

**DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION
32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY
RESIDENCE OF MR X (OR 3 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 for the purposes of Part 3 of that Act. The other party to the dispute is the CouncilB.

The facts of the case

2. The following information has been ascertained from the statement of facts and statement prepared by CouncilA (but not agreed between the parties to this dispute), the copy case notes and correspondence together with a copy of the tenancy agreement in respect of YHouse, CouncilB. Mr X was born on xdate 1959. He has cerebral palsy with a learning disability, described as “mild learning difficulties” in the statement of facts prepared by CouncilA and in the case notes supplied as “a moderate to severe learning disability”.

3. In 1987, Mr X was placed by CouncilA in ZHouse, CouncilB pursuant to Part 3 of the 1948 Act. In 2002, it was decided that ZHouse would close. The statement reports that an independent advocate from CouncilC Putting People First consulted with the residents about the types of accommodation available to them, where they wanted to live and with whom and who they wanted to support them. The consultation process took approximately 12

months and included Mr X's parents, social workers, the team manager of CouncilA's advocacy services as well as people who knew Mr X at ZHouse.

4. I have also been provided with a copy of a document entitled "Information about Mr X's move from ZHouse" since the paperwork concerning the consultation process conducted by the independent advocate has been lost. The document was prepared in July 2009 by Mr X's Service Co-ordinator. Of the original move, she says: "Mr X was very clear throughout that he wished to remain living in CouncilB". Mr X wished to live with a certain individual and consequently a suitable property was sought and adapted for both of them. She questioned Mr X about the move out of ZHouse and understood from that conversation that Mr X was happy to continue to live in CouncilB.

5. In 2003 ZHouse deregistered as a care home. On 14th July 2003 Mr X moved into YHouse, a supported living bungalow in CouncilB. A tenancy agreement was signed with the words "MR X" underneath and witnessed by the Appointee. The tenancy granted exclusive possession of a bedroom and shared usage of other facilities and the tenant was to be solely responsible for the stated rent. CouncilA's letter dated 9th November 2010 states that CouncilC Scope worked with Mr X in helping him to understand his lease.

6. In 2008 the person with whom Mr X resided died. Later that year, Mr X's girlfriend moved into the bungalow. Various correspondence has passed between CouncilA and CouncilB but agreement could not be reached as to the responsible local authority from July 2003 to the present time.

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 Department¹, the leading case of *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 (“Shah”), *Levene v Inland Revenue Commissioners* (1928) AC 217 (“Levene”), 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 Council A of responsibility for services under section 29 of the 1948 Act from July 2003.

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.

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.

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.

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 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...”.

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 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

13. The key issue is whether or not Mr X continued to be provided with residential accommodation under Part 3 of the 1948 Act post July 2003, or whether, as Council A contends, he was no longer being provided with such accommodation. If the accommodation was still being provided under Part 3,

then section 24(5) will apply and Mr X will be deemed to continue to be ordinarily resident in CouncilA. But if it was 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.

14. My determination is that Mr X ceased to be provided with accommodation under Part 3 of the 1948 Act on the date he became a private tenant at YHouse on 14th July 2003. My reasons for reaching this decision are firstly that 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. This was the case when Mr X first moved to ZHouse but not when he entered his own tenancy 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. Mr X is living in a private residential arrangement and the funding of his accommodation, i.e. with housing benefit, reflects his independent living arrangement.

15. Secondly, even if Mr 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. Mr X is entirely

responsible for the payment of his rent under the tenancy and pays for this with housing benefit. The effect of this determination is that the deeming provision contained in section 24(5) of the 1948 Act no longer applies and Mr X's ordinary residence falls to be determined in accordance with the normal rules.

16. 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”.

17. 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).

18. In the case of *Levene*, Lord Warrington of Clyffe said:

“Ordinarily resident” also seems to me to have no such technical or special meaning...If it has any definite meaning I should say that it means according to the way in which a man’s life is usually ordered”.

Capacity

19. 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 now found in section 3 of the Mental Capacity Act 2005. That section 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).

20. As the guidance on ordinary residence states at paragraph 27, under section 1(2) of the Mental Capacity Act 2005 it should always be assumed that adults have capacity to make their own decisions relating to their accommodation and care unless it is established to the contrary.

21. It is CouncilB's case that Mr X did not have capacity to enter into a lease. In CouncilB's letter dated 7th October 2010 it is asserted that "there is no indication that Mr X had capacity to even grasp the link between signing and having a roof over his head". In their letter dated 26th August 2008, CouncilB refer to reviews conducted in 2006 and 2008 putting Mr X in a high risk category of being abused/exploited and an inability to read or write or to understand a financial assessment form as showing Mr X would be highly unlikely to understand the legal implications of signing a lease.

22. On the other hand, CouncilA assert that Mr X does have capacity to decide where he wishes to live and have produced a document prepared by Mr X's Service Co-ordinator who questioned Mr X in July 2009 and understood from that conversation that Mr X was happy to continue to live in the CouncilB area. I have also seen copies of case notes from June, July and August 2010 which are consistent with Mr X wishing to remain in CouncilB and maintaining his contacts there. I am also informed in recent correspondence (CouncilB's letter dated 7th October 2010 and CouncilA's letter dated 9th November 2010) that Mr X had told his occupational therapist that he wanted to live with his parents. His parents are said to be too frail for this to happen and it seems that they now visit Mr X rather than Mr X visiting them. CouncilA in their letter dated 9th November 2010 say that Mr X has since been asked about his wishes and CouncilA are clear that Mr X wishes to live in CouncilB.

23. The decision in question here is where Mr X wishes to live. That is not a decision which relates to the exact nature of the accommodation nor does it require an understanding of the implications for which local authority would be responsible for funding Mr X's care. A Community Residential/Nursing Placement Review started on 21st November 2006 reports under the section "Development of skills" that "there is clear evidence that he (Mr X) is able to choose and has a great deal of control over his life". The assessment also noted that Mr X had developed a number of social connections and friendships in his community. He attends a local church occasionally. Frequent contact is had with his family in CouncilA with (at that time) one weekend per month spent at their house. An assessment commenced in January 2008 noted that Mr X attends an art class and clubs in the evenings as part of his "social/educational activities and contact with the local community weekly activity programme". The "professional judgments" section at the end of this report states that "Mr X is very established in the CouncilB area and it would be very detrimental for Mr X to live anywhere else. I strongly recommend that Mr X stay in CouncilB as he has lived there for the last thirty years".

24. The overwhelming impression from the papers I have seen is that Mr X can choose where he wishes to live and has voluntarily resided in the CouncilB area for many years. He has made friends in the area and attends a number of social activities. If I am wrong on the issue of capacity and Mr X does not have sufficient mental capacity to form an intention as to where he wishes to live, his ordinary residence falls to be determined in accordance

with the case of Vale. 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 parent's 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 parent's 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.

25. In Mr X's case, I do not think it appropriate to treat him as residing at his parents' home by analogy with the position of a small child. Mr X has had a residence independent of his parents for a considerable period and whilst he maintains frequent contact with his parents, he has his own social contacts and is not so dependent upon his parents as to make this solution an appropriate one. I am also informed that Mr X's parents cannot have him live with them. The case therefore has to be considered according to the alternative approach set out in Vale i.e as if the person did have mental capacity. In the absence of the deeming provision and given that Mr X has

lived and become settled in CouncilB for many years, with many local activities and social contacts, it is not possible to conclude that Mr X is ordinarily resident in CouncilA. I determine that Mr X was ordinarily resident in CouncilB as of 14th July 2003 and has remained so since.

Signed on behalf of the Secretary of State

Dated