

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 13 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 legal submissions provided by both parties. The authorities in dispute are CouncilA and CouncilB.
3. Mr X was born on xdate 1993. He is severely autistic and has a severe learning disability. He lived with his mother in the area of CouncilA until 14<sup>th</sup> September 2007 when he was placed by CouncilA on a full-time (52 weeks a year) basis at the SchoolQG, Town1B, CouncilB pursuant to section 20 Children Act 1989 (“the 1989 Act”).
4. On 12<sup>th</sup> March 2008, Mr X’s mother moved to Town2B, CouncilB, where she presently lives in her own home.
5. On 16<sup>th</sup> February 2011, Mr X turned eighteen.
6. Mr X’s placement was due to end at the end of January 2012. In anticipation of this, CouncilA contacted CouncilB in April 2011 to raise the issue of Mr X’s ordinary residence. Both local authorities accept that Mr X requires a specialist residential placement and does not have mental capacity (within the meaning of Section 2 of the Mental Capacity Act 2005) to decide where he wishes to live. Pending determination of ordinary residence, both local authorities have agreed to a joint assessment of Mr X’s needs and that any placement will be one to which both authorities agree.
7. On 12<sup>th</sup> March 2012, Mr X moved to a specialist residential placement at ResidentialPlacement66 in Town2B, CouncilB, and he is reported to have settled in well. CouncilA has agreed to continue to fund the placement at ResidentialPlacement66 pending the determination.

**The relevant law**

8. I have considered the agreed statement of facts and legal submissions provided by both parties, certain provisions of the 1989 Act, the provisions of Part 3 of the 1948 Act and the Directions issued under it<sup>1</sup>, the Department of Health guidance in LAC (93)7<sup>2</sup> and “*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*”<sup>3</sup> (“the Ordinary Residence Guidance”), the leading case of R v Barnet ex parte Shah (1983) 2 AC 309 (“Shah”), R v Waltham Forest London Borough Council ex

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<sup>1</sup> Contained in LAC(93)10.

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

<sup>3</sup> Updated edition of the guidance published in July 2011.

parte Vale, the Times 25.2.85 (“Vale”) and R (Greenwich) v Secretary of State and Bexley [2006] EWHC 2576 (“Greenwich”). My determination is not influenced by the fact that CouncilA is currently funding the Part 3 services.

9. 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 and attention which is not otherwise available to them. 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.
10. 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.
11. 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.”

12. 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.
13. 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.”*

14. 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.”*

15. 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 the Vale case, 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**

16. Mr X became eligible for residential accommodation and/or services under the 1948 Act on his eighteenth birthday. Before his eighteenth birthday, Mr X was being provided with services by CouncilA as a looked after child under the 1989 Act.
17. As set out in paragraph 146 of the Ordinary Residence Guidance neither the 1989 Act nor the 1948 Act makes 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.
18. 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. Given that CouncilA had responsibility for Mr X under the 1989 Act, CouncilA remained Mr X’s place of ordinary residence for the purposes of the 1989 Act and there would be a starting presumption that Mr X’s place of ordinary residence remains the same for the purposes of the 1948 Act when she turned 18.
19. 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.”*
20. At paragraph 149, it continues to say that this starting presumption may be rebutted by the circumstances of the individual’s case and the application of the Shah or Vale tests. 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.
21. CouncilB submits that the starting presumption has not been rebutted for the following reasons:

- a. CouncilA concede the presumption applied at the material time, namely Mr X's 18<sup>th</sup> birthday when services under s21 of the 1948 Act were first provided.
- b. Mr X had not made new links to CouncilB outside of the SchoolQG.
- c. Mr X lacks capacity to decide where to live and express a preference to live in CouncilB.
- d. The primary reason Mr X has continued to reside in CouncilB beyond the age of 18 was because his placement at the SchoolQG did not end until January 2012.

Accordingly, CouncilB submit that the deeming provision in s24(5) of the 1948 Act applied when Mr X reached 18 and continued to apply when he moved to the residential home in Town2B in March 2012 so that he continues to be ordinarily resident in CouncilA.

22. CouncilA submits that, having regard to all the circumstances, the starting presumption under the 1989 Act has been rebutted and that applying either the test in Shah or Vale, Mr X's ordinary residence is in CouncilB.
23. On Mr X attaining 18, it is agreed that he was first provided with services under s21 of the 1948 Act. It is agreed that immediately before his 18<sup>th</sup> birthday, Mr X was ordinarily resident in CouncilA for the purposes of the 1989 Act and so the starting presumption for assessing Mr X's ordinary residence under the 1948 Act is that he remains ordinarily resident in CouncilA. However, this is only the starting presumption and may be rebutted by considering all the facts of his case.
24. Both local authorities also accept that Mr X does not have capacity to decide where to live. I have not been provided with any mental capacity assessment but on the basis that it is not disputed, I conclude that Mr X does lack such mental capacity, so consider which of the tests in Vale to apply.
25. In my view the relevant test is 'test one' in Vale. Given that Mr X's learning disabilities are such as to render him totally dependent on his mother, the concept of having an independent ordinary residence of his own which he has adopted voluntarily and for which he has a settled purpose does not arise. Accordingly, Mr X is in the same position as a small child and his ordinary residence is the same as that of his mother because that is his "base". Accordingly, I conclude that Mr X would be ordinarily resident in CouncilB as this is where his mother lives.
26. However, I note, that CouncilA submits that the alternative approach in Vale should be adopted. This considers a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered including physical presence in a particular area and the nature and purpose of that presence as outlined in Shah, but without requiring the person themselves to have adopted the residence voluntarily. Even if this approach were adopted, I would conclude that on the circumstances of this case, Mr X would be ordinarily residence in CouncilB.
27. I note that it is agreed that Mr X has been living in CouncilB's area full time since 14<sup>th</sup> September 2007 and that his mother has been living in CouncilB since 12<sup>th</sup> March 2008 so as to be close to Mr X. It is noted that Mr X has not

established any connections outside his accommodation. He does not visit his mother at her home but his family visits him in his placement. Paragraph 13 of CouncilA's submissions state that Mr X's family visit him

“...as frequently as twice a week, with Mr X's mother encouraging other family members to attend with her. It is considered essential to [Mr X]'s welfare that he maintains his relationship with his family. The Pathway Plan prepared by CouncilA County Council in June 2011 recommends on-going frequent contact between Mr X and his family. His mother has also made it very clear that she wishes for Mr X to continue to reside in CouncilB.”

28. It is agreed that Mr X has no remaining ties to CouncilA.
29. I therefore conclude that the presumption that Mr X remains ordinarily resident in CouncilA can be rebutted because the regular order of his life has, at the material time of his 18<sup>th</sup> birthday, been organised to be based in CouncilB. He is physically present in CouncilB. The only connections he has outside his accommodation are to his family who, by way of his mother, live in CouncilB whereas in contrast he no longer has any connections to CouncilA. Accordingly, as of his 18<sup>th</sup> Birthday, and for the purposes of the 1948 Act, Mr X is ordinarily resident in CouncilB.
30. As Mr X is being provided with Part 3 accommodation under the 1948 Act, section 24(5) of the 1948 Act applies and he is deemed to continue to be ordinarily resident in the area in which he was not ordinarily resident immediately before Part 3 accommodation was provided for him. Immediately before Mr X was provided with Part 3 residential accommodation on 16<sup>th</sup> February 2011, he was living in CouncilB where he was ordinarily resident for the purposes of that part of that Act. Accordingly, the deeming provision does not change his ordinary residence.
31. For these reasons, my determination is that Mr X has been ordinarily resident in CouncilB since 16<sup>th</sup> February 2011.

Signed on behalf of the Secretary of State for Health

Dated