

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION  
32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY  
RESIDENCE OF MR X (OR 5 2011)**

**Introduction**

1. I am asked by the 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 Mr X for the purposes of Part 3 of that Act.

**The facts of the case**

2. The following facts are derived from the statement of facts (“SOF”) agreed by CouncilA and CouncilB and other documents submitted by them.

3. Mr X was born on xdate 1979. He has severe epilepsy, Tourettes Syndrome and a mild learning disability.

4. CouncilB first became aware of Mr X and his family on 1<sup>st</sup> February 2006. This was the date on which it was contacted by Mr X’s father who informed it that the family had moved to CouncilB in January 2006, that Mr X wished to live independently and, according to a contact note made by CouncilB, that the family had located an independent living facility run by GCentre in CouncilC and been advised that social service department funding would be required. CouncilB agreed to allocate a social worker to make further contact and explore the position.

5. For reasons that are unexplained, Mr X did not move to the GCentre and on 14<sup>th</sup> February 2007 CouncilB carried out an SAP (Single Assessment Process) overview/summary for Mr X. This states that he wanted help with advice on provision of services in the area, work experience and long term independent living and that his hopes at the end of the assessment were to live in appropriately supported living accommodation. It also states that Mr X requires 24 hour supported living and that the service to be provided by CouncilB is to “*identify suitable care provision*”.

6. From the SOF it appears that contact between CouncilB and Mr X or his family was next made when Mr X’s family asked CouncilB to support Mr X to achieve a move to “*a facility in Area1 run by THomes*”<sup>1</sup> which Mr X had located and which he believed would meet his needs. The family were concerned that Mr X might fail to secure a vacancy there unless steps were quickly taken to secure it.

7. On 4<sup>th</sup> April 2007, THomes carried out an assessment of Mr X’s needs. I assume this assessment was made pursuant to a request by Mr X or his family rather than CouncilB. This is because on 9<sup>th</sup> March 2007 CouncilB sent a letter to THomes agreeing to a request made by that organisation to carry out an assessment provided it was at no cost to CouncilB. A letter dated 15<sup>th</sup> April 2008 from CouncilB to the Head of Democratic and Legal Services at CouncilA mentions that the outcome of the

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<sup>1</sup> ie. in the CouncilA

assessment was that Mr X was considered to be suitable for living independently with the provision of modest home care services.

8. In September and October 2007, before Mr X's move to CouncilA, CouncilB appear to have sent a number of letters to CouncilA social services department and to CouncilA PCT. From the three letters provided with the documents (dated 5<sup>th</sup> September 2007, 18<sup>th</sup> September 2007 and 24<sup>th</sup> October 2007) it is clear to me that their purpose was to inform the PCT and social services department<sup>2</sup> of Mr X's intended move so that they could carry out any necessary assessments and make arrangements as regards the funding of Mr X's care package and, by the letter of 18<sup>th</sup> September to make them aware that Mr X would lose his place unless a decision as to funding was made within 4- 6 weeks. CouncilA social services department's response to those letters is set out in replies dated 19<sup>th</sup> October and 2 November and is that in its view it has no financial responsibility for Mr X if he moves to THomes.

9. In October 2007, pursuant to its functions under section 47 of the National Health Service and Community Care Act 1990, CouncilB drew up a "Specialist Social Work Assessment" and "Care Plan". This states that Mr X requires "*daily support with general living and skills – to enable him to cook, clean, housekeeping and general maintenance of property to ensure health and safety is monitored and risk assessments completed*".

10. The Care Plan also refers to Mr X's need for "*support with all personal needs and hygiene*" and his "*wish to live as independently as possible*". Under "Carer's Issues" it refers to the need for Mr X to "*move on – ideally,... to THomes as soon as possible*" and states that it is for "*PCT and SSD to agree move to CouncilA as soon as possible, 4-6 weeks notice given on 19 September – Due to expire. Carer needs full support and decisions made in order for family to be at ease and enjoy a lifestyle themselves*". Under "Any other information" it states that it is "*URGENT that Mr X secures funding for his placement in CouncilA. Agreed with health that a 6 week review would be supported by CouncilB, and the case should be considered at this point to pass control to CouncilA and PCT respectively. This will be agreed at the point of 6 week review (TBA).*"

11. An email exchange between CouncilB and the PCT in CouncilB shows that on 8<sup>th</sup> October 2007 they agreed to share on a 50/50 basis the costs of Mr X's care at THomes. Emails between PCT in CouncilB and CouncilB Social Services Department show that this was subject to review at six weeks.

12. The Care Plan and the letter of 24<sup>th</sup> October to CouncilA PCT which states "*I am conscious that CouncilB will be paying for the home care services since he will be moving into his new accommodation during November 2007, despite strenuous efforts to engage your authority in participating in a handover....Accordingly CouncilB intends to withdraw its funding of the service provision to Mr X 6 weeks after the implementation date of him living in our jurisdiction/authority.*" indicate to me that CouncilB and the PCT in CouncilB made their decision to provide funding so that Mr X would not lose his place at THomes pending a decision as to funding being made by the PCT and social services departments in the CouncilA.

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<sup>2</sup> ie. the PCT and SSD in the CouncilA

13. Mr X moved to THomes on 26<sup>th</sup> November 2007. Since moving into THomes Mr X's domiciliary care costs have been met on a 50/50 basis by CouncilB and CouncilB PCT. The SOF and other documents do not disclose the nature of Mr X's accommodation or explain how the accommodation costs were met for the period from 26 November until 1<sup>st</sup> February 2008. But the tenancy agreement provided with the documentation is dated 1<sup>st</sup> February 2008 and shows that from that date Mr X and another entered into an assured short hold tenancy agreement (AST) as joint tenants with THomes as the landlord. It relates to Flat 6 UCourt, WRoad, Area1 (CouncilA) and states that the rent is £850pcm and that Mr X and the joint tenant are jointly and individually responsible for the rent and that the landlord has the right to end the tenancy if the rent is not paid. CouncilB is not a party to and is not mentioned in the tenancy agreement.

### **The relevant law**

14. I have considered all the documentation submitted by both parties, the provisions of Part 3 of the 1948 Act, the Department of Health guidance "Ordinary Residence: guidance on the identification of the ordinary residence of people in need of community care services, England (publication date 15 April 2011) "OR Guidance", the leading case of R v Barnet Croydon ex parte Shah (1983) 2 AC 309 (*Shah*), the House of Lords decision in Chief Adjudication Officer v Quinn Gibbon [1996] (*Quinn Gibbon*).

15. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 years 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 Part 3 is, subject to further provisions in that Part, the authority in whose area the person is ordinarily resident.

16. By virtue of section 26 of the 1948 Act local authorities can, instead of providing the accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. In particular 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 a refund for all or some of the costs of the accommodation 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 any balance (and covering any unpaid fees). Section 26 was considered by the House of Lords in Quinn Gibbon. The leading judgement given by Lord Slynn held:

*"...arrangements made in order to qualify as Part 3 accommodation under section 26 must include a provision to be made by a local authority to the voluntary organisation at 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.*

17. Section 24 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 that Act “*he shall be deemed for the purposes of that Act to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him*”.

18. The duty to provide welfare services under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

### **The application of the law**

19. The key issue is whether Mr X is provided with residential accommodation under Part 3 of the Act. If he is provided with accommodation under Part 3 of the Act then section 24(5) will apply and Mr X will be deemed to be ordinarily resident in CouncilB that being the area in which he was ordinarily resident immediately before the residential accommodation was provided for him. But if it is not provided under Part 3 then Mr X’s ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

20. For the reasons given in paragraphs 22 onwards, my determination is that MrX has not been provided with accommodation under Part 3 of the 1948 Act certainly from the date at which he became a private tenant at Flat 6 UCourt. That date is no later than 1<sup>st</sup> February 2008 which is the date on which he entered into an assured shorthold tenancy agreement in relation to that property with THomes.

21. The SOF and documentation supplied with it does not explain who and on what basis Mr X’s residential accommodation at THomes was paid for during the period 26<sup>th</sup> November 2007 until 1<sup>st</sup> February 2008. If CouncilB and CouncilA provide me with information and a further statement of agreed facts to cover this period I will make a determination of ordinary residence for that period. However I hope that it will not be necessary to do so and that the two authorities will be able to reach agreement themselves on the question of where Mr X was ordinarily resident for that 65 day period.

### **Reasons for decision**

22. One of the conditions for qualifying for accommodation under section 21 is that, without the provision of such accommodation, the care and attention which the person requires will not otherwise be available to them. From at least 1<sup>st</sup> February 2008 Mr X has been receiving the care and attention he requires whilst living in private residential accommodation which is the tenancy of Flat 6. The case of R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38 confirmed that normally accommodation would not be provided under section 21 where a person enters into their own tenancy agreement. In this case, Lord Hoffman said that the effect of section 21(1)(a) was that, normally, a person

needing care and attention which could be provided in their own home, or in a home provided by a local authority under the housing legislation, is not entitled to accommodation under section 21 of the 1948 Act.

23. Although it may be possible for a person who is a tenant of their own property to be in receipt of Part 3 accommodation it would be necessary for there to be contractual arrangements between the individual, the accommodation provider and the local authority which meet the requirements of section 26(3A) of the 1948 Act. The contracts which have been entered into with THomes do not meet those requirements. In particular they do not provide that in the event of default by Mr X CouncilB must pay the rent to THomes and recover the payments from Mr X. Rather, the tenancy agreement shows that Mr X is a joint tenant with another party and that they alone are jointly and severally liable in the event that one or other of them fails to pay the rent due under the tenancy agreement.

24. The effect of my determination is that the accommodation which is occupied by Mr X under the AST is not accommodation into which he has been placed pursuant to arrangements made by CouncilB under section 21 of the 1948 Act and the deeming provision in section 24(5) does not apply. Therefore Mr X's ordinary residence falls to be determined in accordance with the normal rules. Such determination is still necessary because there is no dispute between the parties that Mr X requires to be provided with welfare services under section 29 of the 1948 Act. The local authority responsible for the provision of those services is the one in which MrX is ordinarily resident.

25. There is no suggestion that Mr X does not have mental capacity to make a decision about where he should live. When a person has the mental capacity to make such a decision the relevant test of where that person is ordinarily resident is the one set out in *Shah*. Lord Scarman in his judgement stated:

*“Unless it can be shown that the statutory framework or the legal context in which the words are used requires a differing meaning, I unhesitatingly subscribe to the view that “ordinary residence” 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.”*

26. The OR Guidance, like LAC 93 (7) which it replaces, provides clear guidance on determining someone's ordinary residence. It states that ordinary residence should be given its ordinary and statutory meaning subject to any interpretation by the courts. 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) have to be taken into account.

27. THomes was identified by Mr X as a place in which he wished to live independently and away from his family. He moved there voluntarily in November 2007 and on 1<sup>st</sup> February 2008 he affirmed his wish to continue living in CouncilA by entering into the AST in relation to Flat 6, UCourt. He has continued to live there ever since. In my view Mr X's residence at UCourt has a settled purpose and my determination is that he is ordinarily resident in the CouncilA and has been from at least the date of the AST agreement.

28. For completeness I mention that in reaching this determination I have not overlooked the importance placed by CouncilA on the content of the email exchanges of 8<sup>th</sup> and 9<sup>th</sup> October between CouncilB and CouncilB PCT. In my view these have no significance on the question of Mr X's ordinary residence which I have been asked to determine.

Signed.....

Dated.....