

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

1. I have been asked by Council A to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with Council B.

The facts

2. The following information has been ascertained from the agreed statement of facts, legal submissions and other documents provided by the parties.
3. X is a 30 year old man born on XX.XX.1986. He suffers from spinal muscular atrophy as a result of which he requires assistance to perform most tasks of daily living. He does not suffer from any cognitive impairment and there is no dispute that he has (and had) capacity to decide where to live. The dispute concerns his ordinary residence in the period between 1 June 2013 and 26 September 2015.
4. Prior to 1 June 2013 X lived with his parents in the family home at Address 1, in the area of Council A ("Address 1"). His care needs were met by Council A, under provisions of the National Assistance Act 1948 and the Health and Social Care Act 2001¹, by way of direct payments used to fund a live-in carer. The agreed statement of facts records that Council A started to provide support for X in September 2005. The Independent Living Fund was also used to provide services to X.
5. I have had sight of a Care First Support Plan updated on 2 July 2012 which refers to X completing a six month training course at the Organisation 1 in Area 1 and having a temporary flat in Area 1. I understand that Council A continued funding X's care when he was in Area 1. It appears that X was back living at home with his parents when the Care First Support Plan was completed. The document states: "*I would like to have my own home so I can live independently again*". It notes that X had been on the housing waiting list at District Council 1 for many years and that it seemed unlikely he would be offered accommodation any time soon. It records a possibility that a house could be purchased for X with money from the estate of his recently

¹ The agreed statement of facts refers to the Community Care (Direct Payments) Act 1996. Relevant provisions of this Act were repealed on 1 November 2004 and replaced by corresponding provisions in the HSCA 2001.

deceased grandfather, and it states that his parents will support him with finding a suitable house and managing his finances when the time comes.

6. The agreed statement of facts records that, on 1 June 2013, X moved to and acquired a tenancy at Address2 in the area of CouncilB ("Address2"), visiting relatives in the CouncilA area from time to time. He began receiving housing benefit and council tax support from the DistrictCouncil2. It appears from documents I have seen that, in fact, X entered into the tenancy on 1 June 2013 but did not move until 6 June 2013.
7. I have not been provided with the original housing benefit application form, but I have had sight of a Housing Benefit and Council Tax Reduction review form, dated 24 October 2013. This records X's home address as Address2. It states that X started renting his home on 1 June 2013 but did not move there until 6 June 2013. It further records that X was employed by "Organisation2" in Area2 and that he started this job on 30 September 2013. I have not been provided with any details as to the nature or duration of the employment. The form was completed on behalf of X by his mother who, in the relevant part of the form, wrote: *"normally I do [X's] paperwork for him as its difficult for him to do it himself"*. The form includes a declaration, signed by X's mother, in the following terms: *"as far as possible I have confirmed with the person claiming that the answers I have written on this form are correct"*.
8. The date on which X first started receiving housing benefit and council tax relief is not clear but I have seen evidence of bank statements for June and July 2014 which show that he was receiving regular payments directly into his own bank account.
9. CouncilA undertook a review of X's care provision in January 2014. The review document records X's contact address as Address1, and it appears from the reviewer's summary that the venue for the review meeting was Address1, with both X and his mother in attendance. It records that: "[X] uses a temporary flat in CouncilB with the support from one person when he goes out to do some temporary work". It also states that "I want to use the bath hoist in my temporary flat in CouncilB, with support from one person, when I go back there for short term work".
10. Notwithstanding the description of the CouncilB flat as "temporary", on 8 May 2014 X entered into a tenancy agreement for Address2, commencing

on 1 June 2014, with a term of one year. I have been provided with the tenancy particulars but not a signed copy. I note that the agreed statement of facts says X signed the tenancy agreement. It is not clear whether any formal written tenancy agreement was in place prior to 8 May 2014 but there is no dispute that X was paying rent for the property continuously from 1 June 2013.

11. On 16 September 2014 CouncilA convened a meeting to review X's care and support. It appears that, at this stage, he was living back in the area of CouncilA. The review document gives his address as Address1. It also states that X "lives alone in a small CouncilA village". (I am unclear why it says that X lives alone as it is apparent from other documents that Address1 was the family home, and the review document notes that X's parents are often away, seeming to imply that the rest of the time they are with X). The review document records that: *"recently [X] was employed as a Communications Officer in CouncilB, but the daily commute from CouncilA proved to [sic] fatiguing for him to continue in this post"* (my emphasis). I have seen no other reference to employment in CouncilB or a commute from CouncilA to CouncilB. There is no evidence as to when X moved back to Address1 or how long he stayed there. There is no evidence that he sought to terminate his tenancy over Address2 or that he (or his mother) took any steps to inform the relevant housing benefit authorities that Address2 was no longer his main home.

12. The agreed statement of facts records that, in June 2015, CouncilA carried out a review of X's needs under the Independent Living Fund transfer arrangements and, during that review, it became apparent that X was in receipt of housing benefit for a property in the area of CouncilB. On 27 July 2015 CouncilA received confirmation from DistrictCouncil2 and Borough Council1 that X was in receipt of housing benefit for Address2, and had been since 1 June 2013. DistrictCouncil2 confirmed to CouncilA that they would not have paid housing benefit to X if X had not declared that his property in the area of CouncilB was his sole and main residence. CouncilB are not clear what involvement DistrictCouncil2 has with X given that the property is in CouncilB. CouncilA states that BoroughCouncil1 and DistrictCouncil2 entered into a shared service of revenue and benefits in December 2009. I have no reason to doubt that this is the case.

13. On 3 September 2015 CouncilA social services department contacted CouncilB by way of email requesting that they take over responsibility for meeting the care and support needs of X. The email states: *“It has come to our attention that [X] who was formally [sic] resident in CouncilA is now a resident in CouncilB and he claims housing benefit in the CouncilB area. I understand that X will now be living in CouncilB on a permanent basis. In line with ordinary residence guidance we wish to formally notify CouncilB that [X] is eligible for a social care assessment. Services from CouncilA will cease on 25/09/2015 and [X] and his mother would welcome contact from CouncilB to arrange an assessment date. CouncilA have funded 50 hours a week care for [X] via a direct payment, which CouncilB will need to continue with until an assessment is undertaken...”*
14. A further email from X’s social worker to CouncilB, dated 14 September 2015, noted that [X] had been seen as part of the ILF closure and a temporary package had been put in place. Attempts had been made to set up a full review but X and his mother wished to have questions answered with regard the Care Act and X’s new rights- *“it was during this process that the department found out that [X] was actually resident in CouncilB and was claiming housing benefit.”*
15. There is some dispute as to whether X continued to be registered with a GP in CouncilA. CouncilA assert that the relevant surgery has no record of X but I am told that, on 12 September 2016, a social worker from CouncilB telephoned the surgery and was told, in terms, that X had been registered at the surgery since 1994 and continued to be registered with a named doctor at the surgery. I accept, as fact, that this is the case. However, I note that I have no evidence as to how often (if at all) X saw his general practitioner in the relevant period.
16. On 16 September 2015, CouncilB carried out its own assessment of X. Its assessment gives X’s address as Address2. It records that X was currently working as a junior TV producer and notes that keeping in touch with family and friends is important. It appears that X commenced the job as junior TV producer in August 2015. A letter from CouncilB to CouncilA, dated 7 January 2016, records a conversation with X’s mother in which she said that *“[X’s] flat in CouncilB was temporary and that her son decided to make CouncilB his permanent home when he got his current job in August 2015”*. On 27 September 2015 CouncilB took over funding responsibility for X.

17. On 12 October 2015 CouncilA wrote to CouncilB seeking reimbursement from CouncilB of payments made to X in the period from 1 June 2016. This was followed up with a number of chaser emails and another formal letter on 23 December 2015. After further chasing, CouncilB responded substantively by letter dated 7 January 2016 (received by CouncilA on 26 January 2016) disputing that X was entitled to reimbursement as claimed on the basis that prior to August 2015 X's presence in CouncilB was temporary in nature.
18. CouncilA responded on 8 March 2016 reasserting their entitlement to reimbursement and raising the point that X had applied for and been granted housing benefit to which he would not have been entitled if the property in the area of CouncilB was not his sole or main residence. CouncilA requested a response within 14 days. However, in spite of repeated chasing, CouncilB did not reply until 3 May 2016 when they confirmed their position that X remained ordinarily resident in CouncilA between June 2013 and August 2015.
19. Thereafter, on 12 May 2016, CouncilA sent a draft statement of facts and bundle of documents to CouncilB for agreement with a view to referring the dispute to me. It is not necessary for me to set out all of the correspondence that followed, save to note that CouncilA had to chase CouncilB for replies on a number of occasions. The parties were unable to agree a statement of facts prior to 30 June 2016 when the referral was made. Following further correspondence, an agreed statement of facts and bundle of documents was submitted to me on 19 September 2016. Both parties put in legal submissions on 30 September 2016.

The Authorities' Submissions

20. CouncilA submits that X acquired ordinary residence in CouncilB on 1 June 2013. In short, it states that:
 - a. X voluntarily adopted CouncilB as his place of abode in June 2013.
 - b. Whether or not he intended to reside in CouncilB's area permanently is not relevant.
 - c. The date on which X became ordinarily resident in CouncilB's area is a question of fact and does not relate to when CouncilA notified CouncilB that X was resident in their area.

- d. It was a requirement of receipt of housing benefit that X normally occupied the property in CouncilB as his home.
 - e. The fact that X had been on the waiting list for a property in CouncilA since 2005, and the fact that he may have remained registered with a GP in the area of CouncilA, do not change the fact that from June 2013 CouncilB was X's place of abode.
21. CouncilB disputes that X was ordinarily residence in CouncilB prior to August 2015. It submits that:
- a. This referral is out of time and I should not consider it.
 - b. In any event, CouncilA failed to comply with its statutory duties to monitor and review the care package it provided to X thereby creating the issues that they are now trying to address.
 - c. X did not consider that he was in CouncilB for settled purpose until August 2015. CouncilA's own documents confirm that X's residence in CouncilB prior to August 2015 was of a temporary nature and his address is stated to be in CouncilA.
 - d. Any error in the payment of housing benefit is not a matter for CouncilB and the payment of such benefits cannot be determinative of ordinary residence.
 - e. CouncilB acted appropriately and speedily to manage the referral and the dispute is one of a monetary value rather than about meeting the care and support needs of X.

The Law

22. I have considered all the documents submitted by CouncilA and CouncilB; the provisions of Part 1 of the Care Act 2014 ("the 2014 Act") and the Care and Support (Disputes Between Local Authorities) Regulations 2014; the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it²; the Care and Support Statutory Guidance and the earlier guidance on ordinary residence issued by the Department³; and relevant case law, including *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46* ("Cornwall"), *R (Shah) v London Borough of Barnet*

(1983) 2 AC 309 (“*Shah*”), and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 (“*Mohammed*”).

23. “Ordinary residence” is not defined in the 1948 Act or the 2014 Act. Guidance has been issued to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

24. In *Shah*, 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...

...there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the “propositus” intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.”

25. In *Mohammed*, Lord Slynn stated:

“It is clear that words like “ordinary residence” and “normal residence” may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. 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. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves into a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation.”

Application of the law to the facts

26. Before turning to the substantive issue of X's ordinary residence, I must address CouncilB's submission that CouncilA are out of time to request a determination by me under section 40 of the 2014 Act. Regulation 3(7) of the Care and Support (Disputes Between Local Authorities) Regulations 2014 provides that, if authorities cannot resolve a dispute between themselves within four months of the date on which it arose, the lead authority must refer it to the appropriate person (me in this case). However, there is nothing in the regulations to suggest that I am precluded from considering a referral that is made after four months. I note that at least some of the delay in this case was caused by CouncilB's failure to respond promptly to correspondence and, in all the circumstances, I am prepared to consider the referral.
27. The substantive issue of X's ordinary residence between June 2013 and September 2015 is an issue of fact. The evidence available to me is limited. In particular, it is not possible to determine precisely how much time X spent at Address2 and at Address1 in the relevant period, and the details as to his employment are scant. I must do my best to determine the issue, on the balance of probabilities, based on the evidence that is before me.
28. It is not disputed that X rented Address2 from 1 April 2013. On the evidence contained in the housing benefit review form, I find that he moved there on 6 June 2013 (not 1 June 2013) and, shortly thereafter, he secured a job in Area2. The fact that he applied for and obtained housing benefit for Address2 is highly significant: this benefit is payable only in respect of a dwelling that the recipient "*normally occupies as his home*" (see Housing Benefits Regulations 2006, reg. 7).
29. As noted above, I have not had sight of the original housing benefit application. However, I am satisfied, on the balance of probabilities, that a

form must have been completed and submitted in terms indicating that Address2 was X's sole or main home. CouncilA state that they were told by DistrictCouncil2 that that this was the case and, whilst I have not been provided with the original correspondence, I have no reason to doubt that this is true. The standard housing benefit claim form requires applicants to state whether they have a main home somewhere else, and had X answered "yes" to this question he would not have met the eligibility criteria for receipt of the benefit.

30. I note that the housing benefit review form that is before me was completed by X's mother and it may well be that the original application was also completed by her. However, the fact that X did not complete this form, and may not have completed the original form, does not mean that these matters cannot be relied upon as evidence of X's intentions. It is clear that X's mother was heavily involved in his care and, importantly, she signed a declaration that, as far as possible, she had confirmed with X that the answers she had written on the form were correct. X does not have a mental impairment and the housing benefit was paid into his bank account. I have no reason to doubt that he was aware of the application.

31. In these circumstances, the fact that housing benefit was granted and continued to be paid to X is good evidence that Address2 was his main home, whether on a temporary or permanent basis. I agree with CouncilB that the payment of housing benefit alone cannot be determinative: the payments could have been made in error and the test for eligibility for housing benefit is not identical to the test of ordinary residence. However, the fact that X applied for, was granted, and continued to receive housing benefit is highly relevant.

32. I note that the assessment undertaken in January 2014 refers to X's "temporary flat" in CouncilA and his "temporary" employment. This is important. I disagree with CouncilA's assertion that X's apparent view that the accommodation was temporary irrelevant. However, it is not determinative. The question is whether X's purpose of living there had a sufficient degree of continuity to be properly described as settled. There is evidence that X moved, at least in part, to take up employment and various assessments record a wish to live independently. As noted above, housing benefit was claimed on the basis that Address2 was X's main home, and the fact that, in May 2014, he signed a tenancy agreement with a 12 month term suggests a significant degree of continuity.

33. It is significant that X was living back with his parents in September 2014.

However, there is no evidence as to how long he stayed at the family home and there is nothing to suggest that he took any steps to terminate the tenancy over Address2 or to contact the relevant benefits authority to inform them of any material change in circumstance (as would have been required if Address2 had ceased to be his main home).

34. The question of whether X remained ordinarily resident at Address1 or acquired ordinary residence at Address2 is a question of fact and degree. It is difficult to make an assessment without more detailed evidence as to how much time X spent at each address and the employment that he undertook. However, on the evidence available, I have concluded that, from 6 June 2013, X moved to Address2 voluntarily for settled purpose, in that he intended to make this his main home notwithstanding that he may have considered it temporary and notwithstanding that he spent some periods back with his parents.
35. The fact that he was on the housing register for a council flat in CouncilA does not affect my conclusion. Whilst he might have preferred to have his own flat in a different area, as a matter of fact, the only property over which he had a tenancy was in the area of CouncilB (see Mohammed, cited above). Similarly, X's continued registration with a GP in CouncilA, whilst relevant, does not outweigh the fact that he moved to CouncilB, entered into a tenancy agreement and sought and obtained housing benefit (which required him to be living there as his main home).
36. Finally, I note that CouncilB raise issue with CouncilA's failure to review X's care sooner and assert that they acted appropriately and speedily to manage the referral when it came. These matters are raised as grounds for resisting CouncilA's claim for reimbursement. However, they are not within the scope of my jurisdiction under section 40 of the 2014 Act which is limited to determining where a person is ordinarily resident.

Conclusion

37. For the reasons set out above, I find that X became ordinarily resident in Council B from 6 June 2013 when he moved to Address 2.