

## **DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR 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 Mr X.
2. The authorities in dispute are CouncilA and CouncilB.
3. The period in dispute is from 31<sup>st</sup> March 2009 to 17<sup>th</sup> June 2012.
4. For the reasons set out below, I have determined that Mr X was ordinarily resident in CouncilB during this period.

### **The facts of the case**

5. The following information has been ascertained from the statement of facts prepared by CouncilA subject to the amendments set out in their letter to the Department of Health dated 27th May 2014, the legal submissions and supporting documents supplied by both authorities in dispute and correspondence from the CouncilC in whose area Mr X lived from 17<sup>th</sup> June 2012 to 20<sup>th</sup> May 2013. Unfortunately the authorities in dispute have not been able to agree a joint statement of facts as required by the Secretary of State’s Directions<sup>1</sup> but CouncilB has commented on CouncilA’s statement of facts.
6. Mr X was born on 00/00/1982. He has a diagnosis of Asperger’s Syndrome and it is accepted by both authorities that he has community care needs as set out in the needs assessments; that is, that he needs support to manage his accommodation, finances and life skills such as shopping, cleaning and reminders about personal hygiene. He is not diagnosed as having any learning disabilities. The authorities have never disputed that Mr X has capacity to decide where to live.
7. Mr X, is one of nine children, who were the subject to proceedings under the Children Act 1989. In 1993 he was permanently placed in foster care. After various foster placements, he settled in a foster placement in CouncilA before moving to a flat in CouncilA where he lived independently.

---

<sup>1</sup> Direction 5(1)(b) of the Ordinary Residence Dispute (National Assistance Act 1948) Directions 2010.

8. In February 2006, GS was evicted from the flat in CouncilA following a conviction for arson with intent to danger life and was remanded in Prison for 9 months. Following his release in January 2007, he was housed at a homeless hostel in CouncilA but evicted following an allegation of assault.
9. On 3<sup>rd</sup> September 2007, he moved to a supported living placement provided by One Step at a Time (“OSAAT”) in CouncilD.
10. Mr X was unhappy in Council D so moved to a different support living placement provided by OSAAT in CouncilE on 2<sup>nd</sup> May 2008.
11. Due to OSAAT re-locating its offices to CouncilB, Mr X moved to another placement provided by OSAAT as of 31<sup>st</sup> March 2009. This was House 1 in CouncilB which was linked to OSAAT’s offices. Mr X signed a tenancy agreement with OSAAT under which Mr X was granted an assured shorthold tenancy of the property and was liable for the rent paid for by housing benefit. The tenancy agreement contained no provision that CouncilA was responsible for any of the rent in default or otherwise. OSAAT also provided domiciliary care services to Mr X pursuant to a contract between OSAAT and CouncilA. As stated in CouncilA’s submissions, Mr X was at this time receiving 15 hours one-to-one support per week with access to onsite 24 hours staffing paid for by CouncilA.
12. On 18<sup>th</sup> July 2011, Mr X moved into another supported living placement provided by OSAAT and also within CouncilB’s area, House 2. Mr X signed another tenancy agreement with OSAAT for an assured shorthold tenancy. Again, Mr X was liable for the rent paid for by housing benefit and there was no provision that CouncilA was responsible for any of the rent in default or otherwise. OSAAT also continued to provide Mr X’ care services pursuant to a contract between OSAAT and CouncilA. However, as noted in correspondence, this property was not attached to any of OSAAT’s offices so Mr X’ access to 24 hour support staff would be by way of telephone.
13. Due to noise complaints, Mr X was moved again but OSAAT refused to accommodate him in their properties due to complaints from neighbours and damage to properties. By letter to the Department of Health dated 27<sup>th</sup> May 2014, CouncilA state that it appears that CouncilB’s housing officer had assumed housing responsibility for Mr X and assisted to move him to the following addresses from the following dates:
  - House3 within CouncilB’s area from 20<sup>th</sup> April 2012;
  - House4 within CouncilC’s area from 17<sup>th</sup> June 2012;
  - House5 also within CouncilC’s area from 21<sup>st</sup> December 2012.

14. CouncilB dispute that it is clear that Mr X was assisted in this move by CouncilB's Housing Officers and assert Mr X was assisted by OSAAT in effecting these moves.
15. No documents have been provided in relation to these placements.
16. CouncilC were invited to make representations as to whether Mr X acquired ordinary residence in CouncilC between 17<sup>th</sup> June 2012 and 20<sup>th</sup> May 2013. By email dated 17<sup>th</sup> June 2014, CouncilC confirm that Mr X had never been referred to them so they have no records as to his placements in their area so consider that it would not be appropriate to express an opinion as to Mr X' ordinary residence during this period.
17. In any event, it is noted that CouncilA have agreed to discount the period from 17<sup>th</sup> June 2012 to 20<sup>th</sup> May 2013 from the period of time in which they will seek reimbursement from CouncilB. Accordingly, this is no longer relevant to the period in dispute between CouncilA and CouncilB and so I am no longer required to make a determination of ordinary residence for this period.
18. On 20<sup>th</sup> May 2013, again due to noise complaints and threatening neighbours, he was moved to accommodation at House6 which is back within CouncilB's area and where he was still residing on the date at which Mr X' ordinary residence was referred for a determination. He signed a tenancy agreement with CouncilB Homes on 20<sup>th</sup> May 2013. CouncilB has accepted that Mr X is ordinarily resident in CouncilB from 20<sup>th</sup> May 2013.

### **The relevant law**

19. I have considered all the documentation submitted by both parties. This includes the statement of facts, legal submissions and supporting documents provided by both parties, correspondence from Haringey, the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it<sup>2</sup>, the Department of Health guidance in LAC (93)7<sup>3</sup> and "*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*"<sup>4</sup> ("the Ordinary Residence Guidance"), and the leading case of R v Barnet ex parte Shah [1983] 2 AC 309 ("Shah") and the House of

---

<sup>2</sup> Contained in LAC(93)10.

<sup>3</sup> LAC (93)7 was the guidance applicable at the relevant time, and until 19th April 2010.

<sup>4</sup> Updated edition of the guidance published in July 2011.

Lords' decision in Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72.

20. My determination is not affected by Council A having assumed provisional responsibility for funding Mr X's care for the period in dispute.
21. Section 21 of the 1948 Act empowers local authorities, so far as the Secretary of State directs, 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. By virtue of the relevant Direction, that power is converted into a duty in relation to person who are ordinarily resident in their area and other persons who are in urgent need thereof.
22. 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.
23. 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. First, subsection (1A) requires that where arrangements under section 26 are 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) 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).
24. Section 24 makes further provision as to the meaning of ordinary residence. 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.

25. The duty to provide welfare services under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority. 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 (CSDPA) supplements and relates to the welfare services provided under section 29 of the 1948 Act.

26. "Ordinary residence" is not defined in the 1948 Act. The Ordinary Residence Guidance provides at paragraphs 18 onwards that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. It states that—

*"The concept of ordinary residence involves questions of fact and degree, and 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."*

27. The leading case on ordinary residence is that of Shah. In this case, Lord Scarman held—

*"Unless, therefore, 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."*

### **The submissions of the parties**

28. CouncilB submits that Mr X is not ordinarily resident in CouncilB for the period in dispute for the following reasons:

- (i) Mr X' behaviour is such that he was unable to maintain a tenancy so it makes more sense to have his case monitored by CouncilA who have knowledge of his case;
- (ii) CouncilB was not informed of Mr X's move to its area on 31<sup>st</sup> March 2009 until receipt of CouncilA's letter dated 27<sup>th</sup> July 2009;
- (iii) The move to House1 was not voluntary but as a result of OSAAT relocating its offices.
- (iv) The accommodation at House1 was provided under section 21 of the 1948 Act so that the deeming provision in section 24(5) applies. House1 was residential accommodation under section

21 because OSAAT was both the landlord and the domiciliary care provider. Further, the care service provided included 24 hour care which was ancillary to the provisions of accommodation without which the care and attention required by Mr X would not otherwise be available to him. CouncilB also asserts that for this reason the arrangements satisfy the conditions under section 26 of the 1948 Act.

(v) CouncilB would have accepted Mr X became ordinarily resident in CouncilB on 18<sup>th</sup> July 2011 when moving to House2 but for the fact that his tenancy was not secure by reason of the threats of, and subsequent, eviction.

29. CouncilA submit that Mr X is ordinarily resident in CouncilB for the period in dispute. He has capacity and voluntarily chose to move to the supported living placement in CouncilB for settled purposes. It is submitted that Mr X has never been provided with accommodation under section 21 of the 1948 Act so the deeming provisions do not apply. He has had tenancy agreements for all his placements and paid his accommodation costs. The domiciliary care services have been provided by OSAAT paid for by CouncilA pursuant to section 29(4) of the 1948 Act.

### **The application of the law**

30. The key issue is whether, as CouncilB contends, Mr X is provided with residential accommodation under Part 3 of the 1948 Act so that the deeming provision in section 24(5) applies. If not, then Mr X' ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

### **Part 3 Accommodation?**

31. My determination is that Mr X was not provided with accommodation under Part 3 of the 1948 Act during the period in dispute. My reasons for reaching this decision are set out in paragraphs 32 to 39 below.

32. First, one of the conditions for qualifying for residential accommodation under section 21 is that, without the provision of such accommodation, the care and attention which the person requires would not be available to them. In Mr X' situation, this condition could not be fulfilled when he entered into his own tenancy agreement. As cited at paragraph 94 of the Ordinary Residence Guidance, the case of R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38 confirmed that this would not usually be the case where a person enters their own tenancy agreement. Lord Hoffman said that the effect of section 21(1)(a) is that, normally, a

person needing care and attention which could be provided in their own home, or in a home provided by a local authority under the housing legislation was not entitled to accommodation under section 21 of the 1948 Act.

33. I do not consider, as submitted by CouncilB, that the ancillary access to 24 hour support by OSAAT rendered Mr X' independent living arrangements to be residential accommodation under section 21. The access to 24 hour support does not mean that Mr X required a package of accommodation and care under section 21. The care and attention that he needed was available to him in his own home.
34. Second, where both the accommodation and domiciliary care has been provided by the same provider, it does not necessarily follow that such arrangements amount to the provision of accommodation under part 3 of the 1948 Act. Paragraph 98 of the Guidance states that:

*“It may be possible for a person who is a tenant of their own property still to be in receipt of Part 3 accommodation, but it would be necessary for there to be contractual arrangements between the individual, the accommodation provider and the local authority which meet the requirements of section 26(3A) of the 1948 Act. In particular, the local authority would have to be the payer of default and the contractual arrangements would need to stipulate that if the individual failed to pay to the accommodation provider the amount he or she had been assessed as being able to pay in respect of the accommodation costs (which may be the full cost), the local authority would have to pay instead and recover such payments from the individual.”*

35. This was confirmed in the case of Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72, where Lord Slynn held that:

*“...arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include a provision for payments to be made by a local authority to the voluntary organisation at rates determined by or under the arrangements. Subsection (2) makes its plain that this provision is an integral and necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2), then residential accommodation within the meaning of Part 3 is not provided...”*

36. There is no evidence that the arrangements which have been entered into with OSAAT meet the requirements of section 26(2) and (3A) so as to constitute accommodation provided under part 3 of the 1948 Act. The

tenancy agreements for House1 and House2 contained no provision that CouncilA was responsible for any payments in respect of the accommodation. CouncilA has been funding Mr X' domiciliary support but as the private tenant, Mr X paid the rent in respect of these two properties with the housing benefit he received.

37. Further, CouncilA have received confirmation from CouncilB Homes, CouncilB's trading company which manages and maintains CouncilB's accommodation, that Mr X was responsible for the rent in respect of the property he occupied at House3 from 20<sup>th</sup> April to 17<sup>th</sup> June 2012.
38. Accordingly, there is no evidence of any contractual arrangements which could fall within section 26(2) and (3A) in respect of the properties at which Mr X lived during the period in dispute.
39. The effect of my determination is that Mr X was never provided with Part 3 accommodation during the period in dispute and the deeming provision in section 24(5) does not apply. Mr X' ordinary residence for the period in dispute therefore falls to be determined in accordance with the normal rules. Such determination is still necessary because Mr X is still required to be provided with welfare services under section 29 of the 1948 Act. The local authority which has a responsibility to provide those services is the one in which Mr X is ordinarily resident.

#### Shah Test

40. It is not disputed that Mr X has capacity to decide where to live. When a person has the mental capacity to make a decision about where they should live then the relevant test of where that person is ordinarily resident is the one set out in Shah detailed at paragraph 27 above.
41. As stated in the Ordinary Residence Guidance at paragraph 22, particular attention should be paid to Lord Scarman's statement that ordinary residence is the place a person has voluntarily adopted whether for a short or long duration. Ordinary residence can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes. There is no minimum period for 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.
42. It is clear to me that Mr X' residence in CouncilB during the period of dispute was adopted voluntarily and for settled purposes. Mr X was free and able to decide where he wanted to live and Mr X has, in fact, refused particular offers of accommodation in the past. He has a high level of independence shown by his ability to choose which accommodation he accepts and to enter



tenancy agreements at House1 and later House2. No documentation has been produced in relation to the accommodation at House3 but I have no reason to doubt Mr X did not also agree to live at this address even if his placement there was intended to be temporary pending a more permanent placement.

43. Also, as stated in CouncilA's letter to CouncilB dated 27<sup>th</sup> September 2010, Mr X had expressed a preference to remain within the CouncilB to maintain his current community links and attendance at college. In CouncilB's letter in reply dated 8<sup>th</sup> October 2010, it accepts that Mr X' impending move to separate accommodation within Council B's area would be "entirely voluntary" and CouncilB acknowledges it will be the responsible authority. (For the reason set out at paragraph 46 below, I reject CouncilB's subsequent alternative submission that Mr X could not obtain ordinary residence because he could not maintain a tenancy.)
44. Accordingly, I conclude that during the period in dispute Mr X had adopted voluntarily residence in CouncilB for settled purposes as part of the regular order of his life for the time being.
45. In the absence of any evidence of coercion, I do not accept CouncilB's alternative submission that Mr X's move to House1 on 31<sup>st</sup> March 2009 was non-voluntary because it was instigated by the relocation of OSAAT's premises. Mr X was free to agree to move to the particular accommodation provided by OSAAT or to any other independent living accommodation whether provided by OSSAT or any another provider.
46. Nor do I accept CouncilB's submission that Mr X was unable to establish ordinary residence because his behaviour was such that he was often threatened with eviction and so unable to maintain a tenancy. Ordinary residence is to be determined in accordance with the test in Shah as to whether a person has voluntarily chosen to adopt a place for settled purposes as part of the order of their regular life for the time being. It is to be determined at the time in question not by reference to a future event, such as whether a person is likely to be evicted or not. Any future event may, in fact, turn out to be hypothetical. Ordinary residence may very well change in the future, if, for example, a person is evicted, but then that this is a question of fact to be determined at that time in light of the circumstances which have actually come to pass.
47. Finally, the date upon which a local authority is notified of a person's move would not determine a person's ordinary residence. Nevertheless, it is noted that in correspondence, CouncilA have agreed only to recover reimbursement from the date of their notification letter on 27<sup>th</sup> July 2009.

48. Accordingly, for all the reasons set out above, my determination is that Mr X has, for the purposes of the 1948 Act, been ordinarily resident in CouncilB from 31<sup>st</sup> March 2009 to 17<sup>th</sup> June 2012.

Signed on behalf of the Secretary of State for Health

Dated