

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 the CouncilB to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of X.

The facts of the case

2. The following information has been ascertained from the agreed statement of facts prepared by the two authorities involved in the dispute and the supporting documents supplied. X was born in 1966. X has a mild to moderate learning disability and exhibits behaviours which are diagnostic of autistic spectrum disorder. X also has Coeliac Disease and Roussy Levy Syndrome which affects her gait, posture and co-ordination. X uses a wheelchair when she goes out and a zimmerframe to walk around the home where she resides. It is agreed by both parties that X has capacity to decide where to live.

3. X was born in Area1 and moved with her parents to CouncilB area in 1971. The agreed statement of facts records that she was placed in care in February 1971. In 1977 a Care Order was sought and X was placed at Hospital 1. At age 11, X was transferred to Residential School 1, Area2. X lived with her mother briefly in 1984 before moving into a residential place in CouncilB area in 1985. X was moved into a residential placement in Care home 1, CouncilA area on 4th March 1996 by Council B. The placement was provided under section 21 of the 1948 Act.

4. On 7th December 2009 X’s residential placement at CareHome1 was converted into a Supported Living Placement when Provider 1 deregistered its homes. X signed a tenancy agreement on this date. The rent element of the placement was, and continues to be, paid for by private means. It is understood that this is via housing benefit entitlement paid by CouncilC. It is agreed that at some point CareHome1 was renamed. For simplicity I will continue to refer to the name of the accommodation X lived at after 7th December 2009 as Care Home 1. On 7th July 2010, as part of a mental capacity assessment, X was asked whether she would consider a move back to CouncilB area. X was visibly upset at this suggestion and expressed a desire to remain living in CouncilA area.

5. From 7th December 2009 domiciliary care was, and continues to be, provided by Provider 1. CouncilB made payments for X's care to the Provider1 from 7th December 2009 to 15th January 2012 on a provisional basis. CouncilA began making payments for X's care on 28th November 2011. The period of overlap was an error on the part of CouncilB and both parties agree that it does not affect the ordinary residence of X.

6. There is no argument about the suitability of X's current provision which Council A continue to fund, rather the dispute relates to when CouncilA first became responsible for the provision of section 29 services.

The relevant law

7. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by Council B and Council A, the provisions of Part 3 of the 1948 Act, sections 46 and 47 of the National Health Service and Community Care Act 1990 (“The 1990 Act”), the guidance on ordinary residence issued by the Department (“The Guidance”) and the case of *Shah v London Borough of Barnet*¹ (“Shah”). My determination is not influenced by the provisional acceptance by Council B or the continued acceptance of Council A, of responsibility for funding services under Part 3 of the 1948 Act.

8. Section 47 of the 1990 Act provides that local authorities have a duty to assess the needs of any person for whom the authority may provide or arrange the provision of community care services and who may be in need of such services. Local authorities have a further duty to decide, taking into account the outcome of the assessment, what, if any, services they should provide to meet the individual’s needs.

9. “Community care services” is defined in section 46(3) of the 1990 Act and includes services provided under Part 3 of the 1948 Act.

10. 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 or 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 and other persons who are in urgent need thereof”.

11. The duty to provide welfare services (non-residential community care services) under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

12. 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

¹ (1983) 1 All ER 226

ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

13. "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. 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".

The submissions of the parties

14. CouncilB submit that X ceased to be ordinarily resident in their area on 7th December 2009, the date on which X signed the tenancy agreement for her supported living arrangement. CouncilB argue that after this date their duties ended and responsibility for the provision of X's section 29 services should rest with CouncilA. Further CouncilB submit that they were not under any duty to provide X with residential accommodation under section 21 of the 1948 Act after Care Home 1 deregistered and converted into supported living accommodation.

15. Relying on Shah, CouncilB submit that X's move was voluntary and for a settled purpose as evidenced by her decision to stay at CareHome1 after its deregistration as a residential care home, the signing of the private tenancy agreement and her continued physical presence in CouncilA area since December 2009.

16. CouncilB acknowledges that it continued to pay for care services for X up until approximately 15th January 2012. Due to administrative error CouncilB continued to make payments for care services after CouncilA commenced payments on 28th November 2011. CouncilB is seeking to recover these monies for this period of overlap directly from the care provider.

17. CouncilA submit that they only became aware of X's presence in their area upon receiving a letter from CouncilB dated 6th September 2010.

CouncilB's letter argued that CouncilA should take over responsibility for the funding of X's care package. The letter did not specify a date from which CouncilB proposed X should have been considered ordinarily resident in CouncilA area, but did state they became aware of the issue at a review on 7th July 2010. In a letter dated 17th September 2010 CouncilA refuted CouncilB's assertion on the basis that X's care needs had not changed on the deregistration of CareHome 1 on 7th December 2009. CouncilA now accept that this was not necessarily a correct interpretation of the law. Since no further correspondence was received from CouncilB, CouncilA assumed the dispute was settled and did not initiate a re-assessment.

18. Council A received a further letter from CouncilB dated 11th March 2011 alleging that Council A had not responded to their previous letter 6 months earlier. CouncilA requested copies of CouncilB's assessments of X's needs on 17th May 2011 but these were not supplied until 5th August 2011.

19. In an email dated 4th October 2011 CouncilA informed CouncilB that it would be undertaking an assessment of X's needs. CouncilA formally accepted responsibility for X by email on 17th October 2011. Due to an internal error CouncilA did not inform CouncilB of the date of acceptance, 28th November 2011, until 15th December 2011.

20. On 27th August 2013 CouncilB emailed CouncilA claiming that a transfer date had never been communicated to them.

21. CouncilA submit that CouncilB did not observe paragraph 57 of the Guidance by failing to inform them that X had been placed in their area. They submit that paragraph 1 of the Guidance provides that a local authority must conduct its own community care assessment of the person whose ordinary residence is to be determined, before it can decide whether to accept responsibility.

22. CouncilA further submit that CouncilB's referral to the Secretary of State for determination was premature and pursuant to direction 4 of the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 it was unreasonable for CouncilB to refer the matter before 26th December 2013.

23. Finally CouncilA dispute that X voluntarily adopted CareHome1 for a settled purpose and submit there is no evidence in support of the argument that she did. CouncilA argue that X had no choice in the matter when the home was de-registered and submit that X was not made aware of the

implications of her decision to stay at CareHome1 until the mental capacity assessment was conducted in 2010.

24. CouncilA conclude that I should determine that the date X acquired ordinary residence on 28th November 2011 i.e. the date from which CouncilA informed CouncilB that they would accept responsibility.

The application of the law

25. X was originally provided with residential accommodation in CouncilA area by CouncilB under section 21 of the 1948 Act. Neither party have sought to argue that the move to a supported living placement was not appropriate and that provision ought to have continued to be made under section 21.

26. The deeming provisions in section 24 of the 1948 Act only have effect if a local authority has placed a person in residential accommodation outside of their area. Paragraph 97 of the Guidance almost exactly describes the situation at hand:

“The same principles [those outlined in paragraph 96] apply where a care home deregisters to provide independent living accommodation on the same site. If a person who had been placed in the care home “out of area” under Part 3 of the 1948 Act decides to remain living on the site under independent living arrangements, and is assessed as being able to do so, they would be likely to acquire a new ordinary residence in that area. The deeming provision would not apply as the person would no longer be in receipt of Part 3 accommodation.”

27. X’s ordinary residence falls therefore to be determined on the day which Council B stopped providing section 21 accommodation, that is 7th December 2009.

28. The Guidance, at paragraph 57 makes clear that the placing authority should always inform the host authority of any persons placed in independent sector accommodation in their area under section 21 of the 1948 Act and I would expect a local authority to notify another at the earliest opportunity. However ordinary residence is a question of fact and responsibility for the provision of services under Part 3 of the 1948 Act does not turn upon notification by a local authority.

29. Furthermore the 1948 Act and subsequent Directions (published by the Department of Health in LAC (93) 10) impose a duty ‘in relation to persons

ordinarily resident in the area of the local authority'. It is clear that the duty arises to people who are ordinarily resident in fact, not when a local authority becomes aware that a person is ordinarily resident. The ordinary residence of a person is not dependant on or influenced by a local authority's awareness of a person's presence.

30. As paragraph 19 of the guidance provides;

'the concept of ordinary residence involves questions of fact and degree...factors such as time, intention and continuity...have to be taken into account'.

The material fact in this case is that X signed a tenancy agreement for an independent living placement on 7th December 2009. The part of the Guidance which relates to notifying a host authority of an out of area placement is concerned with practical arrangements and ensuring continuity of care where an authority makes an out of area placement. It does not affect the application of the test for determining ordinary residence laid down in Shah. Failure to notify does not mean that a person cannot acquire an ordinary residence in the new area.

Thus X's ordinary residence is not altered by CouncilB's delays and CouncilA's responsibility did not turn on them having undertaken an assessment.

31. In any event it seems surprising that CouncilA were unaware of the deregistration of the care home which became CareHome1.

32. I cannot accept CouncilA's submission that there is no evidence that X intended to remain in its area. The tenancy agreement itself, which is expressed in clear language and has pictures to assist X in understanding it, and the mental capacity assessment dated 7th July 2010 clearly constitute an expression of X's wishes with regards to where she lives. It is clear to me that X has adopted CouncilA's area as her home voluntarily and for a settled purpose.

33. I note that both the assessment which pre-dates 7th December 2009 and X's handwritten note which post-dates it, indicate that X is happy at CareHome1 and has friends there.

34. I therefore determine that X was ordinarily resident in CouncilA's area from 7th December 2009.

Signed on behalf of the Secretary of State:

Date: