

## **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 CouncilE and CouncilS to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mr X. This determination is made in accordance with the *Memorandum of Understanding between the Secretary of State and the Scottish Ministers Relating to the Determination of Cross-Border Ordinary Residence Disputes* (“the MoU”) which became effective on 16<sup>th</sup> December 2011<sup>1</sup>.

2. Paragraph 3 of the MoU provides that, in the event of a cross-border dispute (an ordinary residence dispute involving at least one local authority in Scotland and at least one local authority in England), the Secretary of State will determine the dispute when it relates to a question of ordinary residence arising under Part 3 of the 1948 Act and a local authority in England is seeking to recover expenditure from a local authority in Scotland.

3. This dispute concerns the question of Mr X’s ordinary residence for the purposes of determining whether CouncilE or CouncilS is responsible for the provision of social care services to Mr X.

4. In accordance with paragraph 6 of the MoU, I have therefore notified the Scottish Ministers of this dispute and we have agreed that determination of this dispute falls to me. I have also consulted the Scottish Ministers and taken their views into account before determining the dispute, as required by paragraph 8 of the MoU.

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

5. The following information has been ascertained from the jointly agreed statement of facts prepared by the two authorities involved in the dispute and the copy documents supplied.

6. Mr X was born on X date 1994. He has a severe global learning disability. He also has a cerebral visual impairment which affects the way he interprets visual information and Mear’s Irlene Syndrome which affects his reading skills

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<sup>1</sup>[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_126003](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126003)

and is linked to dyslexia. Mr X has specialist reading glasses that have improved his ability to read and he is now able to read for pleasure on a Kindle. An assessment in August 2012 by the Council's Communication Disorders Team confirmed that Mr X has a diagnosis of Autism Spectrum Disorder.

7. Council's Children's Services placed Mr X with foster carers, Carer E1/S1 and Carer E2/S2 on 4<sup>th</sup> April 2007 in Council's area. On 3<sup>rd</sup> December 2010 the foster carers moved to location S1 in the area of Council's. Mr X moved with them and their adopted daughter and remains there to date.

8. Mr X was assessed at the age of 18 by Council's. The document produced with the copy papers and marked "Statement of Assessed Needs" is undated although the assessment was clearly carried out when Mr X was 18 since his age is recorded as such. The assessor was a Mrs D. The assessment found that:

"Mr X requires a significant level of practical help and support in order to make independent decisions due to his learning difficulties and he requires 'cajoling' in order to make a decision for himself. Mr X has a tendency to tell people what he thinks they want to hear. Mr X has real difficulties with communication which are masked because he presents as a very sociable and pleasant young man..... Mr X requires a lot of explanation using simple language in order to understand a particular concept and benefits from discussion being made very relevant to himself...Mr X would need support and advice from his carers, with information provided in an appropriate form, in order for him to make an informed decision on major life changing decisions".

9. Mr X was noted to be attending College S1 (with one of his carers providing transport as Mr X is unable to travel independently) and also to be in supported employment for 1 day per week. Mr X was also stated to attend a disability support group and to be an award winning swimmer. He enjoys local drama and football groups and attends a local disco. Mr X is noted to require practical support with all aspects of daily living/domestic activities. His carers support Mr X to manage his money and make appropriate financial decisions. Mr X needs constant prompting to use the shower and to wash himself properly as well as to clean his teeth, shave and wash his hands. He was found to need support in all areas of his life to ensure that he has the opportunity to gain in confidence and develop his independent living skills. In the "Summary of Need" section of the report, his needs in relation to decision-making and daily tasks were described as "substantial" and in respect of relationships, eating and drinking, physical and mental health and staying safe

his needs were found to be “critical”. His needs in respect of personal care were found to be “moderate”.

10. With regard to future plans the assessment notes Mr X’s interest in PlacementS1, described as a supported living and working environment on a farm near LocationS2 for those over 21. Of this option the assessor notes:

“However as PlacementS1 is not an option for Mr X until he is 21 and it is hoped during the next 3 years he may be able to significantly improve his daily living and social skills to such a level that he could consider alternative supported living schemes locally with an appropriate level of support to meet his needs”.

11. The assessment refers to an assessing capacity form completed on 13<sup>th</sup> September 2012 which concluded that Mr X has the capacity to decide where to live. The assessing capacity document dated 13<sup>th</sup> September 2012 has been provided with the copy documents and was also completed by Transition WorkerS1 who is described as “Transition Worker”. It is clear that this document was prepared in the light of the test of capacity set out in the Mental Capacity Act 2005 although the document refers simply to the 3 statutory principles that are outlined in “the act”. The conclusion was as follows:

“I asked Mr X where he wanted to live now that he was 18 and a young adult. Mr X was able to tell me verbally that he would like to continue living with CarerE1/S1 and CarerE2/S2 at the present time. He was happy living in CouncilS and had no desire to return to CouncilE. He was also able to tell me that in the future he would like to live independently and he hoped this could be in CouncilS where he had friends”.

12. It is understood that CouncilS dispute that Mr X has capacity to decide where to live relying on a report commissioned from ConsultantS1 Psychiatrist/Lead Clinician for the Community Learning Disabilities Team at NHS CouncilS. ConsultantS1 saw Mr X on 27<sup>th</sup> January 2014. ConsultantS1 notes that he had been asked to comment on Mr X’s capacity to make decisions about where he lives and whether he needs ongoing psychiatric input. With regard to the latter ConsultantS1 concluded that Mr X does not suffer from any current mental illness and does not require any ongoing psychiatric input. The remainder of the report is as follows:

“As a result of Mr X’s autism and learning disability he requires a great deal of support in his day to day life. CarerE1/S1 informed me that Mr X requires daily

prompting to maintain adequate levels of personal hygiene and also support with everyday tasks such as shopping and cooking. Mr X is unable to organise these tasks for himself. Mr X also has a visual abnormality and this combined with his learning disability and autism means that he is unable to travel independently. Mr X finds busy environments such as public transport or supermarkets extremely difficult to deal with.

Mr X can read and write. He attended (sic) learning support unit at High SchoolS1. Since leaving school he has attended supported courses at college in life skills and basic engineering. As yet Mr X has not had any employment.

Although Mr X can read he is unable to manage any official correspondence without extensive support from his carers.

In general my impression is that Mr X very much over estimates his abilities and has little understanding of his need for ongoing care and support. At present the decisions Mr X makes are supported by his carers and as far as I'm aware he has not showed any ability to make definite plans or decisions with regards to where he lives and his future care and welfare.

After reviewing Mr X today therefore I am of the opinion that he is not capable of making appropriate decisions with regards to where he lives and his future care and welfare”.

13. The agreed statement of facts dated 18<sup>th</sup> March 2014 notes that Mr X has expressed a wish “to remain with his foster parents” and that he no longer expresses an interest in gaining a place in PlacementS1. However, Mr X has expressed an interest in finding suitable supported accommodation in the future. Mr X's friends and associates are all in the area of CouncilS and his recreational activities are also there. It is further stated that Mr X's natural parents live in CouncilE and that he has not had any contact with them since 2007 nor has he expressed any wish to do so.

14. The agreed statement of facts records that CouncilE wrote to CouncilS on 23<sup>rd</sup> November 2012 raising the issue of Mr X's ordinary residence. CouncilS wrote on 8<sup>th</sup> March setting out their position. Both parties could not reach agreement and hence CouncilE requested that the Secretary of State determine the matter. CouncilS set out their submissions in a document forwarded to the Department of Health on 18<sup>th</sup> March 2014.

15. CouncilE has confirmed that they make a direct payment to Mr X's carers to fund his travel costs to and from college and his social activities. Such a

payment is made pursuant to section 57 of the Health and Social Care Act 2001 and regulations made there under in order to secure the provision of services under section 29 of the National Assistance Act 1948 and section 2 of the Chronically Sick and Disabled Persons Act 1970. It is assumed that such payment is made without prejudice to CouncilE's position that Mr X is ordinarily resident in the area of CouncilS.

### **The relevant law**

16. I have considered the agreed statement of facts, the additional documentation, the legal submissions provided by CouncilE and the letter from CouncilS setting out their position, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department<sup>2</sup> ("the Guidance"), the relevant provisions of the Children Act 1989 ("the 1989 Act"), the relevant provisions of the Mental Capacity Act 2005 and the Adults with Incapacity (Scotland) Act 2000 and the cases of *Shah v London Borough of Barnet* (1983) 1 All ER. 226 ("Shah") and *R v Waltham Forest London Borough Council, ex parte Vale*, (1985), *The Times*, 25<sup>th</sup> February ("Vale"). My determination is not influenced by what I understand to be the provisional acceptance by CouncilE of responsibility for funding services under Part 3 of the 1948 Act.

17. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 years 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. The Secretary of State's Directions under section 21<sup>3</sup> 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 or other persons who are in urgent need thereof".

18. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3, the person will be deemed to be ordinarily resident in the area in which he was ordinarily resident before the residential accommodation was provided. This means the local authority placing a person in residential accommodation in another local authority's area retains responsibility for that person.

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[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](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)

<sup>3</sup> LAC (93) 10

Section 26(1) of the 1948 Act provides that, instead of providing the accommodation themselves, local authorities can make arrangements for the provision of the accommodation with a voluntary organisation or any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. In particular, section 26(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 at any rates determined under the arrangements. Additionally, to satisfy subsection 26(3A), the local authority must be liable for any fees not paid by the service user. Residential accommodation provided by an organisation or person that is not a local authority will not fall within section 21 if it does not meet the requirements for arrangements for the provision of accommodation in section 26.

19. Section 29 of the 1948 Act and Directions made there under<sup>4</sup> impose a duty on local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

20. “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”.

21. Where a person lacks capacity but is not totally dependent on a parent or carer such as to be in a similar position to the facts in the case of Vale, the approach referred to in the Guidance as Vale 2 requires the decision maker to look at all the circumstances of the case, as required by Shah, but without requiring the person to have voluntarily adopted the place of residence.

## **Mental capacity**

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<sup>4</sup> LAC (93) 10

22. The test of mental capacity in England and Wales is to be found in section 3 of the Mental Capacity Act 2005. That section states that a person is unable to make a decision for himself if he is unable:

- a) to understand the information relevant to a decision;
- b) to retain that information;
- c) to use or weigh that information as part of the process of making the decision; or
- d) to communicate his decision (whether by talking, using sign language or any other means).

23. As the guidance on ordinary residence states at paragraph 27, under section 1(2) of the Mental Capacity Act 2005 it should always be assumed that adults have capacity to make their own decisions relating to their accommodation and care unless it is established to the contrary.

24. In Scotland the test for capacity is found in the Adults with Incapacity (Scotland) Act 2000. Section 1(6) of this Act provides that “incapable” means “incapable of—

- (a) acting; or
  - (b) making decisions; or
  - (c) communicating decisions; or
  - (d) understanding decisions; or
  - (e) retaining the memory of decisions,
- as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and “incapacity” shall be construed accordingly”.

### **The parties’ submissions**

25. CouncilE submits that Mr X has the capacity to decide where to live in accordance with the capacity assessment dated 13<sup>th</sup> September 2012 and has acquired an ordinary residence in the area of CouncilS. CouncilE points out that whilst Mr X was accommodated under the Children Act 1989 prior to his 18<sup>th</sup> birthday any presumption that he continues to be ordinarily resident in CouncilE is rebutted by the fact of:

- a) Mr X’s lack of any ties with CouncilE;
- b) Mr X’s now extensive ties with CouncilS;

- c) Mr X's own wishes and feelings which are to remain with his former foster parents in CouncilS and specifically that he does not wish to return to CouncilE; and
- d) Mr X's desire to eventually move to independent living in CouncilS.

26. CouncilS argue that Mr X lacks capacity, relying on the report of ConsultantS1, a psychiatrist, dated 27<sup>th</sup> January 2014 whose qualifications and experience it is submitted should carry some weight. CouncilS argue that if Mr X lacks capacity then his ordinary residence cannot have changed from CouncilE to CouncilS. On page 2 of the submissions CouncilS state as follows:

"If he does lack capacity, then his Ordinary Residence remains what it was prior to his moving to CouncilS as provided in section 24 of the 1948 Act as set out in paragraph (5), the last paragraph on page 2 of 5 in Counsel's opinion" (apparently referring to the Grounds Submitted by the Applicant, namely CouncilE.)

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

27. Prior to his 18<sup>th</sup> birthday Mr X was accommodated under section 20 of the Children Act 1989. He lived with his foster carers in CouncilE's area until that family relocated to locationS1 in the area of CouncilS in December 2010. CouncilE assessed Mr X following his 18<sup>th</sup> birthday and wrote to CouncilS since CouncilE considered Mr X was now ordinarily resident in the area of CouncilS. The duty to provide services under sections 21 and 29 of the 1948 Act arises where a person is ordinarily resident in the area of a local authority (or in urgent need in respect of section 21).

28. CouncilE, in its submissions, refers to section 105(6) of the 1989 Act which provides that in determining the ordinary residence of a child for any purpose of the 1989 Act, any period in which he lives whilst being provided with accommodation by or on behalf of a local authority shall be disregarded. CouncilE also refers to the rebuttable presumption contained within the Guidance (paragraphs 147 and 148) to the effect that the starting presumption is that a person remains ordinarily resident in the area which had responsibility for him under the 1989 Act, in this case CouncilE, and then goes on to argue that this presumption is rebutted as referred to in paragraph 20 of this determination.



29. CouncilS contends that Mr X's place of ordinary residence cannot have altered because Mr X lacks capacity. The reasoning for this assertion is unclear but CouncilS appears to rely on the application of section 24(5) of the 1948 Act. That provision only applies where section 21 accommodation has been provided or should have been provided by the authority of ordinary residence (the latter relying upon the approach taken by the Court in the case of R (Greenwich) v Secretary of State and Bexley (2006) EWHC 2576 (Admin). CouncilE does not make any payments in respect of Mr X's accommodation. It is clear that section 21 accommodation is not being provided by CouncilE. Therefore the deeming provision in section 25(5) of the 1948 Act does not apply. In any event, Mr X would appear to have personal care needs and as such any section 21 accommodation would need to be provided in a care home registered with the relevant regulator for England and Wales (see section 26 (1A) of the 1948 Act.

30. I have two conflicting reports as to Mr X's capacity to decide where to live. The decision in question here is whether Mr X had capacity to decide where he wished to live as the date of his 18<sup>th</sup> birthday in 2012. That is not a decision which relates to the exact nature of the accommodation nor does it require an understanding of the implications for which local authority would be responsible for funding a person's care.

31. If Mr X has capacity and had so as of 2012, when he turned 18 and his need for services under the 1948 Act potentially arose, I determine that he had voluntarily adopted CouncilS for settled purposes as part of the regular order of his life for the time being as required by the case of Shah. It is clear that he has no remaining ties with CouncilE save for his parents, however the last contact was in 2007. Mr X also attends educational, sporting and social activities in the area of CouncilS and has expressed a wish to remain living in CouncilS, ultimately in independent living accommodation. I find that any presumption that he remains ordinarily resident in the area responsible for him under the 1989 Act is rebutted.

32. If Mr X lacks the capacity to decide where to live then the approach known as Vale 2 is appropriate to determine Mr X's place of ordinary residence. This requires the decision maker to consider all the facts of a person's case, including physical presence in a particular place and the nature and purpose of that presence as outlined in Shah, but without requiring the person to have voluntarily adopted that place. When using this approach it is clear to me that Mr X has settled in the area of CouncilS where he is assisted to learn the skills requisite for more independent living and attends many activities in the

locality. He has a social network in the area. I am satisfied that he is ordinarily resident there.

33. Given that I have determined that Mr X is not ordinarily resident in Council E and was not so resident as of his 18<sup>th</sup> birthday or immediately before this date for the purposes of section 21 the 1948 Act, no duty to provide section 21 accommodation or section 29 services arises. The responsibility to provide social care services from 7<sup>th</sup> August 2012 would fall to Council S.

Signed on behalf of the Secretary of State for Health:

Dated: