

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 16 2012)

1. I am asked by CouncilE of England to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mr X.

2. This is a cross-border ordinary residence dispute. Under the terms of arrangements¹ concluded by the Secretary of State and the Welsh Ministers under section 32(4) of the 1948 Act, the determination falls to be made by the Secretary of State because the person to whom the dispute relates was living in England at the time the dispute was referred. Prior to making this determination I have consulted the Welsh Ministers and taken their views into account.

The facts of the case

3. The following information has been ascertained from the statement of facts prepared by CouncilE, and the previous determination made by me on 4 August 2010. The authorities concerned are CouncilE and CouncilS of Scotland. Unfortunately the authorities have not been able to agree a joint statement of facts as required by the Secretary of State’s Directions², but

¹ Published on the Department’s website at:
http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114333.pdf

² The Ordinary Residence Dispute (National Assistance Act 1948) Directions 2010.

CouncilS in their legal submissions have commented on the statement of facts supplied by CouncilE.

4. X was born on xdate 1963. In February 2005 he had a motorcycle accident and suffered a brain injury which resulted in him becoming severely brain damaged. He requires 24 hour care and supervision, and has no mental capacity.

5. At the time of X's accident he was ordinarily resident in CouncilE. Immediately following the accident he was admitted to hospital in TownE, and subsequently to a TRACS home in CouncilE2; TRACS homes offer rehabilitation and care for persons with acquired brain injuries. On 30 March 2006 he was transferred to a TRACS home in CouncilS because his needs could not be met by the home in CouncilE2. The placements in both TRACS homes were arranged and funded by CouncilE Primary Care Trust ("the PCT") and were funded through NHS continuing care ("CHC").

6. X's CHC funding was discontinued on 31 January 2009. He remained at the home in CouncilS and at that point CouncilE accepted interim responsibility for his care home fees under Part 3 of the 1948 Act, pending the determination of X's ordinary residence. On 11 August 2009 X moved from the home in CouncilS to a home in CouncilE in order to be closer to his family.

7. An ordinary residence dispute in respect of X was referred to me by CouncilE in 2010. I was asked to determine X's ordinary residence in respect

of the period from 1 February 2009 to 10 August 2009. The dispute was submitted to me by CouncilE alone and CouncilS did not make any representations, although they were given the opportunity to do so. The statement of facts in respect of that dispute stated that X again became ordinarily resident in CouncilE from 11 August 2009.

8. On 4 August 2010 I determined that X was ordinarily resident in CouncilS for the period in dispute (1 February to 10 August 2009)³. In paragraph 25 of that determination I noted my view that CouncilE's statement as to the application of the law from 11 August 2009 was incorrect, and that X remained ordinarily resident in CouncilS after his move back to CouncilE on 11 August 2009. However the determination of 4 August 2010 applied to X's ordinary residence for the period from 1 February to 10 August 2009 only, as I was not asked to make a determination in respect of the later period. My determination of 4 August 2010 was not challenged.

9. CouncilE subsequently asked CouncilS to accept that X remained ordinarily resident in CouncilS from 11 August 2009, but CouncilS declined to do so. I have now been asked to determine X's ordinary residence in respect of this period.

The relevant law

³ Ordinary residence determination no. 7 2010.

10. I have considered the statement of facts, the legal submissions provided by Council E and Council S, the provisions of Part 3 of the 1948 Act and the Directions issued under it⁴, the guidance on ordinary residence issued by the Department (“the OR guidance”)⁵, and the leading cases of *R v Barnet ex parte Shah* (1983) 2 AC 309 (“*Shah*”) and *R v Waltham Forest Borough Council ex parte Vale* The Times 25.2.85 (“*Vale*”). My determination is not affected by Council E assuming provisional responsibility for funding X’s care.

11. 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”.

12. 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

⁴ Contained in LAC(93)10.

⁵ “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.

ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

13. "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".

14. 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 application of the law

15. The period in dispute is 11 August 2009 to the present.

16. In my determination of 4 August 2010 I concluded that X was ordinarily resident in CouncilS for the period from 1 February to 10 August 2009. I considered that, on the basis of the tests in *Shah* and *Vale*, he had acquired ordinary residence in CouncilS during the period when his placement at the TRACS home in CouncilS was being funded through CHC; it followed from this that when accommodation under section 21 of the 1948 Act was first provided (when CHC funding ceased), section 24(5) of that Act applied to deem X's residence to continue to be in CouncilS.

17. CouncilS did not take the opportunity to submit representations at the time of the previous determination in 2010, and they did not challenge that determination. In their submissions in respect of this determination, CouncilS state that they accept the determination of 4 August 2010 and are not seeking to reopen it; nevertheless they go on to make representations in respect of the period covered by that determination. CouncilS state that it is necessary to

make those representations because the factors that relate to that period are also pertinent in determining X's ordinary residence for the period from 11 August 2009.

18. My determination of 4 August 2010 still stands. CouncilS were aware that that determination was being made, and they did not make any submissions in respect of it. They state that they are not now seeking to re-open it, but even if they were to seek this, I would see no basis for doing so; if CouncilS were not happy with the conclusion reached in that determination, they should have challenged it at the time. Therefore the position remains that X was ordinarily resident in CouncilS for the period from 1 February to 10 August 2009.

19. I have considered CouncilS's submissions in respect of the period from 11 August 2009, which is the period in dispute. They state that the deeming provision in section 24(5) of the 1948 Act does not apply from that date because CouncilS did not make the arrangements for X's return to CouncilE. They also state that to apply the deeming provision in this case would not be appropriate because there is no intention for X to return to CouncilS, as all his family ties are in CouncilE.

20. These issues are not relevant to the application of the deeming provision. Section 24(5) of the 1948 Act provides:

“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.”.

The effect of this is that when a person is provided with residential accommodation under section 21, his ordinary residence is deemed to continue in the area where he was ordinarily resident before that accommodation was first provided, which in X’s case is CouncilS. This is not affected by any other factors, including the person’s intention or who makes the arrangements for the care.

21. X was ordinarily resident in CouncilS when section 21 accommodation was first provided to him on 1 February 2009, and section 24(5) operates to deem that ordinary residence to continue for as long as section 21 accommodation continues to be provided; it does not matter whether he moves to a different home, or a different local authority area, as long as he continues to receive care under section 21. CouncilS comment that CouncilE have been the lead authority throughout, but this is because CouncilE accepted responsibility for X’s care on a without prejudice basis pending the resolution of the ordinary residence dispute; it has no bearing on X’s ordinary residence.

22. Consequently the deeming provision in section 24(5) of the 1948 Act operates to deem X’s ordinary residence to be in CouncilS continuously from the date when section 21 accommodation was first provided (1 February

2009). Therefore my determination is that since 11 August 2009, X has been ordinarily resident in Councils.

Signed on behalf of the Secretary of State for Health

Dated