DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF X (OR 3 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 purposes of Part 3 of that Act. The period in dispute as stated in the agreed statement of facts is from 14 August 2010 to date.

The facts of the case

2. The following information has been ascertained from the agreed statement of facts from CouncilA and CouncilB dated 19 September 2012 (received by the Secretary of State on 01 October 2012).

3. X's needs for community care services were assessed by CouncilB in September 2010 and CouncilA in January 2011.

4. X was born on x date 1992; he is currently 20 years old. The authorities agree that he has autism, a moderate/severe learning disability and challenging behaviour that can present risks to himself and others. He is quite physically fit and is not taking any medication. CouncilB assessed his needs as being mostly critical, otherwise they were substantial. The authorities agree that he needs two carers during his waking hours but they are not agreed as to whether he requires two carers during his sleeping hours.

5. CouncilA provided X with community care services under section 29 of the National Assistance Act 1948 and/or section 2 of the Chronically Sick and Disabled Persons Act 1970, between 14 August 2010 and 22 September 2011. Since 22 September 2011, CouncilB has accepted provisional responsibility for X and are currently funding his care under section 29 of the 1948 Act and/or section 2 of the 1970 Act.

6. From birth until 9 September 1996 it is not in dispute that X was ordinarily resident in CouncilA as he lived with his parents and three siblings at Area1, x address. Between 9 September 1996 and 14 August 2010 X attended a special residential school in CityF, CountryF. Until he turned 18 on 26 January 2010, his accommodation funding needs were met by CouncilA under Section 20 of the Children Act 1989. During this period X would return to stay with his family during school holidays (in CouncilA) and his parents would visit him in CountryF during term time.

7. During April, July and August 2010, X spent two weeks per month in Area2, address x which is located in CouncilB as part of a transitional programme. This house is owned by X's grandfather and has been adapted to meet his needs. This arrangement has been made by his parents. From 14 August 2010 to date X has lived at this address.

8. I understand that it is not in dispute that X currently lives in CouncilB and will do so for the foreseeable future. It is also not in dispute that his parents live in CouncilA and will do so for the foreseeable future.

Capacity Assessment

9. Paragraph 41 of the agreed statement of facts documents that the authorities do not agree on this issue. However, notwithstanding this statement, I can see that both local authorities in their submissions state that X lacks capacity (CouncilB at paragraph 21 and CouncilA at paragraph 12). For reasons I set out below I have assumed that both parties agree that X lacks capacity (see paragraphs 21-23 of this determination).

10. The agreed statement of facts states that on 20 January 2011 a CouncilA social worker and one of X's support workers carried out an assessment of X's mental capacity in respect of his residence. They considered that he understood the information given to him, he could retain it long enough to make a decision and could communicate that decision. They did not consider that, however, that he could weigh up and discuss the pros and cons of the decision or action. However, they did consider that he has capacity in respect of the specific issue. I note at this juncture that this statement is somewhat confusing and also the inconsistency between the statement of facts and the submissions of the respective parties. I deal with the issue of capacity at paragraphs 21-23 of this determination considering both these factors.

11. Paragraph 43 of the agreed statement of facts makes the following recent observations about capacity:

(i) In CouncilA's chronology it is recorded that detailed work undertaken by the School in CountryF supporting X to understand his move to the UK, professionals agreed he has capacity to make decisions about where he lives as he asks his parents to go "home" indicating the bungalow at Area2 in CouncilB.

(ii) In CouncilB's assessment dated 14 September 2010 it is recorded that X would probably find it hard making important decisions for himself, that his mental capacity would need to be assessed on individual decisions and that he needs support to make decisions as appropriate and should be involved in any decision affecting him.

Chronology of relevant events

12. I note the considerable correspondence between CouncilA and CouncilB as to which local authority had ongoing responsibility for X. The detail of this correspondence is repeated at paragraphs 15-39 of the agreed statement of facts. I do not rehearse this detail here as in my determination it is not relevant to the question of ordinary residence.

Preliminary Issues

(i) The period in dispute

13. The agreed statement of facts, which is signed by both parties, records that the period in dispute is from 14 August 2010. However, CouncilB makes a different

statement on this issue in their submissions. CouncilB, at paragraph 40, maintain that the question of ordinary residence cannot be backdated beyond the date of the mental capacity assessment which took place on 24 January 2011. In contrast, CouncilA, at paragraph 33 of their submissions aver that as X's position has not changed to any material degree since 14 August 2010, when he returned to the UK and that therefore the issue of ordinary residence runs from this date. In my determination, based on the agreed statement of facts, I consider that the period of dispute runs from 14 August 2010. The agreed statement of facts post dates the two submissions and as such supersedes their assertions.

14. As to CouncilB's submission that it is not possible to backdate the issue of ordinary residence beyond the date of the mental capacity act assessment that took place on 24 January 2011 when a best interests test could have been undertaken, I reject this submission. On the facts of this case, there is no basis to justify a finding that X's capacity has changed materially between 14 August 2010 and 24 January 2011 and as I have already made the determination that the period in dispute is from 14 August 2010 it follows that it is not possible to backdate the issue of ordinary residence.

(ii) Jurisdiction to determine the case

15. I note CouncilB's submission, at paragraph 5, requests guidance on the Secretary of State's approach to non compliance with the four month time limit stipulated in the directions. It was made clear in an email of 17 July 2012 from the Department of Health to both parties to the dispute that there is nothing in the ordinary residence directions or guidance to say that a dispute which has been ongoing for

a longer period of time cannot be referred to the Secretary of State for a determination. Accordingly, notwithstanding the regrettable delay in this case, the failure to comply with time limits does not remove my duty to make a determination under the 1948 Act.

The relevant law

16. In reaching this determination I have considered:

- The documents submitted by both parties;
- The provisions of Part 3 of The National Assistance Act 1948 ("the 1948 Act") as amended;
- Mental Capacity Act 2005 ("the 2005 Act") and *Re MB* (1997) 2 FLR 426;
- The Department of Health guidance Ordinary Residence: Guidance on the Identification of the Ordinary Residence of People in Need of Community Care Services, England (publication date 15 April 2011, "2011 Guidance"[1]);
- [The Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010] ("The directions");
- The cases that I have been directed to by the two local authorities namely: *R v Waltham Forest London Borough Council ex parte Vale – The Times 25.02.85 ("Vale"), R v Redbridge Borough Council e x parte East Sussex County Council – The Times 31.12.92("Redbridge"), Shah v London Borough of Barnet 1983 All ER 226 ("Shah);*

[1] http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126003

- The recent case of: *R (oao Cornwall Council) v Secretary of State for Health* [2012] EWHC 3739 *(Admin) ("Cornwall").*

17. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 years or over whom, by reason of age, illness, disability or any other circumstances, are in need of care and attention, which is not otherwise available to them.

18. Section 29 of the 1948 Act imposes a duty on local authorities to provide welfare services to those ordinarily reside in their area.

19. "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".*

20. My determination is not influenced by the fact that CouncilB has accepted provisional responsibility for X under section 29 of the 1948 Act and/or section 2 of the 1970 Act.

Does X have capacity to decide where to live?

21. 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 2005 Act. 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).

22. As the guidance on ordinary residence states at paragraph 27, under section 1(2) of the 2005 Act 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.

23. As to the Mental Capacity Assessment, which both parties make reference to, this records that X is able to understand the information given to him – he is able to explore the question of his choice of residence including being able to indicate which of the two homes (Area1 or Area2) he wishes to reside in by selecting a

picture. Further, it states that he is able to retain information long enough to make a decision and evidenced this by repeatedly stating “live and home” while pointing to the picture of Area2 in CouncilB. X is able to communicate his decision by verbalising and by using pictures. However, the assessment considers that X is unable to weigh up and discuss the pros and cons of the decision or action. In support of this finding is the statement that:

> “*Can they weigh up and discuss the pros and cons of the decision or action? No, X has a life long condition (autism) and this has affected his ability to think through the consequences of his decision or action in relation to this specific issue. The condition has affected his ability to critically analyse and reflect on such decision.”*

24. In my determination, the finding that X is unable to weigh up the pros and cons of the decision or action means he therefore lacks capacity in respect of this decision. Although I am aware that the assessment states that he does have capacity in respect of this specific issue the overall issue of capacity is overridden by his inability to weigh up the pros and cons. I therefore agree with CouncilA’s submission at paragraph 12 and CouncilB’s submission at paragraph 21, that X lacks capacity.

Which test to apply?

25. This is a difficult case and the arguments in it are finely balanced. Therefore, in reaching my decision I have considered the entirety of X’s living arrangements

including, in particular, the quality and nature of his relationship with his parents and his level of dependency on them.

26. The guidance provides that if it can be shown that a person lacks capacity to make a particular decision then the 2005 Act makes clear who can take decisions on behalf of them, in which situations and how they should go about doing this. For example, if a person lacks capacity to decide where to live, a best interests decision about their accommodation should be made using the framework of the 2005 Act. Under section 1(5) of this Act, any act done or decision made (which would include a decision relating to where a person without capacity should live) must be done in the best interests of the person who lacks capacity. Section 4 of the 2005 Act sets out how to work out the best interests of a person who lacks capacity and provides a checklist of factors for this purpose.

27. If a person has been placed in accommodation following a best interests decision under the 2005 Act and uncertainties arise about their place of ordinary residence, one of the alternative tests in the *Vale* case should be used to establish ordinary residence. However, a person's mental capacity should always be taken into account when making any decision about their ordinary residence and the *Vale* test should only be used where it can be shown that a person is not capable of forming their own decision as to where to live. This is because the *Vale* tests are based on the assumption that the person lacking capacity cannot have adopted their place of residence voluntarily, as required by the *Shah* test.

The submissions of the two parties

28. CouncilA's position can be summarised as:

(i.) Their primary case is that the *Shah* test applies and as a consequence X is ordinary resident in CouncilB;

(ii.) If it does not apply, because X lacks sufficient mental capacity, then test two in *Vale* applies and he should be treated as if he has capacity to chose where he lives. The result being that he is ordinarily resident in CouncilB.

(iii.) If, test one in *Vale* applies then X has two ordinary residences – one is Area1 and one in Area2. However his stronger link is with Area2 meaning that he is ordinary resident in CouncilB.

29. CouncilB's case is that the first *Vale* test does apply to X's case and that the alternative test in *Vale* is not applicable and nor is *Shah* . They state that he is a young man who lacks mental capacity to decide where he should live. He has always suffered from autism and is totally dependent on his parents for his care and decisions relating to his care. Their primary case is that, in accordance with the decision in *Vale*, X's ordinary residence must follow that of his parents who reside in CouncilA. CouncilB maintain "that none of the scenarios envisaged by paragraph 33 of the Guidance in which the alternative test in *Vale* should be applied appear to apply in this case".

Shah

30. I reject CouncilA's primary case that *Shah* is the correct test to apply to X's circumstances. This is because it is a pre-requisite to the application of the *Shah* test that the person in question has capacity to enable them to voluntarily adopt a settled residence (see paragraph 30 of the guidance). Therefore, contingent on my determination that X does not have capacity it must follow that it is not appropriate to use the *Shah* test.

Vale one

31. Paragraph 33 of the guidance states that:

> *"However, the approach set out in test one of Vale may not always be appropriate and should be used with caution: its relevance will vary according to the ability of the person to make their own choices and the extent to which they rely on their parents or carers. This Vale test should only be applied when making decisions about ordinary residence cases with similar material facts to those in Vale. For example, in cases involving older people whose parents are deceased, people who have become ordinarily resident in an area and then lost capacity, or younger people who have either lived independently of their parents prior to losing capacity or have limited contact with them, this test may not be appropriate and the alternative approach set out in Vale should be used."*

32. In light of this it is helpful to consider the facts of the *Vale* case. This case concerned a 28 year old woman with severe mental handicap. It was decided in that case that her ordinary residence was that of her parents because that was her "base". Although she lived in residential care, she retained a significant base with her parents and, in view of her handicap; her ordinary residence remained that of her parents. In that case, Taylor J stated:

> *"Where the propositus (to use Lord Scarman's word) is so mentally handicapped as to be totally dependent upon a parent or guardian, the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise. She is in the same position as a small child. Her ordinary residence is that of her parents because that is her "base".*

The key issue is therefore whether X is so mentally handicapped as to be totally dependent on his parents and whether he is in same position as a small child who is unable to voluntarily adopt an ordinary residence for his own settled purposes. If he does fit this description, then his ordinary residence will follow the ordinary residence of his parents if it can be said that their home provides a base.

33. I have due regard to the caution at paragraph 33 of the guidance but in my determination on the basis of the papers I have seen, X's case shares the key factual matrix of the *Vale* case itself:

(i) X is totally dependent on his parents for his care [This fact is evident from a large number of the documents provided but, in particular: the assessment dated 14 October 2009 and assessment dated 14 September 2010],

(ii) His parents take an active role in his care and he maintains a close and enduring bond with them. [Assessment 14 September 2010].

The outcome of the application of this test is that X is ordinarily resident in CouncilA, where his parents reside.

34. In support of this approach, I am guided by the recent decision of the Administrative Court in the *Cornwall* case. This case shares a similar factual matrix to the one in question because the relevant person, PH, had severe learning difficulties and lacked mental capacity to decide where to live. In that case, in an application of the ***Vale one*** test the Secretary of State determined that PH was ordinarily resident in the same local authority as his family because his family home was his "base". One of Cornwall's grounds of appeal queried whether the family home in that case can be properly regarded as PH's base. In considering this question Mr Justice Beaston cited with approval the Secretary of State's determination (paragraph 25 of the determination is cited at paragraph 8 of the judgment):

"I note that Cornwall question whether the family home in Cornwall can properly be described as a "base" for [PH] given the infrequency of his visits there. It is not merely the number or frequency of visits

that are determinative. The entirety of the relationship between [PH] and his parents is to be taken into account, and when regard is had to that, it is clear that [PH's] base"

35. In the *Cornwall* decision the Administrative Court dismissed the public law challenge against the Secretary of State's determination that PH's ordinary residence rests with his parents because their home was his base. The case concluded that, on the basis of the facts before the court, the Secretary of State was entitled to reach the conclusion he did. Clearly, whether X's parents' house or his grandfather's house is his "base" will always be a question of fact and degree. However looking at the entirety of X's relationship with his parents, it is in many ways closer and more dependent than that described in the *Cornwall* decision.

    (i) It is clear from the documentation I have seen that unlike *Cornwall* there is no alternative parenting unit (in the form of foster parents) to challenge the primary dependency on X's biological parents. In particular there is no suggestion that X's grandfather has a role to play in his day to day decision making or his general care.

    (ii) Compared to the situation in *Cornwall*, X's parents maintain a greater degree of regularity of contact including having responsibility for his financial affairs, accompanying him to all relevant healthcare appointments and his father takes X out for exercise and leisure activities. In support of this assertion, I rely on the evidence contained in the assessment carried out by CouncilA– the date of this document

is unclear but it must have been created between January 2011 and January 2012 (on the basis of X's age and the assessor's statement at B2). At B1 the form records that X's primary address is "Area1", and it refers to X's mother, Mrs X, as the main carer. It records that "X said that X has settled at Area2 and that CareStaff are doing their best to support him". CouncilB maintains that CouncilA treat X's parents as his main carers and this is evidenced at page B4 and in the summary of the carers' situation:

> *"Mr and X play an active role in x's life and advocate for him on his behalf. They are happy to continue with their current level of support for x … X accompanies x to all relevant health appointments, opticians and dentists. While x is at home of a holiday (sic), Mr X has to take time off work as x responds better to his father. Mr X takes x out for exercise and leisure activities."*

36. It is clear from the above-mentioned documentation that the entirety of X's relationship with his parents means that he regularly visits them, contact is maintained and they play an active and very supportive role in his life. However, I am not persuaded by CouncilB's assertion that the fact Area2 is situated very close to Area1 and that they both have an CouncilB address are relevant considerations for the purpose of ordinary residence determination, although it is evident from the documentation that the proximity of the two properties has helped to ensure ongoing regular contact between X and his parents.

37. CouncilB also make reference to the ***Redbridge*** case which followed the decision in ***Vale***. Having reviewed this case, I do not consider that it adds anything substantive to my consideration of X's case but I note that the approach taken accords with that taken in ***Cornwall***. Therefore, in line with the approach taken in these two cases, it is appropriate to apply the ***Vale one*** test to this case, the outcome of which being that X's ordinary residence follows his parents, as their home is his base, and he is ordinarily resident in CouncilA.

38. I appreciate that it is not in issue that X is physically present in CouncilB and not in CouncilA and that therefore this determination could be considered to be artificial. On this issue the case of ***Cornwall*** is again instructive. Mr Justice Beatson makes it clear that physical presence is not a pre-requisite to ordinary residence and, further, paragraph 80 makes it clear that a more relevant factor is the continuing involvement of parents. I repeat the relevant sections here for completeness:

> *"79. It is, however, important not to accord insufficient weight to the fact that Parliament chose the concept of "ordinary residence" as opposed to "residence", to the difference between those concepts, and to the other factors which are of relevance in determining "ordinary residence.*
>
> *80. It is clear from the cases, including Shah's case and Mohammed v Hammersmith and Fulham LBC[2], that physical presence is not sufficient to constitute "ordinary residence" but the implication of Mr*

[2] **[2001] UKHL 57**

Lock's submissions is that it is a necessary requirement. He relied on Holman J's statement in North Yorkshire CC v Wiltshire CC [1999] Fam. 323 at 333 that it is "wholly artificial to regard a child as continuing to be ordinarily resident in an area in which neither he nor his family continues actually to reside and to which neither expects to return". In PH's case that has been the position since May 2012, but it was not the position in December 2004. At that time PH's parents lived in Cornwall, there was a physical presence by him in the county during his visits. Indeed, as it happened, PH was physically present in Cornwall on the day before his eighteenth birthday, although I disregard that fortuitous circumstance as of no significance to the determination of the question before me. However, his parents were much involved in the arrangements for his care and took an active and continuing interest in him, and that is a relevant factor."

CouncilA's case of "two ordinary residences"

39. As I have determined that ***Vale one*** is the appropriate test, I must go onto to consider CouncilA's case that the application of this test leads to the conclusion that X is ordinarily resident in both CouncilA and CouncilB. CouncilA refer to the ordinary residence guidance at paragraph 26 which I repeat here:

"Although in general terms it would be possible for a person to have more than one ordinary residence (for example, a person who divides their time equally between two homes), ***this is not possible for the purposes of the 1948 Act*** *[emphasis added].*

The purpose of the ordinary residence test in the 1948 Act is to determine which single local authority has responsibility for meeting a person's eligible social care needs, and this purpose would be defeated if a person could have more than one ordinary residence. If a person appears genuinely to divide their time equally between two homes, it would be necessary to establish (from all of the circumstances) to which of the two homes the person has the stronger link."

40. CouncilA asserts that the "stronger link" test in the guidance is applied to a person who moves between two homes and it should be equally applicable here. On their case the stronger link must be with the accommodation that the parents have placed the child in – thereby making X ordinarily resident in CouncilB. They direct me to paragraphs 8F-9A of the *Vale* transcript:

"*It may well be therefore that in the present case Judith, although ordinarily resident with her parents throughout [in Waltham Forest's area], had a secondary ordinary residence at Camp Hill [the home in Eire where she had been for 9 years before joining them] for the duration of her stay there, and again acquired a second ordinary residence when she went to Stoke place [the home she went to].*

41. I am not persuaded by this submission as in my determination the application of ***Vale one*** necessarily means that X lacks the ability to form a settled intention to acquire a second ordinary residence. The cited paragraph of the guidance clearly describes someone dividing their time physically between two different

addresses they have voluntarily adopted – which is not applicable to this case. Furthermore, given the stated dependency X has on his parents I determine that in any event his stronger link is with his family home in CouncilA. Finally, I note that the paragraphs that I have been directed to are *obiter dicta* and as such their precedent value is limited.

Vale two

42. As I have already determined that ***Vale one*** is the appropriate test to apply to this case it is not necessary for me to go onto consider CouncilA's alternative position that it is appropriate to apply the ***Vale two test***. Furthermore, the examples where the "alternative test" is to be preferred are, in my determination, not relevant to this case – I agree with CouncilB's submissions at paragraph 25 on this issue.

Conclusion

43. For the reasons set out above, I determine that from 14 August 2010 until the present day, X was ordinarily resident in CouncilA.

Signed on behalf of the Secretary of State for Health

Dated: