

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 8 2011)**

1. I am asked by CouncilA (in England) and CouncilB (in Wales) 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 period 13<sup>th</sup> August 2004 to date. A determination in this matter was previously provided in 2003.

**The facts of the case**

2. The following information has been ascertained from the agreed statement of facts and copy papers supplied by the parties to this dispute. Mr X was born on xdate 1981. He has Cri-du-Chat syndrome, suffers from severe learning difficulties and exhibits challenging behaviour. A report from a Consultant Clinical Psychologist dated 4<sup>th</sup> December 2002 concluded that “...Mr X, whilst having the capacity to communicate informed choices on some day-to-day issues, would not have the capacity to make or reliably express an informed choice about where he would want to live...” I do not propose repeating the facts set out in the determination of 2003 but will update the sequence of events thereafter. The determination concluded that on 3<sup>rd</sup> March 1999, Mr X was ordinarily resident in CouncilB (in Wales) and continued to be so as a result of the deeming provision contained in section 24(5) of the 1948 Act. I will return to these provisions later. Mr X’s lack of capacity led to the conclusion in this case that he is in the same position as a small child and his ordinary residence is that of his parents who resided in CouncilB (in Wales) on 3<sup>rd</sup> March 1999.

3. On 13<sup>th</sup> August 2004, Mr X’s placement under section 21 of the 1948 Act at QLodgings a 3 bedded residential unit in the gardens of QSchool, CouncilC (in England) came to an end as the school had changed their scheme and could no longer offer adult placements. Prior to being at QLodgings, Mr X had resided at QSchool since 1993. The agreed statement of facts notes that Mr X does not react well to change, needs a stable routine and change has a severe impact on his behaviour. Consequently, Mr X’s parents agreed that Mr X should return to live with them in CouncilA (in England), where they had moved to in November 2000, on a temporary basis only until a new permanent residential placement could be identified. In the chronology attached to CouncilB’s letter dated 22<sup>nd</sup> March 2010 it is stated with reference to Summer/Autumn 2004: “Options for a placement were discussed with the care manager. However, Mr X’s parents chose to take Mr X home.”

4. On 14<sup>th</sup> August 2004, a Direct Payment agreement was entered into between CouncilB (in Wales) and Mr X’s mother to purchase 19 hours of home support weekly. These monies are used to purchase care provided by Mr Z who is Mr X’s step-father and full time carer. This was intended as a temporary arrangement until an alternative placement could be located. I understand from the copy papers that it has not been possible to employ suitable carers and Mr Z has put his business on hold as a result. Also in August 2004 an application was made to the Independent Living Fund by CouncilB (in Wales). Monies were received by Mr X for a short period but payment was cancelled since the support provided did not meet the criteria.

5. Between April 2005 and 2007, CouncilB (in Wales) attempted to find a suitable placement for Mr X. In November 2008, CouncilA (in England) completed an Adult Care Assessment which it undertook as authority of the moment and without prejudice as to responsibility for funding. In December 2009 CouncilA (in England) carried out a further assessment. It was felt that Mr X required a placement with 24 hour support and help to widen his social circle. Immediate respite for the family was recommended. The agreed statement of facts notes that Mr X has been referred to the local PCT with regard to NHS Continuing Healthcare Funding which is to go to Panel. Correspondence has passed between the parties to this dispute but it has not been possible to reach agreement.

6. Mr X's mother, Mrs Z, wrote to the Public Services Ombudsman for Wales, who, in a letter dated 6<sup>th</sup> August 2009, considered Mr X to be now ordinarily resident in CouncilA (in England).

### **The relevant law**

7. In addition to the documentation referred to above, I have considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department<sup>1</sup>, the leading case of *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 ("Shah"), the House of Lords decision in *Chief Adjudication Officer v Quinn Gibbon* 1 WLR 1184 [1996] ("Quinn Gibbon") and *R v Waltham Forest London Borough Council, ex parte Vale*, the Times 25.2.85 ("Vale"). My determination is not influenced by the provisional acceptance by CouncilA (in England) of responsibility for funding services.

8. 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. 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 or other persons who are in urgent need thereof".

9. 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.

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<sup>1</sup> Until 19<sup>th</sup> 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.

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. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with nursing or 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...”.

11. 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”.

12. The duty to provide welfare services (non-residential community care services) under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

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. Where a person lacks the capacity to decide where to live, as is the position with Mr X, the case of Vale is relevant. In that case, it was held that where a person's mental state is such that they are not capable of forming an intention to live in a particular place, the fact that the person may not therefore reside voluntarily in that place does not prevent it from being their place of ordinary residence. Such cases must be decided by reference to different considerations. Miss Vale was a 28 year old woman with severe mental disabilities. The solution adopted in her case was to treat her as residing at her parents' home by analogy with the position of a small child because she was so mentally handicapped as to be totally dependent upon a parent or guardian. Even though she resided in a residential care home, her parents' home was her "base". The judge in Vale also set out an alternative approach. This alternative test means that one should consider all the facts of the case, including physical presence and the nature and purpose of that presence in a particular place, as outlined in Shah, but without requiring the person themselves to have voluntarily adopted the residence. The previous determination concluded that the first test in Vale was appropriate in Mr X's case and that his ordinary residence was that of his parents who resided in Council B (in Wales) the day before residential accommodation under Part 3 of the 1948 Act was provided to him.

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

15. When Mr X ceased to reside at Q Lodgings in Council C (in England) in August 2004, he ceased to be provided with accommodation under the 1948 Act. Residing at his parents' house was meant to be a temporary arrangement for Mr X pending the finding of a suitable placement since Mr X does not react well to change. Direct payments are made by Council B (in Wales) to purchase welfare services from Mr Z, Mr X's stepfather.

16. Since Mr X is no longer in accommodation provided under section 21 of the 1948 Act, the deeming provision in section 24(5) of the 1948 Act has ceased to apply. The previous determination concluded that Mr X lacks capacity and is to be viewed as in the same position as a small child whose residence is that of their parents. That solution is still appropriate in this case and I therefore determine that Mr X was ordinarily resident in Council A (in England) where his parents were living as of 13<sup>th</sup> August 2004 and this continues to be the case.

17. I would refer the parties to the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 which provide at direction 2(1) that the local authorities in dispute must not allow the existence of an ordinary residence dispute to prevent, delay or otherwise adversely affect the provision of services under Part 3 of the 1948 Act. Direction 2(2) provides that one of the local authorities must provisionally accept responsibility for the provision of services pending the determination and direction 2(4) provides that, in the absence of agreement, the local authority in whose area the person is living should take responsibility. It seems that whilst an assessment has been carried out by Council A, the family are awaiting respite care and a placement is still outstanding. I do not expect a dispute to delay the provision of services as seems to have happened in this case according to the copy case notes.

Signed:

Dated: