

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 11 2011)

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 statements of facts prepared by two authorities involved in the dispute, and the supporting documents supplied. The authorities concerned are CouncilA and CouncilB. Unfortunately the authorities have not been able to agree a joint statement of facts as required by the Secretary of State’s Directions¹ and instead have each submitted their own statement.

3. Mr X was born on xdate 1976. He is profoundly deaf and has a number of health difficulties including a heart condition, curvature of the spine, and depression which leads to a deterioration in his health if un-medicated.

4. Mr X’s family reside in CouncilA. Mr X had been residing with his parents at the family home and in mid-2008, due to a deterioration in his mental health which put a strain on the relationship between Mr X and his parents, a community care assessment was carried out. Following that assessment it was decided that it was in Mr X’s interests for him to move to supported living accommodation.

5. In August 2008 Mr X moved to a temporary supported living flat, QCourt in AreaB1, CouncilB; care was provided by CharityB, a charity which provides support for deaf people in the community. (The statement of facts from CouncilB states that Mr X moved to QCourt in August 2009, but this appears to be an error.) Subsequently accommodation became available at RCourt, in AreaB2, CouncilB, a supported living facility also run by CharityB. RCourt was considered suitable accommodation for Mr X; the precise date that he moved to RCourt is not clear from the information supplied to me but it appears that it was some time between September and November 2009.

6. Mr X continues to live at RCourt. He has a tenancy agreement with CharityB, and receives housing benefit and council tax benefit from CouncilB.

7. CouncilA funded Mr X’s care costs when he first moved to CouncilB. On 4 November 2009 CouncilA wrote to the CouncilB Institute for the Deaf (BID), who had a service level agreement with CouncilB to provide assessment and care services, requesting that CouncilB take over responsibility for Mr X’s care package. The letter stated that CouncilA was ceasing to fund Mr X’s care as it had now become clear that RCourt was Mr X’s permanent rented accommodation and that his ordinary residence was in CouncilB. The letter stated that funding would cease on 13 December 2009, to give BID time to get the necessary arrangements in place.

¹ The Ordinary Residence Dispute (National Assistance Act 1948) Directions 2010.

8. On 25 March 2010 CouncilB wrote to CouncilA stating that it was not CouncilB's view that Mr X wished to remain in CouncilB, and it was not accepted that his ordinary residence had transferred to CouncilB. Therefore CouncilB did not accept that responsibility for Mr X's care had transferred to CouncilB.

9. Between March and September 2010 there were several exchanges of correspondence between CouncilA and CouncilB. On 24 September 2010 CouncilB wrote asking CouncilA to reconsider the matter and agree that it should remain the responsible authority, or if it did not agree, to refer the dispute to the Secretary of State.

10. On 6 May 2011 CouncilB advised CouncilA that they now accepted that Mr X was ordinarily resident in CouncilB and were prepared to accept responsibility for him from 24 September 2010, the date on which the ordinary residence dispute arose. CouncilA responded on 12 May 2011 stating that they did not accept that CouncilB's responsibility arose on 24 September 2010, and restating their view that responsibility had transferred to CouncilB on 13 December 2009.

The relevant law

11. I have considered the two statements of facts, the additional documentation, the legal submissions provided by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act and the Directions issued under it², the guidance on ordinary residence issued by the Department ("the OR guidance")³, and the leading case of *R v Barnet ex parte Shah* (1983) 2 AC 309 ("*Shah*").

12. Section 29(1) of the 1948 Act empowers local authorities to provide welfare services. The Secretary of State's Directions under Part 3 of the 1948 Act provide that the local authority is under a duty to make arrangements under section 29(1) "in relation to persons who are ordinarily resident in their area".

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".

The application of the law

² Contained in LAC(93)10.

³ "Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England" effective from 19 April 2010 (as amended).

14. The period in dispute is 13 December 2009 to 24 September 2010. My determination is that Mr X was ordinarily resident in CouncilB during this period. My reasons for reaching this conclusion are as follows.

15. CouncilA submit that Mr X has the mental capacity to decide where he wishes to live. CouncilB make no specific submissions this point but in their statement of facts it is recorded that “there does not appear to be evidence relating to Mr X lacking capacity”. There is no evidence in any of the papers supplied to me to suggest that Mr X lacks mental capacity. I therefore conclude that he had the capacity to decide where he wished to live.

16. It is not in dispute that Mr X was living in CouncilB’s area during the period in question. In order to determine where he was ordinarily resident at that time, it is necessary to consider all the facts of the case, including Mr X’s intentions, in accordance with the test in *Shah*.

17. CouncilB submit that the move to their area was not Mr X’s choice; they argue that decisions with which he did not agree were made on his behalf. In support of this they refer to a number of occasions on which Mr X indicated that he was not happy in CouncilB and wished to return to CouncilA. CouncilB submit that this is evidence that Mr X did not adopt CouncilB as his voluntary place of residence and that therefore the test in *Shah* was not satisfied.

18. It is apparent from the information before me that Mr X had reservations about the move to CouncilB and it was at first unclear whether he would remain there long-term, which is why CouncilA initially retained responsibility for him. It is also clear that he is now settled there, as indicated by CouncilB’s subsequent acceptance of responsibility. I am asked to determine whether he had acquired ordinary residence in CouncilB for the period in dispute.

19. CouncilB’s submissions refer to a number of documents which they say support the assertion that Mr X wished to return to CouncilA. However there are also documents which suggest that Mr X was content to remain in CouncilB; for example the report of the social worker, dated 2 November 2009 stated that Mr X had “gradually settled down” and that “he now sees his future as being where he is for 5 years”.

20. I accept that Mr X did on a number of occasions express a wish to return to CouncilA; however it does not appear to me that he was in this frame of mind permanently. There is evidence that by the start of the period in dispute, by which time he had been in CouncilB for over a year, he felt settled there and was content to stay in CouncilB for a few more years. It therefore appears to me that he had adopted CouncilB as his place of residence “voluntarily and for settled purposes as part of the regular order of his life for the time being”, in accordance with the test in *Shah*.

21. If I am wrong about the above and Mr X was not in fact content to be in CouncilB, the question is whether he could be said to be ordinarily resident there even though he did not particularly want to be there. CouncilB appear to be suggesting that

because it was not Mr X's wish to be in CouncilB, he cannot be said to have adopted residence there voluntarily, as required by the *Shah* test.

22. The issue of enforced presence was considered in *Shah*. Lord Scarman said that in determining ordinary residence, the residence must be voluntarily adopted:

“Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.”.

This indicates that residence may not be voluntary if it is enforced, but I do not understand CouncilB to be suggesting that Mr X's residence in CouncilB was enforced in such a way. He might have preferred not to be there, but that is not the same as saying that he was compelled to stay there against his will. The letter of 3 October 2008 from the psychiatrist at CouncilA and CouncilC Mental Health, stated “Mr X is aware that we cannot enforce him stay [sic] at QCourt but that it was the view of all those involved with him that this is a good opportunity and placement for him. Whilst at the present time Mr X isn't completely committed to this, he has agreed for us to seek to extend the placement beyond the 3 month trial period”. This indicates that although Mr X may have been unsure about staying in CouncilB, he agreed to do so. Whilst it appears that at that point he was not wholly keen on the idea, there is no evidence to suggest that he was forced to stay.

23. In this context it is also helpful to consider the case of *Mohammed v Hammersmith and Fulham London Borough Council* ([2002] 1 All ER 176), in which the issue of “normal residence” for the purposes of the Housing Act 1996 was considered. In that case Lord Slynn of Hadley said:

“So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides.”.

I consider that this reasoning can be applied to the present situation. Mr X was not being forcibly held in CouncilB. Although he may have preferred to move back to CouncilA, he had accepted (perhaps reluctantly) residence in CouncilB. That was where he was resident for the time being and although it may not have been his first choice, that does not prevent him acquiring ordinary residence there.

24. Furthermore, I can see no basis for concluding that Mr X was ordinarily resident in CouncilA during the period in question. He had left his parents' home in August 2008 and it does not seem to have been an option for him to return there. I cannot identify any address in CouncilA at which Mr X could be said to be resident. Although he might have liked to move back to CouncilA he did not, at that time, have anywhere in CouncilA which could be considered his ordinary residence.

25. Therefore my determination is that from 13 December 2009 to September 24 2010, Mr X was ordinarily resident in CouncilB.

Signed on behalf of the Secretary of State for Health

Dated