

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 17 2012)

1. I am asked by CouncilA and CouncilB to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Ms X.

The facts of the case

2. The following information has been ascertained from the joint statement of facts prepared by the two authorities involved in the dispute and the copy documents supplied. Ms X was born on xdate 1933 and has a learning disability. She attended a special school in her earlier years. She lived with her mother, on whom she was dependent, until her mother’s death at which point Ms X moved to sheltered accommodation in CouncilB’s area.

3. On 21st June 2011 Ms X was admitted to JHospital with confusion and a urinary tract infection. On 4th July 2011, she was transferred to the Rehabilitation UnitK funded by the NHS. Whilst in the Rehabilitation UnitK discussions took place relating to where Ms X should reside in future. A mental capacity assessment completed on 24th August 2011 by CouncilB concluded that Ms X does not have the capacity to decide where she wishes to live. Ms X said on the one hand that she did not want to return to her flat in CouncilB’s area and that she didn’t like the warden and then spoke of popping back there and that she did like the warden. She also spoke of wishing to live in TownA1 (in CouncilA) near her family whereas notes suggest that prior to her hospital admission she did not want contact with her family and did not want them to know about her hospital admission. She was observed to be very comfortable with her nephew and niece when they came to visit.

4. The same FACE overview assessment completed by CouncilB in relation to a determination of best interest notes that:
“The staff at the Rehabilitation UnitK feel that Ms X is at high risk of self neglect and would be unable to manage even with support services in her previous home environment. They feel that she requires residential placement so that her needs can be monitored 24 hours a day. They also feel that it would benefit her to be near her family in TownA1 (in CouncilA)”.

5. The pros and cons of the various options were noted and the summary states that a decision would need to be made in Ms X’s best interests with consultation from social services and the family who were keen for her to move to TownA1 to be near them.

6. A further assessment completed on 3rd November 2011 found as follows:
“Although she is physically well with independent skills with mobilising and transfers, Ms X does not initiate any activity or self care. Ms X had demonstrated a high level of self neglect prior to admission with a history of declining services.

The nephew has applied for sheltered housing in TownA1 where he lives and where Ms X’s brother has a sheltered flat.

It does seem that Ms X will have the best opportunity of a successful return to independent living in sheltered housing when she has the full support promised by her family”.

7. A diary note for 2nd September 2011 within the diary record of the Social Services Department of CouncilB records that considering the high level of concern for Ms X’s safety, her request not to return to her home address and the fact of her nephew arranging sheltered housing in TownA1 (in CouncilA), an interim placement would be requested. There then follows some diary entries regarding the location of the residential interim placement with Ms X’s nephew querying why this couldn’t be in TownA1 (in CouncilA). A diary entry for 19th September 2011 records that the Higher Needs Panel would not agree to an interim placement in TownA1 (in CouncilA). It is understood that CouncilB refused because they wished to monitor Ms X closely to be certain that sheltered accommodation would safely meet her needs (paragraph 5 of CouncilB’s submissions).

8. Ms X moved to LCare Home in TownA1, CouncilA on 22nd September 2011 and resides there to date.

The relevant law

9. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department and the case of R (Greenwich) v Secretary of State and Bexley [2006] EWHC 2576 (“Greenwich”). My determination is not influenced by the provisional acceptance by CouncilA of responsibility for funding services under Part 3 of the 1948 Act.

10. Section 21 of the 1948 Act empowers 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 and attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State’s Directions under section 21 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 and other persons who are in urgent need thereof”.

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

12. Section 24(6) of the 1948 Act reads as follows:

“For the purposes of the provision of residential accommodation under this Part, a patient (“P”) for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS

accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area”.

13. By virtue of section 26 of the 1948 Act, local authorities can, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

The parties' submissions

14. CouncilB states that its intention had been to return Ms X to her original accommodation or to extra care sheltered accommodation. It asserts that its higher needs panel decided to offer an interim residential placement in its area with close monitoring until sheltered accommodation could be found in CouncilA, which was the wish of Ms X's nephew. The close monitoring was considered to be essential as there was concern that a protracted stay in residential accommodation would result in Ms X losing the ability to live independently. CouncilB considered that this close monitoring could not be achieved in CouncilA. CouncilB argue that this was a clear and justified reason for refusing to comply with the preferred choice of the nephew for interim accommodation in CouncilA pursuant to the National Assistance Act (Choice of Accommodation) Directions 1992. It is further submitted that the placement of Ms X in a residential care home in CouncilA was arranged privately by the nephew without its involvement, agreement or assistance.

15. CouncilA draws attention to the mental capacity assessment dated 24th August 2011 which recorded the view that Ms X was at risk of self neglect if returned home even with a substantial care package. It contends that CouncilB should have arranged residential accommodation pursuant to section 21 of the 1948 Act and should have complied with the National Assistance Act (Choice of Accommodation) Directions 1992 by arranging that accommodation in CouncilA, near to Ms X's family.

The application of the law

16. It is not for me to determine whether a person qualifies for the provision of accommodation under section 21 of the 1948 Act. That decision is for the local authority and ultimately the courts by way of judicial review. The relevant criterion for section 21 is whether the care and attention which a person requires is available otherwise than by the provision of residential accommodation. If it is not, then residential accommodation must be provided. It is clear from reading the papers that

an interim residential placement was being sought pending the location of suitable sheltered housing in the CouncilA area. According to the diary record a registered care home in CouncilB's area, QHouse, was contacted regarding availability and there is also a note recording a conversation with the nephew to the effect that he thought Ms X had resided at this home in the past and "hated it".

17. It is not clear to me whether concerns about Ms X's ability to cope in sheltered housing remained (it seems that they did given CouncilB's wish to monitor Ms X closely to be satisfied that sheltered accommodation would safely meet her needs) and whether this could have been one reason for a period in a residential care home or it was just viewed as a temporary stop gap until suitable sheltered accommodation in CouncilA could be found. However, I also note the concern by CouncilB for close monitoring to reduce the risk of permanency.

18. In order to determine ordinary residence, I must proceed on the basis that section 21 accommodation was clearly in the process of being arranged by CouncilB. However, it is also clear that the nephew did not understand or agree with the decision for the interim placement to be in the CouncilB's area but rather wanted a placement in CouncilA. I am not convinced that a perceived absence of close monitoring was an adequate reason not to comply with the family's choice and imagine that arrangements could have been made to ensure sufficiently close monitoring in CouncilA.

19. There is a CouncilB Social Services Department diary record for 20th September 2011 which notes:
"T/c to LCare Home residential home....TownA1 (in CouncilA)...spoke with L. She confirmed that they have a vacant room and are waiting to hear from Ms X's nephew if he is going to take it". Ms X did move into this home on 22nd September 2011 and is funded by CouncilA on a without prejudice basis.

20. CouncilB allege that because this placement was privately arranged, it is not the provision of section 21 accommodation. However, in Greenwich, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (see paragraph 55 of the judgment). In any event, CouncilA have paid the care home fees on a without prejudice basis since admission. I will therefore determine Ms X's ordinary residence on the day before Ms X moved into the residential care home in CouncilA, being 21st September 2011 on the basis that section 21 accommodation should have been provided. On this date, Ms X resided in the Rehabilitation UnitK which is funded by the NHS. In accordance with section 24(6) of the 1948 Act, Ms X retains her ordinary residence before she entered the Unit and JHospital. The parties agree that prior to her move to LCare Home, Ms X was ordinarily resident in the area of CouncilB.

21. I therefore determine that on 21st September 2011, Ms X was ordinarily resident in the area of Council B and has remained so by virtue of the deeming provisions in sections 24(5) and 24(6) of the 1948 Act.

Signed

Dated