

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X

1. I am asked by CouncilA and CouncilB to make a determination for the purposes of section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mr X from 4th October 2010 to date.

The facts of the case

2. The following information has been ascertained from the agreed statement of facts and copy documents provided. Mr X was born X date 1982 and has a moderate learning disability, developmental delay and global dyspraxia. Until 28th August 2001 Mr X lived with his parents in CouncilA’s area. On this date he started at CollegeB1, a residential college in the area of CouncilB. Mr X lived at the college during term time and returned to live with his parents in the holidays save for holiday respite. Mr X stayed for holiday respite with an Adult Placement Scheme (“APS”) carer in CouncilB area sometime in the Summer of 2005.

3. CouncilA’s Education Department paid for Mr X’s accommodation at the College until July 2005. In September 2005 Council A’s Adult Social Services Department took over funding and did so under section 21 of the 1948 Act. It agreed to pay for one academic year unless a long term residential placement could be found prior to July 2006.

4. In November 2005 Mr X started having tea visits with an APS carer at her home at address1 in the area of CouncilB and subsequently a six day trial period in early January 2006. On 9th January 2006, CouncilA gave notice to CollegeB1 to the effect that Mr X would not return on 10th January but would be staying with the APS carer. CouncilA began paying for this placement purportedly under section 21 of the 1948 Act.

5. An annual review took place on 24th January 2006 at address1 attended by Mr X, his mother and sister, the APS carer, team manager and social worker and it was agreed that the APS placement would be long term for Mr X. The notes state:

“Mr X stated in the meeting and with T [T is new and doesn’t say who he is – is he the APS carer?] privately his clear wish he is happy with his new home and carers”.

At this meeting it was agreed that the APS team manager would take over as Mr X's benefits appointee. Whilst Mr X may have had some personal care needs such as needing help with shaving whilst at CollegeB1, it was noted at this assessment under the section "Personal Care and Daily Living Skills" that personal care needs were limited to supervision and encouragement including checking that Mr X had shaved properly.

6. The Summary of Current Needs section of the review states as follows:

"1/ Mr X needs a stable and suitable home setting that fosters consistent care and support both emotionally and practically. Mr X should be enabled in maintaining his present placement in APS care subject to regular reviews.

2/ Mr X needs encouragement and supervision with his daily living skills e.g. cooking and household chores. Mr X needs daily guidance and prompting to maintain his independence with personal hygiene and appearance.

3/ Mr X needs support and assistance to access health services e.g. Dentist and G.P.

4/ Mr X must be supported in managing his monies and maintaining his benefit entitlements via a DSS appointee.

5/ Mr X should be enabled in accessing local community resources and day-time activities he is interested in and help him develop his level self-confidence and skills.

6/ Mr X needs support in keeping regular family contact, where agreed and that such contact is by choice and is mutually convenient".

7. At page 201 of the bundle of copy papers is a copy of a licence agreement between the APS carer and Mr X signed on 17th August and 20th August respectively with a start date of 14th September 2009. This agreement gave Mr X licence to occupy a single furnished room with shared use of the hallways, kitchen, bathroom, toilet and living room/dining room.

8. It seems that an application for housing benefit was made to CouncilC and Mr X has been in receipt of the same since 4th October 2010. It is paid to Personal Support Company1 which has a contract to manage the APS on behalf of CouncilA.

9. CouncilA initially paid the accommodation costs but asserts that it has not done so since 4th October 2010 when Mr X's housing benefit was first paid. CouncilA have confirmed that Personal Support Company1 currently pay the APS carer £371 per week which comprises £80.00 in respect of accommodation funded by way of housing benefit, £250 for services provided

under section 29 of the 1948 Act (of which Mr X pays a client contribution) and £41 in respect of utilities paid by Mr X from State benefits.

10. A mental capacity assessment carried out by Social Worker1, on 7th August 2012 concluded that Mr X has the capacity to decide where to live.

11. At a network meeting held on 8th February 2012, Mr X was asked where he would like to live. Mr X stated that he wanted to continue living in CouncilB. Social Worker1 then spoke privately with Mr X about where he wanted to live and Mr X again confirmed that he wanted to remain living where he was and would like to consider more independent living further down the line. I also note the CouncilA Shared Information form at page 188 of the bundle of copy papers which notes that Mr X “has a wide social network at address1” and the review carried out on 15th February 2010 which states at page 128 that through activities at the Day Centre, and his placement “he has an extensive social network that continues into weekends and holidays”. The reviews conducted by Company1, for example at pages 119-125 of the bundle, detail some of the activities and mention the large circle of friends Mr X has made and the fact that he is in regular contact with his sister, who also lives at address1.

12. CouncilA continues to fund services under section 29 of the 1948 Act on a provisional basis pending the making of this determination.

The relevant law

13. In making this determination I have considered the agreed statement of facts and copy papers supplied together with the submissions. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department ¹and the case of R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309 (“Shah”). My decision is unaffected by the fact that CouncilA continues to fund services under section 29 of the 1948 Act on a provisional basis pending the outcome of this determination.

¹ Until 19th April 2010, this guidance was contained in LAC(93)7 issued by the Department. From that date it was replaced by new guidance entitled “Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England”. This determination refers to the guidance being that in force at the time the determination was made.

14. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 or over who by reason of age, illness or disability or any other circumstances are in need of care or attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State's directions under section 21 of the 1948 Act (contained in LAC (93)10) provide that the local authority is under a duty to make arrangements under that section "in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof".

15. By virtue of section 26 of the 1948 Act, local authorities can, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. Firstly, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

16. Section 24(5) of the 1948 Act provides that where a person is provided with residential accommodation under Part 3 of the 1948 Act, he shall be deemed for the purposes of the 1948 Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him. In accordance with paragraph 58 of the judgement in Greenwich, I interpret the reference to residential accommodation at the end of this subsection to mean residential accommodation under Part 3. The relevant date for the deeming provision contained in section 24(5) of the 1948 Act is immediately before such accommodation was or should have been provided.

17. The duty to provide welfare services (non-residential community care services) under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

18. "Ordinary residence" is not defined in the 1948 Act. The guidance (paragraph 18 onwards) notes that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. The concept involves questions of fact and degree. Factors such as time, intention and continuity have to be taken into account. The leading case on ordinary residence is that of Shah. In this case, Lord Scarman stated that:

"unless ...it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration".

19. The guidance goes on to say that when a person does not have the capacity to decide where he wishes to live one of the alternative tests in the case of R v London Borough of Waltham Forest, ex parte Vale, the Times 25th February 1985 ("Vale") should be used to establish ordinary residence. In the Vale case, it was held in the case of a person with severe learning disabilities who was totally dependent on her parents, that the concept of her having an independent residence of her own which she has adopted voluntarily and for which she has a settled purpose did not arise. She was in the same position as a small child. Her ordinary residence was that of her parents because that was her "base". Alternatively, the court said that if it was wrong as to Miss Vale having an ordinary residence with her parents, one had to consider the question as if she were a person of normal mental capacity but without requiring the person themselves to have adopted the residence voluntarily.

The submissions of the parties

20. CouncilA assert that the social care assessments and the mental capacity assessment conducted in August 2012 demonstrate that Mr X has the capacity to decide where to live and that Mr X must be assumed to have capacity unless the contrary is proved. They further assert that whilst Mr X was in accommodation provided pursuant to section 21 of the 1948 Act from 10th January 2006, he no longer required such accommodation from 4th October 2012 when Mr X had a licence agreement and was able to pay for his accommodation himself by way of housing benefit. In accordance with the

tests for ordinary residence set out in Shah, they contend that Mr X is patently ordinarily resident in the area of Council B.

21. Council B assert that Mr X requires care and attention which is not otherwise available than by the provision of accommodation, that Council A or its agent "Personal Support Company 1" make payments in respect of accommodation and that Mr X lacks the capacity to enter into a licence agreement which they contend is shown by the papers and matters referred to in paragraphs 11-17 of their first set of submissions.

The application of the law

22. Shared lives Schemes or Adult Placement Schemes are a mechanism for promoting independent living. It is clear to me from the papers that Mr X wants to work towards more independent living. The guidance on ordinary residence provides as follows:

Shared Lives Schemes (also known as Adult Placement Schemes)

120. Local authorities or independent providers may operate shared lives schemes (also known as adult placement schemes) which offer an alternative form of social care accommodation and support for people aged 18 and over. Under the scheme, ordinary family households typically provide accommodation and support to people with social care needs, offering the person the opportunity to become part of the family. However, shared lives services do not always involve the provision of accommodation and can include day care support in the carer's home or kinship support, where a person acts as "extended family" to a person who is living in their own home.

121. Where a person enters accommodation under the shared lives scheme, they usually pay for their accommodation themselves, often through housing benefit, with any social care needs being met by services provided under section 29 of the 1948 Act. If the person moves to a new local authority for the purpose of entering shared lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah (see paragraphs 18-22 (*Meaning of ordinary residence*)).

122. If a local authority (A) does not have any shared lives accommodation in its area but a community care assessment identifies a shared lives scheme to be the best way to meet a person's accommodation and support needs, the

person may decide to move into accommodation provided by a shared lives scheme in a neighbouring local authority (B). They may be supported in this decision by local authority A who may reach an agreement with local authority B for local authority A to provide support services using its powers under section 29 of the 1948 Act, or for local authority B to provide such services with reimbursement from local authority A. Although local authorities have a duty to provide section 29 services to people who are ordinarily resident in their area, they have a general power to provide services under this section and can exercise this power in relation to people who are not ordinarily resident in their area.

123. The deeming provisions do not apply to section 29 of the 1948 Act. Therefore, in situations where a person's previous local authority is providing or paying for services under section 29 of the 1948 Act, it does not mean that ordinary residence is retained in the previous authority. Any arrangements between local authorities of the kind referred to in the previous paragraph would not prevent the person from acquiring an ordinary residence in the area in which they are living. Ordinary residence disputes arising in relation to services provided under section 29 that are submitted to the Secretary of State for determination will be decided accordingly. See ordinary residence determination 9-2008 for an example of how the ordinary residence provisions apply to shared lives schemes.

124. Shared lives accommodation is not usually arranged under section 21 of the 1948 Act. This is largely because the concept of shared lives is about "family" and "belonging" with individuals making their own choice to enter a shared lives scheme rather than being placed in the scheme by their local authority. Therefore, local authorities may recommend that a person enters a shared lives scheme. They may also help the person to choose a scheme and facilitate their move but such advice and assistance would usually fall short of "making arrangements" within the meaning of section 21.

125. However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in shared lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home.

126. If a local authority does use section 21 to place a person in accommodation under the shared lives scheme, the section 24(5) deeming provision would apply (see paragraphs 9-15 (*Residential services*)) for more

information on residential accommodation under section 21 of the 1948 Act). The person would remain ordinarily resident in the area of the placing local authority regardless of where they were accommodated under the shared lives scheme.

127. Occasionally, a shared lives scheme may be based in one local authority area but have households under the scheme located in other local authority areas. Where this is the case, the person would usually be ordinarily resident in the local authority in which their household is located, in line with the Shah test. They would not generally be considered ordinarily resident in the area where the scheme itself is located, but this would depend on all the circumstances. Similarly, if the shared lives carer relocates to a new local authority area, and the person accommodated under the scheme moves with the carer, they would generally acquire an ordinary residence in the area where their new house is located, rather than remaining ordinarily resident in their previous local authority area.

128. Organisations or local authorities operating shared lives schemes should not use ordinary residence as a reason for preventing access by people living outside of the area where the scheme and its accommodation is located. The needs of the individual should be paramount and where a particular shared lives scheme or household best meets the need of the individual involved, the location of the scheme or household and the ordinary residence of the person should be secondary considerations.

23. This case is unusual in that CouncilA assert that the accommodation was initially provided under section 21 of the 1948 Act albeit that Mr X has some personal care requirements and as such where personal care is provided with accommodation, this must be provided in a registered care home. "Personal care" includes the prompting, together with supervision of a person in relation to a number of specified activities including the care of skin, hair and nails². Since 4th October 2010, Mr X has been legally entitled to receive housing benefit in respect of the licence agreement he has to occupy a room and the shared use of other rooms and is responsible for paying for his accommodation albeit that Personal Support Company¹, which manages the APS, receives and pays this on his behalf. Otherwise Mr X manages his finances with the help of his APS carer. However, I now understand from the e-mail dated 8th November 2013 from Ms Y of CouncilA that the sum of £371,

² Regulation 2 of the Health and social Care Act 2008 (Regulated Activities) Regulations 2010 (2010/781)

which includes the accommodation costs covered by housing benefit, is guaranteed by CouncilA:

“However it is clear through established course of dealing that the council does in fact guarantee a weekly payment to carers, currently £371, supported by invoices from a company that the council pays”.

24. Were it not for the fact that section 21 accommodation cannot lawfully be provided because Mr X has personal care needs and is not in a registered care home, such a guarantee would have suggested an arrangement within the scope of subsections (2) and (3A) of section 26 of the 1948 Act since the local authority is in effect agreeing to pay any balance or unpaid fees. If this were the lawful provision of section 21 accommodation, the deeming provision in section 24(5) of the 1948 Act would apply.

25. This leads me to consider whether or not there is a duty to provide section 21 accommodation in a registered care home. In the case of *R v (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (see paragraph 55 of the judgment).

26. The first limb of the test in section 21 of the 1948 Act is whether or not the person is in need of care and attention. Care and attention is defined by Baroness Hale in *R (M) v Slough BC* [2008] UKHL 52 at paragraph 33;

‘...the natural and ordinary meaning of the words ‘care and attention’ in this context is ‘looking after’. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list.’

I agree with CouncilB that Mr X is in need of care and attention.

27. The second limb of the test to determine whether a duty under section 21 of the 1948 Act exists is to ask whether or not the care and attention needed is available otherwise than by the provision of residential accommodation. In the case of *R (SL) v Westminster CC* [2013] UKSC 27 Lord Carnwath held:

At 44 – ‘What is involved in providing “care and attention” must take some colour from its association with the duty to provide residential accommodation.’

At 45 – ‘...was it “available otherwise than by the provision of accommodation under section 21”? Although it is unnecessary for us to decide the point, or to consider the arguments in detail, it seems to me that the simple answer must be yes, as the judge held. The services provided by the council were in no sense accommodation-related. They were entirely independent of his actual accommodation, however provided, or his need for it. They could have been provided in the same place and in the same way, whether or not he had accommodation of any particular type, or at all.’

28. Section 29 of the 1948 Act and the Directions issued thereunder require the provision of certain welfare services to individuals such as Mr X. Such services are provided in the community and in a person’s own home. The list of services which can be so provided is expanded upon by Section 2 of the Chronically Sick and Disabled Persons Act 1970. It is clear that the list of needs reproduced at paragraph 6 of this determination come within the nature of services which can be provided in a person’s own home under these provisions. The fact that he is able to live in an APS household provides him with a home family environment and in the event, the services needed by Mr X are provided by the APS carer and paid for by CouncilA on a provisional basis. However, equally the services Mr X requires could be provided by another contractor. Those services are not intrinsically linked to the accommodation. I therefore determine that there was no duty to provide section 21 accommodation.

29. It is asserted by CouncilB that Mr X lacks the capacity to enter into a licence agreement. The capacity assessment dated 7th August 2008 concludes that Mr X has the capacity to decide where to live. The test for capacity is found in section 3 of the Mental Capacity Act 2005. That section states that a person is unable to make a decision for himself if he is unable:

- a) to understand the information relevant to a decision;
- b) to retain that information;
- c) to use or weigh that information as part of the process of making the decision; or
- d) to communicate his decision (whether by talking, using sign language or any other means).

Section 1(2) of the Mental Capacity Act 2005 states that it should always be assumed that adults have capacity to make their own decisions relating to their accommodation and care unless it is established to the contrary.

30. I have seen nothing in the papers to contradict the findings of the capacity assessment and am not convinced by CouncilB's contention that Mr X lacks the capacity to enter into a licence agreement. The essentials of the licence agreement, a copy of which appears at pages 201-202 of the bundle, are not difficult to understand and from reading the papers I consider that Mr X has sufficient support to enable him to understand the rules and obligations of living at the placement.

31. I am satisfied from reviewing the assessments that in accordance with the leading case of Shah, Mr X has voluntarily adopted CouncilB area as his place of ordinary residence, that he intends to stay there for the foreseeable future and had adopted CouncilB area as such by 4th October 2010. He has developed a social network there, including his sister. Contact with his parents in the area of CouncilA is more limited since a Christmas visit in 2009.

32. I therefore determine that Mr X is ordinarily resident in the area of CouncilB and has been since 4th October 2010.

Signed on behalf of the Secretary of State

Dated: