

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 1 2013)**

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.

**The facts of the case**

2. The following information has been ascertained from the agreed statement of facts prepared by the two authorities involved in the dispute and the supporting documents supplied. Mr X was born on xdate 1975 and has a severe learning disability, autism, epilepsy, bi-polar affective disorder and temporo-mandibular joint dysfunction affecting his ears. He has challenging behaviour and limited verbal communication. He has been assessed as lacking the capacity to decide where to live.

3. In October 1975 Mr X was placed into foster care following a "non-accidental" injury caused by his father. A care order was granted to CouncilA on 12<sup>th</sup> November 1975. In May 1976 Mr X moved to a residential nursery in CouncilA following a breakdown in the foster placement. In July 1979 Mr X moved to a children's home in CouncilA and in August 1986 he was placed in a long term foster placement in AreaOne in CouncilC with respite 2-3 nights per month.

4. Mr X turned 18 on xdate 1993 and on 30<sup>th</sup> March 1993 he moved into a residential care home in AreaOne in CouncilC still funded by CouncilA. The agreed statement records that this was because the foster placement had broken down.

5. In 1999 contact was re-established with Mr X's mother and a yearly meeting was arranged. In July 2002 Mr X was detained in hospital under section 2 of the Mental Health Act 1983 and discharged a month later back to the care home in AreaOne in CouncilC. In October 2002 Mr X moved to D44Home residential care home, TownD, CouncilD as the home in AreaOne (CouncilC) was no longer able to meet his needs.

6. In 2004 Mr X's mother died. Mr X was referred to the Independent Mental Capacity Advocate Service ("IMCAS") in August 2006 and a report from the service dated 21<sup>st</sup> February 2007 records that "It appears Mr X's behaviour is being managed to fit in with his living environment at D44Home" and that "Mr X appears to be responding to work encouraging him to go out more in the community". It further notes that "brokerage could be considered as a way of finding a more appropriate care package for Mr X".

7. The agreed statement records that also in 2007, Skills for People/IMCAS produced a support plan which indicated that a single person tenancy in the TownD, CouncilD locality would meet Mr X's needs and offer a much greater quality of life.

8. On 1<sup>st</sup> May 2008 a social worker for CouncilA, assessed Mr X as lacking the capacity to decide whether to stay in residential accommodation or to move to supported living in the community. Skills for People/IMCAS produced an interim report dated 28<sup>th</sup> May 2008, following a referral by the social worker, which stated that “supported living has the potential to provide a much more fulfilling and satisfying life for Mr X and that it would be appropriate to make that decision in principle now”.

9. The agreed statement records that a tendering process identified Voluntary GroupZY as the proposed service provider whilst shared ownership was being investigated. An interim move to a care home at 123RoadB in CouncilB was proposed in order to establish a staff care team who could become confident in meeting Mr X’s needs before a move to supported living. The agreed statement also records that it “became clear that D44Home was not meeting his needs”.

10. A further referral to Skills for People/IMCAS was made on 26<sup>th</sup> November 2008 and the “IMCA Final Report” is dated 31<sup>st</sup> December 2008. This concluded that:

“It appears that the long term plan to provide supported living for Mr X, specifically designed for his individual needs in a house to be purchased within the area in which he is familiar Mr X greatly improve Mr X’s quality of life and respect his rights and wishes....On balance I feel the transition into supported living Mr X be more successful if he can move into 123RoadB as an interim measure...The transition would be considerably enhanced if it were possible for him to maintain his relationship with the 2 members of staff from D44Home who he likes and trusts most”.

11. In January 2009 Mr X moved into 123RoadB, CouncilB run by Voluntary GroupZY. This placement was made under section 21 of the 1948 Act by CouncilA and was intended to be for six months. The agreed statement of facts notes that attempts were made to maintain Mr X’s contact with TownD (i.e. D44Home) however he was at best indifferent and at times distressed.

12. Skills for People produced an advocacy report dated 2<sup>nd</sup> June 2010 which records that “since his move to CouncilB Mr X has become much more settled, he is engaging in lots more activities and has maintained the connections to the broad geographical area that he has built up while living at D44Home..Mr X’s support plan is still current and should form the basis of his future support”.

13. There then followed a period of correspondence between the respective authorities concerning social care responsibility for Mr X which has culminated in this reference for a determination.

14. In October 2010 CouncilA were contacted by Mr X’s sister since she had found out that she was adopted and was seeking to contact her birth family. As she was 8 months pregnant at the time, she was advised to contact CouncilA again once she had given birth and her situation was calmer.

15. In July 2011 Mr X was again assessed by CouncilA as lacking the capacity to decide whether to move from residential care into his own tenancy. On 6<sup>th</sup> July 2011 Voluntary GroupZY indicated that 123RoadB would be closing. A social worker for CouncilB sent a housing application form to CouncilA for completion and this was duly returned. CouncilA again referred Mr X to IMCAS and completed a re-assessment of his needs which was also forwarded to CouncilB.

16. On 6<sup>th</sup> December 2011 CouncilB made a reference to the Continuing Healthcare Funding Panel who met on 15<sup>th</sup> December and refused to discuss Mr X as they considered he was the responsibility of CouncilA. On 8<sup>th</sup> December, CouncilB wrote to CouncilA claiming that Mr X required residential care as a result of a deterioration in his behaviour. CouncilA's enquiries found nothing significant in Mr X's behaviour to warrant a change to the proposed care plan.

17. A report from IMCA Service dated 4<sup>th</sup> January 2012 noted that "at the meeting on the 28/7/11 it was agreed by all present that Mr X should continue to reside in the CouncilB area. In the three years that Mr X has lived at 123RoadB he has built a connection with the area. He recognises places within CouncilB and he has a structured routine and social calendar focused in the area". It was also noted that "concern has been raised in relation to his level of care needs and if this is an appropriate level to be provided in a tenancy situation".

18. On 5<sup>th</sup> January 2012 Housing CouncilB informed CouncilA that it worked in partnership with CouncilB Learning Disability Team and had been instructed not to offer housing to Mr X whilst the funding dispute was on-going. CouncilA advised they would fund pending a determination of ordinary residence. The dispute continued and Mr X was not offered any housing.

19. On 8<sup>th</sup> February 2012 NHS TrustD prepared a report which noted that "The evidence from the Community Challenging Behaviour pathway and the formulation meeting suggests that Mr X is getting the right support from the right people in the right place. Although the physical environment may have to change for Mr X, it would not be in his best interests for him to lose the established, therapeutic support he currently receives from a consistent and familiar staff team".

20. On 9<sup>th</sup> February 2012 CouncilA applied to the Court of Protection for a single order authorising the Authorised Officer for Property and Affairs for CouncilA to enter into or terminate agreements on Mr X's behalf. Such an order was granted on 26<sup>th</sup> April 2012.

21. Also in April 2012 Mr X had a holiday near to his sister's home in CouncilE. Contact went well and twice yearly contact in the future was agreed upon.

22. Voluntary GroupZY extended the placement at 123RoadB until 4<sup>th</sup> June 2012. On 3<sup>rd</sup> May 2012 CouncilB Housing offered a tenancy to Mr X which commenced on 14<sup>th</sup> May 2012 although Mr X moved into CourtB, CouncilB on 30<sup>th</sup> May 2012 once decoration of the property had been completed. CouncilA continues to commission the care package for Mr X pending this determination.

## **The relevant law**

23. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by Council A and Council B, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department and the cases of *Shah v London Borough of Barnet* (1983) 1 All ER 226 (“Shah”) and *R v Waltham Forest London Borough Council, ex parte Vale* (1985) the Times 25<sup>th</sup> February (“Vale”). My determination is not influenced by the provisional acceptance by Council A of responsibility for funding services under Part 3 of the 1948 Act.

24. 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”.

25. 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.

26. 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. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated Mr X make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

27. The duty to provide welfare services under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

28. “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

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” .*

29. The guidance goes on to say that when a person does not have the capacity to decide where he wishes to live, one of the alternative tests in the case of *Vale* should be used to establish ordinary residence. In *Vale*, it was held in the case of a person with severe learning disabilities who was totally dependent on her parents, that the concept of her having an independent residence of her own which she has adopted voluntarily and for which she has a settled purpose did not arise. She was in the same position as a small child. Her ordinary residence was that of her parents because that was her “base”. Alternatively, the court said that if it was wrong as to Miss Vale having an ordinary residence with her parents, one had to consider the question as if she were a person with mental capacity but without requiring the person themselves to have adopted the residence voluntarily.

### **The submissions of the parties**

30. CouncilA asserts that Mr X has no connection to CouncilA and that he left Part 3 accommodation when he moved into a tenancy on 30th May 2012 in CouncilB. It comments that the original plan was for Mr X to retain links to TownD, CouncilD but this changed when it became clear that Mr X was indifferent to his visits back to the area and could be distressed by them. In order to determine Mr X’s best interests, the IMCA Service was consulted which supported a move to supported living. Mr X was moved to 123RoadB as an interim measure and the move enabled him to build relationships with a core team of staff who would then be able to support him with a move to a tenancy.

31. CouncilA considers that Mr X became ordinarily resident in CouncilB when he started his tenancy which was signed by the Authorised Officer for Property and Affairs for CouncilA following the granting of an order by the Court of Protection. Contact with Mr X’s sister was in its early stages and she was not closely involved in Mr X’s care.

32. CouncilA further states that Mr X is familiar with the CouncilB area and has built up relationships within it. CouncilA comments that Mr X attends ActivityU on a Monday, he accesses the community on a Tuesday, he goes to a local disco on Wednesdays and Thursdays and he attends ActivityW on a Friday. CouncilA asserts that the alternative test in *Vale* is appropriate to determining Mr X’s place of ordinary residence.

33. Council B argue that the placement at 123 Road B was not suitable for Mr X, that as a result a number of safeguarding referrals were made and that had discussions around the suitability of the placement taken place between Council A and Council B, Mr X would not have been placed in Council B. It is argued that there was no intention to follow through with a move to independent living until faced with the closure of 123 Road B. It is furthermore argued that given the level of Mr X's personal care needs, he should be placed in a residential care setting. It is argued that Council A have failed to follow the ordinary residence guidance and that they have arranged accommodation under section 21 of the 1948 Act such that, as a result of the deeming provision in section 24(5) of the 1948 Act, responsibility for funding rests with Council A. It is also submitted that Mr X refuses to engage with activities organised for him in Council B and that any links to the area are limited.

34. I have also received a letter dated 6<sup>th</sup> September 2012 from Company Of Solicitors who has been instructed to act on behalf of Mr X by his advocate of Skills for People. This letter states that;

"...the advocate has no doubt that if Mr X were able to analyse his situation, which is one where he has no connection at all with Council A but now close and established connections with people and places in Council B area, he would regard Council B as his home and a place where he would choose to live independently in as "normal" an environment as he could".

35. Additionally, I have been supplied with a copy of the tenancy agreement between Housing Council B and Mr X, signed on his behalf by the Court appointed deputy together with the Care Plan Review dated 1<sup>st</sup> August 2012, case recordings for 14<sup>th</sup> August and 9<sup>th</sup> October 2012, learning logs and activity sheets completed by Voluntary Group ZY in relation to Mr X, two ABC charts dated 2<sup>nd</sup> November 2011, a letter from Ms Voluntary Worker of Council A dated 30<sup>th</sup> November 2012 and a document prepared by Team Co-ordinator for Voluntary Organisation ZY dated 23<sup>rd</sup> November 2012.

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

36. For Mr X's current accommodation to be provided under Part 3 of the 1948 Act it would need to satisfy the requirements of section 26 of the 1948 Act. It cannot be such accommodation because Mr X has personal care needs and furthermore because there would need to be a payment agreement between the local authority and the organisation providing the accommodation. There is no such agreement. Mr X has a tenancy agreement and is liable to Housing Council B for the payment of his rent.

37. As paragraph 103 of the ordinary residence guidance states, a person Mr X usually acquire an ordinary residence in the local authority area where his tenancy is situated. Here a best interests decision was made in respect of Mr X because he lacks the capacity to decide where to live. An independent mental capacity advocate service was appointed to advise. It is clear that this service considered that Mr X's residential placement at D44 Home restricted him and supported a move to

independent living provided appropriate support was available. It is also clear that Mr X finds change difficult so a transitional arrangement was created at 123RoadB where Mr X could become accustomed to the care team before moving to independent living. It seems that this placement continued for longer than originally envisaged but in May 2012, Mr X moved into the tenancy with Voluntary GroupZY continuing to provide the care.

38. Where a person has capacity to decide where to live, his place of ordinary residence is that which he has adopted voluntarily and for settled purposes. Where a person lacks capacity then one of the tests in Vale should be used to assess the place of ordinary residence. Mr X is not dependent on a parent or guardian and his sister has only recently come into his life. The first test in Vale is therefore inappropriate. The second test requires that one assess the position as if the person had capacity. The Care Plan Review dated 1<sup>st</sup> August 2012 comments that:

“Mr X’s move into his own tenancy has gone well. He appears to really benefit from having his own space and his mood is described as very good. Risks associated with his behaviour have also decreased”.

The case recordings, Learning Logs/activity sheets and report of the Team Co-ordinator demonstrate that Mr X goes out into the community regularly and seems to enjoy a number of activities particularly local discos where he socialises. He clearly still has episodes of challenging behaviour but it seems a reasonable view contained within the Care Review Plan dated 1st August 2012, that Mr X copes better living alone with appropriate support. The ABC Charts I have been provided with relate to some concerning behaviours and I understand from MsVoluntaryWorker’s letter that these documents are reviewed by the Community Nurse to assess whether further formal intervention with the Challenging Behaviour Team is needed. I am satisfied from reviewing the evidence that Mr X is settled in the CouncilB area and likes living there. He has no remaining links with CouncilA. I therefore determine that Mr X was ordinarily resident in CouncilB from 30th May 2012 when he moved into his tenancy at CourtB, CouncilB.

Signed

Dated