

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 5 2012)

1. I am asked by Council1E (in England) to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Ms X for the purpose of Part 3 of that Act. The period for which Ms X’s ordinary residence is in dispute is from 26th May 2002 (when Ms X moved to Scotland in Council1S’s area) until the present time.

Jurisdiction

2. Council1S does not accept that the Secretary of State has jurisdiction. It argues that only Scottish Ministers can determine the dispute as the question in its view is not whether Ms X remains ordinarily resident in Council1E, but rather whether she has become ordinarily resident in Council1S for the purposes of the Social Work (Scotland) Act 1968 (“the 1968 Act”). Council1S says that only Scottish Ministers have power to make determinations under that Act.
3. The Secretary of State and the Scottish Ministers have entered into a Memorandum of Understanding signed by them on 16th and 13th December 2011 respectively. The Memorandum applies from 16th December 2011. Paragraph 3 of the Memorandum provides for the Secretary of State to determine a cross-border dispute where the dispute 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. The Secretary of State and Scottish Ministers have agreed the Secretary of State should determine the dispute.
5. Ms X is in receipt of services under Part 3 of the 1948 Act. This determination is made under the 1948 Act. It is not a determination under the 1968 Act as I agree with Council1S that the Secretary of State does not have powers to make a determination under that Act.
6. Prior to determining the dispute the Scottish Ministers have been consulted and have been provided with a draft of this determination. Scottish Ministers are content with this determination and the Secretary of State has taken into account this view in making this determination.

Facts of the case

7. The following facts are derived from the Statement of Facts prepared by Council1E and the supporting documents. Council1S did not comment on the Statement of Facts, but there does not appear from the submissions of Council1S to be any dispute in relation to the facts of the case except in relation to the question of whether or not Council1E meet the accommodation costs of Ms X.
8. Ms X was born on xdate 1957.

9. Ms X suffers from a mild learning disability. Ms X has capacity to make decisions as to where she wishes to reside.
10. Ms X lived with her mother until her mother's death in January 1982. She then lived with her sister for a short while before moving in with her grandmother, both of whom lived in RegionQ in England.
11. On 19th August 1983 she referred herself to Council1E and asked for a hostel placement. She stayed temporarily in other hostels before moving into one at 22 HostelV, RegionR in England.
12. On 5th October 1987 she moved from there into a group home in RegionT in England and on 23rd September 1992 she returned to the hostel at HostelV.
13. On 29th January 1994 she began to live in an adult placement in Area77W, RegionW in England with Mrs FC1 as her carer.
14. On 23rd August 1997 she moved to Area88W, RegionW in England again as an adult placement. Her new carers were Mr & Mrs FC2. Ms X was placed with Mr & Mrs FC2 by a scheme for placing adults with learning disabilities with carers in Council1E and which is also run by Council1E.
15. On 1st March 2002 Mr & Mrs FC2 moved to Council1S's area and on 26th May 2002 Ms X moved to live with Mr & Mrs FC2 from RegionQ in England where she had been in respite care.
16. On 25th July 2003 Mr & Mrs FC2 and Ms X moved within the Council1S's area to Town1S, Council1S (Scotland). Ms X has resided there with Mr & Mrs FC2 since then. Under the placement agreement Mr & Mrs FC2 agreed to meet Ms X's support needs, including in respect of budgeting and planning large purchases, arranging transport, promoting safe relationships, helping with hair, nails and make-up. Council1E pays a placement fee which covers meals, laundry, utilities and furniture and other household items. In respect of accommodation, Council1E have confirmed that Ms X is paid housing benefit administered by Council1S which is received on her behalf by Council1E (England) and then passed on to Mr & Mrs FC2 as part of the placement fee.
17. Ms X receives respite care in Council1E each year funded and arranged by Council1E. This enables Ms X to maintain contact with her brother and sister and with other friends. She is funded for 21 days, but in fact spent 15 nights in RegionQ in England in 2003; 14 in 2004; 17 in 2005; 12 in 2006; 9 in 2007; 21 in 2008; 11 in 2009; and 12 in 2010.
18. The documents provided by Council1E with the Statement of Facts include a number of reports of recent assessments carried out by Council1E with Ms X, dated 8th August 2008, 29th July 2009, 21st September 2009 and 18th August 2010. These assessments show Ms X to be very happy in her placement with Mr & Mrs FC2. They record Ms X's attendance at college and her voluntary work in the Council1S area. They also describe her day to day life and her social life. The 2008 assessment report records Ms X as saying that she loves living with Mr &

Mrs FC2 and living in Scotland and that is her home as much as she loves visiting her friends in RegionQ in England for holidays. In the 2010 assessment report she is reported as saying that she doesn't want to move back to RegionQ (in England). She again expressed the view that RegionQ was good for a holiday, but that she loved Scotland.

19. By letter dated 27th March 2007, Council1E asked Council1S to take over responsibility for meeting the care and support needs of Ms X. Correspondence has ensued in which Council1S has refused to take on such responsibility.

Relevant law

20. I have considered all the documentation submitted by both parties. This includes the Statement of Facts prepared by Council1E and representations from both local authorities. I have also considered the provisions of Part 3 of the 1948 Act, the Department of Health guidance in LAC (93)7¹ and "*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*"² ("the Ordinary Residence Guidance"), the leading case of R v Barnet ex parte Shah (1983) 2 AC 309 ("Shah") and Levene v Inland Revenue Commissioners (1928) AC 217 ("Levene"). My determination is not influenced by the fact that Council1E is currently providing Part 3 services.

21. Section 29 of the 1948 Act empowers local authorities to provide welfare services for those ordinarily resident in the local authority's area.

22. 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 and attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under section 21 is, subject to further provisions of Part 3 of the 1948 Act, the authority in whose area the person is ordinarily resident.

23. By virtue of section 21(7) of the 1948 Act, a local authority can, where it is providing accommodation under section 21, also make arrangements for the provision on the premises in which the accommodation is being provided of such other services as appear to the authority to be required.

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.

24. Section 24 of the 1948 Act 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*

¹ LAC (93)7 was the guidance applicable at the relevant time, and until 19th April 2010.

² Updated edition of the guidance published in July 2011.

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 Shah, Lord Scarman held—

“Unless, therefore, 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.”

Further, in the case of Levene, Lord Warrington of Clyffe said—

““Ordinarily resident” also seems to me to have no such technical or special meaning.... If it has any definite meaning I should say that it means according to the way in which a man’s life is usually ordered.”

26. The Ordinary Residence Guidance provides at paragraphs 18 and 19 clear guidance on determining a person’s ordinary residence. It states—

“The concept of ordinary residence involves questions of fact and degree, and 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.”

27. Paragraphs 120 to 128 of the Ordinary Residence Guidance deal specifically with Adult Placement Schemes. It says—

“Shared Lives Schemes (also known as Adult Placement Schemes)

120. Local authorities or independent providers may operate shared lives schemes (also known as adult placement schemes) which offer an alternative form of social care accommodation and support for people aged 18 and over. Under the scheme, ordinary family households typically provide accommodation and support to people with social care needs, offering the person the opportunity to become part of the family. However, shared lives services do not always involve the provision of accommodation and can include day care support in the carer’s home or kinship support, where a person acts as “extended family” to a person who is living in their own home.

121. Where a person enters accommodation under the shared lives scheme, they usually pay for their accommodation themselves, often through housing benefit, with any social care needs being met by services provided under section 29 of the 1948 Act. If the person moves to a new local authority for the purpose of entering shared lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah (see paragraphs 18-22 (*Meaning of ordinary residence*)).

123. The deeming provisions do not apply to section 29 of the 1948 Act. Therefore, in situations where a person’s previous local authority is providing or paying for services under section 29 of the 1948 Act, it does not mean that ordinary residence is retained in the previous authority. Any arrangements between local authorities of the kind referred to in the previous paragraph would not prevent the person from acquiring an ordinary residence in the area in which they are living. Ordinary residence disputes arising in relation to services provided under section 29 that are submitted to the Secretary of State for determination will be decided

accordingly. See ordinary residence determination 9-2008 for an example of how the ordinary residence provisions apply to shared lives schemes.

124. Shared lives accommodation is not usually arranged under section 21 of the 1948 Act. This is largely because the concept of shared lives is about “family” and “belonging” with individuals making their own choice to enter a shared lives scheme rather than being placed in the scheme by their local authority. Therefore, local authorities may recommend that a person enters a shared lives scheme. They may also help the person to choose a scheme and facilitate their move but such advice and assistance would usually fall short of “making arrangements” within the meaning of section 21.

125. However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in shared lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home.

126. If a local authority does use section 21 to place a person in accommodation under the shared lives scheme, the section 24(5) deeming provision would apply (see paragraphs 9-15 (*Residential services*)) for more information on residential accommodation under section 21 of the 1948 Act). The person would remain ordinarily resident in the area of the placing local authority regardless of where they were accommodated under the shared lives scheme.”.

Submissions of the Councils

28. Council1E submits that Ms X has been ordinarily resident in Council1S’s area since March 2003, if not earlier. Council1E in the Statement of Facts prepared by it says that it is providing support to Ms X under section 29 of the 1948 Act and/or section 2 of the Chronically Sick and Disabled Persons Act 1970 (“the 1970 Act”).
29. Council1S submits that Ms X is ordinarily resident in Council1E’s area. It contends that Ms X has chosen to live with Mr & Mrs FC2 and not in Council1S. It argues therefore that the test in Shah of a person adopting a place voluntarily and for a settled purpose is not met in Ms X’s case. It argues that in a sense her presence in Council1S is an “enforced presence”. Council1S also points to the fact that Council1E organised the placement and have reviewed the placement on a number of occasions over the years. Council1S further argues that as Council1E has been contributing to the accommodation costs, the placement with Mr & Mrs FC2 was made in exercise of the powers under section 21 of the 1948 Act and therefore the deeming provision in section 24(5) of the 1948 Act applies.

Determination

30. The first issue to determine is whether Ms X’s placement is made by Council1E under (1) section 21 of the 1948 Act or (2) section 29 of the 1948 and section 2 of the 1970 Act. It is clear that Ms X is being provided with an adult placement scheme. Adult placement schemes are not generally arranged as residential accommodation under section 21 of the 1948 Act.
31. Instead, the accommodation is paid for by the person for by the person themselves usually by means of housing benefit – with associated domiciliary care services

being provided under section 29 of the 1948 Act and section 2 of the 1970 Act. This is the case here. Ms X's accommodation costs are met through housing benefit.

32. Accordingly, I find that the placement was made under section 29 of the 1948 Act and section 2 of the 1970 Act. That being the case, the deeming provision in section 24(5) of the 1948 Act does not apply to deem her resident in Council1E.
33. Ms X moved to Council1S (Scotland) 26th May 2002. She has lived in the area of Council1S since then – a period of almost 10 years. She is very happily settled there and attends college and undertakes voluntary work. She has formed friendships and has links to the community. Whilst she has maintained links with Council1E and visits annually for respite care and to visit her brother and sister and other friends, it is clear from the assessments that she regards these periods as holidays and that her home is in Scotland.
34. It is agreed that Ms X has capacity to decide where to live. The report on Ms X's placement by her advocate dated 7th March 2002 records her decision - "I have made up my mind and I am going to Scotland. I am not going to change my mind. They [Mr & Mrs FC2] are really nice people."
35. A decision to move to a place because of another's presence in that place does not prevent a person from acquiring ordinary residence in that place. The test in Shah requires that a person adopt a place voluntarily and for settled purposes as part of the regular order of the person's life for the time being whether of short or long duration. That test can be met (and indeed is met in Ms X's case), where the motive for a move is to live with another person.
36. The fact that Council1E has taken responsibility for Ms X for the whole period that she has lived in Council1S's area is not a relevant consideration in determining the ordinary residence of a person.
37. In conclusion, my determination is that Ms X has been ordinarily resident in the area of Council1S since 26th May 2002.

Signed on behalf of the Secretary of State for Health.....

Dated.....