

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 6 2013)

1. I am asked by CouncilA and CouncilB Council to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mr Mr X.
2. The period in question is the period from some time in 2000 to 26 February 2012, when CouncilC accepted financial responsibility for Mr X, on the basis that he had, with effect from that date, become ordinarily resident in their area.
3. My determination is not influenced by the fact that in practice CouncilA have accepted responsibility for funding Mr X’s services under Part 3 of the 1948 Act during the period in dispute.

**The facts of the case**

4. The following information has been obtained from the agreed statement of facts and copy documents supplied.
5. Mr X was born on xdate 1970, the only son of his mother Mrs Y.
6. He has a diagnosis of Asperger’s Syndrome/High Functioning Autism and probable borderline Learning Disability. He has been assessed as having the capacity to make decisions about where he is accommodated. An assessment of capacity was undertaken on 28 July 2011. There have never been any documented concerns regarding his capacity save during the course of episodes where his emotional wellbeing has impacted on his clarity of thought. It is accepted by both parties in the agreed statement of facts that Mr X must be assumed to have capacity to make decisions about his accommodation both currently and in the past and I make this determination on the basis

that he does have, and has always had at the relevant times, such capacity.

7. Mr X lived with his mother in A1Town, CouncilA during the early years of his life. In 1978, when presumably aged either 7 or 8, he was placed by CouncilA Education Authority for Special Education at the BStar School, BTown1 in CouncilB. He remained at the school until 1986. In June 1986, when he was 16, he entered BTheCentre, BTown2 – also in CouncilB. Although it is not made explicit in the statement of facts, I have assumed that both placements were arranged by CouncilA in discharge of their statutory duties.
8. According to the agreed statement of facts, he “remained” at BTheCentre until June 2000. This was a period of 14 years. He was sixteen when he went there and an adult of 30 when he left. It is not clear from the address given whether the Centre he entered in 1986 was the same centre he “remained” in until 2000 as the addresses given in the agreed statement of facts are slightly different. The term “remained” suggests it was the same place. There are however several different BTheCentres in CouncilB – so this point is not clear. I will assume it was the same one as the statement of facts makes no mention of his having moved from one centre to another. The BTheCentre is described as a residential care home.
9. The following information has been ascertained from the agreed statement of facts, In January 1995 there was a dispute about ordinary residence between CouncilA and CouncilB (when Mr X would have been an adult of 25). That decision was referred to the Association of County Councils for a determination in what I assume was an agreed arrangement for an impartial third party to reach a decision on a disputed question of ordinary residence. The decision, which was accepted by CouncilA, was that Mr X was at that time ordinarily resident in CouncilA despite his physical presence in CouncilB. CouncilA remained the funding authority. I have no information in the

agreed statement of facts as to the statutory provision relied on by CouncilA to fund the placement at this stage or any points argued in the dispute regarding ordinary residence in 1995.

10. I have to assume that the original placement when Mr X was a child was made under the provisions that related to CouncilA's education responsibilities and that the continued placement, once he had reached 18, was under section 21 of the National Assistance Act 1948.
11. During this time Mr X had employment as a kitchen porter at BTown3 College, CouncilB.
12. On 5<sup>th</sup> June 2000 Mr X was served with 4 weeks' notice to leave BTheCentre following a dispute between the care staff and his mother Mrs Y. At this time his mother and Mr X had been investigating the possibility of a new placement. On 8 July 2000 Mr X moved to live with his mother in BTown4, CouncilB (his mother having previously moved from her home in CouncilA to live in BTown4.)
13. Mr X stayed with his mother for the next 3 years until January 2003, when, because of his mother's deteriorating health, it became necessary for him to find a new home.
14. CouncilA wrote to CouncilB on 9 October 2000 informing them of the background of the case, of the fact that Mr X had moved to live with his mother (in CouncilB) in July and indicating that as he was no longer "placed" by CouncilA they looked to CouncilB to pick up the care management responsibility in the future.
15. CouncilB responded to the letter on 19 October 2000 indicating that they accepted that Mr X had become ordinarily resident in CouncilB.
16. CouncilA responded by letter dated 26 October 2000 with some further details regarding Mr X's assessments and an indication that the

immediate needs were social work support and a planned move for Mr X.

17. Council B responded by letter dated 20 December 2000 indicating that they considered that the situation regarding Mr X had not been made sufficiently clear in Council A's letter of 9 October. The letter recorded that Mr X had only moved as a temporary measure to his mother's home and that they did not want to live together. In those circumstances, Council B indicated that they considered Mr X remained a client of Council A and consequently, despite their letter of 19 October, they did not accept that Mr X was ordinarily resident in Council B.
18. There was further correspondence between Council A and Council B during the period between that 20 December 2000 letter and 13 March 2001, the content of which indicated that Mr X's case, and the question of which local authority was responsible for him, was a matter of discussion between the two councils.
19. Whatever might have been the extent of discussion and agreement between the two local authorities at that point, it seems that in practice Council A did continue to provide social care support to Mr X. (The support seems to have consisted of support of the kind that might be provided under section 29 of the 1948 Act.)
20. The question of Mr X's ordinary residence was raised again by letter dated 23 August 2002 from Council A, following a visit on 14 August 2002 to update his community care assessment. It was noted that Mr X had been living at home with his mother Mrs Y for two years, was very settled and was enjoying a close and supportive relationship with his mother. It was their wish that Mr X remain at home with his mother for the foreseeable future. Their long term plan was for Mr X to live independently in a supporting people model of service. Council A again

raised the question of whether CouncilB accepted that Mr X had established ordinary residence in CouncilB.

21. That letter was sent again by CouncilA to CouncilB on 20 September 2002.

22. I am not provided with any further correspondence between the two authorities until 18 August 2010.

23. Mr X continued to live with his mother in CouncilB until 13 January 2003. At around this time his mother Mrs Y's health deteriorated and it became necessary for Mr X to find a new home. CouncilA Social Services assisted in finding a temporary respite placement with Mr and Mrs SpeErite in BTown4 CouncilB. He moved there on 7 January 2003 but the placement broke down by 13 January 2003. On that date he moved to a second temporary respite placement with Mr and Mrs TrEespi, BTown4, CouncilB. This placement was arranged by CouncilA using their "contract for the provision of a residential or nursing home service". This implies that the placement purported to be made under the provisions of section 21 of the 1948 Act.

24. Mr X also spent a week at Care Centre44, A2Town CouncilA where he was assessed for a placement in that residential environment but he never returned to live there.

25. Mr X then began living in a placement with Mr and Mrs TrEespi's daughter at 101 Side Platter Avenue, BTown4 in CouncilB. This placement was set up by CouncilA under their "contract for the provision of a residential or nursing home service" dated 28 March to 30 April 2003. The placement subsequently became a permanent placement. CouncilB were informed by fax from CouncilA that the placement would become permanent with Mr and Mrs TrEespi's daughter with effect from 30 April 2003 and that CouncilA would

continue to fund the placement. I have not been provided with a copy of that fax.

26. On 28 May 2003 Mr and Mrs TrEespi's daughter signed an agreement with CouncilB Adult Placement Scheme. This placement was arranged and paid for by CouncilA.

27. At the time Mr X originally moved to live with Mr and Mrs TrEespi's daughter, her premises had been registered under the Care Standards Act 2000 as a small care home. However, on 31 August 2004 the Adult Placement Schemes (England) Regulations 2004 ("the 2004 Regulations") came into force and as a result, the premises ceased to be so registered.

28. Mr X continued to live with Mr and Mrs TrEespi's daughter from 2003 to 2011 and he continued to work at BTown3College in CouncilB until that employment was terminated in April 2005.

29. In February 2007 Mr X signed and entered into a "licence agreement for Full Time Shared Lives Agreement" to live with Mr and Mrs TrEespi's daughter at 101 Side Platter Avenue, BTown4, CouncilB. I am not given any information in the statement of facts as to any formal licence arrangements covering Mr X's continued residence with Mr and Mrs TrEespi's daughter between the period when her premises ceased to be registered as a small care home (in 2004) and the date of signing this licence agreement. However, it is clear that in practice Mr X continued to live there.

30. Mr X made a claim for housing benefit in March 2007 but as he did not respond to correspondence from CouncilB that claim went no further. He made a further claim for housing benefit from CouncilB in July 2008 and began to receive the benefit that same month. Prior to his receiving housing benefit, CouncilA council had met the costs of Mr X's placement, with Mr X making a contribution.

31. In June 2009 Mr X's mother died. This led to an increase in compulsive behaviour and in a need for emotional support.
32. On June 2010 Mr X signed and entered into a further "Licence Agreement for Full-Time shared lives Agreement to continue to live with Mr and Mrs TrEespi's daughter.
33. On 18 August 2010 CouncilA requested CouncilB to carry out an assessment of Mr X's needs with a view to transferring responsibility. CouncilA pointed out that as Mr X had been resident in CouncilB for several years and held a current housing tenancy he should be regarded as ordinarily resident in the CouncilB area. The letter gave notice that CouncilA would cease funding for Mr X on 18 November 2010, although it seems that in fact this did not happen.
34. On 24 December 2010 (some time after the date of notice of withdrawal of funding) CouncilB requested further information from CouncilA in support of their letter of 18 August 2010.
35. 18 January 2011 Mr and Mrs TrEespi's daughter gave six months notice to end Mr X's licence to reside with her, the reasons being the increased support requirements that Mr X required following his mother's death. On the same day, a planning meeting was held, chaired by CouncilA and attended by CouncilB, to discuss Mr X's funding and a "moving on" plan. A further meeting was held on 23 March 2011. I have not been provided with a record of those meetings but a letter dated 24 March 2011 records that at the January meeting it had been suggested that Mr X would be moving into a flat he had inherited from his mother and that following a review of the situation when that move had taken place, CouncilA would be asking CouncilB to take over the funding. It is not clear why the question of funding was apparently still being discussed some months after CouncilA had given notice of their intention to withdraw funding.

36. By a letter dated 8 August 2011, CouncilA Legal Department asserted that in fact Mr X had been ordinarily resident in CouncilB since the date in 2004 when the placement at 101 Side Platter Avenue with Mr and Mrs TrEespi's daughter had been de-registered as a result of the 2004 regulations. In this letter, CouncilA indicated that they expected to recover all expenditure expended backdated to 8 August 2005 in accordance with the Limitation Act 1980. In their subsequent submissions CouncilA have asserted that Mr X in fact became ordinarily resident in CouncilB at an earlier stage, during the period between 2000 and 2003 when he lived with his mother.
37. By letter dated 30 August CouncilB responded indicating inter alia that they did not accept that Mr X had established ordinary residence in CouncilB as early as CouncilA claimed. They indicated that they were working with CouncilA to find suitable accommodation for Mr X who had, they accepted, indicated a desire to live in CouncilB. They suggested that once such accommodation had been found, and Mr X had lived there for a period of a few months they would be willing to "consider ordinary residence being transferred".
38. Correspondence on the question of ordinary residence continued between the authorities but no agreement was reached, hence this application.
39. Mr X meanwhile moved to live with Mr and Mrs Z89 in RegionC22, CouncilC on 26 October 2011, under a "licence agreement for full-time shared lives". He had previously spent some time living with Mr and Mrs Z89 during respite arrangements which began as early as 2001. The housing cost is funded by housing benefit. Mr X continues to live at this address.



40. By letter dated 3 November 2011 CouncilA notified CouncilC that as Mr X was now ordinarily resident in their area they proposed to withdraw funding with effect from 26 February 2012.

41. CouncilC accepted that Mr X was ordinarily resident in their area and accepted responsibility for funding and meeting his care needs from 26 February 2012.

42. The question of Mr X's ordinary residence is thus settled as from this date. The matter in dispute, between CouncilA and CouncilB, is the question of his ordinary residence for the period between 2000 and 26 February 2012.

### **The relevant law**

43. In making this determination I have considered the agreed statement of facts and documents provided by the parties. I have also considered the legal submissions submitted by the parties. I have also considered the provisions of Part 3 of the National Assistance Act 1948 ("the Act"); the current guidance on the identification of the ordinary residence of people in need of community care services, England issued by the Department of Health in April 2011 ("the 2011 guidance"); previous guidance on the question of ordinary residence (LAC (93)7 and the guidance on the identification of the ordinary residence of people in need of community care services (England) issued by the Department of Health in May 2010) and the case of R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309 ("Shah").

44. My decision is not affected by the fact that in practice CouncilA have been the funding authority until 26 February 2012.

### *Duty to provide accommodation*

45. 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 or disability or any other circumstances are in need of care or attention which is not otherwise available to them. The Secretary of State's directions under section 21 of the Act (contained in LAC (93)10) provide that the local authority is under a duty to make arrangements under that section "in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof".

#### *The relevant local authority*

46. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State's Directions<sup>1</sup> provide that the local authority is under a duty to make arrangements under that section "in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof".

#### *The deeming provision*

47. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

#### Welfare services

48. Section 29 of the 1948 Act imposes a duty on local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

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<sup>1</sup> LAC (93)10

## *Ordinary residence*

49. “Ordinary residence” is not defined in the 1948 Act. The Department of Health has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services. The most recent such guidance, was the guidance published on 15 April 2011 – “Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England” (“the 2011 guidance”).

50. This period in dispute is 2000 to 2012 and during that time a number of different guidance notes have been in force. During the period the relevant guidances were: LAC (93)7; new guidance issued with effect from 5 May 2010 and the current guidance issued 15 April 2011. They all treat the question of ordinary residence in a similar manner, though the 2010 and 2011 documents are much more detailed in their discussion.

51. The 2011 guidance (paragraph 18) 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. The leading case on ordinary residence is that of Shah. In this 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.”*

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

52. The period in dispute is the period between July 2000 and 26 February 2012. The period began when Mr X moved to live with his mother in BTown4 in CouncilB on 8 July 2000 and continued during the time he lived with Mr and Mrs TrEespi's daughter and others as detailed above.
53. Prior to moving to live with Mr and Mrs TrEespi's daughter Mr X lived for a few weeks in some temporary respite or assessment accommodation (which would seem likely to have been registered as residential care homes although the statement of facts is not specific about that). While living with Mr and Mrs TrEespi's daughter, he was living in premises registered as a care home under the Care Standards Act 2000 until they ceased to be so registered as a result of the 2004 regulations. The statement of facts does not give any information about the formal arrangements under which Mr X lived at Mr and Mrs TrEespi's daughter's premises after the deregulation until the period from 22 February 2007 when Mr X signed and entered into the licence agreement for full-time shared lives to reside with Mr and Mrs TrEespi's daughter.
54. At all times during the period in dispute (and indeed since 1978) he was living in the area of CouncilB in circumstances that could be described as "voluntary and for settled purposes as part of the regular order of his life for the time being". This would suggest that he was ordinarily resident in CouncilB. The only circumstance in which he might be considered ordinarily resident elsewhere is if the deeming provision in section 24(5) of the 1948 Act applied to his case, in other words if he were being provided with residential accommodation under (Part 3] of the 1948 Act, in which case he would continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was so provided.
55. It is accepted by all parties that while living in the Abbey Opportunity Centre in CouncilB (prior to moving to live with his mother in July 2000)

Mr X had been ordinarily resident in the area of CouncilA (despite his physical presence in CouncilB).

56. The question arises of where he was ordinarily resident when he moved from that placement to live with his mother, again in the area of CouncilB.

57. CouncilA submit in the first of their legal submissions (Part A) that Mr X became ordinarily resident in the area of CouncilB on or very shortly after 8 July 2000 when he moved to live with his mother.

58. In my view that submission is correct. Mr X's move may have been, initially, intended as a temporary respite as the placement at the Abbey Opportunity Centre had broken down. Arguably, and depending on the circumstances, if an alternative placement had been found quickly, and that placement had consisted of the provision of accommodation under Part 3 of the 1948 Act, his ordinary residence might not have changed.

59. However, it is clear from the statement of facts that this move to live with his mother did not, in fact, prove to be a temporary arrangement. He lived with his mother for nearly three years in what seems to have been (certainly by 2002) a "close and supportive relationship". In my view it would be unusual for a residence of nearly three years to be classed as "temporary". In any event, even if a period of residence could reasonably be described as "temporary", a "temporary" residence in a particular location would not prevent someone becoming ordinarily resident there. It is clear from the *Shah* test that a person's stay in a place does not have to be permanent, or even long-term, for ordinary residence to be acquired: it merely has to be "part of the regular order of his life *for the time being*, whether of long or short duration" (emphasis added).

60. It was recorded at this stage in 2002 that it was the wish of Mr X and his mother that he should remain at home with his mother for the

foreseeable future, although it was acknowledged that their long term plan was for Mr X to move to some form of supported independent living. It seems clear therefore that, certainly by this point, Mr X was living with his mother “as part of the regular order of his life for the time being” and had been doing so for some time, arguably from the time he originally moved there.

61. Council B have suggested that the original move to live with his mother Mrs Y was not of Mr X’s volition as it was suggested that, initially at least, Mr X did not want to live there and only reluctantly accepted the option of residing there pending a planned move elsewhere. No such planned move took place at this early stage however, despite several offers being made by Council A Council during the period from July to December 2001. Mr X declined all such offers, in effect choosing the alternative of remaining with his mother.

62. In this context it is perhaps helpful to consider the case of *Mohammed v Hammersmith and Fulham London Borough Council* ([2002] 1 All ER 176), in which the issue of “normal residence” for the purpose of the Housing Act 1996 was considered. In that case Lord Slynn of Hadley said:

“So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides.”

63. I consider that this reasoning can be applied to this case in respect of the early period of Mr X’s residence with his mother. His move from St Anne’s Centre might not have been by his choice and he might have initially been somewhat reluctant to live with his mother. However, he clearly accepted doing so and indeed it seems he declined alternative

offers when they were made during 2001. Whatever his initial reluctance might have been about living with his mother, it was the place where he was resident for the time being and any such reluctance would not have prevented his acquiring ordinary residence.

64. The evidence, in any event, indicates that, even if that were the case initially that there was some ambivalence about the placement on Mr X's part, that situation had clearly changed by, at the latest, 2002.

65. Mr X's residence with his mother continued until January 2003 when it became necessary to find an alternative because of his mother Mrs Y's deteriorating health. He continued to be employed at BTown3College throughout this time.

66. Mr X's residence with his mother was not, and it is not suggested that it was, the provision of residential accommodation under Part 3 of the 1948 Act. The deeming provision in section 24(5) of the 1948 Act therefore would not apply in this case so as to "overrule" the factual circumstances. The matter falls to be considered on the facts of the case.

67. I find that over the period between July 2000 and January 2003 Mr X had clearly voluntarily adopted his mother's home in CouncilB as his abode "for settled purposes as part of the regular order of his life for the time being". Accordingly, at the time of his move in July 2000, or sometime thereafter, and certainly prior to August 2002, Mr X's ordinary residence changed from being in CouncilA (the ordinary residence accepted by all parties while he was residing at the Abbey Opportunity Centre) to being in CouncilB, the area where he was physically present.

68. There is nothing in CouncilB's legal submissions that persuade me to the contrary. I do not accept their suggestion that Mr X's residence was a "temporary measure" throughout the whole of the period that he lived

with his mother (some two and a half years). The agreed statement of facts notes that certainly in August 2002 the situation was settled at that time, even if there was an intention to look to alternative independent arrangements at some time in the future. In correspondence dated 23 August 2002 it was noted, that it was “their [i.e. Mr X and his mother] wish that Mr X remain at home for the foreseeable future.”

69. Any placements thereafter should, accordingly, have been arranged by Council B as Mr X had acquired ordinary residence in Council B. However, it is clear from the documentation that there was a continuing disagreement between the two authorities as to responsibility and it appears Council A continued to make the practical arrangements for Mr X. This included making a series of arrangements for Mr X when he had to leave his mother’s home in 2003 because of her ill health. Those placements were, it seems, made under the provisions of section 21 of the 1948 Act and the placement with Mr and Mrs TrEespi’s daughter in 2003 was certainly a placement in premises registered at that time as a care home. This was therefore accommodation provided in accordance with Part 3 of the 1948 Act.

70. These placements were all in Council B and in practice Mr X remained living in Council B until 2012 when he chose to move to Council C. It is correct that the deeming provision in section 24(5) of the 1948 Act would apply to, certainly, the first stage of this period (in 2003) but its application would make no practical difference as Mr X had acquired ordinary residence in Council B prior to 2003. The application of the deeming provision in respect of his move to Mr and Mrs TrEespi’s daughter in 2003 (and either of the earlier placements which proved to be temporary) would have produced the same result as if there had been no deeming provision. He was “deemed” to be resident in Council B – where he was also, in practice, resident.



71. Therefore my determination is that Mr X became ordinarily resident in Council B on or very shortly after 8 July 2000, when he moved to live with his mother, and he remained ordinarily resident in Council B up to 26 February 2012.

Signed .....

Date .....