

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

**The background to the case**

2. The following information has been ascertained primarily from the joint statement of facts prepared by the two authorities involved in the dispute. I indicate where the information is taken from other sources such as the legal submissions prepared by each of the two authorities or the further information provided by the two authorities and the copy documents supplied.

3. X was born in 1919 . She has lived in the area of CouncilB for many years. She has two sons and her Son holds a Power of Attorney in regard to her personal welfare including her healthcare.

4. X suffers from short term memory loss but with no formal diagnosis of dementia. In addition, she has physical health care needs, suffering from Rheumatoid arthritis and cellulitis in her legs.

5. The information in this paragraph and paragraph 6 is from CouncilB’s letter of March 2014. In June 2011, following a hospital admission, X was discharged to Nursing Home 1. In late June 2011, X returned home and was provided with care at home by Council B intermediate care providers. In July 2011, CouncilB carried out a financial assessment which resulted in X self-funding her care. CouncilB state that the service provision was reviewed with the family following a financial assessment and it was agreed that from early-mid August 2011 X would self-fund her care from an external agency. The family were advised to revert to CouncilB if they had any further concerns.

6. X was admitted to hospital due to a sickness bug in May 2012. On discharge from hospital1 3 days later X was transferred to NursingHome2 within the area of CouncilB. NursingHome2 provided a step down bed facility funded by the NHS. The letter of late March 2014 states “the discharge was arranged by the hospital social worker and that social worker would normally keep records of this. Unfortunately there was an agency social worker employed by the hospital who did not keep the appropriate notes in this matter.”

7. An email from the Social Worker I who was involved when X was in the hospital in June 2011, to an officer of Council B, dated late July 2013 states, "Patient was admitted again on 19 May 2012 and was seen by Agency Social Worker K who referred patient to Respite Care." The email of early June 2014 from Council B to the Secretary of State states that "Social Worker K was employed through an agency by Council B."

8. I return to the agreed statement of facts. During the period of time in which the step-down facility was being provided Social Worker K provided details of Care Home 3 in the area of Council A to provide 24 hour care and support services to X. X's family rejected this option.

9. X transferred to Care Home 4 in the area of Council A on a private funding basis at the end of May 2012, arranged by her son. There is evidence that X did not have capital (except for her main home) over the real statutory threshold when she moved into the residential accommodation at Care Home 4. (This is taken from the agreed statement of facts and is corroborated by Council B's legal submissions which state "When X was referred to Council A she had savings of £2,000 and had already spent £9,000 at Care Home 4.")

10. Social Worker K failed to advise Council B of X's discharge from Nursing Home 2.

11. Council A entered into a Deferred Payment Agreement with X's Son R on 28 August 2012 in respect of Care Home 4's care fees.

12. According to Council B's legal submissions, X transferred to Care Home 5 in the area of Council A in mid December 2012.

13. The two local authorities are seeking determination of X's ordinary residence from late August 2012 to date.

### **The relevant law**

14. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by Council A and Council B, the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act"), section 47 of the National Health Service and Community Care Act 1990 ("the 1990 Act"), the guidance on ordinary residence issued by the Department ("the Guidance") and the cases of *Shah v London Borough of Barnet* (1983) 1 All ER 226 ("Shah"), *R (on the application of B) v Camden LBC and Camden and Islington Mental*

Health and Social Care Trust (2005) (“Camden”) and R (Greenwich) v Secretary of State and Bexley [2006] EWHC 2576 (“Greenwich”).

15. 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. On 19 April 2010, by virtue of the coming into force of s148(1) of Health and Social Care Act 2008 on that date, section 24(6) of the 1948 Act became ‘For the purposes of the provision of residential accommodation under this Part, a patient (“P”) for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.’ By the same enactment, on the same date, a section 6A came into force stating; ‘In subsection (6) “NHS accommodation” means—

(a) accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006...’

18. Ordinary Residence is not defined in the legislation. However, of particular note is the leading case of Shah in which Lord Scarman stated:

‘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.’

## **The Parties' submissions**

### **CouncilA's submissions**

19. CouncilA makes the following submissions:

20. - The reason for X's presence and admission to the initial accommodation at Care Home 4 was as a result of the failure of CouncilB and the local Clinical Commissioning Group in CouncilB to make timely arrangements for appropriate accommodation for X, where they were under a duty to do so. In being offered an alternative care home placement, Care Home 3, X was being assisted in identifying an appropriate care home placement by CouncilB. This would therefore confirm that under section 47 of the 1990 Act, CouncilBB had assessed X's needs.

21. - In reliance on the Camden case, an individual must be assessed not merely with regard to services that they may be in need of but which they may be about to be in need of. The step down facility would have been aware of the future need for X to require 24 hour care, as the hospital social worker would have been exercising social work functions on CouncilB's behalf and, in failing to do so, they, together with CouncilB, neglected to assess the future care needs of X.

22. - The family's involvement in identifying an alternative care home for X came about because of the limited assistance offered by the hospital social worker and was not a choice that was made voluntarily.

23. - Regarding X's discharge from Nursing Home 2(step down facility), X's sonR (son and attorney for X) did advise the CouncilA social worker that the staff nurse in charge there requested that he identify a care home for his mother as soon as possible, as X was ready for discharge. There was no social worker input at this stage. X's sonR therefore took the lead role in identifying Care Home 4 in May 2012 and X only came to CouncilA's attention in August 2012 when her funds had been all but depleted.

24. - At the point of CouncilA's involvement with X, her savings had been reduced to £2,000 and she had spent £9,000 in care home fees. It would therefore appear that she did not have savings over the capital limit when she was moved to CareHome4 and hence should not have been identified as a self-funder.

25. - X's sonR is clear that while his mother was a patient in Hhospital1 on her previous admission, a financial assessment had been conducted by SocialWorkerM. X was assessed to pay a contribution of £23 per week by the "Living Independent Team" and she was provided with care at home by CouncilB. It therefore follows that a recent financial and care needs assessment had been conducted in observance of CouncilB's statutory duties under section 47 of the 1990 Act. Further, as X had been offered CareHome3 and X's sonR had been asked to go and consider it, it is clear that a social worker had commenced steps in order to fulfil the statutory duties that CouncilB are empowered with.

26. - Whilst CouncilB does not hold any records relating to the period between October 2011 and October 2012, the actions of the hospital social worker suggest CouncilB's Social Services Department had been consistently involved with regard to the assessed needs of X.

27. - CouncilB cannot absolve itself of its statutory duty merely on the basis that it holds no written records or that the responsible hospital social worker did not undertake her full duties with regard to assessing and conducting the necessary financial assessment with the family's involvement.

28. - The deeming provision under section 24(6) of the 1948 Act prevails. Therefore whilst X attorney may well have entered into a deferred payment agreement with CouncilA, this arrangement was made without prejudice to CouncilA's argument that X remains ordinarily resident in the CouncilB's area.

29. - X's sonR made all the necessary arrangements to move his mother because of her memory problems and hence inability to make an informed decision as to where she should move.

30. - CouncilA's submission of the application for a determination to the Secretary of State slightly outside of the 28 day limit was due to them hoping that CouncilB would engage fully with CouncilA but they did not do so.

#### CouncilB's submissions

31. CouncilB makes the following submissions:

32. – In response to CouncilA's statement that X's SonR explained to its social worker that he was not aware of the transfer from the hospital to Nursing Home 2 until it had happened and that he was not given advice about his mother's financial entitlements, it was a matter for the hospital social worker to make the

necessary referral to CouncilB's social services department for them to become involved in her discharge/care planning. This referral was never made. CouncilA saying that the family had no contact with social services in the time that X was residing at NursingHome2 is consistent with this.

33. - X moved to CareHome4 after the family made their own separate investigations into an appropriate care home on a private self-funding basis. The move to the area of CouncilA under private arrangements means that she is ordinarily resident in the area of CouncilA.

34. - Had X's sonR approached CouncilB early on in the move to Care Home 4, an assessment and panel funding would have been considered and likely approved but he did not do so and as they had not received a hospital referral they could not have known they might need to assist.

35. - CouncilA claim that paragraphs 58 and 74 of the Guidance apply such that: CouncilB failed to make arrangements despite having an obligation to do so and so, under the Greenwich case, the deeming provision in section 24(5) of the 1948 Act applies and X's ordinary residence falls to be decided at the date immediately before the accommodation should have been provided. CouncilB assert that no such duty arose because it was not aware of X's situation so paragraph 72 of the Guidance applies: X moved into a new area under private arrangements and so the settled purpose test in the Shah case applies.

36. - When CouncilA contacted CouncilB in mid February 2013 to obtain copies of assessments carried out during the time X was an in-patient at Hospital1 and when she was admitted to Nursing Home 2, there were no such assessments nor indeed a case note on CouncilB's system since a case note in 2011. Given CouncilB had no records or notes relating to X between October 2011 and October 2012 and given that the discharge from Hospital1 was the responsibility of the PCT, CouncilB could not have been aware of X.

37. - On 3 May 2013, CouncilA wrote to advise that X would not have made the decision to move to Care Home 4 voluntarily, due to her significant memory problems but CouncilB state that capacity has not been an issue in this case.

38. - There was an agency social worker employed by the hospital who did not keep appropriate notes in this matter; such notes should have been updated onto CouncilB records but have not been.

39. - X was only at NursingHome2 for six days before the family decided that she needed to move out and she entered CareHome4. CouncilB does not

consider that there was the urgency to move from the step-down at NursingHome2as prior to the relatively short period of time in hospital X only received two 15 minute calls a day from private care providers. CouncilB would normally expect a stay of up to four weeks in such circumstances. The move to Care Home 4 was entirely of the family's own volition and therefore X lost her ordinary residence in CouncilB.

40. - CouncilB have no reason to question capacity because they were not advising/assisting in May 2012 which is the time around which the issue of whether X had capacity is being raised.

41. - CouncilA are wholly out of time for making a referral to the Secretary of State.

### **Application of the law**

42. X has been provided with residential accommodation by CouncilA at CareHome4 from August 2012 to December 2012 and at CareHome5 from December 2012 to date because her health is such that she needs care and attention which would not otherwise be available to her. That need is clear from the CouncilA Managers Sign off for Long Term Funding from August 2012. That accommodation is thus provided under Part 3 of the 1948 Act.

### **Applicability of deeming provisions under the 1948 Act**

43. The two deeming provisions under the 1948 Act and their applicability to X's situation prior to 28 August 2012 need to be taken into account when considering her ordinary residence after 28 August 2012.

44. Under the deeming provision in section 24(5) of the 1948 Act, X's ordinary residence from the time she was provided with Part 3 accommodation in August 2012 to date, is deemed to be wherever she was ordinarily resident immediately prior to that date.

45. However, if X's accommodation at Care Home 4 between late May 2012 and late August 2012 should have been provided under Part 3 of the 1948 Act and not privately funded, her ordinary residence for that period is deemed to be where she was ordinarily resident prior to May 2012, the date she moved to Care Home 4 care home. Whether this should have been Part 3 accommodation is considered a few paragraphs further on in this determination.

46. Prior to 28 May 2012, from 19 May 2012, X was in accommodation provided under the NHS Act 2006 (initially in Hospital 1 until late May 2012 and subsequently in Nursing Home 2 at the step-down facility funded by the NHS). As such, under the deeming provision in section 24(6) of the 1948 Act, her ordinary residence between 19 and 28 May 2012 is deemed to be wherever she was ordinarily resident immediately prior to 19 May 2012.

47. It is agreed between the parties that X was ordinarily resident in the area of Council B prior to 19 May 2012, having lived in the area of Council B for many years and retaining a home there.

48. I have been asked to determine ordinary residence from 28 August 2012. However, if X's accommodation at Care Home 4 between 28 May and 28 August 2012 should have been Part 3 accommodation, the effect of the deeming provisions is that X's ordinary residence whilst she continues to be in Part 3 accommodation is deemed to be where she was ordinarily resident prior to 19 May 2012; and this is agreed to be the area of Council B.

#### The Greenwich case

49. Under the Greenwich case, if the local authority of ordinary residence should have made arrangements under Part 3 of the 1948 Act, the deeming provision should be applied and interpreted on the basis that such arrangements had actually been put in place by that local authority. The deeming provision would apply from the date the provision should have been put in place.

50. In the Greenwich case, the London Borough of Bexley (LBB) had previously placed Mrs D in a care home. A year later LBB decided that Mrs D should instead be in a nursing home. On 22 and 23 May 2002, conversations were had by LBB which indicated that two possibilities other than a nursing home were considered by LBB (Leyton and Camden wards and Woodlands unit) but were either unsuitable or did not have beds available. Mrs D moved into a different care home under emergency arrangements made by LBB, in the area of the London Borough of Greenwich (LBG) on 27 May. However, it was not clear whether or not it was a placement under Part 3 of the 1948 Act. Mrs D's available capital dropped below the threshold for self-funding, and so she became eligible for Part 3 accommodation, on 29 June 2002 when arrangements should have been made.

51. Mr Justice Charles, at 55 of his judgement, held that 'if the position is that the arrangements should have been made – and here it is common ground that



on 29 June a local authority should have made those arrangements with the relevant care home – that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority.’ The deeming provision in section 24(5) of the Act applied from that date. However, the Secretary of State’s conclusion that LBG were responsible for the costs was deemed correct because at some point between 27 May and 29 June Mrs D had lost her ordinary residence in the area of LBB as a matter of fact – she had no home in LBB (it had been sold a year earlier to pay for care) and had moved to live in the area of LBG.

### Application of Greenwich

52. In X’s case, it is not clear exactly what happened between the move to Hospital1 on 19 May 2012 through the move to Nursing Home 2 on 22 May 2012 and then to Care Home 4 at the end of 28 May 2012, in particular the role of the hospital social worker:

- CouncilA’s letter of 4 March 2013 to CouncilB states; ‘In terms of the transfer from Hospital1 to NursingHome2 this was funded by the NHS and was organised without any family involvement, X’s SonR explained that he did not know of the transfer until it had already happened. X’s SonR further confirmed that he was given no advice in terms of what his mother would be financially entitled to and that the family had no contact with social services during the duration of X’s stay at NursingHome2.
- The statement of agreed facts states; ‘During the period of step-down facility the social worker provided details of Care Home 3 , to provide 24 hour care and support services to X.’
- CouncilB’s letter of early August 2013 states; ‘Our client confirmed that, following X’s discharge from the hospital, had she taken up the offer of a ‘step-down’ bed for the duration of 2 weeks, at a care home, for example in Nursing Home 3 in the CouncilB Borough, as initially suggested by the Hospital Social Worker, then our client can confirm that a CouncilB social worker would have assessed X’s financial and care needs.’ It is not clear whether this relates to the period of time following X’s discharge from hospital in 2011 or 2012.
- CouncilA’s undated personal assessment states; ‘After her latest fall and admittance to hospital she was assigned a hospital social worker who by X and her son’s request began a search for a suitable residential home within a close proximity to the home of X’s son... One care home was suggested (Care Home 3) but this was deemed not suitable by the family. X was moved to a step down bed at Nursing Home 2 in CouncilB area and no further contact was made between CouncilB Social Services and the family. It was at this point that X’S SonR independently began to search for a suitable care home after which he

contacted Care Home 4 and X was transferred via ambulance to this residential home in late May 2012. After a trial period of a month X became a full resident at the beginning of July 2012.'

- CouncilA's email of 13 March 2014 states; 'Regarding X's discharge from Nursing Home 2(step down facility), X's SonR (attorney for X) did advise the CouncilA social worker that the staff nurse in charge there requested that he identify a care home for his mother as soon as possible, as X was ready for discharge. There was no social worker input at this stage. X's son therefore took the lead role in identifying Care Home 4 in May 2012 and X only came to CouncilA's attention in August 2012 when her funds had been all but depleted.'
- CouncilB's legal submissions state at paragraph 7; 'The decision to move X came about as a result of the family rejecting the one offer of a placement by the hospital social worker and hence she was moved in her best interests to Care Home 4, which was privately funded.'

53. From the above, it seems reasonable to draw the following conclusions:

- During X's stay at either the hospital and Nursing Home 2, i.e. in late May, the agency social worker, J, who it is now known was employed by CouncilB through an agency, provided details to the family of CareHome3 care home , to provide 24 hour care and support services to X. According to CouncilB's submissions, the social worker offered a placement there to X.
- The request to find a suitable residential home was made by the family to the social worker.
- The decision to move X from the hospital1 to NursingHome2 was made without the family's involvement. It is not clear whether the social worker was involved in this decision but given the emphasis placed in various accounts above on there being no social work involvement following the move to NursingHome 2, it is quite possible the social worker was fully involved until that point.

54. CouncilB contend at paragraph 3 of their legal submissions that had X's sonR approached CouncilB early on in the move to CareHome4, an assessment and panel funding would have been considered and likely to be approved but he did not do so and as they had not received a hospital referral they could not have known they might need to assist.

55. However, given the social worker was employed by CouncilB and given she was requested to seek suitable residential accommodation, there is no doubt that (a) X had the requisite level of need to trigger an assessment under section 47 of the National Health Service and Community Care Act 1990 and (b) that CouncilB had knowledge that the person may be in need of services. Instead of carrying out such an assessment, the social worker was not in contact with X or her family after 22May, leaving the family to make their own arrangements for

residential accommodation which X moved into on 28May. If the social worker had been in touch with X's SonR and explained the extent of his mother's financial entitlements coupled with an element of choice, given that the family had to approach CouncilA only three months later for such support, I am satisfied that the family would have accepted such assistance and asked the social worker to identify suitable accommodation other than CareHome3.

Would the provision that CouncilB should have put in place amount to Part 3 accommodation?

56. X's level of needs is summarised in the Managers Sign Off – Long Term Funding document of 28 August 2012:

'X suffers from short term memory loss but with no formal diagnosis of dementia. This affects her ability to care for herself through negatively affected cognition and memory retention alongside physical ailments such as Rheumatoid arthritis and cellulitis in her legs, both of which significantly reduce her mobility. These combined factors have led to her having several falls and injuring herself whilst she was living independently. As such this means that she requires support including assistance whilst using a frame to walk and her self care needs such as washing and going to the bathroom combined with the requirement for carers to prompt and encourage her to take her medication and to maintain her nutritional requirements. X was socially isolated whilst living independently and has been taking medication for depression for the last 2 years. Due to short term memory loss it is likely that X was neglecting taking this medication and as such her mental wellbeing was not being attended to. Until the first months of 2012, X had been living independently in a flat in CouncilB's area. SonR had privately organised a carer to visit 3 times a day as she had started to develop problems with her memory over the past few years and was struggling to manage her own care needs. X had also had a series of falls resulting in injury and admittance to hospital<sup>1</sup> in CouncilB's area , this has been suggested by family to be in part due to ulceration of her legs, potential dehydration and confusion. After her latest fall and admittance to hospital there was evidence to suggest that she was now failing to maintain safety at home.'

57. The view of the Council A manager on 28 August 2012, again set out in the Sign Off – Long Term Funding document was 'that X is no longer able to cope independently and it is essential for her to receive care and support within a 24 hour residential setting where her needs can be attended to when required.'

58. This view was expressed three months after the date at which it is necessary to determine whether CouncilB should have put in place Part 3 accommodation. However, Council B asserted that had they been approached

soon after the move to CareHome4, panel funding would have been likely and that X moved to CareHome4 in her best interests after a residential placement had already been offered to X. CouncilB might not have placed X in that specific accommodation but it is clear they would have placed her in some accommodation and the provision of care and support together with such accommodation would have been provided under section 21 of the 1948 Act.

59. CouncilA's letter of March 2013 states; 'at the point of CouncilA involvement with X, her savings had been reduced to £2000 and she had spent £9000 in care home fees. It would therefore appear that she did not have savings over the capital limit when she was moved to CareHome4 and hence the duty to provide accommodation to her would have kicked in then'. This is in contrast to the circumstances in the Greenwich case where Mrs D was not beneath the self-funding threshold until four weeks and five days after she needed the accommodation.

60. As such, from 28 May 2012 CouncilB should have provided accommodation under Part 3 of the 1948 because X, by reason of her age, illness and disability, had a need for care and attention which was not otherwise available to her. The principle set out by Mr Justice Charles in the Greenwich case applies; the deeming provision in section 24(5) of that Act should apply to the period between 28 May 2012 to 28 August 2012. By virtue of the application of the deeming provisions in section 24(6) and 24(5) to the periods of time between 19 and 28 May 2012 and 28 August 2012 to date respectively (see paragraphs 44 to 46 above), X's ordinary residence has continued to be that where she was ordinary resident prior to 19 May 2012, in the area of CouncilB.

#### Timely referral to the Secretary of State

61. The Guidance states at paragraph 197 that if the parties cannot resolve within four months, they must make an application to the SofS for a determination and they have 28 days in which to prepare and submit the application following the expiry of the four month period. CouncilA wrote to formally dispute X's ordinary residence on 4 March 2013 and it appears that for the vast majority of the time before the matter was referred to the Secretary of State, CouncilA were waiting for CouncilB to respond rather than vice versa.

62. Whether one party was to blame for the delay or not does not absolve the duty of the Secretary of State to make a determination of ordinary residence.

63. I therefore determine that X was ordinarily resident in the area of Council B in the time period during which ordinary residence is disputed by the two local authorities i.e. during the period from 28 August 2012 to present.

Signed on behalf of the Secretary of State for Health:

Date: