

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3)  
OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE  
OF X (OR 13 2013)

1. I am asked by CouncilA and CouncilB to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mrs X for the purposes of Part 3 of that Act.
2. The period for which the ordinary residence of X is in dispute is from 22 August 2008 (the date from which CouncilB argues it ceased to provide her with accommodation under Part 3 of the 1948 Act) until 8 April 2009 (the date on which she became eligible for NHS continuing care (“NHS CHC”)).

**The facts**

3. The following facts are derived from the Statement of Facts agreed by CouncilA and CouncilB, and from the copy documents supplied. X was born on x date 1930. In May 2008 CouncilB carried out an assessment of her need for community care services under section 47 of the National Health Service and Community Care Act 1990. At the time of the assessment, X was living in CouncilB. She was found to be in need of care and attention in a residential setting. She had capacity to decide where she wished to live and chose to be near her son and his family who lived in the area of CouncilA. On 29 May 2008 CouncilB placed her at CareHomeA1 in the area of CouncilA.

4. At the time of her placement, X owned a property in CouncilB which was left empty after she moved out. The placement was arranged under a “Short Term Pending House Sale” contract under which CouncilB paid the fees of the placement until such time as X’s property could be sold.
  
5. Within the 12 week period during which X was entitled to have the value of her property disregarded (“the Disregard Period”)<sup>1</sup>, CouncilB offered X a Deferred Payment Agreement<sup>2</sup> in respect of the period after the Disregard Period. X declined the offer.
  
6. On 21 August 2008 the Disregard Period ended. X’s property was valued at approximately £110,000. CouncilB continued to discharge the care home fees under the Short Term Pending House Sale contract and placed a charge on X’s property in respect of those fees.
  
7. On 8 April 2009 X became eligible for NHS CHC which was funded by CouncilA Primary Care Trust.
  
8. On 2 October 2009 CouncilB’s legal charge was discharged in full.

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<sup>1</sup> Under the National Assistance (Assessment of Resources) Regulations 1992 where a local authority arranges permanent residential care for a person, the value of the person’s main or only home is disregarded for the first 12 weeks of local authority arranged care.

<sup>2</sup> See section 55 of the Health and Social Care Act 2001.

9. On 16 November 2009 X's property was sold for £110,000 and she purchased another property in the CouncilB area.
  
10. On 5 October 2010 X's eligibility for NHS continuing healthcare ceased.
  
11. In December 2010 X was admitted to hospital. Whilst she was a patient, CareHomeA1 gave her notice that it could no longer meet her needs. It was around this time that a dispute arose between CouncilA and CouncilB as to X's ordinary residence.
  
12. In January 2011 a placement was secured for X at CareHomeA2 by the HospitalA social work team in the CouncilA area. She was discharged from hospital in February 2011. In the same month CareHomeA2 Hall served notice on X that it could no longer meet her needs. In March 2011 she was placed at CareHomeC1 in the CouncilC by CouncilA on a "without prejudice" basis.
  
13. The matter in dispute, between CouncilB and CouncilA, is the question of X's ordinary residence for the period from 22 August 2008, following the ending of the Disregard Period, until 8 April 2009, when she became eligible for NHS CHC.

## **The relevant law**

14. In making this determination I have considered the agreed statement of facts and documents provided by the parties. I have also considered the legal submissions from the parties. I have also considered the provisions of Part 3 of the 1948 Act, guidance on ordinary residence issued by the Department<sup>3</sup>, the leading case of *R v Barnet LBC ex parte Shah (1983) 2 AC 309* (“Shah”), the Department of Health Local Authority Circular on assessment of need for accommodation under Part 3 of the 1948 Act (LAC(98)19) and the Department of Health Local Authority Circular on the 12 week property disregard (LAC(2001)10).

15. My determination is not influenced by the fact that Council A have accepted responsibility for funding X’s care under Part 3 of the 1948 Act pending resolution of the dispute.

## **Section 21**

16. 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 require local authorities to make arrangements to provide residential accommodation for those qualifying under Part 3 who are ordinarily resident in their area or in urgent need of such accommodation and also for persons with no settled residence who are or have been suffering from mental disorder and who are in the authority's area.

17. Paragraphs 9 to 12 of the Department of Health Local Authority Circular LAC(98)19 make it clear that having capital in excess of the upper limit set out in the National Assistance (Assessment of Resources) Regulations 1992 does not in itself constitute adequate access to alternative care and attention. If a local authority is to end a contract made on behalf of a resident and make that person 'self funding' they should satisfy themselves that the person is able to manage their own affairs or has someone who can take over the arrangements on their behalf. Where the person is unable to manage their own affairs or has no one to act on their behalf it would be for the authority to

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<sup>3</sup> Guidance on the identification of the ordinary residence of people in need of community care services, England.

continue to manage the contract and the person should remain a Part 3 placement. If the person is capable or has someone to act on their behalf for them, then if the authority decides to terminate its involvement, they must inform the resident or representative in writing, explaining why.

18. Paragraph 12 c) of the Department of Health Local Authority Circular LAC(2001)10 makes clear that after the end of the Disregard Period, councils will need to consider whether the value of residents' assets (including property) mean they no longer need council support.

#### **Section 24**

19. 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 Part 3 of the 1948 Act, the person "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), as substituted by section 148(1) of the Health and Social Care Act 2008 ("the 2008 Act") with effect from 19 April 2010, provides: "For the purposes of the provision of residential accommodation under this Part, a patient ("P") for whom NHS accommodation is provided shall be deemed to

be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.”

21. New section 24(6A) inserted by section 148(1) of the 2008 Act with effect from 19 April 2010, provides (so far as relevant): “In subsection (6) “NHS accommodation” means—

(a) accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006...”.

22. Prior to 19 April 2010, (and at the time when X was provided with NHS CHC), section 24(6) read as follows : “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, where or not he in fact continues to be ordinarily resident in that area.”

23. Thus, prior to 19 April 2010, the deeming provision in section 24(6) applied to those in NHS hospital accommodation only. By virtue of section 148(1) of the

2008 Act, the deeming provision applies also to those in non-hospital NHS accommodation.

24. However, under transitional provisions<sup>4</sup>, the amendments made to section 24 by section 148(1) of the 2008 Act do not have effect in relation to a person for whom non-hospital NHS accommodation is being provided immediately before 19 April 2010, for as long as the provision of that accommodation continues.

25. Therefore, in determining the ordinary residence of a person, such as X, who went into non-hospital NHS CHC accommodation on or before 18 April 2010 and continued to be there after that date, the ordinary residence rules that applied on the day they went into care should be applied – i.e. the dispute must be resolved in the light of the specific circumstances and not by application of the deeming provisions.

### **Ordinary residence**

26. “Ordinary residence” is not defined in the 1948 Act. The guidance 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

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<sup>4</sup> See Article 12(1) of Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010 (S.I. 2010/708).



degree. Factors such as time, intention and continuity have to be taken into account.

27. 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”.

## **Section 26**

28. 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. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local

authority, to the other party to the arrangements, of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements, and that the local authority shall either recover from the person accommodated the refunds they are liable to make or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment, with the local authority paying the balance (and covering any unpaid fees).

29. Section 26(2) was considered by the House of Lords in *Quinn Gibbon*. The leading judgement given by Lord Slynn held (page 79(j)):

“...arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include provision for payments to be made by a local authority to the voluntary organisation at such rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2), then residential accommodation within the meaning of Part 3 is not provided...”.

### **Application of the legal framework**

30. The question for me to determine is where X was ordinarily resident immediately before she was provided with NHS CHC accommodation on 8

April 2009. The parties are in agreement that X's initial placement in CouncilA's area from May 2008 to 21 August 2008 was made by CouncilB under section 21 of the 1948 Act. Therefore the period in relation to which I have determined her ordinary residence is from 22 August 2008 until 8 April 2009.

31. This turns on whether X was provided with Part 3 accommodation during this period. If she was, then section 24(5) will apply and X will be deemed to continue to be ordinarily resident in the area in which she was ordinarily resident before Part 3 accommodation was provided. But if X's accommodation was not provided under Part 3, then her ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

32. My determination is that X's accommodation in CareHomeA1 during the period of the dispute was provided under Part 3 of the 1948 Act. My reasons for reaching this decision are set out in the following paragraphs.

33. First, one of the conditions for qualifying for accommodation under section 21 of the 1948 Act is that, without the provision of such accommodation, the care and attention which the person requires will not otherwise be available to them. According to CouncilB, its responsibility for X ceased from 22 August

2008 on the basis that the Disregard Period ended and the value of X's home in CouncilB ceased to be disregarded. From then, CouncilB claim, X had both the capacity and the means to provide for her own care and attention.

34. However, I do not think that that is the correct approach. As paragraphs 9 to 12 of the Department of Health Local Authority Circular LAC(98)19 state, possession of capital above the statutory upper limit does not exempt the local authority from its duty to make arrangements for those persons who are themselves unable to make care arrangements and have no-one to make arrangements for them. At the end of the Disregard Period, if there are reasons why a person is unable to enter into a private contract with the care home, they remain the responsibility of the original authority.

35. In X's case, in the absence of the sale of her principal asset, her home, having materialised, there does not seem to have been any material change in her circumstances such that she was in a position to make her own arrangements at the end of the Disregard Period. It appears to me that in the absence of the sale of her home, she did not have the resources to pay for her care home fees at the time. My view is not affected by the fact that, according to the papers, CouncilB's legal charge subsequently appears to have been discharged (in October 2009) in the month previous to the sale of her home (November 2009). It is not entirely clear how X came to be in a position to discharge the legal charge in the previous month to that in which

her home was sold, but this was well after the period in dispute and, during that period, the need for CouncilB to contract for X's placement with CareHomeA1, and to pay the related fees, seems to have arisen because of, or been linked to, a delay in the sale of her home. This is supported by the fact that: a) CouncilB contracted for that placement under a Short Term Pending House Sale contract; b) CouncilB placed a legal charge on X's property in respect of the fees for the placement (having offered her a Deferred Payment Agreement); c) X was apparently not in a position to discharge CouncilB's legal charge during the period in dispute; and d) this state of affairs continued for several months until shortly before the sale of her home. I take the view that during the period in dispute, CouncilB contracted for X's placement under Part 3 of the 1948 Act.

36. Second, the arrangements which were entered into by CouncilB with CareHomeA1 on X's behalf, appear to have met the requirements of section 26. In accordance with subsection (1A), the accommodation was provided in a registered care home. Further, in accordance with section 26(2), the arrangements provided for the making by CouncilB to CareHomeA1 of payments in respect of the accommodation provided under the Short Term Pending House Sale contract. CouncilB subsequently recovered from X the amount of the refund which she was liable to make.

37. The fact that this was Part 3 accommodation is further supported by the fact that a charge was placed by Council B on X's property in respect of the fees it paid for the accommodation.

38. The effect of my determination that X was provided with Part 3 accommodation during the period of the dispute is that the deeming provision in section 24(5) of the 1948 Act applied, and that she accordingly continued to be ordinarily resident in Council B (where she was so resident immediately before the period of the dispute).

39. The next question for me – and one which is not directly referred to me – is how this ordinary residence was affected by X's entitlement to NHS CHC. Both parties appear to have approached the dispute on the basis of establishing where X was ordinarily resident immediately before she became eligible for NHS CHC. This suggests a presumption that following her entitlement to NHS CHC, X continued to be ordinarily resident in the area in which was so resident before that entitlement. If that is correct, then the parties seem to be applying the deeming provision in section 24(6) to the facts.

40. However, CareHomeA1 is not a hospital to which section 24(6) of the 1948 Act applied at the material time. Therefore the deeming provision in section

24(6) cannot apply to the period when X's stay in CareHomeA1 was funded by NHS CHC. X's ordinary residence during that period falls to be determined according to the usual rules. For this it is necessary to look at all the circumstances of the case.

41. If the parties wish to take this issue up further and, in the event of a disagreement between them, refer the matter to me for a determination in the light of full representations on this issue from both parties, then that is a course which is open to them.

42. In summary, I determine that X was ordinarily resident in CouncilB for the purposes of the 1948 Act from 22 August 2008 to 8 April 2009.

Signed on behalf of the Secretary of State for Health

Date: