

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 11 2012)

1. I am asked by CouncilE1 (England) to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Ms X for the purpose of Part 3 of that Act. The period for which Ms X’s ordinary residence is in dispute is from 22nd September 2009, the date Ms X moved to CouncilS1’s area (in Scotland) until the present time.

Jurisdiction

2. The Secretary of State and the Scottish Ministers have entered into a Memorandum of Understanding signed by them on 16th and 13th December 2011 respectively. The Memorandum applies from 16th December 2011. Paragraph 3 of the Memorandum provides for the Secretary of State to determine a cross-border dispute where the dispute relates to a question of ordinary residence arising under Part 3 of the 1948 Act and a local authority in England is seeking to recover expenditure from a local authority in Scotland.
3. The Secretary of State and Scottish Ministers have agreed the Secretary of State should determine the dispute.
4. This determination is made under the 1948 Act. It is not a determination under the Social Work (Scotland) Act 1968 (“the 1968 Act”). The Secretary of State does not have powers to make a determination under the 1968 Act.
5. Prior to determining the dispute, the Scottish Ministers have been consulted and have been provided with a draft of this determination. The views of the Scottish Ministers have been taken into account in making this determination.

Facts of the Case

6. The following facts are derived from the Statement of Facts provided by CouncilE1 and the supporting documents. CouncilS1 has commented on the Statement of Facts, and although some facts may be outside their knowledge, they do not dispute the facts.
7. Ms X was born in CouncilS2 on xdate 1971.
8. Ms X has a learning disability and Down’s syndrome. Ms X has been assessed to lack capacity to decide where to live.
9. Ms X was moved by her parents from CouncilS2 to a faith based residential care home in CouncilE1 in 1993. In 2003, following the closure of the residential care home, CouncilE1 placed Ms X in residential care in CouncilE2.
10. Ms X’s mother, brother, sister-in-law, niece and nephew all play an active part in her life. Her mother lives in CouncilS2, otherwise all her family live in

CouncilS1. Ms X's family were concerned that Ms X was becoming isolated from them and their Scottish cultural roots, therefore they requested she return to Scotland.

11. CouncilE1 assisted Ms X to relocate to independent living accommodation at 24 IndLiving Place, CouncilS1 where she has lived since 22nd September 2009.
12. The property is rented from 99Housing Association Ltd. A Tenancy Agreement was signed on Ms X's behalf by her brother, who is her appointee for social security benefits. CouncilS1 challenges the legality of the tenancy agreement on the basis that her brother had no lawful authority to contract on his sister's behalf, having neither financial nor proxy powers under the Adults with Incapacity (Scotland) Act 2000.
13. Ms X receives housing benefit and council tax relief from CouncilS1.
14. Ms X has 24 hour care and support services provided by SupportServices88 Ltd under Part 3 of the 1948 Act which is arranged and funded by CouncilE1.
15. By letter dated 1st June 2011, CouncilE1 wrote to CouncilS1 suggesting that Ms X is ordinarily resident in CouncilS1 and that CouncilS1 take over responsibility for meeting her care and support needs. CouncilS1 has refused to take on such responsibility and CouncilE1 has accepted provisional responsibility for Ms X pending the determination of the dispute. CouncilE1 is seeking to recover expenditure from CouncilS1 as of 1st October 2011.
16. On 1st February 2012, CouncilE1 wrote to the Secretary of State asking him to make a determination as to Ms X's ordinary residence. By letter dated 13th March 2012, the local authorities were invited to provide the Secretary of State with the listed documents and information as referred to in Part 5 of the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 by an agreed date.

The relevant law

17. I have considered all the documentation submitted by both parties. This includes the Statement of Facts prepared by CouncilE1 and CouncilS1's comments thereon, representations from both local authorities and correspondence between the local authorities.
18. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department ¹and the cases of R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309 ("Shah"), R v Waltham Forest

¹ Until 19th April 2010, this guidance was contained in LAC(93)7 issued by the Department. From that date it has been replaced by new guidance entitled "Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England". This determination refers to the new guidance as the guidance in force at the time the determination was made.

London Borough Council ex parte Vale, the Times 25.2.85 (“Vale”) and R (Greenwich) v Secretary of State and Bexley [2006] EWHC 2576 (“Greenwich”). My decision is not affected by the fact that Council E1 has continued to fund Ms X’s care services whilst attempts have been made to resolve this dispute.

19. Section 29 of the 1948 Act empowers local authorities to provide welfare services for those ordinarily resident in the local authority’s area.
20. 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 or attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident.
21. 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. 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.
22. Section 24(5) of the 1948 Act provides that where a person is provided with residential accommodation under Part 3 of the 1948 Act, he shall be deemed for the purposes of the 1948 Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him. In accordance with paragraph 58 of the judgement in Greenwich, I interpret the reference to residential accommodation at the end of this subsection to mean residential accommodation under Part 3. The relevant date for the deeming provision contained in section 24(5) of the 1948 Act is immediately before such accommodation was or should have been provided.
23. “Ordinary residence” is not defined in the 1948 Act. The guidance (paragraph 18 onwards) notes that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. The concept involves questions of fact and degree. Factors such as time, intention and continuity have to be taken into account. The leading case on ordinary residence is that of Shah. In this case, 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 “ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration”.
24. The guidance goes on to say that when a person does not have the capacity to decide where he wishes to live, one of the alternative tests in the case of Vale

should be used to establish ordinary residence. In the Vale case, it was held in the case of a person with severe learning disabilities who was totally dependent on her parents, that the concept of her having an independent residence of her own which she has adopted voluntarily and for which she has a settled purpose did not arise. She was in the same position as a small child. Her ordinary residence was that of her parents because that was her “base”. Alternatively, the court said that if it was wrong as to Miss Vale having an ordinary residence with her parents, one had to consider the question as if she were a person with mental capacity but without requiring the person themselves to have adopted the residence voluntarily.

Submissions of the Councils

25. CouncilE1 submits that since Ms X lacks capacity to decide where to live, one of the alternative tests in the Vale case should be used to establish ordinary residence. It is submitted that test two is the most appropriate as Ms X’s capacity is not so severe as to render her totally dependent on a parent or guardian. Accordingly, in determining her ordinary residence as if she had mental capacity, but without requiring her to have adopted the residence voluntarily herself, her physical presence in CouncilS1 is relevant as is the nature and purpose of her presence in CouncilS1 which was for her to be close to her family and not lose her Scottish cultural roots. In the absence of any contract between the Council and 99Housing Association Ltd for CouncilE1 to pay for the accommodation, CouncilE1’s assistance in arranging the move falls short of “making arrangements” under section 21 of the 1948 Act so the deeming provision in section 24(5) does not apply. CouncilE1 submits Ms X’s situation of having her tenancy agreement signed by her brother, who is a social security appointee, is analogous to the person whose tenancy is signed by their lasting power of attorney or deputy, and so she should be regarded as having acquired an ordinary residence in the area in which her independent living accommodation is located; namely, CouncilS1.
26. CouncilS1 primarily submits that on the assumption that CouncilE1 did comply with the Mental Capacity Act 2005 and carry out a best interest assessment which held Ms X’s needs would be best met under independent living arrangements, the decision of CouncilE1 to place Ms X in accommodation in CouncilS1 was nevertheless ultra vires. This is either on the basis that the tenancy agreement was not lawfully entered into by a person who had legal authority to contract on Ms X’s behalf or, in the absence of a person lawfully able to make decisions on Ms X’s behalf, the Council did not enter into a contract with the housing provider. Accordingly, CouncilE1 did not comply with the Guidance at either paragraphs 103 or 104 and so did not fulfil the conditions required to establish ordinary residence in the place where the independent living accommodation is located. Alternatively, CouncilS1 submits that the correct test to apply in determining ordinary residence in this case is Test One in Vale. This is on the basis that the test turns on dependence rather than whether the person they are dependent upon is a parent or not. Since Ms X requires care on a 24/7 basis, and her care services were arranged by CouncilE1 (without which the move to CouncilS1 would not be possible), CouncilS1 submit Ms X’s ordinary residence lies with CouncilE1. Finally, it is submitted that payment of Council Tax and Housing Benefits are not determinative of ordinary residence.

Determination

27. The first issue to determine is whether Ms X's accommodation was arranged by Council E1 under (1) section 21 of the 1948 Act or (2) section 29 of the 1948 and section 2 of the 1970 Act. The deeming provision in section 24(5) only applies in respect of Part 3 residential accommodation. It does not apply to services provided under section 29 of the 1948 Act and section 2 of the 1970 Act.
28. Given that Ms X has nursing or personal care needs then if provided with residential accommodation under section 21, she would have to be placed in a care home so registered with the relevant regulator for England or Wales in order to meet the requirements of s26(1A) of the 1948 Act. However, it is not possible for the accommodation at IndLiving Place to comply with s26(1A) because a Scottish care provider would not be able to meet these requirements.
29. Further, it is noted that Ms X has moved from residential care under Part 3 of the 1948 to independent living accommodation under a tenancy agreement. Ms X is in receipt of housing benefit which is paid via her appointee, her brother, and that monthly rent is paid to the accommodation's landlord, 99Housing Association Ltd. It is clear that there is no contract between Council E1 and the accommodation's landlord, 99Housing Association Ltd. It is also clear that the 24 hour domiciliary care and support is provided as part of a separate arrangement between Council E1 and SupportServices88 Ltd.
30. On the basis of these facts, I accordingly determine that Council E1 did not provide accommodation under section 21 of the 1948 Act and so the deeming provision in section 24(5) of the 1948 Act does not apply. Instead, I consider that Ms X has moved to rented accommodation under private arrangements whilst the domiciliary care services delivered by SupportServices88 Ltd are provided pursuant to arrangements under section 29 of the 1948 Act and section 2 of the 1970 Act.
31. The second issue is to determine which test to apply to determine Ms X's ordinary residence. No assessment of Ms X's capacity to decide where to live has been provided but a letter from Ms X's brother and appointee, her brother, dated 25th September 2007 and the reported opinion of consultant psychiatrist, Dr N, state that she lacks such capacity. On the basis that neither local authority disputes this, I conclude that she lacks capacity to decide where to live.
32. In my view, the relevant test to apply in determining Ms X's ordinary residence is test two in Vale. I consider that Ms X ought not to be treated as if she were in the same position as Miss Vale; a position to be equated with that of a small child. Her learning disabilities are not so severe as to render her totally dependent on a parent or guardian. Although, she is provided with 24 hour one to one care and support, this accords her the ability to live independently of her family and, as detailed in her brother's letter, to participate in various activities of her choosing including visiting family, horse-riding, swimming and attending church.

33. Accordingly, the appropriate approach is to consider Ms X's ordinary residence as if she had capacity, considering the nature and purpose of that presence as outlined in Shah, but without requiring the person themselves to have adopted the residence voluntarily. Ms X has been physically present in CouncilS1 since 22nd September 2009. The nature and purpose of her presence in CouncilS1 is to be closer to her family who, apart from her mother who is in CouncilS2, remain in CouncilS1. In the letter dated 25th September 2007, her brother requests that Ms X be moved to a place nearer her family, "[i]deally this should be in the north CouncilS1 area, near her brother who is her appointee." On the basis that her brother is in charge of her affairs and the fact that the majority of her family are in CouncilS1, I determine that Ms X has from 22nd September 2009 to the present day established herself in CouncilS1 for settled purposes as part of the regular order of her life and is accordingly, ordinarily resident in CouncilS1 for this period.

CouncilS1's Submissions

34. CouncilS1 has submitted that test one in Vale should apply. However, in not adopting this test, I have taken into account paragraph 33 of the guidance which advises that this test should be used with caution and should only be applied in cases with similar material facts to those in Vale. Accordingly, test one does normally apply in cases of total dependency on a parent (or a foster parent if that relationship was sufficiently close to have effectively replaced that of the parent, for example, where there is no longer any parental contact.) Either way it is based on dependency within a family-like relationship. Given that Ms X has moved into independent living accommodation, her facts are not materially similar to those in Vale so it would not be appropriate to apply test one. However, even if CouncilS1 were right and test one should apply, then I would look to see where her family (or guardian) upon whom she was totally dependent were based. For the same reasons as set out at paragraph 33 above, I would, on the basis of the information provided, conclude that she was ordinarily resident in CouncilS1 as the majority of her family, and especially her brother upon whom she appears most dependent, are resident there. The fact that CouncilE1 has accepted provisional responsibility for arranging this care is not determinative.

35. The legality of the tenancy agreement is not determinative of Ms X's ordinary residence. As a matter of fact, regardless of whether her brother had authority to sign the tenancy agreement on Ms X's behalf or not, Ms X has been living at 24 IndLiving Place, CouncilS1 since 22nd September 2009. Evidently, both parties to the agreement have accepted that Ms X is resident at this address and acted in accordance with the terms of the tenancy. Furthermore, the tenancy agreement would also have to have been accepted by CouncilS1 as establishing the rental liability in respect of which they would pay Ms X's housing benefit.

36. I agree with CouncilS1 that entitlement to housing benefit and council tax benefit is not determinative of ordinary residence but it may be relevant to deciding whether accommodation arrangements are provided under s21 or 29 of 1948 Act.

37. In conclusion, my determination is that Ms X has been ordinarily resident in CouncilS1's area since 22nd September 2009.

Signed on behalf of the Secretary of State for Health.....

Dated.....