

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

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 the CouncilB.

Facts

2. I have taken the following facts from the agreed statement of facts and other documents provided by the parties.
3. X was born on XX XX 1960. She has a diagnosis of Down's Syndrome and learning disability in addition to epilepsy, auto-immune hepatitis and hypothyroidism.
4. When she was 5 years old X was placed at House1, CouncilC. I assume this was a children's home.
5. In 1976 X was moved to a residential care home at Road1B, CouncilB by CouncilA. She has lived in CouncilB ever since.
6. In 2003 X was placed by CouncilA in another residential care home in CouncilB managed by Organisation1.
7. In 2009 X's accommodation was re-registered as supported living accommodation. It appears that from this date, X lived in that accommodation with her boyfriend.
8. On 26 October 2011 X moved into her current supported living accommodation with her boyfriend. This accommodation had two bedrooms.
9. I have seen copies of a support plan dated March 2010 and an assessment completed by reference to the Care Act 2014 dated 15 February 2016. It is clear from these documents that X requires support and care on a daily basis to meet her assessed needs.

10. I have also seen an assessment of X's mental capacity dated 5 February 2013. This was completed by a social worker, Y, who concluded that X has capacity to make decisions as to where to live.
11. On 6 February 2014 the Court of Protection appointed a deputy to make decisions about X's property and affairs. I note that the order makes no reference to X's welfare, including where to live.
12. In 2016 X's boyfriend passed away. X moved into a different smaller flat in the same block. In December of that year, a tenancy agreement was signed in relation to X's occupation of this accommodation.
13. It appears that the dispute as to X's ordinary residence arose as early as 2012 but that Council B did not confirm their position until 30 August 2017. Council B accepted that X was ordinarily resident in Council B but only from 1 November 2015. Council A had always submitted that X was ordinarily resident in Council B from 26 October 2011 when she signed her tenancy agreement for Organisation 1.
14. Attempts to resolve the dispute between the two authorities have not been successful.

Parties' submissions

15. Council A submits that X became ordinarily resident in Council B in October 2011 when she signed her tenancy agreement for her supported living accommodation at Organisation 1.
16. Council A submits that when X moved from her residential care home to supported living accommodation she was no longer being provided with accommodation under Part 3 of the National Assistance Act 1948. From that moment, Council A have only provided X with care and support, not accommodation which is funded by way of housing benefit allowance payments.
17. As a consequence, Council A submits that X cannot be deemed to be ordinarily resident in Council A's area pursuant to section 24 of the 1948 Act.

CouncilA also submit that the deeming provisions pursuant to section 39 of the 2014 Act do not apply due to the effect of article 6(2) of the Care Act 2014 (Transitional Provisions) Order 2015.

18. In the absence of any deeming provisions, CouncilA submit that X is clearly ordinarily resident in CouncilB.
19. CouncilB accepts that X is now ordinarily resident in CouncilB but disputes CouncilA's assertion that she has capacity to decide where to live. CouncilB refers to an assessment of X's capacity dated 1 November 2015 which concludes that she lacks capacity to decide where to live.
20. CouncilB rely on the decision of the Supreme Court in *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46* and make reference to X's express wish to remain living in CouncilB where she has resided for over 40 years. Reference is also made to a best interests decision that X should live in CouncilB.
21. CouncilB submit that X should be treated as being ordinarily resident from 1 November 2015 because that is the date on which she was assessed as lacking capacity to decide where to live.

Legal framework

22. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); the Mental Capacity Act 2005; 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"), *Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184* ("Quinn") and *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46* ("Cornwall").
23. Any question as to a person's ordinary residence arising under the 1948 Act which is to be determined on or after 1 April 2015 ("the relevant date") is to be

determined in accordance with s.40 of the Care Act 2014 pursuant to article 5 of the Care Act (Transitional Provision) Order 2015/995.

24. Section 40(1) provides that any dispute about where an adult is ordinarily resident for the purposes of this Part, or any dispute between local authorities under section 37 about the application of that section, is to be determined by the Secretary of State, or where the Secretary of State appoints a person for that purpose (the “appointed person”), that person. Section 40(1) also provides that regulations may make further provision about the resolution of disputes of the type mentioned in subsection (1).

25. Section 78(1) provides that a local authority must act under the general guidance of the Secretary of State in the exercise of functions given to it under the Care Act 2014.

26. Section 24(5) of the National Assistance Act 1948 provides that where a person is provided with residential accommodation under Part 3, he shall be deemed to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him.

27. Section 1(2) of the Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he lacks capacity.

28. In the Shah case, Lord Scarman said as follows:

“...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. The statutory Care and Support guidance (revised 2017) provides-

“19.26 Where a person lacks the 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.

19.27 *The Supreme Court judgment in Cornwall made clear that the essential criterion in the language of the statute 'is the residence of the subject and the nature of that residence'.*

19.28 *At paragraph 51, the judgment says in relation to the Secretary of State's argument that the adult's OR must be taken to be that of his parents as follows:*

'There might be force in these approaches from a policy point of view, since they would reflect the importance of the link between the responsible authority and those in practice representing the interests of the individual concerned. They are however impossible to reconcile with the language of the statute, under which it is the residence of the subject, and the nature of that residence, which provide the essential criterion.....'

19.29 *At paragraph 47, the judgment refers to the attributes of the residence objectively viewed.*

19.30 *At paragraph 49, the judgment refers to an: assessment of the duration and quality of actual residence.*

19.31 *At paragraphs 47 and 52, the judgment refers to residence being 'sufficiently settled'.*

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."*

Application of law to facts

30. Council B do not appear to assert that the deeming provisions provided by Section 39 of the 2014 Act apply. For the avoidance of doubt, I am of the view that they do not apply for the reasons identified in the submissions provided by Council A.

31. I have carefully considered whether the deeming provisions under the 1948 Act apply. In the *Quinn* case the House of Lords considered the application of the deeming provisions of the 1948 Act and, in particular, what was meant by provision of residential accommodation under Part 3. Lord Slynn said at page 1192B-D as follows:

“In my opinion arrangements made in order to qualify as the provision of Part III accommodation under section 26 must include a provision for payments to be made by the local authority to the voluntary organisation at the rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and a 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 III is not provided and the higher rate of income support is payable.”

32. The evidence in the present case is that Council A did not make any payment for X's accommodation from 26 October 2011. From that point in time her accommodation was paid for by way of housing benefit and not by Council A. As a consequence, she was not being provided with accommodation by Council A under Part 3 and the deeming provisions provided by section 24(5) of the 1948 Act do not apply.

33. I have considered the question of whether X lacks capacity to make decisions about where to live and whether the same makes any difference to her ordinary residence.

34. There is a presumption that a person has capacity to make decisions unless it is established that she lacks capacity pursuant to section 1 of the Mental Capacity Act 2005.

35. The question of a person's capacity has to be determined as at the date in question. There is no evidence as to X's capacity on or around 26 October 2011 and so I must follow the statutory presumption that she had capacity

when she entered her tenancy for her supported living accommodation at that time.

36. I have not seen the assessment of X's capacity dated 1 November 2015 referred to by Council B but it makes no difference to my conclusion in relation to ordinary residence. Even if X lacked capacity to decide where to live from 1 November 2015 it does not mean that the deeming provisions under the 1948 Act apply from that (or any other date). If X lacked capacity it would be necessary to consider the *Shah* test as modified by the Supreme Court's decision in *Cornwall*.

37. Paragraph 19.32 of the guidance provides that where a person lacks capacity the approach is to follow the *Shah* test but to discount the need for that person to have voluntarily adopted their place of residence.

38. Therefore, even if X lacked capacity from 1 November 2015 it would still be necessary to consider all the facts including X's physical presence, her purpose for living there, her connection with the area, the duration of residence and her 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. Applying that approach to the facts of this case I have no doubt that X is ordinarily resident in Council B and has been since 26 October 2011.

Conclusion

39. For the reasons set out above I conclude that X has been ordinarily resident in Council B since 26 October 2011.