

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MRS X (OR 10 2011)

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 Mrs X.

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. Mrs X was born on xdate 1956 in Ireland. As a young child she came to live in England in CouncilC with her parents and siblings. At the age of 18 she moved to Area1D, CouncilD with her family. She subsequently married her second husband, and they moved to YCountry to live and work.

3. In October 2007, Mrs X suffered a subarachnoid haemorrhage whilst living in YCountry and was admitted to hospital there. She was discharged on 17th January 2008 and returned to the couple’s home in YCountry. On 13th February 2008, Mrs X and her husband returned to England and stayed with Mrs X’s sister in Area1B, CouncilB. Mrs X’s mother lives in CouncilD, her brothers elsewhere.

4. On 17th February 2008, Mrs X was admitted to Area1B Hospital (in CouncilB) after having been taken to a GP surgery by her sister with a suspected thrombosis. It seems that Mrs X’s sister, had discussed Mrs X with her own GP prior to this since she was not happy with the care Mrs X was receiving in YCountry.

5. On 14th April 2008, Mrs X was placed in a non-NHS hospital at ZPlace, in CouncilA’s area, for specialist neurological rehabilitation under NHS continuing healthcare which was funded by the PCT in CouncilB. On 29th October 2008, Mrs X was placed in OLodge, a nursing home on the same site, by the PCT also under NHS continuing healthcare until 22nd July 2010, which is the date the PCT advised that Mrs X no longer qualified for continuing healthcare. She has remained at OLodge, however, still funded by the PCT but on a without prejudice basis, pending Mrs X’s move to alternative accommodation.

6. In December 2009, a mental capacity assessment was carried out concerning “the decision to move out of ZPlace nursing home now that her rehabilitation has been completed”. (I understand that Mrs X was in OLodge and not ZPlace as of December 2009). The assessor’s conclusion was as follows:
“I do not think Mrs X is able to make an informed decision about where she should live long term as it is a particular (sic) complex decision for her but she is unable to retain the information in order to make this decision. This was also the decision of Acquired Brain Injury nurse when this question was considered last summer”.

7. I understand that a best interests meeting was held at ZPlace on 16th June 2010. The decision maker at this meeting was of the Acquired Brain Injury nurse PCT who had been agreed as being the appropriate decision maker (as the PCT was still funding Mrs X) by the professionals who attended a meeting the previous day. Her decision

was that Mrs X be placed in a nursing home in the Sussex area. I understand that Mrs X's husband has issued proceedings in the Court of Protection to appeal this decision and a best interest's declaration on residence is awaited. I also understand that there has been an urgent authorisation followed by a standard authorisation for the deprivation of liberty pursuant to the Mental Capacity Act 2005 but the authorisation has now lapsed.

The relevant law

8. In addition to the documentation referred to above and the parties' legal submissions, 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"), *R(Greenwich) v Secretary of State and Bexley* (2006) EWHC 2576 (Admin) ("Greenwich") and *R v Waltham Forest London Borough Council, ex parte Vale*, the Times 25.2.85 ("Vale"). My determination is not influenced by the interim funding of the placement by the PCT in Council B.

9. 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. Section 24(3) provides that where a person in the area of a local authority has no settled residence, or is in urgent need of accommodation, the authority has the same power to provide accommodation as under section 24(1) as if he were ordinarily resident in its area. The Secretary of State's Directions under section 21 provide that local authorities are required to provide residential accommodation to those qualifying under Part 3 not only for those ordinarily resident in their area or in urgent need of such accommodation but also for persons with no settled residence who are or have been suffering from mental disorder and who are in the authority's area.

10. 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".

11. Section 24(6) of the 1948 Act provides that a patient in an NHS hospital, including hospitals that are part of an NHS Trust, should be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before he was admitted as a patient to the hospital. Section 148 of the Health and Social Care Act 2008 extended the deeming provision in section 24(6) to include all settings in

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.

which NHS accommodation is provided and this amending provision came into force on 19th April 2010. Transitional provisions (Article 12(1) of S.I. 2010/708) provide that the extended deeming provision shall not apply to those in non-hospital NHS accommodation when the amendment to section 24(6) came into force (19th April 2010) and this continues to be the case for as long as they continue to be in that accommodation.

12. “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”.

13. Where a person lacks the capacity to decide where to live 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 application of the law

14. The statement of facts signed by both parties notes at paragraph 25 that Mrs X is “currently being provided with nursing care under section 21” (of the 1948 Act). It appears that Mrs X became eligible for accommodation under section 21 of the 1948 Act once her eligibility for continuing healthcare ceased on 22nd July 2010. I am satisfied that I can determine ordinary residence in a case when section 21 accommodation should have been provided, as happened in the case of Greenwich. In Greenwich, the Court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act (arrangements under section 21 made with a voluntary organisation or person who is not a local authority) and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (paragraph 55 of the judgment). The relevant date to determine ordinary residence in accordance with section 24(5) is

immediately before section 21 accommodation was or should have been provided. I take this to mean the day before, namely 21st July 2010.

15. On 21st July 2010, Mrs X was at OLodge, a care home, receiving continuing healthcare funding. It is non NHS accommodation but was funded by the NHS whilst Mrs X remained entitled to continuing healthcare. Mrs X moved there on 29th October 2008, prior to the extension of the deeming provision to non-hospital settings in which NHS funded care is provided. Mrs X's ordinary residence must therefore be considered in the light of the case law and guidance relating to ordinary residence.

Capacity

16. Both parties agree at paragraph 3 of the statement of facts that Mrs X lacks capacity "to make an informed decision as to where she wants to reside". I have been provided with a copy of a mental capacity assessment which I have referred to at paragraph 6. This assessment, conducted in December 2009, concluded that Mrs X lacked capacity to decide where she wanted to live and noted this also to be the conclusion of the Acquired Brain Injury nurse when the question was considered "last summer", presumably the summer of 2008 when Mrs X was at ZPlace.

17. The test of capacity is to be 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).

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.

18. The assessment on capacity was conducted in December 2009 and I have no evidence with the copy papers as to Mrs X's capacity on or around 21st July 2010. However, on balance and given the view that Mrs X was not thought to have the requisite mental capacity when the question was considered in the Summer of 2008, I take the view that Mrs X did not have capacity to form an intention as to where she wished to live on or around 21st July 2010. Mrs X was admitted to Area1B Hospital in February 2008 and I suspect that she did not have capacity at this time either. However, in case I am wrong on this issue, I have made the determination below on both alternatives.

Determination if Mrs X lacked capacity to decide where to live

19. If Mrs X did not have capacity on or around 21st July 2010, it is necessary to consider the case of Vale. In Vale, the judge rejected the view that ordinary residence continued at a place 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.

20. In the case of a person such as Mrs X, whose disability occurred some time after leaving her parents' home and who prior to the haemorrhage had lived with her husband in YCountry for several years, that solution is not appropriate. The case therefore has to be considered according to the alternative approach in Vale. This means one has to 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.

21. It seems that the options open to me are to find that Mrs X was ordinarily resident on or around 21st July 2010 in:

- a) CouncilB or its region,
- b) CouncilA, where OLodge is located, or
- c) to determine that she has no settled residence in the United Kingdom.

22. Mrs X was physically present at her sister's house for four days before her admission to hospital but it is not possible for me to say whether the couple or Mrs X planned to reside in CouncilB. It is true that an ordinary residence can be gained in a short period, as stated in Shah, however, it is not clear to me that the purpose of Mrs X's presence was a gateway to staying and receiving care in the CouncilB region.

23. The PCT placed Mrs X in ZPlace in CouncilA's area and subsequently in OLodge on the same site to receive continuing healthcare. There is no evidence to suggest that Mrs X has any links to the CouncilA area and indeed the mental capacity assessment notes that Mrs X had told a number of people that she wished to leave OLodge.

24. I am mindful of the view taken by the court in the Greenwich case that finding a person to be of no settled residence is not a conclusion to be reached hastily given that it necessarily, save in certain circumstances, results in a lesser degree of protection for the person. However, I find it hard to come to any other conclusion in this case.

Determination if Mrs X had capacity to decide where to live

25. Although I do not consider that Mrs X had capacity to decide where to live on or around 21st July 2010, I have considered in the alternative what effect it would have on my determination if she had such capacity. In those circumstances, the test in Shah would apply and I would have to consider in the light of all the circumstances of the case, both whether the place of residence had been voluntarily adopted and whether it was for settled purposes as part of the regular order of Mrs X's life for the time being.

26. Paragraph 9 of the statement of facts refers to the content of an e-mail from a social worker at CouncilA in which it is recorded that Mrs X's sister wanted her to return to the United Kingdom to receive the care she felt she needed. I have no information concerning whether the plan was to settle in the United Kingdom and, if so, in which area. Paragraph 11 of CouncilB's submissions state that Mrs X's husband informed a social worker for CouncilB that Mrs X had no intention of residing in CouncilB when they returned to the United Kingdom. The mental capacity assessment carried out in December 2009 states that Mrs X's husband preference would be for himself and Mrs X to reside in the JArea.

27. There is no clear evidence or agreement between the parties as to Mrs X's intentions when she returned to the United Kingdom other than her sister's wishes for better care. Her husband maintains that she did not wish to stay in Council B. Mrs X was seen as an emergency for a suspected thrombosis and subsequently admitted to hospital and whilst it may be assumed that Mrs X was amenable to considering care options, I cannot say that she clearly wanted to settle in any particular area. I therefore determine on both alternatives, that on or around 21st July 2010, Mrs X was of no settled residence. Mrs X was physically present in Council A's area on this date when her need for services under Part 3 arose and given the presence of mental disorder, Council A were under a duty pursuant to the Approvals and Directions (Appendix 1 to LAC(93)10), to provide services.

Signed:

Dated: