

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014 OF THE ORDINARY RESIDENCE

1. I have been asked by CouncilA to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.
2. In determining the issue I have had regard to the agreed statement of facts; the submissions of both parties; and the bundle of documents provided.
3. For the reasons set out below, I find that X is ordinarily resident in CouncilB and has been since she moved to EstablishmentB in October 2011.

Factual Background

4. X was born on XX XX 1986 she has Coffin Lowry Syndrome, a genetic disorder caused by a mutation of the X chromosome. X has some autistic type tendencies including a poor social use of language. She has a scoliosis and cannot walk very far.
5. I am informed that X was not “looked after” by CouncilA within the meaning of the Children Act 1989.
6. In March 2008, X had a breakdown in her mental health. I am informed that she was sectioned under the Mental Health Act 1983 although it is not clear for how long or under what provision. It is said in the agreed statement of facts that “following discharge, she entered into 24 hour supported living. X is not in receipt of section 117 aftercare.”
7. I note that she needs support with personal care, medication, food preparation, finances, community participation/involvement, engaging in new activities, communication, physio/exercise, eating and independent living skills. She needs 1:1 support during the day.
8. I am informed that X has been living in AreaB since 31 August 2008.
9. I have been provided with undated review documentation in relation to a placement at Address1, AreaB. That gives as the “date of admission” 1 September 2008. The service provider is described as “Organisation1”. The service is described as “24 hour support”. The narrative social work analysis states at page 6:
“...X has adapted well to living with one other client within a residential setting on a supported living contract...”

10. In 2011, X moved to EstablishmentB, which is in the area of CouncilB. I note that her care continues to be provided by Organisation1.
11. I note that I have been provided with a copy of a CLDT High Cost Review Tool with a start date of 26 January 2015. That records the organisation as "Organisation1" and describes the accommodation type as "supported living". That states:

"...When X was ready to be discharged, she moved into 24 hour supported accommodation provided by Organisation1 in AreaB. At that point, X was living with another woman W1 – this didn't work out due to W1 attacking X. W1 left the property and another woman W2 has moved in.

X and W2 reported to get along well. They have very different interests and tend to spend little time together. They do go on holiday together once a year and sometimes go on trips together.

In October 2011, X and W2 moved into their current property as their previous landlord ended their tenancy."
12. On 7 October 2014, CouncilA wrote to CouncilB contending that X was ordinarily resident in the area of CouncilB.
13. On 7 November 2014, CouncilA sent a letter to CouncilB chasing a response to its letter of 7 October 2014.
14. On 16 January 2015, X entered into an assured shorthold tenancy agreement with Individual1 and Individual2, who are said to be private landlords, at EstablishmentB. I note that the tenancy agreement is not contingent on X accepting care from any particular organisation.
15. I note that it is common ground that, at least from that point, X was not being provided with accommodation pursuant to Part 3 of the NAA 1948.
16. On 26 January 2015, CouncilA undertook an assessment of X's capacity. That assessment concluded that X lacked capacity to make decisions as to where to live. CouncilA and CouncilB agree that she lacks capacity in that regard.
17. The capacity assessment records the following:

"...
X became a little distressed about the possibility of moving back to CouncilA. This suggested that she would prefer to stay in AreaB. I asked her if she would like to stay in AreaB or return to CouncilA. She said she would like to stay where she is. I discussed the possibility of returning back to CouncilA. What that would mean to X. Such as being

close to family and old friends, Maybe having a different support service and staff team. Maybe different types of activities. X stated that she does not wish to return to CouncilA.

We discussed what it means to X to live in AreaB considering all care reviews and care plans. X said she likes her familiar staff team, she has a routine in activities and local facilities, and she has some friends here as well as a boyfriend.

I then asked what she likes about CouncilA such as being close to family. She became a little distressed but then said she grew up there and knows it well, her family and some old friends are there.

We then noted some challenges about living in AreaB again from reviews and care plans. I asked how she feels about travelling to visit her family. She said she is okay about it.

I asked her if there was anything she did not like about living in AreaB such as having to travel to visit family. She said she doesn't mind travelling.

I asked her if there was anything she would not like if she had to return back to CouncilA. She said she would like to be back here."

18. On the same day, 26 January 2015, a best interests decision was taken that it was in X's best interests to remain at EstablishmentB.
19. On 30 January 2015, CouncilA wrote a further chaser letter to CouncilB. By email of 6 February 2015, Individual3, a solicitor at CouncilB, wrote to CouncilA asking CouncilA to set out the basis on which it is said that X is ordinarily resident in CouncilB. There followed further correspondence in relation to this. A referral was made to me for a determination on 6 May 2015. The determination was delayed pending the decision of the Supreme Court in the case of *R (on the application of Cornwall County Council) v Secretary of State for Health* [2015] UKSC 46 and, thereafter, pending the publication of guidance by the Department in light of that decision. I have received further submissions from CouncilA and CouncilB in light of that decision.

Legal Framework

20. It is common ground that this matter falls to be determined in accordance with the provisions of the National Assistance Act 1948 rather than the Care Act 2014. I

therefore set out below the law as it stood at the relevant time, prior to 1 April 2015¹ when relevant provisions of the 2014 Act came into force.

21. 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."
22. Under section 24(5) of the 1948 Act ("the deeming provision"), a person who is provided with residential accommodation under Part 3 of the 1948 Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.
23. 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 made for the provision of accommodation together with nursing or 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).
24. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority. Section 2 of the CSDPA supplements and relates to welfare services provided under section 29 of the 1948 Act.

Ordinary Residence

¹ The provision of care and support for adults and of support for carers is governed by the 2014 Act as from 1 April 2015 and the relevant provisions of the 1948 Act have been dis-applied in relation to England by S.I. 2015/914. The period in dispute starts from before the 1 April 2015 commencement date

25. "Ordinary residence" is not defined in the 1948 Act. The Department of Health has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services² ("the guidance"). Paragraph 18 of the guidance 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.
26. In *Shah v London Borough of Barnet* (1983) 1 All ER 226, 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 "ordinary residence" refers to a man's abode in a particular place or country which he has adopted voluntarily and for a settled purpose as part of the regular order of his life for the time being, whether of short or long duration"
27. Additional considerations apply where the relevant person lacks capacity to determine (and thus to "voluntarily adopt") his abode. This issue was addressed by the Supreme Court in the *Cornwall County Council* case. The Supreme Court held that the focus must be on the nature of the residence of the subject of the decision (paragraph 51) which may include having regard to the duration and quality of that residence (paragraph 49). The published guidance on ordinary residence notes that all of the relevant circumstances must be considered including the person's physical presence, the purpose of living there, the person's connection with the area, their duration of residence and their views, wishes and feelings (so far as ascertainable) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.

Application of the law to the facts

28. I note that it is common ground that the arrangements in place for X since 16 January 2015 do not amount to accommodation provided under Part 3 of the NAA 1948 but are a genuine supported living arrangement.
29. I have limited information as to the position before 16 January 2015. On the basis of the evidence before me, I consider it more likely than not that X's placement at EstablishmentB has been a genuine supported living arrangement since she moved there in October 2011. I note that review documentation from placement1 refers to a "supported living contract"; I note that Organisation1 has been providing care throughout but that does not establish that the placement at

² From 19th April 2010, this guidance was contained in "Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England" issued on 15th April 2011 reissued October 2013. Save where expressly stated otherwise, this determination refers to this guidance as the guidance in force at the relevant time for which the determination falls to be made.

EstablishmentB was previously a placement under Part 3; and no evidence was presented to suggest that the nature of the placement at EstablishmentB has changed since X has been there. In these circumstances, I consider that it is more likely than not that the current placement has always been a supported living arrangement.

30. The question of X's ordinary residence therefore falls to be considered by applying the approach identified in the *Cornwall County Council* case. I note that as X was not a looked after child, the issue of deemed ordinary residence under the Children Act 1989 does not apply. I also note that while the Supreme Court identified an underlying policy that one authority should not be able to "export" responsibility for a particular service-user, the question of ordinary residence has to be addressed by looking at all the circumstances relevant to the nature and duration of a person's residence.
31. In my judgment, X is ordinarily resident in the area of CouncilB and has been since 2011. While I note that X has family and friends in CouncilA, and that connection to her social network is important to her, she has lived at her current placement as her home since 2011. I do not see why it should be considered that she remained ordinarily resident in CouncilA having moved to her current address.
32. I note that even if I had not considered that she was ordinarily resident in the area of CouncilB since 2011, I would have considered that she was ordinarily resident in the area of CouncilB since 16 January 2015. The best evidence I have as to X's wishes and feelings is that she treats EstablishmentB as her home and wishes to remain where she is. These would be additional factors pointing to her ordinary residence being in the area of CouncilB.

Conclusion

33. For these reasons I find that X is ordinarily resident in the area of CouncilB and has been since October 2011.