

REVIEW BY THE SECRETARY OF STATE OF A DETERMINATION PURSUANT TO SECTION 40(2) OF THE CARE ACT 2014

Introduction

1. I have been asked by CouncilA to review a determination of the ordinary residence of X made on 24 February (“the original Determination”). The dispute is with CouncilB.
2. The request for a review, along with accompanying legal submissions and further evidence, was sent to me by CouncilA on 23 May 2017. I received submissions in response from CouncilB on 18 August 2017 and further submissions in reply from CouncilA on 2 October 2017. I have taken all of these submissions into account, along with all the documents and evidence submitted for the original Determination, in reaching my decision on this review.
3. The relevant law and factual background is set out in full in the original Determination and I do not repeat it here. X is a 35 year old woman (DOB XX/XX/1982) with a diagnosis of moderate learning disabilities, autistic tendencies and epilepsy. She was born and raised in the area of CouncilB before moving to a residential care home in the area of CouncilA in or around 2001. There is no dispute that this accommodation was provided by CouncilB under Part III of the National Assistance Act 1948 (“the NAA”) and that, accordingly, under section 24(5), she was deemed to remain ordinarily resident in the area of CouncilA.
4. For the purposes of this review, the important dates are:
 - a. 17 April 2007 when X moved into a flat at Address1A, area of CouncilA with a package of care provided by Organisation1(“O1”); and
 - b. 4 June 2009 when X moved to a placement at Address2A area of CouncilA, described by CouncilB as a self-contained flat provided by Organisation2 with access to staff (a tenancy agreement was not signed until 21 June 2010; housing benefit was provided from 14

September 2010, backdated to 24 May 2010- the significance of these matters is addressed in more detail below).

5. In my original Determination I found that X has been ordinarily resident in the area of CouncilA since 17 April 2007 when she first moved to Address1A. I found, on the balance of probabilities, that this was supported living accommodation not provided under section 21 of the NAA, and that X was not in need of accommodation under section 21.

The parties' submissions

6. CouncilA submits that I was wrong to make this finding, essentially for two reasons:
 - a. Firstly, it submits that, for the purpose of determining whether accommodation was provided under Part III, what matters is whether CouncilB paid for the accommodation and the evidence as a whole is that it did; and
 - b. Secondly, it submits that I erred in failings to find that Address1A and Address2A were care homes for the purposes of section 3 of the Care Standards Act 2000 ("the CSA"). CouncilA avers that CouncilB placed X in care homes and should have paid all her rent, as well as paying for her care, and that the deeming provision under section 24(5) should be applied as if this happened (per *R (Greenwich LBC) v Secretary of State for Health* [2006] EWHC 2576).
7. CouncilB disputes CouncilA's case. It submits that my original Determination was correct and should be confirmed by this review. In particular, it submits that:
 - a. Payments made to Address1A and Address2A were in respect of care only;
 - b. The community care assessments undertaken by CouncilB made clear that X was suitable for supported living and did not require residential care; and

- c. Neither Address1A nor Address2A were registered as care homes: the effect of CouncilA's submission is that those responsible for them are guilty of a criminal offence for failure to register for provision of regulated services.
8. CouncilB also raises objection to changes in CouncilA's case since the original Determination and its attempt to rely on new evidence. These issues are addressed immediately below.

The scope of the review

9. In advancing its current submissions CouncilA is seeking implicitly to resile from a concession made in its original legal submissions to the effect that X has been ordinarily resident in its area since May 2015. It also seeks to rely on further evidence that was not submitted for the purposes of the original Determination. No explanation has been given as to why this evidence was not obtained or adduced earlier.
10. CouncilB objects both to the admission of new evidence and to CouncilA's implicit attempt to resile from its previous concession. It submits that a review is not a re-hearing and that it would be an abuse of the review process to permit CouncilA to go behind its earlier concession.
11. The scope of a review under section 40(2) is not defined. On carrying out a review, pursuant to section 40(3), I must either (i) confirm the original decision, or (ii) substitute a different determination. This requires me to decide whether or not the original decision was wrong, and to form a view on what is the correct decision. In doing so, I am not confined to reviewing the original determination on narrow public law grounds, and I am not prohibited from admitting new evidence: whether to do so is a matter in my discretion.
12. I must exercise that discretion having regard to the objective of the statutory scheme which is to provide a fair and just mechanism for the efficient resolution of ordinary residence disputes without the need for recourse to the

courts. The production of late evidence, after the original determination has been made, undermines the efficiency of the scheme and (in some circumstances) it may be unfair. I deprecate CouncilA's approach in seeking to admit new evidence without any explanation as to why it was not adduced earlier. However, the evidence upon which it seeks to rely is relevant and CouncilB has had opportunity to consider and respond to it. In the particular circumstances of this case, I am persuaded that, in the exercise of my discretion, I should admit the new material.

13. For the reasons set out below, I find that the original Determination was correct. It is, therefore, unnecessary for me to determine whether, or in what circumstances, a party should be permitted to resile from a clear concession, and I do not propose to decide the point in the abstract.

Was X provided with accommodation under Part III?

14. The first substantive question I must determine is whether accommodation at Address1A was provided under Part III of the NAA. This is a matter of fact and law. I agree with CouncilA that the question of whether CouncilB did, in fact, pay for the accommodation is highly material. However, for the reasons set out below, I am unable to conclude, on the balance of probabilities, that it did.

15. As I set out in my original determination, a duty to provide accommodation under Part III arises only where care and attention are not available otherwise than by the provision of accommodation. This is reflected in paragraph 94 of the 2013 ordinary residence guidance which states: *"in order for there to be accommodation provided under s.21 NAA, it must be possible to say that, without provision of such accommodation, the care and attention which the person requires would not be available to them"*.

16. Under section 26(1A) arrangements must not be made for the provision of accommodation together with personal care unless the accommodation is to be provided at a registered care home. Pursuant to section 26(2), any arrangements must provide for the making by the local authority of payments

in respect of the accommodation at rates determined by or under those arrangements. Arrangements which do not provide for the making by the local authority of such payments are not arrangements under Part III (see *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184).

17. The contemporaneous assessments, as set out in the original Determination, do not identify a need for care and attention that could only be met by provision of accommodation. Instead they refer to “supported living” and an “independent flat in the community”. X’s assessed need was for care and support in her own flat. Whilst I accept that accommodation under Part III is not strictly limited to accommodation in a care home, and in certain circumstances it can include ordinary accommodation, a duty to make provision arises only where there is a need for care and attention which can only be met if accommodation is provided. As I read the contemporaneous assessments, X did not have a need for care and attention that could only be met if accommodation was provided. She had a need for care and attention that could be met in her own supported living flat.

18. This is important to any consideration of whether, in fact, accommodation was provided, and paid for by CouncilB, under Part III. There is a dearth of evidence about the arrangements under which X lived, and was provided with care, at Address1A. I am told the service provider no longer operates and relevant documents are unavailable. However, it is significant that, at the time when X was living at Address1A, in October 2008, CouncilB wrote to CouncilA stating in clear terms that X had a tenancy; that she was receiving housing benefit to pay her rent; and that CouncilB was not paying for accommodation at all. This is the only contemporaneous document that addresses directly the nature and funding of X’s placement. CouncilB has maintained throughout that it did not pay for X’s accommodation.

19. Turning to the specific grounds raised by CouncilA:

- a. I do not consider that the letter dated 18 May 2017 from CouncilC assists in resolving this issue. It states that CouncilC- the relevant housing benefits authority- does not have records dating back to 2007.

I do not take this to mean that housing benefit necessarily was not granted to X at this time.

- b. Likewise, I give little weight to the letter dated 9 September 2013 in which lawyers acting for CouncilA asked CouncilB “*why was [X] not in receipt of housing benefit from 17 April 2017...?*” I have no evidence as to the basis on which the lawyers made this assumption.
- c. I note that a letter dated 5 April 2011 from CouncilB referred to X being a licensee. However, this letter must be weighed against the other evidence (including the contemporaneous correspondence) which indicates that X did have a tenancy and, in any event, the issue of whether X was a tenant or a licensee is not determinative of whether accommodation was provided under Part III.
- d. I note that there is no direct evidence of a tenancy or license agreement, but equally there is no positive evidence that these did not exist. I must do my best to decide the matter, on the balance of probabilities, on the evidence that is available to me.
- e. CouncilA asserts that it is not clear from the documents produced by CouncilB that it did not pay for the accommodation, but, again, I repeat that I must do my best on the evidence before me. It is important to note that CouncilB has always maintained that it made payments only in respect of care. Both parties are public authorities with a duty to act fairly and transparently in this dispute and, absent evidence to the contrary, I must proceed on the basis that, when CouncilB wrote to CouncilA in 2008 stating that it was not paying for accommodation, it properly understood this to be the case.
- f. Finally, CouncilA states that X’s needs and the care provided to meet them, comprising 24 hour support, are entirely consistent with accommodation having been provided under the NAA. I disagree. X’s assessed need, as referred to above, was for care in a supported living

setting, not in a care home. This type of accommodation is not routinely provided under the NAA. Whilst 24 hour support was available to X on site, the assessments indicate that this was support that could be provided to X in her own flat if needed. She was not assessed as requiring round the clock care. See, for example, the 2007 assessment: *“there is 24 hour support on site and [X] has a bell sot at [sic] she is able to alert staff if needed”*.

20. For the reasons set out above I consider that my original Determination that accommodation at Address1A was not provided under Part III of the NAA was correct. It follows (subject to the issue of whether X should have been provided with such accommodation, which I address below) that X was ordinarily resident in the area of CouncilA from 17 April 2007. On this basis, it is not strictly necessary for me to determine whether accommodation at Address2A was provided under Part III, as X would continue to be ordinarily resident in the area of CouncilA in any event.

21. However, the issue may be relevant indirectly to the extent that, if accommodation at Address2A was provided under Part III, this could be taken to suggest that earlier accommodation at Address1A was also provided under Part III. It is right to note that X did not have a tenancy agreement and was not in receipt of housing benefit for the first year of her residence at Address2A. It may be that, for some or all of that period, CouncilB was paying for the accommodation, although I note that the record of payments made to Organisation2 does not show a clear decrease in the sums paid after housing benefit was secured.

22. In any event, to the extent that CouncilB may have been making payments towards to cost of accommodation, it appears, on the evidence, that this was an oversight or error. In the statement of facts, CouncilB states that, from the inception of the placement, it was led to believe that X would be provided with a tenancy agreement and would be paying rent, and it raised a concern when it was noticed that the costings included a component for housing. In the circumstances, I do not consider that an inference properly can be drawn from

the fact CouncilB may, for a time, have been paying for accommodation at Address2A, that it also paid for accommodation at Address1A.

23. I note that the housing benefit in respect of Address2A, when it was secured, was not sufficient to cover all of the rent. However, on the evidence available to me, I cannot conclude, on the balance of probabilities, that CouncilB are or were responsible for paying the shortfall. CouncilB plainly states that it has not been paying for accommodation and it has no liability to make any payments under the terms of the lease.

Should LA have been provided with accommodation under Part III?

24. I reject CouncilA's alternative submission that CouncilB should have been paying for accommodation under Part III on the basis that Address1A was, and Address2A is, a care home within the meaning of section 3 of the CSA. As noted above, X has not been assessed as requiring care home accommodation. CouncilB's assessments are quite clear that what she requires is support in her own supported living flat.

25. I note that Y1, who runs Address2A, told a CouncilA social worker in May 2012 that the provision was "effectively a residential home". However, there is nothing to suggest that he was being asked to address the issue in a technical sense of whether accommodation was provided "together with" personal care for the purposes of section 3 CSA. As CouncilB points out, the effect of CouncilA's submission is that those responsible for Address1A and Address2A are guilty of criminal offences contrary to section 10 of the Health and Social Care Act 2008 for failing to register for the provision of regulated services. On the evidence available to me I cannot conclude that this is the case. I refer, in particular, to the case note of the CouncilA social worker, dated 25 July 2017, which records a safeguarding visit to Address2A due to a "query with registration and personal care". Had the social worker concluded on that visit that there was a problem with registration, she would have been obliged to report the matter to the Care Quality Commission who would have been required investigate. There is no evidence that this happened and I

understand that, to this date, Address2A continues to operate as a supported living placement not a registered care home.

26. I do not, therefore, consider that X should have been provided with care home accommodation under Part III of the NAA at any time from 17 April 2007.

Conclusion

27. For the reasons set out above I confirm my original Determination that X has been ordinarily resident in the area of Council A since 17 April 2007.