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

Introduction

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 for the purposes of Part 3 of that Act.

The facts of the case

2. The following facts are derived from the statement of facts agreed by CouncilA and CouncilB and other documents submitted by them.

3. Mr X was born on xdate 1941. He has Down's Syndrome. CouncilA and CouncilB agree that Mr X has capacity to make decisions about care and residence and to enter into a tenancy agreement.

4. CouncilB placed Mr X in a QQ42[1] Ltd accommodation located in CouncilA on 10 July 1965. Mr X has since resided in various QQ42 Ltd houses in CouncilA. Mr X has lived in a QQ42 Ltd accommodation called ResidentialUnitS for almost 46 years.

5. In 2006, Mr X asked CouncilB to transfer him to another QQ42 Ltd house in Scotland, the CareHomeS*, which he considered would better cater to his needs as a senior citizen with Down's Syndrome. In 2007, CouncilB arranged for Mr X to visit alternative accommodation in the CouncilA area (Organisation77 Trust), but Mr X did not wish to move to either place. In 2009, Mr X again asked to move to the CareHomeS*.

6. On 15 October 2009, Mr X entered into a private tenancy agreement for his current house on ResidentialUnitS, TownA1. This was because the QQ42 Ltd provider deregistered as a residential care home and started offering supported living accommodation to tenants on the same site.

7. The landlord of ResidentialUnitS, TownA1 is QQ42 Ltd. Mr X's rent is fully funded by housing benefit. The Region1A (located within the area of CouncilA) pays the benefit directly to QQ42 Ltd at a rate of £106.07 per week. Mr X does not receive any deductions or set off in his rent. Although Region1A pays the benefit to QQ42 Ltd, Mr X is personally liable for his rental payments. Mr X's personal care is provided by a separate domiciliary care agency.[1]

8. In March 2010, CouncilB reviewed Mr X's care package. On 29 March 2010, CouncilB wrote to CouncilA asking it to take over responsibility for Mr X. On 29 April 2010, CouncilA wrote to CouncilB saying it did not consider him an ordinary resident of CouncilA. In August 2010, CouncilB wrote to CouncilA to advise it would terminate funding for Mr X's care package on 20 November 2010.

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[1] Letter from CouncilB dated 12 January 2010 about the nature of Mr X's tenancy, the facts of which were not disputed by CouncilA.

9. Mr X's sister and brother informed CouncilB in 2010 that they supported Mr X remaining at ResidentialUnitS. However, on 1 August 2011, Mr X's siblings complained to CouncilB that CouncilB failed to: assist Mr X to find more suitable accommodation, and properly advise Mr X about the implications of signing the tenancy agreement on 15 October 2009.

The relevant law

10. 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 (publication date 15 April 2011, "OR Guidance"); and
    - the leading case R v Barnet LBC ex parte Shah (1983) 2 AC 309 ("Shah"), the House of Lords decisions in Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72 and R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, Mohammed v Hammersmith and Fulham London Borough Council [2002] 1 All ER 176, and London Borough of Greenwich, R (on the application of) v Secretary of State for Health & Anor [2006] EWHC 2576 (Admin).

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

12. 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).

13. Section 24(5) (the 'deeming provision') 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.

14. Section 26(1) of the 1948 Act provides that, instead of providing the accommodation themselves, local authorities can make arrangements for the provision of the accommodation with a voluntary organisation or any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. In particular, subsections 26(2) and (3A) state that arrangements under that section must provide for the making of payments by the local authority to the other party in respect of the accommodation at any rates determined under the arrangements. Additionally,

to satisfy subsection 26(3A), the local authority must be liable for any fees not paid by the service user. Residential accommodation provided by an organisation or person that is not a local authority will not fall within section 21 if it does not meet the requirements for arrangements for the provision of accommodation in section 26.

15. 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.

The application of the law

16. The key issue is whether Mr X is being provided with accommodation under section 21 of the 1948 Act under the private tenancy agreement he entered into with QQ42 Ltd on 15 October 2009. Before entering into the tenancy, the parties agree that CouncilB's placement of Mr X in QQ42 Ltd accommodation in CouncilA was provision of accommodation under section 21. As a consequence of the section 24(5) deeming provision, the parties agree that Mr X was deemed to remain ordinarily resident in CouncilB until that date.

17. CouncilB submit that Mr X ceased to be ordinarily resident in CouncilB when he entered into the tenancy on 15 October 2009. I note that CouncilB has submitted two different dates for the change in ordinary residence in its correspondence with CouncilA. CouncilB initially submitted that the change in ordinary residence occurred when Mr X signed a tenancy agreement on 1 April 2003 as part of a supported living care arrangement.[2] However, in subsequent correspondence, CouncilB submitted that the change in ordinary residence occurred when Mr X signed the tenancy agreement on 15 October 2009. As the Statement Of Facts and CouncilB's legal submissions refer only to the 15 October 2009 tenancy agreement, I have treated this date as the relevant date for the change in ordinary residence argued by CouncilB.

18. If Mr X's current accommodation arrangements continue to fall under section 21, Mr X will be deemed to be ordinarily resident in CouncilB's area because of the continuing operation of the section 24(5) deeming provision. However, if his accommodation is independent living accommodation that does not fall under section 21, then the deeming provision will not apply and it will be necessary to consider whether he has acquired a new ordinary residence in CouncilA's area.

19. For the reasons given in paragraphs 20 to 36, my determination is that, since 15 October 2009, Mr X has been ordinarily resident in CouncilA's area. He has not been provided with accommodation within section 21 since he entered into the tenancy agreement on that date.

Reasons for decision

[2] Letter from CouncilB (Business Support Manager to Head of Service) to CouncilA, undated (however, the letter appears to have been sent around 20 September 2010 because it gives three months' notice for terminating Mr X's funding as concluding on 20 November 2010); Letter from CouncilB to CouncilA dated 6 April 2011; Letter from CouncilB to CouncilA dated 26 April 2011.

20. One of the conditions for qualifying for accommodation under section 21 is that, without the provision of such accommodation, the care and attention which the person requires would not otherwise be available to them. From at least 15 October 2009, Mr X has been receiving the care and attention he requires whilst living in private residential accommodation under his tenancy. The case of R (on the application of Westminster City Council)v National Asylum Support Service [2002] UKHL 38 confirmed that a person needing care and attention that could be provided in their own home under a tenancy agreement would not normally be entitled to accommodation under section 21.

21. Additionally, in order for a person's accommodation under a private tenancy agreement to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet the requirements of section 26(2) of the 1948 Act. Section 26(2) provides that the local authority shall recover from the person a refund for the amount of payments made by the local authority on the person's behalf to the accommodation provider. The payment arrangements must provide for the making of payments by the local authority to the accommodation provider at any rates determined under the arrangements. This was confirmed in the case of Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72, in which Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.

22. Sections 26(3) and (3A) make further provision about the payments arrangements for Part 3 accommodation. Section 26(3) provides that the person is liable to refund the local authority the amount of payments made on their behalf, or such lesser amount as the local authority is satisfied they should be liable to pay. Section 26(3A) provides that, alternatively, the person can pay the accommodation provider directly, and the local authority can pay any difference between this amount and the amount the local authority would otherwise have been liable to pay. To satisfy section 26(3A), the local authority must also be liable for the rent payments in the event that the person defaults in their payments to the accommodation provider.

23. The OR Guidance says that '[w]*here a person moves from residential care under Part 3 of the 1948 Act to accommodation under a tenancy agreement, it is unlikely that there would be any "arrangements" as required by section 26(2) or (3A)*'.[3]

24. The tenancy agreement that Mr X entered into with QQ42 Ltd does not meet the requirements of section 26. Mr X's rent is fully funded by his housing benefit. He does not receive any refunds or offsetting by any local authority for his rental payments. He is personally liable in the event that he defaults on his rental payments.

25. The effect of my determination is that Mr X's accommodation is not accommodation in which he has been placed pursuant to arrangements made by CouncilB under section 21. If the provision of accommodation does not fall within section 21, the section 24(5) deeming provision does not apply. If section 24(5) does not apply, then Mr X's ordinary residence falls to be determined according to the normal rules.

26. Such determination is still necessary because Mr X requires welfare services under section 29 of the 1948 Act. The OR Guidance says that, where a person moves out of

[3] OR Guidance, paragraph 95.

residential care into independent living accommodation that does not fall under section 21, the person would usually acquire a new ordinary residence in that area. The local authority in the area in which the person is living becomes responsible for the provision of any community care services the person is assessed as needing under section 29.

27. The OR Guidance also says a person is likely to acquire a new ordinary residence in an area if a care home deregisters to provide independent living accommodation on the same site.[4] This appears to be the case here. The QQ42 Ltd accommodation in which Mr X was living deregistered as a residential care home and the QQ42 Ltd started providing supported living accommodation to private tenants on the same site.[5]

28. "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 the relevant test of where that person is ordinarily resident is the one set out in Shah. In this 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.

29. I am satisfied from the information available to me that Mr X had and has the necessary mental capacity to make decisions about where he wishes to live.

30. CouncilA submit that Mr X cannot be considered to be ordinarily resident in CouncilA because he did not 'voluntarily adopt' TownA1 (in CouncilA) as his home or choose to live there for 'settled purposes' (as required by the Shah test). This is because he expressed to CouncilB on at least two occasions that he wanted to move to the CareHomeS* in Scotland. The question is whether he could be said to be ordinarily resident there even though he did not particularly want to be there.

31. The statement of facts states that Mr X expressed a desire to move to the CareHomeS* to CouncilB in 2006 and 2009. It appears that Mr X's siblings also took him to visit the CareHomeS* in 2007. The statement of facts also contains extracts from CouncilB's social work file notes that indicate CouncilB arranged for Mr X to visit another residential care home in CouncilA in March 2007, and that Mr X's family and QQ42 Ltd had not identified an urgent need for Mr X to be moved during CouncilB's annual review of Mr X's care in July 2008. The statement of facts contains extracts from emails to CouncilB from Mr X's siblings in 2010 indicating support for Mr X remaining in the QQ42 Ltd accommodation in CouncilA.

32. The issue of enforced presence was considered in Shah. Lord Scarman said that in determining ordinary residence, the residence must be voluntarily adopted:

[4] OR Guidance, paragraphs 95-97.
[5] Letter from CouncilB dated 12 January 2012.

> Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

33. This indicates that residence may not be voluntary if it is enforced, but I do not understand CouncilA to be suggesting that Mr X's residence in CouncilA was enforced. He might have preferred not to be there, but that is not the same as saying that he was compelled to stay there against his will.

34. In this context it is also 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" was considered for the purposes of the *Housing Act 1996*. 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."

35. I consider that this reasoning can be applied to the present situation. Mr X was not being forcibly held in CouncilA. Although he expressed a preference to move to Scotland, he had accepted (albeit reluctantly) ongoing residence in CouncilA. That was where he was resident for the time being and, although it may not have been his first choice, it did not prevent him acquiring ordinary residence there. Mr X appears to have voluntarily entered into the tenancy agreement at TownA1 (in CouncilA) for the purpose of remaining in that accommodation, and regards it as his home for the foreseeable future. While Mr X expressed the desire to move in 2006 and 2009, the statement of facts does not indicate that he has made more recent requests to move there. It therefore appears that Mr X adopted his abode at TownA1 voluntarily and for a settled purpose.

36. Accordingly, I determine Mr X is resident in CouncilA for the purposes of the 1948 Act and has been so resident since 15 October 2009.

CouncilA submissions

37. I now turn to consider CouncilA's submissions that CouncilB acted unlawfully in failing to assist Mr X to move to a care home in Scotland and that, but for this failure, Mr X would not have entered into the 15 October 2009 tenancy agreement. Specifically, CouncilA says CouncilB breached the *National Assistance Act 1948 (Choice of Accommodation) (Amendment) Directions 1993* (the *1993 Directions*). The *1993 Directions* apply to the provision of Part 3 accommodation. The parties do not dispute that, prior to Mr X entering into the tenancy agreement, CouncilB provided him with Part 3 accommodation.

38. The *1993 Directions* provide that local authorities in England have a duty to arrange places in care homes in England and Wales of people's choice, subject to certain conditions. Sections 26(1A) and (1B) of the 1948 Act provide that such arrangements can only be made with care homes in England registered under Chapter 2 of Part 1 of the *Health and Social Care Act 2008* in respect of a regulated activity carried on in the home, or care homes in Wales registered under Part 2 of the *Care Standards Act 2000*. Section 26 does not permit English local authorities to make arrangements with

voluntary or private homes in Scotland. However, a Scottish local authority can arrange residential accommodation for a resident of England and make arrangements to recover the cost of making the arrangements from the relevant English local authority. The *1993 Directions* provide that English local authorities are expected to be '*willing to liaise with Scottish local authorities for the latter to make the appropriate arrangements*'.[6]

39. CouncilA also submit that I should consider the High Court decision of London Borough of Greenwich, R (on the application of) v Secretary of State for Health & Anor [2006] EWHC 2576 (Admin). In that case, the SofS submitted that, if a local authority was found to have acted unlawfully by not entering into arrangements that should have been made but were not made, then the first local authority should repay the second local authority from the relevant date when the first local authority should have provided Part 3 accommodation.

40. CouncilA claims that CouncilB acted unlawfully by failing to comply with its statutory duty under the *1993 Directions* to make residential care arrangements for Mr X in Scotland. This is a matter that CouncilA can only pursue through judicial review. It is not a question within my jurisdiction under section 32(3) of the 1948 Act. Therefore, my determination set out in paragraph 37 stands, i.e. that Mr X is resident in CouncilA and has been so resident for the purposes of the 1948 Act since 15 October 2009.

Signed …………………………………………………………………….

Dated ………………………………………………………………………

[6] *1993 Directions*, paragraphs 2-7.