

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF Mrs X

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 background to the case

2. The following information has been ascertained from the joint statement of facts prepared by the two authorities involved in the dispute, the legal submissions prepared by each of the two authorities and the copy documents supplied.

3. Mrs X was born on X date 1935. She has lived in CouncilA area for the last 50 years, during the course of her entire married life, and continued to do so following her husband’s death in 2002.

4. On 18 May 2010, Mrs X moved from her home in CouncilA to reside with her daughter, in CouncilB.

5. On 28 May 2010, Mrs X was admitted as a voluntary patient to HospitalB1, with a diagnosis of psychotic depression.

6. On 27 August 2010, Mrs X was discharged from HospitalB1. Mrs X immediately went to reside with her daughter in CouncilB. She did not return to live in CouncilA.

7. On 17 January 2012, Mrs X was readmitted to HospitalB1, again as a voluntary patient.

8. On 15 June 2012, Mental Health Social WorkerB1 at CouncilB, carried out a care assessment of Mrs X. During the course of this assessment, Mrs X stated that she wanted to return to CouncilA.

9. On 24 July 2012, Mrs X was registered on CouncilA’s housing register. She was supported in doing so by her daughter.

10. On 26 July 2012, Mrs X was transferred from HospitalB1 to HospitalA1. CouncilB assert that the reason for this transfer was to facilitate her returning to CouncilA.

11. On 18 September 2012, CouncilA accepted provisional responsibility for the provision and funding of Mrs X's care pursuant to paragraph 199 of the Department of Health Ordinary Residence Guidance ("the Guidance"). That same day, Mrs X moved from HospitalA1 to reside at the Residential Care HomeA1 (acting as lead authority) made the arrangements for Mrs Hodgson's placement under Section 21 of the National Assistance Act 1948.

12. CouncilA offered Mrs X a deferred payment agreement under section 55(7) of the Health and Social Care Act 2008, the legal formalities and agreement for which were finally completed and a charge registered against Mrs X's property in CouncilA on 18 April 2013.

13. Mrs X continues to reside at Residential Care HomeA1. Mrs X was assessed in May 2012 by a CouncilB social worker as having the capacity to make decisions about where she resides pursuant to the provisions of the Mental Capacity Act 2005. Both CouncilB and CouncilA accept that Mrs X has retained such capacity at all times. Mrs X must therefore be assumed to have had such capacity both now and in the past.

14. Between 18 May 2010 and 18 September 2012, Mrs X continued to own a property in CouncilA. She did not place the property on the market at any point during this period.

15. Mrs X is being provided with services under section 21 of the National Assistance Act 1948 following assessment under section 47(1)(b) of the National Health Service and Community Care Act 1990.

16. Mrs X has been assessed by Mental Health NHS TrustA1 as having an extensive range of care needs. Mrs X has a recurrent depressive disorder and acute anxiety. This has been complicated by multiple drug reactions to medications tried. Mrs X's mental health needs mean that Mrs X is unable to live alone and needs staff available 24 hours a day to provide reassurance and enable Mrs X to manage her anxiety and low mood. Mrs X tends to negativity and the assistance she needs at any time very much depends on her mood and level of anxiety. Mrs X can physically shake to the extent that she is unable to walk safely and experiences tremor in her hands. At such times Mrs X regularly requires assistance to dress but her needs are variable. Generally her needs are as follows:

- Prompting for medication;
- Assistance with bathing;

- Assistance with activities of daily living; shopping, laundry and meal preparation;
- Support to manage her finances;
- Support to go out in the community;
- 1:1 support to manage her anxiety at particular times; and
- Follow up and medical review from mental health service.

17. Mrs X's eligible needs are adequately met by the arrangements currently in place which remain flexible and responsive to her needs.

18. The two local authorities are seeking determination of Mrs X's ordinary residence from 19 September 2012 to date although it should be noted that her ordinary residence if it did change would have done so on 18 rather than 19 September 2012.

The relevant law

19. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by CouncilA and CouncilB, previous decision OR 1-2008, the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act"), the guidance on ordinary residence issued by the Department ("the Guidance") and the cases of *Shah v London Borough of Barnet* (1983) 1 All ER 226 ("Shah"), *Levene v Inland Revenue Commissioners* (1928) AC 217 ("Levene"), *R (on the application of Cornwall Council) v The Secretary of State for Health and Others* (2012) EWHC 3739 (Admin) ("Cornwall"), *R (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576 ("Greenwich"), *Fox v Stirk* 1970 2 QB 463 ("Fox").

20. 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 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".

21. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under the Act is deemed to continue to be

ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

22. On 19 April 2010, by virtue of the coming into force of s148(1) of Health and Social Care Act 2008 on that date, section 24(6) of the 1948 Act became 'For the purposes of the provision of residential accommodation under this Part, a patient ("P") for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.' By the same enactment, on the same date, a section 6A came into force stating; 'In subsection (6) "NHS accommodation" means—

(a) accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006...'

23. Ordinary Residence is not defined in the legislation but developing case law in this area has done so and is referred to within the application of the law below.

The Parties' submissions

CouncilA's submissions

24. CouncilA makes two independent submissions in the alternative to each other:

A - That Mrs X was ordinarily resident in the CouncilA area until 18 May 2010 and after she moved to live with her daughter in CouncilB on that day, her ordinary residence changed to the area of CouncilB over the following ten days prior to her admission to hospital.

B – If Mrs X's ordinary residence remained in the CouncilA area between 18 – 28 May 2010, her ordinary residence changed to the area of CouncilB during the time she again lived with her daughter between 27 August 2010 and 17 January 2012. Living there for seventeen months constituted sufficient continuity bearing in mind Lord Scarman's judgement in the Shah case and Viscount Cave's views in the Levene case. As such, on or shortly after 27 August 2010 Mrs X became ordinarily resident in CouncilB's area and has remained so ever since.

CouncilB's submissions

25. CouncilB makes the following submissions:

- In the near eighteen months Mrs X lived with her daughter until January 2012, she did not voluntarily adopt CouncilB as her home. Throughout that time Mrs X owned her own home in X address within CouncilA's area, the home she has lived in for fifty years until 18 May 2010. During those near eighteen months, Mrs X continued to express a wish to return to her own home or to alternative accommodation in CouncilA as that was where her husband was buried and where all her friends lived and she did not want to live permanently with her daughter. In any event, her daughter's accommodation was not big enough and she had other members of her family living with her. Mrs X stayed with her daughter for longer than was originally anticipated because she was unwell and was considering whether to return to her own home or to sell it to enable her to have extended housing options in CouncilA.
- That Mrs X received services whilst temporarily absent from CouncilA is not indicative of her ordinary residence having changed. [para.25 of guidance]
- That Mrs X was physically present in CouncilB was not sufficient to make her ordinarily resident there (Cornwall case at paragraph 80).
- If, as in the Greenwich case, the lack of a place to return to is a significant factor to be taken into account, the existence of a place to return to must equally be a factor to take into account.
- Mrs X did not reside in CouncilB for settled purposes. She resided in CouncilB because she was not well enough to return to her own home to live alone.
- Mrs X was in CouncilB for a relatively short period of time when compared to her residence in CouncilA. Paragraph 22 of the Guidance confirms that irrespective of whether the person owns or has an interest in a property in another area, there is no minimum or maximum period in which a person has to be living in a particular place for them to be considered ordinarily resident there because it depends on the nature and quality of the connection with the new place. Mrs X does not have any connection with CouncilB other than the fact that her daughter lives there.

- If Mrs X's absence from her home in CouncilA was too long for a temporary absence such that CouncilA was no longer her place of ordinary residence, she was of no settled residence at the time her need for residential accommodation arose.

Application of the law

26. It is clear from paragraphs 8 – 13 of the agreed statement of facts that there is no dispute between the two local authorities that Mrs X is, and has been since 18 September 2012, living in accommodation provided pursuant to Part 3 of the 1948 Act.

27. What is in dispute is in which local authority area Mrs X has been ordinarily resident since 18 September 2012, and therefore has the duty to provide or arrange for the provision of such accommodation.

The deeming provision in section 24(5) of the 1948 Act

28. Section 24(5) of the 1948 Act states:

'Where a person is provided with residential accommodation under this Part of this 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.'

29. As Mrs X has been provided with residential accommodation under Part 3 of the 1948 Act since 18 September 2012, she is deemed to be ordinarily resident in the area in which she was ordinarily resident prior to that date.

The deeming provision in section 24(6) of the 1948 Act

30. From 17 January 2012 to 18 September 2012 (the date when Mrs X was first provided with Part 3 accommodation), Mrs X was residing in hospital accommodation. From 17 January 2012 to 26 July 2012 this was in HospitalB1 and from 26 July 2012 to 18 September 2012 this was in HospitalA1.

31. As to which local authority area Mrs X was ordinarily resident in during that time, section 24(6) states;

'For the purposes of the provision of residential accommodation under this Part, a patient ("P") for whom NHS accommodation is provided shall be

deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.'

32. Section 24(6A) provides that NHS accommodation includes accommodation at a hospital. As a voluntary patient, the provision and accommodation provided to Mrs X in these two hospitals was under the NHS Act 2006.

33. As such, the area in which Mrs X is deemed to be ordinarily resident in the period 17 January 2012 to 18 September 2012, and by virtue of section 24(5), after 18 September 2012, is the area in which Mrs X was ordinarily resident prior to being provided with accommodation in HospitalB1 on 17 January 2012.

18 May 2010 – 17 January 2012

34. There is no doubt that Mrs X was ordinarily resident in CouncilA until 18 May 2010 when she went to live with her daughter.

35. There is dispute as to where Mrs X was ordinarily resident between 18 May 2010 and 28 May 2010 on which date she was admitted HospitalB1 for the first time.

36. Mrs X's ordinary residence for the period of time that she resided in HospitalB1, from 28 May 2010 to 27 August 2010, is not determined by the deeming provision in section 24(6), above, as Mrs X did not go into Part 3 accommodation immediately upon leaving the hospital accommodation. Her ordinary residence during this three month period is therefore also disputed.

37. Finally, Mrs X's ordinary residence between 27 August 2010, her first discharge from HospitalB1, and 17 January 2012, her readmission to HospitalB1, is also disputed.

38. The starting point for considering whether Mrs X acquired ordinary residence in CouncilB prior to 17 January 2012 in the periods when she was not in hospital, in other words between 18 to 28 May 2010 and between 27 August 2010 to 17 January 2012, is the leading case of Shah in which Lord Scarman stated:

'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.’

‘Settled purposes’

39. With regard to the ‘settled purpose’ test, CouncilB contends that Mrs X stated to the social worker during their assessment of her of 15 June 2012 that she wanted to return to CouncilA to her “cultural and spiritual home”. As pointed out by CouncilA, it is clear from that assessment, a copy of which I have now been provided, that those words were not hers. The occupational therapist’s observation at that time was ‘although being in CouncilB in excess of 10 months now, Mrs X has always considered CouncilA to be her as I would describe, her cultural and spiritual home, a place she always wished to return to when she became well enough.’

40. When providing this assessment, CouncilB state that the records indicate that all medical correspondence was addressed to Mrs X’s GP in CouncilA and to a temporary GP in CouncilB whilst she was staying with her daughter. However, CouncilA have provided eight letters addressed to a GP in CouncilB between 16 September 2010 and 29 November 2011 and, as CouncilA state, there is no indication from those letters that they were copied to a GP in CouncilA. Other letters may have been sent to a GP in CouncilA but I do not have conclusive evidence on this matter.

41. As part of these further submissions made by CouncilB on 23 October 2013 they contend that Mrs X continued to pay all utility and Council Tax charges on her home in CouncilA throughout the period of time that she lived in CouncilA. I have considered this point and assign it some value but note the following: Mrs X could not have avoided such charges (although, depending on CouncilB’s council tax policy she could possibly have lowered her council tax bill if she had removed all of the furniture from her home) and I have not received evidence supporting this contention nor is it an agreed fact between the parties.

42. The letters themselves are a very helpful indicator of her intentions during that period of time. The letter from the CouncilB Community Mental Health Team to GP of 4 February 2011 states that ‘Mrs X remains nervous, sad and unable to decide what to do about her bungalow which she owns in CouncilA. She is anxious about her ability to cope in isolation and yet cannot decide whether to sale [sic] and where to move. This unsolved problem is a

contributing factor to her ongoing depression and anxiety.’ This indicates that Mrs X did not have a settled purpose in staying in CouncilB.

43. The letter from the CouncilB Community Mental Health Team to GP of 21 July 2011 states ‘She [Mrs X] said she was constantly worrying about “everything” especially about returning to her home in CouncilA.’ Later in the letter, ‘Mrs X also worried all the time, especially about the fact that she had been living with her daughter since May 2010, and that her house in CouncilA was empty. Mrs X said she got on well with her daughter and granddaughter, but she would like to go back to her own home. Unfortunately, she lacked the confidence to do so and did not feel she could cope on her own.’ It appears that the frustration and worry about not being able to go home made her anxious.

44. The letter from the CouncilB Community Mental Health Team to GP of 9 September 2011 states ‘Mrs X expressed worries about sorting out her house in CouncilA. She said she cannot “face thinking about moving” to live somewhere else in the future.’

45. The final two letters I have had sight of, dated 19 October 2011 and 29 November 2011 respectively, indicate an improvement in Mrs X’s mood but provide no reference to her intended living arrangements.

46. Significantly, Mrs X did not attempt to sell her property in CouncilA during that time. Soon after, Mrs X completed an application to go onto CouncilA’s housing register and was registered on 24 July 2012.

47. Given the above it is clear that Mrs X was not residing in CouncilB with a settled purpose.

Temporary absence

48. I will now consider the matter from the perspective of temporary absence. CouncilA refer to Viscount Cave’s words in the Levene case that ‘it [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.’ In that case the House of Lords held that Mr Levene had retained his residence in the UK. He had sold his house in the UK along with his furniture although he did return to live in hotels in the UK for five months a year and when abroad also stayed in hotels. Whilst Mrs X was residing in CouncilB with some degree of continuity, I believe that she saw this as a temporary absence and now, as of 18 September 2012, has returned to CouncilA as was her wish throughout.

49. Paragraph 24 of the Guidance discusses temporary absence and the principle that temporary absence does not deprive a person of their ordinary residence. That paragraph refers to the Fox case and the following from Lord Denning; 'If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.' Lord Denning states at 472; 'Though "home" does have emotive tones the key factor is that it is the usual settled abode to which a person can go when he wishes'. Mrs X's home in CouncilA was her settled abode to which she could go whenever she wished and the reason she did not was that she had needed her daughter to care for her. It was for that reason that she moved to live with her daughter on a temporary basis, in her mind, and in that I would draw a parallel with Lord Denning's reference to a temporary absence from home in hospital; nothing stopped the individual in the Fox case from returning home from hospital, and nothing stopped Mrs X from returning to her home in CouncilA, save for the need to have medical needs met or be cared for.

50. Paragraph 22 of the Guidance states; 'Ordinary residence can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes, irrespective of whether they own, or have an interest in, a property in another local authority area. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the nature and quality of the connection with the new place.' It seems that although she undoubtedly had a connection with the new place, CouncilB, by virtue of it being where her daughter lived and where she was staying, it was nowhere near as strong as the connection that she maintained with her old place, CouncilA, where her home had always been, where she retained possession of her home, where her husband was buried and where her friends all lived.

51. Paragraph 105 of the Guidance states; 'When a person who is not being provided with Part 3 accommodation by a local authority chooses to relocate permanently to another local authority area of their own volition, perhaps to be near their family They generally acquire an ordinary residence in their new area.' On the evidence presented to me, it does not seem as though Mrs X did choose to relocate permanently in CouncilB. She moved to live with her daughter because she was unwell and unable to move home and live by herself but as she herself has stated, she wanted to return to CouncilB.

No settled residence

52. Given the length of time which Mrs X lived in CouncilA, her not putting her home in CouncilA on the market, her intention to return to CouncilA and the principle set out in the Greenwich case that local authorities should exercise caution when making a finding that a person is of no settled residence, I cannot find that Mrs X had no ordinary residence in the period of time prior to 17 January 2012.

Conclusion

53. Paragraph 19 of the Guidance states; 'The question 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.'

54. Mrs X spent just over two years in the CouncilB area including around nine months in HospitalB1 and seventeen months at her daughter's home. This would appear to be a significant amount of time and continuity but relative to the fifty years previously that Mrs X had lived in CouncilA, it is not. That context and Mrs X's clear intention to return to CouncilA, whether to her own home or alternative accommodation, which she did do in September 2012, strongly suggests that she was ordinarily resident in CouncilA in the period prior to 17 January 2012 and indeed throughout the time she resided in CouncilB.

55. By virtue of 24(5) and 24(6) of the 1948 Act, Mrs X's area of ordinary residence following the provision of Part 3 accommodation from 18 September 2012 is that in which she was ordinary resident prior to 17 January 2012.

56. I therefore determine that Mrs X was ordinarily resident in the area of CouncilA in the time period during which ordinary residence is disputed by the two local authorities i.e. during the period 19 September 2012 to present.

Signed on behalf of the Secretary of State for Health:

Date: