IN THE SUPREME COURT OF NEW ZEALAND

SC 10/2015
[2015] NZSC 139

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

Hearing:	20 August 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	P D McKenzie QC and A J McGurk for Appellant K G Stephen and N E Bailey for Respondent
Judgment:	24 September 2015

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS

(Given by William Young J)

Introduction

[1] In 1993, the appellant, Mrs Dawn Greenfield, and her husband left New Zealand to serve as missionaries. Since then they have lived overseas, mainly in Singapore where they rented accommodation.[1] They have enjoyed residency status there and were eligible to apply for citizenship. They were also resident in Singapore for tax purposes.

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[1] They lived in Singapore from 1993 until very recently. At all times material to the decisions which have been made in this case they were living in Singapore.

[2] Mr and Mrs Greenfield have children and grandchildren living in New Zealand. Up until around eight years ago, they retained ownership of their family home at Bucklands Beach in Auckland. At that time, they subdivided the property, selling part but retaining a section with a small house on it. Mr and Mrs Greenfield's doctor is in New Zealand and they telephone him for advice if required. In 2003 Mrs Greenfield returned to New Zealand for treatment for a broken leg and remained for three months. In 2009 she spent the year in New Zealand after the birth of a grandchild. In other years, they have usually returned to New Zealand at least once for periods of approximately three weeks. When in New Zealand they use the Bucklands Beach property.

[3] Mr and Mrs Greenfield have always intended to retire in New Zealand but have not yet set a date for their return.

[4] Mrs Greenfield attained the age of 65 years on 1 February 2012. Shortly afterwards, and while in New Zealand, she applied for New Zealand superannuation. This application was declined by the Chief Executive of the Ministry of Social Development (the Chief Executive), on the ground that she was not "ordinarily resident" in New Zealand and therefore did not meet the ordinary residence eligibility requirement stipulated by s 8(a) of the New Zealand Superannuation and Retirement Income Act 2001 (the Act).

[5] The Chief Executive's decision was upheld by a Benefits Review Committee and by the Social Security Appeal Authority (the Authority).[2] Mrs Greenfield appealed successfully to the High Court against the decision of the Authority[3] but a subsequent appeal by the Chief Executive to the Court of Appeal was allowed.[4] She now appeals with leave[5] from the judgment of the Court of Appeal.

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

3 *Greenfield v Chief Executive of the Ministry of Social Development* [2013] NZHC 3157 (Collins J) [*Greenfield* (HC)].

4 *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611, [2015] 3 NZLR 177 (Wild, White and French JJ) [*Greenfield* (CA)].

5 *Greenfield v Chief Executive of the Ministry of Social Development* [2015] NZSC 57.

The statutory provisions

[6] Under the Act eligibility for New Zealand Superannuation is determined by reference to age – an applicant must be 65 – and residency. As to the latter, s 8 provides:

> **8 Residential qualification for New Zealand superannuation**
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> 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, unless section 31(4) of this Act or section 191(4) of the Veterans' Support Act 2014 applies; and
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> (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
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> (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.

"Ordinarily resident in New Zealand" is defined, unhelpfully for present purposes, as not including "being unlawfully resident in New Zealand".[6]

[7] Section 9(1) provides that in determining whether someone "has been present in New Zealand" "no account" is to be taken of periods of absence associated with obtaining specialist medical treatment or vocational training, work as a mariner on New Zealand ships, certain military service and work as a volunteer for Volunteer Service Abroad Inc. To the extent that these circumstances have anything in common, it is that (a) the associated absences from New Zealand are likely to be comparatively limited in duration and (b) while absent from New Zealand, the person concerned is unlikely to regard his or her location out of New Zealand as "home". This last point is reinforced by s 9(2) which provides:

> (2) Subsection (1) applies only if the chief executive is satisfied that during the absence of the applicant he or she remained ordinarily resident in New Zealand.

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[6] See s 3 of the Social Security Act 1964, the definitions of which apply in relation to expressions that are not defined in the Act, including "ordinarily resident in New Zealand": see New Zealand Superannuation and Retirement Income Act 2001, s 4(2).

[8] Section 10, which is of considerable contextual significance to the appeal, is in these terms:

> **10 Periods of absence as missionary also not counted**
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> (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.
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> (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.
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> …

There is nothing in s 10 which corresponds to s 9(2).

[9] Sections 9 and 10 are clumsily expressed. They are intended to operate by way of qualification of the s 8(b) and (c) eligibility rules. But their language is not closely correlated to that of s 8(b) and (c). We can illustrate this by reference to s 10:

(a) In the first place, s 10 is expressed in an awkwardly negative way. Instead of providing that a person is to be treated as present in New Zealand during a period of absence which falls within s 10(1), it instead provides that "no account" is to be taken of the period of such an absence. On a very literal approach, this would mean that the Court should ignore the period of time in question. On such an approach, Mrs Greenfield's time out of New Zealand would be ignored and she would therefore not meet the s 8(c) eligibility criterion. This, however, would not be consistent with the legislative purpose. Instead, it is clear that s 10 proceeds on the basis that a period of absence which is within s 10(1) counts as presence in New Zealand.

(b) Secondly, although s 8(b) and (c) both refer to the subject person being "both resident and present" in New Zealand, s 10 only explicitly addresses the presence requirement. A very literal interpretation would leave scope for the conclusion that someone deemed to be present in New Zealand while overseas on missionary service, might not be a resident during that time. Such interpretation, however, would not be consistent with the legislative purpose.

[10] The current legislative scheme has its origins in s 8 of the Old-age Pensions Act 1898. In that statute and in all subsequent legislation there have been eligibility requirements as to prior residency in New Zealand corresponding at least broadly to those now provided for by s 8(b) and (c) of the current Act. From the outset there were exceptions, corresponding, to a greater or lesser extent, with those now provided for in s 9.[7] And, since 1962, there has also been an exception for missionaries corresponding to that now provided for by s 10.[8]

[11] Until comparatively recently, there was complete congruence between the eligibility rules and the exceptions. This was so with s 14 of the Social Security Act 1964 as first enacted. Under s 14(1) eligibility for superannuation depended upon ordinary residence in New Zealand at the date of application and 20 years residence in New Zealand prior to application with absences from New Zealand not exceeding specified periods of time.[9] Section 14(2) then provided that no account should be taken of absences of the kind now addressed by s 9. And s 14(3) permitted the Social Security Commission to deem periods of overseas service as a missionary to count as residence in New Zealand.

[12] The first of the problems we have identified arose when the national superannuation scheme was introduced pursuant to the Social Security Amendment Act 1976. What was required under the new s 14(1) was ordinary residence at the date of application and residence in New Zealand for certain periods of time

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7 See Old-age Pensions Act 1908, s 8; Pensions Act 1913, s 8; Pensions Act 1926, s 8; Social Security Act 1938, s 15(2); and Social Security Act 1964, s 14(2).

8 This exception was introduced by s 2 of the Social Security Amendment Act (No 2) 1962.

9 There was also an alternative eligibility criterion based on ordinary residence in New Zealand on the date of the enactment of the Pensions Amendment Act 1937 and a specified date not later than 10 years before the application for the benefit with the same provision as to absences.

preceding the application. Unlike the original s 14(1), the new subsection did not contain reference to "absences". Unfortunately, however, s 14(2) continued to operate by way of a direction that "no account shall be taken" of specified absences. This particular disconnect between the rule and its qualification has been carried through into the current provisions.

[13] The second problem has its origin in the Social Security Amendment Act 1987 which further amended s 14(1) so as to introduce a "both resident and present" test.[10] Again, and unfortunately, s 14(2) was not amended to catch up with the changes to s 14(1). This drafting error also has been carried through to the current provisions.

[14] We are satisfied that the legislative scheme requires the ss 9 and 10 exceptions to be treated as correlating precisely with the eligibility rules to which they apply. This requires that s 10(1) be construed as if it provided:

> For the purposes of s 8(b) and (c), an applicant is deemed to have been both present and resident in New Zealand, during any period of absence while engaged in missionary work outside New Zealand as a member of, or on behalf of, any religious body … .

The parties agree that this is the correct approach. Accordingly, a missionary who was ordinarily resident in New Zealand before leaving to carry out missionary work is entitled to count against the s 8(b) and (c) requirements the time spent out of New Zealand on missionary work; and this without any requirement to establish, independently, that he or she was, at that time, "resident" in New Zealand.

[15] As to the broader legislative scheme, we note that:

(a) Under s 21 of the Act, a person is not entitled to New Zealand superannuation while absent from New Zealand, except as specifically provided to the contrary. This disentitlement does not apply generally in relation to the first 26 weeks of certain temporary absences from New Zealand.[11] Nor does it necessarily apply in relation to absences

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[10] Social Security Amendment Act 1987, s 8. This was to reverse the effect of *Fowler v Minister of Social Welfare* (1984) 4 NZAR 347 (HC).

[11] New Zealand Superannuation and Retirement Income Act, s 22.

of up to two years for medical treatment,[12] or absences of up to 156 weeks by a person engaged in full-time voluntary and unpaid humanitarian work.[13]

(b) Sections 26–35 also make provision, in reasonably complex terms, for payment of New Zealand superannuation to those (i) residing for periods in excess of 26 weeks (or up to 52 weeks in respect of certain Pacific states) in countries with which New Zealand does not have relevant reciprocal agreements or conventions[14] or (ii) travelling for more than 26 weeks but not residing in any other country.[15] Such a person must be ordinarily resident in New Zealand at the time of his or her application.[16] The amount receivable is calculated by reference to the amount of time the person concerned has resided in New Zealand between the ages of 20 and 65 with absences within s 9 and on missionary service not counted as such.[17]

(c) Section 74(1)(a) of the Social Security Act permits termination or reduction of benefits payable to, or in respect of, persons who are not ordinarily resident in New Zealand. Given the definition of "benefit" in s 3 of the Social Security Act, this power applies in relation to New Zealand superannuation. Section 74 is expressed to apply notwithstanding anything to the contrary in the 2001 Act, with the result that it can be resorted to even in circumstances in which superannuation is payable pursuant to ss 21–35 in respect of someone who is outside New Zealand.

The issue in the case

[16] Against this background, it is clear that Mrs Greenfield meets the s 8(b) and (c) eligibility criteria. This is because the years she has spent out of New Zealand as

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12 Section 23.
13 Section 24.
14 Section 26(1)(b)(i).
15 Section 26(1)(b)(ii).
16 Section 26B(b).
17 Section 26A.

a missionary count towards periods of presence and residence in New Zealand required by those two subsections.

[17] The only issue is therefore whether she was ordinarily resident in New Zealand at the date of her application.

The decisions below

The review and appeal structure

[18] 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 to apply to a Benefits Review Committee in respect of an adverse decision by the Chief Executive[18] and a right of appeal to the Authority.[19] From decisions of the Authority there is a right of appeal, but on a question of law only, to the High Court,[20] with further right of appeal, but subject to leave, to the Court of Appeal[21] and this Court.[22]

[19] In the current context it is unnecessary to refer to the reasons of the Chief Executive or Benefits Review Committee.

The Authority's decision

[20] The Authority upheld the decision of the Chief Executive. In doing so, it concluded that:

(a) Sections 9 and 10 are directed towards determining the period an applicant has been resident and present in New Zealand for the purposes of s 8(b) and (c).[23]

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

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18 Social Security Act 1964, s 10A.
19 Section 12J(1)(d).
20 Section 12Q.
21 Section 12R.
22 Section 12S.
23 Authority's decision, above n 2, at [21].

absence from New Zealand.[24]

(c) The expression "ordinarily resident" means the place or places where a person leads a settled existence broken only by temporary absences.[25]

(d) Mrs Greenfield did not lead a settled life in New Zealand and her absence from New Zealand could not be regarded as temporary.[26]

The High Court judgment

[21] The appeal to the High Court was on questions of law and Collins J was thus only entitled to interfere with the decision of the Authority if it was erroneous on a point of law.

[22] Collins J recorded that the parties agreed that the Authority had erred when it held that s 10 was specifically directed towards deciding the period an applicant had been present *and resident* in New Zealand for the purpose of calculating the residence criteria under s 8(b) and (c).[27] He agreed that this was so, noting that the language of s 10 does not refer to residence in New Zealand.[28] As will be apparent, we disagree with his conclusion on this point.

[23] Although Collins J accepted that s 10 was not addressed to the "ordinarily resident" requirement in s 8(a),[29] his approach to that subsection was coloured by his understanding of s 10. That this is so emerges from the following passage of his judgment:

> [48] The Authority's interpretation of ss 8 and 10 draws a distinction between missionaries who have spent large periods of their life overseas and who have returned to settle in New Zealand at age 65, and those who wish to continue their missionary work overseas after they turn 65.
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> [49] On the basis of the Authority's analysis, those who are in the first category I have referred to in paragraph [48] are entitled to New Zealand

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24 At [22].
25 At [25]–[30].
26 At [34]–[39].
27 *Greenfield* (HC), above n 3, at [23].
28 At [27].
29 At [52].

> superannuation. However, missionaries in the second category I have referred to in paragraph [48] are not eligible for New Zealand superannuation.
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> [50] In my assessment, the distinction which the Authority has drawn is not consistent with the objectives of s 10 of the Act, which is designed to ensure that missionaries working abroad will not necessarily be rendered ineligible for New Zealand superannuation by virtue of the fact that they have devoted large portions of their life to overseas missionary work.

[24] We agree that s 10 has the purpose attributed to it at [50]. But the approach of the Authority does not deny eligibility to missionaries on the basis of them having "devoted large portions of their life to overseas missionary work". On the contrary, the approach of the Authority ensures that such service counts towards eligibility for New Zealand superannuation. The approach Collins J adopted would come close to extending s 10 so as to operate as a qualification to not just s 8(b) and (c) but also s 8(a), an interpretation which he recognised was not tenable.

[25] On the question whether the Authority's approach to ordinary residence was correct, he said:

> [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.
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> [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.
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> [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.
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> [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.

The judgment of the Court of Appeal

[26] The Court of Appeal was of the view that the insertion of the word "present" into the predecessor of what is now s 8(b) and (c) did not affect the meaning and effect of ss 9 and 10. They saw the "terminological disjunct" between ss 9 and 10 and s 8(b) and (c) which we have discussed as the result of "a drafting oversight" rather than a "legislative policy",[30] a view which coincides with the conclusion which we have already expressed.

[27] The Court of Appeal took this approach to what "ordinarily resident" means:[31]

> [25] Unlike the expression "domicile", the expression "ordinarily resident" does not have a fixed meaning. 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, the meaning of the expression ascertained from dictionary definitions.
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> [26] The New Zealand Oxford Dictionary gives the following relevant definitions:
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> > "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".
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> [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.
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> [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.

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30 *Greenfield* (CA), above n 4, at [40].

31 References omitted.

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

[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:

(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;

(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.

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

(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:

(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.

[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. 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.

[28] The Court saw this approach as consistent with the legislative history of the entitlement to New Zealand superannuation and earlier similar benefits, the requirement that those receiving New Zealand superannuation will at the outset be present in New Zealand, the default position that it is not paid in respect of absences from New Zealand exceeding 26 weeks and the general structure of the exceptions to this which are provided.[32]

[29] On this basis, the Court of Appeal concluded, without difficulty, that the Authority had not erred in law in concluding that Mrs Greenfield was not "ordinarily resident" in New Zealand at the time she applied for national superannuation. Accordingly the appeal was allowed.

Our approach

[30] There are a large number of New Zealand statutes in which the expression "ordinarily resident" occurs.[33] Sometimes the expression is defined and in other cases it is not. In a number of statutes the expression is defined to include (sometimes by way of deeming) a person who:[34]

> [H]aving resided in New Zealand with the intention of establishing his or her home therein, or with the intention of residing in New Zealand indefinitely, … is outside New Zealand but has an intention to return to establish [his or her] home therein or to reside in New Zealand indefinitely.

For Collins J, the key factor establishing that Mrs Greenfield was ordinarily resident in New Zealand was her intention to return. In essence, he construed s 8(a) as if the expression "ordinarily resident" had the extended definition just set out. The present appeal really comes down to whether s 8(a) is to be construed in that way. If it is, Mrs Greenfield was ordinarily resident in New Zealand at the date of her application and her appeal should be allowed.

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32 At [37]–[38].

33 Statutes which use the phrase "ordinarily resident" include the Accident Compensation Act 2001, Antarctica Act 1960, Child Support Act 1991, Crimes Act 1961, Overseas Investment Act 2005, Electoral Act 1993 and the Adoption Act 1955.

34 See for example Antarctica Act 1960, s 2(2); Crimes Act 1961, s 4; and Terrorism Suppression Act 2002, s 4(2). A similar definition features in the Cook Islands Constitution Act 1964, sch "The Constitution of the Cook Islands", art 28(2).

[31] An obvious initial problem for Mrs Greenfield is that the Act does not define "ordinarily resident" in the way just indicated. And the definition set out in [30] might be thought to be an extension of the ordinary meaning of the expression. A person who is ordinarily resident in New Zealand because of an intention to return to New Zealand eventually might well also be ordinarily resident, in accordance with the ordinary meaning of the expression, in the country in which that person was living at the time.

[32] The meaning to be attributed to the words "ordinarily resident in New Zealand" when used in s 8(a) obviously turns on the particular statutory context in which it is used. Material to this is the particular setting in which the expression appears, including the overall legislative scheme[35] and the legislative history. There are limits to what can be derived from the language, scheme and history of the Act. As illustrated by the disconnect between the terms used in s 8(b) and (c) and the text of ss 9 and 10, the statutory scheme is not expressed with seamless perfection. We can, nonetheless, discern in it some pointers.

[33] In respectful disagreement with the Court of Appeal, we do not see the cost of New Zealand superannuation as being of moment and thus do not regard the considerations referred to by the Court of Appeal in [31] of its judgment as material to the application of the concepts of residence and ordinary residence. We also recognise that if Mrs Greenfield can establish an entitlement to New Zealand superannuation, she would be able to receive New Zealand superannuation while living abroad, perhaps permanently, providing she does so in a country with which New Zealand does not have a reciprocal arrangement or convention. Such support as this consideration provides for her argument is diminished by the possibility of termination or reduction under s 74(1)(a) of the Social Security Act and is, as well, outweighed by considerations of much greater weight which go the other way and to which we now turn.

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35 As the Court of Appeal observed at [30], "It is not uncommon for statutes to use expressions such as 'ordinarily resident' to provide a connection of this nature. The Court must then inquire what degree of connection was envisaged by Parliament when enacting the particular provision." See *Greenfield* (CA), above n 4 (reference omitted).

[34] As to the overall scheme of the legislation, we note the requirements for ordinary residence (a) at the time of application under s 8(a); (b) while absent from New Zealand under s 9(2); (c) at the time of departure from New Zealand in the case of someone not born in New Zealand when s 10 applies; and (d) at the time of application for the purposes of s 26B. These requirements suggest an understanding on the part of the legislature that (a) temporary absences of the kind addressed in s 9 are not inconsistent with the person concerned continuing to be ordinarily resident in New Zealand; but (b) during periods of longer absences, particularly in circumstances in which that person may regard the other country as home, the person concerned will not be ordinarily resident in New Zealand. In light of this, a construction of "ordinarily resident" along the lines provided for in the definition cited in [30] would not make sense. Such a construction would likewise detract significantly from the practical reach of the s 74(1)(a) power under the Social Security Act to terminate or reduce benefits for those not ordinarily resident in New Zealand. As well, the various contexts in which the expression "ordinarily resident" appears make it clear that the legislature did not envisage that a person could, simultaneously, be ordinarily resident in New Zealand and another country.

[35] The legislative history shows that while pre-application absences from New Zealand of the kind now provided for by ss 9 and 10 were not to preclude eligibility, actual residence (whether ordinary or otherwise) at the date of application has always been a prerequisite to entitlement to New Zealand superannuation and earlier similar benefits. The flavour of the legislation as it has evolved is distinctly against construing "ordinarily resident" as if it bore the extended meaning set out in [30].

[36] In s 8, the expression "resident and present" occurs alongside "ordinarily resident". Both "ordinary residence" and "residence" denote a place in which someone resides. In this sense, both refer to the place which is regarded as home for the time being. The differing levels of permanence or habituality sufficient to amount to residence and ordinary residence are not susceptible of precise definition. Where, as here, concepts of both ordinary residence and residence (and in the latter case, associated presence) are in play in a statutory scheme, a person might be thought to be resident in the place currently regarded as home and ordinarily resident

in the place that usually is so regarded. A person who leaves a place intending never to return will, from that moment, no longer be resident or ordinarily resident there.[36] But where, as here, no such intention can be discerned, the inquiry into ordinary residence should logically address where the subject person's home had been up until the critical date, where that person was living at the critical date and that person's then intentions as to the future.

[37] In a case where the subject person is not living in New Zealand but has in the past lived in New Zealand, that person's intentions as to future residence will be material to whether he or she remains ordinarily resident in New Zealand. As noted, an intention never to return to New Zealand would preclude a finding of ordinary residence in New Zealand. On the other hand, the possibility that the subject person might not return to New Zealand would not necessarily have the same effect. By way of example, a person who takes a temporary job for six months in Australia but whose family and house remain in New Zealand would remain ordinarily resident in New Zealand despite entertaining the possibility of remaining in Australia depending on the way circumstances pan out. The stronger and less equivocal the intention to return, the more likely it is that ordinary residence in New Zealand has been retained. The state of mind of the subject person, however, is only one consideration and must be assessed alongside the domestic realities of that person's life including the length of time that person has lived out of New Zealand. Other considerations may include the age of the subject person and family connections with New Zealand and the other country.

[38] We are satisfied that what we have just outlined is the correct approach to s 8. In reaching this conclusion we have considered a number of High Court decisions which have addressed the residence eligibility criteria for superannuation.[37] We see these cases as broadly consistent with the approach we have adopted. In particular

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[36] See for instance *Macrae v Macrae* [1949] 2 All ER 34 (CA) at 36–37.

[37] See *Clarkson v Chief Executive of the Ministry of Social Development* [2010] NZAR 657 (HC); *Matenga v Director-General of Social Security* HC Wellington, AP91/98, 16 June 1999 per Doogue and Gendall JJ; *O'Neill v Department of Social Welfare* HC Christchurch, A 175/97, 23 February 1998, per William Young J; *Carmichael v Director-General of Social Welfare* [1994] 3 NZLR 477 (HC); and *Wilson v Social Security Commission* (1988) 7 NZAR 361 (HC). As to "resident and present", see *S v Chief Executive, Ministry of Social Development* [2011] NZAR 545 (HC) and, as to continuous residence, see *Fowler v Minister of Social Welfare* (1984) 4 NZAR 347 (HC), the effect of which was reversed by the legislature's introduction of the requirement for presence in what are now s 8(b) and (c).

we do not see these cases as supporting the proposition that an applicant's subjective intention as to future residence is necessarily determinative of ordinary residence, although such intention may of course be highly relevant.

[39] When Mrs Greenfield applied for New Zealand superannuation, she saw herself as living in Singapore which was then her home (in the sense of being the location of her everyday domestic life). She was, therefore, plainly resident in Singapore. Since this had been the case for the preceding 19 years and she had no fixed plan as to when she would leave Singapore, she was obviously ordinarily resident there too, and this on any conceivable approach to the legal test. We agree with the Court of Appeal that at least under this Act, one can be ordinarily resident in only one place. The conclusion that Mrs Greenfield was ordinarily resident in Singapore when she applied for New Zealand superannuation therefore necessarily means that at that time she was not ordinarily resident in New Zealand.

[40] For these reasons, we conclude:

(a) The Authority's decision was not erroneous in point of law.

(b) To the extent that the High Court Judge appears to have regarded the s 10 qualification to the operation of s 8(b) and (c) as also controlling or influential as to the application of s 8(a) he was wrong and he was likewise wrong in treating as decisive Mrs Greenfield's intention to return eventually to New Zealand.

(c) The Court of Appeal was correct to allow the Chief Executive's appeal.

Disposition

[41] The appeal is dismissed. There is no order for costs.

Solicitors:
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Crown Law Office, Wellington for Respondent