

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

Introduction

1. I am asked by the CouncilE of England and the CouncilS of Scotland to make a determination under section 32(3) of the *National Assistance Act 1948* (“the 1948 Act”) of the ordinary residence of Mr X for the purposes of Part 3 of that Act.
2. This determination is made in accordance with the *Memorandum of Understanding between the Secretary of State and the Scottish Ministers Relating to the Determination of Cross-Border Ordinary Residence Disputes* (“MoU”), which became effective on 16 December 2011.¹
3. Paragraph 3 of the MoU provides that, in the event of a cross-border dispute (an ordinary residence dispute involving at least one local authority in Scotland and at least one local authority in England), the Secretary of State will determine the dispute when it relates to a question of ordinary residence arising under Part 3 of the 1948 Act and a local authority in England is seeking to recover expenditure from a local authority in Scotland.
4. This dispute concerns the question of Mr X’s ordinary residence for the purposes of determining whether CouncilE or CouncilS is responsible for the provision of services to Mr X under section 29 of Part 3 of the 1948 Act.
5. In accordance with paragraph 6 of the MoU, I have therefore notified the Scottish Ministers of this dispute and we have agreed that determination of this dispute falls to me. I have also consulted the Scottish Ministers and taken their views into account before determining the dispute, as required by paragraph 8 of the MoU.
6. Any ordinary residence disputes arising in relation to section 29 that are submitted to the Secretary of State for determination will be decided in accordance with the existing legal framework on ordinary residence.²

The facts of the case

7. The following facts are derived from the statement of facts (“SOF”) agreed by CouncilE and CouncilS dated 19 December 2012, their legal submissions³ and other documents submitted by them.
8. Mr X was born in 1959. He has learning difficulties. Mr X moved to the HomePLD, a Special Needs Centre in CouncilS, in 1978. The CouncilE’s Predecessor CouncilE0 was involved in negotiating Mr X’s placement at HomePLD.

¹http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126003

² OR Guidance, paragraph 100.

³ As regards CouncilE, the amended legal submissions dated 13 December 2012 were considered.

9. From 1979 to 1993, HomePLD provided sheltered employment. Each resident received Employment Support Grant (ESG) from the Department of Employment, plus a productivity payment and a personal allowance. The local authority provided top up payments.
10. From 27 May 1993, HomePLD registered as a care home with CouncilS2 under the Social Work (Scotland) Act 1968 as amended by the Registered Establishments (Scotland) Act 1987.
11. From 1 May 1994, HomePLD indicated it would provide a day care programme including work opportunities rather than a Sheltered Workshop offering sheltered employment.
12. From 17 March 2003, HomePLD de-registered as a care home and started providing supported living accommodation on the same site. Mr X decided to continue to live in HomePLD in such accommodation. Mr X's rent became funded by Housing Benefit. CouncilE and CouncilS agree that, from HomePLD's reorganisation as a provider of supported living accommodation on 17 March 2003, Mr X ceased to be provided with accommodation under section 21 of the 1948 Act.⁴ Since 2004, Mr X has shared a flat for four people in HomePLD.
13. From 17 March 2003, CouncilE has paid £142 a week for Mr X's 'workplace training, day activities and care' and continues to pay for these services. Mr X works at HomePLDFarm 3.5 days a week. He attends social activities, singing and woodwork classes and folk dancing.
14. CouncilE submits that, since 17 March 2003, Mr X has been ordinarily resident in CouncilS's area. CouncilS submits that Mr X remains ordinarily resident in CouncilE's area and has not acquired new ordinary residence in CouncilS's area.

The relevant law

15. I have considered:

- the documents submitted by both parties;
- the provisions of Part 3 of the 1948 Act;
- the Department of Health guidance *Ordinary Residence: Guidance on the Identification of the Ordinary Residence of People in Need of Community Care Services, England* (published on 15 April 2011, "OR Guidance");
- the *Approvals and Directions for Arrangements from 1 April 1993 made under Schedule 8 to the National Health Service Act 1977 and Sections 21 and 29 of the National Assistance Act 1948* (LAC (93)10); and
- the leading case *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 ("*Shah*").

16. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 years or over

⁴ CouncilE amended submissions, paragraphs 28, 36; CouncilS submissions, paragraph 35.

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.

17. Section 24(1) of the 1948 Act provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions in that Part, the authority in whose area the person is ordinarily resident. However, local authorities can place people in residential accommodation in another local authority area (an 'out of area' placement).
18. Section 24(5) makes further provision as to the meaning of ordinary residence. It provides that, where a person is provided with residential accommodation under Part 3, the person will be deemed to be ordinarily resident in the area in which he was ordinarily resident before the residential accommodation was provided. This means the local authority placing a person in residential accommodation in another local authority's area retains responsibility for that person.
19. Section 29(1) of the 1948 Act imposes a duty on local authorities to provide welfare services to adults ordinarily resident in the area of the local authority who have mental disorder, or are substantially and permanently affected by illness, injury or disability. Local authorities may also enter into arrangements to provide such services to people who are not ordinarily resident in their area.⁵
20. Section 29(4) relevantly provides that local authorities may make arrangements:
 - [...]
 - (c) for providing workshops where such persons may be engaged (whether under a contract of service or otherwise) in suitable work, and hostels where persons engaged in the workshops, and other persons to whom arrangements under subsection (1) of this section relate and for whom work or training is being provided in pursuance of the [Disabled Persons \(Employment\) Act 1944](#) [or the [Employment and Training Act 1973](#)] may live;
 - (d) for providing persons to whom arrangements under subsection (1) of this section relate with suitable work (whether under a contract of service or otherwise) in their own homes or elsewhere;
 - (e) for helping such persons in disposing of the produce of their work;
 - (f) for providing such persons with recreational facilities in their own homes or elsewhere;
 - [...]
21. Section 29(7) provides that a person who is engaged in work in a workshop provided under section 29(4)(c) shall be deemed for the purposes of the 1948 Act to be ordinarily resident in the area in which he was ordinarily resident immediately before he was accepted for work in that workshop (including workshop training).

⁵ OR Guidance, paragraph 100.

The application of the law

22. The key issue is whether services under section 29(4)(c) have been provided to Mr X (and, if so, during which period), which triggers the section 29(7) deeming provision in relation to his ordinary residence. For the period Mr X has been provided services under section 29(4)(c), he will be deemed to be ordinarily resident in CouncilE's area (in England) because of the operation of the section 29(7) deeming provision. However, if no services are provided to Mr X under section 29(4)(c), then the deeming provision will not apply, and it will be necessary to consider whether he has acquired a new ordinary residence in CouncilS's area (in Scotland) making CouncilS responsible for providing community care services.
23. CouncilS submits that Mr X has continuously been provided with work in a workshop under section 29(4)(c), being work on the HomePLD Farm, since his placement in HomePLD in 1978. CouncilS says that '[w]hilst the sources of funding for aspects of Mr X's placement has changed over the passage of time, the workplace element of that placement has remained constant'.⁶ As a consequence of section 29(7), CouncilS submits that Mr X remains ordinarily resident in CouncilE's area for the purposes of the 1948 Act, regardless of the changes in the provision of his residential accommodation, and CouncilE remains responsible for providing services under section 29.
24. CouncilE agrees that, between 1979 and 1993, it appears that Mr X was provided with work and accommodation under section 29(4)(c).⁷ The operation of section 29(7) means that during that period Mr X was deemed for the purposes of the 1948 Act to be ordinarily resident in CouncilE's area, being the area in which he was ordinarily resident immediately before he started working in that workshop. However, CouncilE submits that, from 1 May 1994, work and accommodation was no longer provided to Mr X under section 29(4)(c). On that date, Mr X was instead provided with suitable work under section 29(4)(d) in the form of 3.5 days work a week on the HomePLD Farm as part of his day care programme and recreational activities under section 29(4)(f).⁸ His accommodation was provided by CouncilE under section 21. CouncilE submits that, at the latest, Mr X ceased to be provided work under section 29(4)(c) when he ceased to be paid the ESG, which appears to be a date falling between 22 March 1996 and 23 December 2002.⁹
25. Therefore, CouncilE submits that Mr X acquired a new ordinary residence in CouncilS's area from the date on which Mr X ceased to be provided work under section 29(4)(c) and that CouncilS, in whose area he was living, became responsible for providing him with community care services.
26. For the reasons given in the following paragraphs, my determination is that Mr X acquired a new ordinary residence in CouncilS's area from 17 March 2003.

Reasons for decision

⁶ CouncilS supplementary legal submissions, paragraph 2.

⁷ CouncilE amended submissions, paragraph 21.

⁸ CouncilE amended submissions, paragraph 31.

⁹ CouncilE amended submissions, paragraph 26.

27. The OR Guidance says a person is likely to acquire a new ordinary residence in an area if they lived in a care home that deregisters and starts providing independent living accommodation (not being accommodation under section 21) on the same site.¹⁰ The OR Guidance says that, in these circumstances, the local authority responsible for the area in which the person is living becomes responsible for the provision of any services the person is assessed as needing under section 29.¹¹
28. HomePLD deregistered as a care home and started providing supported living accommodation on the same site from 17 March 2003. Unless Mr X is being provided with workshop services under section 29(4)(c) and the section 29(7) deeming provision applies, the OR Guidance suggests that CouncilS became responsible from 17 March 2003 for providing services Mr X is assessed as needing under section 29.
29. As CouncilS notes, the 1948 Act does not define the term “workshop” in section 29(4)(c) and there has been no reported case law on the meaning of this term. There is an overlap between the provision of work in a workshop falling under section 29(4)(c) and the provision of suitable work falling under section 29(4)(d). However, section 29(4)(c) describes the provision of hostel services to the person falling under section 29(1) *in addition to* the workshop, employment or training described in section 29(4)(c). The work and accommodation are provided as a package.
30. However, the provision of the package of workshop and workshop hostel services under section 29(4)(c) is now rare: as ‘[a]lmost all such workshops have been closed in the last decade, with the current focus on enabling disabled people to access mainstream work using social security support – such as Access to Work schemes’.¹²
31. Workshops offering sheltered employment have been phased out and have been redesigned as day care programmes including work opportunities, which are provided under section 29(4)(d) and (f). Accommodation for persons who are provided with work under section 29(4)(d) is provided under section 21.
32. The bundle of documents provided to me as part of the CouncilE’s submission suggest that the provision of work for Mr X was one of a range of services provided to him. CouncilE’s view is that, while HomePLD initially provided Mr X sheltered employment, HomePLD was subsequently reorganised to provide ‘day activities provision’.¹³ HomePLD describes itself in a letter to CouncilE dated 18 February 1994 as providing ‘a choice of accommodation, day care, meaningful employment and an integrated social environment’¹⁴ and in a letter to CouncilE dated 5 March 2003 as providing ‘workplace training, day activities and care’¹⁵.

¹⁰ OR Guidance, paragraphs 95-97.

¹¹ OR Guidance, paragraph 96.

¹² Luke Clements and Pauline Thompson, *Community Care and the Law*, 5th ed., 2011, paragraphs 9.54-9.55.

¹³ CouncilE Funding Report and Recommendations dated 29 January 1993, p.2 of CouncilE bundle.

¹⁴ Letter from HomePLD to CouncilE dated 18 February 1994, CouncilE bundle, p.11.

¹⁵ Letter from HomePLD to CouncilE dated 5 March 2003, CouncilE bundle, p.34.

33. On this basis, I agree with CouncilE's submissions that it appears that Mr X was provided with work and hostel services under section 29(4)(c) from 1979 until 1 May 1994, at which time HomePLD ceased offering sheltered employment and started offering a day care programme containing work opportunities. From 1 May 1994, Mr X was instead provided accommodation under section 21 and suitable work under section 29(4)(d) by CouncilE.
34. The section 29(7) deeming provision ceased to apply when section 29(4)(c) services ceased being provided to Mr X, and the section 24(5) deeming provision then applied because Mr X was being provided with residential accommodation under section 21 of the 1948 Act. As a result of section 24(5), which deems the person to be ordinarily resident in the area in which he was ordinarily resident before the residential accommodation was provided, Mr X continued to be deemed to be ordinarily resident in CouncilE. CouncilE was therefore also responsible for providing him with services under section 29.
35. However, Mr X ceased to be provided with residential accommodation under section 21 on 17 March 2003, when HomePLD reorganised as a supported living accommodation provider. At this time, the section 24(5) deeming provision ceased to apply and the normal rules for determining ordinary residence applied.
36. 'Ordinary residence' is not defined in the 1948 Act. When a person has the mental capacity to make a decision about where he should live, then *Shah* sets out the relevant test of where that person is ordinarily resident. In that case, Lord Scarman stated:

Unless therefore it can be shown that the statutory framework or the legal context in which the words are used requires a differing meaning, I unhesitatingly subscribe to the view that "ordinary residence" 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.
37. CouncilE and CouncilS agree Mr X has the mental capacity to decide where he wishes to live. I am satisfied that, when HomePLD in CouncilS deregistered as a care home and started offering supported living accommodation, Mr X adopted HomePLD as his home voluntarily and for settled purposes as his place of residence. Therefore, from 17 March 2003, Mr X acquired a new ordinary residence in CouncilS' area, and CouncilS became responsible for providing community care services to him.
38. Accordingly, I determine that Mr X is resident in CouncilS' area for the purposes of the 1948 Act and has been so resident since 17 March 2003.

Signed:

Date: