

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF X

1. I am asked by Council A and Council B to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of X.
2. The period for which X’s ordinary residence is in dispute is from 18 December 2010 (when she moved into residential accommodation in CareHome1, CouncilB until the date of her death in December 2013.
3. For the reasons set out below, my determination is that immediately before 18 December 2010, X was of no settled residence. On, or shortly after, that date she acquired ordinary residence in CouncilB and remained ordinarily resident there until her death on 22 December 2013.

The facts of the case

4. The following information has been ascertained from the statement of facts prepared by CouncilA and CouncilB, their legal submissions, and the copy documents supplied by them.
5. The agreed facts are as follows: X was born in 1922. She owned a bungalow in CouncilB, the ownership of which was transferred to her son and daughters in 2004.
6. She continued to live in the bungalow in CouncilB until 2008 when she moved to CouncilA to live with her granddaughter.
7. X’s relationship with her granddaughter deteriorated and in November 2010 she left her granddaughter’s home amidst allegations that she had hit her great granddaughter. She was taken to the police station and then taken to hospital with chest pains.
8. Whilst in hospital, CouncilA was contacted to assess X’s needs. This was done and X was assessed as requiring residential care.
9. X was offered a placement by CouncilA “to facilitate X’s hospital discharge”.

10. However X refused the offer and expressed a wish to reside in CouncilB to be closer to her children. X had capacity to decide where to live.
11. On 18 December 2010 X moved out of hospital to CareHome1 in CouncilB. X's family funded the placement.
12. On 30 March 2011 X's son approached CouncilB for funding for the placement. In April 2011 CouncilB carried out a financial assessment which indicated X had under £5000 in capital. On 23 January 2012, CouncilB contacted CouncilA to fund the placement. The parties fell into dispute.
13. CouncilA funded half the cost of the placement for the period from 13 November 2011 to 25 October 2012 on a "without prejudice" basis.
14. CouncilB funded the placement from 12 or 16 April 2012 to 25 October 2012 on a "without prejudice" basis, there being some "crossover and confusion" in relation to payments to CareHome1.
15. On 25 October 2012 X moved to CareHome2 in CouncilB where she remained until her death in December 2013. CouncilB funded this placement on a "without prejudice" basis.
16. There is some dispute over the reasons for CouncilA's failure to conduct a financial assessment of CouncilB at the time of her needs assessment in hospital in 2010:
 - CouncilA state that during the needs assessment X was asked whether she required a financial assessment to which X replied that she "had the proceeds of sale from her house which she gave away to her family members" and that the proceeds of sale were placed in a bank account in her children's name. CouncilA presumed that this was to fund X's residential care and therefore did not carry out a financial assessment;
 - CouncilB state that according to a statement from X's son, whilst X was in hospital, CouncilA informed X's family that X could not be funded out of area but would be allocated a residential home in CouncilA and that if the family funded X's care for the first 6 months, they could then apply to CouncilB for funding. This seems to coincide with the contents of an email dated 15 May 2011 from X's son to CouncilB amongst the supporting documentation. CouncilB also state that X's son has

confirmed that CouncilA were aware that X's capital was below the capital disregard limit and that she did not have the proceeds of the bungalow as she had not owned it since 2004.

17. In fact the bungalow was sold in 2010 by X's children and the proceeds of the sale divided between themselves. CouncilB make submissions to this effect. This is also acknowledged in the following terms in CouncilA's submissions, paragraph 4.9: "If X did not have the funds, it is unclear why X told [Y] that she did and why she was under the impression that she had the funds of the Bungalow, which we now understand was sold in the same year X required essential care not in 2008." This is also supported by the following papers enclosed with the supporting documents: a) Solicitors' letters to X's children in 2010 and b) email from X's son to CouncilB on 29 August 2011.

The relevant law

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 or attention which is not otherwise available to them.

19. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. Section 24(3) provides that where a person in the area of a local authority has no settled residence, or is in urgent need of accommodation, the authority has the same power to provide accommodation as under section 24(1) as if he were ordinarily resident in its area.

20. The Secretary of State's Directions under section 21 require local authorities to make arrangements to provide residential accommodation for those qualifying under Part 3 who are ordinarily resident in their area or in urgent need of such accommodation and also for persons with no settled residence who are or have been suffering from mental disorder and who are in the authority's area.

21. Paragraph 49 of the Guidance on Ordinary Residence issued by the Department of Health¹ states: “In circumstances where a person who is ordinarily resident in one local authority area becomes in urgent need in another local authority area, the person’s local authority of ordinary residence and the local authority of the moment both have a duty to provide Part 3 accommodation. However, it is the responsibility of the local authority of the moment (that is, the local authority in whose area the person is physically located) to make a community care assessment and provide any necessary accommodation under section 21.”
22. A person of no settled residence in urgent need of section 21 accommodation is effectively entitled to choose which authority is to provide the accommodation.
23. In *R (S) v Lewisham London Borough Council and others (2008) EWHC 1290(Admin)*, the High Court considered the case of a woman of no settled residence with severe mental illness. The Court held that whichever authority the woman approached would be liable to provide her with accommodation. The application does not have to be made to the authority in whose area the need arose. Physical presence in the authority’s area is sufficient.
24. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3 of that 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”.
25. In *R v Secretary of State for Health and the London Borough of Bexley ex parte the London Borough of Greenwich [2006] EWHC 2576 (admin)* Charles J observed: “It seems to me that if the position is that the arrangements should have been madethat the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority.”

¹ *Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England*, published on the Department of Health’s website at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf.pdf

26. Section 24(6) of the 1948 Act, as amended, provides that a patient in NHS accommodation is to be deemed to be ordinarily resident in the area, if any, in which the patient was ordinarily resident before the NHS accommodation was provided.
27. Section 21(2A) of the 1948 Act provides that in determining whether care and attention are available to a person, a local authority must disregard so much of the person's resources as may be specified in regulations. The relevant regulations are the National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations 2001 ("the 2001 Regulations"). Regulation 2(1) provides that for the purposes of section 21(2A) of the 1948 Act, a local authority is to disregard so much of the person's capital as does not exceed the capital limit for the purposes of section 22 of the 1948 Act.
28. Regulation 2(2) provides that the capital limit for the purposes of section 22 of the Act means the amount prescribed in the National Assistance (Assessment of Resources) Regulations 1992 ("the Assessment Regulations") as the amount which a person's capital must not exceed if the person is to be assessed as unable to pay for that person's accommodation at the standard rate.
29. The amount prescribed in the Assessment of Resources Regulations is £23,250. Therefore this is the amount of capital to be disregarded, for the time being, in determining whether care and attention are available to a person.
30. The Department of Health has issued guidance to local authorities on charges for residential accommodation and the treatment of resources - the Charges for Residential Accommodation Guide (CRAG).
31. 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. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation

provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

Ordinary residence

32. "Ordinary residence" is not defined in the 1948 Act. The Guidance on Ordinary Residence (paragraphs 18 to 20) notes that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. The concept involves questions of fact and degree. Factors such as time, intention and continuity have to be taken into account.

33. The leading case on ordinary residence is that of *Shah v London Borough of Barnet (1983) 1 All ER 226*. In that case, Lord Scarman stated that:

"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".

34. The starting presumption is that a person has capacity to decide where to live unless it is shown otherwise.

Application of the law

35. I have considered the legal submissions, the statement of facts and the additional documentation supplied, the provisions of Part 3 of the 1948 Act, the Guidance on Ordinary Residence, the relevant case law, the 2001 Regulations, the Assessment of Resources Regulations and CRAG.

36. My determination is not influenced by the provisional acceptance by Council A and Council B of responsibility for funding services under Part 3 of the 1948 Act pending resolution of the dispute.

Preliminary matter

37. Before I turn to the question which has been referred to me for determination, I turn briefly to paragraphs 4.2 and 4.3 of CouncilA's submissions, namely:

"4.2 X had lived in CouncilB all her life. CB, granddaughter stated that X came to live in CouncilA because X was about to go into residential care in the its area, but that she decided that she could come and live with her and her family in CouncilA.

4.3 This seems to indicate that X required residential care when she was in CouncilB. It is unclear whether CouncilB assessed this, if not, CouncilA submits that CouncilB failed to discharge its statutory duty under S47 of the 1990 Act to assess X's needs and to provide (and potentially fund) X with services which met those needs".

38. It is not for the Secretary of State to determine whether or not a local authority failed to discharge its statutory duties other than for the purposes of determining a question arising under Part 3 of the 1948 Act as to a person's ordinary residence, for example to ensure, in accordance with the principles expounded in the *Greenwich* case, that local authorities do not escape the effect of the deeming provision by not providing Part 3 accommodation where they should. In this case, it is clear that X had decided to live with her granddaughter and consequently that any care and attention, if she required it, were seemingly available to her otherwise than by the provision of residential accommodation. There is no evidence available to me to suggest that any needs X had were not being met during her stay with her granddaughter which was for a considerable period (around 2 years) before she entered CareHome1

Was CareHome1A Part 3 accommodation

39. Turning to the question of X's ordinary residence, it is not in dispute that when X went into residential care in CareHome1 in December 2010, this was under private arrangements. It was not arranged by CouncilA or CouncilB and did not meet the requirements of section 26 of the 1948 Act as set out above.

Should CareHome1 have been Part 3 accommodation

40. However, that is not sufficient to settle the matter. The further question which I then have to address is whether Council A or Council B should in fact have made arrangements for Part 3 accommodation for X from December 2010. The *Greenwich* case is authority for the proposition that where a local authority should have made arrangements under Part 3 but did not, the deeming provision in section 24(5) of the 1948 Act applies on the basis that the arrangements had actually been put in place.

41. Accordingly if the arrangements in CareHome1 should have been made under Part 3 of the 1948 Act, the deeming provision should be applied and interpreted on the basis that the arrangements were actually made under Part 3.

The section 21(1)(a) duty

42. In *Wahid v Tower Hamlets [2002] EWCA Civ 287*, Hale J explained that the section 21(1)(a) duty arose:

- a) where the person was in need of care and attention;
- b) that need arose because of age, illness etc; and
- c) care and attention were not available otherwise than by the provision of residential accommodation.

43. The duty would fall on the local authority in whose area the person was ordinarily resident or which was the authority of the moment in relation to a person in urgent need.

44. In this case, X's need was for residential accommodation and there is no issue with regard to the fact that the need arose for a reason set out in section 21(1)(a) of the 1948 Act.

Were care and attention otherwise available?

45. So the question is whether care and attention were otherwise available to X ("the first question") and whether she was ordinarily resident in Council A's area or in urgent need of residential accommodation ("the second question").

The first question

46. The 2001 Regulations read with the Assessment of Resources Regulations are relevant for the purpose of determining the first question. Resources which do not exceed the capital limit of £23,250 are to be disregarded for this purpose.
47. From the correspondence between the parties and from statements made by X's son, I conclude that as at December 2010 X had capital of approximately £8000.
48. I do not accept CouncilA's reasons for failing to conduct the financial assessment which would have revealed this, namely that X stated to CouncilA that she would self fund her own placement using the proceeds from the bungalow she sold "two years ago" and that when asked whether she required a financial assessment, X replied that she "had the proceeds of sale from her house which she gave away to her family members" and that the proceeds of sale were placed in a bank account in her children's name.
49. In fact the bungalow was not sold two years previously but that same year (2010) however, in any event, at the point of sale, the bungalow did not belong to X but to her children and the proceeds of the sale were divided between them.
50. CouncilA's records read: "Mrs Booth has been collected from the ward and taken by her son and daughter in law to a residential home in TownA where she will self fund her own placement using the proceeds from the bungalow she sold two years ago when she gave away her money to family members".
51. The words "gave away" should, in any event, have indicated that the proceeds were no longer in X's possession.
52. It does not appear to me that CouncilA treated the apparent giving away of the proceeds as deliberate deprivation². An email dated 24 December 2012 from CouncilA to CouncilB states that the transfer of the proceeds of sale of X's bungalow to her children should be looked

² Under regulation 25 of the Assessment of Resources Regulations, subject to certain exceptions, a person may be treated as possessing actual capital of which the person has deprived himself or herself for the purpose of decreasing the amount that he or she may be liable to pay for accommodation (or, in this case, for the purpose of being treated as not having care and attention available). Paragraph 6.067 of CRAG cites lump-sum payments to others as a potential example of deprivation of capital, although not necessarily for the purposes of avoiding a charge for accommodation.

into as a deprivation of assets which suggests that CouncilA itself may not already have done this at an earlier point in time i.e. when it assessed X's needs. Paragraph 4.8 of CouncilA's submissions states "Questions should have been asked about the funds from the sale of the property and whether it should have treated X as having notional capital as it was foreseeable that X would require care". This suggests that in fact X was not treated as having notional capital.

53. However such treatment, i.e. treating X as possessing the proceeds would have been wrong in any event because they were not hers to give away as the property was not owned by her at the point of sale, having been transferred to her children in 2004 four years before she needed to move out of it.

54. Paragraph 6.065 of CRAG states that the LA should decide from available evidence whether the resident owned the capital which would, but for deprivation, have been taken into account.

55. Paragraph 6.070 of CRAG states that the timing of any disposal should be taken into account when considering its purpose. It would be unreasonable to decide that a resident had disposed of an asset in order to reduce his charge for accommodation when the disposal took place at a time when he was fit and healthy and could not have foreseen the need for a move to residential accommodation.

56. In any event, I conclude that at the relevant time X's capital was well below the capital limit of £23,250 specified in the Assessment of Resources Regulations and stood to be disregarded for the purposes of determining whether the care and attention which she required were available to her. Accordingly my conclusion is that X did not have care and attention otherwise available.

The second question

57. I must then turn to the question of whether X was ordinarily resident in CouncilA's area or in urgent need of residential accommodation.

58. At the time when X's needs were assessed by CouncilA, X was in TownY hospital³ (an NHS hospital).

³ Although the supporting documentation suggests that the hospital might have been Town Z Hospital, nothing turns on this as Town Z Hospital is also an NHS hospital.

59. By reason of the deeming provision in section 24(6) of the 1948 Act, a person for whom NHS accommodation is provided is to be treated as being ordinarily resident in the place where they were ordinarily resident before the NHS accommodation was provided⁴. Accordingly, where a person is discharged from NHS accommodation, and is then provided with Part 3 accommodation, they are deemed to be ordinarily resident in the area in which they were ordinarily resident before their move to NHS accommodation.

60. The issue in this case is, therefore, where X was ordinarily resident before her admission to hospital in November 2010. Taking a common sense approach to the word “before”, this means determining where X was ordinarily resident on the day before she was admitted.

61. As stated in paragraph 19 of the Guidance on Ordinary Residence, the concept of ordinary residence involves questions of 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.

62. Particularly relevant facts in this case seem to be:

- “Residence” means living somewhere for settled purposes. X had walked out of her granddaughter’s home following a row and had no intention of returning there as neither she nor her granddaughter and her family wanted this;
- X did not acquire a new residence after leaving her granddaughter’s home. It is not clear where she was found by the police but there is no evidence that she had acquired another residence. This is supported by the Needs Assessment Questionnaire dated 10 December 2010 completed by CouncilA which refers to X as “technically homeless”;
- Nor does it seem that CouncilA’s area was to continue to be X’s regular abode; She did not wish to remain in the CouncilA area, her stated intention being to move back to CouncilB (see paragraph 3 of page 2 of the statement of facts, paragraphs 1.5 and 1.6 of CouncilA’s submissions and paragraph 26 of CouncilB’s submissions), which had

⁴ The exception in relation to people who were already in non-hospital NHS accommodation when the amendment to section 24(6) came into force (19 April 2010) is not applicable here as: a) X entered Town Y hospital in December 2010 and b) this was not non-hospital accommodation.

not yet materialised because of a change in her circumstances i.e. her hospital admission;

- X did not appear to retain any or any strong personal or community links with the CouncilA area - there is no evidence that apart from her granddaughter she had relations there, or friends. She had apparently therefore severed her only ties with the CouncilA area.

63. I therefore conclude that before her admission to hospital in November 2010, X was of no settled residence.

64. I am mindful of the view taken by the court in the *Greenwich* case that finding a person to be of no settled residence is not a conclusion to be reached hastily given that it necessarily results in a lesser degree of protection for a person. This is because the local authority has a power but not a duty to provide residential accommodation to such a person unless the person is in urgent need, in which case there is a duty. In that case, Charles J stated (in paragraph 15) that, "...a message derived from the statutory provisions .., is that the preservation of a duty is a relevant feature.". However, despite bearing this in mind, I consider that weighing up all the factors as presented to me, I can only conclude that X was not ordinarily resident anywhere prior to her admission to hospital in November 2010.

65. By CouncilA's own admission, X's needs for care and attention were urgent (CouncilA's submissions, paragraph 4.5).

66. As of 18 December 2010 X was therefore a person with no settled residence in urgent need and thus fell to be accommodated by CouncilA as the local authority of the moment. Accordingly CouncilA should have found that X had needs for care and attention which were not otherwise available and should have arranged Part 3 accommodation for her. CareHome1, into which she moved on 18 December 2010, should therefore be treated as Part 3 accommodation.

67. However, as X had no ordinary residence immediately before Part 3 accommodation should have been arranged for her, the deeming provision in section 24(5) of the 1948 Act does not apply; this provision operates to deem a person's ordinary residence to continue in specified circumstances, but as X had no ordinary residence at the key date, there is nothing to be continued by the operation of the deeming provision.

Ordinary residence upon admission to CareHome1

68. X's ordinary residence upon her admission to CareHome1 therefore falls to be determined according to the normal rules.

69. The relevant facts seem to be:

- She had capacity to decide where to live and had intentionally moved to CouncilB, voluntarily adopting CareHome1 as her place of residence;
- She was clearly there for the settled purpose of being closer to her children;
- She remained there continuously for a significant period - around 22 months.

70. Applying the principles in *Shah*, I take the view that X became ordinarily resident in CouncilB on her move to CareHome1.

71. If that is wrong, I take the view that X became ordinarily resident in CouncilB shortly after her move to CareHome1.

Move to CareHome2

72. I next turn to X's move to CareHome2 in CouncilB from 25 October 2012.

73. There is no evidence of any change in X's circumstances during this time and I accordingly find that she continued to need residential accommodation under Part 3 of the 1948 Act during her move to CareHome2 and her stay there. Accordingly, this accommodation should have been arranged under Part 3 of the 1948 and should be treated as such under the principles expounded in *Greenwich*.

74. The deeming provision in section 24(5) of the 1948 Act applies to deem X's ordinary residence to continue in the area in which she was ordinarily resident immediately before such accommodation was provided to her and that was CouncilB.

Conclusion

75. I therefore find that before 18 December 2010 X was of no settled residence. On, or shortly after, this date, she acquired ordinary

residence in CouncilB and remained ordinarily resident there until her death on 22 December 2013.

Signed

Dated

