

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

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 X for the purposes of Part 3 of that Act. The other local authority involved in relation to this matter is CouncilB.
2. On 1st April 2015 relevant provisions of the Care Act 2014 (“the 2014 Act”) came into force. Article 5 of the Care Act (Transitional Provision) Order 2015/995 (“Transitional Order”) requires that any question as to a person's ordinary residence arising under the 1948 Act which is to be determined by me on or after 1st April 2015 is to be determined in accordance with section 40 of the 2014 Act.
3. I set out below the law as it stood prior to 1st April 2015 when relevant provisions of the 2014 Act came into force. Pursuant to article 6(2)(c) of the Transitional Order, the new ordinary residence deeming provisions under section 39 of the 2014 Act have no effect in respect of a person who, immediately before the relevant date, was being provided with supported living accommodation. The period in dispute is from X July 2006 to January 2014. Accordingly, the determination is made in accordance with the 1948 Act as the law which was in force at the relevant time.

4. I have received a statement of facts and bundle of documents prepared by CouncilA together with legal submissions on behalf of each authority and associated correspondence between the two. In its legal submissions, CouncilB agrees the statement of facts save for the date at which X became ordinarily resident in its area.

The facts of the case

5. The following information has been ascertained from the statement of facts and supporting documents supplied.
6. X was born on x date 1982. He has a learning disability, attention deficit hyperactivity disorder and autistic spectrum disorder. The most recent community care assessment dated 2014 notes that although X can eat and complete his personal care independently, he requires prompting and support for most everyday activities (e.g. domestic chores, preparing meals, managing finances and travelling to places not familiar to him.) There are also significant risks of falling or having an accident at home if left unattended for extended periods.
7. X lived with his family in CouncilB since childhood. Following the death of his mother in 1999, he and his remaining family moved to CouncilA.
8. Following the death of his step-father in 2001 he was placed by CouncilA in a residential home run by CouncilA in its area.

9. In 2006, X moved to supported living accommodation in CouncilB where he still resides to date. X resides at this address as a secure tenant. He is in receipt of housing benefit from CouncilB but this does not cover his rent entirely and he is required to cover the shortfall from his welfare benefits.
10. X has access to 24 hour support at his address provided by a care provider which Council A has funded under section 29 of the 1948 Act.
11. CouncilA submits that X has sufficient mental capacity to decide where he should reside. CouncilB do not accept X acquired ordinary residence on X's move as no capacity assessment was carried out before the move so it is not possible to ascertain his wishes and feeling or his capacity to make the decision at the time of the move. A mental capacity assessment in relation to residence dated 2014 ("the 2014 assessment") concluded X did have capacity to determine where he wanted to live. On this basis, CouncilB have accepted that X has been ordinarily resident in CouncilB since January 2014.
12. CouncilA wrote to CouncilB notifying them that X was resident in their area in March 2014. CouncilA then made a formal referral to CouncilB in July 2014. This is the date from which this dispute as to ordinary residence is accepted to have arisen.
13. CouncilB requested further information from CouncilA by email in September 2014 to which CouncilA responded in October 2014 enclosing

the mental capacity assessment dated January 2014 and X's most recent care plan dated October 2014 and a draft statement of facts for CouncilB to agree.

14. No substantive response was received, so CouncilA referred the matter to the Secretary of State for determination in December 2014.

15. Legal submissions on behalf of CouncilA were received by me in December 2014 and in March 2014 on behalf of CouncilB.

The relevant law

16. I have considered all the documents submitted by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act and the Directions issued under it, the guidance on ordinary residence issued by the Department, and the cases of *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Vale) v Waltham Forest London Borough Council* The Times 25.2.85 ("*Vale*"), and *R (Cornwall) v Secretary of State for Health* [2014] EWCA Civ 12 ("*Cornwall*").

17. My determination is not affected by the provisional acceptance of responsibility by CouncilA.

18. 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. 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..."

19. 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.
20. By virtue of section 21(7) of the 1948 Act, a local authority can, where it is providing accommodation under section 21, also make arrangements for the provision on the premises in which that accommodation is being provided of such other services as appear to the authority to be required.
21. 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. In particular, 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).

22. Section 29(1) of the 1948 Act empowers local authorities to provide welfare services and is the power under which domiciliary care services are normally provided. Section 2 of the Chronically Sick and Disabled Persons Act supplements and relates to the welfare services provided under section 29 of the 1948 Act.

23. "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.

24. The meaning of the term "ordinary residence" has been considered by the courts. In the leading case of *Shah*, 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.”

25. He went 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.”

26. The “voluntary and settled purpose” approach proposed in *Shah* cannot readily be used in circumstances where the person lacks mental capacity to decide where to live. However, the fact that a person does not have the ability to form a view or exercise choice in regard to their place of residence does not prevent them from having a place of ordinary residence. In such cases an alternative approach was set down in the case of *Vale*. This involves considering all the facts of the matter and the circumstances of the person, 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.

27. The *Vale* approach was considered by the Court of Appeal in *Cornwall*.

In *Cornwall* the court considered *Mohamed v Hammersmith and Fulham*

LBC [2002] 1 AC 547 and *Re A (Children) (Habitual Residence) [2014] AC 1*, observing that the significance of the place of actual residence could not be ignored and in the context of severely incapacitated adults, there was much to be said for adopting an assessment of ordinary residence similar to that of habitual residence adopted for dependent children in *Re A*, namely that the ordinary residence would be the place which could properly be described as the centre or focus of the child's social and family environment.

28. *Cornwall* is currently subject to an appeal to the Supreme Court (“the appeal”). In view of this, the Department has proposed that it may stay determinations pending the appeal in cases which raise issues similar to those which are to be considered by the Supreme Court in *Cornwall* and the determination requires application of either the *Vale* or *Cornwall* approach. However, in light of my decision at paragraph 39, it has not been necessary to apply *Vale* or *Cornwall* in this case so I have proceeded with the determination.

The application of the law to the facts

29. It is accepted that X was ordinarily resident in CouncilA immediately before moving to CouncilB in July 2006. CouncilA was providing X with residential accommodation under section 21 within its area and CouncilA was responsible for the provision of services to him.

30. When X moved into supported living accommodation in July 2006, he ceased to be provided with accommodation under Part 3 of the 1948 Act. X became solely responsible for paying his rent under the terms of his tenancy agreement with the landlord. (A tenancy agreement dated September 2011 has been provided and in the absence of any evidence to the contrary, there is no reason to consider that the obligation for X to pay rent at this property differed from the outset in July 2006). X funds his accommodation by way of housing benefit from Council B and an additional sum from his own income. Accordingly, there is no agreement that requires Council A to pay for X's accommodation in Council B, nor has Council A done so since X moved there; so, in view of the conditions in section 26 of the 1948 Act, the accommodation could not constitute Part 3 accommodation.

31. Further, it is not disputed that X's needs have, since July 2006, been managed by the provision of welfare services under section 29 in his own home. He does not have a need for care and attention which cannot be met other than the provision of accommodation, so he is ineligible for Part 3 accommodation by virtue of section 21(1)(a) of the 1948 Act.

32. Given that X is neither provided with, nor eligible for, Part 3 accommodation, the deeming provisions in section 24 do not apply. The issue of X's ordinary residence therefore falls to be considered according to case law and guidance in order to determine whether, on the particular facts, he acquired ordinary residence in Council B consequent upon his move in July 2006.

33. CouncilB submit that it is not possible to ascertain X's wishes and feelings or his capacity to make decisions about where to live because there is no assessment or documentation supplied pertaining to X's move to CouncilB in 2006. CouncilB state that documentation supplied in 2010 and 2014 cannot be relied upon to indicate X's thinking some 4 and 8 years previously because capacity and indeed wishes and feelings can fluctuate. CouncilB refer to a comment in the Secretary of State's determination (OR 10 2013) that documents and assessments carried out some 5 to 6 years after the person's move are "not a reliable indication of the person's needs at the time he moved." This comment relates to the assessment of a person's needs in the context of determining whether or not Part 3 accommodation was provided. It does not relate to the assessment of a person's capacity to make decisions.

34. While it may be regretted that no contemporaneous documentation has been provided, this cannot prevent a determination ever being made. Section 32(3) requires the Secretary of State to determine any question as to ordinary residence arising under Part 3 of the 1948 Act. Any such determination is made on the basis of documents the authorities in dispute provide to the Secretary of State.

35. There is a presumption that an individual does have capacity to make decisions by virtue of section 1(2) of the Mental Capacity Act 2005. Accordingly, in order to rebut this presumption, evidence is required to

establish that a person lacks capacity for any particular decision rather than the other way round. No such evidence has been provided.

36. On the contrary, the Mental Capacity Assessment in relation to residence conducted on 20th January 2014 (“the 2014 assessment”) does provide detail of how X came to live at his current placement in 2006. In particular, the following is noted:

a) X stated that when deciding whether or not to move to CouncilB in 2006 he was shown other options both in CouncilA and in CouncilB;

b) X recalled the reasons as to why, in 2006, he preferred CouncilB compared to the other options; namely that he wished to return to CouncilB where he had lived most of his life and he wanted to be reunited with his family and friends;

c) X recalled the views of others and taking these into account at the time of his decision; namely that his sisters had wanted him to return to CouncilB and were happy with his decision to do so.

37. Notwithstanding that CouncilA did not conduct a formal capacity assessment at the time of X’s move to CouncilB, the 2014 assessment does provide evidence of X’s wishes to move to CouncilB at the time and demonstrates his ability to understand, use and weigh relevant information whilst considering where he wanted to live. This suggests that X did have capacity in this regard.

38. It is also noted in the review dated February 2010 that following the question “Is a Mental Capacity Act assessment required?” the author has

put “No”. Accordingly, there were also no concerns around X’s capacity at this point. I have no evidence to suggest that anything occurred between February 2010 and X’s move in 2006 that may have otherwise suggested to CouncilA that the presumption of capacity was questionable or rebutted.

39. On balance, my decision is that X had the mental capacity to decide where he wanted to live and can acquire ordinary residence in accordance with the test in *Shah*, namely that it is voluntarily adopted and for a settled purpose.

40. I determine that X’s residence in CouncilB is voluntarily adopted. There is evidence that he moved to his current accommodation voluntarily and continues to reside there voluntarily. I have found no evidence of compulsion pertaining to the period of residence at this current placement. In particular, I note the following:

- a) In the 2010 Review it records that X said that he was still very happy living at his current address and with his house mates.
- b) X entered into a tenancy agreement and the 2014 assessment concluded that he had capacity to do so.
- c) As noted above, the 2014 assessment also details how he was shown a number of placements but chose his current placement to return to CouncilB where he had lived most of his life and to be reunited with his family and friends. It also says how he has lived in his present accommodation for over 7 years and is fully settled and would not like to move.

d) It is again noted in the 2014 Review that he is fully settled at his placement and wants to continue to live at his current address.

41. The fact that X has been living at the same address in CouncilB now for over eight years and still explicitly does not wish to move also evidences that X moved to his current accommodation in 2006 with the intention of living there for a settled purpose. I note that X is registered with a GP in CouncilB, occasionally meets with his sister in CouncilB, attends a local work programme sporadically and sometimes does cleaning or washing-up work for a friend in a local pub. On balance, all of this indicates an established settled purpose behind his move to CouncilB.

42. I note CouncilB's submission that it would be entirely unreasonable for CouncilB to be liable for the provision of X's welfare services from 2006 given that CouncilA did not notify CouncilB of X's presence in its area until March 2014 and did not refer X's case for assessment until July 2014; the date from which CouncilA accept the date of this ordinary residence dispute arose. However, as CouncilB acknowledge this is not a matter for determination by me. The date upon which a local authority is notified of a person's move does not determine that person's ordinary residence. Ordinary residence is a question of fact. Accordingly, for all the reasons set out above, my determination is that X has, for the purposes of the 1948 Act, been ordinarily resident in CouncilB from July 2006 and continues to be so resident.

Signed on behalf of the Secretary of State for Health

Dated