

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF
THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF
MR X (OR 10 2013)

1. I am asked by 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 X for the purpose of Part 3 of that Act.
2. The two local authorities have not specified the date from which they wish me to determine the place in which X is ordinarily resident. But CouncilA have requested CouncilB to take over responsibility for meeting his needs from 15 August 2012. Therefore I assume they wish me to determine his place of ordinary residence on that date and I make my determination accordingly.

The background to the case

3. The following information has been ascertained from a statement of facts provided by CouncilA and which has been agreed by CouncilB. In making this determination, I have also considered the legal and further submissions provided by each of the two authorities, the documents listed in the Schedule of Documents and the other documents subsequently provided.
4. X was born on x date 1969.

5. X is diagnosed as having Aspergers Syndrome. Since 2006 he has lived in supported living accommodation at x address. The accommodation is owned by TrustP who provide specialist care and support for people with autism spectrum conditions.
6. Before moving to x address X lived in a residential care home for adults with learning disabilities in TownA, CouncilA which was provided for him by CouncilA under Part 3 of the 1948 Act. It is not disputed that at that time his place of ordinary residence was in CouncilA.
7. The two authorities do not agree the date on which X moved to CareHomeB. A service delivery order from TrustP to CouncilA gives details of services which were provided by them for X in January 2006 and a letter to CouncilB from CouncilA dated 22 February 2013 indicates that he moved to CareHomeB in January 2006. X signed a licence agreement in respect of his accommodation in August 2006.
8. A revised licence agreement dated 10 March 2011 indicates that X's rent is £131.25pw. The two authorities dispute whether the rent is correctly stated. X receives housing benefit of £125pw. CouncilB assert that the rent is £131.25pw and that the short fall between the amount of housing benefit and the amount of the rent is met by CouncilA. CouncilA assert that notwithstanding the figure in the agreement, the rent is £125pw. An email from TrustP to CouncilA dated 12 September 2013 states that TrustP has not sought to obtain the shortfall from CouncilA.

9. A pre-admission assessment of X's needs was carried out in July 2005, prior to his move to CareHomeB. His general state of health was assessed as excellent; he was assessed as being entirely independent in all aspects of personal care and as needing no support during the night. He was assessed as capable of performing daily living skills, except for cooking and budgeting. His main needs for care and support were assessed as being in relation to his chronic anxiety which was assessed as seldom severe, his insecurity and his need for assistance to combat boredom (described in the assessment as "his greatest enemy") by the provision of a fuller daily timetable of both work and college activities. According to the assessment his needs could not be met whilst he resided in the care home in TownA because due to its isolated location he could not make his own way to the town and places for recreation, college or work but needed to rely on staff to drive him there.

10. According to the agreed statement of facts X is able to clean his flat independently, manage his finances with support, manage his medication and prepare his own meals. His support is provided to address risk factors including his desire to play on gambling machines in arcades – which puts him at risk of assault – and to assist him to maintain and improve his social relationships and to access the community by, amongst other things, helping him to socialise and communicate appropriately with other people.

11. The reason for X's move to CareHomeB is not agreed by the authorities. CouncilA state he moved there because he wanted to live in his own flat. A

statement made by his mother for the purposes of this dispute explains that she brought the accommodation to X's attention because he was unhappy in the residential care home and considered it could be a suitable place for him to live because it was purpose built for occupation by people with autism and located in a town where there were recreational facilities within walking distance and which he knew well. The pre-admission assessment states that he attended college in TownB for a year.

12. X currently receives 27 hours of 1:1 support each week from TrustP and attends two day centre sessions each week.

13. In September 2005 the TrustP wrote to CouncilA Social Services (which I assume is part of CouncilA) with a breakdown of weekly costs for his proposed support package. The letter said X would be able to claim housing benefit to cover his rent. It also stated that:

“CouncilB Social Services are extremely worried that they may have to pay for people who move to CouncilB from another county. If you agree to the funding we would like to have confirmation that you would continue to support X as long as he lived at CareHomeB.”

14. CouncilA Social Services replied to this letter on 4 October 2005 in the following terms:

“Thank you for your Proposed Support Package and weekly costs for X to take up tenancy at CareHomeB.

CouncilA County Council Social Services have agreed an ongoing financial commitment to X during his tenancy at CareHomeB.

I would like to arrange a visit to the flats once the show flat is open to visitors. Are you able to give me any dates of when this might be?

Please do not hesitate to contact me if you need further information. I look forward to hearing from you in the near future.”

15. CouncilA have continued to pay for the care and support provided to X by TrustP. The current weekly cost of his care package is £646.13 of which £43.40 is in respect of the night support service. The night support service is available for all residents and according to CouncilA X does not usually need this service.

The relevant law

16. I have considered all the documentation submitted by both parties, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department of Health¹ (“the Guidance”), the leading case of R v

¹ Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England, published on the Department of Health’s website at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf

Barnet ex parte Shah (1983) 2 AC 309 (Shah), the House of Lords decision in Chief Adjudication Officer v Quinn Gibbon [1996] (Quinn Gibbon), R v Waltham Forest London Borough Council, ex parte Vale, the Times 25.2.85 (Vale), SL v Westminster City Council [2013] UKSC 27 (SL) and the case of R (Greenwich) v Secretary of State and Bexley (2006) EWHC 2576 (Greenwich). My determination is not influenced by the funding which CouncilA is currently providing for Part 3 services.

17. Section 21(1)(a) 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 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 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 and other persons who are in urgent need thereof".

18. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

19. 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 that accommodation is being provided of such other services as appear to the authority to be required.
20. 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. 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 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 the balance (and covering any unpaid fees).
21. Section 29(1) of the 1948 Act empowers local authorities to provide welfare services and is the power under which domiciliary care services are normally provided. Section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) supplements and relates to the welfare services provided under section 29 of the 1948 Act.

The application of the law

22. There is no dispute that X was ordinarily resident in CouncilA immediately prior to moving to CareHomeB. If it is shown that the accommodation in CareHomeB has been provided under Part 3 of the 1948 Act from the time he moved there to the current day, the deeming provision in section 24(5) of the 1948 Act will apply and he will be deemed to be ordinarily resident in CouncilA. But if the accommodation is not provided under Part 3 then the deeming provision does not apply and his ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

23. CouncilA asserts that X moved to CareHomeB because he wanted to live in his own flat and be more independent than was possible for him in the residential care home in CouncilA. It asserts that he is not being provided with accommodation under Part 3 of the Act but with domiciliary care under section 29 of that Act and section 2 of the CSDPA. CouncilB asserts that CouncilA placed him there and that he is in residential care pursuant to arrangements made by CouncilA under Part 3 of the 1948 Act or, if not, that he should have been placed in such care by CouncilA and that in either case he remains resident in CouncilA by reason of the deeming provision in section 24(5) of the 1948 Act.

24. It is true that the type of accommodation which can be provided by a local authority under section 21 is not limited to placements in residential care. It can also include placements in an ordinary flat or house. However, in order for accommodation to be provided under section 21 certain conditions need to be met. One of the conditions for qualifying for such accommodation is that the care and attention required by the person will not otherwise be available to them. In the case of SL Lord Carnworth made clear that this means that the care and attention which is required under the section must take some colour from its association with the duty to provide residential accommodation and the services provided must be accommodation-related, or effectively useless if the adult in question has no home. X does have a home. He is living in a private albeit supported living arrangement, which is a licence of a flat that he has himself signed. Therefore, assuming that his needs are being properly met under the arrangements put in place by CouncilA, it is axiomatic that they can be met otherwise than by the provision of accommodation under Part 3.

25. This is consistent with the case of Westminster City Council) v National Asylum Support Service [2002] UKHL 38 in which 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.

26. CouncilB asserts that if he is not in accommodation under Part 3 of the 1948 Act the needs of X when he moved to CareHomeB were such that he should

have been provided with such accommodation rather than with services under section 29 of the Act and that following the Greenwich case CouncilA had a duty to provide him with such accommodation and its failure to do so does not affect the application of the deeming provision.

27 In support of its contention that CouncilA had a duty to meet X's needs by the provision of care and support together with accommodation under Part 3 of the 1948 Act, CouncilB assert in effect that his needs were for Part 3 accommodation immediately prior to his move to CareHomeB and therefore, in the absence of evidence to indicate otherwise, must have been for such accommodation when he moved to CareHomeB. CouncilB also points to the assessments and other reviews carried out in 2012 and as evidence to support its view that in 2006 X's need was for Part 3 accommodation.

28. In my view the documents and assessments carried out in 2012 being an assessment of X's needs some five to six years after his move to CareHomeB are not a reliable indication of his needs at the time he moved there or at the time he signed the tenancy agreement in August 2006 (if different). For the purpose of reaching a view as to whether CouncilA should have provided X with Part 3 accommodation in 2006, I rely on the pre-admission assessment which was carried out in 2005. This is a more contemporaneous record or assessment of his needs at that time than the assessments made in 2012 and also (so I assume from the name) appears to have been made for the purpose of informing a decision as to whether to

admit X to Part 3 or some other form of accommodation. That pre-admission assessment states:

“We are torn between more residential care, this time with peers who share his autistic tendencies and staff who understand them better, and a careful and reversible, attempt at supported living. X will say the latter but his aspirations are not always realistic.”

This statement shows that the provision of residential care under Part 3 of the 1948 Act was not the only option open to CouncilA when making its decision as to how to properly meet X’s needs for care and support. There is no evidence to show that this assessment was not reasonably or properly made or that CouncilA social workers could not reasonably decide that X’s needs could be appropriately met by the provision of services under section 29 of the 1948 Act in supported living accommodation rather than by the continued provision of residential accommodation under Part 3 of the 1948 Act.

29. In view of this I do not agree with CouncilB that CouncilA were required to provide X with accommodation under Part 3 of the 1948 Act. Nor do I consider that CouncilA has entered into arrangements with TrustP under section 26 of the 1948 Act as set out in paragraph 20 above. The documents referred to at paragraphs 13 and 14 expressly state that X’s rent will be paid for by housing benefit and make no provision for the making of payments by CouncilA to TrustP in respect of his accommodation. Although they refer to CouncilA providing continued support for X and to CouncilA’s agreement to undertake

an ongoing financial commitment to X during his tenancy at CareHomeB, my view is that they do not constitute an agreement by CouncilA to pay TrustP any rent due under the tenancy. At most they are evidence of an undertaking by CouncilA to pay for the care and support package provided under section 29 of the 1948 Act.

30. Therefore my determination is that X ceased to be provided with accommodation under Part 3 sometime in 2006 and at the latest when he signed the licence agreement in August 2006.

Ordinary Residence

31. The effect of my determination that X is not provided with Part 3 accommodation is that the deeming provision in section 24(5) does not apply. His place of ordinary residence therefore falls to be determined in accordance with the normal rules. Such a determination is still necessary because X still requires the provision of welfare services under section 29 of the 1948 Act. The local authority which has a duty to provide those services is the one in which he is ordinarily resident.

32. I now turn to consider this issue. When a person has the mental capacity to make a decision about where they should 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 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.”

33. The Guidance provides 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 according to the context, have to be taken into account”.

Therefore, the words ordinary residence must bear their ordinary everyday meaning.

34. In my view X’s residence at CareHomeB has a settled purpose. I consider that he entered into a licence agreement for the property for the purpose of living independently with support from specialist professionals trained to support people with his particular needs probably (although my determination is not changed by this factor) after living there for a trial period of about six months. He knew the area well having previously attended college there for a year and having visited the amusement arcades there on occasion. He is free

to come and go and frequently does leave the premises for the evening or for longer stays with his parents or to go on holiday. There is no evidence to show that he fails to return to his flat of his own volition or that in the seven years he has lived there he has ever expressed a wish not to do so. He attends the CentreK in TownB and volunteers each week at CharityShopH there. Furthermore, he signed a new licence agreement for the same flat in March 2011, and there is no evidence to show that he did so unwillingly or did not understand the consequences of doing so.

35. In my view these factors indicate that X had adopted CareHomeB as his place of ordinary residence by (indeed before) 15 August 2012. CouncilB submit that he has no particular attachment to, or friends in, the area, has not expressed a particular wish to remain there and spends about 50 days each year with his parents. Those are relevant considerations, but in view of the above, I do not think they are sufficient to show that he does not now live there voluntarily for a settled purpose as part of the regular order of his life or that he has not done so continuously from at least 15 August 2012 which is the date on which CouncilB have been asked by CouncilA to take over responsibility for paying for his needs for care and support.

36. Whether X can be said to have adopted that residence “voluntarily” raises issues about his mental capacity. It could be argued that, if he does not have the capacity to decide where he wishes to live, Shah does not apply and the alternative rules set down in the case of Vale should apply instead. In assessing this aspect of the case:

(a) the starting point is that all persons are to be assumed to be competent to make a particular decision until the contrary is shown; and

(b) the test of capacity in August 2001 was that laid down in Re MB [1997] 2 FLR426. A person has capacity to make a particular decision if they are able to comprehend and retain information relevant to the decision in question and weigh it in the balance as part of the process of arriving at a decision.

37. The decision in question here is where X wishes to live. There is no evidence before me to suggest that he is not able to make a decision as to where he wishes to live or to communicate that he does not wish to live at CareHomeB. In this regard I do not share the view of CouncilB that the statement “*X will say the latter but his aspirations are not always realistic*” in the pre-admission assessment indicates a lack of capacity to decide where or how he wishes to live, rather than a tendency to at times lack judgement or awareness as to what is possible – something which is far from confined to people who face mental health challenges. On the basis that he has lived at CareHomeB for seven years, appears willing to return there after trips out including extended holidays and visits to his parents and considering also that he renewed the licence agreement in March 2011, I conclude that he has adopted his abode at CareHomeB voluntarily and for a settled purpose and that he is accordingly ordinarily resident in CouncilB for the purposes of the 1948 Act and has been so resident since before 15 August 2012.

38. If, contrary to my view set out above, X does lack sufficient mental capacity to form an intention as to where he wishes to live, his ordinary residence would fall to be determined in accordance with the body of case law, post-dating Shah and starting with Vale. Vale makes clear that in cases where a person's mental health 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. In Vale, the judge rejected the view that ordinary residence continued at a place which Ms Vale had finally left or that it could be at a place which she anticipated residing in the future. The solution adopted was to treat Ms Vale as residing at her parents' home, by analogy with the position of a small child. In the case of a person such as X, who has had a residence independent of his parents for a considerable period and is not totally dependent for his everyday needs in the manner of a small child upon the local authority or other care provider, that solution is not appropriate. 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, it is not possible to conclude that X remains ordinarily resident in CouncilA where he is no longer present. The alternatives are therefore that he resides in CouncilB or has no settled residence. The second alternative does not appear to fit the facts in this case. In light of all the facts as set out above, even were X to be held to lack the relevant mental capacity to form an intention as to where he wished to live, my determination would still

be that, for the purposes of the 1948 Act, he is ordinarily resident in CouncilB
and has been for all material times.

Signed on behalf of the Secretary of State for Health.....

Dated.....