) at 481.

[33] We also consider that "ordinarily" means something more than "residence", indicating the place where a person regularly or customarily lives, as distinct from temporary residence in a place for holiday or business purposes.

[34] Finally, whether a particular applicant is within the expression as we have interpreted it will be a question of fact in each case.[36] In other words, an objective determination will be required based on an assessment of all the relevant factors in the particular case.

[35] This means that we do not agree with Collins J that an applicant's subjective intentions will necessarily be determinative.[37]

[36] As already noted,[38] the question of fact will be determined in the first instance by the Chief Executive and then, in the event of appeals, by a Benefits Review Committee and the Authority.

[37] Our approach to the interpretation of the expression in s 8(a) is supported by the scheme of the Act and its legislative history.

[38] The following features of the scheme of the Act are relevant:

(a) The residential qualification for New Zealand superannuation is the principal eligibility criterion. It applies to everyone whether or not they may also have the benefit of ss 9 or 10.

(b) It is to be determined by the Chief Executive as at the date of the application.

(c) As Collins J correctly held,[39] the provisions of ss 9 and 10 relating to periods of absence not being counted apply only to the further requirement to be "present" in New Zealand under s 8(b) and (c) and

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36 *Wilson v Social Security* Commission, above n 12, at 362; *Clarkson v Chief Executive of Ministry of Social* Development, above n 23, at [15]; *Re Vassis, ex parte Leung* (1986) 9 FCR 518 at 413 and *Turner v Trevorrow* (1994) 49 FCR 566 at 574–575.

37 High Court judgment, above n 2, at [54(4)], [55] and [57].

38 Above at [13].

39 High Court judgment, above n 2, at [52].

not to the "residence" requirements under s 8(a). The fact that a person may also have the benefit of s 9 or s 10 is therefore not relevant to the determination of eligibility under s 8(a).

(d) The provisions of ss 9 and 10 are relevant only to the extent that s 9(2) and s 10(2) require the persons covered by those provisions to remain "ordinarily resident in New Zealand" or to have been "ordinarily resident in New Zealand" immediately before leaving New Zealand.

(e) The Act contemplates that those receiving superannuation will at the outset be physically in New Zealand and maintain significant physical attachment to New Zealand. Superannuation can continue to be paid where a person then goes overseas for less than 26 weeks.[40] It is implicit in this provision that a person receiving superannuation will otherwise in fact be present in New Zealand.

(f) The structurally similar provision relating to foreign pensions (section 26B of the Act, referred to above) which requires an applicant to be "ordinarily resident and present" also tends to indicate that "ordinarily resident" is a higher standard than mere "residence", requiring actual presence.

[39] Our conclusion that a close and clear connection was intended by Parliament is not affected by the legislative history of the provision. Previous incarnations of the provision have emphasised the importance of actual physical presence in New Zealand.[41] The formulation "ordinarily resident" was first adopted just before the passage of the Social Security Act 1964.[42] The Social Security Commission was given a discretion to refuse to grant or terminate a benefit if in its opinion the applicant or recipient was not ordinarily resident in New Zealand. There is no indication, however, of an intention to weaken the requirement for physical presence,

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40 Act, s 22.

41 For example, under the Social Security Act 1938, s 12(1) and (2)(a) provided as part of eligibility that in the ordinary case a person had to have "resided continuously" in New Zealand for nine of the previous ten years before making a superannuation application. The actual presence of a person at the date of application also appears implicitly to have been required.

42 Social Security Amendment Act 1963, s 54 inserting s 62A into the then principal Act.

which was maintained in later provisions.[43]

[40] Mr McKenzie argued that the word "present" was inserted into the precursor of s 8(b) in 1987 to confirm that the requirement that the provision takes account only of the period the person was physically present in New Zealand, and not any periods of absence overseas, a recent case having decided otherwise.[44] We would be inclined to agree with his submission and also to accept that the amendment was not intended to change the effect of what are now ss 9 and 10. Insofar as the Chief Executive contends otherwise, the argument does not seem correct. Any terminological disjunct between the provisions would appear to be a drafting oversight rather than a legislative policy. Mr McKenzie's argument in this respect is not, however, relevant to the eligibility requirement under s 8(a).

[41] To the extent that the decisions of the High Court in *Wilson*, *Carmichael* and *Clarkson* suggest that an applicant's subjective intentions may be determinative,[45] we do not agree. While an applicant's intentions will be relevant, they do not necessarily determine the outcome of the Chief Executive's objective assessment which should be made on the basis of all the relevant circumstances of the particular case. To hold otherwise would mean than an applicant had sole responsibility for determining their own eligibility. That would not have been Parliament's intention.

[42] In light of our approach to the interpretation of s 8(a), we now turn to answer the two questions of law.

<u>Question (2)</u>: Did the Authority err in law by holding that a missionary must show that her settled life is in New Zealand and absences from New Zealand are temporary, in order to be considered "ordinarily resident" in New Zealand?

[43] For the reasons we have given, an applicant for New Zealand superannuation must establish to the satisfaction of the Chief Executive on the date of his or her application that he or she usually physically lives in New Zealand, intends to remain here for a settled purpose and that any absences from New Zealand are truly

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43 See Social Security Amendment Act 1987 [1987 Act], s 8.

44 1987 Act, s 8 and see *S v Chief Executive of the Ministry of Social Development* [2011] NZAR 545 (HC) at [26]–[33] discussing *Fowler v Minister of Social Welfare* (1984) 4 NZAR 347 (HC).

45 *Wilson*, above n 12; *Carmichael v Director-General of Social Welfare* above n 35; and *Clarkson*, above n 23.

temporary.

[44] The fact that the applicant may be a missionary is not relevant to the question whether the requirements of s 8(a) are met.

[45] This means that this question should be answered "No".

Question 3: Did the Authority err in law in its application of the meaning of "ordinarily resident in New Zealand" to Mrs Greenfield's situation?

[46] The application of the requirements of s 8(a) to Mrs Greenfield's situation involved a question of fact for the Chief Executive.

[47] In deciding that Mrs Greenfield did not meet the requirements, it was open to the Chief Executive to take into account the following factors in determining that she did not meet the requirements:

(a) In her application for New Zealand superannuation she stated that she did not normally live in New Zealand.

(b) She and her husband have lived in Singapore for the last 19 years. They have a residence and pay tax there.

(c) They pay non-resident tax on their income from New Zealand in Singapore.

(d) They have returned regularly to New Zealand over the years, principally to visit family, but those visits have been temporary and not permanent.

(e) Mrs Greenfield's intention to return to New Zealand to live in due course is no doubt genuine, but she has no clear return date yet.

(f) Her genuine intention to return one day is not determinative.

(g) Mrs Greenfield may be domiciled in New Zealand, but that does not

mean that she is necessarily "ordinarily resident" here.

[48] In these circumstances the assessment of weight to be given to Mrs Greenfield's intention to return was a matter for the Chief Executive. We therefore disagree with the suggestion by Collins J at [57] that the Authority erred when it failed to place sufficient weight on Mrs Greenfield's genuine intention to return and too much reliance on the period she has been absent from New Zealand.

[49] Accordingly, we are not persuaded that there was any error of law by the Authority in upholding the Chief Executive's decision. In particular, we are not satisfied that the Chief Executive's decision was without evidential foundation or was so clearly untenable on the facts as to amount to an error of law.[46] Proper application of the law did not require a different answer on the evidence.

[50] This means that this question should also be answered "No".

Result

[51] The High Court erred in answering the following questions of law "Yes" when in both cases the answer should have been "No":

(i) Question: Did the Social Security Appeal Authority (the Authority) err in law by holding that a missionary must show that her settled life is in New Zealand and absences from New Zealand are temporary, in order to be "ordinarily resident" in New Zealand [under s 8(a) of the New Zealand Superannuation and Retirement Act 2001]?

Answer: No.

(ii) Question: Did the Authority err in law in its application of the meaning of "ordinarily resident in New Zealand" to Mrs Greenfield's situation?

Answer: No.

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[46] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[26]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52]; and *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [109]–[111].

[52] The appeal is allowed.

[53] As the Chief Executive did not seek an order for costs, none is made.

Solicitors:
Crown Law Office, Wellington for Appellant
Robert Brace, Porirua for Respondent