

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 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. The dispute relates to the period 27 July 2011 (the date from which CouncilA state that their funding would cease) to 1 August 2013 (the date upon which CouncilB accepts that X is ordinarily resident in CouncilB).
3. For the reasons set out below, my determination is that X has been ordinarily resident in CouncilB during the period in question.
4. I state at the outset that my duty relates solely to a determination as to x’s ordinary residence at the requested date. The issue between the parties in regard to the payment of fees outstanding to the care provider, for the same period, are not a matter for my consideration.
5. The parties’ original application for a determination included only correspondence and communication in regard to payment of and liability for this debt. This was not information upon which I could base my determination. A request for further and more specific

information was sent to both local authorities on 20 October 2014. Responses from both local authorities and additional documentation received have therefore been considered by me in reaching my decision.

The facts of the case

6. The following information has been ascertained from the statement of facts prepared by CouncilA and annotated and signed by CouncilB, the submissions of each local authority, and the copy documents supplied by each local authority and the Supported Accommodation⁴¹⁹ in CouncilB, following my request for further information.
7. The agreed facts are as follows: X is aged 31 years. He is diagnosed with Bi-polar disorder and Asperger's syndrome. CouncilA and CouncilB agree that X has the capacity to decide where to live and that this has been the case at all material times.
8. X was first referred to CAMHS aged 12 years and experienced his first psychotic episode in 2000. His involvement with mental health services has included inpatient psychiatric care as well as outpatient services and supervision.

9. During his attendance at UniversityY, X was informally admitted to HospitalP, on at least two occasions between November 2006 and February 2007. He was then detained on a psychiatric ward in areaS outside of CouncilA and CouncilB under the Mental Health Act 1983 later returning to HospitalP before discharge on 12. 02.07. I am not advised on the papers where he was discharged to.

10.X returned to live at home in the area of CouncilA with his mother between 10.4.07 – 18.6.07 but was then informally admitted to the HospitalQ in the area of CouncilA. Upon discharge x was provided with supported accommodation in the area of CouncilA and although he suffered a relapse and had a further short admission to HopsitalQ again, the supported accommodation in the area of CouncilA appears to have been where he lived during this period until his later move to CouncilB in July 2009.

11.The papers state that X received housing benefit to pay for accommodation during this period. Additional services were funded by CouncilA.

12.At this stage CouncilA assessed X as qualifying for the enhanced Care Programme Approach (“CPA”). This level of care is usually provided where a person has complex mental health needs that require the assistance of both mental health and social services.

13. At least by the date of Council A's first full assessment presented to me, it was considered by X, his mother and professionals involved in his care that the accommodation was no longer suitable and alternative accommodation had to be sought. It was also noted at this date that X was at serious risk of losing the tenancy by reason of eviction. By the date of Council A's review on 1 October 2008 X had expressed a desire for a move to specialist housing for religious people with learning disabilities, in Area L outside of Council A and Council B.

14. X moved to shared Supported Accommodation 51, in the Council B on 26 July 2009. X later moved into a self-contained flat Supported Accommodation 72 on 4 October 2010, where he remains living.

15. Council B conducted an assessment of X's social care needs on 10 August 2013. As a consequence of this assessment Council B accept that X is ordinarily resident in Council B from 1 August 2013. The outcome of this assessment has also been to reduce X's care and support needs to 7 hours per week which have been decreased over a period of 6 weeks from November 2013.

The relevant law

16. Section 21 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 or attention which is not otherwise available to them.
17. The Secretary of State's directions LAC (93) 10 ("the Directions") convert this power to provide accommodation into a duty for those who are "ordinarily resident" in the local authorities' area.
18. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3 of that Act "he shall be deemed for the purposes of this 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 effect of this deeming provision is to fix the date at which a person's ordinary residence falls to be determined.
19. 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.

20. In addition, section 29 of the 1948 Act empowers local authorities to provide a range of non-residential community care services which is similarly converted into a duty by the Directions for those who are ordinarily resident in the local authorities' area.

The Parties submissions

21. Council A refer to the Guidance to support their submission that they have not made arrangements for X to be accommodated under section 21 of the 1948 Act. They note in particular that X has capacity to decide where to live and moved to independent living in 2009 in Council B when he signed a tenancy agreement.

22. Council A state that they wrote to Council B requesting a community care assessment and advising of X's needs by letter to Organisation D on 12.5.11 (resent as an attachment to email 5.7.11) but in fact, ordinary residence transferred at the commencement of the tenancy in July 2009, regardless of a dispute regarding the notification for transfer of responsibility.

23. Council B make no submissions in regard to what services were provided to X under Part 3 of the 1948 Act for the relevant period. Their submissions in the main relate to their contention that at no

point did they accept funding responsibility for x prior to August 2013.

24. Council B accept the following;

- X is ordinarily resident in Council B from 1.8.13 for funding purposes and that he has been factually living in Council B since 2009.

- X signed a tenancy agreement for Supported Accommodation 72 (his current address).

25. Council B state;

- that they never accepted funding responsibility prior to 1 August 2013.
- that the letter dated 12.5.2011 was not received by mail as incorrectly addressed nor were they advised that Council A would cease funding X.
- that an email attaching this letter is not proof that it was actually sent or received (although they accept that their representative responded to the email).
- that they never conducted any review or assessment of X during the relevant period.
- that Supported Accommodation 1 never invoiced them for services and made contact with Council A regarding non-payment stating that they (supported accommodation 1) had not been advised of the cessation of funding.

- that X was never allocated a CouncilB social worker, no representative of CouncilB was present at the CPA transfer meeting nor was their effective transfer or funding responsibility accepted by CouncilB at this meeting.
- CouncilB's view is that SupportedAccommodation781 were hugely over providing during the period as needs were reduced from 42 to 7 hours following assessment by CouncilB in August 2013.

Application of the law

26. I have considered the parties' submissions, the statement of facts and the additional documentation supplied, the provisions of Part 3 of the 1948 Act, the Guidance on Ordinary Residence ("the Guidance"), the relevant case law, and the Directions.

27. Throughout the period in dispute to date, X has remained at his current supported living accommodation in SupportedAccommodation72. Given that CouncilB accept X is ordinarily resident in CouncilB from 1 August 2013 the only way in which X could be said to have been ordinarily resident elsewhere during the relevant period is if the accommodation at that earlier date was;

- i. Provided or made by way of arrangements to accommodate X under Part 3 of the 1948 Act and he is deemed to remain ordinarily resident in CouncilA by reason of section 24 (5), or
- ii. CouncilA should have accommodated X during an earlier period under section 21 and relying on the principles of Greenwich, his ordinary residence is retained in CouncilA by reason of their failure to fulfil this duty.

Was the accommodation provided under Part 3 of the 1948 Act?

28. Section 26 of the 1948 Act sets out the framework for the provision of Part 3 accommodation in the private and voluntary sector.

- 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.
- Subsections (2) and (3A) state that arrangements under that section must provide for the making of payments by the local authority to the other party in respect of the accommodation provided 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).

29. Section 26(3) imposes a liability on the person to refund payments made by the local authority under subsection (2), subject to the proviso that where the person satisfies the authority that he is unable to pay at the standard rate, his ability to pay is to be assessed and he then pays at a lower rate.

30. Section 26(2) was considered by the House of Lords in *Quinn Gibbon*. The leading judgement given by Lord Slynn held:

“.....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 it 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....”.

31. X entered into an assured short hold tenancy with the landlord, Foundation2 in regard to both his current and earlier property (“the tenancies”). X is solely liable for rent, housing management and service charges. I am advised on the papers that X receives housing benefit.

32. There are no provisions in the tenancies for the landlord to recover any unpaid rent or charges from the local authority. X enjoys exclusive possession of his flat and lives independently with the assistance of some care and social services.
33. I find that the arrangements in respect of X's accommodation do not qualify as the provision of Part 3 accommodation under section 26 as they did not include provision as specified in subsection (2) of that section.
34. There is no need for me to proceed to consider whether the requirements of section 26 (1A) are met i.e. that provision of accommodation together with personal care, must be provided in a registered care home. However for the sake of completeness I note that Supported Accommodation⁷² is not a registered care home.

Should accommodation have been provided under Part 3 of the 1948 Act?

35. In *R v Secretary of State for Health and the London Borough of Bexley ex parte the London Borough of Greenwich* [2006] EWHC 2576 (admin) Charles J observed: "It seems to me that if the position is that the arrangements should have been madethat the deeming provision should be applied and interpreted on the

basis that they had actually been put in place by the appropriate local authority.”

36. In *Wahid v Tower Hamlets* [2002] EWCA Civ 287, Hale J explained that the section 21(1)(a) duty arose:

- a) where the person was in need of care and attention;
- b) that need arose because of age, illness, disability of any other circumstances; and
- c) care and attention were not available otherwise than by the provision of residential accommodation.

37. The limb relevant for these purposes is whether X’s need for care and attention were available, *otherwise* than by way of residential accommodation. X has been provided with services within shared and supported living environments since 2007. His mental health has appeared stable and apparently appropriately managed through medication and support mechanisms throughout this period. I find that the care and attention required was reasonably and appropriately delivered in X’s own home and were therefore “otherwise available” without the need for residential accommodation. Furthermore, in view of X’s stated desire for supported but independent living it is unlikely he would have considered residential accommodation was necessary.

38. In view of these factors I do not consider that CouncilA did neglect any duty to provide accommodation under Part 3 of the 1948 Act during the period in dispute.

39. The effect of my determination, that X is not provided with Part 3 accommodation, nor should he have been, is that the deeming provision in section 24(5) does not apply. X's ordinary residence therefore falls to be determined in accordance with the normal rules.

Ordinary residence

40. An ordinary residence determination is still necessary because X required the provision of welfare services under section 29 of the 1948 Act and section 2 CSDPA. The "duty" to provide these services rests on the local authority in which X was ordinarily resident.

41. "Ordinary residence" is not defined in the 1948 Act for the purposes of either section 21 or section 29. The Guidance (paragraphs 18 to 20) 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.

42. The leading case on ordinary residence is that of *Shah v London Borough of Barnet (1983) 1 All ER 226*. In that 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”.

43. In my view X’s residence at Supported Accommodation 72 has a settled purpose. I note that his expressed desire to move to specialist accommodation in area L for religious people with learning disabilities is noted in the review of 1.10.08. The care co-ordinator states in their letter to the Funding Panel that supported accommodation 1 had been identified by X and his mother as a place which would meet his “long term accommodation needs”. When funding for this opportunity was agreed, the review on 1.5.09 notes that his mother would look further into the suitability of the particular setting in Council B.

44. As the first of the tenancies proceeded shortly thereafter, it is apparent that X, his mother and professionals involved in his care all agreed that the proposed supported accommodation met X’s

needs. Almost 1 year after the move, the SUMREV states that X had settled well into the accommodation at SupportedAccommodation72, developed friendships, and attended various social activities, including with other “religious friends”. He had also attended a course and joined a local job club in another council area outside of CouncilA and CouncilB, in the hope of obtaining a job.

45. I consider that he entered into a tenancy at SupportedAccommodation72 for the purpose of continuing to live independently with support from specialist professionals to meet his particular needs.

46. Ordinary residence is a question of fact and is not dependent on the “acceptance of any funding responsibility” as submitted by CouncilB in paras 6 and 10 of their submissions. Although I am not asked to determine ordinary residence from the commencement of the tenancy at SupportedAccommodation51, I accept CouncilB submissions that in fact, ordinary residence transferred at the commencement of this tenancy in July 2009. There is no minimum period in which a person has to be living in a particular place before being considered ordinarily resident there. This initial move to CouncilB was X’s choice and for a settled purpose. CouncilA were empowered to provide section 29 services whilst X was ordinarily resident elsewhere.

Notification to host local authority

47. In regard to the parties' submissions on notification, neither ordinary residence per se nor transfer of ordinary residence is subject to any legal duty or requirement to notify a host local authority. There is also no legal duty to consult a host local authority in regard to an assessment under S47 National Health Service and Community Care Act 1990 ("the 1990 Act").

48. The general assessment duty in S47 (1) of the 1990 Act lies at the centre of all community care responsibilities. The Guidance also refers to the power and duty to conduct an assessment and reiterates the pragmatic approach that the courts have taken in regard to people who are "about to be in need" of community care services.

49. Whether Council B had sufficient knowledge of X so that their statutory duty to assess was triggered is a question of fact and degree.

50. From the papers before me, it appears that Council A did not follow a process analogous to that suggested in Para 57 of the Guidance by advising Council B that X would be in accommodation provided by the independent sector when he first moved there in July 2009. Whilst not obliged to, had they done so it should have been easier

to ensure satisfactory support services were available upon later transition of care services.

51. On the facts and papers before me it is clear that CouncilA wrote to CouncilB requesting a community care assessment and advising of X's needs, regardless of whether adult social services were sited at the address used. Further and as a consequence of that request, email and telephone communications were entered into between the social worker for CouncilA and CouncilB at least in August 2011. The fact that the CouncilB social worker notifies that X had not been considered eligible for Enhanced CPA in February 2011 but was being reviewed by the consultant every three months illustrates that X and his mental health vulnerabilities were known to CouncilB at this stage. The CouncilB Primary Care Mental Health Team ("PCMHT") was clearly assisting X during the period between 26 July 2010 and 6 February 2012.

52. In addition, although it appears that CouncilB were not represented at the CPA transfer meeting, all those that were, including X, his mother and representatives of supported accommodation¹ must have been aware of the proposed transfer of responsibility to CouncilB. In addition, whilst I have no evidence before me that she did, I note the care co-ordinator's stated intention to advise X and his mother in writing of the transfer. It is certainly evident from the PCMHT letters to DrT that X himself, in the presence of supported

accommodation¹ support staff, had commented on his concern regarding funding suggesting that he was aware of the finance issue and that this was an area of anxiety and stress for him.

53. In any event it is not necessary for either a service user, or a representative on their behalf, to make a specific request for a community care assessment. It is imperative that mental health and local authority services operate in an integrated and cohesive way in order to ensure that vulnerable service users' needs are anticipated and preventative measures can be secured. As X was an existing CPA service user, both Council A and Council B should have done more to ensure X's needs were sufficiently transferred and being met. However on the facts presented to me I am satisfied that Council B's duty to complete an assessment was triggered as early as July 2011 and was irrespective of actual eligibility for specific services and/ or disputed ordinary residence.

Conclusion

54. Regardless of my observations above in regard to obligations to assess and notify, ordinary residence is a question of fact. I therefore find that X has been ordinarily resident in Council B during the period in question, that is to say from 27 July 2011 to 1 August 2013.

Signed on behalf of the Secretary of State for Health

Dated