IN THE SUPREME COURT OF NEW ZEALAND SC 10/2015

[2015] NZSC Trans 20

BETWEEN **DAWN LORRAINE GREENFIELD**

Appellant

AND **THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPEMENT**

Respondent

Hearing:	20 August 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	P D McKenzie QC and A J McGurk for the Appellant K G Stephen and N E Bailey for the Respondent

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CIVIL APPEAL

MR McKENZIE QC:

If it please Your Honours, I appear with Mr Tony McGurk as counsel to the appellant.

ELIAS CJ:

Thank you Mr McKenzie, Mr McGurk.

MR STEPHEN:

May it please the Court counsel's name is Stephen, I appear with Ms Bailey.

ELIAS CJ:

Thank you Mr Stephen, Ms Bailey. Yes Mr McKenzie.

MR McKENZIE QC:

Yes if the Court pleases, I do have to place before Your Honour a very recent UK Supreme Court judgment which I thought had sufficient relevance that it really should be produced to the Court and it's fact situation is particularly complex and I have prepared therefore a supplementary submission for the Court on that particular case. With the Court's leave I put those documents forward but propose to address that case perhaps after the first few minutes of opening when I can just set the scene for the Court.

And for that purpose I have prepared a short speaking note. It may be helpful to the Court to have that in my opening remarks and the Court is happy for that produced I do have copies for the Court.

ELIAS CJ:

Thank you.

MR McKENZIE QC:

If the Court pleases, this is an appeal from a case stated for the Social Security Appeal Authority which went on appeal as a question of law to the High Court and from there to the Court of Appeal. The appeal in the High Court was successful, the Court of Appeal reversed the judgment of the High Court and this matter is now with the leave of this Court before the Supreme Court.

Just to summarise the position of the appellant, I have placed a speaking note before the Court, draw attention initially to what I would submit is a central issue between the two parties in this appeal, and it can best be seen in paragraph 9.1 of the respondent's submissions, and I've extracted just a short point from each of those paragraphs. The first one, 9.1, where the respondent submits that in order to implement the purpose of the 2001 Act a close and clear connection is required between an applicant and New Zealand, the appellant agrees that this is the requirement but also says that the appellant's circumstances are such that she clearly meets that, and the parties differ in that respect but not in relation to that principle.

Secondly, 9.2, the respondent submits that an applicant for New Zealand superannuation must establish to the satisfaction of the respondent, the Chief Executive, on the date of their application, that they usually physically live in New Zealand, intend to remain here for a settled purpose and that any absences from New Zealand are truly temporary. Now that is a key point of difference between the parties in this appeal. It's submitted that the respondent wrongly considers that in order to be ordinarily resident in New Zealand there must be significant physical presence in New Zealand, and that's throughout the period of absence, and absences can only be temporary in the sense that they are of short duration only, and a number of passages from the Court of Appeal's judgment were referred to in the primary submissions, I won't go over those again.

Then the appellant submits that Mrs Greenfield's absence is temporary in that it will end upon completion of missionary work, that is a determined date, it's not an indeterminate date. "Temporary" can –

WILLIAM YOUNG J:
Sorry, just pause there. It is an indeterminate date in the sense that it's not been determined, other than by reference to why it will happen, and it hasn't been determined when it will happen.

MR McKENZIE QC:
Yes, it's determined upon the happening of an event, Your Honour. But in my submission it would be that it is not indeterminate in the sense that the Court of Appeal appeared to suggest, but determined upon the happening of a specific event. "Temporary", it's submitted, can be of short or long duration, and that a key submission on the part of the appellant. The purpose of absence is important, viewed in the light of statutory context not length of time away.

WILLIAM YOUNG J:
But, I mean – sorry, just pause there. If someone asked Mrs Greenfield where she lived she'd say, "Singapore."

MR McKENZIE QC:
Where she lived?

WILLIAM YOUNG J:
Yes.

MR McKENZIE QC:
Yes, she lived, was living in Singapore, but that in not, in my submission, in the appellant's submission, determinative or ordinary residence, of where she is ordinary resident.

WILLIAM YOUNG J:
If you asked someone who was at Maadi Camp in Egypt in 1941 where they lived they probably wouldn't say, "Maadi Camp," or, "I'm temporarily here but this isn't my home."

MR McKENZIE QC:
If someone is temporarily absent, Your Honour, they may well refer to the place where they are temporarily living.

WILLIAM YOUNG J:
And the chief engineer on a ship isn't going to say, "Well, this cabin is my home."

MR McKENZIE QC:
That may be, that may be less likely, but there may be some of course inveterate world travellers for whom that would be true. And where the periods of absence are lengthy, and it's the submission of the appellant that that is the case here, then that use of words may well be the case, that is that the person lives where they are spending some significant time.

Then the respondent submits that this submission, in terms of periods of time being lengthy, there were temporary, being of short or long duration, it submitted is consistent with both sections 9 and 10 and sections 26 through to 26B of the 2001 Act and also the case law and I come back to that shortly. And then thirdly, in relation to 9.3 of the respondent's submission, the respondent submitted that the fact an applicant may be a missionary is not relevant to the question whether the requirements of section 8(a) are met and that's the ordinary New Zealand requirement.

The appellant says that this is only partially true. Yes there is no exemption under section 10 from the requirements of section 8(a). The exemption relates only to (b) and (c) and that was recognised by His Honour Justice Collins in the High Court at paragraph 52 of his judgment. It is important however, in the appellant's submission to recognise that Justice Collins at paragraph 56 qualifies the width of his statement by holding the text of section 8(a) requires a decision maker to bear in mind that a person may be ordinarily resident in New Zealand without having been present in this country for considerable periods of time. So that one must look at section 8(a) against the background of the relevant sections in the Act including sections 9 and 10. It's wrong, in my submission, to isolate section 8(a) altogether away from the exemption in section 9 and 10 and read it as though those provisions did not exist.

Then the Act clearly contemplates in section 10 some applicants, namely those engaged in missionary work, will live for long periods of time, even most of their working lives, which is in my submission, clearly implied from the Act in terms of a spouse joining her husband or vice versa after marriage and contemplates a lifetime possibly in missionary service. The position, albeit for shorter periods, applies to VSA volunteers or service personnel under section 9.

Then further, it's well established that when determining ordinary residence, all the surrounding circumstances must be considered and that well established on the authorities. The respondent has wrongly used Ms Greenfield's 19 years of absence from New Zealand as evidence that she does not usually live in New Zealand. This effectively ignores the purpose for her long periods of absence and devalues the very reason for the exemption in section 10.

WILLIAM YOUNG J:

But the reason for the exemption in section 10 is to enable, well may be to enable 8(b) and (c) to be satisfied by someone who is a missionary. So that Ms Greenfield can come back and live in New Zealand, obtain national superannuation, counting towards her 8(c) and (c) period, her time overseas as a missionary. So it doesn't mean section 10 is meaningless.

MR McKENZIE QC:

No Your Honour but I think that section 8(a) in its reference to ordinary residence should not be read in isolation from 10 which contemplates that there will be some

applicants, namely missionaries and others like VSA volunteers who may be out of the country for very significant periods of times.

WILLIAM YOUNG J:
But if a VSA volunteer is out of the country for a long time, say 15 or 20 years that that –

MR McKENZIE QC:
No that's more characteristic of a missionary.

WILLIAM YOUNG J:
Yes but such a VSA volunteer would find it difficult to establish ordinary residence in New Zealand during that period of time and thus probably wouldn't be able to rely on section 9.

MR McKENZIE QC:
Yes, perhaps as the argument develops, Your Honour, I would take issue with that. It's a question of how you view temporary absences.

ELIAS CJ:
Sorry can I just ask you to look at the text because it seems to me that it is significant that 8(a) is concerned only with a particular point in time, the date of application.

MR McKENZIE QC:
Yes.

ELIAS CJ:
And that both (c) and (c) have the reference to presence which obviously is met by periods of absence, so that if one's looking at it simply as a textual matter and I know you want to develop the contextual indications, the provisions read sensibly with ordinary residence having nothing to do with the calculation of the aggregate amount of presence in respect of which the absence provisions of section 10 apply. So that doesn't the text indicate that section 8(a) is different from sections 8(b) and (c), just textually?

MR McKENZIE QC:

Yes I'd accept that it's different, that section 10 does not refer to any exemption in relation to 8(a) and that therefore yes one must give proper weight to that fact, that one looks at ordinary residence on the date of the applicant's application, having regard to all of the facts, that my submission there is that in looking at all of the facts and in reading 8(a), one needs to have regard to the fact the Act contemplates that there will be applicants for whom specific periods of time may be spent outside New Zealand and in the case of a missionary, unlike a VSA volunteer, the missionary is not required to be ordinarily resident throughout the period of absence but a VSA volunteer or service personnel are, perhaps because of the shorter periods in their case.

ELIAS CJ:

But the question is whether at the date of application they must be ordinarily resident?

MR McKENZIE QC:

Yes and one must have a look at the facts at that particular date, I agree.

ELIAS CJ:

And the word "presence" doesn't appear in 8(a) and therefore it's quite consistent that section 10, which is relating to periods of absence to be contrasted with presence, has no application to 8(a)?

MR McKENZIE QC:

The fact that section 10 refers to being resident, yes in subsection 1, "Determining the period an applicant has been present in New Zealand no account et cetera is taken" and the word "resident" is not included there. That was regarded by the Court of Appeal as really being in a sense a drafting oversight. The Court of Appeal read that section –

ELIAS CJ:

Sorry which section?

MR McKENZIE QC:

This is section 10 and the absence of any reference there to "residence" and the reference only to "presence". "Residence", the Court of Appeal considered could be

implied. They were prepared to regard the appellant's argument there as having merit.

ELIAS CJ:

Well yes, I flag that I'm not sure that there isn't really quite a sensible legislative scheme in the different use of residency and presence which doesn't require residency to be read into section 8(a), if that's what you're trying to say.

MR McKENZIE QC:

Yes.

ELIAS CJ:

Into section B and C.

MR McKENZIE QC:

Well certainly section 8(a) doesn't include any reference to "presence".

WILLIAM YOUNG J:

It's not particularly likely that a person who is within section 10 and thus – sorry, well, there's another problem but in fact the section is negatively framed, it doesn't say the period overseas counts as a period of presence, it just says no account is taken of it, which is an awkward deviation from the earlier legislative precursors which said that in deciding whether someone's continuously resident in New Zealand you ignore periods that are within what are now sections 9 and 10, but I mean that's presumably implicit too in the section.

MR McKENZIE QC:

Yes, it's a bit –

WILLIAM YOUNG J:

But you don't, I mean, if construe the section literally Mrs Greenfield doesn't even meet section 8(b) or (c) because she might, while she satisfies the presence requirement she wouldn't necessarily satisfy the residence requirement, but that would be a crazy interpretation.

MR McKENZIE QC:

Well, that would make nonsense of the provision that –

WILLIAM YOUNG J:

Yes, no, I, well, I agree with that.

MR McKENZIE QC:

No missionary could qualify on that basis.

WILLIAM YOUNG J:

Yes, well, I agree with that.

MR McKENZIE QC:

Yes. So I think, yes, as Your Honour's suggesting, the section must be read in a different way.

ELIAS CJ:

Well, I'm not sure about that, because the qualification, the qualifications really are established by (b) and (c) which is concerned with presence and absence, and you have to bring in section 10 there. But –

WILLIAM YOUNG J:

You have to be resident.

ELIAS CJ:

But you have to be resident at the date you apply. And that seems to me to be quite consistent also with section 10(2), which gives you two ways of becoming eligible: you either have to have been born in New Zealand or you have to have been ordinarily resident before you leave. But you have to be ordinarily resident to obtain superannuation, not to be eligible to get it once you come back and are ordinarily resident. That seems to me quite a logical reading of these provisions.

MR McKENZIE QC:

There's no requirement that the applicant be other than ordinarily resident in New Zealand at the date of application –

ELIAS CJ:

Yes.

MR McKENZIE QC:

– and the submission that will be put to Your Honours by the appellant is that "ordinarily resident" encompasses significant periods of absence, there are many cases that support that approach, and those absences can be length, but that need not in itself detract from ordinary residence, which is established, where the absences are for a particular purpose. So that it's not incumbent on Mrs Greenfield to show that she was resident in New Zealand in the sense that she actually was –

ELIAS CJ:

Present.

MR McKENZIE QC:

– living here at the point, but she must show that she's ordinarily resident in New Zealand.

ELIAS CJ:

Yes, I understand that.

MR McKENZIE QC:

Perhaps if I could just briefly take Your Honours to the statutory provisions that are submitted in the speaking note towards the foot of page 2, "Support the appellant's submission that an applicant may be absent from New Zealand for long periods of time and still be ordinarily resident." Now the 2001 Act itself clearly recognises that a person may be ordinarily resident in New Zealand notwithstanding their absence for long periods of time and there's, I refer there to section 9(2), and this is in the case of VSA volunteer service personnel and others, subsection (2) requires that during absence of the applicant, during the absence of the applicant, he or she remained ordinarily resident in New Zealand, and that contemplates that you may be absent, and in the case of some volunteers that may be for a reasonably significant period of time…

GLAZEBROOK J:

It is, if you're looking at VSA or service personnel, there are usually defined tours of duty thought, aren't there? Certainly in terms of VSA I think it might be two with a renewal up to four, but that in fact it's very defined with a definite time of coming back –

MR McKENZIE QC:

Yes.

GLAZEBROOK J:

– as I understand it, and the same would apply to service personnel as well.

MR McKENZIE QC:

That may well be so, thought medical treatment, which is one of the –

GLAZEBROOK J:

Oh, medical treatment may be more…

MR McKENZIE QC:

– with different – yes.

GLAZEBROOK J:

But one would assume that if you needed medical treatment for, say, five years, that you may actually become ordinarily resident elsewhere and that that might be a long time to be away from your family and it might be easier to relocate, for example.

MR McKENZIE QC:

Yes, I would submit not, on the basis of the cases that I will refer to, that a period, if it's for a specific purpose –

GLAZEBROOK J:

Sorry, I meant the people may have decided to relocate –

MR McKENZIE QC:

Yes.

GLAZEBROOK J:

– if it's going to be longer, I wasn't saying that you necessarily lost your ordinary residence in that case. Sorry, just to be clear.

MR McKENZIE QC:

Yes. And it may well be, Your Honour, that the reason why missionaries are dealt with in a separate section and, well, earlier it was a separate subsection, but dealt

with really under quite a separate provision from those other groups of people, is the, you know, the lengthy period of missionary service and the fact that the time away is undefined, and for that reason the missionary provision does not require the missionary to be ordinarily resident in New Zealand during the period of absence, that subsection (2) that I've just cited does not apply –

GLAZEBROOK J:
Yes.

MR McKENZIE QC:
– to section 10. Yes, well, I think I could perhaps skip part of what follows because that's been dealt with in answer to Your Honour.

Just picking up at the top of page 3, "However, in order to qualify under the section 9 exemption, the person must remain ordinarily resident during the course of the absence. This may be consistent under the respondent's analysis in relation to those seeking medical treatment overseas because the visits are more likely to be of short duration," or that may not necessarily be the case, "But for a VSA volunteer on a two-year assignment or for military service overseas the absences may very well mean living abroad. Therefore under the respondent's analysis in relation to the need for presence point to ordinary residence in New Zealand being relinquished. The person would qualify for the section 9 exemption in relation to presence under 8(b) and (c) but then be denied the benefit of the exemption because the absence itself says that they've lost ordinary residence." And then there are also sections 26, 26A and 26B, where a similar argument applies. These sections support there being no presence requirement within the tests for ordinary residence. The rate of superannuation paid while overseas is calculated on a pro rata basis according to residence in New Zealand between the ages of 20 and 65. Under section 26A(2)(b), absences from New Zealand for the purpose of missionary work are ignored when assessing the pro rata rate, and Your Honours may wish to look at that section, section 26A(2) and (b), that's at tab 2 of the bundle.

WILLIAM YOUNG J:
Sorry, it's section 26A?

MR McKENZIE QC:

26A(2) and then (a) and (b), “In determination for the purposes of subsection (1) of the periods during which a person has resided in New Zealand, no account is to be taken, (b), any period of absence from New Zealand while the person was engaged in missionary work,” et cetera. And then I point to subsection (3), “Subsection (2) applies to a period of absence,” and that includes absence as a missionary, “only if the Chief Executive is satisfied that during the it the person concerned remained ordinarily resident in New Zealand.” So it’s the same argument really as relates to section 9(2). That's important to note that in this case the missionary does have to satisfy the Chief Executive that she or he remained ordinarily resident in New Zealand during the period of absence. That's not a requirement under section 10, but if you're going to have the pro rated benefit after 65 then this would apply. And that's a point of course of some importance to missionary bodies, as to there of course the meaning of the words “ordinarily resident in New Zealand”, they have implications beyond the facts, Mrs Greenfield’s specific facts, in this case.

ELIAS CJ:

You mean it goes to the quantum question?

MR MCKENZIE QC:

More than the quantum, it would – yes, yes it would really be quantum, yes that’s right.

WILLIAM YOUNG J:

Can I just ask you the question that’s put in mind, is there – presumably Ms Greenfield is able to received New Zealand superannuation although out of the country for more than 26 weeks?

MR McKENZIE QC:

The difficulty that she has there is that if she is not ordinarily resident in New Zealand –

WILLIAM YOUNG J:

Oh no, just assume she’s eligible, she meets section 8, but she actually physically happens to be in Singapore.

MR McKENZIE QC:

Oh yes she otherwise is eligible.

WILLIAM YOUNG J:
So she's not caught – why doesn't the 26 week, there must be a reason why but why doesn't the 26 week limitation cut in? This the section that says if you're away from New Zealand for more than 26 weeks you –

ARNOLD J:
Is there a portability arrangement with Singapore?

MR McKENZIE QC:
Yes there are two applications so far as the 26 weeks is concerned. Section 22 is the more commonly applied provision, that is someone who qualifies to receive New Zealand superannuation in New Zealand and then goes abroad may retain their or still receive superannuation during temporary absences up to 26 weeks. So that's different, that's a different set of circumstances, that affects the ordinary applicant in New Zealand, applies, receives, then goes overseas for some weeks and there's a limit on their entitlement.

WILLIAM YOUNG J:
So there must be reason why that doesn't apply to Ms Greenfield or why that wouldn't apply to Ms Greenfield.

MR McKENZIE QC:
Yes, well the reason is that the Ministry held that she did not qualify to receive New Zealand superannuation in the first place because she was not an ordinary resident in New Zealand.

WILLIAM YOUNG J:
I already know that but she didn't for a while receive superannuation between the High Court and the Court of Appeal decision. So what I'm wondering about is assuming section 8 is not a problem, why isn't section 21 or section 22 a problem? Now I assume there must be a reason but I'd just like to know what it is.

MR McKENZIE QC:

She, following the judgment of His Honour Justice Collins Ms Greenfield was paid superannuation. It was prorated but because her period as a missionary for 19 years –

WILLIAM YOUNG J:
No look I know that, what I'm saying is if I had superannuation and I went out of New Zealand for a year I would stop getting superannuation wouldn't I?

MR McKENZIE QC:
Yes.

WILLIAM YOUNG J:
Okay because of section 21, 22, 23 et cetera.

MR MCKENZIE QC:
That's right.

WILLIAM YOUNG J:
Okay, now there must be a reason why that wouldn't apply to Ms Greenfield, it's why it is, I would like to know that.

MR McKENZIE QC:
The reason as I understand it Your Honour is that she was held not to qualify or be eligible for New Zealand superannuation because she was not ordinary resident in New Zealand at the date of application.

WILLIAM YOUNG J:
Assume she is resident, assume she meets section 8.

MR McKENZIE QC:
Oh if she did meet section 8, yes she would certainly qualify.

WILLIAM YOUNG J:
Yes but why would she not then run into trouble with the 26 week issue? Now there must be a reason for that because she was being paid for a while?

MR McKENZIE QC:

Only after she'd established the right to be paid.

WILLIAM YOUNG J:

We're at cross purposes. I'm assuming for the moment that section 8 is satisfied.

GLAZEBROOK J:

Well let's assume that she'd been living here for three years before she turned 65 and when she applied she was clearly living in New Zealand. Then she went to Singapore on a missionary expedition, why doesn't she get caught I think you're being asked, by section 22?

MR MCKENZIE QC:

In that set of facts yes she would. She would be able to go back for short terms, you know, up to 26 weeks to continue missionary work but Ms Greenfield had informed the case manager who dealt with her case that she intended to return to Singapore at that stage.

GLAZEBROOK J:

So section 22 – so you accept – well why, let's assume your argument is correct, is she not caught by the section 22 requirement anyway? Is that because of section 26A?

MR McKENZIE QC:

Yes.

GLAZEBROOK J:

And I haven't actually done the sums on how that calculation works. So there's a proportionality is there?

MR McKENZIE QC:

Yes it's prorated in terms of the time in New Zealand prior to the first, you know, application and the time outside New Zealand and in the case of the missionary, because of section 26 –

GLAZEBROOK J:

It's not counted.

MR McKENZIE QC:

- the missionary's period overseas can be included, yeah, as a residence in New Zealand.

GLAZEBROOK J:

I wanted to ask you something different about the six month period. Given that there is that six month period in limitation, it seems to me that that is an indication, a statutory indication, that presence in New Zealand is important for national superannuation purposes.

MR MCKENZIE QC:

Yes that indeed was argued by the Ministry and it's a factor that the Court of Appeal refers, that that indicates the importance of presence but in my submission that turns or applies really to the position of the person who's entitled in the first place and then must maintain that connection with New Zealand. In Ms Greenfield's case if she's ordinarily resident in New Zealand on the date of application, then she would be entitled to receive the superannuation on a portability basis for the longer term, which in her case would qualify for very much a full entitlement.

GLAZEBROOK J:

What I was suggesting is that section 22 with its emphasis on presence, there's a slight difficulty, isn't there in saying presence isn't necessary in respect of ordinarily resident because most of the cases would say you need presence with an intention to remain.

MR McKENZIE QC:

Yes.

GLAZEBROOK J:

With absence only temporary and it's difficult to see presence in a situation, especially if you looked at it on a point in time basis but looking back in terms of what had happened in the future, looking forward in terms of intention of an indefinite period after 65 remaining overseas, it's difficult to see that presence requirement here and 22 would suggest that one at least take account of some present requirement.

MR McKENZIE QC:

Yes it does for the purposes of that section, whereas here we have a section that contemplates the receipt of superannuation outside New Zealand.

GLAZEBROOK J:
What 26A?

MR McKENZIE QC:
Yes.

GLAZEBROOK J:
But that's predicated on ordinary residence.

MR McKENZIE QC:
Yes.

GLAZEBROOK J:
And has to be interpreted against the background of section 22, whereas normally a six month absence would mean that it wouldn't be applicable.

MR McKENZIE QC:
Yes I would submit not, in that subsection 3 would really seem to fly in the face of that, of section 26A because that does contemplate that there may be lengthy absences, perhaps more than 26 weeks where the person may still be ordinary resident in New Zealand.

ELIAS CJ:
Isn't the scheme of the Act that there's a difference between qualification, which depends on that calculation of presence and eligibility to receive superannuation benefits and for superannuation benefits to be paid for you to be eligible for that, you have to be ordinarily resident? You have to be ordinarily resident at the time you make your application and under 26A(3), you have to continue to be ordinarily resident.

MR McKENZIE QC:
That is true, yes.

ELIAS CJ:

Doesn't the whole case come down really to a question of fact whether your client was ordinarily resident?

MR McKENZIE QC:

It certainly comes down to whether she was ordinary resident on the date of application but it's my submission that that's a question of mixed fact and law because –

ELIAS CJ:

Yes, avoidance.

MR McKENZIE QC:

– it becomes important that the Authority correctly applied the relevant principles of law.

ELIAS CJ:

Yes, but presence and absence, which are used for slightly different purposes, it's really the only standalone question is whether she's ordinarily resident in New Zealand.

MR McKENZIE QC:

Yes.

ELIAS CJ:

And isn't the obstacle that you have, the one that Justice Young put to you, is where would she say she lives?

MR McKENZIE QC:

Yes, it – the answer to that question really differs. When one is seeking to discern where someone is ordinarily resident where they live can, in those circumstances certainly mean for Mrs Greenfield New Zealand. In the experience of ordinary living one might respond to that question, say, well, she lives, because she lives from day-to-day, in Singapore, but her submission is the fact that she may live from day-to-day in Singapore does not mean that for ordinary residence purposes, well, she is ordinarily resident in New Zealand in the sense that this is the place that she keeps returning to from periods of absence away.

ELIAS CJ:

But that's the only thing we really need to look at in this case, is whether – and I'm perfectly happy to accept that ordinary residency is a matter of degree and that you have to look at all the circumstances.

MR McKENZIE QC:

Yes.

ELIAS CJ:

But all of this present/absence stuff doesn't seem to be relevant really in that inquiry.

MR McKENZIE QC:

It's relevant only insofar as, as the legal context is concerned.

ELIAS CJ:

She remains, she remains, she's still qualified. When she does take up, if, on the argument on that she's not presently ordinarily resident in New Zealand –

MR McKENZIE QC:

Yes.

ELIAS CJ:

– as soon as she becomes ordinarily resident and as long as she maintains that status then she's qualified on the basis in the Act and she receives superannuation.

MR McKENZIE QC:

Yes. It's really a question of when she so qualified, was she ordinarily resident at the date of application or not.

ELIAS CJ:

Yes, thank you.

MR McKENZIE QC:

And there's no doubt that if Mrs Greenfield returned to New Zealand tomorrow and told the case manager that, "I am intending now to retire in New Zealand," that she would qualify.

ELIAS CJ:

Yes.

MR McKENZIE QC:

Perhaps in answer to Justice Young's question I realise perhaps some, the points that he was looking for there, I should mention that before the Social Security Appeal Authority Mrs Greenfield sought both eligibility in terms of section 8 and also the portability in terms of section 26, and the Appeal Authority found it unnecessary to get as far as the arguments in relation to section 26 and said, "Well, we hold she wasn't ordinarily resident in New Zealand –

WILLIAM YOUNG J:

Right.

MR McKENZIE QC:

– on the date of application," and so that was never addressed.

WILLIAM YOUNG J:

So what happened? But didn't she – I thought I read somewhere that she was paid superannuation for a while?

MR McKENZIE QC:

Not –

WILLIAM YOUNG J:

After the High Court judgment.

MR McKENZIE QC:

After the High Court judgment that…

WILLIAM YOUNG J:

So did the Judge – but I don't recall the Judge addressing portability.

MR McKENZIE QC:

No, he didn't, it was addressed within the Department. Once she had been, it had been determined that she was ordinarily resident in New Zealand on the date of application, the Department looked at her entitlement and the, as I understand it, the

pro rate provision was applied, and in her case meant a relatively significant percentage of the entitlement was paid to her.

WILLIAM YOUNG J:

Okay. I'd quite like a note or just a very brief summary from, perhaps from counsel for the respondent as to how that calculation was made and how it's referenced to the provisions of the Act.

MR McKENZIE QC:

Sir. Yes, well, if I could pass on, I think we've sufficiently dealt with section 26 and that group of sections, to page 4, which is the case law that supports the appellant's submission that an applicant may be absent from New Zealand for long periods of time and still be ordinarily resident, and I can take the Court in this respect to perhaps what's the leading, or has become the leading authority. It's in the casebook described as *Akbarali* but it's commonly known as the *Shah* case, *R v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309; [1983] 1 All ER HL, and I've referred to it in this submission as *Shah*, and I cite from Lord Scarman at page 342 where he agrees with Lord Denning that in their natural and ordinary meaning the words mean that the, "Person must be habitually and normally resident here, apart from temporary or occasional absences," and then the words follow, "of long or short duration." The significance of "habitually" is that it recalls two necessary features mentioned by Viscount Sumner in *IRC v Lysaght's* [1928] AC 234 case, that's a tax case before the House of Lords, namely residence adopted voluntarily and for settled purposes, and I think it's interesting that Lord Scarman at page – no, no, at that same passage, refers to *Stransky v Stransky* [1954] 2 All ER 536 which was a case involving ordinary residents for the purposes of divorce jurisdiction. This is at page 343. "The Court there was required to determine ordinary residence for the purpose of jurisdiction and divorce where three years ordinary residence were required to precede the petition. The wife had spent substantial periods of time, in all more than 15 months, with her husband in Munich," so that was a significant part of the three year period, "but was held to have her real home in London notwithstanding her absences." Lord Scarman stated, "I do not read the judgment as importing into ordinary residence an intention to live permanently or indefinitely." His problem was to determine whether her absences from London destroyed the degree of continuity needed to establish ordinary residence, and I guess that is, in a sense, the key. Absences destroy the degree of continuity needed to establish ordinary residence.

The appellant submits no, given the specific purpose for which Mrs Greenfield was absent and the necessarily long term of that purpose.

Then *Clarke v Clarke; Insurance Office of Australia Ltd* [1964] VR 773; [1965] Lloyds Rep 308, which is an authority that the respondent put forward in the respondent's bundle, and it's a very helpful and interesting case. This is a decision of the Supreme Court of Norfolk Island. I'm sorry, no, *Clarke v Clarke* is – no, that's the *Christian v Griffiths* case. *Clarke v Clarke* is a case in the appellant's bundle, tab 26, but it is also a very interesting illustration of the principles and worthy of the Court's study. It was addressed in the primary submissions and perhaps not necessary to take Your Honours all through it again but I'll just take you to page 3 at tab 26, where mid-page the Court said, "The duration of residence and the comparative times spent in different places or households will, of course, commonly be of great importance but they are not factors which are necessarily decisive. They may be outweighed by other factors." And then the Court gives certain examples and perhaps if I can pick up one, *Lewis v Lewis*, which comes in the middle of that paragraph, "To take another illustration, if a ship's officer spends all but a few weeks of the year at sea and spends those weeks with his wife and children in the home in which they live, it would be an appropriate use of language to say that ordinarily resident resided with his wife. The same would be true of, say, a wool buyer whose occupation prevented him from being at home with his wife and family for more than a few weeks in the year and who followed a regular round of sales and spent longer periods lodging at particular hotels and at the home. In such cases the strength of the bond that ties the man to his family and their household makes up for the short duration of his stays in the home.

Now it might be said here, of course, that Ms Greenfield and her husband both live at the relevant in Singapore, they're now doing their work and living in Cambodia but it makes no difference to the principle. It might be said well husband and wife, they're living there, that is their home but it would be submitted that when all the facts are looked at, the close connection and family connections that the Greenfields have are with New Zealand. It would be very different if, for example, Ms Greenfield had married an American and during their periods of leave made annual visits to America and visited family there and established connections there. That is not this case. All of the connection outside of her work is with New Zealand and that's what the facts show. So it is submitted that the examples given here are irrelevant.

Also *Christian v Griffiths* [2010] NFSC 5 which is again an authority worthy of study which is in the respondent's bundle tab 2, Supreme Court of Norfolk Island and it concerned whether the respondent qualified for election to the legislative assembly of Norfolk Island which required ordinary residence in the territory for a period of five years immediately preceding the date of nomination and the critical question was whether substantial, and they were substantial in this case, periods of residence in New Zealand for education and later in New Caledonia under contract as cultural affairs advisor, were temporary. The Court held that this residence was indeed temporary and did not disqualify her from being ordinary resident and I cited from the judgment, Your Honour, at pages 16 and 17 where the facts are set out and then it concludes at the foot of page 17 of the judgment, paragraph 65. In my opinion, although she was not within the territory during most of this period, and that's relevant, that does not mean that she was not still ordinary resident in the territory, being physically present cannot be the sole test, although it is relevant, I am of the opinion that the respondent was ordinary resident during that period of 18 months because she treated Norfolk Island as her home and only absented herself for the purpose of carrying out her duties pursuant to her contract of service. One could substitute there that Ms Greenfield treated New Zealand as her home and only absented herself for the purpose of carrying out her missionary service. She is like the sailor who is obliged to live elsewhere for long periods of time but who is still ordinary resident where his or home is.

So that it is submitted that lengthy periods of living elsewhere do not necessarily detract from the person concerned being ordinary resident in New Zealand, provided that connection is here and the absences are for a specific purpose and there of course is the clear and objectively established intention to return to New Zealand on completion of that purpose, which is the case here.

Then if I come finally to the foot of page 5, the difference between residence and ordinary residence and if Your Honours have questions on these paragraphs, the definition there, they're largely the work of Mr McGurk, my learned co-counsel and if Your Honours grant leave I would ask that Mr McGurk be able to respond to any questions that there may be on these two paragraphs that would assist the Court.

ELIAS CJ:

Yes that's fine.

MR McKENZIE QC:

Yes perhaps Mr McGurk could develop those paragraphs 11 to 14 for the Court, in case there are any questions for him.

ELIAS CJ:

So does that conclude your submissions or do you want to come back Mr McKenzie?

MR McKENZIE QC:

No it doesn't, no I would want to come back with Your Honour's leave, yes. It's just interpolating in relation to the distinction between those two terms which Mr McGurk's done some work on.

ELIAS CJ:

All right, well it's a little unusual but yes that fine.

MR McKENZIE QC:

Yes I recognise that.

MR McGURK:

The difference between residence and ordinary residence can be seen in the different types of absences that each concept accommodates. Both ordinary residence and residence do allow for absences, however residence, in order for residence not to be interrupted the person cannot be said to be living elsewhere and so the type of absence residence accommodates may be short-term absences such as holidays, business trips abroad but if a person is said to be living elsewhere and I say that Ms Greenfield probably must be said to be living in Singapore, she has relinquished residency in terms of section 8(b) and 8(c) and that is the purpose of course of the exemption in section 10 and the same applies for the exemption in section 9.

O'REGAN J:

Does that mean you can be resident in one place and ordinarily resident in another?

MR McGURK:

Yes it does. Ordinary residence on the other hand does allow for the person to be living elsewhere. "Ordinarily" meaning usually, the person must be usually in New Zealand but not all of that time and so the purpose of the absence is important

having regard to the statutory context in order to determine the level of connection with New Zealand and the case of *Fowler v Minister of Social Welfare* (1984) 4 NZAR 34 is relevant here where Ms Fowler was for 11 months of the five year statutory period she was living in Malaysia. There were visits to Malaysia over that five year period. It was accepted that she was ordinarily resident in New Zealand but the issue was whether she was also resident in New Zealand and it was found that she was because those visits were temporary in nature, they weren't, in terms of degree, she was not said to be living in Malaysia.

The exemption in section 10 referred to residence prior to the *Fowler* decision and as a result of the *Fowler* decision the presence requirement was added to sections B and C and accordingly the exemption in relation to missionaries needed to also include presence because by adding presence to section 8(b) and (c), missionaries would've been automatically disqualified.

What the respondent's submission really tries to do in relation to the question of law, it tries to impose the type of absence that residency accommodates which is temporary, of short term, the type of absence that doesn't interrupt residence, the respondent is trying to restrict ordinary residence to that type of absence, whereas the type of absence that ordinary residence accommodates goes further than that, it also accommodates living elsewhere and that is the key difference. In this case Ms Greenfield, it is accepted that she loses residence by the very nature of her missionary work but her connection with New Zealand remains despite the loss of residence, because ordinary residence means usually residence, usually living somewhere but can include in that period times when she's not resident in New Zealand but still maintains ordinary residence therefore, by way of her connection with New Zealand and that, in the appellant's submission, is a very key submission to answering the question of law which is does ordinary residence have a requirement of presence in the way that the Court of Appeal said that it does and it's never really been the case up until the Court of Appeal's decision, it's never been the case that ordinary residence has encompassed presence – it's never incorporated presence in that way. It's a very new, it was a very –

ELIAS CJ:
You don't say that presence is irrelevant though do you?

MR McGURK:

It's not irrelevant in terms of looking at the overall circumstances, in terms of –

ELIAS CJ:
Ordinary residence.

MR McGURK:
Yes in terms of degree in any individual case.

ELIAS CJ:
But you say it's about sufficiency of connection and that may not be through ordinary presence?

MR McGURK:
That's correct and so an analysis of, for example, in any individual case the purpose of the absence in light of statutory context, it may mean that ordinary residence has certainly been maintained despite living elsewhere in terms of the meaning of residence in section 8(b) and (c) and the example that Mr McKenzie has referred to in relation to the statute, the statute itself acknowledges that a person may very well live elsewhere but maintain ordinary residence.

WILLIAM YOUNG J:
Is there any case where someone has live somewhere for as long as 19 years and only returned to their place of alleged residence for particular purposes and occasionally where that person has been held to be ordinarily resident in the place where they didn't live? I mean is there any case that comes really within a bull's roar of Ms Greenfield's case? What's your best case?

MR McGURK:
Well in terms of length of time, I'm unaware of any but that that's the – the *Griffiths* case I think that the respondent refers is close in the sense that the person spent considerable periods away from Norfolk Island.

GLAZEBROOK J:
Well it was a temporary appointment where a husband and children came back, as I understand earlier, than when she finished. So it was only a two year or 18 months or something was it, I wrote down.

MR McGURK:

There were also periods where she spent studying. She left Norfolk Island to study for significant periods, the majority of a number of the calendar years in question as well as the contract that she entered into but for the purpose of the statute in relation to eligibility to stand for election, her connection with Norfolk Island remained. It's similar in terms of –

GLAZEBROOK J:

Well how long do you say she was out sorry, have you got the date, times? I thought it was just a five year qualification period and she'd been out for two of those five years in New Caledonia on a temporary appointment with her husband and children coming back earlier.

MR McGURK:

Yes that's correct but there were also other periods.

GLAZEBROOK J:

But wasn't it just the five year period of – I mean she had to be, presumably had to have been ordinary resident – oh are you saying she had to be ordinary resident at the beginning of the five year period and therefore the earlier periods were relevant is that – I must say I haven't read this very thoroughly, so –

MR McGURK:

She had to be ordinarily resident for the five year period.

GLAZEBROOK J:

Yes so was the period before then, when she was out for education relevant because she had to be ordinary resident at the beginning of the five year period before she went to New Caledonia, is that why the earlier periods were relevant?

MR McGURK:

My understanding –

GLAZEBROOK J:

So do you want to tell me the facts then?

MR McGURK:

I may have to get Mr McKenzie to explain the factual background of that case but it was my understanding that the five year period that was in question in terms of the statute included time spent in New Zealand studying as well in other calendar years within that five year period she was in New Caledonia with her husband involved in a contract of service.

GLAZEBROOK J:

I didn't think that was the case but unless they were the temporary absences from 2006 but anyway we can look at that.

MR McGURK:

Yes and so just to conclude I think that in relation to the question of law, the respondent's submission is essentially that any absences for ordinary residence are restricted to the types of absences that don't interrupt residence in terms of section 8(b) and 8(c) whereas ordinary residence must also include not living at the place where the person is said to be also ordinary residence, it can include periods of not living at that place. Unless there are any further questions Your Honour.

ELIAS CJ:

No thank you. Thank you Mr McGurk.

MR McKENZIE QC:

In relation to *Christian v Griffiths* the Court has helpfully given an analysis of the times out of the country which in the report can be seen at paragraph 14 on page 4 of the judgment. That's at tab 2 and the five year period is set out there and Your Honour will notice includes some quite significant periods of absence, one of 299 days and another of 225 days. The period of study preceded, Your Honour is correct –

GLAZEBROOK J:

That's what I thought.

MR McKENZIE QC:

– the period of study preceded the five years but the Court held that it ought to look at her overall sort of residential pattern in –

GLAZEBROOK J:

Just in terms of her connection to Norfolk.

MR McKENZIE QC:

Yes, that's right. So that perhaps explains the position, but the – within the five years there were some very significant periods outside the country.

GLAZEBROOK J:

But those were the two periods in New Caledonia, weren't they?

MR McKENZIE QC:

Yes.

GLAZEBROOK J:

Yes.

MR McKENZIE QC:

Yes, that's right. So perhaps finally, in relation to this submission, and then I wish to briefly deal with the United Kingdom authority. The Court of Appeal, it's submitted, wrongly rejected the long-standing line of authority in New Zealand under the Social Security Act and that was developed quite fully in the primary submissions. Unless Your Honour had questions, I don't want to do into that at length now, simply to observe at the outset here that the principles developed in that case, in those cases, the New Zealand cases, under the Social Security Act, the principles developed at those cases were derived from the judgment of Lord Justice Ormrod, who was in the Divisional Court in *Shah* and that case moved on from there but at some length in my primary submissions I explained that notwithstanding the movements in that case, the way in which Lord Ormrod expressed the law was not inconsistent with that of Lord Scarman in *Shah* or the other authorities that I have cited here, so that its mission is the Social Welfare cases are consistent with the principles set out in these cases. They are concerned with the circumstances in which a person is absent from New Zealand for a specific purpose and has a settled intention of maintaining a close connection with New Zealand and returning here on completion of the purpose, so that they all really focused as, indeed, in my submission, the Court needs to do in this case, on the reason for the absence. Important is that any analysis is dependent upon the purpose of the absence considered in the light of statutory context. The importance of purpose of absence in statutory context is highlighted in the case of

Christian v Griffiths, which has been discussed, and it's unnecessary for me to go further over the facts of that case other than to say the purpose of the absence in the statutory context meant that the ordinary residence on Norfolk Island had not been relinquished. In *Shah*, ordinary residence was said to be in the United Kingdom, the country travelled to for the purpose of tertiary study, a result different to that reached in *Christian* but on similar facts, highlighting the crucial nature of purpose of absence and statutory context.

In the present case, the submission is that the applicant has the clear, settled purpose which has been found by all of the Courts and, of course, a strong finding in this respect by the Appeal Authority, of returning to New Zealand on the completion of the specific reason that requires her to be absent, her missionary work, and of maintaining her close connection with New Zealand while she is away. And it's my submission, as in the primary submission, the facts do support that, that at no time has ordinary residence in New Zealand ever been relinquished by her and that, well, the ordinary – is relinquished, is supported by the case law and by the statute itself, and perhaps if I can add there that the fact that the absence here accumulating over 19 years is, of course, lengthy and, as Mr McGurk indicated, there is no authority that one can refer to that, you know, deals with an absence of quite that length, but the submission that I make to the Court is the Court must adopt a principled approach when dealing with, you know, the question of purpose as here and missionary work necessarily involves lengthy, lengthy periods outside of the country. The statute really beneficially treated missionaries in section 10, recognising that, and as His Honour Justice Collins said, really, regarding their work as meritorious, sought to encourage that by dealing with their absence on the basis that it would be treated as being present in New Zealand. That's certainly a beneficial approach to work of that, long-term work of that kind, and it is submitted that the Court in looking at this rather special case should not treat it differently in principle from the approach such as was taken in *Stransky v Stransky* or referred to in *Shah* or in *Christian v Griffiths*, and the length of the purpose, necessary length of the purpose, should not be a factor that detracts from the legitimacy of the purpose.

Then – I'm conscious of time and if Your Honours please, I propose to move onto the supplementary submission, and that may be an opportunity also in the context of that submission to wrap up any final matters for the appellant. So that if I could take Your Honours to the judgment of the United Kingdom Supreme Court, the recent judgment in *R v Secretary of State for Health*, 8 July 2015. I have prepared the supplementary

note because the case has got a particularly complex set of facts and I hope that my narration here will be of some assistance to the Court in getting to grips with an otherwise quite difficult decision.

Reading from the supplementary submission, the case concerned the application of the test for ordinary residence put forward in the earlier House of Lords cases, both of which are in the bundle of authorities, *Levene v IRC* [1928] AC 217 and *Lysaght* and the *Shah* decision, to a statutory provision that placed on local authorities the responsibility for providing accommodation for any child in need in their area. Responsibility was also placed on local authorities to provide residential accommodation to persons aged 18 years and over who, by reason of age, illness, disability, et cetera, are in need of care and attention not otherwise available. Now the question arose in this case as to which local authority was responsible, it was an allocation dispute, for providing or paying for the cost of providing residential accommodation to a child, PH, who had severe physical and learning difficulties and, indeed, was without speech. It was accepted that PH could not make any informed choice about where he would live. Now the legislative provisions are indeed complex and I don't propose to take the Court through them, but the Court accepted in paragraph 2 of the judgment that the answer to the question before it depended on where immediately before his placement in Somerset he was ordinarily resident, and the responsibility determining questions of ordinary residence was with the Secretary of State. A very brief summation of the facts, PH was born in Wilshire, 1986. In 1991 his parents asked Wiltshire to place him with foster parents, which was done, and they were in South Gloucestershire, and despite disquiet on its part Wiltshire, however, continued to fund his care. Later that year parents moved to Cornwall but continued regular contact with PH. At age 18, decisions were required as to his transition to adulthood and involved his being placed in institutional care homes in Somerset, and at that point Wiltshire decided, I think, that it had had enough and it considered the ongoing responsibility to be moved elsewhere, that it rested with Cornwall where the parents were residing. None of the local authorities could agree and they joined together to further the matter, to the Secretary of State who issued a determination that on the relevant date PH was ordinary resident in Cornwall.

That decision was challenged in the High Court but upheld by Justice Beatson. The Court of Appeal disagreed and Lord Justice Elias who delivered the leading judgment held that ordinary residence was in South Gloucestershire where the foster parents lived, that was the place where PH lived day by day and had his settled residence

and it was the place from which he goes out and to which he returns. Visits to Cornwall to his parents were only occasionally for holidays. The majority of the Supreme Court reversed the Court of Appeal and held that PH was ordinary resident in Wiltshire for the purpose of allocating fiscal and administrative responsibility for him.

Lord Carnwath who delivered the majority judgment held that it was common ground that in the present context, unlike other cases considered in the authorities, the subject can only be ordinarily resident in the area of one local authority, otherwise that test would not be an effective tool for allocating responsibility for services or their cost. So like the present case under the Social Security Act, only one ordinary residence could be an issue. The person could have only one ordinary residence and as I've observed that is true in our case as well.

At paragraphs 39 to 48 of the majority judgment Lord Carnwath deals with the authorities on ordinary residence and Your Honours will see a discussion there of the authorities that are before the Court in this case, the *Levene v IRC* and *IRC v Lysaght* tax cases and earlier tax case cited in those decisions and the *Shah* case which I've discussed and I refer Your Honour to the discussion of those cases in those paragraphs.

I summarise them as follows. The tax cases had long held that a person could be ordinary resident in more than one place and that is well established and it is interesting that the insolvency case which is included in the bundle from the respondent, the *Re Taylor, Ex parte Natwest Australia Bank Limited* (1992) 37 FCR 194 case also makes it clear that in insolvency there can be more than one place of ordinary residence.

Then secondly, this could mean, the fact that one could have more than one place of ordinary residence could mean that a person could be regarded as ordinary resident for the tax purposes in United Kingdom when he visited Scotland for two months of the year, although he had a home in New York where he lived for the rest of the year and I think it indicates the flexible nature the approach of the Courts, you know, when one has regard to the particular purpose for the purpose of the statute. As observed by Lord Sumner who in New York would have said of Mr Cadwalader that his in the Highlands, his home is not here, when he spent so little time in Scotland.

The off-sided speak of Lord Scarman in *Shah* was referred to with his emphasis on the two features on ordinary residence, first that it be assumed voluntary and not under constraint and secondly, that it have a degree of settled purpose and it's perhaps not necessary for me to read again that passage which refers to those two factors.

Lord Carnwath then makes a significant qualification and I draw Your Honour's attention to what is said here, although understandably this passage has been often quoted and relied on in later cases, the weight given to the concept of a settled purpose needs to be seen in context. The focus of the passage was to explain why the undoubted residence of the claimants in this country for the necessary period, albeit for the temporary purpose of education, in relation to *Shah*, was sufficiently settled to qualify as ordinary under the accepted meaning. It was relevant therefore to show that it was no less settled than, for example, the residence of Mr Cadwalader during his annual visit to Scotland or that of Mr Levene on his five month visit for medical and other reasons, nor did it matter, it seems, that they might have had other ordinary residences in their countries of origin. Lord Carnwath observed that those features of ordinary residence for tax purposes did not necessarily apply in other contexts, and I think the Court must be cautious when drawing – when applying the principles in *Levene* and *Lysaght* as they were applied in *Shah* to the facts of this case without recognising the very different nature of the purpose for the absences here.

ELIAS CJ:

Well, what is the policy reason for the view that you're taking of how we should construe ordinary residence? You have indicated that there's the concern expressed, well, the specific treatment of missionaries in terms of absences. Is there anything else that you want to point to us in terms of the policy of this legislation?

MR McKENZIE QC:

Yes, I'd agree with the general statement in the Court of Appeal that the policy of the legislation is to recognise that New Zealand has a responsibility in relation to the provision of superannuation at age 65 restricted to those who established a close connection with New Zealand, and I think that the submission here is that Ms Greenfield, despite the lengthy periods of absence, given the purpose of her absences and the approach that the legislation otherwise takes to missionaries, does qualify in showing that she has retained that connection with New Zealand and in that

respect should be treated like other applicants for national superannuation, should not be disadvantaged in comparison with others who may be absent for shorter purposes.

There's – and one needs to have regard when one's looking at policy, which is looking at the responsibility in New Zealand to those with a close connection here, when you have persons who are absent for necessarily lengthy periods of time, and over that time are not in a position, in most cases, to establish a connection for superannuation purposes with any other jurisdiction, someone in Bangladesh or – there's simply not that opportunity, many of the places where missionaries work, and the submission would be that there must be caution on the part of the Court given the length of purpose that the statute recognises here in treating that length of purpose as disqualifying those who are absence.

ELIAS CJ:

I'm just really wondering how far it goes because the statute recognises the position of missionaries in terms of the qualification of absence versus presence but in terms of the ordinary residence threshold does that mean that anyone who is in an occupation that couldn't be undertaken in New Zealand would fall within section 8(a) if they had some sort of connection, equivalent connection?

MR McKENZIE QC:

The difficulty that those persons would face is that they do not have the benefit of section 10, or unless they're Volunteer –

ELIAS CJ:

But then they might meet those connections by just making sure that they were within the country to get over those, that, the presence requirement.

MR McKENZIE QC:

Yes, yes. I have a family member who's just within that category who came back to New Zealand for that purpose at age 60 so that she might have the remaining five years here and so qualify, notwithstanding, in her case, 12 years of continuous absence, or virtually continuous absence, abroad. Yes, there are New Zealanders in that position but they would have to so arrange their affairs as to come within –

ELIAS CJ:

Yes.

MR McKENZIE QC:

– sections 8(b) and (c).

GLAZEBROOK J:

And at that stage they'd be ordinarily resident anyway because they'd have been, at 65, having been here for five years, they'd clearly be ordinarily resident anyway.

WILLIAM YOUNG J:

Can I postulate a slightly different situation? Say I, at the age of 63, gave up living in New Zealand for a period of time, got a job, say, at a university in the UK, sell my house, retain a holiday house, occasionally come back and see children in New Zealand, whatever, but I buy house in the UK. That's where, you know, I live. I have cars, I pay tax, et cetera, there. Will I be ordinarily resident in New Zealand when I'm 65 and come back and say, "Well, I want some super, please," or – because, I mean, that's rather like your case except – and if you treat section 10 as irrelevant to section 8(a), as it would be irrelevant to me, I'd be going uphill, wouldn't it?

MR McKENZIE QC:

No, because you –

WILLIAM YOUNG J:

Even though I say, "Well, look, when I'm finally finished with this job I will come back to New Zealand"?

MR McKENZIE QC:

No, because, Your Honour, section 8(b) and (c), on ordinary residence requirement there –

WILLIAM YOUNG J:

But I qualify. I qualify under section (a), (b) and (c). I haven't got a problem with (a), (b) and (c), but I've given up my job in New Zealand, I've got another job overseas, I've sold my house, but I have got a holiday house, and I have got connections here and I probably spend three or four weeks a year here.

MR McKENZIE QC:

Yes, but –

WILLIAM YOUNG J:

But would I be able to get super?

MR McKENZIE QC:

In my submission not, because of the way that (a), (b) and (c) are read, that unless you're physically –

WILLIAM YOUNG J:

No, but I'm good on (b) and (c) because I've been in New Zealand for not less than 10 years since I've attained 20 and I've spent not less than five years in New Zealand since I was 50. So I'm good on section 8(b) and (c), but what I might not be so good on is section 8(a) if I've got a house in the UK.

MR McKENZIE QC:

That may well be so and I think that your case in that case can be distinguished from that of the missionary.

WILLIAM YOUNG J:

But even if I'm only going to be away for five or six years, then why – how would you distinguish my case from that of Ms Greenfield?

MR McKENZIE QC:

Well, Ms Greenfield has the benefit of – because of –

WILLIAM YOUNG J:

But section 10 is irrelevant to section 8(a).

MR McKENZIE QC:

Well, section 10, but in terms of ordinary residence she's away for a particular purpose –

WILLIAM YOUNG J:

So am I. I've got a really nice job offer in the UK.

MR McKENZIE QC:

Yes, well, if you otherwise qualify, as your illustration indicates, then, of course, you get the benefit of the section because you've established sufficient connection in terms of the requirements.

WILLIAM YOUNG J:

Would I really be ordinarily resident in New Zealand though if I'm living somewhere else?

MR McKENZIE QC:

You're living somewhere else for what purpose?

WILLIAM YOUNG J:

Because that's where my job is.

MR McKENZIE QC:

So your job. I think if it's a situation where you have, although pursuing that purpose, have established a close connection with the country in which you were then residing and you've bought property there, you –

WILLIAM YOUNG J:

Then say I rent a house instead of buying it. Can that really make a difference?

ELIAS CJ:

Isn't the – I suppose the point that you're putting to us is that, in fact it's said in one of the cases, that if you – it's about also identification with the place where you're living and the degree of identification there, not just the identification with the – with New Zealand, so - and I think one of the cases said if you moved on and – or if you didn't – but in this case events have slightly changed, haven't they, because your client's now in Cambodia, which – because before it seemed –

WILLIAM YOUNG J:

Is she in Cambodia? Or wasn't she going to go to Myanmar?

ELIAS CJ:

Well, she's gone to Cambodia instead.

MR McKENZIE QC:

Well, they visit Myanmar quite regularly, or did do. They're now based more regularly in Cambodia itself, yes.

WILLIAM YOUNG J:

I see, okay.

ELIAS CJ:

But I just really wonder whether that – because one of the things, one of the circumstances at the time of the hearings in the other Courts was that there was significant connection with Singapore, there was tax being paid there, there was a flat there, all of those sort of things. Are those not – is there no connection anymore with Singapore in this case?

MR McKENZIE QC:

Not in the way in which – not the facts at the time of the application, although I would submit to Your Honour that the respects in which Ms Greenfield had a connection with Singapore were all solely, when they're examined, solely for the purpose of pursuing her missionary vocation there.

ELIAS CJ:

No I understand that but there were other indications of connection with Singapore which inevitably impact on the degree of connection with New Zealand but if she's moved on so that there isn't that connection, I mean do we have – were there any facts, it was all just agreed for that?

WILLIAM YOUNG J:

Where does the Cambodia – where do they come from?

ELIAS CJ:

Well you've just said that to us, haven't you?

MR McKENZIE QC:

It's a subsequent fact, I just indicated to the Court that Ms Greenfield was no longer, now at the date of hearing, in Singapore, has for the last I think two years been living in Cambodia, given up – yes she's given up her Singapore flat, and her connections, such as they are, for the purposes of living there are now in Cambodia. It's a feature

of some missionary work that missionaries can be peripatetic and they can move from country to country.

ELIAS CJ:

But that seems to me to be really quite a significant thing, if the work is peripatetic because it does mean that you don't have an alternative connection which means that you live in a different place or that you're ordinarily resident in another place but we don't really have that in front of us.

MR McKENZIE QC:

Yes it is a factor that missionaries do tend to move not infrequently, in this case within South Asia. The other factor that I think is important there in establishing connection is that in Ms Greenfield's case any connections that one might have seen of a more permanent character were consciously rejected by her as she does not vote in Singapore, she chose not to become a citizen, she could have, she chose not to acquire property there, although she might have been able to do so. She makes conscious decisions rejecting Singapore, if you like, in favour of New Zealand as the long-term place to which she will return and if one is looking at superannuation, one is necessarily looking at a long-term relationship, if you can call it that, and New Zealand is the place of connection for someone like Ms Greenfield. It is very difficult to envisage in the case of many missionaries, any responsibility being engendered or developed or even could be developed with any other jurisdiction to take on the superannuation role.

ELIAS CJ:

Now sorry I'm just conscious that we should probably be giving Mr Stephen a go soon. Have really concluded?

MR McKENZIE QC:

Look I'm almost finished. If I could just – oh yes we've moved past the adjournment. I've got only a few more minutes to go just to complete the note.

ARNOLD J:

I wanted to ask whether there's anything helpful in the statutory history to this? You've given us some of the previous sections and explanatory notes and so on and there is a change in the way the provisions work but is there anything, don't deal with

it now, but I just wanted to enquire whether there was anything you wanted to draw from that statutory background or anything we could gain from it?

MR McKENZIE QC:
Yes well Your Honour is correct, there was a significant change in 1987, Mr McGurk touched on that, where in response to the *Fowler* decision the wording of section 10 was changed and section 9 to refer to "presence" and the Court of Appeal took the view that in view of the statutory history, the exemption should be read as an exemption from residence and presence, that it was not intended – formerly the wording was "residence" – not intended to change the purpose and, you know, intent of the sections, so that that was a statutory change, it would be submitted, which in the end did not impact really on the way in which section 10 or the missionary is to be treated.

The other factor that would be helpful, Your Honour, is picked up in the judgment of Justice Collins who looked at, traced through briefly the history from the 1938 Act, the introduction of the missionary provision in 1962 and referred to the statutory explanatory note which provides very limited but at least some explanation of the introduction of that provision.

ELIAS CJ:
Perhaps we'd better take the adjournment now and if you want to –

MR McKENZIE QC:
Yes.

ELIAS CJ:
– consider whether you expand a bit on the legislative history, that would be good.

MR McKENZIE QC:
Thank you.

COURT ADJOURNS: 11.41 AM
COURT RESUMES: 12.01 PM

MR McKENZIE QC:

There's I think nothing further that I wish to address on the statutory background and my responses to Justice Arnold, I think, covered the matters that I would want to raise there, and I refer also to Justice Collins' background in his judgment.

I just want to conclude by picking up the end of the note on the United Kingdom Supreme Court case, that the outcome of the case mentioned was that the majority of the Court held that Wiltshire, which had originally placed the child and taken the initial financial responsibility, remained the place of ordinary residence. There were significant policy factors in that and this led to a dissent from Lord Wilson, who held that the child there, or young man as he then was, was ordinarily resident in South Gloucestershire where the foster parents were and did so largely on the basis of an application of the principles in *Shah*, settled purpose, the place of residence with some continuity, and considered that Lord Carnwath, who gave the majority judgment, departed from the language of the statute which Lord Carnwath had held made the residence of the subject and the nature of that residence the essential criterion. So I need to leave Your Honours to look at that judgment but just wish to conclude with some concluding remarks.

ELIAS CJ:

It's really not on point at all, is it? I mean, it's just a recent case in this area but the circumstance in which the young person wasn't able to exercise any sort of choice about where he was placed means it's of very little help in this context, isn't it?

MR McKENZIE QC:

It's – I agree that the facts are very different and it may for that reason be of limited assistance where, of course, we are concerned with a settled purpose and voluntary acquisition, but I would submit that the judgment does show that one must look at ordinary residence in the context of the statute, and there are a great variety of contexts. The tax situation which is often very short-term for business purposes gives rise to very different considerations when one comes to apply the test in a case such as the present. Looking at 12(b), those cases, that's the tax cases, and their sequel in *Shah* require that there be a settled purpose that is part of the regular order of life for the time being, whether of short or long duration. The nature of the purpose of residence in tax cases and also *Shah*, given the relatively short period that study has in a foreign student's life, means that the period of residence may be relatively short in those cases and be regular over that short period. This will not disqualify, in

my submission, a person from being ordinarily resident for the purpose of education over a quite short period in that person's life, and in tax cases a person may be ordinarily resident in more than one place, in more than one place, ordinary residence can be established by visits for business purposes over relatively short, and as those cases showed, very short periods of time with long intervening periods spent elsewhere. So in that sense the context is very different. The 2001 Act has a much longer perspective, being concerned with entitlement to superannuation. It recognises that missionary work is a specific purpose that unlike the tax cases or *Shah* may require long periods of time outside New Zealand but provides exemption in this respect from the qualifying requirements in 8(a) and (b) – 8(b) and (c). A specific purpose that necessarily requires long periods of absence outside New Zealand must be viewed differently from the shorter-term purposes in *Levene*, *Lysaght* and *Shah*. As *Shah's*, seated by Lord Denning, cited in *Shah*, temporary or occasional absences may be of long or short duration. The purpose of missionary work may involve long absences but given the nature of that work this will not in itself mean that ordinary residence is lost, and I refer to the examples in *Levene* and *Christian v Griffiths* of the mariner and the sailor.

Coming to Justice Young's example and reflecting on it, I don't walk away from that situation, Your Honour. If the facts there were such as we have here in Greenfield and the connection is established maintaining connection with New Zealand over that period of absence and very limited, if any, established connection with the place in which that person lives other than the necessary ones of renting accommodation as distinct from purchase, paying taxes, which is a necessary incident of being in a place and obtaining resident status in order to live there, those are – that is all that one can say that Ms Greenfield did to establish some connection with Singapore, nothing further than the essentials that were needed to live there to do her work.

If that's the case in Justice Young's example then I would agree that that person, if they maintained their regular connection with New Zealand, regular visits here, a residential property here, paid tax here on an ongoing basis, have family commitments here, have a doctor here to who – which they've continued to consult, those factors would, no doubt, entitle the person in that example, who is over there for some specific purpose in UK, to also claim to be ordinarily resident in New Zealand.

WILLIAM YOUNG J:

Can I just ask you a question on portability to see whether I've got it right? In order for the pension to be portable she has to be, leaving on the facts as they were at the time of the hearing, she has to be resident in Singapore? She had to leave New Zealand with the intention of residing in Singapore?

MR McKENZIE QC:

Once ordinary residence had been established.

WILLIAM YOUNG J:

Yes, yes.

MR McKENZIE QC:

Yes.

WILLIAM YOUNG J:

Yes, assuming she's eligible under section 8 but she wants to get the pension while in Singapore, under section 26(1)(b) she has to intend to reside in Singapore for a period longer than 26 weeks.

MR McKENZIE QC:

Yes, well, I think that again would indicate to the point that was earlier the subject of submission that one can be resident in another jurisdiction for significant periods of time for a particular purpose and nonetheless be ordinarily resident in New Zealand. The section would be nonsense if that were not the case, that one may be able to maintain ordinary residence here.

So, finally, the submission is that the decision in *R v The Secretary of State* shows that ordinary residence is not lost by long periods of absence. The facts there are unusual but it indicates the flexibility of the approach and the tests used by the Court, and it's the statutory context that must guide the way in which ordinary residence is to be assessed.

So unless Your Honours have further matters that Your Honours wish to raise with me, that really concludes the matters that I wish to put before Your Honours.

ELIAS CJ:

Thank you, Mr McKenzie. Yes, Mr Stephen.

MR STEPHEN:

Thank you, Your Honour. I did wish to start by responding to Justice Arnold's question about the statutory framework, hopefully briefly, but my purpose is to step through the various amendments which occurred which results in us having the form of the language of particularly 8 before us today and then that will lead to the question of how one, in my submission, should interpret these disparate terms, presence, residence and ordinarily resident, and in doing so suggest, as Your Honour, the Chief Justice has, that there is, when you stand back and look at the Act, as one must, in terms of the, what is, in my submission, really just statutory interpretation, a thread of logic that binds it all together in a way that makes it workable, and I'll refer, in relation to the legislative history, to the various items in the appellant's bundle.

So the first is at tab 5, and this is the introduction in 1962 of the exception that a missionary need not meet what is now in sections 8(b) and (c). The first indication that the terms "resident" and "present" were to be treated separately was in 1987 when the Social Security Amendment Act 1987 introduced the additional requirement that an applicant be both resident and present. That's at tab 8.

Tab 9 is the Explanatory Note to the '87 Bill. Tab 9. Clause 3 amends section 14 which was the precursor to section 8 to provide that to qualify for national superannuation a person must have been not only legally resident in New Zealand but also present in New Zealand during the relevant period or periods set out in that section.

ELIAS CJ:

Sorry, is this tab 9, did you say?

MR STEPHEN:

Tab 9, Ma'am, yes.

ELIAS CJ:

Sorry, I'm looking at the appellant's. This is the respondent's, is it?

MR STEPHEN:

No, it's the appellant's.

ELIAS CJ:

And what clause was it?

MR STEPHEN:

Clause 3, which is second described after the words "Part 8".

ELIAS CJ:

I see, sorry, yes, section 17. I looked at clause 14 of this. Thank you.

ARNOLD J:

Sorry, can I just be clear about this? If you go back to the Social Security Act 1938 under tab 4, you qualify then by what they described as continuous residence, and then the exemptions were that continuous residence shall not be deemed to have been interrupted by absence from various causes.

MR STEPHEN:

That's correct, Sir.

ARNOLD J:

And then the missionary one was introduced for the first time in '62, is that what you said?

MR STEPHEN:

That's my submission, yes.

ARNOLD J:

Right, and is that the first reference to ordinarily resident in (b) there?

MR STEPHEN:

No. My understanding is it's been a feature…

WILLIAM YOUNG J:

1938 Act.

ARNOLD J:

Pardon?

WILLIAM YOUNG J:

So what's wrong with that? This is the 19 –

ARNOLD J:

That's under tab 5, the Social Security Amendment Act (No 2) Act 1962.

WILLIAM YOUNG J:

All right.

ARNOLD J:

So that brings in missionary work into this structure.

WILLIAM YOUNG J:

Continuous – ordinary residence didn't come in until '64, did it?

ARNOLD J:

Well, you'll see in that 2(b) it talks about having been ordinarily resident.

WILLIAM YOUNG J:

All right, okay.

ARNOLD J:

And I was just trying to understand if that's the first reference to it, and then it comes in, ordinary residence comes in in '64 in section 14.

MR STEPHEN:

That's my understanding, Sir.

ARNOLD J:

Yes.

MR STEPHEN:

And perhaps continuous residence or residing continually was seen as analogous to ordinarily resident.

ELIAS CJ:

Well, I'm not sure that that –

ARNOLD J:

It's a different concept, I think.

ELIAS CJ:

Yes.

MR STEPHEN:

In any event, my purpose was to –

ELIAS CJ:

Convince us of that, was it? No.

MR STEPHEN:

No, Ma'am. I was trying to just put it in the context of the way in which the interrelationship between the requirement of presence, which is clearly going to be very difficult to fulfil if you're a missionary –

ARNOLD J:

Yes.

MR STEPHEN:

– was put into the statutory scheme.

ARNOLD J:

Mhm.

MR STEPHEN:

And when I was directing Your Honours' attention to the Social Security Amendment Bill '87 that introduced the presence requirement, the reason for that amendment arose out of the High Court's decision in Fowler which took the suggestion that continuous residence meant not quite that, in the sense that temporary absences were still permissible, and *Fowler* discussed in the case of *S v Chief Executive, Ministry of Social Development* [2011] NZAR 545, which is at tab 23, but I don't think it's necessary to take the Court to that other than to say it explained there that what

was said in *Fowler* by Justice Casey was if Parliament intended you to be in effect present, it should say so. And at 26, that's paragraph 26 of *S*, the Court noted that the intention of the amendment was to qualify what the Department actually did when calculating the period of residence for New Zealand superannuation, and the quote is, "With it having always taken into account the period the person was physically present in New Zealand and not any periods of absence overseas and further in order to clarify the intention of the legislation the requirement has been inserted that the person is present as well as resident," and that's from the relevant Parliamentary debate of March '87. It's referred to in *S*. In my submission, it's clear that the legislative history to the '87 amendment suggests that the amendment was designed to strengthen an eligibility requirement, not to relax it.

GLAZEBROOK J:
Strengthen what requirement, sorry?

MR STEPHEN:
The insertion of –

ELIAS CJ:
Do you mean narrow it, not relax it?

MR STEPHEN:
Yes, Ma'am. The obvious difficulty of this is –

GLAZEBROOK J:
Sorry, can you just repeat what you said because I didn't get it down?

MR STEPHEN:
Sorry, Ma'am. So my submission was that the '87 amendment introducing presence was designed to strengthen an eligibility requirement. Her Honour, the Chief Justice, says, and I accept, that to narrow it in the sense of it wasn't widening an ability to obtain New Zealand superannuation, one had to be both resident and present for the qualifying periods.

Now the obvious difficulty this presented to missionaries was that they weren't going to ordinarily be able to fulfil the presence requirement.

Then at tab 11 of the appellant's bundle is the 1990 Social Welfare (Transitional Provisions Act 1990) which corrected that anomaly, if that's what it was, with the exception for missionaries and others that they need to meet the presence requirement.

And so today we have section 8 which requires, in my submission, everyone to be ordinarily resident in New Zealand on the date of their application in order to qualify but that in dealing with section 10 and missionaries, those people do not need to be present but they still need to be resident.

So what does "residence" mean? A person present in New Zealand is very likely to be resident unless they're visiting for a short duration but, in my submission, the legislative analysis indicates a person who is not present can still be resident and where the Chief Executive differs from the appellant is in the suggestion that this means a person who is resident can only be ordinarily resident despite extensive absences overseas for multiple years. In the Chief Executive's submission, "resident" is a different yet related concept to ordinary residence and it –

ARNOLD J:
Does it depend on having another place of long-term residence? I mean, if you instead of residing in Singapore for 19 years the appellant had been to a number of different areas where she carried out missionary work, so 18 months in Singapore and then two years in Cambodia and a year in Laos, and so on and so on, a whole lot of different places –

MR STEPHEN:
Well, as with all things, it would depend on the factual circumstances, Your Honour, but as I understand my friend's argument, or at least concession, if that's what it is, is that you can only be as a matter of law in relation to superannuation ordinarily resident in one place, then Your Honour is correct. It depends on a factual analysis whether or not you are ordinarily resident in New Zealand or elsewhere.

ARNOLD J:
So, from your point of view, the key is the fact that the appellant was located for 19 years in Singapore as opposed to a whole lot of different places?

MR STEPHEN:

I pause because what we are dealing with is the factual circumstances of Ms Greenfield and circumstances may differ in some respects but – and so perhaps an iterant lifestyle would mean that the ordinary residence may be still in New Zealand in some circumstances, but in the case of the appellant we're dealing with someone who has been stationed overseas for 19 years with occasional visits back and I say, with the greatest respect to the argument before the appellant, that that can't be a temporary absence and suggests quite strongly that ordinary residence was, on the basis of the case before the other Courts –

ARNOLD J:

All right.

MR STEPHEN:

– in Singapore. On the question of the facts as well, this is a case stated appeal to some extent, or an appeal from a case stated appeal, and to some extent the superior Courts were given the facts as they were in relation to the initial appeal and one could speculate about where Ms Greenfield might have ended up and may end up in the future and as Your Honour, the Chief Justice, has identified, the question of course is when the application for New Zealand superannuation occurs and, in particular, where is the person ordinarily resident at that time, and in defence of the Ministry, and it's in the bundle, it might be useful to take Your Honour to it, it's in the case on appeal, volume 2, tab 21, paginated page 228, so this is the application that was made by Ms Greenfield, and you'll observe at page 230 under the heading "Residency" the second left-hand question, or question 19, the note is, "This means that you consider New Zealand to be your home. You are legally resident and you normally live here." Question 19, "Do you normally live in New Zealand?" Answer, truthfully, "No." Question 20, "Do you regularly visit New Zealand" – sorry, "Do you regularly visit any countries outside New Zealand?" Answer, "Yes," and there are a number of countries: Singapore, Burma, Cambodia, Indonesia, but significantly first is Singapore. "How often?" "Permanent." So, without putting words in the appellant's mouth, to answer Justice Young's question, "Where would Ms Greenfield consider she lived, at least on the date of the application?" the answer is "Singapore".

GLAZEBROOK J:

Well, she gives that as her address on page 228 as well.

MR STEPHEN:
I don't want to put too much weight on this because, as I say, it's a case stated appeal and we're interested in determining a more general question which is, "How should one interpret 8(a) in the context of the Act?" but as Justice Arnold was putting to me hypotheticals, I thought it would be helpful to come back to what we're actually talking about in terms of the factual circumstances.

So turning to my urging upon you the Ministry's theory of the way in which one should pull together the various provisions of this Act which, having looked at it over some time now, I confess to being somewhat at times to fully piece together, nonetheless, as I say, I think, sorry, my submission there is a sensible line of logic that runs through it.

The Chief Executive's submission is that "resident" is a different yet related concept to "ordinarily resident" and as a result many of the factors relating to the interpretation of ordinary resident, including that of physical presence, will equally apply to the interpretation of being resident. We accept one such factor is the intention of the applicant. The respondent's case is, however, that it's not determinative. The way in which intention is relevant to resident and ordinarily resident differs. This is because determining resident requires a historical survey over the relevant periods and for most applicants, in other words for those to whom sections 9 and 10 aren't relevant, being present will almost invariably mean they are resident.

In contrast, ordinary residence encompasses both the historical survey, perhaps over a shorter timeframe than being resident, as well as an assessment of future intention as to where the applicant will reside. It follows a missionary applicant will not need to have been physically present in New Zealand for the section 8(b) and (c) periods in order to meet the residence criteria, otherwise there's no purpose for those provisions.

A missionary applicant could potentially be considered to have been resident for the prescribed periods while not having been present in New Zealand while they are undertaking missionary work, and in my submission that does not damage and in fact supports the exemption that exists, and I suppose that at base my submission is the approach that I am advocating aligns with the purpose of section 10 and the wider policy objectives of that part of the Act in not penalising missionaries for their absences overseas while undertaking missionary work, and, as I've said, otherwise

the whole purpose of the present exemption could be defeated if a missionary is found to be, not to be resident while all the other criteria are met.

Now, as I understood the argument that was put in relation to the way in which these interrelated terms are to be made, it was suggested to the Court that, by the appellant, that ordinary residence can accommodate the loss of residence. I think I have characterised that correctly, and, with respect, that can't be so because were it to be the case that, for example, Ms Greenfield was neither present nor resident for five of the more of the last 15 years before turning 65 then she wouldn't get in at all.

GLAZEBROOK J:
But she's got the exemption. So she's deemed to be present and resident, isn't she?

MR STEPHEN:
Well, I say she is because I say she remains – well, people in her –

GLAZEBROOK J:
Well, but I thought what the – I thought the submission was that if you're ordinarily – if you're resident, you have to be continually present. If, however – apart from very temporary absences, but the concept of ordinary residence can accommodate longer absences as long as they are for specific purposes and you may become during that period actually resident overseas but not ordinarily resident. It was subtle but I don't think it's the same distinction you're making.

MR STEPHEN:
Well, if that's the way it was meant then I accept that, Ma'am. What I was attempting to suggest though was that these terms are capable of having, depending on the circumstances, a meaning which does not exclude a missionary from continuing to be resident but does exclude that person from being ordinary resident because they are habitually living a life overseas as part of their settled order.

ELIAS CJ:
I must say I would have thought that "ordinarily" was expansive because it indicates that you look at the long-term position, not any particular snapshot, but I don't think it matters very much.

MR STEPHEN:

Well, I accept that, Your Honour. I think it does matter in the sense that, that – the reason it matters for the purposes of the argument on behalf of the Chief Executive is that it needs to be put in the context of New Zealand's superannuation being an entitlement. It's extremely generous in comparison with other places. It's not means tested and it's universal. So 8(a) is the gatekeeper, and, with the greatest respect to the worthy work no doubt the applicant makes and does, care needs to be taken not to interpret the matter in a way that opens the gates too wide.

To take, for example, a suggestion made by Justice Young that he could go to the United Kingdom and take up work, technically that is so although, Your Honour, the United Kingdom is a country where there are reciprocity arrangements so you might be all right, but if we change that circumstance subtly and were Your Honour to decide, having come within 8(b) and (c), to go to Dubai, and I understand from the Ministry that following the decision at first instance this is a real possibility, people in that country were suggesting that they too had met the residential qualification but they retained a strong desire to return to New Zealand at some time to retire and they'd very much like national superannuation now, and I don't want to make too much of the arguments associated with the fiscal side of this but it is relevant.

While I'm on that and…

GLAZEBROOK J:

Well, it's – for most people other than missionaries you have to have met the five year residency requirement after you turn 50 so I doubt very much that there's much of a floodgate unless there's a whole pile of missionaries who, like Ms Greenfield, are so dedicated that they wish to spend their retirement years as well as their earlier years in missionary work.

MR STEPHEN:

No, Your Honour, I'm not suggesting there will be a floodgate of missionaries. I'm suggesting –

ELIAS CJ:

You're suggesting –

GLAZEBROOK J:

Well, those are the only people that are going to be the real issue, aren't they, because most other people will have met all of the requirements and, in fact, if they have met all of the requirements can actually ask for it to be paid off-shore anyway, under 26A?

MR STEPHEN:

That's right, but –

GLAZEBROOK J:

So –

MR STEPHEN:

– but they must first –

GLAZEBROOK J:

So what's the –

MR STEPHEN:

– qualify.

GLAZEBROOK J:

– problem? Well, they will qualify because they'll have –

MR STEPHEN:

Well, not if they're abroad, with respect.

GLAZEBROOK J:

Well, no, because they will qualify because they will have been ordinarily resident when they apply for it, they will have had to have had the five years after they've turned 50. As soon as they have that, as I understand it, they can.

MR STEPHEN:

No, sorry, Your Honour, you're right. We're at cross-purposes.

GLAZEBROOK J:

So there's no floodgate.

MR STEPHEN:

We're at cross-purposes. I'm suggesting that someone who maintains a strong connection but is not ordinarily resident on my analysis in New Zealand because they –

GLAZEBROOK J:

But they won't be resident then so they won't meet (b) and (c). They won't have met the residence requirements.

MR STEPHEN:

But they could've, with the greatest respect.

WILLIAM YOUNG J:

They could've independently.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

They could've, like I would've met it.

GLAZEBROOK J:

Well, yes, but then if you turn 65 you get to take it with you anyway.

MR STEPHEN:

But you've got to qualify first.

GLAZEBROOK J:

Well, at – but you will have qualified because at 65 you will have been ordinarily resident. So it's only the people who might have left at 64.

WILLIAM YOUNG J:

Yes. Is that what you're talking about?

MR STEPHEN:

Yes, Sir.

GLAZEBROOK J:
Well –

MR STEPHEN:
Sorry, I'm –

GLAZEBROOK J:
– it's hardly a floodgate, I would think. I wouldn't have thought that it was a major floodgate issue.

MR STEPHEN:
And I hopefully did say that I wasn't trying to put too much emphasis on that but I was suggesting that the term "ordinary residence", when used in relation to the superannuation provisions and the Social Security Act has a broader aspect and they're in my written submissions. I don't need to flog that.

Can I also acknowledge the request and say that we will file a memorandum explaining what the Department did do following the High Court –

WILLIAM YOUNG J:
Well, I think I understand now that on the basis that she was intending to reside in a non-convention country she was if she otherwise satisfied, if she satisfied section 8, entitled to portability, and in terms of the pro rataing, she was entitled to count against – she was entitled to count the years she'd spent in Singapore. Is that right?

MR STEPHEN:
That's right, Sir, and that's because the decision of Justice Collins was taken to mean that she was ordinarily resident including for the 65A test.

WILLIAM YOUNG J:
Yes.

MR STEPHEN:
So she got 100%.

WILLIAM YOUNG J:
Yes.

MR STEPHEN:

It might be useful –

WILLIAM YOUNG J:

Yes, yes, I understand that, yes.

MR STEPHEN:

– just to correct one thing that I think was made in submission in relation to that, and I'll take you to the Act, but the scheme is that one under 8 acquires New Zealand superannuation and whilst one remains in New Zealand then that is paid at 100%. If you leave New Zealand for up to 26 weeks but not more than 30 – sorry, if you leave New Zealand for up to 30 weeks, you are entitled to 26 weeks, and that is paid at the full rate. 26A rate applies and will potentially do so at a discount depending on the number of months and years you have been absent between 20 and 65, and there are two ways in which that can be obtained. One is if you travel, and one must first inform the Ministry of your intentions, including the countries you wish to go to and the duration, and that seems to be reasonably straightforward. In that circumstance one assumes that you are not going to be ordinarily resident anywhere other than New Zealand because in order to continue to get the section 26A portable rate 26B says you have to remain ordinary resident. The other aspect is where one informs the Department that you intend to reside elsewhere for more than 26 weeks in a non-reciprocal country and in a country that is not a specified Pacific country, and the reason for the latter is that there are other provisions around about sections 30 to 33 of the Act which have an arrangement for people in specified Pacific countries whereby after a year a different arrangement arises and the super is paid to them at a rate depending on how long they've lived in New Zealand.

My point in taking you that far is on my understanding of it, both the way in which the Department operates that provision and I suggest the way it is written is that you can be away for more than 12 months and still receive the superannuation payments on the portable basis. I don't think much hangs upon that but I just wanted to correct the impression. Is it useful to go to what the Act actually says?

GLAZEBROOK J:

But I think that was one of the points that was made against you by Mr McKenzie, as I understand it, that in fact you don't have to have that continuous presence in New Zealand once you qualify.

MR STEPHEN:

I accept that.

GLAZEBROOK J:

Right. They're very – they're exceedingly complicated, it must be said, in terms of –

MR STEPHEN:

Well, Your Honour, the Chief Justice, was saying to my learned friend, "What's the policy?"

GLAZEBROOK J:

I hope the Department actually has simplified things so that ordinary people can actually understand these in some vague manner because they certainly couldn't understand the statute.

MR STEPHEN:

Well, it took me a long time to figure out what would happen to me in relation to 26A.

GLAZEBROOK J:

So the answer obviously is, "No, they don't have anything simple"?

MR STEPHEN:

No, they do. That's unfair. And in fact there is a – in the materials, though no one's taken you to it, is a guidance note. But like all these things, they're a high level and –

GLAZEBROOK J:

Yes.

MR STEPHEN:

– I don't need to urge upon you the fact that the Department may issue guidance note, is not stating the law.

GLAZEBROOK J:

No, no, absolutely.

MR STEPHEN:

It's, with the greatest respect, why we're here today, and it's a 1981 Act with a style of drafting that one doesn't want to be critical about but if, I mean, a –

GLAZEBROOK J:

Other people have been critical about that style of drafting so…

MR STEPHEN:

Yes, well, thank you. I won't say any more.

GLAZEBROOK J:

So can I just, in a nutshell, if you're absence for less than 26 weeks you get paid at the full rate. If you're absent for more than 26 weeks, provided you do the things that you're supposed to do in respect of that, you may get paid at a lesser rate, depending upon the – but that in Ms Greenfield's case she wasn't because her absence was deemed to be presence? Does that make…

WILLIAM YOUNG J:

No, no, because it is portable. She's entitled to the pension if she –

GLAZEBROOK J:

No, no, but she wasn't, she wasn't pro rated –

WILLIAM YOUNG J:

She wasn't pro rated because –

GLAZEBROOK J:

– because her period –

WILLIAM YOUNG J:

Pre-65.

GLAZEBROOK J:

– in Singapore. Yes.

WILLIAM YOUNG J:

Yes.

MR STEPHEN:

And it might be helpful to say, to explore the hypothetical which was put to my learned friend which is were Ms Greenfield to come back to New Zealand and to establish a sufficient degree of permanence or connection or whatever euphemism you wish for that, and to qualify, and then to go away, she can go away for 26 weeks and provided she is, remains ordinarily resident, that's 100%, she can go away for longer than that provided she's signalled that intention up and in that case the 26A discounting applies.

GLAZEBROOK J:

But in her case it wouldn't because…

MR STEPHEN:

No, in her case it would because –

GLAZEBROOK J:

Oh, no, because –

MR STEPHEN:

Differently.

GLAZEBROOK J:

– she hasn't been ordinarily resident during that period.

MR STEPHEN:

Yes.

GLAZEBROOK J:

Yes, I understand, yes.

MR STEPHEN:

So that's 26A(3) and it's capable of reading that and 26A(4) as meaning different things because of the reason –

GLAZEBROOK J:

Yes, yes, I understand that.

MR STEPHEN:

– having to change about how the – but, but I understand the Departmental approach is treated that way and, indeed, in the materials there is an explanation as part of one of the debates which explains that the correct approach, or, sorry, the intention of the combination of 26A(3) and (4) is to require missionaries as well as section 9 people to have been ordinarily –

GLAZEBROOK J:

Yes.

MR STEPHEN:

– resident during the period for the qualification period. Do you wish to hear from me in relation to the analysis of the case law?

ELIAS CJ:

I don't, but anyone got any questions?

O'REGAN J:

I think it's in your written materials.

ELIAS CJ:

Yes, it's in the written material.

MR STEPHEN:

I want to thank the librarians at Crown Law for the Norfolk Island case too.

ELIAS CJ:

Yes, it's quite – I don't think we've ever had one cited to us.

MR STEPHEN:

It's there too because, of course, I respectfully adopt the way in which the Judge deals with this question of whether one can be ordinarily resident in two places at the same time.

ELIAS CJ:

Yes.

MR STEPHEN:

But it's not apparently live now. So can I just check with my junior to make sure that I haven't…

ELIAS CJ:

Yes.

MR STEPHEN:

My junior has alerted me to the position in the bundle which is at tab 13 which is the commentary to the relevant Bill which explains why the interpretation I'm suggesting Your Honour appears to accept.

GLAZEBROOK J:

No, it's clear on the wording, I think, so I understand. Was there – is there – I wasn't sure. That's fine.

MR STEPHEN:

So unless you have anything else?

ELIAS CJ:

No, thank you, Mr Stephen.

MR STEPHEN:

Thank you, Your Honour.

ELIAS CJ:

And thank you for your written submissions. Yes, Mr McKenzie, do you want to be heard in reply?

MR McKENZIE QC:

Just a few points, Your Honour. Just one or two matters of brief reply in the order that they were raised. The possibility that a missionary may move from place to place was raised with Mr Stephen and the response was that, well, that doesn't affect Ms Greenfield's case because the facts here, at least at the relevant time, show her residing for some, a period of time in Singapore. It's submitted, however, that the peripatetic nature or possible nature of missionary work, and I'm conscious that it's not established as a fact as such, but if the Court's able to take notice that that is a

feature then it is a matter that needs to be considered in dealing with a case involving a missionary, and the fact that in this case Ms Greenfield, it's submitted, put down no sort of permanent roots in Singapore, no establishment there that she could not easily move away from and always kept, if you could say, the door to New Zealand wide open, are matters that the Court needs to take into account.

The point was made that Ms Greenfield filled in the form which is at tab 21 in the volume of material from the Ministry, page 230. The question put to her, "Do you normally live in New Zealand?" The answer, "No." Ms Greenfield was not instructed, if you can put it that way, in the intricacies of what it means to be ordinarily resident or not and the Department – if the Department is seeking to try and establish "ordinary residence" from that sort of questionnaire then it's unfortunate and even a lawyer would find some difficulty in the way in which they would respond to that question, and the earlier argument and questions that were addressed during the appellant's argument indicate that, you know, the words "live in some place", the difficulty in providing those with a fixed meaning. But also –

GLAZEBROOK J:
I suppose they're just trying to put it in ordinary language that would fit 90% of people.

MR McKENZIE QC:
That might be so. Yes, I don't want to suggest –

GLAZEBROOK J:
So it's not –

MR McKENZIE QC:
– that they were trying to trap anybody but I don't think the Court can really place any weight on that answer in determining the questions that –

ELIAS CJ:
Well, it's not determinative as really has been accepted but surely it is relevant to the assessment that had to be made as to how she perceived matters herself because this isn't a technical term really, is it?

MR McKENZIE QC:

It's not a technical term in that sense, Your Honour, except that where you live –

ELIAS CJ:

Well, it's not answering the statutory question which still has to be considered.

MR McKENZIE QC:

That's right.

ELIAS CJ:

But where you consider yourself as living must bear on that in most cases.

MR McKENZIE QC:

In most cases. The case of a missionary or maybe even a Volunteer Service Abroad or other person coming under 9 and 10 might raise other questions that really this particular question doesn't really address. But Ms Greenfield did put in a further statement which is at tab 22 and in paragraph 4 does refer to the, or 3 and 4, refer to the answer that she gave, and it will be noticed in relation to the answer about Singapore, permanent, 18 years, missionary purpose of living there, well, the words "purpose of living there", you know, but "missionary", she's clearly indicating and signalling that's really why she's there. She wouldn't otherwise be spending that kind of time in Singapore. And then her answer in paragraph 4. So that it is submitted that really the Court ought not to place significant weight as unfortunately the Court of Appeal did on the answer that was given, and in my submission the Court of Appeal placed undue weight and was wrong in doing so, in treating –

ARNOLD J:

Well, I suppose you'd say if that question had been not, "Do you normally live in New Zealand?" but "Do you consider New Zealand to be your home?" she might have answered, "Yes".

MR McKENZIE QC:

Quite differently, yes, Your Honour, yes, and she indicates that.

ARNOLD J:

So it's a very – it's a compound question and you may give different answers to different bits of it.

MR McKENZIE QC:

Yes.

GLAZEBROOK J:

Yes, she says that at paragraph 5 of her statement, had she been asked what she regarded as her home country.

MR McKENZIE QC:

Yes, yes.

GLAZEBROOK J:

And then she explains a bit more that it's they plan to build a home and her parents and grandchildren live there.

ELIAS CJ:

Well, I think that can readily be accepted because she has no sufficient connection with any other country as far as I can see to regard it as her permanent home, but that's not the question really for determination.

MR McKENZIE QC:

And then, thirdly, Your Honours, the possibility of opening the floodgates was suggested and, in my submission, that's not of real concern given, as Justice Glazebrook pointed out, the particular position that missionaries have under the legislation and those who would be able to take advantage of a decision in favour of Ms Greenfield would indeed be few. And if such persons were as she was, in my submission, able to demonstrate, show that continuing and close connection with New Zealand, even in the unlikely circumstance that they otherwise qualified, then this approaching ordinary residence in the way in which the appellant has here, it's submitted, does not create a floodgates problem.

Then it was suggested that Ms Greenfield could come back to New Zealand for perhaps a relatively short period of time to re-establish connection here and then would come within the legislation, that does seem to indicate some artificiality on the facts of this case. Those connections are already here and if the Department is willing to accept, or were willing to accept on a relatively short re-establishment of those connections that she's then ordinary resident, notwithstanding 19 years away, that does seem somewhat artificial. The appellant's position is that during those

19 years there are the factors earlier referred to which indicate a continuing connection here, not established anywhere else. This is the country to which she has gone and will return, in the words of the cases. The periods in which she goes away may be lengthy but she does return. The evidence shows that indeed she endeavoured to return over that course of time every year to New Zealand for periods back in this country, re-establishing her connections with family and so on. It's submitted that those connections are there on the evidence, they were given insufficient weight or attention by the Court of Appeal, that the Court, it's submitted, should look closely at that evidence and the submission for Ms Greenfield is that the continuing connection here linked with the special purpose for which she was away do entitle her to be regarded on the particular facts of this case as being ordinarily resident in New Zealand on the date of her application.

That, if Your Honours please, concludes my submissions.

ELIAS CJ:

Yes, thank you, Mr McKenzie. Well, thank you, counsel, for your submissions and we will take time to consider our decision in the matter.

COURT ADJOURNS: 12.59 PM