

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 18 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 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. The authorities in dispute are CouncilA and CouncilB.
3. Mr X was born on xdate 1991. He has complex psychological care and support needs associated with an autistic spectrum disorder.
4. In 2008, after allegations of sexual abuse against family members, he was placed by CouncilA in a specialist residential home at OHouse in CouncilB pursuant to section 20 of the Children Act 1989 (“the 1989 Act”). This was managed by Children’s Services PCentre.
5. On 25th October 2009, Mr X turned 18. He continued to live at OHouse. CouncilA funded his placement and community care package and state that this was pursuant to Section 29 of the 1948 Act.
6. CouncilA also provided Mr X, as a “former relevant child” with leaving care services pursuant to the 1989 Act. A Pathway Plan Review by CouncilA dated 29th September 2010 states that CouncilA’s Adult Services in conjunction with Children’s Services PCentre had agreed an individual care package for Mr X to live in a 2-bedroom flat as a tenant with 10 hours support per day. One bedroom was for Mr X and the other for a member of staff to sleep in or in the future it could be considered for another young person to share with Mr X.
7. On 7th March 2011, Mr X moved into this flat, where he currently resides, at 79a Somewhere Road, TownB1 within CouncilB’s area.
8. On 4th January 2012, Mr X signed a Licence Agreement with the owner of the property (two directors of Children’s Services PCentre). The agreement permits Mr X to occupy the property in consideration of a licence fee. Also, the Owners agree to procure the supply of services to Mr X during the subsistence of the Licence. Mr X’s care package includes 10 hours support per day which includes personal care provided by Children’s Services PCentre. CouncilA has accepted provisional responsibility for this care package. Mr X claims housing benefit to pay for his accommodation.
9. Mr X is visited regularly by his father and sister and on occasion he has also visited them in CouncilA.
10. Mr X has said on various occasions that he wishes to return to CouncilA but he has also said that he wishes to stay in CouncilB for the time being.

11. CouncilB assert in their submissions that Mr X does not have capacity to enter into a tenancy or licence, however, neither party has disputed that Mr X has mental capacity to decide where he wants to live.

The relevant law

12. I have considered all the documentation submitted by both parties. This includes the joint statement of facts, CouncilA's statement of facts, CouncilB's response and the legal submissions and supporting documents provided by both parties, certain provisions of the 1989 Act, the provisions of Part 3 of the 1948 Act and the Directions issued under it¹, the Department of Health guidance in LAC (93)7² and "*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*"³ ("the Ordinary Residence Guidance"), the leading case of R v Barnet ex parte Shah (1983) 2 AC 309 ("Shah"), Levene v Inland Revenue Commissioners (1928) AC 217 ("Levene"), R (Greenwich) v Secretary of State and Bexley [2006] EWHC 2576 ("Greenwich"), Mohammed v Hammersmith and Fulham London Borough Council ([2002] 1 All ER 176) and R (Manchester City Council) v St Helen's Borough Council, [2009] EWCA Civ 1348.
13. My determination is not affected by CouncilA assuming provisional responsibility for funding Mr X's care.
14. Section 21(1)(a) of the 1948 Act empowers local authorities, so far as the Secretary of State directs, 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. By virtue of the relevant Direction, that power is converted into a duty in relation to person who are ordinarily resident in their area and other persons who are in urgent need thereof.
15. Also, 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. So, in respect of those ordinarily resident in their area, local authorities owe a duty to make arrangements under section 21, however, in respect of those not ordinarily resident in their area, local authorities only have a power to make such arrangements and then, pursuant to section 24(4), only with the consent of the other local authority in which the person is ordinarily resident.
16. 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 including at section 26(1A) the condition that the accommodation must be provided in a registered care home.

¹ Contained in LAC(93)10.

² LAC (93)7 was the guidance applicable at the relevant time, and until 19th April 2010.

³ Updated edition of the guidance published in July 2011.

17. 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 this Part of this 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.”

18. In accordance with paragraph 58 of the judgement in Greenwich, I interpret the reference to residential accommodation at the end of this subsection to mean residential accommodation under Part 3. The relevant date for the deeming provision contained in section 24(5) of the 1948 Act is immediately before such accommodation was or should have been provided.

19. Section 29 of the 1948 Act empowers local authorities, to such extent as the Secretary of State may direct, to provide welfare services. This is the power under which domiciliary social care services are usually provided. The relevant direction given by the Secretary of State provides that the local authority is under a duty to make arrangements under section 29(1) to persons who are ordinarily resident in their area and has a power to make such arrangements to persons who are not ordinarily resident in their area.

20. 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.”

21. 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.”

22. 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.”

The application of the law

23. Mr X became eligible for residential accommodation and/or services under the 1948 Act on his eighteenth birthday. As set out above the duty to provide those services lies with the local authority in which Mr X is ordinarily resident. For the reasons set out below my view is that on the date of his eighteenth birthday Mr X was ordinarily resident in Council B.

24. Before his eighteenth birthday, Mr X was being provided with services by CouncilA as a “looked after child” under the 1989 Act. As paragraphs 146 and 147 of the Ordinary Residence Guidance explain neither the 1989 Act nor the 1948 Act make provision for how to determine ordinary residence when a young person moves from being eligible for services under the 1989 Act to being eligible for services under the 1948 Act. Therefore, when making decisions about the ordinary residence of young people in transition to adult services, local authorities should have regard to both Acts and, could reasonably have regard to the 1989 Act and start from a presumption that the young person remains ordinarily resident in the local authority that had responsibility for them under the 1989 Act.
25. Section 105(6)(a) and (c) of the 1989 Act provides that, in determining the ordinary residence of a child for any purposes of that Act, any period in which a child lives in a school or accommodation provided by or on behalf of a local authority, then that period should be disregarded. CouncilA had responsibility for Mr X under the 1989 Act and so the starting presumption is that CouncilA remains Mr X’s place of ordinary residence for the purposes of the 1948 Act.
26. However, as stated at paragraph 145 of the Ordinary Residence Guidance:
“The local authority that had responsibility for the young person under the 1989 Act is not necessarily the young person’s local authority of ordinary residence once they become eligible for services under the 1948 Act.”
27. At paragraph 149, it continues to say that the starting presumption may be rebutted by the circumstances of the individual’s case and the application of the Shah test. A number of factors should be taken into account. These include:
- The remaining ties the young person has with the authority that was responsible for their care as a child
 - Ties with the authority in which they are currently living
 - The length and nature of residence in the area
 - Where the young person has mental capacity, his/her views in respect of where he/she wants to live.
28. Neither local authorities challenges Mr X’s capacity to decide where to live. CouncilB, in its response, submits (among other things) that having regard to Mr X’s views to move to CouncilA in the future, CouncilA should assist Mr X to meet this aspiration. CouncilA submits that, having regard to all the circumstances, the starting presumption has been rebutted and I am of the same opinion.
29. Mr X has lived in CouncilB since the age of 16 and lived in CouncilB’s area for about 4 years. The report of Head Therapist dated 24th October 2001, (Appendix E to CouncilA’s submissions) records that with support, he has managed the transition to the semi-independence of his flat “particularly well” and seems “contained and comfortable within the longevity of relationships” with Children’s Services PCentre’ support staff. The continuity of his support “allows [Mr X] to experience invaluable consistency of relationship, expectations and treatment approach” and “he continues to make good progress.” He also now experiences structured access to the local community including attending courses and group

activities like going to the cinema and out for meals and unsupervised periods of time to visit shops.

30. His family remain in CouncilA. His mother died in December 2010 and Mr X attended the funeral with his family. Mr X visited his family for Christmas in 2011, otherwise his father visits him regularly in CouncilB every 3 or 4 weeks, sometimes accompanied by other family members. However, as noted in Case WorkerOne's summary dated 11th April 2011 (Appendix 8 to CouncilB's submissions), contact arrangements between Mr X and his father need to be carefully monitored as Mr X has been affected by disparaging comments made during contact. Mr X's father's views concerning his relationship with Mr X are recorded in Case WorkerOne's note dated 18th April 2011 (Appendix I to CouncilA's submissions) and it is clear the relationship has its difficulties and both Mr X and the family require support in their relationship.
31. Mr X has capacity to decide where he lives. I note that on several occasions Mr X has stated he wants to return to CouncilA. Case WorkerTwo's report dated 16th February 2012 records Mr X expressing how he wants to go back to CouncilA to be close to his family and friends and "roots" and that he feels isolated in CouncilB. It is also accepted by the various assessments undertaken by CouncilA that Mr X would like to return to CouncilA. However, the assessments also show that Mr X's views change (Appendix J) and although Mr X wishes to return to CouncilA, it is clear that Mr X intends this move to be sometime in the future; see for example Appendix F to CouncilA's submissions, note dated 29th September 2001 when Mr X states he would like to return "but not until" he has learnt everything he needs to learn and done everything he needs to do. Also, the note dated 20th February 2012 records Mr X would like to move to CouncilA but "only when he felt ready." The report of the home visit with Mr X on 9th March 2012 records that Mr X acknowledges his need for therapy which he would like to continue before returning to CouncilA (Appendix H) and the note of the meeting on 20th April 2012 concludes that Mr X wants to go to CouncilA but "wishes to continue with his therapy and to stay in CouncilB for the time being." (Appendix J). The period for which Mr X thinks it will take him to feel ready to move to CouncilA also varies but is expressed in years, for example not until he is 21/22 (Appendix J) or 22/23 years of age (Appendix F).
32. I note CouncilB's submission that Mr X is able to express his wishes and feelings and that he has consistently stated his intention to move to CouncilA in the future, however, his ordinary residence is not necessarily determined by his intention. In this context it is 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" for the purposes of the Housing Act 1996 was considered. 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."
33. I consider that this reasoning can be applied to the present situation. Mr X is not being forcibly held in CouncilB. Although he may wish to be closer to his

family, he has accepted residence at his address in CouncilB whilst he continues his therapy. CouncilB is where he is in fact resident for the time being and although it may not always necessarily be his preferred choice, it does not prevent him acquiring ordinary residence there.

34. Accordingly, in line with the settled purpose test in Shah, I determine that Mr X has adopted CouncilB voluntarily and for settled purpose. As such, the presumption that he remains ordinarily resident in CouncilA can be rebutted for the purposes of the 1948 Act, and he is ordinarily resident in CouncilB as of his eighteenth birthday.
35. Having determined that Mr X is ordinarily resident in CouncilB, CouncilB is under a statutory duty to provide the services, so assessed, to Mr X under the 1948 Act. It is therefore unclear as to why CouncilA has provided these services. At the time of Mr X's eighteenth birthday, CouncilA appears to believe that they were providing services under section 29 of the 1948 Act. If so, section 29(1) and the Secretary of State's relevant directions provide a power for a local authority to provide such services for a person who is not ordinarily resident in their area, but it is not a duty. As stated by Sir Anthony May in R (Manchester City Council) v St Helen's Borough Council, [2009] EWCA Civ 1348 at paragraph 50:

“The provision of community care services in those circumstances [by a local authority for a person who is not ordinarily resident in their area] is properly, in my view, to be seen as the exercise of a power, not a duty, from which it is open to the local authority exercising that duty to withdraw subject to normal considerations of rationality, abuse of power or legitimate expectation.”

36. Then, during the steps taken to resolve the ensuing ordinary residence dispute, CouncilA discovered that in fact, because of a misunderstanding between them and the care providers (Children's Services PCentre), no tenancy agreement had been entered into and no housing benefit applied for. As a result, CouncilA had been paying Children's Services PCentre for both the accommodation and care package. CouncilA therefore concedes that Mr X's accommodation was provided pursuant to section 21 of the 1948 Act up until the date he signed the Licence Agreement.
37. However, I do not think Mr X's accommodation could have been provided pursuant to section 21. Firstly, by virtue of section 24(4), CouncilA would need to obtain CouncilB's consent before entering into section 21 arrangements in respect of a person ordinarily resident in CouncilB's area. Secondly, by virtue of section 26(1A), arrangements for the provision of accommodation together with nursing or personal care under the 1948 Act cannot be provided unless the provided accommodation is at a registered care home. Neither OHouse nor 79a Somewhere's Road are registered care homes within the meaning of the 1948 Act.
38. Given the uncertainty as to whether the services under the 1948 Act are provided under section 21 or section 29, then in accordance with the approach adopted in Greenwich, I look at what the position should have been. This is on the basis that (a) if a local authority has failed to comply with a statutory duty then such a failure would be the subject of judicial review and (b) if and when the Court

found that a local authority had acted unlawfully in not making the correct arrangements, the effect would be that the correct arrangements would be put in place retrospectively, in the sense that the local authority would have to make the appropriate payments from the relevant date.

39. If the services were arranged under section 29, then the deeming provision in section 24(5) would not apply. Mr X would, for the reasons stated in paragraphs 28 to 34 above, be ordinarily resident in CouncilB from the date of his eighteenth birthday in which case CouncilB would have been under a duty to provide Mr X's care package.
40. If the accommodation was provided pursuant to section 21, then I do not think this would change Mr X's ordinary residence under the 1948 Act. The deeming provision in section 24(5) would apply. Immediately before Mr X entered what is said to be residential accommodation under Part 3 of the 1948 Act, he was living in CouncilB and, for the reasons as stated in paragraphs 28 to 34 above was ordinarily resident there for the purposes of that Act. Accordingly, the deeming provision would not change Mr X's ordinary residence.

CouncilB's Submissions

41. In their response to CouncilA's application, CouncilB make a number of alternative submissions as to why Mr X's ordinary residence has not transferred to CouncilB. I deal with these in turn:
42. Firstly, they submit that Mr X's occupation of his address is pursuant to a Licence rather than a Tenancy Agreement. I do not think this is determinative of a person's ordinary residence for the purposes of the 1948 Act. The Licence is binding and entitles Mr X to occupy his address lawfully in accordance with the terms of the agreement. The legal status of his property right is not material in deciding where he is ordinarily resident as a matter of fact.
43. Secondly, it is submitted that Mr X lacks capacity to enter into a Licence or Tenancy agreement. No evidence as to either Mr X's capacity or his understanding of the terms of the agreement has been provided to support this assertion. In any event, as stated at paragraph 27 of the Guidance, all issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005. Under this Act, it should always be assumed that adults have capacity to make their own decision unless established to the contrary. The test for capacity is specific to each decision at the time it needs to be made, so in this case, the test is whether Mr X is able to decide where he wants to live at the material time, not whether he understands all the terms and conditions of the agreement. Neither party contests Mr X's ability to decide where to live. Furthermore, in the absence of any evidence to the contrary, I have no reason to suppose that with the support offered by Children's Services PCentre, that Mr X either lacked the capacity to make a decision as to where he wanted to live when he left OHouse or that he was unable to understand the nature of his obligations under the Licence Agreement.
44. Therefore, in accordance with the provisions of the Mental Capacity Act 2005 and the Guidance, I must, and do, take the view that Mr X did have capacity to

decide where he wanted to live both when he left OHouse and when he signed the agreement. This means that, as set out above, the test in Shah applies.

45. Thirdly, CouncilB submit that Mr X is not living in supported living accommodation pursuant to section 29 of the 1948 Act but section 21 residential accommodation such that the deeming provision in section 24(5) applies. For the reasons stated at paragraph 40 above, the application of the deeming provision does not change Mr X's ordinary residence under the 1948 Act.
46. Fourthly, CouncilB submit that all or some of Mr X's care is provided pursuant to CouncilA's leaving care responsibilities under the 1989 Act. This is outside the Secretary of State's jurisdiction. In accordance with section 32(3) of the 1948 Act, CouncilA has asked the Secretary of State to make a determination of ordinary residence for the purposes of the 1948 Act, not the 1989 Act. CouncilB has not objected to this approach.
47. Accordingly, for the reasons stated above, my determination for the purposes of the 1948 Act is that Mr X has been ordinarily resident in CouncilB since 25th October 2009.

Signed on behalf of the Secretary of State for Health

Dated