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 under section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the ordinary residence of Mr X.

The facts of the case

2. The following information has been ascertained from the agreed statement of facts prepared by the two authorities involved in the dispute and the supporting documents supplied. Mr X was born on X date 1963. He has a severe learning disability and suffers from epilepsy and atypical autism. He has communication and occasional behavioural difficulties. The agreed statement of facts states 'it is not in dispute that at all material times Mr X lacked capacity to make decisions concerning his welfare, residence and financial affairs'.

3. Mr X was admitted to hospitalA1 as a child and was subsequently moved to hospitalA2 in areaA where he lived for a number of years before moving to Care homeA1, a residential care home in CouncilA.

4. In 1991 Mr X was transferred to a residential care placement at care homeA2 where he resided until that facility closed in date 2009. Mr X had limited contact with his family while at this placement and was visited by his mother on two or three occasions each year before she passed away sometime in 2012. Mr X has three brothers and one sister but contact is infrequent.

5. In 2008 Mr X was assessed by CouncilA in light of the impending closure of care homeA2. The assessment is dated 12th November 2008 and was completed by Reviewing OfficerA1. In this assessment it was proposed that Mr X's model of service change from residential care to supported living. Mr X was assessed as needing to live in a property where he would have access to staffing support for twenty four hours each day. It was noted that the severity of Mr X's learning disability and his challenging behaviours were such that the risks arising from his being unsupervised for any length of time would be unacceptable. This assessment also highlighted that a carefully planned programme of transition should be put in place for Mr X's move in light of the possible adverse psychological impact of such a move on him. Although an

occupational therapy assessment suggested a need for ground floor accommodation, staff at care homeA2 were of the view that with support and the implementation of risk reduction strategies, Mr X could learn to use stairs safely.

6. On 30th March 2009 Mr X moved to a supported living placement at supported living homeB1, CouncilB where he continues to reside. CouncilA did not conduct a formal best interest assessment prior to Mr X's move to supported living homeB1and did not appoint an IMCA to support him.

8. When Mr X was first placed at supported living homeB1, his accommodation was provided by companyB1. A tenancy agreement was entered into on Mr X's behalf by companyB1, who was also the named landlord, on 30th March 2009. CompanyB1 subsequently applied to CouncilB on 3rd April 2009 for housing benefit on Mr X's behalf as his appointee and the agreed statement of facts records that Mr X has been in receipt of housing benefit throughout his stay at supported living homeB1. CouncilA has accepted that the tenancy agreement dated 30th March 2009 was void as companyB1 did not have the authority to enter into this contract on Mr X's behalf.

9. On 13th November 2012, following an application by CouncilA, the Court of Protection was satisfied that Mr X "lacked capacity to make various decisions in relation to a matter or matters concerning his property and affairs" and ordered that an authorised officer of CouncilA's Adult and Community Services be permitted to enter into as tenancy on Mr X's behalf. A new tenancy was therefore executed on 5th December 2012 and was duly signed by the authorised officer of the County Council and by the landlord.

10. The agreed statement of facts states that 'Mr X's family continue to live in the CouncilA area and he does not have any significant relationships with persons in the CouncilB area other than those who care for him...further, Mr X does not attend any day centres, work or voluntary placements in the CouncilB area. Due to the level of his learning disability Mr X's main interactions are with staff at Supported living homeB1'. However the personal assessment dated 20th April 2013 states that 'Mr X has a limited social network which is restricted to the two other tenants he lives with, although he appears happy and settled with this way of life'. The same assessment records that Mr X also enjoys regular shopping trips, visits to the cinema, nearby parks and bowling alley and attends a local disco on a weekly basis.

11. On 18th February CouncilA sent a letter to CouncilB seeking its agreement that, under the "Ordinary Residence Guidance on the Identification of the Ordinary Residence of People in need of Community Care Services, England" and the Ordinary Residence Disputes (National Assistance Act 1948) 2010 Directions, Mr X had lost his ordinary residence status in CouncilA on 30 March 2009 and should be duly regarded as being ordinary resident within CouncilB.

12. CouncilA presently acknowledges 'without prejudice' responsibility for the provision of social care services to Mr X. These services entail the provision of domiciliary service but exclude the funding of accommodation and meals which are funded by Mr X's benefit entitlements.

The relevant law

13. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department[1] ('The Guidance') and the cases of Shah v London Borough of Barnet[2] ("Shah") and R v Waltham Forest London Borough Council, ex parte Vale[3] ("Vale"). I have also considered the cases of R (Greenwich) v Secretary of State and Bexley[4], SL v Westminster City Council[5], Wycahvon District Council v EM[6] , Rhodes, Rhodes v Rhodes[7] and section 7 of the Mental Capacity Act 2005. My determination is not influenced by the provisional acceptance by CouncilA of responsibility for funding services under Part 3 of the 1948 Act and/or Section 2 of the Chronically Sick and Disabled Persons Act 1970.

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1 *Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England*, published on the Department of Health's website at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf.pdf

2 (1983) 1 All ER 226

3 (1985) the Times 25th February

4 (2006) EWHC 2576 (Admin)

5 [2013] UKSC 27

6 [2012] UKUT 12 (AAC)

7 (1890) 44 Ch D 94

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 and attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 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 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".

16. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

17. 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. First, 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).

18. The duty to provide welfare services under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

19. "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”.

20. 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 Vale should be used to establish ordinary residence. In Vale, 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 with mental capacity but without requiring the person themselves to have adopted the residence voluntarily.

21. Wychavon District Council v EM[8] concerned a severely disabled woman who lived in a property built and owned by her parents. There was an unsigned tenancy agreement in place between EM and her parents. EM sought to claim housing benefit but was refused on the grounds she was not ‘liable to make payments in respect of the dwelling which she occupies as her home’[9]. The court agreed that EM had no liability under the law of contract as she was not party to the tenancy agreement and had no knowledge of it (due to the lack of understanding caused by her disability). This was somewhat in contradiction to the precedent set by Mesher J in CH/2121/2006 that even if a party to a contract does lack sufficient understanding to have capacity, the contract is not void, but is merely voidable at the option of the affected party. There is no minimum level of understanding below which a contract is void. The matter, however, was not considered in depth as EM did not sign the tenancy agreement. In Wychavon the court went on to rule that liability arose by virtue of the common law or section 7 of the Mental Capacity Act 2005. The

8 [2012] UKUT 12 (AAC)

9 Housing Benefit Regulations 2006, SI 2006/213

common law position is clearly expressed in re Rhodes, Rhodes v Rhodes[10] which was concerned with the recovery of costs, from the estate of a deceased disabled woman, arising from her stay in an asylum. Cotton LJ stated:

"whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property… But, then, although there may be an implied obligation on the part of the lunatic, the necessaries must be supplied under circumstances which would justify the Court in implying an obligation to repay the money spent upon them."

Lopes LJ agreed and continued:

"If a person finds necessaries for a lunatic, and intends to be repaid for so doing, and to constitute a debt against the lunatic, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries…The question what are necessaries must always be considered with reference to the reasonable requirements of the lunatic, having regard to the station in life and means of the person in question."

22. Section 7 of the Mental Capacity Act 2005 codified the common law position providing that 'if necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.'

The submissions of the parties

23. CouncilA submit that accommodation should not be considered as being provided under section 21 of the 1948 Act if the resident is deemed to be a self-funder, that is to say, they make direct payments to the accommodation provider without any support from the local authority.

24. CouncilA submit that the common law principle of necessity and/or section 7 of the Mental Capacity Act 2005 render Mr X liable for his own accommodation costs. CouncilA argue that they have never had any contractual liability should Mr X fail to pay his rent and therefore Mr X's

10 (1890) 44 Ch D 94

accommodation arrangements have never been provided under the guise of section 21 of the 1948 Act.

25. CouncilA accepts they may have erred in failing to conduct a formal best interest assessment but submit that this has no impact on the question of ordinary residence. CouncilA maintains that all meetings were focused on Mr X's best interests and that he and his family were consulted in relation to the proposed move although there is no documentary evidence of this.

26. CouncilA submits that this move was in the best interests of Mr X due to his need for ground floor accommodation in a supportive living arrangement. CouncilA also maintains that no suitable ground floor accommodation could be identified in the CouncilA area within their tight time scale (i.e. before the closure of Care homeA2 due to major structural problems. It should also be noted that there were adult protection concerns over the aggressive behaviour of the other remaining service user).

27. CouncilB on the other hand contend that CouncilA had a continuing duty to provide Mr X with accommodation under section 21 of the 1948 Act after the closure of Care homeA2. CouncilB argue that since Mr X lacked capacity to make arrangements for accommodation himself and there was no person with legal authority to act on his behalf, the placement at supported living homeB1 cannot be said to be 'otherwise available' to him within the meaning of the phrase in section 21 of the 1948 Act.

28. Relying on the *Greenwich* case, CouncilB submit that even if the accommodation arranged by CouncilA did not comply with section 26 of the 1948 Act, the section 21 duty was unaltered and the deeming provision in section 24(5) therefore applied. Consequently they submit that Mr X's ordinary residence should be assessed at 29th March 2009; the day immediately prior to his move to supported living homeB1.

29. Finally CouncilB, applying the 'second Vale test' submit that there is no evidence to suggest that, if he had capacity, Mr X would have adopted Supported living homeB1 for settled purposes as part of the regular order of his life when he moved there.

The application of the law

30. It is clear that Mr X requires care and attention but is that care and attention available to him otherwise than by the provision of residential

accommodation as required by section 21 of the 1948 Act? In the case of R (SL) v Westminster CC Lord Carnwath provided:

> 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.'

Lord Carnworth also gave his view that whether care and attention is otherwise available is a matter best left to the judgement and common sense of the local authorities directly concerned. The adult assessment dated 13th November 2008 makes clear that in Reviewing OfficerA1's professional opinion a supported living arrangement would meet Mr X's needs. Indeed this view appears to be borne out by the personal assessment dated 30th April 2013, Mr X appears 'happy and settled with this way of life'.

31. Nor is it for the Secretary of State to determine the validity or otherwise of the tenancy agreement. Mr X has received housing benefit to pay for his accommodation from 30th March 2009 and the common law doctrine of necessity or section 7 of the Mental Capacity Act 2005 would suffice to render Mr X liable for the payment of his accommodation.

32. Paragraph 104 of the Department's Ordinary Residence Guidance states 'in situations where the person lacks capacity and does not have a deputy or LPA, the local authority may arrange the person's accommodation under section 21 of the 1948 Act and enter into a contract with the housing provider for the provision of accommodation, with reimbursement from the person as necessary'. I do not consider this applicable in the case at hand as CouniclA was not, at any time, liable for Mr X's rent or any subsequent arrears. I am satisfied that Mr X is a self-funder and has been so since 30th March 2009.

33. Accordingly I find that the deeming provision in section 24(5) of the 1948 Act does not apply and Mr X's ordinary residence falls to be determined on the day he moved to supported living homeB1, namely 30th March 2009 .

34. Where a person has capacity to decide where to live, his place of ordinary residence is that which he has adopted voluntarily and for settled purposes. Where a person lacks capacity then one of the tests in Vale should be used to assess the place of ordinary residence. Mr X's mother is deceased and he has lived in residential care homes and hospitals since he was a child. Although Mr X did have some contact with his mother before she passed away, it did not appear to have the necessary element of dependency envisaged in the first Vale test. Further there is no mention of his father in the documents supplied and he sees his siblings very rarely. I do not consider the first test in Vale to be appropriate to the facts of this case.

35. Vale also set out an alternative approach. This alternative test means one should consider all the acts of the case, including physical presence in a particular place, as outlined in Shah (see above) but without requiring the person themselves to have voluntarily adopted residence.

36. Mr X has been physically present in CouncilA for the last four years. From the personal assessment dated 30th April 2013, it appears that Mr X is settled and happy in his new home. There is no mention of the potential difficulties a move was thought to pose (as per the adult assessment dated 13th November 2008) and Mr X is described as having a 'social network' with the two other tenants in the property. In CouncilB Mr X attends a weekly disco in the local area and goes shopping regularly. Mr X's outings are dependent on his health but he is generally assisted to go out into the community once or twice per day. On balance I am satisfied that Mr X is settled and happy in the CouncilB area.

37. I therefore determine that Mr X was ordinarily resident in CouncilB from 30th March 2009.

Signed on behalf of the Secretary of State for Health:

Dated: