

## **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.
2. The period for which Mr X’s ordinary residence is in dispute is from 9 October 2010 (the date from which he was treated as a “self-funder” by CouncilA) to date.
3. For the reasons set out below, my determination is that Mr X has been ordinarily resident in CouncilA’s area during the period in question.

### **The facts of the case**

4. The following information has been ascertained from the agreed statement of facts prepared by CouncilA and CouncilB, their submissions, and the copy documents supplied by them.
5. The agreed facts are as follows: Mr X was born in 1986. He is diagnosed with microcephaly and has significant and permanent learning disabilities that impair his ability to comprehend information and to communicate. CouncilA and CouncilB agree that he lacks capacity to decide where to live and that this was the case at all material times.
6. Mr X lived with his mother in CouncilA’s area until her sudden death in 2006 when he was placed by CouncilA in a care home in its area. In 2008, Mr X was placed at Care Home1, a care home in CouncilB’s area, by CouncilA. He was provided with accommodation there under section 21 of the 1948 Act. Before his placement he was ordinarily resident in CouncilA’s area for the purposes of that Act.
7. In December 2008, Mr X’s mother’s home in CouncilA’s area was sold.
8. Mr X was initially in Care Home1 for a trial period which expired in March 2009. During this period and for a short while thereafter Care Home1, through its manager, and CouncilA, through a purchasing officer in its Learning Disability Team, sought to agree a written contract for his placement but the parties could not agree on its terms. Care home1 sent CouncilA monthly invoices for the total cost of the placement and CouncilA recovered Mr X’s contribution from his sister who lived in abroad. She was Mr X’s “DWP appointee”.
9. The other members of MrX’s close family are his father who lived abroad and brother. who lives in England. They were his Court of Protection financial deputies.
10. On or before 17 April 2010, Mr X received a third of the proceeds of sale of his mother’s house, £40,829.11, which was paid into an account in the names of his brother and sister. In a review of Mr X’s care plan carried out for a social work review in July 2010, it was noted that he was well-settled at Care home11, that he seemed comfortable in his personal space, that there had been a general improvement in his behaviour, that he was more co-operative and responsive and that he had developed a trustful relationship

with his carers and peers. This was reflected in CouncilA's review form completed on 23 August 2010 which noted that he had settled well and appeared happy at Care home1.

11. On 30 September 2010, Mr X's sister signed a CouncilA form headed "Benefit and changes in financial circumstances 2010" in which she disclosed that Mr X had £40,829.11 in his brother and sister's account and £6,678.71 in another account in his sister's name.
12. By letter, an officer in CouncilA's Financial Assessment & Benefit Service informed Mr X's sister that Mr X had been assessed as having to pay the maximum cost for his care home placement because he had more than £23,250 in savings. It also informed her that if and when his capital fell below this figure, she could request a new financial assessment. On the same date, the officer informed Mr X's social worker in CouncilA's Learning Disability Team that it had come to light that Mr X should be self-funding and that it had been decided not to backdate the decision on self-funding but to run his self-funding (status) from that date. The officer said that Mr X would be entitled to claim the care element of his disability living allowance again and asked the social worker to advise Care home1 and ask them to complete the claim forms with him.
13. Mr X's brother asked CouncilA for a copy of the same form and said "we" would like to pay the money Mr X owed to CouncilA as soon as possible. He described himself as Mr X's legal deputy.
14. On or around 29 October 2010, CouncilA ceased to pay invoices sent to it by Care home1. CouncilA informed Mr X's brother of the decision that X should be a self-funder.
15. A few weeks later, Care home1's Manager spoke with Council A's Learning Disability Team which advised him that in self-funder cases the service-user normally paid the home directly in response to which Care home1's Manager expressed concerns on the basis that Mr X's sister was abroad and that CouncilA might delay in resuming responsibility for costs once Mr X's capital dropped below £23,250. Care home1's Manager expressed these concerns in writing.
16. Shortly afterwards, Mr X's Solicitors wrote to CouncilA to request that urgent steps be taken to undertake a proper means assessment and to ensure continuity of care at Care home1.
17. In early 2011, Care home1 wrote to CouncilA complaining that Mr X's fees were more than three months in arrears and that since September, Care home1's invoices had been disregarded without explanation.
18. By letter, CouncilA informed Mr X's sister that Care home1 should be invoicing her for his placement and that once his savings fell below the capital limit CouncilB would be responsible. He said he was in the process of referring Mr X to CouncilB.
19. Council A calculated that Mr X's capital fell below £23,250 in January 2011. This is disputed by CouncilB who contend that Mr X's capital fell below £23,250 in July 2010.

20. A week later, Mr X's Solicitors sent Council A a letter before claim asking it, among other things, to accept responsibility for Mr X. By reply CouncilA refused to do so but accepted provisional responsibility pending the resolution of the dispute.
21. On 14 February 2011, CouncilA emailed Care home1 indicating that Mr X ceased to be self-funding in January 2011. At that time, no money had been paid to Care home1 on Mr X's behalf and no contract/agreement had been made between Care home1 and Mr X or his family members.
22. By a letter, Council A informed Mr X's brother that Mr X was required to meet the full cost of his placement from October 2010 to January 2011 and that the brother was required to settle any outstanding amounts directly with Care home1.
23. In April 2011, CouncilA contacted CouncilB to check if they had accepted the referral of Mr X. A week later, there were email exchanges between CouncilA and CouncilB without resolving the issue.
24. The following month, Mr X's Solicitors wrote to CouncilA saying that payment had been made to Care home1 on the basis of CouncilA's specific assurances that it would not take any point that in doing so they were accepting that CouncilA's responsibility was at an end. CouncilA replied by email a month later without commenting on CouncilA's continuing responsibility.
25. By letter to CouncilA, Care home1 confirmed that there was no contract between Care home1 and Mr X or his family members because Care home1 continued on the understanding that the agreement with CouncilA was still in force.
26. As stated above, CouncilA has accepted provisional responsibility for funding Mr X at Care home1 pending the resolution of the dispute.

### **The relevant law**

27. 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, disability or any other circumstances are in need of care or attention which is not otherwise available to them.
28. Section 21(2A) of the 1948 Act provides that in determining whether care and attention are available to a person, a local authority must disregard so much of the person's resources as may be specified in regulations. The relevant regulations are the National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations 2001 ("the 2001 Regulations"). Regulation 2(1) provides that for the purposes of section 21(2A) of the 1948 Act, a local authority is to disregard so much of the person's capital as does not exceed the capital limit for the purposes of section 22 of the 1948 Act.
29. Regulation 2(2) provides that the capital limit for the purposes of section 22 of the 1948 Act means the amount prescribed in the National Assistance (Assessment of Resources) Regulations 1992 ("the Assessment Regulations") as the amount which a

person's capital must not exceed if the person is to be assessed as unable to pay for that person's accommodation at the standard rate.

30. The amount prescribed in the Assessment Regulations is £23,250. Therefore this is the amount of capital to be disregarded, for the time being, in determining whether care and attention are available to a person.
31. Section 24(1) of the 1948 Act 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. Section 24(3) provides that where a person in the area of a local authority has no settled residence, or is in urgent need of accommodation, the authority has the same power to provide accommodation as under section 24(1) as if he were ordinarily resident in its area.
32. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3 of that Act "he shall be deemed for the purposes of this 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". The effect of the deeming provisions is to fix the date at which a person's ordinary residence falls to be determined. Once the deeming provisions have been considered, the next stage is to determine where the person was actually ordinarily resident at the relevant time.
33. In *R v Secretary of State for Health and the London Borough of Bexley ex parte the London Borough of Greenwich* [2006] EWHC 2576 (admin) Charles J observed: "It seems to me that if the position is that the arrangements should have been made .....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."
34. The Secretary of State's Directions under section 21 require local authorities to make arrangements to provide residential accommodation for those qualifying under Part 3 who are ordinarily resident in their area or in urgent need of such accommodation and also for persons with no settled residence who are or have been suffering from mental disorder and who are in the authority's area.
35. 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).

36. Section 26(3) imposes a liability on the person to refund payments made by the local authority under subsection (2), subject to the proviso that where the person satisfies the authority that he is unable to pay at the standard rate, his ability to pay is to be assessed and he then pays at a lower rate.

### **Ordinary residence**

37. “Ordinary residence” is not defined in the 1948 Act. The Guidance on Ordinary Residence<sup>1</sup> (paragraphs 18 to 20) 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.

38. The leading case on ordinary residence is that of *Shah v London Borough of Barnet (1983) 1 All ER 226*. In that 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”.

39. The starting presumption is that a person has capacity to decide where to live unless it is shown otherwise.

### **Application of the law**

40. I have considered the parties’ submissions, the statement of facts and the additional documentation supplied, the provisions of Part 3 of the 1948 Act, the Guidance on Ordinary Residence, the relevant case law, the 2001 Regulations and the Assessment Regulations.

41. My determination is not influenced by the provisional acceptance by Council A of responsibility for funding services under Part 3 of the 1948 Act pending resolution of the dispute.

### **Was Care home 1 Part 3 accommodation**

42. To see whether the deeming provision in section 24(5) of the 1948 Act applied to Mr X’s stay in Care home 1, it is necessary to consider whether Care home 1 was residential accommodation under Part 3 of the 1948 Act.

43. The “acceptance” by Council A, at paragraph 3 of its submissions, of the deeming provision in section 24(5) of the 1948 Act suggests that the placement in Care home 1 was purported to be under section 21 of the 1948 Act. However that is not sufficient to determine the matter.

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<sup>1</sup> *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](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf).

44. Section 26 of the 1948 Act sets out the framework for the provision of Part 3 accommodation in the private and voluntary sector. Arrangements under that section must provide for the making by the local authority of payments in respect of the accommodation and the local authority must recover from the person accommodated a refund or agree that the person accommodated will make payments direct to the establishment with the local authority paying any balance (and covering any unpaid fees). Section 26(2) was considered by the House of Lords in *Quinn Gibbon*. The leading judgement given by Lord Slynn held:

“.....arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include a provision for payments to be made by a local authority to the voluntary organisation at rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2), then residential accommodation within the meaning of Part 3 is not provided....”.

45. I find that the arrangements in respect of Care home1 do not qualify as the provision of Part 3 accommodation under section 26 as they did not include provision as specified in subsection (2) of that section. CouncilA, at paragraph 15 of its submissions seems to suggest that whilst no written agreement was entered into between CouncilA and Care home1, there was nonetheless a contract in place. This appears to accord with CouncilB’s view as reflected in its submissions (see, for example, paragraphs 12 to 15).

46. It is not necessary for the purposes of this determination for me to make a finding on this point as in any event the evidence before me is insufficient foundation for a conclusion that the arrangements between CouncilA and Care home1 included provision as specified in section 26(2). This is further supported by the fact that the Statement of Facts at paragraph 8 states that the parties sought to agree a written contract but “could not agree on its terms”. This is also supported by CouncilB’s submissions which, at paragraph 17, state that “CouncilA and Care home1 did not reach agreement as to the terms of the [Pre-Placement Contract] or [Individual Service Contract] proposed by CouncilA prior to the commencement of [Mr X’s] trial placement or continuation of his placement at the end of the trial period.”

### **Should Care home1 have been Part 3 accommodation**

47. However, that is not sufficient to settle the matter. The further question which I then have to address is whether CouncilA or CouncilB should in fact have made arrangements for Part 3 accommodation for Mr X during his stay at Care Home1. The *Greenwich* case is authority for the proposition that where a local authority should have made arrangements under Part 3 but did not, the deeming provision in section 24(5) of the 1948 Act applies on the basis that the arrangements had actually been put in place.

48. Accordingly if the arrangements in Care Home1 should have been made under Part 3 of the 1948 Act, the deeming provision should be applied and interpreted on the basis that the arrangements were actually made under Part 3.

49. Three separate periods (“the three periods”) fall to be considered:

- the period from 21 September 2008 (the date of Mr X’s placement at Care home1) until October 2010 (the date from which Mr X was treated as a “self-funder” by Council A) (“the first period”);
- the period from October 2010 to January 2011 (the date from which Mr X’s capital was calculated by CouncilA to have fallen below the capital limit for the purposes of section 22 of the 1948 Act) (“the second period”); this is part of the period in respect of which a question as to Mr X’s ordinary residence arises;
- the period from January 2011 to date (during which Mr X’s capital was calculated by CouncilA to have fallen below the capital limit for the purpose of section 22 of the 1948 Act) (“the third period”). This is the remainder of the period in respect of which a question as to Mr X’s ordinary residence arises.

### **The section 21(1)(a) duty**

50. In *Wahid v Tower Hamlets [2002] EWCA Civ 287*, Hale J explained that the section 21(1)(a) duty arose:

- a) where the person was in need of care and attention;
- b) that need arose because of age, illness etc; and
- c) care and attention were not available otherwise than by the provision of residential accommodation.

51. The duty would fall on the local authority in whose area the person was ordinarily resident or which was the authority of the moment in relation to a person in urgent need.

52. In this case, Mr X’s need was for residential accommodation and there is no issue with regard to the fact that the need arose for a reason set out in section 21(1)(a) of the 1948 Act.

### **Were care and attention otherwise available?**

53. So the question is whether care and attention were otherwise available to Mr X (“the first question”) during the three periods, and whether he was ordinarily resident in CouncilA or CouncilB’s area or in urgent need of residential accommodation (“the second question”) during the second and third periods.

54. In respect of the first period, there seems to be no disagreement on this point. CouncilA accepts, at paragraph 3 of its submissions, the application of the deeming provision in section 24(5) of the 1948 Act which suggests that the placement in Care home1 was purported to be under section 21 of the 1948 Act and this in turn suggests that CouncilA had decided that care and attention were not otherwise available to X. CouncilB takes no issue with this point and I find that care and attention were not otherwise available to Mr X during the first period and that the arrangements at Care home1 in respect of him should therefore have been made under Part 3 of the 1948 Act.

55. In respect of the second period, there is no evidence that Mr X's needs changed but it is necessary to refer further to the 2001 Regulations read with the Assessment Regulations. Resources which do not exceed the capital limit of £23,250 are to be disregarded for the purpose of deciding whether care and attention are otherwise available to a person. However, other resources may be taken into account for this purpose.
56. This is what Council A did in respect of the second period i.e. from October 2010 until January 2011 during which Mr X having received the proceeds of sale of his mother's house was in possession of capital which was above the capital limit. Having done this Council A appears to have automatically proceeded to the conclusion that, Mr X being a "self-funder", the service "was ended" (see paragraph 18 of Council A's submissions) and "therefore that it terminated its contract with [Care home 1]". The implication seems to be that Council A considered that care and attention were otherwise available to Mr X during the second period.
57. Council B contend that Mr X's capital should be treated as having fallen below the capital limit within 11 weeks from the date on which it should have been taken into account by Council A, 11 weeks being the period for which his capital in fact remained above the capital limit. Thus Council B contend that Mr X's capital should be regarded as having fallen below the capital limit from July 2010. Council B contend that it was not open to Council A to treat Mr X as a self-funder from October 2010 and that had Council A acted correctly and sought to re-claim full contribution from Mr X for an 11 week period from April 2010, Council A could not have made an argument that Mr X was self-funding and that the issue of his ordinary residence would not have arisen.
58. As regards Council A's argument, in my view Council A's approach to the second period is not the correct approach. As paragraphs 9 to 12 of the Department of Health Local Authority Circular LAC(98)19 provide, possession of capital above the statutory upper limit does not exempt the local authority from its duty to make arrangements for those persons who are themselves unable to make care arrangements and have no-one to make arrangements for them.
59. In Mr X's case, he did not have capacity to decide where to live and it seems improbable that he had capacity to enter into private arrangements with Care home 1. Although he had family members, including a brother who acted as his Court of Protection deputy, none of them entered into arrangements with Care home 1 on his behalf. Given my finding that care and attention were not otherwise available in respect of the first period, in the absence of evidence of a change in the position of Mr X's family members as regards the entering into of arrangements on his behalf, I conclude that Mr X could not be regarded as having care and attention available to him solely by virtue of the existence of his family members during the second period. This is supported by the following considerations:
- Mr X had no welfare deputy<sup>2</sup> and no formal decision (commonly referred to as "best interests decision") appears to have been taken by Mr X's family members on his behalf

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<sup>2</sup> Letter dated 24 January 2011 from Solicitors to Council A at page n of the bundle.

that he should continue to reside at Care home1 as at the time when CouncilA contend that Mr X became a self-funder<sup>3</sup>;

- in December 2010 Mr X's Solicitors wrote to CouncilA to request that urgent steps be taken to undertake a proper means assessment and to ensure continuity of care at Care home1;
- Mr X's "circle of support", a small group of individuals concerned with his welfare, including his immediate family (including his next of kin) and his financial deputies, was concerned that CouncilA had no arrangements in place for ensuring continuity of funding<sup>4</sup>;
- the actions of Mr X's financial deputy appear to have been consistent with welfare responsibility remaining with CouncilA<sup>5</sup>.

60. From this I draw the inference that there was nobody else willing and able to enter into arrangements with Care home1 on behalf of Mr X. In the absence of any other material change of circumstance, I conclude that care and attention were not available to Mr X otherwise than by the provision of residential accommodation under Part 3 of the 1948 Act during the second period. Arrangements for the provision of such accommodation should therefore have been made for him during the second period.

61. In respect of the third period, when Mr X's capital was calculated by CouncilA to have fallen below the capital limit, it is necessary to refer again to the 2001 Regulations read with the Assessment Regulations. Resources which do not exceed the capital limit of £23,250 are to be disregarded for the purpose of deciding whether care and attention are otherwise available to a person. As Mr X's capital fell below the capital limit during the third period, I decide that care and attention were not available to Mr X otherwise than by the provision of residential accommodation during the third period and that the arrangements at Care home1 in respect of him should therefore have been made under Part 3 of the 1948 Act.

62. As regards CouncilB's arguments as to the period during which Mr X's capital should have been treated as falling below the capital limit, in my view it is not necessary for me to make a finding on this point. For the purposes of this determination, the matter of Mr X's capital is relevant to the first question i.e. for the purpose of deciding whether care and attention were otherwise available. Whilst resources which do not exceed the capital limit of £23,250 are to be disregarded for this purpose, other resources may, but do not have to, be taken into account. Indeed as mentioned above, possession of capital above the statutory capital limit does not exempt the local authority from its duty to make arrangements for those persons who are themselves unable to make care arrangements and have no-one to make arrangements for them.

63. It was therefore open to CouncilA to decide not to backdate the period in respect of which Mr X's capital was to be taken into account for the purposes of deciding whether care and attention were otherwise available to Mr X.

64. Further and in any event, nothing turns on this as I have concluded above that Mr X continued to be a person to whom care and attention were not available otherwise than

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<sup>3</sup> Letter dated 10 June 2013 from CouncilB to CouncilA at page p of the bundle.

<sup>4</sup> Letter dated 24 January 2011 from Solicitors to CouncilA at page r of the bundle.

<sup>5</sup> Letter dated 24 January 2011 from Solicitors to CouncilA at page s of the bundle.

by the provision of residential accommodation since the beginning of his placement in Care home1 to date notwithstanding his possession of capital above the capital limit. The point in time in which the 11 week period fell therefore has no material bearing on my conclusions on this point.

### **Ordinary residence**

65. I must then turn to the question of whether Mr X was ordinarily resident in CouncilA or CouncilB's area or in urgent need of residential accommodation during the second and third periods.

66. As stated above, there is no dispute over the fact that as at the date of the placement in Care home1, Mr X was ordinarily resident in CouncilA's area.

67. By virtue of 24(5) of the 1948 Act, where a person is provided with residential accommodation under Part 3 of that Act "he shall be deemed for the purposes of this 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".

68. Given my finding that the arrangements at Care home1 should have been made under Part 3 of the 1948 Act in respect of the second period, I find that by virtue of section 24(5) Mr X is to be deemed to continue to be ordinarily resident in CouncilA's area where he was ordinarily resident immediately before the second period.

69. Turning to the third period, given my finding that this, too, should have been arranged under Part 3 of the 1948 Act, I find that, by virtue of section 24(5), Mr X remained ordinarily resident in the area in which he was ordinarily resident immediately before the third period i.e. CouncilA's area.

### **Conclusion**

70. I therefore find that Mr X has continued to be ordinarily resident in CouncilA's area during the period in question, that is to say from October 2010 to date.

Signed on behalf of the Secretary of State for Health:

Dated: