

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 4 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 agreed statement of facts prepared by the two authorities involved in the dispute, and the supporting documents supplied. The authorities concerned are CouncilA and CouncilB.

3. Mr X was born on xdate 1984. He suffers from several physical and mental disabilities. He was assessed by CouncilB pursuant to section 47 of the National Health Service and 007UNIT Care Act 1990 to be eligible for services under Part III of the National Assistance Act 1948 (“the 1948 Act”) in or about July 2001. He required full time care and support in appropriate residential accommodation, and this continues to be the case.

4. Mr X is currently in permanent residential care, pursuant to section 21 of the 1948 Act, in Area1A in CouncilA. Area1A is a specialist home catering for persons with learning disabilities, autism and challenging/complex needs.

5. Until July 2001 Mr X lived with his parents in the area served by CouncilB. On 11 July 2001 Mr X was admitted to Area1A, the placement being arranged and funded by CouncilB. Mr X remained at Area1A until 13 January 2009; on that date he was admitted to the KMedicalCentre in CouncilA.

6. On 3 April 2009 Mr X was assessed as eligible for NHS continuing health care funded by CouncilB Primary Care Trust ("CouncilB PCT"), to take effect on his discharge from hospital.

7. On 21 April 2009 Mr X was transferred to the SHospital in CouncilG.

8. On 28 April 2009, Area1A stated that they could no longer meet Mr X's increased needs and that therefore he could not return to the home on his discharge from hospital. CouncilB served notice terminating Mr X's placement at Area1A.

9. On 1 May 2009 Mr X returned to KMedicalCentre.

10. On 4 June 2009 Mr X was discharged from KMedicalCentre and placed by CouncilB PCT in the 007UNIT, CouncilC. The placement was funded by CouncilB PCT.

11. On 30 September 2009 Mr X was discharged from 007UNIT and returned to Area1A. The transfer was at the request of Mr X's parents, who were not

happy with the care being provided at 007UNIT. An assessor from Area1A visited Mr X at 007UNIT and decided that they could again meet his needs, as his condition had improved. Funding continued to be provided by CouncilB PCT. CouncilB were not informed of the transfer.

12. On 9 February 2010, CouncilB PCT reviewed Mr X's needs and decided that he was no longer eligible for NHS continuing health care.

13. Mr X's parents no longer live together, but both continue to live in the area of CouncilB. Both parents play an active role in his life. Mr X visits his father every two weeks; the transport is arranged by Area1A. Each visit lasts approximately half an hour. Mr X's mother visits Mr X at Area1A on a weekly basis.

14. The dispute about ordinary residence between CouncilA and CouncilB arose on 13 May 2010.

15. It is agreed by all parties that Mr X lacks mental capacity within the meaning of section 2 of the Mental Capacity Act 2005 to decide where to live.

16. It is agreed that Mr X's ordinary residence remained in the area of CouncilB when he was first placed in Area1A in 2001, and also when he was admitted to KMedicalCentre on 13 January 2009, when he was subsequently transferred to the SHospital in CouncilG, and when he returned to KMedicalCentre on 1 May 2009.

17. Pending the determination of ordinary residence, Mr X's placement is being provisionally funded by CouncilA. My determination is not affected by this provisional acceptance of responsibility.

The relevant law

18. I have considered the agreed statement 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 it¹, the guidance on ordinary residence issued by the Department ("the OR guidance")², and the leading cases of *R v Barnet ex parte Shah* (1983) 2 AC 309 ("*Shah*") and *R v Waltham Forest Borough Council ex parte Vale* The Times 25.2.85 ("*Vale*").

19. 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 or 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

¹ Contained in LAC(93)10.

² 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.

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".

20. Under section 21(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.

21. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(6) as in force at the relevant time³ provided that:

"For the purposes of the provision of residential accommodation under this Part of this Act, a patient in a hospital vested in the Secretary of State, a Primary Care Trust or an NHS trust shall 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, whether or not he in fact continues to be ordinarily resident in that area."

22. Section 24(6) applied to Mr X on his admission to KMedicalCentre on 13 January 2009; it ceased to apply to him when he was admitted to 007UNIT

³ See paragraphs 27 to 30 below.

on 4 June 2009, as 007UNIT was not a hospital within the meaning of section 24(6) at that time. Accordingly, the 1948 Act did not deem Mr X to be ordinarily resident in the area of Council B. His ordinary residence at that date falls to be determined in accordance with the common law. However, just because the deeming provision did not apply to Mr X does not mean that Mr X's ordinary residence changed at this date.

23. "Ordinary residence" is not defined in the 1948 Act. The OR 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".

24. The test in *Shah* applies where a person is capable of adopting a residence "voluntarily and for settled purposes". Where a person does not have the mental capacity to decide where they wish to live, however, the OR guidance (paragraphs 27-34) advises that the alternative test in *Vale* should be used. 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 application of the law

25. The key issue in this case is where Mr X was ordinarily resident when CouncilB PCT ceased to provide NHS continuing health care on 9 February 2010.

26. My determination is that Mr X was ordinarily resident in the area of CouncilB. My reasons for reaching this conclusion are set out below.

27. CouncilA in their legal submissions rely in particular on paragraph 114 of the OR guidance. This refers to the deeming provision in section 24(6) of the 1948 Act, as amended by section 148 of the Health and Social Care Act 2008 (“the 2008 Act”). The amendment made by section 148 of the 2008 Act had the effect of extending the deeming provision in section 24(6) to all accommodation funded by the NHS, whether that accommodation was

provided in a hospital or elsewhere. Prior to that amendment, section 24(6) applied only to hospitals.

28. The amendment made by section 148 of the 2008 Act came into force on 19 April 2010. It was therefore not in force when NHS continuing health care ceased to be provided to Mr X on 9 February 2010, nor when ordinary residence was first disputed on 4 June 2009.

29. Even if NHS continuing health care had continued to be provided to Mr X beyond 19 April 2010, the amendments made by section 148 of the 2008 Act would not have been relevant to Mr X's case. This is because transitional provisions⁴ provided that the amendments made by section 148 did not apply to a person who was receiving non-hospital NHS accommodation on 19 April 2010; instead the previous legislation remained applicable to that person for as long as that accommodation continued to be provided.

30. The fact that the dispute arose after the implementation of section 148 of the 2008 Act is not relevant. The relevant law is the law as at the date when ordinary residence falls to be determined, which is 9 February 2010.

31. As the deeming provision in section 24(6) does not apply to Mr X, his ordinary residence falls to be determined according to the usual rules. Council A in their legal submissions refer to paragraph 14 of the previous ordinary residence guidance (LAC 93/ 7) which suggests that local authorities

⁴ Article 12 of S.I. 2010/708.

could reasonably apply the section 24(6) approach by analogy to people leaving prisons, resettlement units or other similar establishments. However, paragraph 14 also states that “any dispute 007Unitst be resolved in the light of the specific circumstances”. In my view, paragraph 14 of the previous guidance merely suggests one possible approach that could be followed by local authorities in relation to persons leaving prisons, resettlement units or other similar establishments, but it does not say that this approach must be followed. In terms of this determination, I am required to determine Mr X’s ordinary residence in accordance with the relevant legislation and case-law and it is not open to me to apply the section 24(6) approach by analogy. Moreover, paragraph 14 does not refer to a person in Mr X’s situation, namely a person moving from hospital accommodation to residential accommodation.

32. If I were to follow the approach suggested in the preceding paragraph (applying the deeming provision in section 24(6) by analogy), the effect would be that Mr X’s ordinary residence would continue to be in the area of CouncilB. It is agreed that Mr X’s ordinary residence had been in the area of CouncilB until the point of his placement in 007UNIT; had he been transferred from KMedicalCentre straight back into residential care under section 21, his ordinary residence would not have changed.

33. However, I do not think it is open to me to apply section 24(6) by analogy and so I have considered the alternative approach of determining ordinary residence according to the usual rules. For this, it is necessary to look at all the circumstances of Mr X’s case.

34. Mr X lived with his parents in the area of CouncilB until the age of sixteen. Since 2001 Mr X has lived in Area1A, apart from the period in 2009 when he was in hospital and in 007UNIT. He was placed in Area1A because that home had the specialist facilities to care for him. Mr X's parents still live in CouncilB and he has regular contact with them.

35. Before being placed in Area1A, Mr X's ordinary residence was in CouncilB; by virtue of section 21(5) of the 1948 Act, he continued to be ordinarily resident there after the placement began. By virtue of the deeming provision in section 24(6) he continued to be ordinarily resident in CouncilB when he was transferred to hospital. This provision ceased to apply to him when he was transferred to 007UNIT on 4 June 2009.

36. The question to be decided is where Mr X was ordinarily resident at the date that his entitlement to NHS continuing health care ceased, on 9 February 2010. By that time he had been back in Area1A for four months, after a period in hospital and in 007UNIT.

37. It is agreed that Mr X does not have (and never has had) the mental capacity to decide where he wishes to live. Therefore in deciding where he is ordinarily resident, it is necessary to apply the test in *Vale*. That 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, visiting them two or three times a year and, in view of her handicap, her ordinary residence remained that of her parents. Effectively she was in the same position as a small child, as she was not capable of having an independent ordinary residence of her own.

38. In my view, the above test is applicable in Mr X's case. I have considered whether the alternative test in *Vale* should be applied, as suggested by CouncilB in their legal submissions; 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. However in my view that test is not applicable in a case such as Mr X's. It may be appropriate where a person has at some stage of their life been independent and had some capacity to make their own decisions, or has only limited contact with their parents, but from the information before me it does not appear that this applies to Mr X.

39. In applying the first *Vale* test to Mr X, I conclude that his ordinary residence is in the area of CouncilB. Mr X lived with his parents in the area of CouncilB until the age of sixteen. The area of CouncilB is where Mr X's parents reside, and he still has regular contact with them. Mr X's parents continue to take an active role in his life: for example it was at their request that Mr X was moved from 007UNIT back to Area1A. In my view, Mr X's position is analogous to that of Judith Vale of the *Vale* case; his situation is

such that he is not capable of having an ordinary residence independently of his parents.

40. I do not think it is essential for me to determine the parent with whom Mr X's ordinary residence lies, given that they both continue to live in the area of Council B. Mr X has ongoing contact with both his mother and father and I do not have enough information before me to reach a firm conclusion on whether Mr X has more of a base with one parent than the other. However if it were necessary to make a decision on the basis of the evidence available, I would consider that Mr X's ordinary residence lies with his father. This is because Mr X makes regular visits to his father; he does not appear to visit his mother at her home, although she visits him frequently at Area 1A.

Signed on behalf of the Secretary of State for Health

Dated