

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X AND MR Y (OR 19 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 and Mr Y.

The facts of the cases

2. The following information has been ascertained from the two statements of facts prepared by CouncilA and the supporting documents supplied. The other party to the dispute is CouncilB. CouncilB have not contributed to the statements of facts nor supplied any documents; however they have stated in correspondence that they do not contest CouncilA’s summaries of the facts.

Ms X

3. Ms X has a moderate learning disability and requires ongoing support in all aspects of her life. Ms X was raised in CouncilC, and in September 2007 she moved to UnitQ College66 in TownB1W, CouncilBWestRegion. This was arranged by the Connexions service in CouncilC and was funded by the Learning and Skills Council. During the first year of Ms X’s course, her family moved from CouncilC to CouncilA; however Ms X herself has never lived in CouncilA. While Ms X was at college, CouncilA’s Learning Disability Team assessed her as having a significant learning disability. CouncilA consider that Ms X has the capacity to choose where to live.

4. During her final year at college Ms X visited several UnitQ communities and eventually chose Accommodation B55, in TownB2, CouncilB. On 12 April 2010 Ms X moved to Accommodation B55, and has resided there since. CouncilA assisted Ms X in her move to Accommodation B55 and provide her with a package of care support. She has a tenancy agreement and receives housing benefit from CouncilB to help pay her rent.

5. On 20 June 2011 CouncilA wrote to CouncilB stating that they considered that Ms X was ordinarily resident in CouncilB and requesting CouncilB to carry out an assessment of Ms X’s needs. No response was received; CouncilA wrote again on 5 October 2011 stating that if CouncilB would not accept responsibility for Ms X, CouncilA would request an ordinary residence determination from the Secretary of State and would seek reimbursement for costs backdated to 1 October 2011.

Mr Y

6. Mr Y has a learning disability, epilepsy, and ongoing health needs. He requires 24 hour care and support in his home. Mr Y was born and raised in CouncilA. In 1977 he was placed in accommodation under section 21 of the 1948 Act in VillageB3, a UnitQ residential care home in CouncilB. In 2002 VillageB3 de-registered as a care home and began to provide supported living accommodation.

7. Mr Y has remained at VillageB3 (CouncilB); he receives a package of care support from CouncilA. CouncilA understand that Mr Y has a tenancy agreement with UnitQ and receives housing benefit from CouncilB to help pay his rent. CouncilA consider that Mr Y has the capacity to choose where to live.

8. Mr Y has stated that he is happy at VillageB3 and wishes to remain living there. His family no longer play an active part in his day to day life.

9. On 1 June 2011 CouncilA wrote to CouncilB stating that they wished to close their funding responsibility for Mr Y and requesting CouncilB to carry out an assessment of Mr Y's needs. CouncilA wrote again on 6 September 2011 stating that they would be looking to cease their involvement with Mr Y on 1 October 2011. They stated that if CouncilB would not accept responsibility for Mr Y, CouncilA would request an ordinary residence determination from the Secretary of State and would seek reimbursement for costs backdated to 1 October 2011.

Both cases

10. CouncilA received no response from CouncilB to the correspondence referred to above. On 9 December 2011, CouncilA made an application to the Secretary of State for a determination of ordinary residence for both Ms X and Mr Y. CouncilA have accepted interim responsibility for the provision of services pending resolution of the dispute.

11. In response to enquiries, CouncilB wrote to the Department of Health on 21 February 2012 stating that "this is not a dispute in the usual manner of two separate Councils being opposed on the issue of who is responsible for issues under Ordinary Residence guidance. I do not seek to contest CouncilA's summary of the facts nor are there any lengthy legal submissions to be put forward on our part". However CouncilB stated that there were safeguarding concerns about the accommodation, and requested that considerations of ordinary residence should be postponed until their safeguarding investigations had been completed.

12. On 24 February 2012 Departmental officials responded to CouncilB stating that it was not considered that safeguarding concerns impacted on the question of ordinary residence, and requesting CouncilB to provide the information necessary for the ordinary residence determination to proceed.

13. On 16 March 2012 CouncilB wrote to the Department stating that they would not seek to contest the determination of ordinary residence, and would accept that Ms X and Mr Y were resident in CouncilB. However on 21 May, CouncilA informed the Department that the matter was still unresolved. Following further correspondence with both authorities, it was clarified that CouncilB had accepted responsibility for Ms X and Mr Y from 1 April 2012, but that the period from 1 October 2011 to 31 March 2012 was still in dispute.

14. On 26 June Departmental officials wrote to CouncilB asking them to confirm whether they were able to agree with CouncilA the question of Ms X's and Mr Y's ordinary residence for the remainder of the period in dispute, and advising them that

the Secretary of State would make a determination if agreement was not reached by mid-July. No response was received.

The relevant law

15. I have considered the statements of facts, the submissions provided by CouncilA, the provisions of Part 3 of the 1948 Act and the Directions issued under it¹, the guidance on ordinary residence issued by the Department (“the OR guidance”)², and the leading cases of *R v Barnet ex parte Shah* (1983) 2 AC 309 (“*Shah*”). My determination is not affected by CouncilA assuming provisional responsibility for funding Ms X’s and Mr Y’s care.

16. 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 and attention which is not otherwise available to them. 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. The Secretary of State’s Directions under section 21 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”.

17. 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.

18. 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 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”.

19. CouncilA state that services to Ms X and Mr Y are being provided under section 2 of the Chronically Sick and Disabled Persons Act 1970; this provision requires local authorities to provide specified services to people in respect of whom they have functions under section 29 of the 1948 Act. In my view it is likely that the services supplied to Ms X and Mr Y are in fact provided under section 29 of the 1948 Act, rather than under section 2 of the 1970 Act. However for the purposes of this determination the distinction is not relevant, as the considerations as to ordinary residence are the same; my jurisdiction under the 1948 Act to determine questions relating to ordinary residence applies also to questions arising under section 2 of the 1970 Act, by virtue of subsection (1A) of that section.

20. “Ordinary residence” is not defined in the 1948 Act. The OR guidance (paragraph 18 onwards) notes that the term should be given its ordinary and natural

¹ Contained in LAC(93)10.

² “Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England” effective from 19 April 2010.

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

21. The period in dispute is 1 October 2011 to 31 March 2012. My determination is that Ms X and Mr Y were ordinarily resident in CouncilB for this period. The reasons for my determination are as follows.

Ms X

22. Ms X moved to Accommodation B55 in April 2010 and has resided there since. She chose that accommodation, having looked at a number of other options before selecting Accommodation B55. According to the information provided by CouncilA (which has not been challenged by CouncilB), Ms X considers Accommodation B55 her home and wishes to remain there for the foreseeable future. She had been living there for 18 months by the beginning of the period in dispute.

23. I consider that Ms X adopted Accommodation B55 as her residence voluntarily and for settled purposes, as required by the test in *Shah*. She chose to move there and signed a tenancy agreement. She is happy and settled there, and there is nowhere else that could be considered to be her home. I am not asked to determine the precise date when Ms X became ordinarily resident in CouncilB but in my view it is clear that she was settled there well before 1 October 2011, which is the start of the period in dispute. Therefore I determine that Ms X was ordinarily resident in CouncilB throughout that period, ie from 1 October 2011 to 31 March 2012.

Mr Y

24. Mr Y moved to VillageB3 in 1977, having previously lived in CouncilA. Initially he was provided with residential accommodation under section 21 of the 1948 Act. This meant that his ordinary residence was deemed to continue in CouncilA by virtue of section 21(5) of the 1948 Act. However that provision no longer applied to Mr Y when VillageB3 ceased to be a residential care home in 2002; therefore since that time his ordinary residence falls to be determined on the facts, in accordance with the test in *Shah*.

25. Since 2002 Mr Y has continued to live in VillageB3. He chose to remain there, in supported living accommodation, after the Village ceased to be a residential care home. According to the information provided by CouncilA (which has not been

challenged by CouncilB), he is happy there and wishes to remain living there, and he has stated that he has no wish to return to CouncilA.

26. I consider that Mr Y adopted VillageB3 as his residence voluntarily and for settled purposes, as required by the test in *Shah*. He has lived there since 1977. He chose to remain living there when the home de-registered, and it is understood that he has a tenancy agreement. He is happy and settled there. I am not asked to determine the precise date when Mr Y became ordinarily resident in CouncilB but in my view it is clear that he was settled there well before 1 October 2011, which is the start of the period in dispute. Therefore I determine that Mr Y was ordinarily resident in CouncilB throughout that period, ie from 1 October 2011 to 31 March 2012.

Signed on behalf of the Secretary of State for Health

Dated