

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

1. I have been asked by the 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 Mr 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 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.

The facts

3. The following information has been ascertained from the statement of facts prepared by CouncilA and CouncilB’s response to that statement of facts, the legal submissions prepared by each authority and other documents supplied by the authorities.
4. X is age 58 years and has a history of excessive alcohol use and epileptic seizures leading to acquired brain injury (as detailed below). The most recent community care assessment, completed by CouncilA on 4 October 2014, concludes that: “he has difficulty with most or all aspects of personal care and also everyday activities such as household shopping, preparing snacks/meals and housework”.
5. I am advised on the papers that historically X resided as a lodger in a purpose built flat rented from his sister on RoadG the area of CouncilA.
6. In March 2008 X suffered an epileptic seizure which resulted in an acquired brain injury. The formal diagnosis given in the social services records is subdural haematoma and subarachnoid haemorrhage. He was admitted to HospitalY on 23rd June 2008 and then transferred to the Unit3 on 28 October 2008. He was discharged to return to live with his sister on 3 March 2009. Following this episode X’s reliance on his sister for care and support is said to have significantly increased.
7. X sustained a second brain injury on 28 July 2010. It is reported that he suffered another seizure and had a fall during which he suffered further brain trauma resulting

in subarachnoid haemorrhage and subdural bleeding. He was admitted to Hospital Y and then transferred to the Unit 3 on 22 September 2010.

8. He was discharged from the Unit 3 to the Nursing Home G46 in the Council A. The date on which he was discharged is not clear. The statement of facts submitted by Council A states 8 February 2011 whereas the most recent FACE Overview Assessment states May 2011. The date is not material to my decision.
9. Council A's statement of facts refers to another brief period of admission to hospital in late June/early July 2013 which is not referred to in the FACE Overview assessment. This admission is not material to my decision.
10. An assessmentⁱ undertaken by Council A on 13 August 2013 states as follows:
 - a. X expressed that he would like to live more independently whilst aware that he needs a certain level of support;
 - b. Mental Capacity Assessment to be completed in regard to this choice/decision;
 - c. X stated he is familiar with the Council A area and would like to remain living in particular localities that he is most familiar with;
 - d. He is currently in a nursing home which is not an appropriate housing situation. He would require supported living
 - e. He would benefit from step down facilities to prepare him for independent living.
 - f. There is reference to supported living in Council A.
11. The FACE 8/13 also notes that X's sister was preparing to move away from the London area, and that she was no longer able to provide care and support or accommodation for X.
12. X's sister now lives in County N. She has not visited X since he moved to his current address.
13. X moved to a Supported Living 212, in Council B on 10 January 2014. The tenancy agreement for the payment of rent amounting to £250 per week is between the Landlord M and X. The copy of the tenancy agreement submitted to me has not been signed by the landlord.

14. However, it does not appear to be in dispute that X has been living at SupportedLiving212 since 10 January 2014 and paying rent through housing benefit. CouncilA states that it provides domiciliary care services to X at SupportedLiving212 under section 29 of the 1948 Act. X is registered with a GP in CouncilB.
15. It appears that no formal capacity assessment was undertaken at the time X moved to SupportedLiving212 in spite of the fact that FACE 8/13 stated that an assessment would be undertaken. The documents indicate that X was deemed to have capacity. I consider the relevant capacity issues below.
16. On 31 March 2014 CouncilA referred X to CouncilB setting out in an e-mail its position that, following his move, X was now ordinarily resident in their area. CouncilB responded on 7 April 2014 acknowledging the referral and enquiring whether a capacity assessment had been undertaken. CouncilA replied to this enquiry stating: "X has capacity and is able to make informed choices- hence, no Mental Capacity Assessment being completed".
17. CouncilA made a further formal referral to CouncilB on 8 October 2014 requesting a response by 6 November 2014. The referral letter enclosed a draft statement of facts and a capacity assessment that had been undertaken by SocialWorkerR on 25 September 2014 ("CouncilA MCA"), in respect of X's capacity to make informed decisions about his care and accommodation. The assessment concluded that X had capacity in this regard.
18. The referral also enclosed a FACE Overview Assessment that had been carried out by CouncilA on 4 October 2014 ("FACE 10/14"). The assessment records that:
- "[X] requested to be supported in moving to alternative accommodation where he could live more independently. It was following this reassessment process that a decision to support [X] find alternative accommodation was made. [X] was deemed to have the capacity to make this decision and three different supported living service providers were considered. Following this process, [X] moved to the current service which was identified especially around the key issues of supporting [X] to manage his alcoholism and help increase his independent living skills... [X] maintained that he was very happy living at SupportedLiving212 and believed that the service remained appropriate in meeting his needs"*

19. CouncilB responded to the referral on 14 October 2014, disputing CouncilA's account of X's capacity and his wishes and feelings. The solicitor for CouncilB stated that she would respond further once she had received CouncilB's assessment of X's capacity.
20. Further correspondence passed between the two authorities, but CouncilB did not provide a substantive response prior to 12 December 2014 when the matter was referred to me by CouncilA.
21. By email to me on 24 December 2014, CouncilB requested further time to consider the matter, make submissions and comment on the statement of facts, asking that no determination be made until after the end of January 2015. I agreed to further time for the authorities to attempt to resolve the dispute until 2 February 2015. I was advised by CouncilA that CouncilB had not communicated further with them. On 13 February 2015 I advised both authorities that my determination would proceed on the papers submitted and provided a further 7 days for additional submissions or observations to be made.
22. CouncilB sent written submissions to me on 20 February 2015. Its submissions enclosed various documents including the record of a placement review carried out on 4 June 2014 which states that: *"[X] said he likes the placement and the area."* The review notes concerns around X's drinking and continence. The reviewing officer's summary states:
- "The move to his current placement was initiated by [X's] apparent request to live more independently. [X] reportedly not want to live on his own as he is aware that he is unable to manage by himself... [X] is able to express his opinions and make choices. He currently controls his finances though lacks understanding and as a result does not manage well." [sic]*
23. CouncilB submissions also refer to a mental capacity assessment dated 6 June 2014 ("CouncilB MCA") (this assessment was not included with the documents originally sent to me but was later submitted at my request). This mental capacity assessment, carried out by SocialWorkerJ, concerns X's capacity to manage and maintain his own tenancy. It concludes that X does not have capacity in this regard.

The Authorities' Submissions

24. CouncilA submits that X became ordinarily resident in CouncilB on 10 January 2014 when he moved to SupportedLiving212. The basis for its submission is that:

- a. The deeming provisions under section 24 of the 1948 Act do not apply because X holds a tenancy agreement in relation to SupportedLiving212 and the accommodation is not paid for by the CouncilA;
- b. X had capacity to determine his own place of residence and moved to SupportedLiving212 voluntarily;
- c. Insofar as X may have lacked capacity to enter into a tenancy agreement (which is not admitted) this would render the contract *voidable* not void; and, in any event, the legality of the tenancy agreement is not determinative of ordinary residence.
- d. It is not accepted that X wishes to live in CouncilA but, in any event, the fact that a person would prefer to live at some other location does not affect his ordinary residence (reliance is placed on the dicta of Lord Slynn in *Mohamed v Hammersmith & Fulham LBC* [2001] UKHL 57).
- e. X's residence at SupportedLiving212 is for settled purpose.

25. CouncilB disputes that X became ordinarily resident in its area on 10 January 2014 or at all. It accepts that the normal presumption is that if someone is in supported living they acquire the ordinary residence of the area of their placement, but it raises three grounds on which, it submits, I should find that X continues to be ordinarily resident in the CouncilA:

Firstly, it submits that A's assessment of X as requiring 168 hours of care is indicative of a residential placement rather than supported living;

- a. Secondly it raises concerns about the suitability of SupportedLiving212, noting that X frequently returns to the home drunk and is incontinent during the night; he leaves the house early in the morning and does not return until the evening. It suggests that these elements beg the question whether a more structured residential setting would be more appropriate.
- b. Thirdly, it submits that X lacks capacity to determine his own place of residence or to manage his tenancy.

The Law

26. I have considered all the documents submitted by CouncilA and the CouncilB, the provisions of Part 3 of the 1948 Act and the Directions issued under itⁱⁱ, the guidance on ordinary residence issued by the Departmentⁱⁱⁱ, and the cases of *R (Shah) v*

London Borough of Barnet (1983) 2 AC 309 (“*Shah*”), *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 (“*Greenwich*”), *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 (“*Quinn Gibbon*”), and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 (“*Mohammed*”). My determination is not affected by provisional acceptance of responsibility by CouncilA.

27. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force. Pursuant to article 6(2)(c) of the Care Act (Transitional Provision) Order 2015/995, the new ordinary residence deeming provisions under section 39 of the 2014 Act have no effect in respect of a person who, immediately before the relevant date, was being provided with supported living accommodation.
28. 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 or attention which is not otherwise available to them.
29. 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).
30. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal care under section 21 of that Act with any organisation other than a registered care home.
31. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that

Part, the authority in whose area the person is ordinarily resident. The Secretary of State's Directions 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".

32. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under Part 3 of 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.
33. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority. Section 2 of the Chronically Sick and Disabled persons Act 1970 supplements and relates to welfare services provided under section 29 of the 1948 Act.

Ordinary Residence

34. "Ordinary residence" is not defined in the 1948 Act. The Department of Health has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services^{iv}.
35. In *Shah v London Borough of Barnet* (1983) 1 All ER 226, 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 "ordinary residence" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration"
36. Additional considerations apply where the relevant person lacks capacity to determine (and thus to "voluntarily adopt") his abode. In *R v Waltham Forest London Borough Council, ex Parte Vale* (1985) Times 25 February Taylor J held that:
 - a. Where the person is so mentally handicapped as to be totally dependent upon a parent or guardian, the concept of having an independent ordinary residence which has been adopted voluntarily and for a settled purpose does not arise. Such persons are in the same position as a small child. Their ordinary residence is that of their parents because that is their 'base' ("Vale 1").

- b. The alternative approach involves considering a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in Shah, but without requiring the person themselves to have adopted the residence voluntarily ("Vale 2").

37. In *R (Cornwall Council) v Secretary of State for Health* [2014] EWHC Civ 12, the Court of Appeal ("Cornwall") considered the Vale approach and stated that the Vale 1 approach should not be followed. In Cornwall the court considered *Mohamed v Hammersmith and Fulham LBC* [2002] 1 AC 547 and *Re A (Children) (Habitual Residence)* [2014] AC 1, observing that the significance of the place of actual residence could not be ignored and in the context of severely incapacitated adults, there was much to be said for adopting an assessment of ordinary residence similar to that of habitual residence adopted for dependent children in *Re A*, namely that the ordinary residence would be the place which could properly be described as the centre or focus of the child's social and family environment.

38. Cornwall is currently subject to an appeal to the Supreme Court and judgment is pending. In view of this, the Department has proposed that it may stay determinations pending the judgment in cases which raise issues similar to those which are being considered by the Supreme Court in *Cornwall* and the determination requires application of either the Vale or Cornwall approach^v

39. This case does not, in my view, raise issues similar to those in *Cornwall*. My decision below is based on the law as it currently stands.

Application of the law to the facts

40. I consider that X is, and has been since 10 January 2014, ordinarily resident in CouncilB. He has lived continuously at SupportedLiving212 since that date. It is clear from the documents that I have seen that X moved for a settled purpose in that SupportedLiving212 was a long-term placement identified by the social worker as meeting X's needs. Whilst there is some suggestion that X goes on long walks back to CouncilA, CouncilB's own review indicates that he likes his current placement and the area. He receives care and support at SupportedLiving212 and is registered with a GP in CouncilB.

41. I note submissions made by CouncilB that X expressed a wish to return to live at RoadG during the CouncilB MCA assessment and walks each day to spend his time in an area familiar to him and where he knows people. I also note CouncilA's reliance in their submissions on Lord Slynn in *Mohammed* where he stated " 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"
42. I do not consider the statements made by X in the CouncilB MCA assessment as evidence that X did not voluntarily move to SupportedLiving212 or did not intend to remain there for a settled purpose. CouncilA state that X considered all three placements available to him before moving to SupportedLiving212. The FACE reviews and CouncilB residential review all state that X expressed that he liked his placement, the area and the support that he receives at SupportedLiving212. He may on occasion express a preference to live with his sister and nieces in RoadG but his ordinary residence is at SupportedLiving212 and he moved there in January 2014, with the intention of making it his home with appropriate support available to him.
43. CouncilB raises three grounds for submitting that X remains ordinarily resident in CouncilA. I shall deal with each in turn.

Part 3 accommodation

44. Firstly, it is suggested that the high level of support provided to X at SupportedLiving212 is indicative of a residential placement. If SupportedLiving212 was a residential placement this would be relevant to the deeming provisions under section 24 of 1948 Act. However, the placement is not a registered care home and it is clear on the facts that it does not meet the requirements of section 26 (1A).
45. X alone is liable for the rent which is paid for by housing benefit. X is also responsible for the additional service charge. I note that when this fell into arrears it was waived by the landlord and not sought from CouncilA. The arrangements do not meet the requirements of section 26(2) as set out above as they do not provide for the making of payments by a local authority to the accommodation provider (and hence do not provide for the consequential recovery of payments from the person receiving accommodation).

46. CouncilA does not provide the accommodation pursuant to section 21 of the 1948 Act. The care services are provided under section 29 of the 1948 Act. Therefore the deeming provisions under section 24 do not apply.

Suitability of the accommodation

47. Secondly, concerns are raised by CouncilB as to the suitability of the current placement. Such a claim could potentially be relevant to the question of whether CouncilA should have provided section 21 accommodation and failed to do so. In *R (Greenwich) v Secretary of State for Health and LBC Bexley* [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."
48. Accordingly if CouncilA should have made arrangements for X under Part 3 of the 1948 Act, the deeming provision should be applied and interpreted on the basis that the arrangements were actually made under Part 3.
49. It is not within my remit to replace the opinion of social care staff, involved in Xs care over a long period, in regard to his care needs, unless the facts as provided to me clearly show that an authority has avoided its responsibility by failing to meet needs. I do not find that to be the case here. I note in particular that the concerns raised in FACE 10/14, and CouncilB's residential review, following the move to SupportedLiving212, are not manifestly different to those expressed in FACE 8/13 when X was accommodated in a nursing home. These concerns largely relate to X's alcohol dependency, poor concentration and memory, incontinence and daily absence from the home returning late in the evening intoxicated.
50. FACE 8/13 refers to Xs own wish to move to more independent living with appropriate support. The recommendation therein states that this should be facilitated through step down facilities as the current nursing home is not appropriate housing for him. FACE 10/14 states that three different support services were considered and SupportedLiving212 selected as best able to meet X's needs and increase his independent living skills.
51. Merely because the concerns remain live whilst living in supported accommodation does not mean that X's needs cannot be met therein. Acquiring independent living

skills is a progressive goal which X himself has asked for support to achieve. The level of independence he is able to achieve may depend on his willingness to engage with all the services and support available to him.

52. The support services required by X are provided under section 29 of the 1948 Act.

Mental Capacity

53. The third matter raised by CouncilB is X's capacity to decide his residence and manage his tenancy. I note that mental capacity is issue and time specific and there is an assumption in favour of capacity (Mental Capacity Act 2005, s. 1(2)). There is no consensus between the authorities on this issue.

54. In the present case there was no formal assessment of X's capacity to make decisions about his residence at the time he moved to SupportedLiving212. Those involved in the decision at the time deemed that he had capacity to make this decision. The assessment relied on by CouncilB dated June 2014 concerns X's ability to manage his own tenancy which is distinct from (though related to) his capacity to decide where to live.

55. The decision in question is whether X had the capacity to voluntarily choose to live at SupportedLiving212 in January 2014. It is not a decision as to the exact nature of the care plan to be implemented there. It is not necessary for a person to comprehend every detail of an issue in order to have capacity; he must be able to comprehend and weigh the salient details relevant to the decision (see LBL v RYJ [2010] EWHC 2664 (Fam) at [24] and [58]).

56. It is clear from the FACE and Residential reviews, completed and provided to me by both authorities, that X was able to express and communicate his views independently without recourse to an advocate, consider information provided to him and use this to formulate his decisions and responses. I take as examples of this from the following:

- X repeatedly states that he does not wish to live on his own as he is aware that he is unable to manage alone,
- His emphasis that he is satisfied with the service that he receives and he does not want to move from the current service,

- X expressed concern about being made homeless as a result of correspondence received about service charge arrears and agreed to additional support to rectify this difficulty.

57. I do not accept CouncilB's view that X does not understand the concept of having a tenancy agreement or the risk associated with breaching the tenancy. On the contrary X has accepted help and support in order to safeguard his tenancy for example in regard to enabling him to meet his service charge obligations and the need to purchase a new bed and waterproof mattress.

58. The concerns raised by CouncilB relate more to X's reluctance to accept that he may have greater or different care needs associated with alcohol dependency. CouncilB consider that X lacks insight into his care needs and abilities and was unable to take into account the views of others. I do not accept that such alleged deficiencies are indicative of incapacity to decide where to live. They may colour the decision made by the service user but they do not negate it.

59. I accept CouncilA's submission that any issue about X's capacity to sign the tenancy agreement would only render the contract voidable not void and, in any event, the legal enforceability of a tenancy agreement is not determinative of ordinary residence. Ordinary residence is a matter of fact.

60. These considerations point towards a conclusion that X had capacity to decide his residence when he moved in January 2014 which I accept.

Conclusion

61. For the reasons set out above, I accept CouncilA's submission that X is ordinarily resident in CouncilB and that he has been so since 10 January 2014.

Signed on behalf of the Secretary of State for Health:

Dated:
