

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

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

The facts

2. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by the parties.
3. X is a 73 year old woman (DOB XX.XX.43) with a learning disability and hemiplegia. She has been assessed as requiring a range of care and support services. I am told that between the ages of 17 and 50 she lived in HospitalC near CouncilC. When she was 50 years old she moved to Address1B, in the area of CouncilB. I understand that, at the time, this placement was a registered care home.
4. The circumstances of the move to Address1B are not entirely clear. I have been provided with a copy of a contract between CouncilB and CouncilA PCT, dated 5 April 2007, in which CouncilA PCT are identified as the placing authority. The agreement appears to be in standard terms, under which CouncilB offered to other authorities bed spaces and accommodation units, to which it had rights under block contracts, where it did not require them. The contract included the following clauses:

“3.2 In the case of the Placing Authority assessing that the Service User requires Supported Living the Council shall procure a package of care under their existing contractual arrangements suitable to the Service User’s assessed needs. The Council [CouncilB] shall also nominate the Service User to the Accommodation Provider and shall use its best endeavours to secure acceptance by the Accommodation Provider of the Service User.

5.4 In the event of the Placing Authority assessing that the Service User requires a change of provision (from registered care to Supported Living or vice versa) the Council shall endeavour to accommodate such change and provide the new placement. If this can be accommodated and the Placing Authority agrees that the accommodation is suitable

then the contributions to that of both the Service User and the Placing Authority shall be reviewed accordingly always provided that the total fee payable to the Council under this Agreement in respect of the placement shall be met.”

5. It appears that, at some point prior to 2010, proposals were advanced for Address1B to be redeveloped as a supported living placement. I have been provided with a string of emails between CouncilA and CouncilB sent in March and April 2010. On 8 March 2010 CouncilA wrote to CouncilB requesting a copy of the placement agreement relating to X. In an email sent at 14:40 CouncilA stated that: *“we are not planning to move X, but to transfer the payment of her placement to the local authority”*. CouncilB sought clarification as to whether they were seeking to transfer X’s funding to CouncilA or to CouncilB. CouncilA replied at 14:45 that: *“we are completing the s.256 revenue transfer from NHS AreaA to CouncilA, so responsibility for X will come over to CouncilA and council will become responsible for the assessment and funding for this client”*.
6. An internal CouncilB email sent at 15:55 on 8 March 2010 suggests that a contractual variation or new placement agreement would be required. From the documents I have seen it appears that there was some further correspondence between CouncilB and CouncilA on 30 March 2010 concerning the terms on which X would be placed. An email from CouncilA at 16:52 suggests that the current placement should *“remain within the block arrangement whilst the re-provision occurs”* but that CouncilA would then *“seek to have an individual spot contract with the support provider once the re-provision has been completed”*. Subsequent internal CouncilB emails dated 9 and 13 April indicate that CouncilB did not agree CouncilA’s suggestions, but I have not been provided with any documents that evidence what ultimately was agreed.
7. From the documents I have seen, it is not clear whether any formal agreement was ever reached. However, I note that in its legal submissions CouncilA appears to accept that X’s placement continues to be governed by the contractual agreement dated 5 April 2007.
8. Address1B formally de-registered as a care home at some point prior to 2 April 2012 when X signed an assured non-shorthold tenancy agreement. The agreement does not include any care provision and there is nothing to suggest that CouncilA accepted any liability to meet, or make up any shortfall

in, the rent that was payable under the tenancy. It is understood that X's rent is met through housing benefit.

9. On 2 January 2014 CouncilA wrote to CouncilB setting out its position that X had become ordinarily resident in CouncilB's area. There followed lengthy correspondence which it is not necessary for me to set out here. CouncilB's position was articulated most fully in a letter dated 21 January 2015 in which it asserted that CouncilA remained responsible for X under the terms of the contract set out above and expressed doubt as to whether X had capacity to make the decision to enter supported living.
10. The matter was referred to me by CouncilA on 15 April 2016 under cover of a letter enclosing a draft statement of facts, legal submissions and other documents. By letter dated 5 July 2016 CouncilB confirmed that it did not intend to file legal submissions. The statement of facts was not finally agreed between the parties until 27 January 2017.

The Authorities' Submissions

11. CouncilA submits that X became ordinarily resident in CouncilB when her placement deregistered and she signed a tenancy agreement. In short, CouncilA's case is that:
 - a. X entered the accommodation in CouncilB "voluntarily" and for "settled purpose";
 - b. After the placement deregistered the statutory deeming provision did not apply;
 - c. The contractual provisions relied on by CouncilB have no bearing on X's ordinary residence; and
 - d. In any event CouncilA does not have any continuing responsibility to fund X's care under the contract as:
 - i. The contract does not expressly exclude the operation of adult social care law, and the same should be implied into the contract by custom and practice; and
 - ii. Any agreement to continue funding the placement once it became a supported living placement was not supported by

consideration as, from that point, Council B was legally obliged to provide the placement.

12. Council B did not file formal legal submissions. The position they adopted in correspondence prior the referral is set out above.

The Law

13. I have considered all the documents submitted by Council A and Council B; 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 (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“*Shah*”), *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 (“*Quinn Gibbon*”) and the authorities cited by Council A.

14. This dispute spans the coming into force of the 2014 Act. It is, therefore, necessary for me to set out below the law as it applied both before and after relevant provisions of the 2014 Act came into force.

Transitional Provisions

15. 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. Article 6(1) states that any person who, immediately before the relevant date (i.e. the date on which Part 1 of the 2014 Act applies to that person), is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the 2014 Act. Article 6(2) provides that the deeming provisions under section 39 the 2014 Act have no effect in relation to a person who, immediately before the relevant date, is being provided with supported living accommodation, for as long as provision of that accommodation continues.

The 1948 Act

16. The following provisions were applicable when X moved to Address 1B and when she signed the tenancy agreement.

Accommodation

17. Section 21 of the 1948 Act empowered 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.
18. By virtue of section 26 of the 1948 Act, local authorities could, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who was not a local authority. Certain restrictions on those arrangements were included in section 26. Firstly, subsection (1A) required that where arrangements under section 26 were being made for the provision of accommodation together with personal care, the accommodation had to be provided in a registered care home. Secondly, subsections (2) and (3A) stated that arrangements under that section had to provide for the making by the local authority of payments in respect of the accommodation at rates determined by or under the arrangements, and that the local authority had to either recover from the person accommodated or agree with the person and the establishment that the person accommodated would make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).
19. In *Quinn Gibbon* (cited above) Lord Steyn held that:

“...arrangements made in order to qualify as the provision of Part III accommodation under section 26 must include a provision for payments to be made by the local authority to the voluntary organisation at the rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and a necessary part of the arrangements referred to in subsection (1) . If the arrangements do not include a provision to satisfy subsection (2) then residential accommodation within the meaning of Part III is not provided and the higher rate of income support is payable.”

The relevant local authority

20. Section 24(1) stated that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act was, subject to further provisions of that Part, the authority in whose area the person was ordinarily

resident. The Secretary of State's Directions provided that the local authority was 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*".

The deeming provision

21. Under section 24(5) of the 1948 Act, a person who was provided with residential accommodation under Part 3 of the Act was deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

Welfare services

22. Section 29 of the 1948 Act empowered local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

The 2014 Act

23. The above sections of the 1948 Act were repealed and replaced by relevant parts of the 2014 Act, subject to the deeming provisions set out above.

Duty to meet need for care and support

24. Section 18 of the 2014 Act imposes a duty on local authorities to meet the assessed eligible needs for care and support of adults ordinarily resident in their area (or present in their area but of no settled residence). Examples of what may be provided to meet such needs are set out in section 8. These include provision of accommodation in a care home or in premises of some other type.

The new deeming provisions

25. Section 39(1) provides that:

"Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident—

(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or

(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.”

26. The accommodation specified in the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 includes care home accommodation, shared lives accommodation and supported living accommodation.

Ordinary Residence

27. “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.

28. In Shah (cited above), 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”

Application of the law to the facts

29. On the evidence before me, applying Shah, there can be little doubt that X voluntarily adopted the placement at Address1B for settled purpose, both when she first moved there and when it converted to supported living. The placement is X’s home where she has lived for many years. Whilst CouncilB raised some concerns in correspondence about whether X had capacity to make decisions about her residence, the assessment undertaken on 27 November 2014 indicates that she is able to verbally communicate her needs and views, and it raises no issue about her capacity. The concerns outlined by CouncilB in correspondence are not sufficient to rebut the assumption of capacity under section 1 of the Mental Capacity Act 2005.

30. Further, from 2 April 2012 when X signed the tenancy agreement, the deeming provision under section 24 of the 1948 Act could not have applied. The accommodation was funded by way of housing benefit and (on the evidence I have seen) neither local authority had any responsibility to pay, or make up any shortfall in, any rent. Care was provided separately from the accommodation. In these circumstances, the accommodation was not provided under Part 3 of the 1948 Act.
31. The new deeming provision under section 39 of the 2014 Act does not apply because X was already in supported living at the relevant date (see the transitional provisions cited above).
32. It follows that on an ordinary application of the law to the facts, X became ordinarily resident in the area of Council B at least from April 2012 when she signed the tenancy agreement. I have considered whether the contract between Council B and Council A PCT- which may still govern the placement- could affect this position. I have concluded that it could not. Ordinary residence is a question of fact concerned centrally with the circumstances of the relevant individual. The essential character of X's residence in the area of Council B is unaffected by any on-going contractual dispute in respect of liability for the costs of X's care. The important point here is that X now has her own tenancy in the area of Council B, which she entered into voluntarily and for settled purpose. The accommodation is separate legally from the care and is funded by X herself through housing benefit.

Conclusion

33. In these circumstances, I conclude that X is, and has been since 2 April 2012, ordinarily resident in the area of Council B. It is not necessary for me to express a concluded view on whether Council A has any on-going contractual liability to Council B, and it would not be inappropriate for me to do so. A contract cannot alter the underlying statutory duties.