

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF Ms X (OR 10 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 from 11th December 2010 (being the day after the end of the 12 week disregard period).

The facts of the case

2. The following information has been obtained from the agreed statement of facts and copy documents supplied.

3. Ms X was born on xdate 1920.

4. Ms X resided at Flat 18, BlockofFlats, in AreaAOne, CouncilA until the summer of 2010.

5. She was admitted to the AreaAOne Hospital in the summer of 2010.

6. On 7th August 2010 Ms X was discharged from hospital into a temporary respite and assessment bed at RespiteBlockP, AreaAOne. Her stay there was initially anticipated to last for a period of two weeks.

7. On 18th September 2010 Ms X was placed in a care home by CouncilA in exercise of its powers under sections 21 and 26 of the 1948 Act. The care home is in the area of CouncilB. This followed an assessment of Ms X’s needs by CouncilA. Ms X expressed a desire to be near her daughter who also wished her mother to be within easy reach of her home. Ms X lacked the capacity to decide where she wished to reside and decisions taken about Ms X have been made by Ms X’s daughter.

8. On 26th October 2010, Ms X was financially assessed and the outcome was that Ms X had capital above the capital limit of £23,250¹ tied up in her home. In addition, she had savings of over £5000 at the time of her move to CouncilB.

9. Ms X’s daughter was told by CouncilA that it would be funding Ms X’s accommodation during the 12 week disregard period and that any application for loan funding by way of a deferred payments scheme should be sent to it. The 12 week disregard period is the period provided for under the National Assistance (Assessment of Resources) Regulations 1992 (S.I. 1992/2977) (“the Assessment of Resources Regulations”)² under which for a period of 12 weeks beginning with the day on which a person first becomes permanently resident in accommodation provided under section 21 of the 1948 Act the value of their own home is disregarded for the purposes of calculating that person’s capital for the purpose of those Regulations.

¹ See regulation 20 of the National Assistance (Assessment of Resources) Regulations 1992 (S.I. 1992/2977) as amended by S.I. 2010/211, regulation 3.

² See paragraph 1A of Schedule 4 to the Assessment of Resources Regulations.

10. On 14th February 2011 CouncilA advised Ms X's daughter that Ms X would be the responsibility of CouncilB on the basis that after the 12 week disregard period she would be considered to be self-funding.

11. After the end of the 12 week disregard period CouncilA has continued to pay for the continued cost of Ms X's care on an interim without prejudice basis. No deferred payment agreement has been entered into.

12. CouncilA and CouncilB dispute which of them is responsible for Ms X's care from the end of the 12 week disregard period on 10th December 2010.

The relevant law

13. In making this determination I have considered the statement of facts and copy papers supplied together with the submissions of both Councils. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department³ and the cases of R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309 ("Shah"), R v Waltham Forest 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"). I have also considered guidance LAC 2001(25), LAC 2002(15) and LAC (DH) (2009) 3. My determination has not been influenced by CouncilA's continued funding of Ms X's care.

14. 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.

15. 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.

16. 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

³ 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.

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. Greenwich also says (at paragraph 55) that where a local authority should have made arrangements with a care home, then the deeming provision should be applied and interpreted on the basis that the arrangements had actually been put in place by the appropriate local authority.

17. Under the Assessment of Resources Regulations every person entering residential accommodation who owns a property but who does not have sufficient income or assets (as defined in the regulations), excluding their property, to cover the cost of their care is entitled to have the value of their property disregarded for a 12 week period. This 12 week property disregard provides a period of limited state financial support and offers the person an opportunity to consider how best to fund their accommodation. For some people this may involve a decision to sell their home in order to fund their care from the proceeds. For others, it allows time for the arrangement of a deferred payment agreement. Section 55 of the Health and Social Care Act 2001 provides local authorities with a discretionary power to operate deferred payment agreements. A deferred payment agreement is an agreement made by an individual with their local authority to have their care home fees paid by the local authority and for these payments to be recovered from their estate at the end of the agreement, at which point the property is usually sold. The individual grants the local authority a charge over their property for this purpose.

The application of the law

18. CouncilA and CouncilB both agree that Ms X was ordinarily resident in AreaAOne (CouncilA) until 18th September 2010 when she moved to AreaB1, CouncilB. They disagree however as to Ms X's ordinary residence from the end of the 12 week disregard period provided for under para 1A of Schedule 4 to the Assessment of Resources Regulations. In the view of CouncilA, Ms X became ordinarily resident in the area of CouncilB. CouncilB, on the other hand, considers the Ms X remained ordinarily resident in the area of CouncilA.

19. CouncilB argues that as CouncilA failed to offer Ms X a deferred payment agreement as provided for in the Ordinary Residence guidance, Ms X's ordinary residence should be determined in accordance with Greenwich as if Ms X had entered into a deferred payment agreement and as if the local authority had entered into section 21 arrangements. The deeming provision in section 24(5) of the 1948 Act should be applied and accordingly, Ms X was ordinarily resident in CouncilA at the end of the 12 week disregard period.

20. CouncilA agrees that whether CouncilA was required to offer a deferred payment agreement is key to the determination of Ms X's ordinary residence, as this establishes whether CouncilA should have made arrangements pursuant to Greenwich. CouncilA argues that Ms X had £5000 in liquid capital which she could have used to contract with the care home. CouncilA operates a policy whereby service users who have property against which a deferred payment agreement may be secured, but also have assets of £5000 or more are not offered a deferred payment

agreement until their cash falls below £5000. That was the policy operated in this case. Ms X was under the CouncilA's policy ineligible to be offered a deferred payment agreement. CouncilA submits that it was not obliged to offer a deferred payment agreement to Ms X and its decision not to do so does not mean that Ms X remains ordinarily resident in CouncilA's area.

21. In my view Ms X remained ordinary resident in the area of CouncilA at the end of the 12 week disregard period. In accordance with Greenwich the deeming provision in section 24(5) of the 1948 Act applies as arrangements under section 21 of the 1948 Act should have been made. As the Ordinary Residence guidance makes clear at paragraph 90 (emphasis added) –

“90. However, if the person decides against having a deferred payment, they revert to self-funding status at the end of the 12 week property disregard period. At this point, they would be likely to acquire an ordinary residence in the area of local authority B, in line with the principles set out in the Shah test. If they later require local authority funded community care services, including the option to enter into a deferred payment agreement, they should approach local authority B. **The situation would be different, however, if local authority A had failed to offer the person information about deferred payment agreements during the 12 week property disregard period. It was established in the Greenwich case that if arrangements should have been made under section 21 of the 1948 Act but were not, then the deeming provision in section 24(5) should be applied as if the arrangements had been made. Therefore, if information about deferred payment agreements had not [been] given at the time the person entered residential accommodation, local authority A would remain responsible for the provision of a deferred payment agreement should the person require one in the future.**”

22. The final part of the scenario for deferred payment agreement illustrates this aspect of the guidance –

“If local authority A had failed to offer Robert a deferred payment agreement during the 12 week disregard period it would be local authority A to which Robert should turn to discuss entering a deferred payment agreement. It was established in the Greenwich case that if arrangements should have been made under section 21 of the 1948 Act but were not, then the deeming provision in section 24(5) should be applied as if the arrangements had been made. Therefore, in this case, if information about deferred payment agreements had not been given, Robert would not have had the opportunity to apply for a deferred payment when he initially entered his residential accommodation. Local authority A's failure to make this information available means it would remain responsible for offering Robert a deferred payment at a later stage.”

23. CouncilA has a policy of not offering deferred payment agreements to users with capital of £5000 or above in addition to their own home. It refers to paragraph 8 of LAC 2001(25) which says –

“8. Councils may agree to deferred payments only if a person entering or in

permanent residential care has insufficient income and other assets, other than the value of their main or only home in which they have a beneficial interest, to meet the cost of their care and the person:

- for whatever reason does not wish to sell their home or
- is unable to sell their home quickly enough to pay for their care home fees.”

24. It is clear from paragraph 88 of the Ordinary Residence Guidance and paragraph 13 of LAC 2001(25) that whilst local authorities have a discretion as to whether or not to provide deferred payment in individual cases, they should always ensure that individuals who are to become permanent residents are made aware of the possibility of entering into a deferred payment agreement. Paragraph 88 goes on to say –

“Information about deferred payment agreements should be given at the time the person decides to enter residential accommodation or, where a person is initially accommodated under the 12 week property disregard, during this 12 week period at the latest. It is good practice for local authorities to record any information about deferred payment agreements, including whether a deferred payment was offered, whether an application was made by the individual, and whether the application was accepted or rejected.”

25. Whilst Ms X’s daughter was told that any application for a deferred payment agreement should be sent to CouncilA no offer was made by CouncilA. Whilst the Ordinary Residence Guidance and LAC 2001(25) refer both to offering information about, and offering, a deferred payment agreement, I do not think anything should turn on this distinction. The critical point is that a person is afforded a proper opportunity to enter into a deferred payment agreement. This involves not only the receipt of information from the local authority that is responsible for the person during the disregard period, but also the right to make an application and receive from a local authority a decision taking into account the individual’s particular circumstances. In LAC 2002(15) at paragraph 9 of the Annex local authorities were advised-

“9. It has become evident that a number of councils have made limited use of their powers to make deferred payments. For this reason, the Chief Inspector of Social Services wrote to councils in July 2002 – CI(2002) 12 refers – and reminded them that they are expected to have a deferred payment scheme in place. The Chief Inspector further advised councils that they could be challenged if they did not consider exercising their discretion to offer deferred payments in individual cases.”

26. CouncilA failed to act in accordance with the Ordinary Residence Guidance and LAC 2001(25). This failure meant that Ms X (or Ms X’s daughter acting on her behalf) was not given the opportunity to consider whether to make an application for a deferred payment agreement from CouncilA. Whilst CouncilA has a policy in relation to the cases in which it will agree to a deferred payment agreement, it must consider the circumstances of each case. There must be a question as to whether it

would have been reasonable for CouncilA to have refused a request for a deferred payment agreement by Ms X having regard to the low level of Ms X's liquid capital and her likely future care needs. CouncilA did not put itself in a position to be able to know whether the eligibility criteria set out in paragraph 8 of the LAC 2001(25) would have been met or not.

27. For the reasons given above I determine that Ms X was ordinarily resident in the area of CouncilA from 11th December 2010.

28. Although not relevant to this decision, I note that it is agreed that Ms X lacks mental capacity. Paragraph 85 of the Ordinary Residence guidance notes that a lack of mental capacity may mean that a person is unable to enter into a private contract with a care home and in those circumstances they may remain ordinarily resident in the original authority's area. It is not clear from the statement of facts whether regardless of the issue relating to deferred payment agreements, a local authority would have been required to enter into section 21 arrangements in respect of Ms X.

Signed

Dated