

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 the 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 for the purpose of Part 3 of that Act.
2. The parties have indicated that the dispute arose on 9 August 2012 when CouncilB formally requested CouncilA to take over responsibility for Mrs X on the basis that CouncilB believed she was ordinarily resident in CouncilA's area.

The background to the case

3. The following information has been ascertained from a statement of facts agreed by the parties and other documents and information provided by the parties. In making this determination, I have also considered the legal submissions provided by each of the two authorities.
4. Mrs X was born in 1938. Mrs X lived on her own in a flat in CouncilA's area. She had previously had some contact with CouncilA's Adult Social Care Services Department which involved an occupational therapy assessment in April 2008. That involvement ceased in November 2008.
5. Mrs X was admitted to Hospital1 in the area of Council C on 24 February 2012 after being found wandering some distance from her home. On 14 March 2012, she was discharged to the care of her daughter who lives in the area of CouncilB. Nursing notes made at the time and a referral letter addressed to the Community Mental Health Team dated 19 March 2012 states this was on a temporary basis. Although nursing records raised a query whether this arrangement could be made longer-term, a letter from Mrs X's daughter dated 29 November 2013 confirms that the arrangement was temporary. Whilst at her daughter's home, Mrs X slept on a sofa in the lounge.
6. No formal capacity assessment was carried out by either local authority. Nursing and medical notes (from 1, 2 and 14 March 2012) record that Mrs X presented with elements of atherosclerotic dementia, fluctuating levels of cognitive function and a "*marked cognitive disturbance with short-term memory, aphasia and disorientation*". Mrs X was also described as having nominal dysphasia and difficulties concentrating and following certain

conversations and that she presented elements of confabulation and delusional beliefs. CouncilB's self-directed assessment (19 April 2012) records Mrs X as suffering from severe dementia and having short-term memory problems. The assessment notes that Mrs X "*needs to be presented with information in small chunks to help her understand her situation. Needs help to weigh up risks and make informed choices*".

7. Nursing and medical notes also record that Mrs X did not want to return to her home as she was afraid that people were after her: a report on 2 March 2012 states that Mrs X cannot go back to her flat as she's too frightened "*those fellas's [sic] might creep round the back – I'm scared*" and on 14 March 2012, Mrs X's daughter is recorded saying that her mother "*is still expressing fear of going home*". In addition, a "therapy" note on 19 April 2012 records her daughter stating that Mrs X was still "*adamant that she does not go back [to her flat] and that this will be allocated to someone else in due course*".
8. On 18 April 2012, a safeguarding alert was raised via the Emergency Duty Team of CouncilD after it was alleged that Mrs X had assaulted one of her daughter's children. It is not clear why CouncilD was approached. Council D contacted CouncilB's Mental Health Team who responded to the alert as local authority for the area where Mrs X lived. On 23 April 2012, Mrs X was provided by CouncilB with Part 3 accommodation in a care home in the authority's area. This was originally an emergency temporary placement. On 2 November 2012, CouncilB notified CouncilA that this was no longer sustainable as an emergency placement and had been made into a permanent placement. The placement is being funded by CouncilB on a without prejudice basis pending this determination of ordinary residence.
9. Mrs X spent further time in hospital between 30 April and 14 May 2012 due to a fall resulting in a hip fracture. She returned to the care home on discharge. Nursing notes record she was initially confused and disorientated (post-operative delirium) with later periods of paranoia and fluctuating lucidity / confusion (10 May 2012). She scored low results on two mini mental state examinations on 11 May and 30 May 2012.
10. On 30 April 2012, Mrs X's tenancy was surrendered and mutually exchanged with her grandson's property (also in CouncilA's area). The records presented to me give a confused account of events in respect of the family's dealings with these properties but the mutual exchange appears to have been effected by Mrs X's son. Subsequently, on 3 June 2012, the landlord of the property that had previously been her grandson's

received notice surrendering the tenancy. The second property was never occupied by Mrs X. A letter from Mrs X's son dated 28 October 2012 states that he ended the tenancy at as her dementia rendered her unable to do so.

The relevant law

11. I have considered all the documentation and information submitted by both parties, the provisions of Part 3 of the 1948 Act and the guidance on ordinary residence issued by the Department of Health¹ (the Guidance), the Mental Capacity Act 2005 (the MCA) the cases of *Shah v London Borough of Barnet* (1983) 1 All ER 226 (Shah), *R v London Borough of Waltham Forest, ex parte Vale*, the Times 25th February 1985 (Vale), *Levene v Inland Revenue Commissioners* (1928) AC 217 (Levene), *Fox v Stirk* 1970 2 QB 463, *R v London Borough of Redbridge ex parte East Sussex County Council* (1992) Times, 31 December (Redbridge), and *R (Greenwich) v Secretary of State and Bexley* (2006) EWHC 2576 (Admin). (Greenwich). My determination is not influenced by the provisional funding which WBC is currently providing for Part 3 services.
12. Section 21(1)(a) 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. 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.
13. The Secretary of State's Directions under section 21 (contained in LAC(93)10) provide that a 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*".

¹ Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252864/OR_Guidance_2013-10-01_Revised__with_new_contact_details_New_DH_template.pdf

14. The deeming provision, found in section 24(6) of the 1948 Act, sets out that, for the purposes of the provision of Part 3 accommodation, a person for whom NHS accommodation is provided is to be treated as being ordinarily resident in the place where they were ordinarily resident just before the NHS accommodation was provided.
15. The deeming provision in section 24(5) of the 1948 Act provides that 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.
16. “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” .

17. Where a person loses capacity in later life, the approach known as “Vale 2” requires the decision maker to look at all the circumstances of the case, as required by *Shah*, but without requiring the person to have voluntarily adopted the place of residence.
18. Section 2(1) of the MCA states that a person lacks capacity in relation to a matter if at the material time she is unable to make a decision for herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. The test for capacity is found in section 3 of the MCA. That section states that a person is unable to make a decision for herself if she is unable to:
- (a) understand the information relevant to a decision;
 - (b) retain that information;

- (c) use or weigh that information as part of the process of making the decision; or
- (d) communicate his decision (whether by talking, using sign language or any other means).

19. Section 1(2) of the MCA provides that a person should always be assumed to have capacity to make their own decisions unless it is established to the contrary. Where lack of capacity has been established, section 1(5) provides that decisions as to accommodation and care must be made in the person's best interests. Section 4 sets out the factors to consider for this purpose.

The submissions of the parties

20. Although the parties have indicated that the dispute arose on 9 August 2012 (when Council B formally requested Council A to take over responsibility for Mrs X), the parties do not appear to agree on the date from which they wish me to determine Mrs X's ordinary residence. Council B submits that Mrs X has retained ordinary residence in Council A at the point of discharge from hospital (14 March 2012) whereas Council A submits that, at the point Part 3 accommodation was provided (23 April 2012), Mrs X was ordinarily resident in Council B.
21. Council B submits that Mrs X's stay at her daughter's home, following discharge from hospital, was a temporary arrangement. Council B also argues that Mrs X is likely to have lacked the mental capacity in 2012 to decide where to reside or to surrender either of the tenancies. Furthermore, the decisions to surrender the properties were made by the family without any apparent priority being given to her best interests.
22. Council B refers to paragraph 58 of the Guidance which sets out the main principle in *Greenwich*: where a local authority fails to provide Part 3 accommodation despite being under a section 21 duty, the deeming provision in section 24(5) applies as if arrangements had been made. The authority argues that the duty to provide accommodation does not depend on having knowledge of the person in need but that, in any event, Council A was made aware of Mrs X's situation by a letter from Hospital 1 dated 19 March 2012. The letter, addressed to the Community Health Team, requests that arrangements are made to review Mrs X.

23. CouncilA submits that Mrs X moved in with her daughter with no intention of returning to live in the CouncilA's area and that, although records suggest that Mrs X's move to her daughter's was thought to be temporary, the family "*quickly realised that living alone was no longer an option*" and therefore steps were taken to surrender her tenancy. It is considered irrelevant that this involved an exchange of tenancies.
24. CouncilA submit that Mrs X had the necessary mental capacity to choose where to live and to enter into the tenancy surrender / exchange. Mrs X had expressed she did not want to return to her home and the presumption in section 1 of the Mental Capacity Act 2005 (the MCA) applies (Mrs X should be assumed to have had the capacity to choose where to live unless established to the contrary). CouncilA argues that Mrs X's family assisted her to exchange and terminate the tenancies in recognition of her acknowledged needs and wishes.
25. CouncilA notes that they had ceased to provide social care services to Mrs X in November 2008 and that, since the authority did not receive notification that Mrs X had been admitted to hospital, the matters set out in the hospital letter of 19 March 2012 were "*left to health colleagues to follow up*". It is not clear which health colleagues the authority refers to or whether they did follow up. The letter states that Mrs X was discharged to the "temporary care" of her daughter in Council B's authority but CouncilA notes that when CouncilD's Emergency Duty Team was contacted on 18 April 2012, it was unknown to them that Mrs X had already been living with her daughter for over a month.

The application of the law

Section 24(6) deeming provision

26. The deeming provision in section 24(6) of the 1948 Act provides that, for the purposes of the provision of Part 3 accommodation, a person for whom NHS accommodation is provided is deemed to be ordinarily resident in the area in which she was ordinarily resident immediately before she was admitted as a patient to hospital.
27. The deeming provision only applies in relation to the ordinary residence of people who are provided with Part 3 accommodation.² Mrs X was provided with residential accommodation under Part 3 of the 1948 Act on 23 April

² See section 24(6) of the 1948 Act and paragraph 54 of the Guidance.

2012 following her discharge from hHospital1 on 14 March 2012. Therefore, this deeming provision is not relevant in relation to the period between 14 March to 23 April 2012 when Mrs X was living with her daughter.

Section 24(5) deeming provision

28. The deeming provision in section 24(5) of the 1948 sets out that where a person is provided with residential accommodation under Part 3 of the 1948 Act, she shall be deemed to continue to be ordinarily resident in the area in which she was ordinarily resident immediately before the residential accommodation was provided. The question in this case is therefore, where was Mrs X ordinarily resident immediately before she was placed in the care home on 23 April 2012?
29. Taking a common sense approach to the words “immediately before”, I find I ought to determine where she was ordinarily resident on the day before she was admitted, namely on the 22 April 2012.

The application of Greenwich

30. As provided by the Guidance (paragraph 90), when arrangements should have been made under section 21 of the 1948 Act but were not made, the deeming provision in section 24(5) applies as if the arrangements had been made. The question is therefore, at what point should Part 3 accommodation have been provided to Mrs X?
31. The evidence presented to me does not provide sufficient information on the arrangements made for Mrs X’s discharge from hospital on 14 March 2012. A nursing note dated 13 March 2012 states that a ward doctor wants “*to discharge [Mrs X] home as she is medically fit and the family will provide support to include her staying with them at night. I will refer to the local CMHTE for a review at home ? memory clinic*”. A nursing note on the following date, records that Mrs X was being discharged to her daughter’s home on a temporary basis and that she was still “*expressing fear of going home*”. Following the discharge, the hospital wrote to the Community Health Team on 19 March 2012 to request a review of Mrs X on account of “*memory difficulties of at least 2 years duration*”. The letter adds that “*MMSE’s undertaken whilst in hospital ranged between 5/30 – 9/30*”.

32. Mrs X stayed at her daughter's home until the arrangements became unsustainable. CouncilB assessed Mrs X on 19 April 2012. The assessment records various matters including Mrs X's aggressive episodes towards her grandson, who is disabled, and threatening to set the house on fire.
33. Even if CouncilA had constructive knowledge of Mrs X's situation by virtue of the hospital letter dated 19 March 2012, it appears to me that Mrs X's need for Part 3 care and attention arose at a later period, when the temporary arrangement with her daughter broke down. Although it is unclear what the plan was for Mrs X's future care and for how long it was envisaged Mrs X would stay with her daughter, as a matter of fact I consider that care and attention was available to Mrs X otherwise than by the provision of accommodation whilst she was able to live at her daughter's house.
34. Where was Mrs X ordinarily resident when her need for section 21 accommodation arose? There are three options to consider:
- (a) Mrs X was ordinarily resident in CouncilA;
 - (b) Mrs X was ordinarily resident in CouncilB;
 - (c) Mrs X has no settled residence.

Mental capacity

35. Before I address this question I must first consider whether Mrs X had the necessary mental capacity to make a decision where to live. The background section of this Determination summarises some of the information obtained from clinical records of Mrs X's first admission to hospital. It is my opinion that such records suggest, as required by section 2(1) of the MCA, "*an impairment of, or a disturbance in the functioning of, the mind or brain*". The next question is whether this rendered Mrs X unable to make a decision for herself. The records suggest that Mrs X might have had difficulty understanding and retaining information. However, the assessment undertaken on 19 April 2012 records that, with help, she could make informed choices. Mrs X also appears to have been able to communicate her decisions. Therefore, the evidence available suggests that it is possible that Mrs X had the capacity to make a decision in respect of where to live.

36. If I am wrong and Mrs X lacked capacity to make this decision, then I approach the question looking at all the facts but without requiring voluntary adoption as required by Shah.

Was Mrs X ordinarily resident in CouncilA?

37. As set out in the background section of this Determination, medical records show that Mrs X had made a choice not to return to home as early as 2 March 2012 and her daughter appears to have acknowledged and respected this wish. By at least 19 April 2012, Mrs X's daughter appears to have decided that it was no longer appropriate for Mrs X to live on her own as she informs that Mrs X's flat "*will be allocated to someone else in due course*".

38. It would not matter therefore that the tenancy was actually terminated on 30 April 2012. Although properties were exchanged, there is no indication on the evidence available to me that Mrs X intended to live in the grandson's property or that her family intended her to live on her own either. Mrs X may have had the necessary mental capacity to decide that she did not want to return home. If she did not, then approaching the question of ordinary residence but without requiring the voluntary adoption, the facts lead me to the same conclusion, namely that Mrs X lost her ordinary residence in CouncilA prior to being provided with Part 3 accommodation.

39. Therefore, I determine that Mrs X was not ordinary resident in CouncilA prior to being provided with Part 3 accommodation.

Was Mrs X ordinarily resident in CouncilB?

40. On 14 March 2012, Mrs X was discharged to her daughter's home in the area of CouncilB. As provided in the background section of this Determination, the arrangements were temporary. The case of *Levene* states that ordinary residence "*connotes residence in a place with some degree of continuity and apart from accidental or temporary absences*". *Fox v Stirk* further provides that "*temporary presence at an address does not make a man resident there*".

41. In *Shah*, Lord Scarman draws a distinction between residence that is voluntarily adopted and that which is enforced (such as where a person is kidnapped or imprisoned). Mrs X's residence in CouncilB was not enforced but I think it is relevant that Mrs X appears to have stayed at her

daughter's home because she had no other choice; she was unwilling to return to her property and in any event unable to live on her own.

42. Furthermore, on the evidence available to me, Mrs X does not appear to have built up any community ties with the CouncilB area during her time at her daughter's home. There are also no records suggesting that Mrs X wanted to remain in the area of CouncilB in the long term or that her family wished this. Mrs X slept on the sofa whilst staying at her daughter's house. The accommodation in the care home, on 23 April 2013 was an emergency placement and only later, on 2 November 2012, became a permanent placement.
43. In light of these factors, I consider that Mrs X had not become ordinarily resident in CouncilB by 22 April 2012. I therefore determine that Mrs X was not ordinarily resident in CouncilB immediately before she was provided Part 3 accommodation.
44. As there is no other contender for ordinary residence in this case, I consider that the deeming provision in section 24(5) of the 1948 Act does not apply as Mrs X was not ordinarily resident in any area immediately before Part 3 accommodation was provided.

No settled residence

45. My conclusion is therefore that on the relevant date, namely 22 April 2012, Mrs X was of no settled residence. I am mindful of the view taken by the court in *Greenwich* that finding a person to be of no settled residence is not a conclusion to be reached hastily given that it necessarily results in a lesser degree of protection for that person. In that case, Charles J stated that:

"...a message derived from the statutory provisions ..., is that the preservation of a duty is a relevant feature."

46. However, despite bearing this in mind, I consider that weighing up all the factors presented to me, I can only conclude that Mrs X was not ordinarily resident in either CouncilA or CouncilB when she was provided with accommodation under Part 3. This is not to say however that she did not in due course acquire an ordinary residence in the area of CouncilB depending on all the circumstances of her stay there.

47. A person of no settled residence falls to be accommodated under the power in section 24(3) of the 1948 Act. Under Directions issued by the Secretary of State (LAC(93)10), local authorities have a duty to provide Part 3 accommodation to people who are not ordinarily resident in their area but who are in urgent need of such accommodation. The Guidance provides as an example of such urgent need, a situation where a person stays with their family in another local authority area but the caring responsibilities prove too much for the family (paragraph 48). In Mrs X's case, the urgent need for accommodation arose when the temporary arrangements made by her daughter broke down.
48. The courts considered the application of section 24(3) in relation to the meaning of no settled residence in the case of *Redbridge*. The case provides that responsibility for a person falls on the "*local authority of the moment*" – the authority in whose area the person in question is physically present. Therefore, I conclude that Council B was the authority responsible for providing Part 3 accommodation at the relevant time.

Signed on behalf of the Secretary of State for Health.....

Dated.....