

## **DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF Mr X**

### **Introduction**

1. I am asked by CouncilE1 of England and the CouncilS1 of Scotland to make a determination under section 32(3) of the *National Assistance Act 1948* (“the 1948 Act”) of the ordinary residence of Mr X for the purposes of Part 3 of that Act.
2. This determination is made in accordance with the *Memorandum of Understanding between the Secretary of State and the Scottish Ministers Relating to the Determination of Cross-Border Ordinary Residence Disputes* (“MoU”), which became effective on 16 December 2011.<sup>1</sup> Paragraph 3 of the MoU provides that, in the event of a cross-border dispute (an ordinary residence dispute involving at least one local authority in Scotland and at least one local authority in England), the Secretary of State will determine the dispute when it 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. In accordance with paragraph 6 of the MoU, I have notified the Scottish Ministers of this dispute and we have agreed that determination of this dispute falls to me because it relates to the question of whether Mr X’s accommodation falls under Part 3 of the 1948 Act and CouncilE1 in England are seeking to recover expenditure from CouncilS1 in Scotland.
3. I have also consulted the Scottish Ministers and taken their views into account before determining the dispute, as required by paragraph 8 of the MoU.

### **The facts of the case**

4. The following facts are derived from the statement of facts (“SOF”) agreed by CouncilE1 and CouncilS1 and other documents submitted by them.
5. Mr X was born in 1963 in CouncilS2 in Scotland. He and his family moved to the CouncilE1 area in 1967. He has mild intellectual disabilities, and is assessed as having substantial need for physical and emotional support.
6. From 1982, Mr X lived in a Residential Area<sup>9</sup><sup>2</sup> in CouncilE2 for people aged 19-25 called The House. When he was 25, he moved to the Residential Complex88 in AreaS1District. Mr X has resided at Residential Complex88 since 7 January 1989.
7. On 16 March 2003, Residential Complex88 deregistered as a care home, and started providing supported living accommodation on the same site on 17

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<sup>1</sup>[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_126003](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126003)

<sup>2</sup> Residential Area<sup>9</sup> include residential communities for adults with learning disabilities and special needs.

March 2003. Mr X has since resided in supported living accommodation in Residential Complex88 under consecutive signed occupancy agreements between him and the landlord, Residential Company88 Ltd.<sup>3</sup> The term of the first occupancy agreement began on 17 March 2003.

8. Mr X has received housing benefit from 17 March 2003. Mr X's rent is fully funded by housing benefit. Mr X is personally liable for his rental payments. There is no contractual arrangement between Residential Complex88 and CouncilE1 for CouncilE1 to fund any difference between the amount of housing benefit Mr X receives and his housing costs.<sup>4</sup>
9. In October 2004, Mr X moved houses within the Residential Complex88, but remained in AreaS1District within CouncilS1's area. This is the date from which CouncilE1 claim that Mr X became ordinarily resident in CouncilS1 at the latest.
10. On 23 January 2008, CouncilE1 notified CouncilS1 in writing that Mr X was resident in the CouncilS1 area. CouncilE1 continues to pay for the care services provided to Mr X, and seeks reimbursement of Mr X's care costs from that date.

### **The relevant law**

11. I have considered:

- the documents submitted by both parties;
- the provisions of Part 3 of the 1948 Act;
- the Department of Health guidance *Ordinary Residence: Guidance on the Identification of the Ordinary Residence of People in Need of Community Care Services, England* (published on 15 April 2011, "OR Guidance"); and
- the leading case *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 ("Shah"), and the House of Lords decisions in *Chief Adjudication Officer v Quinn Gibbon* [1996] 4 All ER 72 and *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38.

12. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 years or over who, by reason of age, illness, disability or any other circumstances, are in need of care and attention, which is not otherwise available to them.

13. Section 24(1) of the 1948 Act provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions in that Part, the authority in whose area the person is

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<sup>3</sup> Registered Charity No.\*\*\* England and Wales and SC\*\*\* in Scotland. See Occupancy Agreements in Appendix 3 to the SoF.

<sup>4</sup> Letter from Residential Complex88 to CouncilE1 of 16 January 2012, Tab 2 of Appendix 1 to the SoF, p.50a.

ordinarily resident. However, local authorities can place people in residential accommodation in another local authority area (an 'out of area' placement).

14. Section 24(5) (the 'deeming provision') makes further provision as to the meaning of ordinary residence. It provides that, where a person is provided with residential accommodation under Part 3, the person will be deemed to be ordinarily resident in the area in which he was ordinarily resident before the residential accommodation was provided. This means the local authority placing a person in residential accommodation in another local authority's area retains responsibility for that person.
15. Section 26(1) of the 1948 Act provides that, instead of providing the accommodation themselves, local authorities can make arrangements for the provision of the accommodation with a voluntary organisation or any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. In particular, section 26(2) and (3A) state that arrangements under that section must provide for the making of payments by the local authority to the other party in respect of the accommodation at any rates determined under the arrangements. Additionally, to satisfy subsection 26(3A), the local authority must be liable for any fees not paid by the service user. Residential accommodation provided by an organisation or person that is not a local authority will not fall within section 21 if it does not meet the requirements for arrangements for the provision of accommodation in section 26.
16. Section 29 of the 1948 Act imposes a duty on local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

### **The application of the law**

17. The key issue is whether Mr X is being provided with accommodation under section 21 of the 1948 Act under the occupancy agreements he has entered into with Residential Company<sup>88</sup> Ltd since 17 March 2003. Council<sup>E1</sup> submit that Mr X ceased to be ordinarily resident in Council<sup>E1</sup>'s area in October 2004 at the latest, when Mr X voluntarily moved houses within the Residential Complex<sup>88</sup>.
18. Before entering into these agreements, the parties agreed that Council<sup>E1</sup>'s placement of Mr X in Residential Complex<sup>88</sup> accommodation in Area<sup>S1</sup> District was provision of accommodation under section 21. As a consequence of the section 24(5) deeming provision, the parties agreed that Mr X was deemed to remain ordinarily resident in Council<sup>E1</sup>'s area until 17 March 2003.
19. If Mr X's current accommodation arrangements continue to fall under section 21, Mr X will be deemed to be ordinarily resident in Council<sup>E1</sup>'s area because of the continuing operation of the section 24(5) deeming provision. However, if his accommodation is independent living accommodation that does not fall under section 21, then the deeming provision will not apply and it will be necessary to consider whether he has acquired a new ordinary residence in Council<sup>S1</sup>'s area.

20. For the reasons given in the following paragraphs, my determination is that Mr X has been ordinarily resident in CouncilS1's area since 17 March 2003, being the date when he signed his first occupancy agreement with Residential Company88 Ltd. He has not been provided with accommodation within section 21 since that date.

### **Reasons for decision**

21. One of the conditions for qualifying for accommodation under section 21 is that, without the provision of such accommodation, the care and attention which the person requires would not otherwise be available to them. *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 confirmed that a person needing care and attention that could be provided in their own home would not normally be entitled to accommodation under section 21.
22. The OR Guidance provides that accommodation will normally be characterised as independent living accommodation not falling under section 21 where a person has signed a tenancy agreement and the accommodation is paid for by housing benefit, with the provision of community care services and other support as necessary.<sup>5</sup>
23. Additionally, in order for a person's accommodation under a private occupancy agreement to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet the requirements of section 26(2) of the 1948 Act. Section 26(2) provides that the local authority shall recover from the person a refund for the amount of payments made by the local authority on the person's behalf to the accommodation provider. The payment arrangements must provide for the making of payments by the local authority to the accommodation provider at any rates determined under the arrangements. This was confirmed in the case of *Chief Adjudication Officer v Quinn Gibbon* [1996] 4 All ER 72, in which Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.
24. Section 26(3) and (3A) make further provision about the payment arrangements for Part 3 accommodation. Section 26(3) provides that the person is liable to refund the local authority the amount of payments made on their behalf, or such lesser amount as the local authority is satisfied they should be liable to pay. Section 26(3A) provides that, alternatively, the person can pay the accommodation provider directly, and the local authority can pay any difference between this amount and the amount the local authority would otherwise have been liable to pay. To satisfy section 26(3A), the local authority must also be liable for the rent payments in the event that the person defaults in their payments to the accommodation provider.
25. The OR Guidance says that "[w]here a person moves from residential care under Part 3 of the 1948 Act to accommodation under a tenancy agreement, it

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<sup>5</sup> OR Guidance, paragraph 93.

is unlikely that there would be any “arrangements” as required by section 26(2) or (3A)”.<sup>6</sup>

26. CouncilE1 and CouncilS1 agree that Mr X was provided with Part 3 accommodation during the time the Residential Complex88 was a registered care home (i.e. from 7 January 1989 to 16 March 2003 inclusive). However, since 17 March 2003, when Residential Complex88 ceased to be a registered care home and started providing supported living accommodation under private contractual arrangements, Mr X has been receiving the care and attention he requires whilst living in private residential accommodation under the occupancy agreement.
27. The occupancy agreements that Mr X had entered into with Residential Company88 Ltd do not meet the section 26 requirements in order to be accommodation falling under section 21. CouncilS1 submits that CouncilE1 has “continued to make payments to the Residential Complex88 in respect of any accommodation costs beyond the amount paid through Housing Benefit”.<sup>7</sup> However, Residential Complex88 has confirmed that Mr X’s rent is fully funded by his housing benefit.<sup>8</sup> Mr X does not receive any refunds or offsetting by any local authority for his rental payments. Mr X is personally liable in the event that he defaults on his rental payments.
28. Contrary to CouncilS1’s submissions, CouncilE1’s payments to Residential Complex88 contribute toward Mr X’s care costs, not his accommodation costs. This is evidenced by comparing the components in CouncilE1 purchase orders made before and after 16 March 2003. The orders made after 16 March 2003 clearly only concern Mr X’s care services costs, not his residential costs.<sup>9</sup>
29. CouncilS1 submit that accommodation provided under an occupancy agreement should be differentiated from accommodation provided under a tenancy agreement.<sup>10</sup> However, the title of the contract does not materially change my findings that Mr X’s accommodation is private residential accommodation or that the contract does not meet the section 26 requirements.
30. The effect of my determination is that Mr X’s accommodation is not accommodation in which he has been placed pursuant to arrangements made by CouncilE1 under section 21. If the provision of accommodation does not fall within section 21, the section 24(5) deeming provision does not apply. If section 24(5) does not apply, then Mr X’s ordinary residence falls to be determined according to the normal rules.
31. Such a determination is still necessary because Mr X requires welfare services under section 29 of the 1948 Act. The OR Guidance says that, where a person moves out of residential care into independent living accommodation that does

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<sup>6</sup> OR Guidance, paragraph 95.

<sup>7</sup> CouncilS1 submissions, paragraph 15.

<sup>8</sup> Letter from Residential Complex88 to CouncilE1 of 16 January 2012, Tab 2 of Appendix 1 to the SoF, p.50a.

<sup>9</sup> ‘Financial Information’, Tab 5 of Appendix 1 to SoF, pp.112-128.

<sup>10</sup> CouncilS1 submissions, paragraph 15.

not fall under section 21, the person would usually acquire a new ordinary residence in that area. The local authority in the area in which the person is living becomes responsible for the provision of any community care services the person is assessed as needing under section 29.

32. The OR Guidance also says a person is likely to acquire a new ordinary residence in an area if a care home deregisters to provide independent living accommodation on the same site.<sup>11</sup> This is the case here, when Residential Complex88 deregistered as a residential care home and the Residential Company 88 Ltd started providing supported living accommodation to private tenants on the same site.

33. 'Ordinary residence' is not defined in the 1948 Act. When a person has the mental capacity to make a decision about where he should live, then *Shah* sets out the relevant test of where that person is ordinarily resident. In that case, Lord Scarman stated:

Unless therefore it can be shown that the statutory framework or the legal context in which the words are used requires a differing 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 purposes as part of the regular order of his life for the time being, whether of short or long duration.

34. CouncilS1 submits that Mr X may lack the requisite capacity to make decisions about his residence and enter into the occupancy agreements. CouncilE1 submits that it has not been necessary for Mr X to have a formal capacity assessment as his capacity has never been in doubt.

35. The current test for capacity is contained in the *Mental Capacity Act 2005*. Section 1(2) provides that a person is presumed to have capacity unless it is established that he or she lacks it. Section 3 provides that a person is unable to make a decision for himself if he is unable: (a) to understand the information relevant to a decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate his decision (whether by talking, using sign language or any other means).

36. Mr X's capacity to make decisions about his residence and to enter into occupancy agreements is supported by several of the documents provided to me. Correspondence from Residential Complex88 to CouncilE1 on 9 November 2004 informing CouncilE1 that Mr X had accepted accommodation in another Residential Complex88 house within the CouncilS1 area indicates Residential Complex88 considered Mr X to have capacity to make decisions about his residence.<sup>12</sup> Further, on 10 October 2007, a Clinical Consultant Psychologist of the AreaS1District & Galloway NHS Board assessed Mr X and reported that he is "an able gentleman with only mild intellectual disabilities who does not see that he has any particular difficulties and who

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<sup>11</sup> OR Guidance, paragraphs 95-97.

<sup>12</sup> Letter from Residential Complex88 to CouncilE1 of 9 November 2004, Tab 2 of Appendix 1 to the SoF, p.45.

does not wish any intervention”.<sup>13</sup> More recently, Residential Complex88 wrote to CouncilE1 on 16 January 2012<sup>14</sup> and stated that:

“[t]here has been no formal assessment of his mental capacity and he is not under any order or Guardianship agreement. It is our view that whilst Mr [X] may not understand the fine details of his occupancy agreement, we think that he indicates that he is sufficiently aware that the agreement gives him rights and responsibilities to be able to consent to its terms and to give his signature validity. He clearly states his view that he wants to live at Residential Complex88...”

37. CouncilS1 has not provided contrary evidence about Mr X’s capacity. In the absence of any contrary evidence, I am satisfied that Mr X had and has capacity to make decisions about his residence and to enter into occupancy agreements at the relevant time.
38. For the reasons discussed in paragraphs 34-37 above, I am satisfied from the information available to me that Mr X had and has the necessary mental capacity to make decisions about where he wishes to live.
39. I am satisfied that Mr X adopted Residential Complex88 in AreaS1District as his home voluntarily and for settled purposes as his place of residence. This is evidenced by Mr X’s Review Assessments from 1994-2009<sup>15</sup> that indicated he was content to continue living in Residential Complex88. In particular, this was demonstrated in October 2004 when Mr X accepted Residential Complex88’s offer to move houses within Residential Complex88. Additionally, Mr X has voluntarily signed a series of occupancy agreements to enable him to continue living in Residential Complex88.
40. Accordingly, I determine that Mr X is resident in the CouncilS1 area for the purposes of the 1948 Act and has been so resident since 17 March 2003.

Signed:

Date:

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<sup>13</sup> Letter from Clinical Consultant Psychologist, CouncilS1 NHS Board, of 10 October 2007, Tab 2 of Appendix 1 to the SoF, p.46.

<sup>14</sup> Letter from Residential Complex88 to CouncilE1 of 16 January 2012, Tab 2 of Appendix 1 to the SoF, p.50a.

<sup>15</sup> ‘Social Services Documents’, Tab 4 to Appendix 1 to SoF, pp.75-111.