

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 9 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 Mr X from 11th August 2011 when Mr X transferred into a shared lives scheme.

The facts of the case

2. The following information has been obtained from the agreed statement of facts and copy documents supplied. Mr X was born on xdate 1992. He has a diagnosis of Downs Syndrome and learning difficulties. Mr X requires support 24 hours a day seven day a week in order to maintain his health and safety and ensure his physical and emotional well being. He is reliant upon carers to carry out all aspects of his daily living routine.

3. In 2001 Mr X was placed by CouncilA with Mr and Mrs FosterCarers1 under a care order made pursuant to the Children Act 1989. At that time Mr and Mrs FosterCarers1 lived in CouncilA and were approved by CouncilA as foster carers. Prior to the care order in 2001 he lived with his mother at Flat 5, BuildingF, CouncilA.

4. Between 2001 and 2006, Mr and Mrs FosterCarers1 lived in CouncilA at three different addresses.

5. In 2006 Mr and Mrs FosterCarers1 moved with Mr X to HouseG, CouncilB.

6. Mr X remained in foster care with Mr and Mrs FosterCarers1 until his 18th birthday on 20th January 2010. He then remained with Mr and Mrs FosterCarers1 under CouncilA’s “staying put policy” until he finished his full-time education in a school in CouncilA in July 2011.

7. On 26th June 2011 CouncilA referred Mr X to CouncilB on the basis that he had become ordinarily resident in CouncilB.

8. In July 2011 Mr X’s placement with the Mr and Mrs FosterCarers1’s was formally transferred onto the Shared Lives Scheme. A placement agreement was signed by Mr and Mrs FosterCarers1, Mr X and CouncilA on 11th August 2011. Mr X receives £120 per week in housing benefit which is used to fund his accommodation costs.

9. At the time of the request for a determination, Mr X received services under section 29 of the 1948 Act. He also was in receipt of direct payments. These services are in addition to the 24 hour care provided by Mr and Mrs FosterCarers1 and additional support to enable him to attend college and access the community. Mr X attends college in CouncilA three days per week with friends from his old school in CouncilA. He also socialises with friends in CouncilA, as well as in CouncilB. He accesses outreach support and a youth club in CouncilB.

10. Mr X maintains contact with his mother. This is supervised and takes place every six weeks.

11. Mr X lacks capacity to decide where to live. This is the agreed view of Council A and Council B. An assessment carried out in June 2011 by a social worker working for Council A concluded that Mr X was unable to consent to or be involved in the formal arrangements and agreements necessary to becoming a boarder with Mr and Mrs Foster Carers under the shared lives scheme.

The relevant law

12. In making this determination I have considered the statement of facts and copy papers supplied together with the submissions. I have also considered the provisions of Part 3 of the 1948 Act, certain provisions of the Children Act 1989 (“the 1989 Act”), the guidance on ordinary residence issued by the Department¹ 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”) and R v Council B County Council ex parte Salisbury and Pierre [2000] 1FLR 155 (“Salisbury and Pierre”). My decision is not affected by the fact that Council A has continued to care manage and fund Mr X’s placement whilst attempts have been made to resolve this dispute.

13. Section 29 of the 1948 Act empowers local authorities to provide welfare services for those ordinarily resident in the local authority’s area.

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. 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.

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.

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 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.

17. “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”.

18. 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 of normal mental capacity but without requiring the person themselves to have adopted the residence voluntarily.

The submissions of the parties

19. The submission of CouncilA is that Mr X was ordinarily resident in the area of CouncilB immediately before his 18th birthday. CouncilA argues that the starting presumption that Mr X remained ordinarily resident in the area of the local authority that had responsibility for him under the 1989 is rebutted in the case of Mr X. It points to the fact that although his mother is resident in CouncilA, Mr X sees her for contact every six weeks on a supervised basis. He attends college in CouncilA three days a week. Other than that he has lived in CouncilB since 2006. He accesses outreach support and a youth club in CouncilB. His advocate is based in CouncilB. His social network is based in both CouncilA and CouncilC. CouncilA submits that Mr X’s ordinary residence should be determined in accordance with the first test in Vale. It points to the fact that Mr X has lived with Mr and Mrs FosterCarers1full time since 2001 and is totally dependent upon them. He sees his mother on a six

weekly basis for contact only and this contact is supervised. CouncilA submits that even if the alternative test in Vale is applied then Mr X's physical presence in CouncilB for the last six years and the nature and settled purpose of the placement under the shared lives scheme leads to the same conclusion. Further, CouncilA says in its submission that it has not provided Mr X with accommodation under section 21 of the 1948 Act.

20. CouncilB is of the view that immediately before his 18th birthday Mr X was ordinarily resident in CouncilA. CouncilB says that the starting presumption that Mr X's ordinary residence remains in CouncilA is not rebutted by the circumstances of Mr X's case or the Shah or Vale tests. This is because Mr X did not voluntarily adopt CouncilB – he moved there because his existing foster carers moved house. His move to CouncilB and his continued stay there was a result of decisions taken by CouncilA with Mr and Mrs FosterCarers1. His foster carers are paid carers. His place of residence should not be determined by the extent of Mr X's dependency on Mr and Mrs FosterCarers1. CouncilB notes that Mr X continues to have supervised contact with his mother every six weeks and that she lives in CouncilA. It points to the fact that he attended school in CouncilA until July 2011 and then started to attend college in CouncilA for three days a week (with friends from school). He also socialises with friends in CouncilA.

21. CouncilB argues that anyone placed in what is intended to be a long term or permanent placement has a settled purpose to the placement but that does not automatically make the area where the person is physically living the place of ordinary residence.

22. CouncilB argues that Mr X's placement under the shared lives scheme was made under section 21 of the 1948 Act. It says that CouncilA has continuing duties under the 1989 Act and under adult social care legislation.

The application of the law

23. It is the case that prior to Mr X's 18th birthday on 20th January 2010, he was a "looked-after" child under the 1989 Act and CouncilA was the responsible authority.

24. As stated in paragraph 147 of the Ordinary Residence Guidance, local authorities in determining ordinary residence could reasonably have regard to the 1989 Act and start from a presumption that the young person remains ordinarily resident in the local authority that had responsibility for them under the 1989 Act. Section 105(6) of the 1989 Act provides:

"In determining the 'ordinary residence' of a child for any purpose of the Act, there shall be disregarded any period in which he lives in any place-

(a) which is a school or other institution;

(b) ...

(c) while he is being provided with accommodation by or on behalf of a local authority".

25. I consider that for the purposes of the 1989 Act Mr X was ordinarily resident in CouncilA. Residence whilst accommodation was being provided by or on behalf of a local authority, in this case with foster carers, would be disregarded in accordance with section 105(6)(c) of the 1989 Act.

26. The starting presumption is that Mr X remained ordinarily resident in the area of the local authority which had responsibility for him under the 1989 Act, namely CouncilA. However, as paragraph 149 of the Ordinary Residence Guidance goes on to say, this starting point may be rebutted by the circumstances of the case and the application of the Shah and Vale tests. Paragraph 149 refers to various factors that should be taken into account in applying those tests including the remaining ties the young person has with the authority that was responsible for their care as a child, ties with the authority in which they are currently living, the length and nature of residence in this area and the young person's views in respect of where he or she wants to live (if they have the mental capacity to make this decision).

27. I find the presumption that Mr X remained ordinarily resident in the area of CouncilA is rebutted in this case.

28. In my view the relevant test is test one in Vale and in applying that test I determine that Mr X was ordinarily resident in the area of CouncilB from his 18th birthday. I consider that Mr X ought to be treated as if he were in the same position as Miss Vale; a position that can be equated with that of a small child. At the time of his 18th birthday he had been residing with his carers Mr and Mrs FosterCarers1 for over eight years and his home was with them. After his 18th birthday he continued to live with them and from August 2011 did so as part of a shared lives scheme. He only has limited supervised contact with his mother. Mr X said in an assessment carried out under section 47 of the National Health Services and Community Care Act 1990 in June 2011 that "I have lived with my current foster carers since the age of 9 and feel safe and settled in my placement". The capacity assessment also notes that Mr X expresses great affection for Mr and Mrs FosterCarers1 and notes that he is clearly well settled and appeared happy with them.

29. If I am wrong as to the application of test one in Vale, then in accordance with the second test in Vale, I find that Mr X was ordinarily resident in the area of CouncilB. The second test in Vale requires that a person's ordinary residence is determined by considering the question as if they were a person of normal mental capacity but without requiring the person themselves to have adopted the residence voluntarily. 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".

30. Applying this test, I consider that Mr X was ordinarily in the area of CouncilB from his 18th birthday. Although he continued to have links with CouncilA - going to school in CouncilA (and having friends there) and his mother with whom he had supervised contact with every six weeks lives there, his main relationship was with his carers Mr and Mrs FosterCarers1 with whom he had lived for eight `years (and with them in the area of CouncilB since 2006). He continued to live with them as he completed his full time education and thereafter he entered into a shared lives scheme with Mr and Mrs FosterCarers1. Mr X said in an assessment carried out under section 47 of the National Health Services and Community Care Act 1990 in June 2011 that "I have lived with my current foster carers since the age of 9 and feel safe and settled in my placement". The capacity assessment also notes that Mr X expresses great affection for Mr and Mrs FosterCarers1 and notes that he is clearly well settled and appeared happy with them. The best interests assessment carried out in September 2011 says that "XX has worked directly with Mr X to explore his views and ensure his contribution to this decision has been maximised, they feel Mr X's choice is to remain with Mr and Mrs FosterCarers1 at this time". He has a social network in CouncilB (as well as in CouncilA). The assessment dated 3rd August 2011 notes that Mr X's social networks mainly revolve around Mr and Mrs FosterCarers1, their extended family and his friends at school/college.

31. The mere fact that CouncilA was the responsible authority for Mr X under the 1989 Act is not of itself enough in this case to affirm the presumption that he is ordinarily resident in CouncilA.

32. The fact that a local authority takes a best interests decision on behalf of a person does not prevent that person from becoming ordinarily resident in another local authority's area. Nor is it correct to view the placement as long term, but for that not to be relevant to the determination of a person's ordinary residence. He had at the time of the shared lives scheme placement lived with Mr and Mrs FosterCarers1 for 10 years and this is very relevant factor in determining a person's ordinary residence.

33. The finding of Mr X to be ordinary resident in the area of CouncilB is not effected by the continued application of the 1989 Act. As is noted in paragraph 157 of the Ordinary Residence guidance –

“157. It should be noted that where a child has been placed out of area under the 1989 Act and becomes eligible for leaving care services upon reaching the age of 18, this does not automatically mean they are ordinarily resident in the area that had responsibility for them under the 1989 Act. Whilst the young person remains entitled to leaving care support from their responsible authority, all the circumstances of their case must be considered. Scenarios 3 and 5 below provide examples of how the 1989 Act and the 1948 Act operate in parallel when a young person is eligible to leaving care services under the 1989 Act and accommodation and/or services under the 1948 Act.”

34. The legal basis for the provision of Mr X's placement between his 18th birthday and the beginning of his shared lives scheme placement is unclear. Given Mr X's personal care needs, this period cannot have been in accommodation provided pursuant to section 21 of the 1948 Act as it would not have met the requirements of

section 26(1A). It may have been provided pursuant to continuing duties under the 1989 Act but the Secretary of State's jurisdiction under section 32(3) of the 1948 Act does not extend to determining this. It seems that at the very least social work support has been provided to Mr X by Council A since 20th January 2010 and I have proceeded to make this determination on the basis that at least some of the services Council A has provided to Mr X have been provided under section 29 of the 1948.

35. I also determine that Mr X's placement under the shared lives scheme was not arranged under section 21 of the 1948 Act. Mr X was in receipt of housing benefit that covered the cost of his accommodation.

36. Paragraphs 120 to 128 of the Ordinary Residence Guidance deal specifically with shared lives schemes. It says—

“Shared Lives Schemes (also known as Adult Placement Schemes)

120. Local authorities or independent providers may operate shared lives schemes (also known as adult placement schemes) which offer an alternative form of social care accommodation and support for people aged 18 and over. Under the scheme, ordinary family households typically provide accommodation and support to people with social care needs, offering the person the opportunity to become part of the family. However, shared lives services do not always involve the provision of accommodation and can include day care support in the carer's home or kinship support, where a person acts as “extended family” to a person who is living in their own home.

121. Where a person enters accommodation under the shared lives scheme, they usually pay for their accommodation themselves, often through housing benefit, with any social care needs being met by services provided under section 29 of the 1948 Act. If the person moves to a new local authority for the purpose of entering shared lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah (see paragraphs 18-22 (*Meaning of ordinary residence*)).

123. The deeming provisions do not apply to section 29 of the 1948 Act. Therefore, in situations where a person's previous local authority is providing or paying for services under section 29 of the 1948 Act, it does not mean that ordinary residence is retained in the previous authority. Any arrangements between local authorities of the kind referred to in the previous paragraph would not prevent the person from acquiring an ordinary residence in the area in which they are living. Ordinary residence disputes arising in relation to services provided under section 29 that are submitted to the Secretary of State for determination will be decided accordingly. See ordinary residence determination 9-2008 for an example of how the ordinary residence provisions apply to shared lives schemes.

124. Shared lives accommodation is not usually arranged under section 21 of the 1948 Act. This is largely because the concept of shared lives is about “family” and “belonging” with individuals making their own choice to enter a shared lives scheme rather than being placed in the scheme by their local authority. Therefore, local authorities may recommend that a person enters a shared lives scheme. They may also help the person to choose a scheme and facilitate their move but such advice and assistance would usually fall short of “making arrangements” within the meaning of section 21.

125. However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in shared lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home.

126. If a local authority does use section 21 to place a person in accommodation under the shared lives scheme, the section 24(5) deeming provision would apply (see paragraphs 9-15 (*Residential services*)) for more information on residential accommodation under section 21 of the 1948 Act). The person would remain ordinarily resident in the area of the placing local authority regardless of where they were accommodated under the shared lives scheme.”

37. For the reasons given above I determine that Mr X was ordinarily resident in the area of Council B from 20th January 2010 and he was therefore on 11th August 2011 when Mr X was transferred onto a shared lives scheme ordinarily resident in the area of Council B.

Signed

Dated