

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 12 2012)

1. I am asked by CouncilA and CouncilB to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mr X from 21st September 2010 when he moved to his current address at ResidenceG, Town1B, CouncilB.

The facts of the case

2. The following information has been obtained from the agreed statement of facts from CouncilA and CouncilB and copy documents supplied.

3. Mr X was born on xdate 1987. He has been diagnosed with a moderate learning disability and autistic traits.

4. From 2nd March 1995 until September 2006 Mr X lived with his mother and brother at the family home in CouncilA. In September 2006 he attended a 38 week residential course at the RNIB College in CouncilC until it closed in July 2007. From September 2007 until July 2010 he attended a 3 year residential course at College77 in TownD1, CouncilD, whilst there he occupied accommodation pursuant to a tenancy agreement and received housing benefit in respect of the accommodation. He moved back to CouncilA to live with his mother when his course at College77 ended.

5. Whilst at College77 Mr X attended transition sessions to prepare him for his move from the College at the end of his course. He was supported in this by his Transitional Worker. The outcome of the transition sessions was that he and his family informed CouncilA that Mr X did not wish to return to live in CouncilA and with his family’s support would be looking for accommodation in CouncilB to share with others from the college whilst exploring the purchase of property in the area.

6. CouncilA wrote to CouncilB in June 2010 to notify them that Mr X was making arrangements to become ordinarily resident in CouncilB and to request it to carry out a needs assessment for him. At that time the plan was for Mr X to purchase a property in TownE1 with seven other CouncilB residents TownE1 in a supported housing scheme run by College77.

7. This did not happen. Instead Mr X returned to live with his mother at the end of his course and in September 2010 he moved to the premises he currently occupies in CouncilB. He shares the property with two other people who were also students at College77. He signed the tenancy agreement for the property on 21 September 2010. The tenancy agreement was countersigned by Mr X’s mother to confirm that she was satisfied he understood the nature of the contract and had capacity to sign it and an independent person witnessed the signing. He receives housing benefit and council tax benefit in respect of the property.

8. Mr X enrolled on a college course at Town1B College in September 2010 and attended a project and a day employment skills development activity. Currently, he

attends Town1B College twice a week and participates in swimming and football activities in Town1B and a drama class in nearby TownB2 once a week.

9. Mr X attended a meeting with CouncilB and CouncilA social services departments on 29th November 2010 during which CouncilB were provided with all documents necessary to facilitate the completion of an assessment by them of his care needs.

10. CouncilB informed CouncilA on 22 March 2011 of its view that Mr X lacks capacity to decide where to live and on 28 November 2011 a social worker from CouncilB met with him to carry out an assessment of his capacity to consent to moving to his present home and his understanding of the content and consequences of signing the tenancy agreement.

The submissions of the parties

11. CouncilA submits that Mr X has been ordinarily resident in CouncilB since 21st September 2010 when he moved to his current address in CouncilB. It points to the fact that he and his family informed them that he did not wish to return to live in CouncilA at the end of his studies at College77 and that he is successfully living an independent life in CouncilB with friends and former College77 pupils where he attends college and drama and other activities.

12. CouncilB submits that in accordance with Vale Mr X's ordinary residence should be that of his mother's home in CouncilA. It points to the fact that he lived with his mother in CouncilA before he started and when he finished his education at College77 and asserts that he does not have capacity to decide where he wants to live or to understand the consequences of his signing the tenancy agreement for 3 ResidenceG, Town1B, CouncilB.

The relevant law

13. In making this determination I have considered the statement of facts and copy papers supplied together with the submissions. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department (the Guidance)¹ and the cases of R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309 ("Shah"), R v Waltham Forest London Borough Council ex parte Vale, the Times 25.2.85 ("Vale"). My decision is not affected by the fact that CouncilA has continued to care, manage and fund Mr X's care whilst attempts have been made to resolve this dispute.

14. Section 29(1) of the 1948 Act empowers local authorities to provide welfare services. The Secretary of State's Directions under Part 3 of the 1948 Act provide that

¹ Until 19th April 2010, this guidance was contained in LAC(93)7 issued by the Department. From that date it has been replaced by new guidance entitled "Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England". This determination refers to the new guidance as the guidance in force at the time the determination was made.

the local authority is under a duty to make arrangements under section 29(1) “in relation to persons who are ordinarily resident in their area”.

15. “Ordinary residence” is not defined in the 1948 Act. The guidance (paragraph 18 onwards) 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”.

16. But if Mr X did not have capacity to decide where he wanted to live in September 2010 his ordinary residence falls to be determined in accordance with the body of case law post-dating *Shah*. The leading case here is that of *Vale*. In that case it was held that where a person’s mental state is such that they are not capable of forming an intention to live in a particular place, the fact that the person may not therefore reside voluntarily in that place does not prevent it from being their ordinary place of residence. Such cases must be decided by reference to different considerations. Miss Vale was a young woman with severe mental disabilities. The solution adopted in her case was to treat her as residing at her parent’s home by analogy with the position of a small child, because she was so mentally disabled as to be totally dependent on a parent or guardian. Even though she resided in a residential care home, her parent’s home was her “base”. The judge in that case also set out an alternative approach or test. This alternative test means that one should consider all the facts of the case, including physical presence, and the nature and purpose of that presence, in a particular place as outlined in *Shah* but without requiring the person themselves to have voluntarily adopted the residence.

The application of the law

17. The first issue for me to consider is whether Mr X can be said to have adopted his residence in Town1B “voluntarily”. This raises issues about his mental capacity. If he does not have capacity to decide where to live I must apply the one of the tests set down in the *Vale* case instead.

18. The Guidance² makes clear that all issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005. Under this Act, it should always be assumed that all persons are competent to make their own decisions, including decisions relating to their accommodation and care unless it is established to the contrary.

² Paragraph 27

19. The test of capacity (which as the Guidance ³ makes clear is specific to each decision at the time it needs to be made) is that laid down in section 3 of the Mental Capacity Act 2005. That section states that a person is unable to make a decision for himself if he is unable to:

- (a) understand the information relevant to the decision
- (b) retain that information
- (c) use or weigh that information as part of the process of making the decision
- (d) communicate his decision (whether by talking, using sign language or any other means).

20. The only evidence provided to me which indicates that Mr X did not have mental capacity to make the decision to live in Town1B are the contents of Part 2 of the MCA form completed by a senior social worker from CouncilB in relation to an assessment conducted in November 2011 for the purpose of finding out whether in September 2010 Mr X did have capacity to consent to move to Town1B and to understand the contents and consequences of the tenancy agreement.

21. That form records that Mr X was agitated by the assessment and questions and was unable to understand or to answer questions directed at finding out what he remembered about and how he made the decision to move. Based on his two previous meetings with Mr X and the outcome of extensive talks with Mr X's senior carer of 15 months and others, the senior social worker concluded and reported that Mr X did not have capacity to have made a decision about where he was going to move to and did not have capacity to understand the contents of a tenancy agreement.

22. I do not think this evidence is sufficient to rebut the presumption with which I must start, which is that Mr X did have capacity in September 2010 to decide where he wanted to live.

23. Mr X has moderate learning difficulties and autistic traits. He is therefore likely to need some, possibly significant, support to help him make and communicate a decision about where he wants to live. Evidence, if any is needed, that Mr X does need support to make decisions is in the contents of the self directed support questionnaire which he completed with assistance from CouncilA Social Services and Transitional Worker. In summary, it advises that Mr X can make most day to day decisions himself once he has support to understand fully what is being asked of him and can also make his own decisions for more complex decisions although because these are not always in his best interests needs more support when things do not go as planned.

24. Mr X received significant support to help him make decisions about what he wanted to do on leaving College77. He took part in transitional meetings for this purpose with members of College77 staff and was allocated a Transitional Worker. A report provided by Transitional Worker in August 2011 states that he needed a great deal of support throughout the transitional process and that in weekly 1 ½ hour transition sessions which he attended with other learners who were also moving on from the College, he talked about and made clear that his wishes for the future were to

³ Paragraph 28

live with friends he had made at college, in a calm, quiet environment and that he did not want to move home and live with his mother or to live in a city environment.

25. Mr X also appears to have received significant support to help him understand the effect and consequences of the tenancy agreement, I have been provided with a statement by Mr X's mother in which she says that it was carefully broken down and explained to Mr X so that he could understand it, and the agreed statement of facts accepts that his mother held that view when Mr X agreement.

26. I have no reason to suppose that with this support, Mr X was unable and lacked the capacity to make a decision as to where he wanted to live at the end of his course at College77 or to understand the nature and content of the tenancy agreement. His inability some 13 months later to convey his reasons for moving to Town1B or his understanding of the decision making process and the content and nature of the tenancy agreement does not assist me in reaching a view as to his state of mind at the time he made the decision to move and sign the agreement. Nor does it rebut the presumption with which I must start, which is that Mr X had capacity to decide where to live and to understand the tenancy agreement at the time he made the decision and signed the agreement.

27. Therefore, in accordance with the Guidance and the provisions of the Mental Capacity Act 2005, I must and do take the view that Mr X did have capacity to decide where he wanted to live in September 2010. This means that the test in *Shah* applies and I have to consider in the light of all the circumstances of the case, both whether Mr X adopted his place of residence voluntarily and whether it was for settled purposes as part of the regular order of his life.

28. I am satisfied from the information available to me that Mr X chose to live at his present address in Town1B. My view is that he wanted to live an independent life in shared accommodation with other ex students from College77 and not with his mother in CouncilA. In my view he was aware that the move to Town1B would enable him to do this and for this reason voluntarily decided to move there. I am satisfied, from the statement of his mother that he knew the effect of signing the tenancy agreement.

29. I am also of the view that Mr X made the move to Town1B for settled purposes as part of the regular order of his life for the time being. I reach this view from the fact that he moved there to start a new independent life away from his family with college friends and enrolled at Town1B College in September 2010 and accessed a project, and a day employment skills development activity.

30. Although I do not consider that Mr X lacked the mental capacity to decide where to live on the relevant date (21 September 2010), I have considered what effect it would have on my determination if he did lack such capacity. As indicated above, there were two approaches set out in *Vale*. The first approach was to treat the person as a small child who had their parents' home as a base. The Guidance makes clear that this test should only be applied when making decisions about ordinary residence cases with similar material facts to those in *Vale* i.e. where the person whose ordinary residence falls to be determined is still relatively young and whose learning disabilities are so severe as to be totally dependent on a parent or guardian. This is not

the case with Mr X. He has moderate not severe learning disabilities and he is not wholly dependent on a parent or guardian.

31. Therefore even if Mr X did not have sufficient mental capacity in September 2010 to decide where to live, I think the alternative test in Vale is more appropriate to the facts of this case. This involves considering a person's ordinary residence as if they had capacity, but without requiring the person themselves to have adopted the residence voluntarily.

32. Applying this test and for the reasons set out above my view is that LG is ordinarily resident in Town1B in CouncilB and became so on 21 September 2010.

Signed

Dated