

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 2 2013)**

1. I am asked by CouncilA and CouncilB to make a determination for the purposes of the Community Care (Delayed Discharges etc) Act 2003 ("the 2003 Act") and section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the ordinary residence of Ms X.

**The facts of the case**

2. The following information has been ascertained from the agreed statement of facts and copy documents provided. Ms X was born on xdate 1911 in CTown, CouncilC. She married and moved to RoadA1, CouncilA where she gave birth to her son. She left the United Kingdom in the 1950s and lived in the CountryZ for many years. Ms X then moved to CountryQ to be with her son and lived there for 8 years.

3. Ms X's son lives in the area of CouncilA and on 1<sup>st</sup> March 2012, he brought his mother over from CountryQ. Prior to this step, her son corresponded with CouncilA with a view to having her assessed for social care services. Her son advised that he would be unable to have his mother to stay at his property as it is over three floors and he would be unable to care for her.

4. It seems that medical reports from CountryQ were provided to CouncilA on the basis of which it was opined that Ms X would not meet the eligibility criteria for residential accommodation but could be supported in the community. Her son was informed that in order for his mother to be housed by CouncilA in sheltered or supported housing, she would need to be eligible for Housing Benefit. If she could fund her own placement, CouncilA could assess her. The website address for the Care Quality Commission was provided together with the website address for the only nursing home in CouncilA for self-funders, A0ANursingHome's. It is noted that Her son did not consider that his mother was able to care for herself being "very shaky and unable to care for her everyday needs" (e-mail of 10<sup>th</sup> June 2011 to Adult Social Care at CouncilA).

5. It seems that CouncilA agreed to arrange and pay for sheltered accommodation on a temporary basis until Ms X's entitlement to public funds, if any, had been established. The Service Manager at CouncilA wrote to her son on 12<sup>th</sup> August 2011 to confirm that although this was not standard practice, the commitment would be honoured. Her son went to visit his mother in Capital of CountryQ and was concerned about the onset of dementia and a lack of ability to carry out basic tasks. He was concerned that his mother could not live alone and stated this view was shared by the care home where she at that time resided. In the light of this information, the Care Manager at CouncilA wrote to her son on 26<sup>th</sup> September 2011 advising a medical assessment before travel and a formal assessment by CouncilA once Ms X was in CouncilA before any offer of support could be made.

6. Her son wrote to the Care Manager on 25<sup>th</sup> November 2011 and noted that his mother was desperate to come back to UK. The Care Manager asked whether a mental health assessment had yet been carried out, as previously advised, to determine “whether Ms X has the mental capacity to decide to travel back to the UK and whether, from a mental health perspective such a decision would be in her best interests”.

7. On 12<sup>th</sup> January 2012, her son sent two medical reports received from the care home in Capital of CountryQ to the Care Manager by e-mail. Some e-mail correspondence followed and her son wrote to the Care Manager (CouncilA) on 13<sup>th</sup> February 2012 to advise that he was returning to Capital of CountryQ to collect his mother and would be returning with her on Sunday 26<sup>th</sup> February. Her son advised that he had been in contact with A0ANursingHome’s who confirmed that they had a room available for Ms X upon arrival. Her son requested that an assessment be carried out on 27<sup>th</sup> or 28<sup>th</sup> February but the earliest date that could be offered was 6<sup>th</sup> March. Her son was unable to make this date and the correspondence continued. I note that in CouncilA’s submissions, at paragraph 2, it is stated that CouncilA had arranged to carry out an assessment of her needs on 5<sup>th</sup> March 2012

8. The agreed statement of facts provides that Ms X arrived in the UK on 1<sup>st</sup> March 2012 and was accommodated at A0ANursingHome in CouncilA. This was privately arranged and funded. Ms X sustained a fall and was admitted to HospitalB, in CouncilB’s area on 3<sup>rd</sup> March 2012 with a fractured neck of femur. It seems that different information was provided by the hospital as to Ms X’s likely stay. The Care Manager was told that it might be 3-4 days whereas her son was told by a nurse that his mother could be in hospital for three or four weeks.

9. On 4<sup>th</sup> March 2012 HospitalB issued a notice under section 2 of the 2003 Act with an estimated discharge date of 1<sup>st</sup> April 2012 which it served on CouncilA on 5<sup>th</sup> March 2012.

10. The Care Manager of CouncilA met with her son at A0ANursingHome on 5<sup>th</sup> March 2012. The Care Manager’s e-mail to her son following this meeting is contained within the copy papers provided. In the e-mail, the Care Manager notes that he was told by the ward that treatment may only take 3-4 days. He was also told by A0ANursingHome’s that her son had packed up his mother’s possessions and had not renewed the booking with them. The e-mail notes as follows:

“I was wondering what arrangements you have made to accommodate your mother following discharge from hospital as although we can assess your mother on the hospital ward we cannot guarantee that any kind of support can be organised if she is medically fit for discharge within the above noted time frame”.

11. Her son wrote to the Care Manager on 6<sup>th</sup> March and noted:

“I have spoken to the hospital on several occasions yesterday and they do not know how long she will be there, it depends on how long it takes her to mend and be able to walk. One nurse, originally, said it could be three or four weeks...I did remove

her from A0ANursingHome's as the hospital told me that she may even be there for up to one month, so I thought it best to take her things for the moment".

12. Further correspondence followed in which the Care Manager wrote that he thought Ms X was technically homeless and that in such cases the local authority where the hospital is situated has responsibility for assessment. Her son confirmed in an e-mail of 7<sup>th</sup> March 2012 that he had brought his mother's possessions back to his home at RoadA2, CouncilA "which is her official address for the moment" and doubted if his mother could be technically homeless.

13. On 4<sup>th</sup> April 2012, Solicitors acting for CouncilA wrote to HospitalB disputing that Ms X was ordinarily resident in its area and stating it believed CouncilB to be the responsible authority. The agreed statement of facts notes that the dispute arose on this day.

14. A meeting took place on 10<sup>th</sup> May between CouncilA and CouncilB but the issue of Ms X's ordinary residence could not be resolved. CouncilA agreed to assess Ms X and to make interim discharge arrangements on a without prejudice basis given that a section 2 notice had been served upon them and had not been withdrawn.

15. Ms X was assessed on 11<sup>th</sup> May 2012. She insisted that when she left hospital she would be living with her son. The assessor's summary contains the following:

"Ms X physically does not meet the criteria for Residential Accommodation and her needs could be met in Supported or Extra Supported Housing. However, there appears to be an underlying mental health condition that needs regular monitoring as well as a need to ensure compliance with medication so as to maintain good mental health. Until the psychiatric report is received and all assessments completed I recommend that Ms X should be transferred to an interim bed".

In the "further actions" section of this report it is stated:

"Awaiting reports from the ward including psychiatric assessment regarding diagnosis and capacity regarding medication (confirming she lacks capacity and it being in her best interest to be given covertly)".

16. The agreed statement of facts records that Ms X was discharged from HospitalB on 29<sup>th</sup> May 2012. CouncilA's submissions at paragraph 5 note that Ms X is currently in accommodation funded and provided by CouncilA under section 21 of the 1948 Act, namely at the DDCareHome in TownD, CouncilD. The agreed statement of facts also provides that CouncilA and CouncilB agree that Ms X has capacity to decide where to live.

### **The relevant law**

17. In addition to the documentation referred to above and the parties' legal submissions, I have considered the provisions of Part 3 of the 1948 Act, the provisions of the 2003 Act, the guidance on ordinary residence issued by the

Department<sup>1</sup> and the leading case of *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 (“*Shah*”). My determination is not influenced by the interim funding of the care home placement by Council A.

18. 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 or 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. Section 24(3) provides that where a person in the area of a local authority has no settled residence, or is in urgent need of accommodation, the authority has the same power to provide accommodation as under section 24(1) as if he were ordinarily resident in its area. The Secretary of State’s Directions under section 21 provide that local authorities are required to provide residential accommodation to those qualifying under Part 3 not only for those ordinarily resident in their area or in urgent need of such accommodation but also for persons with no settled residence who are or have been suffering from mental disorder and who are in the authority’s area.

19. Section 24 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 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”.

20. Section 24(6) of the 1948 Act, as amended, provides that a patient in NHS accommodation should be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before the NHS accommodation was provided.

21. The duty to provide welfare services (non-residential community care services) under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

22. “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:

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<sup>1</sup> Until 19<sup>th</sup> 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”.

“ 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” .

23. By virtue of section 2 of the 2003 Act, a responsible NHS body must serve notice upon the local authority which appears to it to be the local authority where the patient is ordinarily resident where it considers it unlikely to be safe to discharge the patient unless one or more community services are made available. The local authority served with such a notice must then carry out an assessment of the patient’s needs. Disputes as to ordinary residence can be referred to the Secretary of State for determination pursuant to section 8 of the 2003 Act.

24. Paragraph 165 of the guidance provides:

“ It should be noted that a determination under section 8 of the 2003 Act can only be sought in relation to ordinary residence questions that arise under Part 1 of that Act, i.e. in connection with delayed discharges. Where ordinary residence disputes arise in relation to the provision of social care accommodation or services to a person upon their discharge from hospital determinations should be sought under section 32(3) of the 1948 Act” .

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

25. This matter has been referred to me as an application for determination under both the 2003 Act and the 1948 Act although the Agreed Statement of Facts refers to the 2003 Act alone and its dispute Directions. It is not clear whether the responsible NHS body for the purposes of the 2003 Act is seeking delayed discharge payments. It is clear, however, that the two local authorities who have referred this matter for determination are seeking a finding as to which local authority is responsible for providing services under the 1948 Act upon discharge. I will therefore determine this matter pursuant to section 32(3) of the 1948 Act although note that such a determination might also be relevant for the purposes of the 2003 Act given that a determination as to Ms X’s place of ordinary residence prior to her admission to hospital will determine the local authority of responsibility upon discharge.

26. Ms X is a British citizen and holds a British passport. She has lived in the CountryZ and CountryQ for a number of years but made it clear to her son that she wished to return to the UK. In an e-mail to CouncilA dated 8<sup>th</sup> December, Her son wrote as follows:

“ Her desire to return to the UK is unquestionable. Indeed the carers at the home in Capital of CountryQ have given up and stopped counting the number of times my mother packs for the journey back to the UK, only to have to unpack when no one comes to collect her. I, too, have cut down on my visits given she is so disappointed every time I come and tell her she is not coming back to the UK just yet” .

27. Two points to note from the assessment carried out by CouncilA are that it is recorded at page 2 that Ms X “insisted that when she leaves hospital she will be living with her son” and on page 9 it is noted that “her son brought her back to the UK with a view to an assessment for funding for a residential placement within CouncilA”. From reading this and the copy correspondence it is clear that Ms X intended to return to the UK to live and hoped to be with her son. This was not possible because of the nature of the accommodation where her son lives and also because her son frequently works away. The e-mail correspondence between her son and CouncilA shows that the intention was for Ms X to reside in appropriate accommodation in CouncilA so as to be near her son who manages his mother’s affairs.

28. Ms X was provided with accommodation pursuant to section 21 of the 1948 Act following her discharge from hospital on 29<sup>th</sup> May 2012. In accordance with the deeming provisions in sections 24(5) and (6) of the 1948 Act, Ms X’s place of ordinary residence is that immediately before her admission into hospital. Immediately before her admission on 3<sup>rd</sup> March 2012, Ms X had spent a couple of days in the A0ANursingHome in the area of CouncilA where she was awaiting a social services assessment by CouncilA.

29. The essential question seems to me to be whether or not a period of two days is too short to acquire an ordinary residence in a place. Paragraph 22 of the guidance, relying on Lord Scarman’s words in Shah as set out in paragraph 22 of this determination, provides that ordinary residence can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes. The paragraph highlights that there is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there because it depends on the nature and quality of the connection with the new place.

30. I am satisfied that Ms X voluntarily moved to the UK and more specifically CouncilA with the intention of settling there. It seems that she would have resided with her son had this been a possibility but failing which she had moved to a home in CouncilA awaiting assessment by that local authority so that she could either be placed in residential accommodation in the area or be assisted with finding sheltered accommodation also in the area with a package of care services and State benefits, if available.

31. Regrettably, Ms X suffered a fall and was admitted to HospitalB in CouncilB’s area. Quite understandably, her son upon hearing that his mother might be in hospital for three to four weeks and paying private care home fees, cancelled the room and removed her belongings to his property in CouncilA pending his mother’s discharge and the promised assessment by CouncilA.

32. CouncilA asserts that this is a case where paragraph 44 of the Guidance anticipates a finding of no settled residence. They assert that the example given, namely that if a person has clearly and intentionally left their previous residence and moved to stay elsewhere on a temporary basis during which time their

circumstances change, a local authority may conclude a person to be of no settled residence. I do not consider the facts of this case to be akin to the scenario envisaged by paragraph 44. Ms X had left Country Q to reside permanently in the UK and more specifically in Council A. This did not change. Although her stay at AOA Nursing Home was anticipated to be temporary, pending assessment of her needs, her stay in Council A was not. I consider that her ordinary residence had crystallised at the AOA Nursing Home in Council A by the time of her admission to hospital. Furthermore, paragraph 44 is to be read in the light of paragraph 22 which I have referred to at paragraph 28 of this determination. And, as paragraph 130 of the guidance provides:

“Accordingly, a returning British citizen would usually acquire an ordinary residence in the area in which they chose to locate, if their intention was to stay living there for settled purposes”,

And further at paragraph 132:

“It should be noted that ordinary residence can be acquired as soon as a person moves to an area, if their move is voluntary and for settled purposes. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there,”.

33. Nor is it appropriate to view the stay in hospital as altering the place of ordinary residence. Paragraphs 23 and 24 of the guidance make clear that ordinary residence is not lost by a temporary absence in hospital. Council A also allege that the stay at AOA Nursing Home's Nursing Home had an insufficient degree of continuity for it to be described as settled as she was there until assessment by Council A and this can be shown by the subsequent removal of her belongings and cancellation of her room. As I have noted above, the clear intention was to reside in Council A and I consider that Ms X had already gained an ordinary residence in Council A by the time of her hospital admission.

34. I therefore determine that on the day prior to her admission to hospital Ms X was ordinarily resident in Council A and by virtue of the deeming provisions in sections 24(5) and (6) remains so.

Signed .....

Dated.....