

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 7 2011)

1. I am asked by CouncilA (England) to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Ms X for the purposes of Part 3 of that Act.

The facts of the case

2. Ms X was born on xdate 1970 and has a learning disability. She attended primary and secondary schools in Scotland and subsequently a school in Area1 in England. Neither Ms X nor her mother were happy with this latter school. Ms X then attended College of Arts and Technology where she completed courses in cookery, typing and computers.

3. In November 1991, Ms X visited IResidential Care Home, at that time a registered residential care home in CouncilB (in Scotland), run by the 004Trust, for a two week trial period. The trial went well but there were no immediate vacancies. The case notes suggest that 004Trust advised Ms X’s mother to request an assessment of Ms X by CouncilA (England) as there was a shortfall between benefits and the cost. A home visit took place on 17th December 1991 and the key worker recommended that whilst CouncilA (England) would be in general support of the placement, further social work support was not felt to be required. It was also noted that the family were able to support the placement financially. Ms X moved to IResidential Care Home on 6th October 1992.

4. CouncilA (England) have confirmed that they paid a small top-up fee from the beginning of Ms X’s placement at 004Trust (Scotland) although this is not clear from the case notes I have seen. It is clear, however, that CouncilA (England) made top-up payments prior to March 2003 and CouncilA (England) state that such payments were made pursuant to Part 3 of the 1948 Act.

5. The statement of facts prepared by CouncilA (England) provides that 004Trust deregistered as a residential care home from midnight on 16th March 2003 and joined the Supporting People Scheme in CouncilB (in Scotland). CouncilA (England) say that the period for which Ms X’s ordinary residence is in dispute is from receipt of the letter dated 5th March 2003 from 004Trust stating their intention to deregister to the present date. It is understood that CouncilA (England) funded Ms X’s day care until 30th April 2006 on a provisional basis.

6. I am informed by CouncilB (in Scotland) that Ms X was assessed under the Social Work (Scotland) Act 1968 in September 2009 and that CouncilB agreed to fund a work/day placement at IResidential Care Home and that such funding has been backdated to April 2009. The period for which ordinary residence is in dispute between CouncilA (England) and CouncilB (in Scotland) is seemingly March 2003 (CouncilA say from receipt of the letter communicating an intention to deregister) to April 2009.

7. In CouncilA's submissions, they state that Ms X entered into a tenancy agreement with 004Trust and received housing benefit from the date of this agreement. I have not seen a copy and have not been advised of the date of that agreement. CouncilB (in Scotland), in their letter to CouncilA (England) dated 30th June 2006, contends that these were not tenancy agreements under Scots law but "occupancy agreements". Initially, CouncilB (in Scotland) declined to agree a statement of facts or to provide legal submissions, instead relying upon the assertions made in their correspondence. In correspondence, CouncilB (in Scotland) disputed the jurisdiction of the Secretary of State to make this determination. However, CouncilB (in Scotland) requested time to obtain Counsel's opinion. An extension was granted to 14th December 2010 but nothing further has been received.

8. The assessment carried out on 17th December 1991 found Ms X to be articulate and able to express an opinion clearly. A letter from 004Trust dated 25th February 2005 states that Ms X has capacity to enter into a tenancy agreement.

The relevant law

9. I have considered the statement of facts provided by CouncilA (England) and their legal submissions, the case notes and all the correspondence supplied. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department¹, the leading case of *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 ("Shah") and the House of Lords decision in *Chief Adjudication Officer v Quinn Gibbon* [1996] ("Quinn Gibbon"). Additionally, although they are not directly relevant to a determination of a person's ordinary residence for the purposes of the 1948 Act, I have considered the provisions of the *Social Work (Scotland) Act 1968*, the *Recovery of Expenditure for the Provision of Social Care Services (Scotland) Regulations 2010* and the ordinary residence guidance CCD 3/2010. My determination is not influenced by CouncilA's provisional acceptance of responsibility for day care until 30th April 2006.

10. 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.

11. By virtue of section 21(7) of the 1948 Act, a local authority can, where it is providing accommodation under section 21, also make arrangements for the provision on the premises in which the accommodation is being provided of such other services as appear to the authority to be required.

¹ Until 19th April 2010, this guidance was contained in LAC(93)7 issued by the Department. From that date it has been replaced by new guidance entitled "Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England". This determination refers to the new guidance as the guidance in force at the time the determination was made.

12. 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 nursing and 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 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(2) was considered by the House of Lords in “Quinn Gibbon”. The leading judgement given by Lord Slynn held (at paragraph 1192):

“.....arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include a provision for payments 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...”.

13. 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 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”.

14. 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.

Jurisdiction

15. Council B (in Scotland) has questioned whether or not the Secretary of State has jurisdiction to determine this matter given that the authority from whom recovery of expenditure is sought is in Scotland. Section 32(1) reads as follows:

- (1) Any expenditure which apart from this section would fall to be borne by a local authority —
 - (a) in the provision under this Part of this Act of accommodation for a person ordinarily resident in the area of another local authority, or
 - (b) in the provision under section twenty-nine of this Act of services for a person ordinarily so resident, or
 - (c) in providing under paragraph (a) of subsection (7) of section twenty-one of this Act for the conveyance of a person ordinarily resident as aforesaid,

shall be recoverable from the said other local authority and in this subsection any reference to another local authority includes a reference to a local authority in Scotland. Section 32(3) goes on to say that:

(3) Any question arising under this Part as to a person's ordinary residence shall be determined by the Secretary of State or by the Welsh Ministers.

CouncilA (England) maintain that they have provided services on a disputed basis pursuant to the 1948 Act since the change in registration of 004Trust (in Scotland) in March 2003. I am satisfied that this section gives authority for the Secretary of State to determine ordinary residence where the authority from whom expenditure is sought to be recovered is in Scotland.

The application of the law

16. It is not clear to me that CouncilA (England) were or should have been providing accommodation pursuant to Part 3 of the 1948 Act when Ms X first moved to CouncilB (in Scotland). If they were not, then ordinary residence would have crystallised earlier since Ms X would have been self-funding her accommodation and hence, in her circumstances, ordinarily resident in CouncilB (in Scotland) when she first moved there. I have not been asked to determine ordinary residence from the date of Ms X's move to CouncilB (in Scotland).

17. The key issue is whether or not Ms X was being provided with residential accommodation under Part 3 of the 1948 Act post March 2003. If the accommodation was being provided under Part 3, then section 24(5) will apply and Ms X will be deemed to be ordinarily resident in CouncilA, assuming she was in Part 3 accommodation prior to this date. But if it was not provided under Part 3 post March 2003, then Ms X's ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

18. My determination is that Ms X was not being provided with accommodation under Part 3 of the 1948 Act from the date on which she became a private tenant/occupant at 004Trust (in Scotland). My reasons for reaching this decision are set out in the following paragraphs.

19. 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. This was the case, subject to the rider in paragraph 16, at the outset of Ms X's residence at 004Trust in Scotland. However, it ceased to be the case when Ms X entered into her own tenancy or occupancy agreement. In *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, paragraph 26, Lord Hoffman said that the effect of section 21(1)(a) is that normally a person needing care and attention which could be provided in his own home, or in a home provided by a local authority under the housing legislation, is not entitled to accommodation under this provision. Ms X is living in a private residential arrangement and the funding of her accommodation, i.e. housing benefit, reflects her independent living arrangement.

20. Secondly, even if Ms X did qualify to be provided with accommodation under section 21, the arrangements which have been entered into with a third party do not meet the requirements of section 26 and cannot therefore be accommodation provided under Part 3 of the 1948 Act. There is no provision, as I understand it, for the making of payments by CouncilA (England) to 004Trust (Scotland) in respect of the accommodation provided. Ms X pays her rent with housing benefit.

21. The effect of my determination that Ms X was not provided with Part 3 accommodation post March 2003 is that the deeming provision in section 24(5) does not apply and Ms X's ordinary residence falls to be determined in accordance with the normal rules. Ms X requires welfare services (in England under section 29 of the 1948 Act) and CouncilA (England) paid for these on a disputed basis until 30th April 2006. The local authority responsible for providing such services is the one in which Ms X was ordinarily resident as of the commencement of her tenancy or occupancy agreement.

22. When a person has the mental capacity to make a decision about where to live then the relevant test of where that person is ordinarily resident is the one set out in Shah. Lord Scarman in his judgment stated:

“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 “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”.

23. The guidance on ordinary residence issued by the Department and referred to above, provides that the concept of ordinary residence involves questions of fact and degree. 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 (paragraph 19).

24. It has not been suggested that Ms X lacks the mental capacity to decide where she wishes to live. The case notes record that Ms X wanted to move to 004Trust (in Scotland) and a letter from 004Trust dated 25th February 2005 states that Ms X “has the necessary capacity to enter into a tenancy agreement”. In 2003 the test of capacity was that laid down in the case of *Re MB* (1997) 2 FLR 426. That case established that a person has capacity to make a particular decision if they are able to comprehend and retain information relevant to the decision in question, weigh it in the balance and come to a decision. The current test is very similar and is contained in the Mental Capacity Act 2005. The starting point is that a person is assumed to have capacity unless it is established that he or she lacks it (see section 1(2) of the Mental Capacity Act 2005). Section 3 of the Mental Capacity Act 2005 states that a person is unable to make a decision for himself if he is unable: (a) to understand the information relevant to a decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or, (d) to communicate his decision (whether by talking, using sign language or any other means). I have made this determination on the basis that Ms X has capacity to decide where she wishes to live.

25. Ms X has lived at 004Trust (Scotland) since 1992 and signed a tenancy agreement (according to CouncilA (England) and 004Trust (Scotland)) in or about March 2003. I am satisfied from the information available to me that Ms X wishes to remain at 004Trust and that she has adopted it voluntarily and for settled purposes. I determine that Ms X was ordinarily resident in CouncilB (in Scotland) from the date of signing her agreement and has remained so.

Signed on behalf of the Secretary of State for Health

Date: