

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF
THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF 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 for the purposes of Part 3 of the 1948 Act. The period for which X’s ordinary residence is in dispute is 24 February 2012 to date.

The facts of the case

2. I take these details from the submissions and bundles (referred to as follows:

“Bundle A” : provided with CouncilA’s first submissions 4 April,

“Bundle B”: received with CouncilA submissions 23 May,

“Bundle C”: received with extra pages and updated index 8 July) provided to me by CouncilA.

I note that these are not agreed facts and have kept in mind CouncilB’s position that they are reliant on CouncilA for these facts “[having] never been responsible for the care of [X]” but accept the chronology of events and that X has been factually residing in CouncilB since 24 February 2012.

3. I set out the relevant facts having also read the comments made on 22 April by LawyerT on behalf of CouncilB edited on CouncilA’s first statement of facts
4. X was born on x date 1992. He has a moderate learning disability and cerebral palsy which affects all four limbs and requires the use of a

wheelchair. X has a visual impairment and limited speech, he uses a VOCA electronic aid for communication.

5. X is an only child and lived with his mother, MrsX following the breakdown of his parents' marriage, when he was very small. X had contact with his father at the weekends. X's mother has remarried.

6. X attended CollegeY (at least for his post-secondary level education) until July 2011, possibly until February 2012. The exact dates of the duration of his attendance are not evident on the papers provided to me.

7. In May 2010 communication between MrsX and the Learning Disability Team (LDT) led to the LDT assessment dated 7 May 2010 ("the assessment") and the commencement of a transition and moving on plan ("the plan"). The last page of the assessment notes that the information was obtained from his mother and the CollegeY. The updating annotation (.05.11) post-dates at least 3 further meetings detailed on the contact sheet as follows:
 - i. 20 Jan 2011 multi-agency meeting at the school,
 - ii. 11 Mar 2011 with the Nurse and Mrs X at home,
 - iii. multi-agency meeting at school 4 May 2011.

X was present at all these meetings.

8. As a consequence of the plan and other matters arising during the intervening period (which I shall refer to expressly below) X moved into a flat in CouncilB's area, on 24 February 2012. X's tenancy agreement ("the tenancy") is dated January 2013 and signed March 2013. I accept CouncilA's

submissions that the date discrepancy is as a consequence of a change to the terms as detailed in para 28 of CouncilA's submissions and note the reference to X having signed a pictorial tenancy agreement at the date of the first review.

9. X has received a Supported Living care package since the start of his occupation. CouncilA continued to meet the costs of the supported living package until they wrote to CouncilB disability team on 21 February 2013 seeking a change of authority and transfer of responsibility from 25 March 2013. Further contact was made with the Disability Team and later "Idcommissiiong" but the parties have been unable to agree and the matter was referred to their respective legal teams.
10. CouncilA continues to meet the cost of the supported living package until a determination is made. I have disregarded the interim payments for the purpose of this determination.
11. The period for which X's ordinary residence is in dispute is 24 February 2012 to date. I do however note that the first contact from CouncilA to CouncilB on 25 February 2013 was requesting a change of authority from the later date of 25 March 2013.
12. I have considered the submissions of both CouncilA and CouncilB, the bundles of documents marked A, B and C submitted by CouncilA and the speech and language report dated 11 June 2014 (" the report"), the

provisions of Part 3 of the 1948 Act and the Directions issued under it (the Directions), the Chronically Sick and Disabled Persons Act 1970 (“ the CSDPA”)the Guidance on Ordinary Residence issued by the Department (“the OR guidance”) and the cases of R v Barnet ex parte Shah (“Shah”), Mohammed v Hammersmith and Fulham LBC (“Mohammed”), Chief Adjudication Officer and Another v Quinn and Gibbon.

The issues

13. A: If it is shown that the accommodation is being provided under part 3 of the 1948 Act the deeming provision within section 24(5) shall be applicable

CouncilA submit that X is provided with a supported living package which amounts to community care services under S29 of the 1948 Act and S2 CSDPA but that he is not provided with accommodation under S21 of the 1948 Act.

CouncilB make no submissions on this point.

14. B: Whether X moved “out of area” voluntarily and for a settled purpose

CouncilA submits that X has had capacity to determine where he wishes to live throughout and that he adopted his current accommodation voluntarily and for settled purposes.

CouncilB submit that whilst X has capacity to decide where to live he did not in fact voluntarily choose to move to the flat in CouncilB area, nor was the move for a settled purpose.

The relevant Law

15. Section 21 of the 1948 Act and the Directions impose a duty on local authorities to make arrangements for providing residential accommodation for persons aged 18 and 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.

16. This is the duty of the local authority in whose area the person is ordinarily resident.

17. Section 24 (5) of the 1948 Act (the deeming provision) makes further provision as to the meaning of ordinary residence. Where a person is provided with residential accommodation under Part 3 the person shall be deemed to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided. This means a local authority placing a person in residential accommodation in another local authority's area retains responsibility for that person.

18. Instead of providing accommodation themselves, local authorities can 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 such arrangements are included in section 26 of the 1948 Act. These conditions require that where arrangements under section 21 are being made for provision of accommodation together with personal care, the accommodation must be provided in a registered care home and must provide

for the local authority to pay the care home in respect of the accommodation provided.

19. In addition, the local authority must be liable for any fees not paid by the service user. Residential accommodation provided by an organisation or person that is not a local authority will not fall within S21 if it does not meet the requirements in S26.

20. Section 29 of the 1948 Act imposes a duty on local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

The application of the law

21. It is clear from both the assessment and the Transition and Moving On plan (“the plan”) that X has personal care needs for which he is either dependent on others or for which he requires assistance. These include assistance with daily living. I acknowledge the advancements X made in preparing for his transition and following his move to the flat in Council B’s area. I also note Council A’s submissions that the “supported living package consists of daytime hours and sleeping”

22. On the basis of this evidence X does have personal care needs as defined in regulation 2 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010.

23. The question is whether the arrangement includes the local authority paying for the accommodation provided, as well as the personal care. Did the private tenancy agreement meet the requirements of S26 of the 1948 Act?
24. Under the terms of the tenancy X alone is the tenant. He is solely liable for the payment of rent and service charge, payment of rent arrears and any repayment of housing benefit. The landlord is also able to recover possession on two months' notice.
25. There are no provisions for the making of payments by the local authority to the accommodation provider for the purposes of S26 (2). This is a necessary element of the provision of accommodation in order for it to be the provision of Part 3 accommodation. As there is no liability on the local authority for rent payments there are also no provisions for the recoupment of payments in the event of the tenants default as required under S26(3A).
26. It is my determination that X's accommodation is not accommodation in which he has been placed pursuant to arrangements made by Council A under section 21. The deeming provision in S24(5) cannot therefore apply. X receives care services under S29 of the Act.

Ordinary Residence

27. Local authority duties arise under S29 of the 1948 Act to those who are "ordinarily resident". I now turn to consider this element of the determination.
28. In the case of Shah 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.

29. As the parties agree that X has capacity I therefore use Shah as my starting reference. In considering the question of ordinary residence Lord Scarman made clear that the mind of the person was important in two respects. The residence must be voluntarily adopted and there must be a degree of settled purpose.

30. Council B submit that X's move out of area was both involuntary and without a settled purpose.

31. They base these submissions on the following:

- a. That significant evidence points to the conclusion that X always wished to live close to his father i.e. in Council A (para 7), such as:
 - the mental capacity assessment of 29 July 2011 was flawed and is the only evidence of any attempt to assess his wishes and feelings (para 10),
 - the paragraph that states X was bothered by the near and far symbols and worried about the distance indicates he wanted a place closer to home (para 10.3)

- he lived in CouncilA throughout his childhood, his parents live there and he wants to return there (according to the assessment) (para 14.6)
- b. There was no detailed assessment of X's wishes and feelings comparable to that conducted by CouncilA in compiling the report (para 8) which CouncilB submits is relevant as;
- if there had been there would have been a report prepared by a skilled professional (para 11),
 - neither were there repeated detailed examinations of his wishes and feelings at key junctures (para 15)
 - the stated reason for a move to CouncilB (association and local knowledge through his stepfather) is particularly weak (para 14.4)
- c. Because of his disabilities and difficulties in effective communication there may have been assumptions made about X's wishes, based on the following;
- there is no supporting evidence that X ever " confirmed" the wishes expressed by his mother on his behalf that he had decided to move to the flat in CouncilB's area (para 9)
 - X's mother may have had the ulterior motive of making contact with his father more difficult,(para 9)
 - X was in no position due to his mobility and communication difficulties to express unhappiness with decisions made about him (para 14.1)

- X remains young and could happily live with the role of doing what others want him to (para 14.2)
- the surprise expressed by Assesor3 in attendance at the CouncilB assessment is indicative that the distance factor was never explored with him (para 12)

32. I disagree that the circumstances surrounding X's move out of area resemble the examples expressed by Lord Scarman in Shah such as "kidnapping, imprisonment or desert island abandonment" as denoting involuntariness "so overwhelming a factor as to negative the will to be where one is" These examples denote enforced involuntariness for which the individual can have no influence, regardless of their mental or physical capacity.

33. On the facts before me it appears that X has been able to confidently express his wishes and feelings and has others, independent and distinct from his mother, to whom he can disclose or communicate those wishes and feelings.

34. I base this view on the following:

a. the notes of the capacity assessment ("MCA")

- was undertaken by a specialist speech and language therapist, an Occupational Therapist known to X , and in the presence of MrsX his mother (who was asked to leave the room on occasion to ensure X was able to respond freely) and the care manager.

- The Talking Mat format was used (as it was in preparing the CouncilB report) which uses an interactive system of pictures and symbols. Responses were checked for accuracy and photographed.
- X was provided with information in order to assist him in making a decision in a format that was understandable to him. He was told the purpose of the assessment and it was undertaken following several visits to accommodation's in Council B's area.
- I do not consider that the comments X made in regard to either the bedroom decoration in CouncilB or the kitchen in CouncilA are indicative of him not understanding the process or having insufficient information available to make an informed choice. He may have made a humorous comment but was still of the view that he did not like the CouncilB bedroom. His "don't know" selection regarding the kitchen in CouncilA area was possibly also because he did not have experience of kitchens and did not know what to expect or how to navigate this yet. "Don't know" would therefore appear a pertinent response.
- The paragraph in the MCA headed "Talking about distance and travel time" illustrates that X was fully aware of the difference in distance between accommodation in CouncilA and CouncilB and that he was alert to the views of his father on this. His factually incorrect responses regarding near and far appear to me to be his way of expressing his wish that the relative distances were vice versa (the area in CouncilB was closer) and not the result of him misunderstanding the travel time and distance to accommodation in CouncilB.

Furthermore his repeated trips to the area in Council B prior to moving and during the course of his transition plan would have clearly proved the distance and time taken to travel to accommodation in Council B. His “clear choice” at the time of the MCA and in January 2012 was that he wanted to move to the area in Council B.

b. Ascertaining and opportunities for X to express his wishes and feelings

- X was party to several multi party agency meetings following the date of his mother’s notification of his wish to move home. These were attended by several professionals who knew him well. X was also assisted on a daily basis by a personal carer (with whom he had a close personal relationship) and before he left home, a further male carer. I believe that if X displayed any anxiety or objection about the proposed transition plan or the move out of area, one of these individuals would have been alerted to it.
- X was also in contact with his father who played a part in the transition process at least from around July 2011 (as the MCA was raised as a consequence). If he was not entirely happy with the choices made I believe he would have added these objections to those of his father, either before the move or afterwards at the first review 19.6.12 at which his father was present.
- Following his move to Council B’s area, X would also have had an opportunity to raise any dislike or anxiety independently of the staff. He

was in touch with both his father (speaking several times per week) although he had chosen not to visit overnight, his “nan and Br“ every 4-6 weeks and his aunt every 2-3 months and his father, his father’s partner and his mother were also present at the CouncilA Adult Social Services Review on 19.3.13 (“the review”).

c. X’s ability to express his wishes and feelings

- From the papers before me, X appears to present as a confident and sociable individual.

“ X.. can often be heard singing or calling out to people,... “and

“ X... is very sociable, loves children and is a ‘people watcher’.”

- It is stated many times that X sought more independence after completing his studies and that he and his mother had “outgrown” living together (the assessment, the contact sheet, the support plan). This included seeking work experience and ambitions for employment. In the shorter term he “would like to go to the cinema by bus, to have his own money, go the pub with friends, to have a girlfriend ...”
- An example of his confidence in speaking about his wishes is provided by his request to the Care Manager and the Nurse that he did not wish MrsX to undertake his personal care anymore (contact sheet meeting 11 Mar 2011 page 32b Bundle C).

- In regard to ascertaining X's wishes and feelings on a continuous basis, as well as the various opportunities detailed above that I believe facilitated this I note the following:
 - i. the Contact sheet notes comments from the first review meeting following the move to the flat in CouncilB's area, in which it is apparent that X was progressing well in his new home and had made advancements towards both independence and increased confidence. His strength of character is illustrated again by his "refusing to wear his glove" , "using more speech and increasing in confidence when approaching people".
 - ii. The evidence illustrates that X was freely participating and enjoying all the opportunities that were available to him in an independent supported living setting.

Reasons for moving to CouncilB

35. The connection between X's stepfather and CouncilB creating some familiarisation with the area may have been the initial reason why CouncilB was initially considered. However, the papers before me do illustrate that various other options were considered locally, were presented to X and viewed by either the Care Team or X with MrsX, father and/or PA on occasion.

36. X's intentions in moving from the family home were that he sought more independence which he considered that he would achieve in a supported living environment with people of similar age.

37. The Minutes of Meeting with X's father and his family members (the Minutes) and Council A submissions explain why many places were not suitable. The combination of providing for X's access and care needs plus meeting his wishes and expectations for independent living was limiting the choice of suitable properties.

38. The culmination of the search and X's own expression of his wishes and feelings following his integration into a peer group at the flat in Council B's area (facilitated by a support worker taking him to Council B daily to familiarise himself with the area) meant that he preferred to move to Council B. If he had any uncertainty about the distance or the proposed transition there was ample time and opportunity available to him to allow him to express this and request alternatives, which I believe he would have done if he had any uncertainty. The transition was more than one year long. X wanted to move at the end of his studies in July 2011 but because he had elected Accommodation 88 (not then built) he anticipated moving later than this but before January 2011 to Accommodation 88. The build was delayed which meant he remained at home. Had X sought earlier exit and not really had a real wish to move to Council B I believe that he would have asked for any alternative that allowed an immediate move. He did not do so until a place became available in Council B, an area well known to him at that stage, in accommodation with which he was familiar and had built up peer friendships

39. X simply wanted to move out of home and enjoy as many of the same freedoms as others his age.

Settled purpose

40. I acknowledge that Council B submit that X has expressed a wish to live closer to his father in Council A during the assessment report. After more than 2 years living in Council B, where contact with his father has become more limited, he may now consider a move closer to his father would increase his contact. Whether he chooses to make such a move is for him to decide, aided by the relevant authority and I trust that X's wishes for the future will be acted upon.

41. I have considered whether X's wish expressed in the report to live closer to his father has any impact on his voluntariness to move to the flat in Council B's area. For all the reasons stated above I do not consider that it does.

42. However I keep in mind that Lord Scarman held in Shah that the natural and ordinary meaning of "ordinarily resident" requires there to be a settled purpose.

43. I have therefore considered separately whether the recently expressed wish negates the "settled purpose" which must be established to create ordinary residence.

44. Lord Scarman states that the;

"purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose

while settled, may be for a limited period.... All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.”

45. I have considered the facts based on the evidence before me and note in particular; the review and contact sheet are evidence that X has enjoyed a full life whilst at the flat in Council B's area. He has freely entered into activities including socialising at the pub and going for dinner and employment at a local café. There appears to be a clear pattern of how X spends his daily life in and around the area.

46. X's intentions for the future are not contrary to this as there is no necessity for ordinary residence to be “permanent “or “indefinitely enduring”

“.. the notion of a permanent or indefinitely enduring purpose as an element in ordinary residence derives not from the natural and ordinary meaning of the words “ordinarily resident” but from a confusion of it with domicile”

47. Lord Slynn explained in Mohammed that a preference to reside elsewhere does not prevent normal or ordinary residence.

Conclusion

48. X is not accommodated under Part 3 of the 1948 Act. He receives S 29 assistance by way of a supported living care package. X voluntarily chose to move to the flat in Council B's area in 2012 because it enabled him to move out of home, to live in supported accommodation with a peer group and facilitated his aspirations to adapt and develop new skills towards his longer

term goals. His intention was to establish a settled home which he has done.

From the date of his occupation at the flat in CouncilB's area, X's ordinary residence has been in CouncilB.

Signed on behalf of the Secretary of State for Health:

Date: