

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 4 2012)**

1. I am asked by CouncilA to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Ms X.

**The facts of the case**

2. The following information has been ascertained from the agreed statement of facts prepared by the two authorities involved in the dispute, and the supporting documents supplied. The authorities in dispute are CouncilA and CouncilB.
3. Ms X was born on xdate 1989 in RegionC (outside of Councils A and B). As a small child, she developed hydrocephalus and cerebral palsy and in March 1996 she was made the subject of a statement of Special Educational Needs.
4. In 2002 she moved with her mother to live in the CouncilB area. She was made the subject of a care order under Section 31 of the Children Act 1989 (“the 1989 Act”) and placed in foster care with Ms FC1 whilst her mother recuperated from spinal injuries.
5. In 2003 Ms FC1 moved to CouncilA. Ms X moved with her and was placed at SchoolK, AreaA1, CouncilA. She boarded at SchoolK during the week and stayed with her foster carer during alternate weekends and the school holidays.
6. During this time Ms X continued to have contact with her mother and brother who remained living in the CouncilB area and with her extended family who lived in RegionC.
7. Subsequently, Ms X’s mother was diagnosed with terminal cancer and died in 2005.
8. In 2007 Ms X turned 18.
9. During the duration of the care order, CouncilB was responsible for Ms X’s care and education. CouncilB paid recoupment to CouncilA in respect of the costs of the education provision under Regulation 3 of the Education (Inter-agency Recoupment) Regulations 1994 (“the education Regulations”).
10. In readiness for Ms X’s 18<sup>th</sup> birthday, Ms FC1 had, on 1<sup>st</sup> October 2007, been assessed by CouncilA, on CouncilB’s request, as an Adult Placement Carer. Ms X continued to board at SchoolK until 17<sup>th</sup> July 2009, and to live with Ms FC1 at alternate weekends and during the school holidays under a placement managed by CouncilA and funded by CouncilB.
11. The documents provided within the Council’s agreed bundle include a number of reviews of care plans and core assessments carried out by CouncilB with Ms X. Those dated 2<sup>nd</sup> October 2007, 19<sup>th</sup> May 2008, 21<sup>st</sup> October 2008 show Ms X to be happy at SchoolK and in her placement with Ms FC1. They record that she

has maintained relationships with her extended family in RegionC and her brother in CouncilB.

12. From December 2008, CouncilB had various meetings with Ms X to discuss her options on leaving SchoolK and Ms X visited various residential placements in CouncilA. In the reports dated 26<sup>th</sup> February and 27<sup>th</sup> May 2009 she is recorded as saying she is not yet ready for a supported living home or an independent flat with live in care. She wants to live with other young people who are wheelchair users like herself, and wants to keep in touch with her friends. She would like to attend CollegeJ in AreaA2, CouncilA everyday to continue her lessons. Although she does not want to live with Ms FC1 when she leaves school, she wants to keep in touch with her and see her.
13. An eligibility criteria list for community care services for Ms X from CouncilB dated 29.06.09 identifies her needs relating to physical and mental health, personal care and family and social responsibilities as “substantial.”
14. On 19<sup>th</sup> July 2009, Ms X moved into LHouse in AreaA3, CouncilA, which is residential accommodation provided under Part 3 of the 1948 Act. She also began to attend classes at CollegeJ.
15. CouncilB signed the letter of agreement dated 19<sup>th</sup> August 2009 as the purchaser for the provision of care and accommodation at LHouse and advised CouncilA that a placement had been made in CouncilA’s area. The two authorities have not been able to agree in whose area Ms X is ordinarily resident for the purposes of the 1948 Act. The period in dispute is from Ms X’s eighteenth birthday in 2007 to the present day.
16. Both local authorities presume that Ms X has mental capacity to decide for herself where she wants to live.

### **The relevant law**

17. I have considered all the documentation submitted by both parties. This includes the agreed statement of facts, the documentation and legal submissions provided by both parties, certain provisions of the 1989 Act, the provisions of Part 3 of the 1948 Act and the Directions issued under it<sup>1</sup>, the Department of Health guidance in LAC (93)7<sup>2</sup> and “*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*”<sup>3</sup> (“the Ordinary Residence Guidance”), the leading case of R v Barnet ex parte Shah (1983) 2 AC 309 (“Shah”) and Levene v Inland Revenue Commissioners (1928) AC 217 (“Levene”). My determination is not influenced by the fact that CouncilB is currently funding the Part 3 services.
18. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. Section 24(1) provides that the

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<sup>1</sup> Contained in LAC(93)10.

<sup>2</sup> LAC (93)7 was the guidance applicable at the relevant time, and until 19th April 2010.

<sup>3</sup> Updated edition of the guidance published in July 2011.

local authority empowered to provide residential accommodation under section 21 is, subject to further provisions of Part 3 of the 1948 Act, the authority in whose area the person is ordinarily resident.

19. By virtue of section 26 of the 1948 Act, local authorities can, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26.

20. Section 24 of the 1948 Act makes further provision as to the meaning of ordinary residence. Section 24(5) provides that:

“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.”

21. In Shah, Lord Scarman held—

*“Unless, therefore, 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.”*

22. Further, in the case of Levene, Lord Warrington of Clyffe said—

*“‘Ordinarily resident’ also seems to me to have no such technical or special meaning.... If it has any definite meaning I should say that it means according to the way in which a man's life is usually ordered.”*

23. The Ordinary Residence Guidance provides at paragraphs 18 and 19 clear guidance on determining a person's ordinary residence. It states—

*“The concept of ordinary residence involves questions of fact and degree, and 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.”*

### **The application of the law**

24. Ms X became eligible for residential accommodation and/or services under the 1948 Act on her eighteenth birthday. Before her eighteenth birthday, Ms X was being provided with services by Council B as a looked after child under the 1989 Act.

25. As set out in paragraph 146 of the Ordinary Residence Guidance neither the 1989 Act nor the 1948 Act makes provision for how to determine ordinary residence when a young person moves from being eligible for services under the 1989 Act to being eligible for services under the 1948 Act. Therefore when making

decisions about the ordinary residence of young people in transition to adult services, local authorities should have regard to both Acts.

26. Section 105(6)(a) and (c) of the 1989 Act provides that, in determining the ordinary residence of a child for any purposes of that Act, any period in which a child lives in a school or accommodation provided by or on behalf of a local authority, then that period should be disregarded. Given that CouncilB had responsibility for Ms X under the 1989 Act, CouncilB remains Ms X's place of ordinary residence for the purposes of the 1989 Act and there would be a starting presumption that Ms X's place of ordinary residence remains the same for the purposes of the 1948 Act when she turned 18.
27. However, as stated at paragraph 145 of the Ordinary Residence Guidance:  
*"The local authority that had responsibility for the young person under the 1989 Act is not necessarily the young person's local authority of ordinary residence once they become eligible for services under the 1948 Act."*
28. At paragraph 149, it continues to say that this starting presumption may be rebutted by the circumstances of the individual's case and the application of the Shah test. A number of factors should be taken into account. These include:
  - The remaining ties the young person has with the authority that was responsible for their care as a child
  - Ties with the authority in which they are currently living
  - The length and nature of residence in the area
  - Where the young person has mental capacity, his/her views in respect of where he/she wants to live.
29. CouncilA submits that the starting presumption has not been rebutted because Ms X retained ties with CouncilB through visits to her brother and friends with her foster carer.
30. CouncilB submits that, having regard to all the circumstances, the starting presumption has been rebutted.
31. Both local authorities presume Ms X has capacity to decide where to live. Before her eighteenth birthday, the review dated 2<sup>nd</sup> October 2007 recorded that Ms X had no complaints and enjoyed her time both in school at SchoolK and living with Ms FC1 (her foster carer) for alternate weekends and holidays such that it was decided to continue with this arrangement. At this time, Ms X had been living in CouncilA for over 4 years. Although Ms X maintained contact with her brother in CouncilB and her extended family in RegionC, their homes were bases to which she did not return often, other than for short terms in the holidays or for special events. Neither her brother nor her extended family are able to accommodate Ms X in their homes. Accordingly, in line with the settled purpose test in Shah, I determine that Ms X has adopted CouncilA voluntarily and for settled purpose. As such, the presumption that she remains ordinarily resident in CouncilB can be rebutted for the purposes of the 1948 Act, and she is ordinarily resident in CouncilA as of her eighteenth birthday.
32. Furthermore, in her care reviews in February and May 2009, Ms X stated that she wished to stay close to her friends and her foster family in CouncilA and that she wanted to live in residential accommodation with young wheelchair users like

her. She subsequently agreed to both her placement in LHouse and her attendance at CollegeJ. Given that Ms X is now being provided with residential accommodation under Part 3 of the 1948 Act, s24(5) of the 1948 Act applies and she is deemed to continue to be ordinarily resident in the area in which she was ordinarily resident before Part 3 accommodation was provided for her. Immediately before Ms X entered residential accommodation under Part 3 of the 1948 Act (i.e. on 18<sup>th</sup> July 2009), she was living in CouncilA where she was ordinarily resident for the purposes of that Act. Accordingly, the deeming provision does not change Ms X's ordinary residence.

### **CouncilA's Submissions**

33. In their written submissions, CouncilA make a number of submissions as to why Ms X's ordinary residence remained in CouncilB. I deal with these in turn:

34. Firstly, CouncilA seek to rely on the fact that CouncilB assumed responsibility for Ms X's adult placement and for investigating options for adult care and accommodation once the school placement came to an end. However, the fact that CouncilB has taken responsibility for Ms X for the whole period that she has lived in CouncilA is not a relevant consideration in determining the ordinary residence of a person. Under direction 2 of the Ordinary Residence (National Assistance Act 1948) Directions 2010, local authorities in dispute must not allow the existence of an ordinary residence dispute adversely to affect the provision of services under Part 3 of the 1948 Act and one of the local authorities must accept provisional responsibility.

35. Secondly, CouncilA submit that the period when Ms X attended the residential school from Ms X's eighteenth birthday to her provision with Part 3 accommodation should be disregarded by analogy with s105(6) of the 1989 Act. There is, however, nothing in the 1948 Act which provides for placements in residential schools to be disregarded for the purposes of determining ordinary residence under the 1948 Act. The test is as set out in Shah.

36. Thirdly, CouncilA allege that the arrangement for Ms X's placement with Ms FC1 (her foster carer) from 21<sup>st</sup> October 2007 was not a valid Shared Lives Scheme under the Adult Placement Schemes (England) Regulations 2004. It is unclear from CouncilA's written submissions what conclusion they seek to draw from this submission. The legal formalities of the Adult Placement Scheme are not determinative of ordinary residence. The services provided under the adult placement arrangement would, for the purposes of the 1948 Act, have had to have been provided under section 29 of that Act; whether it was a valid Adult Placement Scheme or not. The adult placement could not have been provided under section 21 of the 1948 Act because by virtue of section 26(1A) arrangements for the provision of accommodation together with nursing or personal care cannot be provided unless the provided accommodation is at a registered care home. Ms FC1's accommodation was not a registered care home so the local authority's arrangements for Ms X's adult placement must have been made under section 29. The deeming provision in s24(5) does not apply to s29 services and so would not have determined Ms X's ordinary residence when she entered the adult placement arrangement. Rather, Ms X's ordinary residence is determined with reference to the facts and circumstances of the case. As stated at paragraph 28 above, the starting presumption under the 1989 Act may be rebutted

by the circumstances of the individual's case and the application of the Shah test. In this case, the starting presumption under the 1989 Act is rebutted for the reasons stated at paragraph 31 above.

37. Accordingly, my determination is that Ms X has been ordinarily resident in CouncilA since her 18<sup>th</sup> birthday in 2007.

Signed on behalf of the Secretary of State for Health

Dated