

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

Introduction

1. I have been asked by CouncilA to make a determination as to the ordinary residence of X. The dispute is with CouncilB.
2. The authorities originally requested a determination under s.32(3) of the national Assistance Act 1948. The determination was stayed pending the decision by the Supreme Court in *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 and the amendments to the statutory guidance accompanying the Care Act 2014.
3. In light of the changes introduced by the Care Act 2014 I proceed to make this determination pursuant to s.40 of that Act.

The facts

4. The following information has been ascertained from the agreed statement of facts, legal submissions and other documents provided by the parties.
5. X was born on XX XX 1981. He has been diagnosed with a moderate learning disability and autism. He has been assessed as requiring some support to meet his needs including prompting to take his medication, washing himself and some other day-to-day activities. He receives support from his mother to manage his finances.
6. In 1998 X became known to CouncilA (when he was aged 17 years). He was assessed as requiring a residential care service as his needs could not be fully met by his mother in the community.
7. In 2004 X moved to a care home owned by Organisation1 at Address1B (in the area of CouncilB). This move was arranged and funded by CouncilA.

8. In November 2011 X's needs were reassessed by CouncilA who concluded that it was appropriate for him to move to supported living accommodation.
9. On 16 January 2012 X was assessed as lacking capacity to make decisions as to where to live. In the summer of 2012 a best interests decision was made, apparently by reference to the Mental Capacity Act 2005, that X should move to independent living accommodation.
10. On 10 December 2012 the Court of Protection ordered that it was in the best interests of X to reside in independent supported living accommodation.
11. From 17 January 2013 X has resided at Address2B. The authorities agree that this is supported living accommodation. The Court of Protection also ordered that a tenancy agreement be signed on behalf of X for this accommodation.
12. The rent due for the supported living accommodation is paid in full by way of housing benefit. CouncilA do not make any payments towards the provision of this accommodation but they do continue to fund X's domiciliary care and have continued to do so on a without prejudice basis pending the determination of this ordinary residence dispute.

The authorities' submissions

CouncilA

13. CouncilA has provided submissions dated 17 September 2014, 23 October 2015 and 1 June 2017.
14. CouncilA submit that X's current supported living accommodation is not provided under Part 3 of the 1948 Act and therefore the deeming provisions of s.24 of that Act do not apply. The decision in *Chief Adjudication Officer v Quinn & Gibbon* [1996] 1 WLR 1184 is cited in support of this submission.

15. CouncilA also submit that from the date X moved to his current supported living accommodation he has not had a need for care and attention which cannot be met other than by the provision of accommodation and so a duty to provide accommodation under s.21 does not arise. They rely on the decision in *R (Westminster CC) v NASS* [2002] 1 WLR 2956 in this regard.
16. X has spent time with his parents in the area of CouncilA but only for 3 nights a week and more recently (August 2015) reduced to as little as 1 day-time visit per fortnight. It is submitted that all these arrangements are properly characterised as X visiting his parents whilst living in the supported living accommodation as his home.
17. CouncilA refer to the Placement Review dated 20 May 2013 which states that X's move to his supported living accommodation was successful, that he settled very well, that he is happy with the people he lives with and has a good rapport with the staff and another resident. CouncilA also point out that X has become less settled and happy at home.
18. Further, CouncilA submit that irrespective of the absence of a review of X's care plan he would have been provided with supported living accommodation prior to the date that the Care Act 2014 applied to him and the deeming provisions under s.39 of that Act do not therefore apply.

CouncilB

19. CouncilB have provided submissions dated 19 September 2014, 19 May 2017 and 5 June 2017.
20. CouncilB concede that from August 2015 X has been ordinarily resident in its area but that prior to that he was ordinarily resident in the area of CouncilA. CouncilB submit that until August 2015 X's "primary residence" was his parents' home in the area of CouncilA where he was also ordinarily resident.

21. Council B submit that until August 2015 X was spending from Friday evening to Monday evenings with his parents. Reliance is placed on the decision in *Cornwall* and the statutory guidance, in particular, paragraphs 19.72 – 19.73.
22. Council B submit that from 2004 X has or has had two places of residence - his own accommodation and his parents and that when he is with his parents they provide (and share) the provision of care to him.
23. Council B assert that X had the greater connection with his parents' home rather than his own accommodation for a number of reasons including the historic and continuing pattern of living, his "limited" integration at his supported living accommodation and his greater connections centring in and around his parents' home. Further reference is made to X's connections with his mother and her involvement in his life generally.
24. Further, Council B submit that irrespective of X's right to occupy a home it may still be considered his "home" pursuant to ECHR Article 8. Reference is made to the decision in the case of *Harrow LBC v Qazi* [2003] UKHL 43 in support of this submission.

The law

25. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act"); the relevant provisions of the National Health Service Act 2006; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015; the Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 ("*Cornwall*") and *Chief Adjudication Officer v Quinn & Gibbon* [1996] 1 WLR 1184.

26. Article 6(2)(c) of the Transitional Order provides as follows:

*“(2) Section 39 of the Act (where a person’s ordinary residence is) does not have effect in relation to a person who, immediately before the relevant date in relation to that person, is being provided with-
...
(c) supported living accommodation (within the meaning of regulation 5 of the 2014 Regulations).”*

27. Regulation 5(1) of the 2014 Regulations provides as follows:

“(1) For the purposes of these Regulations “supported living accommodation” means-
(a) accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and
(b) accommodation which is provided –
(i) in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose); and
(ii) in circumstances in which personal care may be provided by a person other than the person who provides the accommodation.”

28. Section 21(1) of the 1948 Act provides:

“The local authority empowered under this Part to provide residential accommodation for any person shall be subject to the following provisions of this Part of this Act be the authority in whose area the person is ordinarily resident.”

29. Section 21(5) provides:

“Where a person is provided with residential accommodation under this Part of this 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.”

30. In *Cornwall* Lord Carnwarth said:

“...In so far as Vale is relied on to substitute an alternative test, based on “the seat of (his) decision making”, or otherwise on his relationship with his parents and their home, it depends on a misunderstanding of that judgment.” [paragraph 51]

31. The statutory guidance (as revised) includes the following:

“19.26 Where a person lacks capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.”

“19.32 Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person’s physical presence, their purpose for living there, the person’s connection with the area, their duration of residence there and the person’s views, wishes and feelings (insofar as these are ascertainable and relevant) 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.”

“19.73 If a person appears genuinely to divide their time equally between 2 homes, it would be necessary to establish (from all of the

circumstances) to which of the 2 homes the person has the stronger link. Where this is the case, it would be the responsibility of the local authority in whose area the person is ordinarily resident, to provide or arrange care and support to meet the needs during the time the person is temporarily away at their second home.”

Application of the law to the facts

32. X has been living in supported living accommodation since 17 January 2013.
33. The deeming provisions in s.39 of the 2014 do not apply due to the effect of Article 6(2)(c) of the Transitional Order and the issue of JR's ordinary residence must therefore be determined by reference to the law that existed prior to the coming into force of the Care Act 2014.
34. Prior to the introduction of the 2014 Act the principal means by which local authorities were empowered to provide accommodation (outside of the Housing Acts) was pursuant to their powers under Part 3 of the 1948 Act.
35. The sub-heading to Part 3 is "*Provision of accommodation*".
36. Section 21(1)(a) of the National Assistance Act 1948 sets out the power of local authorities to provide residential accommodation for specified persons in need of care and attention not otherwise available to them.
37. Section 21(5) contains the relevant deeming provision and states that references in the 1948 Act to accommodation provided is to accommodation provided in accordance with that section and the next five sections.
38. Section 26(1) of the 1948 Act states that arrangements for the provision of accommodation under section 21 may include arrangements with a voluntary organisation or any other person who is not a local authority where that organisation or person manages the premises for reward (excluding specified accommodation which does not apply).

39. Section 26(2) of the 1948 Act states that any arrangements made under this section shall provide for the making by the local authority to the other party thereto payments in respect of the accommodation provided as such rates to be determined.
40. It is clear that the focus of the statutory regime is the duties and powers on local authorities to *provide* accommodation.
41. It is apparent from the information provided to the Secretary of State that Council A did not provide X's supported living accommodation where he has lived since 17 January 2013.
42. The accommodation is owned by a separate organisation or person. Further, the payments in relation to this accommodation were not made and are not due from Council A but from X. The rent and associated expenses are funded by way of housing benefit / allowance referable to a tenancy agreement between X and the landlord. Accordingly, the accommodation provided by another organisation does not fall within Part 3 of the 1948 Act. This conclusion is supported by the decision in *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 at 1192.
43. Because Council A did not provide accommodation under Part 3 of the 1948 Act so the deeming provisions under section 24(5) cannot apply. In such circumstances, the correct test is that set out in *R v London Borough of Brent ex p Shah* [1983] 2 AC 30 as interpreted by the Supreme Court in *Cornwall* and by reference to the statutory guidance.
44. For the reasons set out below I have concluded that Council A's submissions are correct and that since 17 January 2013 X has been ordinarily resident in the area of Council B.
45. The Court of Protection ordered that it was in X's best interests to reside in his supported living accommodation. It did not make any order that X should also

reside with his parents in their home either as a shared care arrangement or otherwise.

46. It is clear that there has been contact between X and his parents following the move to his supported living accommodation but at no time was he spending equal periods of time in each property. The most X spent with his parents was 3 nights per week. In considering X's physical presence he was clearly spending more time in his supported living accommodation than at his parents' home.

47. The purpose of X's move to his supported living accommodation was to provide him with a long-term home at which he could receive support to meet his needs whilst also maximising his independence. This was entirely consistent with the least restrictive principle under s.1 of the 2005 Act. I have no doubt that the purpose of the move was to provide a long-term home for X which was also in his best interests on the evidence before me.

48. I do not accept any suggestion that the purpose behind the move to supported living accommodation was to create some kind of shared care arrangement. If that were the case I would expect the Court of Protection to have made an order explicitly authorising the same. It did not.

49. X clearly has connections with the supported living accommodation in the area of Council B. He has a tenancy of the accommodation which in turn gives him legal rights to occupy his home. I do not deny that the concept of a "home" is autonomous for the purposes of Article 8 but it is entirely proper for me to consider the fact that X has his own tenancy for the supported living accommodation but is only a visitor to his parents' home over which he has no rights of occupation.

50. Whilst X missed his family and mother in particular following his move on 17 January 2013 there is evidence that the transition went well and that he developed good relationships with both staff and other residents at the supported living accommodation. X's care plan is based on his residence at the supported

living accommodation where he has been encouraged to become more independent and autonomous over time.

51.X has resided at his supported living accommodation continuously since 17 January 2013 – a period of more than 4 ½ years.

52.X's wishes and feelings were clearly considered by all relevant persons and as required by the 2005 Act. The evidence indicates that the professionals involved in X's care and his mother were all agreed that it was in his best interests to live at his supported living accommodation. The Court of Protection was duty bound to take into account those wishes and feelings when concluding that it was in X's best interests to live in supported living accommodation (and not anywhere else).

53.The review of X's move dated 20 May 2013 records that the transition was successful, that he had settled in well and was happy with the people he lives with. Of note is the evidence that he had developed a rapport with the staff and one other resident with whom he shares some support and activities. At that stage, he was noted to be demonstrating an ability to make new friendships and was tolerant of other people's needs.

54.In contrast (and this is without any criticism of X's family in any way) his connections with his former family home appear to have reduced and become more difficult. X's contact at the family home has now reduced to 1 visit during the day time per fortnight.

Conclusion

55.For the reasons referred to above I conclude that X has been ordinarily resident in the area of CouncilB since 17 January 2013.