

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32 (3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF X IN ACCORDANCE WITH SECTION 40 OF THE CARE ACT 2014.

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 X.
2. On 1 April 2015 relevant provisions of the Care Act 2014 ("the 2014 Act") came into force. Article 5 of the Care Act (Transitional Provision) Order (SI 2015/995) 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 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act. I make this determination accordingly.
3. For the reasons set out below, my determination is that X was ordinarily resident in CouncilB's area immediately before his accommodation at the NursingHome5HT under section 21 of the 1948 Act.

The facts

4. The following information has been ascertained from the Agreed Statement of Facts, the submissions of CouncilA and CouncilB and the copy documents provided to me ("the bundle").
5. X was born on x date 1922.
6. As at December 2010, X was living in a tied cottage on an estate in CouncilB's area. It had no damp proof course or central heating.
7. On or around 23 December 2010 the pipes in the cottage burst, causing extensive damage to the cottage and exacerbating its general poor condition. The property was uninhabitable. X was 88 years old and had been diagnosed with stomach cancer, chronic obstructive pulmonary disease with recurrent chest infections and asthma, hypertension, chronic kidney disease and heart disease.
8. X went to stay on a temporary basis with his nephew and his nephew's wife in CouncilA's area.
9. On 30 December 2010, a social worker from CouncilB visited X at his nephew's property. They discussed four options, namely returning to the cottage in CouncilB's area once it had been repaired, moving to another property,

remaining at his nephew's property, or moving into a care or nursing home. No decision was made at this meeting.

10. On 4 January 2011, the social worker received a telephone call from X's nephew. The social worker was advised that X had decided that he wanted to move into residential or nursing care (as appropriate). She arranged a further appointment in order to allow his family to be present when he was assessed and to further discuss the matter.
11. On 13 January 2011, the social worker visited X at his nephew's property. X informed her that he felt that he was getting better. Therefore she did not assess him on that date. She was informed that he had already made contact with the NursingHome5HT in CouncilA.
12. The social worker visited X again on 2 February 2011. She was informed by X and his family that he had decided to give notice on the cottage to end the tenancy and that the family had started to clear it of his possessions. He could not return there without repairs being carried out. Further, X felt that he needed residential care. He had visited the NursingHome5HT, which he liked and which was near to his family and friends. The social worker noted that X's nephew and wife could maintain his care on a temporary basis until alternative accommodation had been agreed. There was no suggestion that he would move into the NursingHome5HT unless and until he was assessed as eligible to be accommodated there under section 21 of the 1948 Act.
13. On 15 February 2011, X's nephew's wife informed the social worker at CouncilB that she could no longer cope with caring for X.
14. CouncilB formed the view that X was ordinarily resident in CouncilA. CouncilA did not agree, but acted as the authority of the moment pending the resolution of this issue. CouncilA assessed X's need for community care services on 21 February 2011 and concluded that his needs were critical. CouncilA made arrangements for him to move to the NursingHome5HT.
15. CouncilA began to provide X with accommodation under section 21 of the 1948 Act at the NursingHome5HT on 23 February 2011.
16. X's tenancy agreement for the cottage terminated on 29 February 2011, when the notice that he had given expired.
17. X remained at the NursingHome5HT until his death on 26 November 2013.

The Authorities submissions

18. CouncilA submit that X had not adopted CouncilA as his usual place of residence by 23 February 2011 (when he was accommodated under section 21 of the 1948 Act) because he had not made a voluntary choice to move to CouncilA for a settled purpose. X stayed with relatives in CouncilA only due to the poor conditions of his own home.
19. CouncilB submit that X's notice to quit his tenancy on or about 2 February 2011 served to sever his ordinary residence with CouncilB and upon which date he either acquired a new ordinary residence in CouncilA or became of no settled ordinary residence.

The law

20. In making this determination I have considered the Agreed Statement of Facts, the parties' submissions and copy papers supplied in the bundle. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department under the 1948 Act ("the OR Guidance") and the Care and Support Statutory Guidance issued by the Secretary of State under the Care Act 2014 ("the Care Act Guidance"). I have also had regard to the cases of *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309 ("*Shah*"), *R v (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576 ("*Greenwich*"), *R (Kent County Council) v Secretary of State for Health and others* [2015] 1 W.L.R. 1221 ("*Kent*"), *Fox v Stirk* 1970 2 QB 463 ("*Fox*"), *Levene v Inland Revenue Commissioners* (1928) AC 217 ("*Levene*"), and *Mohamed v Hammersmith London Borough Council* [2002] 1 AC 547 ("*Mohamed*").
21. My decision is unaffected by the fact that CouncilA continued to fund services on a provisional basis until X's death on 26 November 2013.
22. I set out below the law as it stood at the relevant time.

The 1948 Act

23. Section 21 of the 1948 Act empowered 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 were in need of care or attention which was not otherwise available to them. Section 24(1) provided that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act was, subject to further provisions of that Part, the authority in whose area the person was ordinarily resident.

24. The Secretary of State's directions under section 21 of the 1948 Act (contained in LAC (93)10) provided that the local authority was 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*".
25. By virtue of section 26 of the 1948 Act, local authorities could, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who was not a local authority. Certain restrictions on those arrangements were included in section 26. First, subsection (1A) required that where arrangements under section 26 were being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) stated 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 and that the local authority shall either recover this from the person accommodated or shall agree with the person and the establishment that the person will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees). To satisfy section 26(3A), the local authority must also be liable for the rent payments in the event that the person defaulted in their payments to the accommodation provider.
26. Section 24(5) of the 1948 Act provided that where a person was provided with residential accommodation under Part 3 of the 1948 Act, he shall be deemed for the purposes of that 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. In accordance with *Greenwich and Kent*, I interpret the reference to residential accommodation at the end of section 24(5) to mean residential accommodation under Part 3. The relevant date for the deeming provision contained in section 24(5) of the 1948 Act was immediately before such accommodation was or should have been provided.
27. Section 24 (3) of the 1948 Act provided that where a person with no settled residence, or not being ordinarily resident in the area of the local authority, is in urgent need of residential accommodation under Part 3 of the 1948 Act, the local authority shall have the power to provide residential accommodation as if the person were ordinarily resident in their area.

Ordinary residence

28. "Ordinary residence" was not defined in the 1948 Act. The OR Guidance 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”.

29. The courts have considered cases of temporary residence on a number of occasions.
30. In *Levene*, the appellant lived in hotels in the UK and abroad from March 1918 until January 1925. He appealed unsuccessfully against the decision that he was ordinarily resident in the UK for tax purposes. Viscount Cave observed that *“the word ‘reside’ is a familiar English word and is defined in the Oxford English Dictionary as meaning ‘to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place’* and that *“The expression “ordinary residence” ... connotes residence in a place with some degree of continuity and apart from accidental or temporary absences”.*
31. In *Fox*, the Court of Appeal considered the cases of a number of undergraduate students who sought to be registered to vote at their university address. The question was whether they were resident at that address. Lord Denning MR considered the observations in *Levene* and derived three principles: *“The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. 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 Justice Widgery commented that *“Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence”.* The Court of Appeal found that the students were resident at their university address.
32. In *Mohamed*, Lord Slynn said *“It is clear that words like ‘ordinary residence’ and ‘normal residence’ may take their precise meaning from the context of the legislation in which they appear but it seems to me that the ‘prima facie’ meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not*

appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation takes his few belongings and moves to a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is 'shelter' but it is also where he resides."

33. In *Greenwich*, Mr. Justice Charles made the following observations: "*Habitual or ordinary residence is in each case a question of fact. The temptation to turn it into an abstract proposition should be resisted. Habitual or ordinary residence is not equivalent to physical presence. There can be ordinary or habitual residence without continuous presence, while physical presence is not necessarily equivalent to residence. Residence means living somewhere. The significance of ordinary or habitually is that it connotes residence adopted voluntarily and for settled purposes — that was a point emphasised before me and appears clearly from Shah . Although ordinary residence in one place can be lost immediately acquisition of a new ordinary residence requires an appreciable period of time. The length of the appreciable period of time is not fixed since it depends on the nature and quality of the connection with the new place. However, it may only be a few weeks, perhaps, in some circumstances, even days. In order to establish ordinary residence over a period of time a person must spend more than a token part of that period in the place in question. Ordinary residence is not broken by temporary or occasional absences of long or short duration. It is possible to be ordinarily resident in more than one place at the same time.*" Mr. Justice Charles identified that it is a relevant factor that it is desirable that a local authority retains responsibility and that ordinary residence is not lost.

The application of the law to the facts

The issue

34. It is common ground that X was provided with accommodation under section 21 of the 1948 Act on 23 February 2011. He needed care and attention (by reason of age and/or illness) which was not otherwise available to him. Accordingly, the duty to provide residential accommodation falls on the local authority in whose area X was OR immediately before the provision of accommodation under section 21 of the 1948 Act i.e. 22 February 2011.

35. The only issue in dispute between Council B and Council A is where (if

anywhere) X was ordinarily resident for the purpose of Part 3 of the 1948 Act immediately before residential accommodation was provided to him on 23 February 2011.

36. There are only three possibilities: CouncilB, CouncilA or no settled ordinary residence. If X remained OR in CouncilB on 22 February then by reason of the deeming provision in section 24(5), CouncilB will be the responsible authority under a duty to accommodate him under part 3 of the 1948 Act. If X had adopted a new OR in CouncilA by 22 February then CouncilA will be the responsible authority under a duty to accommodate him. Finally if X had lost his OR in CouncilB but not acquired a new OR in CouncilA, or anywhere else, by 22 February, he would have had no settled OR and CouncilA would be the responsible authority with the power to accommodate him under section 24 (3) of the 1948 Act.

37. I am satisfied that X was ordinarily resident in CouncilB immediately before his accommodation at the NursingHome5HT provided under section 21 of the 1948 Act. The factors which I consider to be particularly relevant in this case are as follows.

“voluntary and settled purpose”

38. X had lived at the cottage in CouncilB for many years and there is no dispute that this was his place of ordinary residence until at least 23 December 2010.

39. When X moved to his nephew's house on 23 December 2010, this was intended to be a temporary move. He had not chosen to move out but he had no choice when the cottage became uninhabitable. It was accidental although it is apparent from the papers that I have been provided with, that it was absolutely essential.

40. When a social worker from CouncilB visited X at his nephews home on 30.12.2010 four options were discussed with him, namely; returning to his home when repaired, transfer to a “rooftops” property, remaining at his nephews home and residential/ nursing care. The social worker asked X to consider, “be pragmatic and make an informed choice that he will then abide by”.

41. On 4.01.2011 X's niece advised the social worker that after consideration X had “decided that he wants to move into residential/ nursing care as appropriate”. On a second home visit on 12.01.2011, it was noted that X feels that “he would like to consider residential/ nursing care as an option for the future. Had already

made contact with the NursingHome5HT, his home of choice and have advised that they visit” .

42. Throughout this period X remained a tenant of the tied cottage in CouncilB. He had not made a decision to leave the home permanently. It appears that the social worker did not undertake an assessment or other visit until 2.2.2011. On this date the social worker was advised that X had given notice on his tenancy and had visited the NursingHome5HT which he liked. The CouncilB assessment of this date confirms the circumstances leading to X’s removal from his home, his increasing support needs and that his accommodation at his nephew’s home was temporary. It further confirms that X agreed he required further assistance and could not return home even with assistance. X is noted to have indicated that he liked StepDownFacilityJ in CouncilB (a step down facility he attended following hospital admission in early 2010) and “ as long as home is within his community he feels that he would do well”. The assessment notes that X stated his *preference* would be to move into the NursingHome5HT but his *decision* identified throughout this period (from at least 4.1.2011) was that he required residential care and could not return home.
43. Giving notice to terminate a tenancy agreement does not (in and of itself) change a tenant’s place of ordinary residence. In order for a capacitated service user to acquire a new ordinary residence (for the purposes of social care) they must have made a voluntary decision to move for settled purposes in accordance with the Shah principles and in accordance with the views expressed by Mr. Justice Charles in *Greenwich*. This is supported by the OR Guidance which states that “ OR can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes, irrespective of whether or not they have an interest in a property elsewhere.” It depends on the nature and connection with the new place.
44. I find that the facts in this case illustrate that Xs move to CouncilA was *temporary* and *accidental*. There was no assumption of *permanence* or expectation of *continuity*. X was not residing at his nephew’s home with a settled purpose nor was it voluntary. I do not accept CouncilB’s submissions that X had severed all his ties with CouncilB. X had a tenancy that he could have facilitated up until 29 February 2011. X may have otherwise become isolated and detached from his life and friends in CouncilB but this was because of the temporary move to his nephew’s home and his limited capabilities. The circumstances were necessitated by his care needs not his voluntary choice.
45. Significantly, whilst X expressed a wish to move to the NursingHome5HT and

had already visited there by 2 February 2011¹, it was not agreed that he would move there unless and until he was assessed as eligible for accommodation under section 21 of the 1948 Act². X's conclusion that he should move into residential accommodation and his expressed preference for the NursingHome5HT did not change his place of ordinary residence and did not cause him to "sever his ordinary residence as submitted by CouncilB³.

"temporary residence"

46. I have also considered the case law in regard to "temporary absence" and the OR Guidance, which provides as follows:

"23. Local authorities should have regard to the case of Levene v Inland Revenue Commissioners (1928) AC 217. This case is particularly useful for considering the effect of temporary absences on a person's ordinary residence or when assessing whether someone has lost their ordinary residence in a particular place. In this case, Viscount Cave stated: 'It [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.'

24. Viscount Cave went on to give examples of temporary absence as being absences for the purpose of business or pleasure, such as a fisherman going away to sea. This issue of absence and its effect on ordinary residence was further considered in the case of Fox v Stirk 1970 2 QB 463. In this case, Lord Denning MR set out the principle that temporary absence does not deprive a person of their ordinary residence: '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.' ...

47. I find the material facts detailed in paragraphs 34-45 above apply equally to signify that X's temporary residence at his nephew's house in CouncilA did not affect retention of his ordinary residence in CouncilB.

"no settled residence"

48. I am mindful of the OR Guidance at paragraph 45 which states;

“46.... as set out in the case of R (Greenwich) v Secretary of State and Bexley (2006) EWHC 2576 (Admin) (“the Greenwich case”), local authorities should exercise caution when making a finding that a person is of no settled residence. In this case, the judge said that a factor to take into account when considering whether a person had lost an ordinary residence in one local authority was whether they had acquired one in a new local authority. This is because those of no settled residence under the 1948 Act have a lesser degree of protection than people with an ordinary residence, and the judge said that the desirability of a local authority retaining a duty to the person in question was a relevant factor in the case (see paragraph 87 of the judgment).” ...

49. I have considered CouncilB’s submission that X’s notice to terminate his tenancy on or around 2.2.2011 rendered him of no settled residence (even if he did not acquire a new ordinary residence after this date) relying on the scenario detailed on page 20 of the OR Guidance. I find that the facts of this case are different to those in the scenario. The distinguishing feature is that X did not leave his home voluntarily and the circumstances giving rise to X’s urgent need were entirely different to the facts in the scenario.

50. I cannot find that X had no ordinary residence in the period from 2.2.2011 because X did not make a voluntary choice to leave CouncilB for settled purposes, his temporary absence from his home did not affect his ordinary residence in CouncilB and his urgent need arose because of his family’s inability to care for him any longer.

Conclusion

51. Section 24(5) of the 1948 Act provided that where a person was provided with residential accommodation under Part 3 of the 1948 Act, he shall be deemed for the purposes of that 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. The relevant date for the deeming provision contained in section 24(5) of the 1948 Act was immediately before such accommodation was or should have been provided.

52. For the reasons set out above, I find that X was ordinarily resident in CouncilB on the day immediately preceding his admission to the NursingHome5HT i.e. 22.02.2011.