

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

1. I have been asked by CouncilA to make a determination under section 40 of the Care Act in respect of the ordinary residence of X. The dispute is with CouncilB.
2. For the reasons set out below, I consider that X is and has been ordinarily resident in CouncilB's area since September 1994.

The facts

3. The following information has been ascertained from the statement of facts, the legal submissions and the other documentation provided by both CouncilA and CouncilB.
4. X is a 55 year old woman (d.o.b. XX.XX.1961). She has Down's Syndrome and has developed early-onset dementia.
5. I am told that X previously resided with her mother in the area of CouncilB. After her mother died in April 1994, an assessment was undertaken by CouncilA's Social Services Directorate, which was attended by X's sisters. The assessment recorded that both X and her family "*would like her to move to a suitable accommodation on the CouncilB*", and that X had a learning disability, i.e. Down's Syndrome, but that she was otherwise generally fit and well. It was also recorded that X could meet her personal needs unaided, save that she required "*some help*" managing her finances, and that she would require some support and guidance in the initial stages following a move. A number of models of accommodation and care were discussed and considered, including residential care, an adult placement, small group with support, and a normal council or private housing situation, shared with other residents.

6. On 8 July 1994, a package of care was agreed by CouncilA's Caring for People Panel for 9 months, consisting of assistance with the transfer to a suitable house/flat on the CouncilB, support to enable X to take her place in the community, and support and guidance in her life and social skills.
7. The service commenced officially in September 1994, at which point X moved to Address1, in CouncilB, to live with her brotherA. I am told that X has her own tenancy, and that she has continued to reside at the Address1 property since moving there in September 1994. Her rent is paid by means of Housing Benefit, and she receives 20 hours floating support per week from Organisation1 to enable her to engage in activities outside of her home.
8. I have been provided with a copy of an assessment undertaken by SocialWorkerA on 10 October 2000, which identified X's needs as being for day support, and supported living accommodation. He recorded that X lived in her own flat supported by Organisation1 between Monday and Friday.
9. A supported self-assessment was undertaken in April 2015. It records, in summary, that:
 - 9.1. X has a significant learning difficulty and early onset dementia.
 - 9.2. X is able to make day to day decisions about her life without support, but that she needs support to make life changing decisions such as moving, and her health needs.

9.3. Her cognitive ability is beginning to decline as her dementia progresses, and her dementia is having a detrimental effect on her general wellbeing and her ability to live unsupported.

9.4. X is dependent on a considerable amount of support from her family, who are unable to maintain their current level of support due to their family and work commitments.

9.5. X likes to go out each day, and that she goes to knitting clubs, walks around town, shopping and for days out, but that she needs support for these activities and to visit her friends in the community.

9.6. As X's dementia was progressing quickly, she required supported living accommodation to meet her current and future needs, and that she would require additional support in her home in the meantime.

Correspondence between the local authorities

10. On 21 June 1995, CouncilA's SocialWorkerA contacted CouncilB's Social Service regarding how CouncilB might take responsibility for X's service. The referral was not considered urgent, and on 30 June 1995 CouncilA agreed to extend funding for X's service for one month.

11. On 1 August 1995, CouncilB wrote to CouncilA, declining to accept financial responsibility for the funding of X's package of care. Thereafter, CouncilA has continued to fund X's package of care.

12. On 12 May 2015, CouncilA wrote to CouncilB, setting out its position that applying the test in Shah X was ordinarily resident in CouncilB's area. CouncilA requested a response within 28 days.

13. Council B did not respond to that letter for some time. Further correspondence, seeking a response to the 12 May 2015 letter, was sent by Council A on 8 June 2015, 28 July 2015, 21 September 2015, 15 October 2015, 30 October 2015 and 17 November 2015.
14. On 7 December 2015, Council B wrote to Council A to the effect that *it* considered that X's ordinary residence should remain with Council A in light of the Supreme Court's decision in R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46. Council B also referred to an assessment undertaken by Council B, on the 24 January 2014, which was said to have identified that "*other people make most of [her] decisions for [her], [she] needs support to make more decisions. X has fluctuating capacity and can be more lucid on some days than others. Her ability to make decisions will depend on this.*" Council A has not disclosed or provided a copy of the 24 January 2014 assessment referred to in its 7 December 2015 letter.

The Authorities' Submissions

15. Council A submits that:
- 15.1. Applying the Shah approach, X's move to Council B was voluntary and for settled purposes.
- 15.2. There is no conclusive evidence that X lacked capacity at the time that the decision to move to Council B was taken.
- 15.3. While she now suffers from early-onset dementia, and requires additional support, this was not the case when X moved to Council B.
- 15.4. The Supreme Court's judgment in Cornwall is irrelevant, as the Care Act 2014 was not in force at the time that X moved to Council B and adopted Council B as her place of residence.

16. Council B accept that the deeming provisions under s. 24 of the National Assistance Act 1948 do not apply, but Council B nonetheless submit that X has remained ordinarily resident in Council A. In summary, Council B contend that:

16.1. The application of the test in R (Shah) v London Borough of Barnet (1983) 2 AC 309 requires that the person adopting the new residence have the mental capacity to do so.

16.2. As X's move pre-dated the coming into force of the Mental Capacity Act 2005, and there is no presumption of capacity in the common law, it is for Council A to establish that X had capacity, and there is no "direct evidence" of this.

16.3. The 1994 assessment suggests that X assented to a plan formulated by others, rather than having formulated a plan to move to Council B of her own initiative.

16.4. R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 is authority for the proposition that where a person lacks capacity, it would not be appropriate for the placing authority to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it.

Relevant law

17. I have considered the material parts of the 1948 Act, the 2014 Act, the 2016 Care and Support Statutory Guidance, and the cases of R (Shah) v London Borough of Barnet (1983) 2 AC 309, R v. Waltham Forest LBC, ex parte Vale (The Times Page 16 25 February 1985), Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184, R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, Wahid v Tower Hamlets [2002] EWCA Civ 287, R (Greenwich) v

Secretary of State for Health and LBC Bexley [2006] EWHC 2576 Admin, R (M) v Slough BC [2008] UKHL 52, Key v Key [2010] EWHC 408 (Ch), and R (Cornwall) v Secretary of State for Health [2015] UKSC 46.

18. As from 1 April 2015, the existing social care legislation under the National Assistance Act 1948 (“**the 1948 Act**”) was supplanted by the coming into force of material provisions of the Care Act 2014 (“**the 2014 Act**”), subject to transitional provisions. Under Article 2 of the Care Act 2014 (Transitional Provision) Order 2015, where support or services were provided to a person, or payments made towards the cost of support or services for a person immediately before the coming into force of the 2014 Act, then Part 1 of the 2014 Act has effect from 1 April 2016 (if not before).

19. Ordinary residence is not defined in the 2014 Act. The 2016 Care and Support Statutory Guidance suggests (at §19.12) that the term should be given its ordinary and natural meaning.

20. 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 a settled purpose as part of the regular order of his life for the time being, whether of short or long duration”

21. In R (Cornwall) v Secretary of State for Health [2015] UKSC 46 (a case concerning the ordinary residence of a person who lacked capacity at all material times), the Supreme Court held that the underlying purpose behind the deeming provisions in the legislation under consideration (namely the Children Act 1989 and the 1948 Act) was that “*an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it*” (at §54).

22. It is a general principle established by common law, and now codified in the Mental Capacity Act 2005 (s. 1(2)), that a person must be assumed to have capacity unless it can be established that a person lacks it.

Application of the law

23. Neither local authority has suggested that this is a case in which the deeming provisions under s. 24 of the 1948 Act, or s. 39 of the 2014 Act would apply. X's needs have been met for some time in her own property, with support from Organisation1.

24. I understand that in light of the progressive effects of X's dementia, some form of supported living accommodation is now recommended for X. Even if it could be said that X's needs can now only be met in one of the prescribed forms of accommodation under the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014/2828, this would not have the effect of changing X's ordinary residence on the facts of this case; the question under s. 39(1) of the 2014 Act (if it applied) would still be whether X was ordinarily resident in CouncilB or in CouncilA before the need for supported living accommodation arose.

25. I consider that X is and has been ordinarily resident in CouncilB since she moved there in September 1994, for the following reasons:

25.1. There is no evidence that X lacked capacity to make decisions as to where she should live at the time that the decision to move to CouncilB was made. I am satisfied on the information available that X did have capacity to decide to move to CouncilB.

25.2. The assessment undertaken in 1994 records that was X's wish, as well as that of her family, that she should move to CouncilB.

25.3. Whilst there is some more recent evidence of fluctuating capacity, it

relates to a point in time at which X had already been residing in CouncilB, in her own flat, for some 20 years.

25.4. I consider that the regular order of X's life is in CouncilB, where she has friends and an established social life in the community.

25.5. I consider that the appropriate test is that set down in Shah. This is not a case which the deeming provisions apply, nor is it a case in which X lacked capacity at the material times.

25.6. Applying Shah, and having regard both to the evidence of X's wish to move to be closer to her family in CouncilB, and the nature and quality of her 20 years' residence in CouncilB.

Conclusion

26. I am satisfied that X voluntarily adopted CouncilB as her place of residence for settled purposes as part of the regular order of her life when she moved there in September 1994.