

REVIEW BY THE SECRETARY OF STATE OF A DETERMINATION IN ACCORDANCE WITH SECTION 40 OF THE CARE ACT 2014

Introduction

1. I have been asked by CouncilA to review my determination dated 10 August 2017 of the ordinary residence of X. The dispute is with CouncilB.
2. The question of X's ordinary residence arose under Part III of the National Assistance Act 1948 ("the 1948 Act") but was determined in accordance with section 40 of the Care Act 2014 ("the 2014 Act") (disputes about ordinary residence) by virtue of article 5 of the Care Act (Transitional Provision) Order 2015 (S.I. 2015/995).
3. My determination was that X is deemed to be ordinarily resident in CouncilA's area from immediately before 28 March 2012.
4. I have reviewed my determination and, for the reasons set out below, I have changed my decision and concluded that X was ordinarily resident in CouncilB from 28 March 2012.

The facts

5. The facts are set out in my determination dated 10 August 2017 and I will only summarise them for the purposes of this review decision.
6. In November 2010 CouncilB first became involved with X who was residing at House1B area of CouncilB.
7. On 19 August 2011 X was admitted to hospital in CouncilB.

8. On 29 October 2011 X was discharged from hospital to a care home known as CareHome1A, situated in the CouncilA area. This care home was arranged by CouncilB but not funded by them (it was privately funded by X).
9. In or around January 2012 X was admitted to hospital with a suspected stroke.
10. By March 2012 X was fit for discharge from hospital.
11. On 28 March 2012 X's brother and his solicitor made arrangements for him to move to another care home known as CareHome1B, situated in the CouncilB area.
12. It is admitted by both authorities that neither of them arranged this move. It is also admitted that the move took place on the basis of information provided by X's representatives that he was a 'self-funder'. The information they provided was that X had savings of approximately £30,000.
13. On 9 November 2012 X's solicitor contacted CouncilB to request a financial assessment on the basis that his means fell below the financial threshold at which a person could be charged for services. By that stage it had become apparent that X had not actually had savings of approximately £30,000 at the time he moved to CareHome1B (he actually had around 50% of that amount).
14. In March 2013 CouncilB completed its financial assessment in relation to X.
15. On 24 May 2013 CouncilB completed its assessment which concluded that X requires local authority support to meet his care needs.
16. On 5 September 2013 X dies.
17. Agreement could not be reached as to X's ordinary residence and CouncilB requested a determination by me of this ordinary residence dispute.

The determination

18. I made by determination on 10 August 2017. I considered all the documents submitted by Council B and Council A and the law as it stood at the relevant time, including the relevant provisions of the 2014 Act, Part III of the 1948 Act and the Directions contained in LAC (93) 10, the guidance on ordinary residence published by the Department of Health (“the guidance”) and the relevant cases 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”), *R (Greenwich) v Secretary of State for Health & anr* [2006] EWHC 2576 (“Greenwich”), *Milton Keynes Council v Scottish Ministers* [2015] COSH 156 (“Milton Keynes”) and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“Cornwall”).

19. I considered whether X lacked capacity to decide where to live at the time he moved to CareHome1B on 28 March 2012. I noted that 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. It was agreed by the authorities that no formal capacity assessment was completed in relation to whether X had capacity to decide where to live. On the evidence available I concluded that there was insufficient evidence before me to determine whether or not X had capacity at the relevant time (paragraphs 36 to 38).

20. I proceeded to determine whether X was ordinarily resident before residential accommodation was provided to him under Part 3 of the 1948 Act. I proceeded on the basis that X was not placed at CareHome1B by Council A and that he was initially self-funding his placement. I found that the issue of whether X had capacity at the relevant time made no difference to the issue of ordinary residence applying the decision in *Cornwall*.

21. I then considered whether the deeming provisions under the 1948 Act applied and concluded that they did. I concluded that if the correct information as to X’s financial means had been provided to Council A he would have been provided

with accommodation under Part 3 of the 1948 Act. I concluded that whilst it was unfortunate that inaccurate information was provided on behalf of X but that “objectively” CouncilA had a duty to provide accommodation which they failed to do. As such the deeming provision under section 24(5) of the 1948 Act applied by reference to the decision of Mr Justice Charles in the *Greenwich* case.

The parties’ submissions

CouncilA

22. In support of their request for a review, CouncilA have provided further submissions dated 10 November 2017.

23. In summary CouncilA submit as follows:

“a. X made a capacitous and voluntary decision to adopt CareHome1B as his settled place of residence on a self-funded basis.

b. The deeming provision in section 24(5) NAA does not apply in this case as on and immediately after 28 March 2012 X was not “a person ... provided with residential accommodation under this Part” *per* section 24(5).

c. The *Greenwich* case does not assist CouncilB.

d. Application of ordinary *Shah* principles leads to the conclusion that X is ordinarily resident in CouncilB.” (paragraph 2)

CouncilB

24. CouncilB has provided legal submissions (undated) under cover of email dated 16 November 2017.

25. In summary, Council B continue to assert that the evidence establishes that X lacked capacity to manage his finances and decide upon his residence by reference to the letter from Solicitors dated 16 August 2016 as well as because the decision to move was made by his brother. It is also asserted that had capacity assessment been completed it would have evidenced that X lacked capacity to decide where to live. (paragraph 20).
26. Further, Council B effectively agree with my original decision that Council A failed to discharge its duty to arrange the provision of accommodation under section 21 of the 1948 Act and that I was correct to proceed on the basis that they had been by reference to the Greenwich case (paragraphs 21 to 24).
27. Further Council B submit that such a conclusion is consistent with the outcome had Council B challenged Council A's refusal to accept a duty to X under section 21 of the 1948 Act (paragraph 25).

Review

28. I have carefully considered the submissions provided by Council A and Council B. For the reasons set out below I have concluded that the original determination that X should be deemed to ordinarily resident in Council A from immediately before his move to CareHome1B on 28 March 2012 should not stand. I have concluded that from that date X was ordinarily resident in Council B.
29. Capacity. Section 1(2) makes it clear that a person must be presumed to have capacity to make a decision unless it is satisfied that he has capacity to do so. It is not for me to determine a person's capacity but I must consider whether there was such evidence so as to allow me to proceed on the basis that X lacked capacity to decide where to reside. There was no assessment of X's capacity to decide where to live prior to his move on 28 March 2012. The CHC eligibility assessment was not concerned with whether X lacked capacity to make decisions as to where to live. That X's brother and others supported him

and may even have decided which care home to move to establishes that he lacked the capacity to make the decision himself by reference to sections 2 and 3 of the 2005 Act. In the circumstances and for the avoidance of doubt I proceed on the basis that X had capacity to decide to move to CareHome1B on 28 March 2012.

30. Deeming provisions. The deeming provision under section 24(5) of the 1948 Act only applies where a person is provided with residential accommodation by the relevant local authority under Part 3 of that Act. This is clear from the decision in *Quinn*. Both authorities agree that CouncilA and CouncilB made the arrangements for the provision of residential accommodation for X under section 21 of the 1948 Act. The arrangements were made by X's representatives who also paid for the same. Whether they did so under a mistake as to X's available savings makes no difference to whether the accommodation was provided by the relevant local authority.

31. The key issue is the meaning and effect of the decision in *Greenwich*. In that case, Charles J concluded that in cases where a local authority should have provided accommodation under section 21 of the 1948 Act the deeming provision under section 24(5) should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority. It is not for me to decide whether Charles J was correct in his approach to section 24(5) of the 1948 Act but I proceed on the basis that he was.

32. In considering whether CouncilA "should" have provided accommodation to X in the period immediately prior or after his move on 28 March 2012 I have concluded that I must limit myself to considering what information would have been available to them at that time. It seems to me to be artificial to consider whether the duty should have been discharged at a particular point in time by reference to information that was subsequently disclosed. It would also create very real practical problems for local authorities if they could be retrospectively challenged for making decisions on information that was not provided to them at the time or based on information that was subsequently discovered to be

inaccurate in circumstances where the authority was in no way to blame for any such inaccuracies.

33. The information provided to CouncilA by those representing X was that he had approximately £30,000 in savings and that he would be funding his care and accommodation at CareHome1B. On the basis of that information, CouncilA would have been entitled to conclude that X was not someone that was “in need of care and attention not otherwise available to him” for the purposes of section 21 of the 1948 Act. As the stated savings were above the financial threshold set by regulations CouncilA would have been acting lawfully in not disregarding those sums. Based on the available information I cannot conclude that CouncilA should have discharged the duty to provide X with residential accommodation under section 21 of the 1948 Act because such a duty would not have arisen at that time. To this extent I accept the further submissions made by CouncilA.

34. Further, I agree with the submissions made by CouncilA that there was no improper failure on their part in not providing residential accommodation under section 21 of the 1948 Act. There is no good reason why they should not have accepted the information provided by X’s representatives.

35. It must follow that X became ordinarily resident in CouncilB in circumstances where he had capacity to decide to move there and where such move was intended to be a permanent move so as to meet his assessed needs in a safe and otherwise appropriate environment.

Conclusion

36. For the reasons set out above X was ordinarily resident in CouncilB from 28 March 2012.