

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.

Facts

2. I have taken the following facts from the agreed statement of facts and other documents provided by the parties.
3. X is a 31-year old woman with a diagnosis of learning disability. She also has epilepsy, hemiplegia on her right arm and leg, muscle spasms to her right arm and a heart shunt in situ. She has been assessed as requiring 24-hour care to meet her needs caused by her conditions.
4. Both authorities appear to accept that X lacks mental capacity to make decisions in relation to her residence and care needs. That was the finding of the NHS continuing healthcare assessment dated 20 April 2016 which was not challenged. On the basis of the information before me I proceed on the basis that X lacks capacity.
5. X used to live with her family in the CouncilB area. On 5 August 2008 X was deemed eligible for NHS continuing healthcare ("CHC"). On 14 September 2010 CouncilB Clinical Commissioning Group placed X at House1A, CouncilA.
6. In January 2016 X's eligibility for CHC funding was due to be reviewed. On 6 January 2017 CouncilA were invited to attend that review. They had no prior knowledge of X. On 14 January 2017 CouncilA contacted CouncilB to make inquiries about X including her ordinary residence.

7. On 20 April 2017 a meeting was held to review X's eligibility for CHC funding. A representative from CouncilA agreed to attend and did in fact attend. A decision as to CHC eligibility was not made at that meeting. On 19 July 2017 CHC funding for X ceased.
8. Since 2 August 2017 CouncilA has funded X's accommodation and care on a without prejudice basis and pending the outcome of the ordinary residence dispute.
9. Attempts to resolve the dispute between the two authorities have not been successful.
10. On 12 February 2018 CouncilA referred the ordinary residence dispute to the Secretary of State for a determination. An agreed statement of facts dated 6 February 2018 was provided along with other documents.
11. On 14 February 2018 CouncilB served legal submissions.
12. On 21 February 2018 CouncilA served legal submissions.

Parties' submissions

13. CouncilA do not accept that X is ordinarily resident in their area. CouncilA submits that the dispute centres around the 'deeming provision' contained in section 24(6) of the National Assistance Act 1948 which apply and that the relevant time is when X moved to a placement in its area.
14. CouncilA additionally submit as follows:

"2. Paragraph 115b states: "As a result of paragraph 12(1) of the Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional Provisions), the deeming provision in section 24(6) of the 1948 Act will not apply to anyone who was receiving NHS CHC immediately before 19 April 2010 and this remains the case for as they continue to be provided with that NHS CHC accommodation. Therefore, in determining the ordinary residence of someone who went into NHS CHC accommodation on or before 18 April 2010 and continued to be there after that date, the ordinary

residence rules that applied on the day they went into care should be applied – i.e. the dispute must be resolved in the light of the specific circumstances and not the deeming provisions.”

15. Council A states that X moved to House 1A in September 2010 after the deeming provision under section 24(6) was introduced (para 8).

16. Council A additionally submit or at least raises a question as to whether the NHS accommodation referred to means the particular placement the person was admitted to or does it refer to the accommodation funded by the NHS through CHC (para 9).

17. Council A conclude by denying X is ordinarily resident in their area and also asserting that section 24(6) was in place when she moved in September 2010 and “should therefore apply in this case” (para 12).

18. Council B put their case on three grounds:

“1. The dispute is essentially one of interpretation of the wording “immediately before the 19th April 2010” in the Department of Health April 2013 Ordinary Residence Guidance paragraph 115b. This sets out that, as a result of paragraph 12(1) of the Health and Social Care Act 2008 (commencement No 15 Consequential Amendments and Transitional Provisions), the deeming provisions in section 24(6) of the 1948 Act will not apply to anyone who was receiving NHS CHC funding immediately before 19th April 2010 and this remains the case for as long as they continue to be provided with that NHS CHC accommodation.

2. Council A contends that X was receiving CHC funding long before this date. She had been receiving CHC funding since August 2008 which is not “immediately before 19th April 2010” and therefore this does not apply to her. If that is so, she would remain ordinarily resident in Council B.

3. Council B’s position is that, as X had been in receipt of CHC funding since August 2008, she was receiving it “immediately before 19th April 2010”.”

19. Council B go on to refer to the 2013 Guidance and the case study referred to as “Lydia” which is said to be analogous and concludes that the deeming provisions do not apply consideration must be given to the individual circumstances as at the date the CHC entitlement ceased.
20. Council B conclude by referring to the decision in *Shah* and the fact that whilst X is treated to lack capacity she has been living at House 1A for some 7 years, it is her home, it meets her needs, she is well settled there and the intention is for her to remain there.

Legal framework

21. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 (“the 2014 Act”); the Health and Social Care Act 2008; Part 3 of the National Assistance Act 1948 (“the 1948 Act”); the Mental Capacity Act 2005; the Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010 (“the 2010 Order”); 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 Transitional Order”); the ordinary residence Guidance (2013); and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“*Shah*”) and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“*Cornwall*”).
22. Section 24 of the 1948 Act provides, so far as is relevant, as follows:

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

...

(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.

(6) For the purposes of the provision of residential accommodation under this Part, a patient (“P”) for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.

(6A) In subsection (6) “NHS accommodation” means—

(a) accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or...

23. The Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010/708 provides, so far as relevant, as follows:

12.— Transitional provision relating to ordinary residence for certain purposes relating to social care

(1) The amendments made to section 24 of the National Assistance Act 1948 (authority liable for provision of accommodation) by section 148(1) of the 2008 Act do not have effect in relation to a person for whom non-hospital NHS accommodation is being provided immediately before the appointed day, for as long as the provision of that accommodation continues.

(2) For these purposes, “non-hospital NHS accommodation” is NHS accommodation that is elsewhere than at a hospital vested in—

- (a) the Secretary of State;
- (b) a Primary Care Trust;
- (c) a Local Health Board;
- (d) a National Health Service trust; or
- (e) an NHS foundation trust.

(3) The amendments made to section 2 of the Chronically Sick and Disabled Persons Act 1970 (provision of welfare services) by section 148(3) of the 2008 Act do not have effect in relation to a question arising under that section 2 as to a person's ordinary residence in a case where, on the appointed day, that question is the subject of court proceedings.

(4) In this article—

“appointed day” means the day appointed under article 11; and
“NHS accommodation” has the meaning given by section 24(6A) of the
National Assistance Act 1948.”

24. The appointed day referred to in paragraph 12(1) of the 2010 Order is 19 April 2010.

25. The relevant passages from Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England (2013) are as follows:

“114. The deeming provision in section 24(6) of the 1948 Act, which sets out that prior ordinary residence is retained where a person is provided with NHS accommodation (see paragraphs 60-65), applies to people in receipt of accommodation as part of a package of NHS CHC. Therefore, where a person is placed in a care home (or other accommodation funded by the NHS) in another local authority area for the purpose of receiving NHS CHC, they continue to be ordinarily resident in the local authority area in which they were ordinarily resident before entering the NHS accommodation. Where a CCG places a person in such accommodation, it is good practice for it to inform the person’s local authority of ordinary residence and, if the person is placed “out of area”, it is also good practice for the CCG to inform the local authority in which the care home is located.

115. Where a person is accommodated in a care home as part of their package of NHS CHC, it is possible that they may cease to be eligible for NHS CHC, but still need to remain in their care home, or to be provided with Part 3 accommodation elsewhere. In such a case, the effect of the deeming provision in section 24(6) of the 1948 Act would be that the local authority in whose area the person was ordinarily resident immediately before being provided with NHS accommodation would be the authority responsible for funding the person’s

accommodation under Part 3 of the 1948 Act, as the following scenarios shows.

...

115b. As a result of paragraph 12(1) of the Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional Provisions), the deeming provision in section 24(6) of the 1948 Act will not apply to anyone who was receiving NHS CHC immediately before 19 April 2010 and this remains the case for as long as they continue to be provided with that NHS CHC accommodation. Therefore, in determining the ordinary residence of someone who went into NHS CHC accommodation on or before 18 April 2010 and continued to be there after that date, the ordinary residence rules that applied on the day they went into care should be applied – i.e. the dispute must be resolved in the light of the specific circumstances and not the deeming provisions.

115c. The extended deeming provision will not apply where a person changes their place of nonhospital NHS accommodation post 19th April 2010 whilst still receiving continuing healthcare which commenced in non-hospital NHS accommodation prior to 19th April 2010.

...”

Application of law to facts

26. Regardless of when I asked to make a determination, it will be made in accordance with the law that was in force at the relevant date, in respect of which ordinary residence falls to be determined.

27. Therefore, where ordinary residence is to be determined in respect of a period which falls before 1st April 2015, then the determination will be made in accordance with Part 3 of the National Assistance Act 1948 (the 1948 Act) (see: *Care and Support Guidance (February 2018, para 19.87)*).

28. In this case this means I have to consider the application of the deeming provision under section 24 of the 1948 Act together with the relevant statutory instrument and guidance to the relevant facts.
29. X was eligible for CHC from 5 August 2008.
30. It was not until 14 September 2010 X was moved to non-hospital NHS accommodation (House1A) funded by CHC. Between 5 August 2008 and 14 September 2010 X lived at home with her parents in Council B.
31. There is no evidence that prior to 14 September 2010 X was being provided with non-hospital NHS accommodation. The agreed statement of facts makes it clear that she was residing with her parents in Council B.
32. This is important because paragraph 12(1) of the 2010 Order provides that the deeming provision under section 24(6) of the 1948 Act will not have effect *in relation to a person for whom non-hospital NHS accommodation is being provided immediately before the appointed day, for as long as the provision of that accommodation continues.*
33. As already pointed out at paragraph 24 of this determination, the appointed day is 19 April 2010. X was first provided with non-hospital accommodation at House1A on 14 September 2010 which is after and not before the appointed day. Consequently, paragraph 12(1) of the 2010 Order is not effective to disapply section 24(6).
34. Section 24(6) provides that ordinary residence must be determined by reference to the area where the person was living immediately before they were provided with NHS accommodation. X was living with her parents in Council B immediately before she was provided with NHS accommodation on 14 September 2010.
35. Council B's error is that they rely on X being in receipt of NHS CHC "funding" prior to the appointed day (para 2 of their submissions). However, paragraph

12(1) of the 2010 Order expressly refers to the provision of “NHS accommodation” prior to the appointed day and not the provision of “funding”. This is confirmed by paragraph 115b of the 2013 Guidance.

36. X may have been provided with NHS CHC funding prior to the appointed day but there is no evidence that she was provided with NHS accommodation prior to that date.

Conclusion

37. For the reasons set out above I conclude that X remained ordinarily resident in Council B from 14 September 2010 due to the effect of section 24(6) of the 1948 Act which is not disapplied by paragraph 12(1) of the 2010 Order.