

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014

1. I am asked by CouncilA and CouncilB to make a determination for the purposes of section 40 of the Care Act 2014 (“the 2014 Act”) of the ordinary residence of X.
2. For the reasons set out below, my determination is that X has been ordinarily resident in CouncilB’s area since 5 November 2012.

The facts of the case

3. The following information has been ascertained from the Agreed Statement of Facts, the submissions of CouncilA and CouncilB and the copy documents provided.
4. X was born on XX 1969. He has been diagnosed with Pervasive Developmental Delay and Autistic Spectrum Disorder.
5. Until 1992, X lived with his mother in CouncilA’s area.
6. In 1992, X was admitted to a mental health rehabilitation hostel. He was discharged in 1996. Following his discharge, he was not entitled to mental health after-care services, his admission having been on a voluntary basis.
7. In 2002, X moved into a residential care placement in CouncilC. This placement was arranged and funded by CouncilA, because X was ordinarily resident in its area immediately prior to his move into this residential care placement.
8. By 4 October 2010, X wished to move from the residential care placement into more independent accommodation. He wanted to live in supported living accommodation.
9. In September 2012, the residential care home in CouncilC gave notice that X had to leave this placement. He was refusing to engage with staff and they found it difficult to cope with this behaviour.
10. A mental capacity assessment record states that on 16 October 2012 X expressed a preference to live in CouncilB, which had been identified as potentially suitable given that it would be closer than CouncilC to his mother in

CouncilA and his sister in CouncilD. The record further notes that he considered that he would have to live somewhere temporarily if a placement was not found because CouncilC had given him notice. He stated that he would be flexible about where he moved to, but that he would be more confident moving to a service where staff were suitably trained to understand his needs relating to Asperger's syndrome.

11. X moved into his current accommodation in CouncilB on 5 November 2012. This was arranged by CouncilA . It is a supported living placement. X entered into an assured shorthold tenancy agreement with the provider of the accommodation on 5 November 2012. This stated that he could not end the tenancy before the end of the term of six months. In practice, he received housing benefit from CouncilB, which covered the rent for the property. He also received a package of domiciliary support through R Agency, which was funded by CouncilA (pending the determination of the ordinary residence dispute).
12. CouncilA notified CouncilB on 29 October 2012 that X would be moving to its area on 5 November 2012.
13. A placement review took place on 28 January 2013, when X had been living at CouncilB for almost three months. This recorded that X was satisfied with the transition process and pleased to be living more independently. He expressed a wish to move into one of the bigger flats in the house, should it become available. His view of the future was that he would like to consider the option of moving at some point in the future to a specialist Asperger's/Autism service with which he would be more confident.
14. On 8 July 2013, X transferred from a room to a studio flat within CouncilB.
15. A further placement review was undertaken by CouncilA on 17 July 2013. This recorded that the provider at CouncilB was the only provider of a supported living service that X could choose, because he had not been given any other options due to limited time to find an alternative provider when he had been given notice to leave CouncilC. The transition to CouncilB had largely been considered a success. He stated that at present he was happy with the support that he was receiving. He was happy to move to a bigger self-contained flat which would give him more room and space. He wished to live more independently and wished to have his own front door key in the future. The placement review recorded that he would welcome any suggestions by his current care provider of services that they might have locally to CouncilB and/or in CouncilE. When he had moved to that placement, he had expected it to have

been a temporary move whilst other appropriate services continued to be identified for him in a proper appraisal with choice given to him. He wished to live in a block of flats where he would have his own flat with the benefit of having joined up activities with other people. The placement review recommendations noted that he wanted to move on in the near future.

16. On 9 September 2013, CouncilA made a formal referral to CouncilB on ground that X was ordinarily resident in CouncilB's area.
17. CouncilB responded on 15 November 2013, disputing that X was ordinarily resident in its area.
18. On 2 December 2013, X's mother wrote to her MP to raise concerns about CouncilA. She considered that it had failed to fulfill its statutory duty to find an appropriate placement for her son. She described him as having been in a temporary placement for the past year. She said that CouncilA had not attempted to follow the proper transition process. He had been moved to CouncilB's area on an emergency basis because the residential care placement had given him notice to leave. He had only moved to CouncilB because he had had no other choice at the time. CouncilA subsequently had gone back on its agreement to find alternative placements for him. She said that X had, in his own mind, seen himself as being at CouncilB for about 6 months before moving on. This had been discussed and agreed at the first placement review in January 2013. X and his mother had refused to agree to him becoming a resident of CouncilB, because they considered that this would imply that he was settled there long-term. At the second placement review in July 2013, CouncilA had agreed to look for three options for X and it had said that the issue of residency would come into play once he had moved on.
19. In early 2014, CouncilA informed X and his mother that they would look for a more appropriate placement and find three options for him. In around June 2014, X viewed a property in CouncilF. However, that potential move was not taken forward.
20. On 8 October 2014, CouncilA contacted X by telephone. He confirmed that he was happy and settled at CouncilB and that he was happy to remain there for the foreseeable future.
21. CouncilA wrote to CouncilB on 16 October 2014, formally notifying CouncilB that CouncilA did not accept responsibility for the provision of services to X under the 1948 Act.

22. CouncilA requested an ordinary residence determination by letter dated 21 January 2015.

23. CouncilB discussed the situation with X on 21 April 2015. He said that his home was “OK” for now but he would like some supported living place in the future and that the plan had been to move on some time. He was happy at CouncilB for now.

24. In August 2015, X informed CouncilB that his accommodation was “OK” but that the plan had always been to move to a flat.

The relevant law

25. In making this determination I have considered the Agreed Statement of Facts, the parties’ submissions and copy papers supplied. I have also considered the provisions of Part 3 of the National Assistance Act 1948 (“the 1948 Act”), the guidance on ordinary residence issued by the Department under the 1948 Act¹ (“the OR Guidance”) and the Care and Support Statutory Guidance issued by the Secretary of State under the Care Act 2014² (“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*”) and *Levene v Inland Revenue Commissioners* (1928) AC 217 (“*Levene*”).

26. My decision is unaffected by the fact that CouncilA has continued to fund services on a provisional basis throughout the material period.

The 1948 Act

27. 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

¹ Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England, published on the Department of Health’s website 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.

² Care and Support Statutory Guidance, published on the Department of Health’s website at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366104/43380_23902777_Care_Act_Book.pdf.

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.

28. 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*".
29. 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.
30. 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.
31. Section 29 of the 1948 Act provided that local authorities could (with the approval of the Secretary of State) make arrangements for promoting the welfare of persons aged eighteen or over who are blind, deaf or dumb, or who suffer from mental disorder of any description and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other prescribed disabilities. The Secretary of State's directions LAC (93)10 approved the making of such arrangements and

directed local authorities to make specified arrangements for persons ordinarily resident in their area. There are no statutory deeming provisions relating to ordinary residence for the purpose of section 29 of the 1948 Act.

Ordinary residence

32. “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”.

33. The courts have considered cases of temporary residence on a number of occasions, including in *Levene*, *Fox*, *Mohamed* and *Greenwich*.

34. In *Fox*, the Court of Appeal considered *Levene* and Lord Denning MR derived three principles: *“The first principle is that a man can have two residences. ... 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..”* 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.

35. In *Mohamed*, Lord Slynn said *“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."

The Care Act 2014 and transitional provisions

36. The dispute relates to X's ordinary residence from 5 November 2012 to date. The dispute arose on 9 September 2013. At this time, the 1948 Act provided the relevant statutory framework. CouncilA requested an ordinary residence determination by letter dated 21 January 2015. This question had not been determined as at 26 March 2015.
37. Paragraph 5 of the Care Act 2014 (Transitional Provision) Order 2015 provides that any question as to a person's ordinary residence arising under the 1948 Act and which is to be determined by the Secretary of State on or after 26 March 2015 is to be determined in accordance with section 40 of the 2014 Act.
38. Section 40 of the 2014 Act provides that any dispute about where an adult is ordinarily resident for the purposes of Part 1 of that Act is to be determined by the Secretary of State (or, where the Secretary of State appoints a person for that purpose, by that person). The Care and Support (Disputes Between Local Authorities) Regulations 2014 were made under section 40(4) of the 2014 Act and apply to this dispute.

The application of the law to the facts

The issue

39. The only issue in dispute between CouncilA and CouncilB is where (if anywhere) X was ordinarily resident from 5 November 2012 to date.
40. The following matters are not in dispute. At all material times, X has had capacity to determine where he wishes to live. He was ordinarily resident in CouncilA's area immediately prior to his move into a residential care placement in 2002. This placement at CouncilC constituted accommodation under section 21 of the 1948 Act. At no material time has he been eligible for mental health after-care services under section 117 of the Mental Health Act 1983. It follows that X was deemed to be ordinarily resident in CouncilA's area whilst he lived at CouncilC. He moved to CouncilB's area on 5 November 2012. This

supported living placement does not constitute accommodation under section 21 of the 1938 Act. X receives services under section 29 of the 1948 Act.

41. CouncilA submits that the deeming provisions in section 24 of the 1948 Act do not apply because the placement at CouncilB is not accommodation under section 21 of the 1948 Act and he receives section 29 services only. X had capacity to determine his place of residence and he acquired ordinary residence in CouncilB's area in the usual way when he moved there voluntarily on 5 November 2012 for settled purposes. A reassessment of X's needs in October 2010 (before he had been given notice to leave CouncilC) stated that X wished to move from the residential care placement to alternative accommodation. At the time of a mental capacity assessment on 26 October 2012, he had reiterated his desire to live in supported living accommodation and in particular to live in CouncilB. He signed a tenancy agreement on 5 November 2012, evidencing his wish to live at CouncilB. The placement review in January 2013 recorded that he had been satisfied with the transition process and that he was pleased to be living more independently. At that time, he wished to move to a bigger flat within the property. This subsequently happened. On 8 October 2014 he confirmed by telephone that he was settled and happy at CouncilB. CouncilA acknowledged that X had questioned in October 2012 whether a non-specialist service would take into account his Asperger's syndrome and whether provider staff would be suitably trained. CouncilA further acknowledged that the placement review in January 2014 recorded that he would like to consider moving at some point in the future to a specialist Asperger's/Autism service with which he would be more confident. However, CouncilA submits that this was not a concrete plan and that he had accepted residence at CouncilB even if he potentially wished to be residing elsewhere. He acquired ordinary residence in CouncilB's area immediately on his move to CouncilB on 5 November 2012.
42. CouncilB's initial written submissions accepted that X was ordinarily resident in its area. However, it denied that he had acquired ordinary residence there on 5 November 2012 when he moved in CouncilB. Instead, CouncilB submitted that did not acquire ordinary residence there until after June 2014. CouncilB sought a determination that he had ordinary residence in its area from 8 October 2014, when he informed CouncilA by telephone that he was happy to remain at CouncilB for the foreseeable future.
43. On 11 August 2015, CouncilB wrote to retract its acceptance that X was ordinarily resident in its area, on ground that it had become aware of further information about the circumstances in which X had moved to CouncilB. This letter was copied to CouncilA.

44. Council B submits that X did not voluntarily adopt the accommodation at Council B. It was the only option that he was given by Council A. He was placed there temporarily as an emergency measure, with the intention that he would be offered long-term alternatives within a short period. He was not there for a settled purpose.

Determination of ordinary residence

45. I am satisfied that X has been ordinarily resident in Council B's area from 5 November 2012. To sum up, the factors which I consider to be particularly relevant in this case are as follows.

46. X's mother has raised a number of concerns about whether or not Council A has complied with its statutory duties. That is not a matter for me to determine. This determination is limited to the issue of X's ordinary residence from 5 November 2012 to date.

47. I acknowledge that X was not given any other options when he moved to Council B. That was the only appropriate supported living placement that had been identified by Council A, when he had to leave Council C. He understood that he would be moving on to another placement at some point. In that sense, the placement was temporary and the choice to placement was not voluntary.

48. However, for the purposes of ordinary residence, it is not necessary for an individual to have had other real options, for them to have moved to a particular residence voluntarily. Further, an individual can have a settled purpose for short duration, even if they do not intend to stay at the residence for the rest of their lives.

49. In this case, X moved to Council B voluntarily. He wanted to move to somewhere more independent than the residential care home placement. He agreed to move to Council B, at least on a temporary basis whilst other options were considered. He personally signed the assured shorthold tenancy agreement.

50. X had a settled purpose when he moved to the room in Council B on 5 November 2012. The placement was not his ideal placement and, for example, he would have had more confidence with a specialist placement for Asperger's Syndrome and Autistic Spectrum Disorder and he would also

prefer to have his own front door key at some point in the future. However, he signed an assured shorthold tenancy agreement for a six month term and his mother described him as seeing himself as being at CouncilB for about six months before moving on. This is sufficient for him to have had a settled purpose on 5 November 2012.

51. Looking at the nature of X's residence at CouncilB and its quality, it is clear that it was his place of ordinary residence from 5 November 2012. From the date of his move, it was his home and he expected it to be his home for about six months. He stayed there for longer than originally expected and he was happy to do so (even though he wanted to move to somewhere with his own front door on a more permanent basis in the near future).

52. I am therefore satisfied that X has been ordinarily resident in CouncilB's area from 5 November 2012.

Signed on behalf of the Secretary of State for Health:

Date: