

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 1 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 Ms X.

The facts of the case

2. The following information has been ascertained from the joint statement of facts prepared by the authorities involved in the dispute, and the supporting documents supplied. The authorities concerned are CouncilA and CouncilB.

3. Ms X was born on xdate1968. She has several health problems and disabilities including temporal lobe epilepsy, right-sided hemiplegia, muscle weakness, hypertonicity affecting the right side of her body, contractures of the wrist and elbow, and arthritis of the spine. She also has a mild learning disability. Ms X requires daily support such as assistance with bathing and personal hygiene, assistance with medication, preparation of meals, and assistance at all times while outdoors, walking or shopping and climbing stairs.

4. As a child, Ms X was resident at her parents’ home in CouncilC. In 1986 she moved to ZCollege, in ATown, CouncilA. She remained there for approximately 20 years apart from a period some time between 1999 and 2002 when, following a car accident, she spent several months in hospital and subsequently at her parents’ home recovering.

5. Ms X’s placement at ZCollege was a residential placement under section 21 of the 1948 Act. The placement was initially funded by CouncilC but responsibility for funding was assumed by CouncilA some time prior to 2002.

6. In 2006 Ms X expressed a wish to live closer to her parents, and she and her family identified YHomes in CouncilB as a suitable home for her. Ms X’s mother contacted CouncilA social services to discuss the possibility of Ms X’s moving, and was advised in January 2007 that she would need to apply for funding to the social services office in the area of the proposed new home. In February 2007 CouncilA social services wrote to CouncilB social services outlining the proposed move and stating that Ms X would become the responsibility of CouncilB once she moved to CouncilB’s area.

7. A lengthy correspondence about the proposed move then took place between CouncilA and CouncilB; this included discussion of Ms X’s social care and health care needs, and there was an extensive debate about what kinds of assessments were required to establish whether the accommodation at YHomes would be suitable for her. There was also some consideration of whether Ms X should be eligible for NHS continuing health care (“CHC”), under which her care needs would be met by the NHS primary care trust rather than the local authority.

8. In May 2008 Ms X’s solicitors contacted CouncilA Trust (“the PCT”) to request that the PCT should fund an initial three month assessment of Ms X at YHomes. The

PCT agreed to fund the placement for assessment purposes only as it had not yet been able to make a decision on Ms X's CHC needs.

9. On 30th May 2008 CouncilA, at the request of the PCT, made arrangements to enter into a contract with YHomes on behalf of the PCT for three months to enable the PCT to conduct an assessment of Ms X's CHC needs. A copy of this contract is not included in the documents before me but it appears from the correspondence provided that the contract was for the provision of care only, and that Ms X was to be responsible for the accommodation costs herself.

10. Some time prior to 1st June 2008 Ms X left ZCollege during a period of illness and went to stay with her parents in CTown, CouncilC. She did not return to CouncilA. The date that Ms X left ZCollege is not specified.

11. On or around 1st June 2008 Ms X moved from her parents' address into KCourt, in CouncilB's area. Care and support was provided by YHomes. ZCollege confirmed that they would retain Ms X's place (free of charge) until 31st August 2008.

12. It appears that at some time on or after her move to KCourt, Ms X purported to enter into a tenancy agreement. It is acknowledged by both parties that she did sign such an agreement; however Ms X's family and legal advisers considered it to be invalid as Ms X has a court-appointed Deputy to manage her affairs and by virtue of the Order appointing the Deputy, Ms X is not considered to have the mental capacity to enter into a tenancy agreement or to understand its effect.

13. A copy of the purported tenancy agreement has not been supplied to me, but from the agreed statement of facts it appears that CouncilA and CouncilB both accept that the agreement was not valid, for the reasons given above. It is unclear why the Deputy did not sign the tenancy agreement on Ms X's behalf.

14. Ms X was awarded housing benefit by CouncilB to assist her with her rent from 1st June 2008.

15. On 27 August 2008 the PCT concluded its assessment and advised Ms X's solicitors that Ms X did not qualify for CHC.

16. On 1 September 2008 CouncilA commenced funding Ms X's domiciliary care costs on a without prejudice basis, pending Ms X's appeal against the PCT's decision. On 4 September 2008 CouncilA carried out a community care assessment which concluded that Ms X was in need of 24 hour care, and that her needs would best be met within a supported living environment to enable her to develop and learn new skills.

17. On 23 April 2009 Ms X's appeal against the PCT's decision failed. Ms X's solicitors subsequently informed CouncilA that they were taking instructions on a further legal challenge to the decision, and a claim for judicial review was submitted on 3 August 2009. Permission to apply for judicial review was refused on 23 September 2009.

18. On 3 September 2009, CouncilA began correspondence with CouncilB regarding clarification of Ms X's ordinary residence. On 24 December 2009 CouncilB advised CouncilA that they did not accept financial responsibility for Ms X's care.

19. On 30 November 2009 Ms X's mother informed CouncilA that Ms X had been advised by her solicitors to seek an alternative placement as the arrangement with YHomes was not now considered permanent. Ms X had been offered a place at VResidential Home, a specialist residential home in CouncilD, which she wanted to accept without delay.

20. Over the next few months there was further discussion about Ms X's needs and further assessments were carried out. It was subsequently agreed that it would be appropriate for Ms X to move to VResidential Home.

21. On 11th May 2010 Ms X moved to VResidential Home to take up a residential placement provided in accordance with Part III of the 1948 Act. Funding was provided by CouncilA on a provisional basis pending resolution of the dispute between CouncilA and CouncilB as to Ms X's ordinary residence. Ms X continues to reside at VResidential Home.

22. It is agreed that Ms X has the mental capacity to decide where she wishes to live. However by virtue of having a court-appointed Deputy, she is not considered to have sufficient capacity to personally enter into legal agreements to put those wishes into effect.

The relevant law

23. I have considered the joint statements of facts and chronology, the additional documentation, the legal submissions provided by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act and the Directions issued under it¹, the guidance on ordinary residence issued by the Department ("the OR guidance")², and the leading case of *R v Barnet ex parte Shah* (1983) 2 AC 309 ("*Shah*"). My determination is not affected by CouncilA assuming provisional responsibility for funding Ms X's care.

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".

¹ Contained in LAC(93)10.

² "Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England" effective from 19 April 2010.

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. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(6) as in force at the relevant time³ provided that:

“For the purposes of the provision of residential accommodation under this Part of this Act, a patient in a hospital vested in the Secretary of State, a Primary Care Trust or an NHS trust shall be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before he was admitted as a patient to the hospital, whether or not he in fact continues to be ordinarily resident in that area.”.

27. Section 29(1) of the 1948 Act empowers local authorities to provide welfare services. This is the power under which domiciliary social care services are normally provided. The Secretary of State’s Directions under Part 3 of the 1948 Act provide that the local authority is under a duty to make arrangements under section 29(1) “in relation to persons who are ordinarily resident in their area”.

28. “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:

“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”.

The application of the law

29. The period in dispute is 1 June 2008 to the present. My determination is that Ms X was ordinarily resident in CouncilB during this period. My reasons for reaching this conclusion are as follows.

30. Both authorities agree that Ms X was ordinarily resident in CouncilA before she moved to KCourt on 1 June 2008. The first disputed issue is the nature of the arrangements under which that move took place. CouncilA submit that the placement in KCourt was arranged by the PCT without CouncilA’s involvement; CouncilB submit that the placement was arranged jointly by CouncilA and the PCT.

³ See paragraphs 33 to 35 below.

31. CouncilA state in their submissions that they entered into the contract with YHomes on behalf of the PCT; CouncilA say they acted as the PCT's agent because the PCT "had no facility for contracting for the services direct". It is unclear to me why the PCT could not have made the arrangements directly with YHomes, and a copy of the contract has not been supplied to me so I am unable to verify the details. The e-mail correspondence contained in the bundle of documents suggests that the arrangement may have been by way of "joint commissioning". Joint commissioning is a practice whereby health and social care bodies are encouraged to work together to provide efficient services. By virtue of powers in section 75 of the National Health Service Act 2006, local authorities may carry out certain functions on behalf of NHS bodies, and vice versa. It is possible that the arrangements in Ms X's case were made in the exercise of these powers. However even if CouncilA had entered into the contract with YHomes on the PCT's behalf under such arrangements, the responsibility for providing and funding the care would have remained with the PCT. Joint commissioning does not affect the legal obligations of the bodies concerned.

32. From the information supplied it is clear that the care services provided during Ms X's initial stay at KCourt were funded by the PCT. It appears that both parties accept this, although CouncilB submit that the care was funded by the PCT "in consultation with CouncilA Council". I recognise that the precise nature of CouncilA's involvement in the placement is disputed; however as the care was funded by the PCT, it must constitute care provided under NHS powers and not social care provided by the local authority under the 1948 Act.

33. I now turn to the legal provisions under which Ms X's ordinary residence falls to be considered following her move to KCourt. CouncilB submit that section 24(6) of the 1948 Act applies, which would have the effect of deeming Ms X's ordinary residence to continue in CouncilA while she was in the PCT funded placement. This proposition cannot be accepted for the following reasons.

34. CouncilB in their legal submissions rely in particular on paragraph 114 of the OR guidance. This refers to the deeming provision in section 24(6) of the 1948 Act, as amended by section 148 of the Health and Social Care Act 2008 ("the 2008 Act"). The amendment made by section 148 of the 2008 Act had the effect of extending the deeming provision in section 24(6) to all accommodation funded by the NHS, whether that accommodation was provided in a hospital or elsewhere. Prior to that amendment, section 24(6) applied only to hospitals.

35. The amendment made by section 148 of the 2008 Act came into force on 19 April 2010. It was therefore not in force when NHS care was provided to Ms X (1 June to 31 August 2008). The fact that the ordinary residence dispute continued after the implementation of section 148 of the 2008 Act is not relevant. The relevant law is the law as at the date in respect of which ordinary residence falls to be determined. This means that the deeming provision in section 24(6) does not apply to Ms X, as she was not staying in an NHS hospital.

36. CouncilB in their legal submissions refer to paragraph 14 of the previous ordinary residence guidance (LAC 93/7) which suggests that local authorities could reasonably apply the section 24(6) approach by analogy to people leaving prisons, resettlement units or other similar establishments. However, paragraph 14 also states that "any

dispute must be resolved in the light of the specific circumstances”. In my view, paragraph 14 of the previous guidance merely suggests one possible approach that could be followed by local authorities in relation to persons leaving prisons, resettlement units or other similar establishments, but it does not say that this approach must be followed. In addition, I do not consider accommodation of this nature to be comparable to a prison or similar. In terms of this determination, I am required to determine Ms X’s ordinary residence in accordance with the relevant legislation and case-law and it is not open to me to apply the section 24(6) approach by analogy.

37. As the deeming provision in section 24(6) does not apply to Ms X, her ordinary residence falls to be determined according to the usual rules. For this, it is necessary to look at all the circumstances of Ms X’s case.

38. It is agreed that Ms X has the mental capacity to decide where she wishes to live, although not to enter into legal arrangements such as tenancy agreements. There is clear evidence that Ms X’s wishes were to live closer to her parents, and this is why the move from ZCollege was originally planned. CouncilB submit that the YHomes placement was arranged by the PCT (possibly in consultation with CouncilA), and was not a decision of Ms X herself. However there is evidence that Ms X herself desired the placement: she wrote a letter on 19 March 2007 to CouncilA and CouncilB social services saying that she would very much like to move to YHomes. Naturally she needed assistance to facilitate the move, but there is no evidence to suggest that the move was not in accordance with her wishes.

39. CouncilB also submit that Ms X’s decision to live in YHomes would have been “inextricably linked” with the decision to enter into a tenancy agreement, and that as she did not have capacity to enter into the latter, it cannot be said that she exercised genuine choice to live in CouncilB. This submission cannot be accepted. As CouncilB point out, paragraph 102 of the OR guidance acknowledges that a person may have the capacity to decide where to live, but not to manage their financial or legal affairs. In these circumstances, another appropriate person (such as a person with a lasting power of attorney (LPA) or a Deputy appointed by the Court of Protection) can make the necessary legal arrangements on the individual’s behalf, and that is what should have happened in Ms X’s case.

40. Paragraph 104 of the OR guidance goes on to explain that where the individual who lacks capacity does not have a Deputy or LPA, the local authority may arrange accommodation for the person under section 21 of the 1948 Act and enter into a contract with the housing provider. Section 21 would be applicable in such a case because the person would not have care and attention “otherwise available to them”. CouncilB submit that CouncilA should have arranged Ms X’s accommodation under this power because the tenancy agreement was not validly signed. However in Ms X’s case, she did have a Deputy who could have acted on her behalf, and therefore it would not have been necessary for the local authority to step in.

41. Having established that the move to KCourt was in accordance with Ms X’s wishes, it is necessary to determine whether she acquired ordinary residence there in accordance with the test in *Shah*. An assessment of Ms X was carried out by YHomes in respect of the period from 1 June to 31 August 2008. The report, dated 2

September 2008, stated “Ms X has settled well into KCourt and has been very happy”. It also noted that Ms X’s behaviour during this period had been less challenging than expected, and that this was considered to be due to the fact that Ms X “was desperate to prove that she should live at KCourt”.

42. This indicates that Ms X felt happy and settled at KCourt, and wished to continue living there. There is no suggestion that she had any desire to return to CouncilA. The fact that Ms X signed a tenancy agreement also suggests that it was her wish to reside there; whilst I accept that she did not have capacity to make the agreement and probably did not fully understand the legal implications of it, it seems likely that she would have had at least some awareness that she was signing something that related to her plans for residing in KCourt. I therefore consider that during her initial three month placement, Ms X became ordinarily resident in CouncilB, as she had adopted KCourt as her home voluntarily and for settled purposes as part of the regular order of her life for the time being, in accordance with the test in *Shah*.

43. The evidence referred to above indicates that in Ms X’s view, the move to CouncilB was intended to be permanent. In particular, her letter of 19 March 2007 in which she expressed her wish to move to YHomes also stated “I lived here for 20 years. Now I need to be nearer my family” and “I have been happy at ZCollege but it is time for me to move on”. Whilst there was some uncertainty amongst those responsible for Ms X’s care as to what arrangements would be suitable for her, in my view there is clear evidence that Ms X herself was very keen on the move and considered KCourt to be her new home. I therefore find that she acquired ordinary residence in CouncilB from the date she moved there, ie 1 June 2008.

44. CouncilB also made a number of alternative submissions, which I shall address briefly.

45. CouncilB submit that the arrangements made for Ms X’s care on 1 September 2008 (supported living arrangements) were not appropriate; they submit that Ms X qualified for residential accommodation under section 21 of the 1948 Act and that she should therefore have been placed in residential accommodation as soon as her NHS funding had ceased.

46. It is not for me to determine the kind of arrangements that should have been made for Ms X’s care. I am required to determine ordinary residence on the basis of the facts that applied at the relevant time: from 1 June to 31 August 2008 Ms X was receiving NHS care, and subsequently she received local authority funded social care in a supported living environment. However, in the light of my conclusion as to ordinary residence in the preceding paragraphs, if Ms X had been placed in residential accommodation on 1 September 2008, this would not affect the outcome of my determination. As Ms X was ordinarily resident in CouncilB by 1 September 2008, the responsibility for her at that time had transferred to CouncilB and they would have been responsible for her care, whether in residential accommodation or otherwise.

47. CouncilB also submit that Ms X cannot be said to have acquired ordinary residence in CouncilB because she does not live there any longer. This submission is plainly incorrect.

48. As explained above, my determination is that Ms X acquired ordinary residence in CouncilB during her initial three month stay in KCourt. She remained at KCourt for nearly two years, until she moved to VResidential Home in May 2010. CouncilB seem to be arguing that the placement in CouncilB should not be considered capable of becoming Ms X's ordinary residence because it was only temporary. In my view it would be unusual for a residence of nearly two years to be classed as "temporary", but even if this were the case, that would not prevent CouncilB becoming Ms X's ordinary residence. It is clear from the *Shah* test that a person's stay in a place does not have to be permanent, or even long-term, for ordinary residence to be acquired: it merely has to be "part of the regular order of his life *for the time being*, whether of short or long duration" (emphasis added).

49. As the placement in VResidential Home was a residential placement under Part III of the 1948 Act, the deeming provision in section 24(5) of the Act applies and so Ms X is deemed to continue to be ordinarily resident in CouncilB's area after her move to VResidential Home.

50. Therefore my determination is that from 1 June 2008, Ms X has been ordinarily resident in CouncilB.

Signed on behalf of the Secretary of State for Health

Dated