

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X AND THE LATE MRS X (OR 2 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 Mr X and the late Mrs X for the purposes of Part 3 of that Act.
2. The authorities involved in this dispute are CouncilA and CouncilB. The request for this determination was submitted by CouncilA on behalf of both authorities and was accompanied by an agreed statement of facts and copies of correspondence and other documents. Both authorities have also submitted legal representations.

Facts of the case

3. The following facts are derived from the statement of facts submitted by the authorities and the accompanying documentation.
4. Mr and Mrs X both originally lived in CouncilB. They have one son who still lives in CouncilB. I am told that at some point they bought, and subsequently sold, a house in CouncilB. I am not told the dates of such purchase or sale.
5. In 1985 Mr and Mrs X stayed in a QHotel while visiting a relative. They enjoyed the experience and for a few months afterwards they stayed for three or four nights a week at the QHotel in CouncilC. They continued this pattern during 1986 when they stayed every weekend at another QHotel – the CouncilD QHotel - which they chose as it was close to CouncilD and gave them easier access to antique fairs in CouncilE and CouncilF which they visited. They continued to visit the CouncilD QHotel for a number of years.
6. In 1996 they took on a tenancy of a flat in CouncilB through the VHousing Estate and moved into that flat. I am told that certainly at the time of the agreed statement of facts, submitted with the letter dated 8 October 2010 from CouncilA , the tenancy was at that time still retained and payments were being maintained in respect of it to the association and full Council Tax was being paid to CouncilB .
7. Approximately 12 months after moving into the flat Mrs X was admitted to hospital for some time following a cerebral haemorrhage. I have assumed that Mr X remained living in the flat during that time. After her discharge from hospital Mrs X returned to live in the flat for a period. However, according to information given to CouncilB by VHousing Estate, it appears Mr X felt the flat was not suitable to Mrs X’s needs and, although alternative accommodation was suggested, this was declined.

The period 1997 – 2007 – CouncilG QHotel

8. In July 1997 Mr and Mrs X went to stay in a QHotel in CouncilG, CouncilF. They checked in on the day it opened in July 1997. They remained there for approximately 10 years.
9. Information available to CouncilB indicates that Mr and Mrs X chose CouncilG as they had had holidays in the area, liked the area and had friends there. They tried to identify a property in the area which would be more suitable to their needs than their flat in CouncilB, the tenancy of which they still retained, but after failing to do so they elected to live in the QHotel in CouncilG as it had an adapted room for disabled people.
10. They registered with a GP in CouncilG and had friends there. They took frequent holidays each year but always returned after such holidays to their room at the CouncilG QHotel. While living in the CouncilG QHotel Mr X had treatment for a cancerous growth and Mrs X spent a period of time in hospital in that area.
11. While they were staying at the CouncilG QHotel, they chose to retain their tenancy of the flat in CouncilB. They continued to pay CouncilB Council Tax. Some of their furniture and other possessions remained in the CouncilB flat. During this 10 year period, every 3 – 4 months Mr X would drive to the CouncilB flat to collect post and check on the belongings that remained in that flat. Mrs X did not return to visit the CouncilB flat during this period.
12. In 2007 the room they occupied was renamed from Room No 1 to “The Mr & Mrs X Suite” and a plaque was mounted in reception celebrating their ten year anniversary at the CouncilG hotel.
13. The information available to CouncilB is that Mr and Mrs X said that it was their wish to continue to reside in CouncilG and that they considered the CouncilG QHotel to be their home.

The period July 2007 to December 2007

14. In approximately July 2007 the CouncilG QHotel manager suggested that MrX write an article about the advantages of hotel accommodation. The article when published attracted overwhelming and intrusive interest and attention. The hotel decided to charge them annually for the cost of their accommodation. It was suggested (I am not told by whom but assume it was the hotel management) that they could move to another hotel in the QHotel chain. They were offered a room at a QHotel in CouncilA. Mr and Mrs X agreed to move there (the first CouncilA hotel). They do not appear to have had any previous links to CouncilA.
15. On arriving at the first CouncilA hotel, it became apparent that the accommodation was not suitable for Mrs X so they left. They went to another hotel in CouncilA, a Post House (the second CouncilA hotel) which they remembered from having once stayed there some years previously. The hotel management agreed to accommodate them. I am not told the exact date they moved from the CouncilG QHotel or the date they moved into the second

CouncilA hotel. However I am told that these events took place during the period July 2007 to December 2007. I am told that having moved into the second CouncilA hotel they remained there for 13 months. As I am advised that they moved from the second CouncilA hotel into the RCare Homecare home in CouncilB in October 2008, I conclude that they moved into the second CouncilA hotel around September 2007. I conclude therefore that the move from CouncilG and the stay in the first CouncilA hotel took place sometime between July 2007 and September 2007.

16. I am advised that during their time staying in hotels in CouncilA (that is, from the period of approximately July 2007 to October 2008) Mr X continued to drive his car to their flat in CouncilB to collect post and check on the belongings they kept at that address. It is not clear to me whether these trips only took place during the period July 2007 to December 2007 (given that the statement about these trips is made in the section of the statement of facts which deals with the period from July 2007 to December 2007) or whether Mr X continued to make these trips to check the flat during the period December 2007 to October 2008. Mrs X tended not to accompany her husband on these trips to CouncilB during their time in CouncilA because of her disability.
17. For most of the period they were in CouncilA their respective deteriorating health and physical conditions prevented their being able to go on holiday.
18. V Housing Estate offered to refer Mr X for an Occupational Health assessment in CouncilB on three occasions, the last being in August 2007. On each occasion Mr X refused stating that he wasn't prepared to return to CouncilB. When asked by CouncilB staff why they had not returned to CouncilB Mr and Mrs X both indicated that there was nothing there for them. This statement about the enquiry from CouncilB staff and Mr and Mrs X's response is included in the agreed statement of facts in the section relating to the period from July 2007 to December 2007. I have concluded therefore that the enquiry related to this period and to the question of why Mr and Mrs X had not returned to CouncilB during this period.

December 2007 onwards

19. Around December 2007, NHS District Nurses in CouncilA (who are not part of the CouncilA) raised with Mrs X a stay at an intermediate care facility which allows assessment and rehabilitation. On 12th December 2007 the intermediate care facility carried out an assessment on Mrs X. They declined to offer intermediate care as Mrs X had no rehabilitation potential.
20. In February 2008 the manager at V Housing Estate received a message indicating that Mr X would like to quit the CouncilB flat. Mr X subsequently rang the manager directly and said he did not wish to quit the flat, and further said that he intended to return to CouncilB. However, following a referral to the CouncilB Occupational Health Team for an assessment, Mr X refused to attend the assessment and said that his intention was to remain in CouncilA.

21. In May 2008 Mr and Mrs X were referred to a CouncilA tenancy support officer to discuss re-housing them from their hotel accommodation. The intention had been to discuss options for other types of accommodation. However Mr and Mrs X preferred to remain in their hotel accommodation and refused all other care options offered by CouncilA . They also chose to continue keeping the tenancy of their flat in CouncilB.
22. Also in May 2008, a care manager was asked to visit Mr and Mrs X by a Housing Officer. A CouncilA community care assessment of Mrs X was begun on 3 June 2008. An assessment of Mr X was also carried out at this time. The assessments were updated in September 2008. I have seen a copy of the assessments.
23. It was clear that Mr and Mrs X were having difficulty in coping and required support in their daily living needs. Mr X was no longer able to provide the support to his wife that he had previously been able to provide because of his own deteriorating health. The staff at the second CouncilA hotel had had concerns about Mr and Mrs X for some time and had been trying to help them to cope.
24. Mr and Mrs X expressed a wish, reflected in the assessment documents, to return to CouncilB on a permanent basis where they said they had maintained contact over many years with friends living in the city. They did not express any preference for an authority to assist them, they just wished to move to their preferred area – which was CouncilB.
25. Mr and Mrs X were at this time registered with a GP in CouncilA whose surgery was across the road from the hotel. The assessment form records that they were registered with a CouncilA GP. The agreed statement of fact also states that there was also a named GP in CouncilB but that it was not known if Mr and Mrs X were still registered with that GP.
26. On 15 September 2008 Mrs X was admitted to ZHospital in CouncilA. This was partly due to mismanagement of her diabetes and partly as a response to the total collapse of Mr and Mrs X's ability to cope. It was clear that the hotel management had expressed grave concerns about the situation. They had initiated a health and safety review of Mr and Mrs X's occupation of their hotel room and it seemed very probable at this stage that the report and recommendation would conclude that Mr and Mrs X should be given notice to leave the hotel accommodation. The community care assessments were updated as at 15 September 2008 and reflect these developments. The updated assessment records that both Mr and Mrs X had requested a transfer to the CouncilB area.

Period after October 2008

27. By October 2008 it was clear to CouncilA Adult Social Services that Mr and Mrs X could no longer maintain a fully independent existence and were expressing a firm wish to return to CouncilB.

28. Mrs X's identified need was for permanent residential care in a care home. The flat in CouncilB was not suitable for her needs and it was clear the hotel accommodation in CouncilA was not suitable either. It was considered that Mr X required supported accommodation with 24 hour cover and District Nurse monitoring. His needs were not of the same level as Mrs X's and it was possible that those needs might be met by support with a domiciliary care package in their flat. However, Mr X would not have wanted this if it involved being separated from his wife.
29. Mrs X was accommodated on an interim basis in a CouncilA care home for 2 days in October 2008 but was adamant she did not wish to reside in a care home. I am told in the agreed statement of facts that she had been about to "return to hospital accommodation" [sic] but that when about to do so she required a hospital admission. I have assumed that the reference to the "hospital accommodation" to which she had been about to return at this point (but did not) is a misprint for "hotel accommodation". Following the hospital admission she remained in hospital until 24 October 2008.
30. CouncilB Social Services identified a suitable care home in the CouncilB area for Mr and Mrs X, RCare Home. It was agreed between CouncilA and CouncilB that Mr and Mrs X would, on an interim basis and pending the resolution of the question of ordinary residence, be placed in this care home by CouncilA under arrangements under Part 3 of the National Assistance Act 1948. It was agreed that the cost would be reimbursed by CouncilB if it were later agreed or determined that they were the responsible authority.
31. Mrs X agreed to move and did move to RCare Home in CouncilB on 24 October 2008. On 28 October Mr X moved to the care home too.
32. Mr and Mrs X gave no indication that they wanted to surrender the tenancy of their flat. However it is noted that they did indicate some time during 2009 that they did not wish to actually reside in the property. It is however also noted that following their move to RCare Home Mr X contacted CouncilA several times to say they were dissatisfied with their accommodation at RCare Home and that they would like to return to their flat in CouncilB when they were well enough.
33. Mr X was admitted to hospital in November 2009 for a hip replacement operation. Following his discharge he returned to RCare Home Sadly, Mrs X died in January 2010.
34. Since October 2008, reviews in respect of Mr and Mrs X were carried out by CouncilB at the request of CouncilA. A CouncilB Social Worker visited Mr X on 5 March 2010. He was at that time assessed as no longer having a need for Part 3 accommodation and that he could be re-housed with a home support package. However, I am advised that following a further visit made to Mr X at RCare Home by a Social Worker from CouncilA on 14 June 2010 it was concluded that Mr X did need ongoing social work intervention and support and that RCare Home met his needs. I am advised that, certainly as at October

2010, Mr X's place at RCare Home continues to be funded by CouncilA pending this determination.

The legal framework

35. I have considered all the documents submitted by CouncilA and CouncilB . These include an agreed statement of facts signed on behalf of both councils; correspondence between the councils, and also with CouncilF, as listed in the letter from CouncilA in requesting this determination; and the legal submissions made on behalf of CouncilA and CouncilB . I have also considered the provisions of Part 3 of the National Assistance Act 1948 (the 1948 Act), the Secretary of State for Health's guidance on ordinary residence¹ and the case of *R v London Borough of Barnet ex parte Shah* (1983) 2AC 309 ("Shah"). My determination is not influenced by the fact that CouncilA has accepted responsibility for funding Mr and Mrs X's care for the disputed period.
36. 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 and attention which is not otherwise available to them.
37. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provision of that Part, the authority in whose area the person is ordinarily resident.
38. Section 24(5) provides that where a person is provided with residential accommodation under Part 3 of the 1948 Act, he shall be deemed for the purposes of the 1948 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.
39. Section 24(6) provides that, for the purposes of the provision of Part 3 accommodation, a patient in certain NHS hospitals 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, whether or not he in fact continues to be ordinarily resident in that area. This section was amended with effect from 19th April 2010 (when section 148 of the Health and Social Care Act 2008, amending section 24 of the 1948 Act, came into force) so that it applied to *any* accommodation provided under the NHS Act 2006 – for example care home accommodation provided by a PCT as part of a package of NHS continuing health care. Prior to that date the provision only applied to NHS hospital accommodation.

¹ Until 19 April 2010 this guidance was contained in LAC (93)7, and on that date it was superseded by the guidance on the identification of the ordinary residence of people in need of community care services published on 5 March 2010. This determination refers to that new guidance (entitled "Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England") as the guidance in force at the time the determination was made.

40. 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 or 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 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).
41. The Secretary of State has issued directions under section 21(1) of the 1948 Act setting out the circumstances under which local authorities will be under a duty to provide residential accommodation under that section. These directions were published as Appendix 1 to LAC(93)10. Under these directions, local authorities are required to provide residential accommodation to those qualifying under Part 3 and who are ordinarily resident in their area.
42. Guidance published in March 2010 (and effective from 19 April 2010) entitled “Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England”), provides further guidance on determining a person’s ordinary residence for the purposes of Part 3 of the 1948 Act. Prior to the publication of this guidance, the relevant guidance was contained in LAC (93)7. This determination refers to that new guidance (as the guidance in force at the time the determination is made. I note that both CouncilA and CouncilB also refer to the 2010 guidance in their submissions.
43. The guidance states that at paragraph 18 that ordinary residence “should be given its ordinary and natural meaning subject to any interpretation by the Courts.” The guidance also states, at paragraph 19 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”.
44. The meaning of ordinary residence has been considered by the courts. In the leading case of *Shah*, Lord Scarman held that:

“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 of long duration.”.

45. He went on to say (on page 344 of the judgment)—

“This is not to say that the “propositus” intends to stay where he is indefinitely; indeed, his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode ... all that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled”.

46. There does not appear to be any suggestion in the papers before me or in any of the submissions that either Mr or Mrs X lacked the capacity to make their own decision as to where they wanted to live. It seems to me that they were both so capable.

Application of the legal framework

47. There is no suggestion in the papers before me or in any of the submissions made that the accommodation in RCare Home is not accommodation provided under section 21 of the 1948 Act (when considered with section 26 of the Act). The provision of accommodation under section 21 of the 1948 Act is the responsibility of the authority in whose area a person is ordinarily resident. The question I have to decide therefore is where Mr and Mrs X were ordinarily resident immediately before they were admitted to RCare Home.

48. In Mrs X’s case, she moved to RCare Home from NHS hospital accommodation. She had moved to that hospital accommodation from a care home in CouncilA (which I have assumed to be residential accommodation provided under Part 3 of the 1948 Act) and she had moved into that care home from NHS hospital accommodation. She had moved into that NHS hospital accommodation on 15 September 2008 from the second CouncilA hotel. The effect of the various deeming provisions under section 24 of the Act, including the one relating to NHS accommodation which applied at the relevant time, is that these periods of residence in the NHS hospital accommodation and the intervening period of residence in the care home in CouncilA are ignored for the purpose of establishing Mrs X’s ordinary residence at the time of her move to RCare Home. She is deemed to continue to be ordinarily resident in the area in which she was ordinarily resident before such accommodation was provided. In practical terms this means I must consider where she was ordinarily resident before she moved into hospital on 15 September 2008.

49. In Mr X’s case, I must consider where he was ordinarily resident in October 2008 immediately prior to moving to RCare Home

50. Both Mr and Mrs X, at the relevant times, were living in the second hotel in CouncilA and had been living there since approximately September 2007.

51. CouncilA suggest in their submissions that there was at that time a dominant connection with CouncilB such as to override the fact that Mr and Mrs X actually lived in CouncilA.

52. Mr and Mrs X had not lived in CouncilB since moving to CouncilG in 1997, although I accept they maintained the tenancy of a flat in CouncilB during this period. During the 10 years of their stay in CouncilG I consider that they demonstrated that they had adopted that abode in CouncilG “voluntarily and for settled purposes as part of the regular order of their lives for the time being.” In support of that view I would accept and endorse the factors that CouncilB put forward in their submission. Mr and Mrs X initially looked for a property in CouncilG; they registered with a GP there; they went on holiday from the hotel in CouncilG and returned there after their holidays; they had friends in the area; and they only returned to the flat in CouncilB 3 or 4 times a year to collect their post. I consider that during the time they lived in CouncilG they were ordinarily resident there and not ordinarily resident in CouncilB.
53. Mr and Mrs X left CouncilG in July 2007. CouncilA question the degree of choice exercised in moving to CouncilA given what the Council refers to as “the circumstances under which they had to leave the CouncilG Hotel and the role of the hotel management.” However there is nothing in the agreed statement of facts to suggest that the decision to move from the CouncilG hotel to CouncilA was not a choice voluntarily made by Mr and Mrs X in the light of their circumstances at the time. Mr and Mrs X seem to have accepted a suggestion made that they move to a particular hotel in CouncilA. When that hotel did not prove suitable they moved again. They did not move to CouncilB or any other place although they could have done so had they wished to. They remained in CouncilA and moved to another hotel, where they stayed for some 13 months.
54. During their time in CouncilA Mr and Mrs X registered with a GP in that city. Mr X continued to drive to the flat in CouncilB to collect their post and check on their belongings kept at that address. However, they did not return to live in the CouncilB flat. In the agreed statement of facts it is recorded that, when asked by CouncilB staff, in respect of the period during July 2007 to December 2007, why they had not returned to CouncilB, Mr and Mrs X indicated that there was “nothing there” for them.
55. I consider that the facts indicate that when Mr and Mrs X moved from CouncilG to CouncilA they adopted CouncilA as their abode “voluntarily and for settled purposes as part of the regular order of their lives for the time being”.
56. CouncilA in their submission refer to “the increasingly clear wish of Mr and Mrs X”, during the time they were in CouncilA, to return to CouncilB, a wish their health prevented them from implementing. They suggest that this brings into question the degree to which their stay in CouncilA was voluntary. I do not accept that any wish to return to the CouncilB area in the future affects the question of whether their move to and subsequent residence in CouncilA was voluntary. They may, some time after moving to CouncilA, have wished to move to CouncilB but that is no more than an expression of an intention to change their residence when they had the opportunity to do so.

57. CouncilA also notes that Mr and Mrs X retained their flat in CouncilB and maintained links with CouncilB. They suggest that this is evidence of an intention to return to CouncilB at some point. This may be the case, although the agreed statement of facts also records that during their time in CouncilA Mr and Mrs had also indicated that they felt there was nothing for them in CouncilB. The statement in Shah referred to above, however, makes it clear that a person's ordinary residence is their abode "adopted....*for the time being* whether of short or long duration". The judgment also makes clear that it is not necessary that the person concerned should intend to stay where they are indefinitely. The fact that Mr and Mrs X may possibly have intended to return to CouncilB at some stage in the future and may at certain stages have expressed a wish to move to CouncilB does not necessarily affect the question of whether, in moving to CouncilA when they did and then living there as they did, they established their ordinary residence in CouncilA at that time.
58. CouncilA have referred in their submission to paragraph 26 of the March 2010 guidance and suggest – with reference to that paragraph - that this is a case where an assessment has to be made of where Mr and Mrs X had the stronger link immediately before being provided with Part 3 accommodation. However, that paragraph 26 deals with the point that for the purposes of the 1948 Act it is not possible to have more than one ordinary residence. It discusses the situation where a person appears genuinely to divide their time equally between two homes and comments that in such cases (because it is not possible for these purposes to have more than one ordinary residence) it would be necessary to establish (from all the circumstances) to which of the two homes the person had the stronger link. Mr and Mrs X however did not divide their time equally between two homes. From approximately September 2007 they lived in the second hotel in CouncilA and for some ten years prior to that they had lived in CouncilG. I do not consider this a case in which it is necessary to consider, as suggested in paragraph 26 of the guidance, which of two residences affords the stronger link.
59. CouncilA submit that Mr and Mrs X had a lifelong connection with CouncilB and had only spent a year in CouncilA. However I do not consider that to be relevant to the question of whether they had established ordinary residence in CouncilA at the relevant time.
60. CouncilA refer to the fact that Mr and Mrs X occupied a hotel room by a mere licence and submit that such licence cannot be said to provide Mr and Mrs X with accommodation which was sufficient to be regarded as their own home. They refer in support of this aspect of their submission to the Department of Health Guidance "Supported Housing and Care Homes (August) 2002). This is guidance in relation to registration as a Care Home under the Care Standards Act 2000 (provisions which no longer apply in England). It relates to when there was a need for an establishment to register as a Care Home under that Act and considers the position of where care was in fact provided to someone "in their own home" – this being relevant to the question of whether an establishment had to be registered as a care home. This guidance has no relevance to the question of a person's ordinary residence.

61. For the reasons set out above, I determine that Mr and Mrs X were both ordinarily resident in the area of CouncilA immediately before being admitted to residential accommodation in RCare Home and that consequently CouncilA is responsible for the provision of Part 3 accommodation for Mrs X from the time of her admission in 2008 to the date of her death in January 2010 and for Mr X from the time of his admission in 2008 to the present.

Signed

Dated