

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 under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.
2. I am asked to determine where X has been ordinarily resident since he moved to his current accommodation on 27 December 2012.

The facts

3. The following information has been ascertained from the agreed statement of facts, legal submissions and other documents provided by the parties.
4. X was born on XX XX 1985. He has been diagnosed with autism, moderate learning disability and epilepsy. It is agreed by the parties that X lacks capacity to decide where to live and to make decisions about his care needs. He has also been assessed as requiring a high level of care and support to meet his needs.
5. X turned 18 on XX XX 2003.
6. Until 2011 X resided at a care home known as House1C in CouncilC. He was placed there by CouncilA pursuant to their duties arising under section 21 of the National Assistance Act 1948.
7. On 5 December 2011 a best interests meeting determined that X should move to supported living accommodation. It appears that this was because it was

nearer his father, provided a better package of care and because it would allow him to be more independent. The meeting proceeded on the basis that X lacks capacity to understand a tenancy agreement and that an application to the Court of Protection would be needed for authorisation to enter such an agreement on behalf of X.

8. Accommodation was identified at Address1B, Area of CouncilB. This is owned and provided by Properties Limited. On 27 December 2011 X moved to this accommodation and reference is made to X moving there under the terms of a “temporary” tenancy agreement pending authorisation from the Court of Protection. A representative of CouncilB was not invited to this meeting.
9. The accommodation at Address1B is not funded by CouncilA. X is in receipt of housing benefit which pays his rent. CouncilA has continued to fund his care and support.
10. On 27 December 2013 a tenancy agreement was signed by X and his father (“Y1”).
11. On 30 October 2014 X was assessed as being able to make simple day-to-day decisions but lacking capacity to make decisions as to where to reside and whether to enter into a tenancy agreement.
12. X continues to live at Address1B where he is described enjoying a busy and active timetable of activities. He is in general good health and benefits from being nearer his family.
13. On 11 December 2014 CouncilA wrote to CouncilB asserting that X was ordinarily resident in its area. The parties agreed to await the outcome of the Supreme Court’s decision in the case of *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“*Cornwall*”).
14. By the 13 June 2017 it appears both authorities accepted that agreement would not be reached as to X’s ordinary residence.

15. On 8 February 2018 an agreed statement of facts was signed by both authorities.

16. On 20 February 2018 I was requested to make a determination as to X's ordinary residence.

The authorities' submissions

17. Council A submit that X is ordinarily resident in Council A for three principal reasons. First, X's accommodation at Address 1B is not accommodation provided under Part 3 of the National Assistance Act 1948 and so the deeming provisions under "section 34" do not apply. I assume this is a reference to the deeming provisions under section 24 of the 1948 Act and that this is a typographical error.

18. Second, X moved into Address 1B before the relevant date identified in the Care Act 2014 and therefore the deeming provisions under section 39 of that Act do not apply due to the effect of article 6(2) of the Care Act 2014 (Transitional Provisions) Order 2015.

19. Third, applying the test in the case of *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*") to the facts of this case leads to the conclusion that X has been ordinarily resident in Council B since he moved to Address 1.

20. In its further submissions dated 23 March 2018 Council A submit that the lack of a valid tenancy does not change the conclusion that X is ordinarily resident in Council B.

21. Council B submit that there is no evidence that they were invited to attend the best interests meeting on 5 December 2011 which decided that X should

move to supported living accommodation. This was in breach of the Department of Health's guidance at the time.

22. Council B submit that X's accommodation at Address 1B was arranged and effected by Council A and that there is no evidence that a tenancy came into force before 27 December 2013. Council B submit that the best interests meeting on 5 December 2011 correctly recorded that X lacks capacity to understand a tenancy agreement and that there was no authority for his father to sign a tenancy on his behalf.

23. Council B submit that X's tenancy is a "nullity" applying the decision of Baker J in *G v E [2010] EWCOP 621* at paragraphs 109 – 110 and that no application has been made to the Court of Protection for authority to sign a tenancy on behalf of X. It is submitted that there is no evidence of a valid tenancy agreement covering any period of X's residence at Address 1B. Accordingly, Council B submit that the deeming provisions under section 24(5) of the 1948 Act apply so that X is deemed to remain ordinarily resident in the area of Council A.

The law

24. I have considered all relevant legal provisions including the National Assistance Act 1948; Part 1 of the Care Act 2014 ("the 2014 Act"); 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 Ordinary Residence Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *Chief Adjudication Officer and Another v Quinn* [1996] 1 WLR 1184 ("*Quinn*"); *G v E [2010] EWCOP 621* and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 ("*Cornwall*").

25. From 1 April 2015, any dispute about an adult's ordinary residence shall be determined in accordance with section 40 of the Care Act 2014.

26. The transitional arrangements are provided for in the Care Act (Transitional Provisions) Order 2015. Article 6 provides as follows:

6.—(1) Any person who, immediately before the relevant date in relation to that person, is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act (authority liable for provision of accommodation) is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the Act.

(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—

(a) non-hospital NHS accommodation (within the meaning of article 12 of the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010(7)) which has been provided since immediately before 19th April 2010;

(b) shared lives scheme accommodation (within the meaning of regulation 4 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014) ("the 2014 Regulations"); or

(c) supported living accommodation (within the meaning of regulation 5 of the 2014 Regulations),

for as long as the provision of that accommodation continues.

27. For the purposes of these provisions, the relevant date is 1 April 2015.

28. The National Assistance Act 1948 provides:

Section 24(5)-

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.

Section 26(1)-

Subject to subsections (1A) and [(1C)]below, arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where—

- (a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) or (aa) of that section, and*
(b) the arrangements are for the provision of such accommodation in those premises.

Section 26(2)-

Any arrangements made by virtue of this section shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and subject to subsection (3A) below the local authority shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this section.

29. The concept of ordinary residence involves questions of both fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account. In the case of *Shah*, Lord Scarman stated:

'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.'

30. The Supreme Court in *Cornwall* held that where the adult lacks capacity the requirement that he adopted voluntarily and for settled purposes does not form part of the ordinary residence test as applied in *Shah*.

Application of the law to the facts

31. I am asked to determine X's ordinary residence from when he moved to his current accommodation on 27 December 2012. As this is prior to the relevant

date (1 April 2015) section 39 of the 2014 Act does not apply due to the effect of Article 6(2)(c) of the Transitional Order. The relevant law is therefore Part III of the 1948 Act together with the relevant statutory ordinary residence guidance (2013).

32. Council B submit that X should be deemed to remain ordinarily resident in the area of Council A due to the effect of section 24(5) of the 1948 Act. This provides that “...[w]here 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.”
33. When considering whether the deeming provision under section 24(5) applies it is necessary to determine whether the person is being “provided” with residential accommodation “under” Part 3 of the 1948 Act. This was considered in the case of Quinn when it was held that were the authority were no longer paying for the accommodation in circumstances where the person was in receipt of housing benefit, that person is not being provided with the accommodation under Part 3 of the 1948 Act. Accordingly, the deeming provisions do not apply.
34. In the instant case, the evidence is that Council A have never paid for X’s accommodation at Address 1B. He has been in receipt of housing benefit which has funded the accommodation. It follows that it has not been “provided” as defined by the House of Lords in Quinn and the deeming provisions under section 24(5) of the 1948 Act do not apply. It is submitted that X did not move into the accommodation under a valid tenancy agreement. That does not alter my conclusion as to the application of section 24(5). The accommodation was not provided by Council A and so the deeming provisions do not apply.

35. The 'normal' principles for determining a person's ordinary residence apply. Those principles are taken from Shah with assistance from the statutory guidance. This requires consideration of a person's abode in a particular place 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. The relevant 2013 guidance confirms this approach (see: paragraph 22). As X lacks capacity to make decisions as to where to live the test to be applied is that described in Shah save that the requirement that he voluntarily adopted his place of residence is not included.

36. It is clear from the statement of facts agreed by the parties that X has been residing at Address1B since 27 November 2011 and that he is well settled in that accommodation. He enjoys regular activities arranged at and from that accommodation and there is no suggestion that he will be moving elsewhere. He is clearly residing there for settled purposes and has been since 27 November 2011.

Conclusion

37. For the reasons referred to above I conclude that X has been ordinarily resident in CouncilB since 27 November 2011.