

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 17 September 2013.

The facts

3. The following information has been taken from the agreed statement of facts, legal submissions and other documents provided by the authorities.
4. X was born on XX XX 1987 at Hospital1, West London. He previously resided at Address1A in the area of CouncilA. Upon entering full-time education, he was assessed as having special educational needs.
5. On 18 February 2013 X was assessed as lacking capacity to enter a tenancy agreement and related issues. On 31 July 2013 CouncilA held a meeting to determine where X should reside by reference to his best interests. It was decided that he should move to supported living accommodation. An organisation called Organisation1 identified a suitable placement for him in the area of CouncilB.
6. On 17 September 2013 X moved to Address1B which is in the area of CouncilB. A tenancy agreement for this accommodation was never signed but the landlord agreed that X could move into the accommodation and he has lived there since 17 September 2013.

7. X's accommodation has always been funded by way of housing benefit payments administered by CouncilB. CouncilA has never funded the same.
8. On 18 February 2014 CouncilA completed an assessment of X's care needs. On 19 May 2014 CouncilA forwarded a copy of the care assessment to the relevant department at CouncilB.
9. On 20 May 2014 CouncilA notified CouncilB that X had been assessed as lacking capacity around his tenancy and that a decision had been made for him to move to supported living accommodation in their area.
10. X receives all of his care and support in and from his current property and engages in various activities in the area. He is registered with a GP in the area of CouncilB.
11. The two authorities have engaged in protracted correspondence but have been unable to agree as to who is responsible for X's needs by reference to his ordinary residence.
12. The dispute as to X's ordinary residence formally arose on 26 September 2017 for the purposes of the relevant Regulations. On 9 April 2018 the authorities signed a statement of facts.
13. On 16 April 2018 CouncilA formally made a request for a determination of X's ordinary residence by the Secretary of State pursuant to section 40 of the Care Act 2014.

The authorities' submissions

14. CouncilA submit that X is ordinarily resident in the area of CouncilB. It is submitted that 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. They submit that the relevant statutory framework is that arising under the National Assistance Act 1948.

15. It is further submitted that X's supported living accommodation in the area of Council B was not provided under Part 3 of the 1948 Act and therefore the deeming provisions under section 24 do not apply. Accordingly, the principles for determining ordinary residence, as identified in the case of Shah as amended by Cornwall, apply. Council A submit that upon the application of those principles to the facts of this case X is ordinarily resident in the area of Council B. It is submitted that the lack of a signed or valid tenancy agreement does not alter that conclusion.
16. Council B submit that they are not responsible for X. They submit that X does not have capacity to make decisions about where he should live and is therefore unable to understand or sign a tenancy. It is submitted that it is "essential" to the acquisition of ordinary residence in another local authority areas that the person concerned must have both chosen to live there and possess the mental capacity to make that choice. Reference is made to the judgment of Lord Scarman in the decision in Shah in this regard.
17. Council B submit that there is no information as to what other options were considered prior to X's move to his current accommodation and that it is considered that Council A could have found somewhere within their area to meet his needs. Council B dispute that a "valid" tenancy was "effected" on 17 September 2013 and that to date a tenancy agreement has not been signed and there is no one in a position to do so. In summary, it is submitted that X is not ordinarily resident in the area of Council B because (1) Council A placed him in Council B's area and (2) there is not a valid tenancy.

The law

18. 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”).

19. 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.

20. 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.

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

22. Section 24(5) of the National Assistance Act 1948 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.

23. Section 26(1) of the 1948 Act provides:

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.

24. Section 26(2) of the 1948 Act provides:

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.

25. 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.'

26. 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

27. I am asked to determine X's ordinary residence since 17 September 2013 when he moved to his current accommodation in the area of Council B.

28. The deeming provisions contained in section 39 of the Care Act 2014 do not apply due to the effect of Article 6(2)(c) of the Transitional Order. The relevant law is therefore Part 3 of the 1948 Act together with the relevant statutory ordinary residence guidance (2013) and case law.

29. Council B submit that X cannot be ordinarily resident in their area because Council A placed him in their area and because there is no "valid" tenancy of his current accommodation. In effect, Council B are submitting that X should be deemed to remain ordinarily resident in the area of Council A even though they do not make any reference to the relevant deeming provisions.

30. The relevant deeming provisions are contained in section 24(5) of the 1948 Act. They provide that where a person is provided with residential accommodation under Part 3 of the 1948 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.

31. In determining whether the deeming provision under section 24(5) applies in any particular case it is necessary to consider whether the person is being "provided" with residential accommodation "under" Part 3 of the 1948 Act. This was one of the issues 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. If accommodation is not being provided under Part 3 the deeming provisions under section 24(5) will not apply.

32. In the instant case, the evidence is that CouncilA have never paid for X's current accommodation at Address1B, area of CouncilB. He has been in receipt of housing benefit which has funded the accommodation. It therefore 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.

33. CouncilB submit that X did not move into the accommodation under a valid tenancy agreement and that he has never had a valid tenancy. That does not and cannot alter my conclusion as to the application of section 24(5). The accommodation was not provided by CouncilA under Part 3 of the 1948 Act and so the deeming provisions do not apply.

34. As no deeming provisions apply, the 'normal' principles for determining a person's ordinary residence must be considered. 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 it is accepted that 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 following the decision in Cornwall.

35. It is clear from the factual background to this case that X has been residing at his current accommodation since 17 September 2013 and that he is well settled there. He engages in activities arranged at and from that

accommodation and there is no suggestion that he has been residing elsewhere. He is clearly residing there for settled purposes and has been since 17 September 2013.

Conclusion

36. For the reasons referred to above I conclude that X has been ordinarily resident in the area of Council B since 17 September 2013.