

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 2014 Act (“the 2014 Act”) of the ordinary residence of X. The dispute is with CouncilB.
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.
3. Section 40 of the 2014 Act provides that any dispute about where an adult is ordinarily resident for the purposes of Part 1 of that Act is to be determined by the Secretary of State (or, where the Secretary of State appoints a person for that purpose, by that person). The Care and Support (Disputes Between Local Authorities) Regulations 2014 were made under section 40(4) of the 2014 Act and apply to this dispute.

The facts

4. X is a 46 year old lady (dob XX XX 1972). She has a mild learning disability and some visual impairment. X can complete many tasks of daily living independently or with minimal prompting. She has a care package comprising 20.5 hours support per week. She is physically mobile and at all material times has had the capacity to make decisions about where she should live and the care and treatment that she should receive.
5. In 1991, CouncilA placed X at Address1B, CouncilB. At that time it was a residential home run by Scope. X moved briefly from Address1B to another residential home run by Scope known as Address2B, CouncilB.

6. In late 1999 X moved from Address2B to Address3B, CouncilB. It is not clear from my papers whether she was married at that time – there are references to her moving into that placement as part of a married couple, but also to her getting married on 24 June 2001. It appears that nothing turns on this ambiguity, however, Address3B is a two bedroom bungalow. It used to be normal local authority housing stock, but Scope registered it with the CQC as a residential care home for two people (X and her husband). It is not clear whether Scope owned, or leased, 7 Address3B during this period, or whether it remained in local authority/housing association ownership and control.
7. On 14 October 2015, X's husband passed away. From the papers, it appears that X has lived alone at Address3B since that time.
8. At a case management meeting on 15 August 2016, X expressed a capacitous wish for her accommodation to become registered, and that she continue to live in the same property but with her own tenancy and care package.
9. On 11 December 2016, Address3B was de-registered as a residential care home and reverted to normal housing stock. X signed a tenancy.

Interim support

10. CouncilA has been meeting X's needs since the dispute arose, on a without prejudice basis. It has met those needs by arranging and funding the care and support set out in X's care and support plan dated 18 August 2016. I confirm that the fact that CouncilA has been acting as leading authority has had no impact on my ultimate conclusion.

The parties' submissions

11. Both parties accept that this case turns on the question of whether X's current accommodation is supported living, and is therefore "specified accommodation" for the purposes of the deeming provision in section 39 of the Care Act 2014. If it is, then CouncilA accepts that there is an unbroken chain of accommodation in

respect of which X will be deemed to have remained ordinarily resident in CouncilA. CouncilB accepts that if the accommodation is not specified accommodation then the deeming provision does not apply and X will have acquired ordinary residence in its area.

CouncilA's submissions

12. CouncilA contends that Address3B is not specified accommodation for the purposes of section 39 of the Care Act 2014, in that it is not supported living. This is on the following basis:

- a. X's care plan does not specify that her needs can only be met in "specified accommodation";
- b. Scope's invoices describe the care provided as domiciliary care rather than personal care. Individual1, service manager at Scope, has confirmed that what is being provided is domiciliary care;
- c. X has capacity to enter into her own tenancy agreement;
- d. CouncilB's reliance upon the entry from the Extra Care Housing and Assisted Living Directory to the effect that Address3B is supported living accommodation is misplaced. That entry was created on 14 May 2015, and so pre-dates the period with which this determination is concerned. In any event, the accuracy of that entry is to be doubted because it is an agreed fact that as at 14 May 2015, Address3B was registered as a care home.

13. CouncilA also points to the fact that X decided for herself that Address3B should be deregistered as a care home and that she should have her own tenancy. CouncilA contends that, as such, paragraph 19.59 of the Care and Support Statutory Guidance, which refers to a situation in which a provider has decided to de-register a care home, should not apply to this situation.

14. Additionally:

- a. Address3B is not specifically designed or adapted for occupation by adults with needs for care and support. It is a normal 1930s bungalow on a normal

- street. It used to be local authority housing stock and is no different from any other housing within that stock;
- b. CouncilA is not aware of any criteria restricting residence at Address3B to adults with care and support needs. For example, there is nothing in the tenancy agreement to that effect;
 - c. Personal care is not available 24/7 on an “as required basis”. It is only available via the care package of 20.5 hours of scheduled care per week provided by the local authority. If a new resident with a different care package moved into the property, then the care they would receive would be the different level of care specified in their care package. There is no underlying care and support provision as such;
 - d. CouncilA’s social workers have visited the property and formed the view that in their professional judgment it is not supported living.

15. CouncilA has also adduced a witness statement of Y, a senior social worker with 28 years’ experience of working in social care in voluntary, housing association, and local authority settings. The statement is signed with a statement of truth. In it, Mr Y sets out as follows:

- “3. I visited X’s home at Address3B, CouncilB, on 11/01/2018 [sic]
4. Address3B is a 1930s bungalow, which was originally Local Authority housing stock. It is no different to any other social housing stock and is not specifically intended as supported living accommodation. These properties are generally allocated to people aged 55 and over but they are not designed for adults with care and support needs, other than that they are bungalows.
5. I am not aware of any reason why Address3B could not be occupied by someone without care and support needs.
6. There is no personal care available at the property. Address3B has no room for on-call staff and is not part of a shared ‘warden’ style system.
7. X does not have access to any care on an unplanned basis. If X had an accident or emergency, she would have to call an ambulance.
8. X would receive the same commissioned support whether she was living at Address3B, at an address around the corner or in her own, owner-occupied accommodation. X’s current tenancy is not linked to the support that she receives.”

CouncilB’s submissions

16. Council B accepts that, if the case were to be determined by reference to *Shah*, there could be no doubt but that X had adopted Address 3B as her place of ordinary residence for voluntary and settled purpose. Council B submits, however, that Address 3B is supported living accommodation and has all the features of supported living. It says that its essential character as supported living accommodation did not change when it de-registered and its management changed.
17. Council B also makes submissions about the applicability of section 39 of the Care Act 2014, in the context of the character of X's placement at the time of the coming into force of the 2014 Act. However, I do not understand there to be any dispute between the parties that section 39 would be applicable, provided that Address 3B is properly to be regarded as supported living accommodation.
18. I invited both parties to make further submissions as to whether Address 3B was supported living, by particular reference to the legal tests and thresholds set out in Regulation 5 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014. I have already incorporated Council A's additional submissions into my summary of its legal arguments as set out above. Council B also made additional submissions, but these did not materially add to the arguments that I have already summarised above.

Legal framework

The Law

19. I have considered all the documents submitted by the two authorities, the provisions of Part 1 of the 2014 Act and the Regulations made under it, the guidance on ordinary residence issued by the Department, and the cases of *R (Cornwall Council) v Secretary of State for Health and Social Care* [2015] UKSC 46 ("*Cornwall*"); *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Greenwich) v Secretary of State for Health and Social Care 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*").

The Care Act 2014

The relevant local authority

20. Section 18 of the Care Act provides that a local authority, having made a determination that an adult has needs for care and support that meet its eligibility criteria, must meet those needs if, amongst other things, the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence.

The deeming provision

21. Section 39 of the Care Act 2014 provides:

“39 Where a person's ordinary residence is

(1) 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.

22. Regulation 2(1) of the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014) provide, as amended, that for the purposes of section 39(1) of the Care Act 2014, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation.

23. Regulation 5 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 provides as follows:

5 – Supported living etc

(1) For the purposes of these Regulations “supported living accommodation” means

(a) accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and

- (b) accommodation which is provided –
 - (i) in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose); and
 - (ii) in circumstances in which personal care is available if required.
- (2) For the purposes of paragraph (1)(b) personal care may be provided by a person other than the person who provides the accommodation.

24. Paragraph 19.48 of the Care and Support Statutory Guidance further elaborates on the meaning of supported living as being either:

- “- specialist or adapted accommodation: this means accommodation which includes features that have been built in or changed to in order to meet the needs of adults with care and support needs. This may include safety systems and features which enable accessibility and navigation around the accommodation and minimise the risk of harm, as appropriate to the individual
- accommodation which is intended for occupation by adults with care and support needs, in which personal care is also available, usually from a different provider.”

Ordinary Residence

25. “Ordinary residence” is not defined in either the 1948 or the 2014 Acts. The Department of Health and Social Care 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.

26. 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”

27. The courts have considered cases of temporary residence on a number of occasions, including in *Levene, Fox, Mohamed and Greenwich*. In *Fox*, the Court

of Appeal considered *Levene* and Lord Denning MR derived three principles: “*The first principle is that a man can have two residences. ... The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence.*” Lord Justice Widgery commented that “*Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence*”. The Court of Appeal found that the students were resident at their university address.

28. In *Mohamed*, Lord Slynn said “*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 to 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. In a sense it is ‘shelter’ but it is also where he resides.*”

Application of law to the facts

29. CouncilA submits that as a matter of fact the accommodation is not specifically designed or adapted for occupation by adults with needs for care and support. I have the signed witness statement of Y attesting to this fact. CouncilB does not make any submissions about this, nor has it provided any evidence of the same. As such, I accept CouncilA’s evidence and submissions that Address3B does not satisfy the requirement in Regulation 5(1)(a) of the 2014 Regulations.

30. As to Regulation 5(1)(b)(i) of the 2014 Regulations, CouncilA describes Address3B as “local authority housing stock”. X’s tenancy appears, however, to be with

Housing Group Limited, a housing association, rather than with the local authority. Either way, however, it appears that Address3B is normal social housing stock in the sense that in principle it appears to be available to anyone who needs it. There is no evidence that it is reserved only for adults who are in need of care and support. When X dies or moves on, Address3B will presumably go back into the ordinary pool of available housing, to be allocated to whomever requires it, whether or not they have an assessed need for care and support for the purposes of Part 1 of the Care Act 2014. As such, Regulation 5(1)(b)(i) of the 2014 Regulations would not appear to be made out.

31. Finally, as to Regulation 5(1)(b)(ii) of the 2014 Regulations, it does not appear that the accommodation is provided “in circumstances in which personal care is available if required”, any more than such care can be made available by way of care package in any other ordinary household or home in the UK. In my view, regulation 5(1)(b) as a whole must be describing a situation which is in some way different from an ordinary arrangement whereby someone lives in their own home and receives planned domiciliary care from an external care agency via a care package, otherwise it would deprive the concept of “supported living” of any real meaning. The reference in Regulation 5(1)(b)(ii) to accommodation being provided in a particular set of “circumstances”, when read in context with the whole of Regulation 5(1)(b), connotes in my view some form of recognisable, cohesive, scheme whereby the living arrangements and the personal care arrangements go in some sense hand in hand, even when not provided by the same organisation. It does not appear that X’s living and care arrangements can be described in this way.

32. I do not regard the history of Address3B being registered as a two-person care home as being of any particular significance. Regulation 5 of the 2014 Regulations requires me to consider the situation as it is now, by reference to the particular tests set out in that provision, which does not include a consideration of what might have been the situation in the past.

33. Nor do I regard the online descriptions of Address3B to be of particular significance. It is for the Secretary of State to decide what does and does not meet

the technical legal definition of supported living for these purposes, by applying the objective tests in Regulation 5 of the 2014 Regulations. I do not know why the online entry described Address3B as it did, but it could very easily have been the result of an error, a misunderstanding, or a non-technical use of the phrase “supported living”. Either way, in the circumstances of this case, it does not in my view provide a reliable guide to whether Address3B meets the Regulation 5 description of supported living.

34. Finally, the parties have both made various contentions about X’s capacity, her wishes, and the *Shah* principles. It is quite clear on the available evidence that X has adopted CouncilB as her place of residence with voluntary and settled intent, having lived there since 1991, a period of almost 30 years. It is the place where she lived her married life. There is no evidence of any ongoing connection to CouncilB, nor of any intention on the part of X to return there after so long. Indeed, even CouncilB appears to accept that this was the case (as set out at paragraph 27 of its legal submissions).

Conclusion

35. In light of my findings above, my determination is that X is to be treated as being ordinarily resident in CouncilB, since 11 December 2016.