

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS Y AND MR X (OR 2 2012)

1. I am asked by CouncilA and the CouncilB to make a determination under section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Ms Y and Mr X from 17th May 2007 although I understand that CouncilA only intend to seek reimbursement from CouncilB from 28th July 2009.

The facts of the case

2. The following information has been ascertained from the agreed statement of facts and copy papers supplied by the parties to this dispute. Ms Y was born on xdate 1985 and has a diagnosis of severe myopia, hepatic fibrosis, mild ataxia and muscle weakness due to muscular dystrophy. She can be at risk of falls. She receives only occasional physiotherapy as an adult. Ms Y also has a borderline learning disability. Mr X was born on xdate 1979 and suffers from a moderate learning disability and has been assessed as being on the autistic spectrum. He has challenging behaviour and has been referred for anger management.

3. Ms Y lived with her parents in AreaC until early 2007 but was asked to leave because of unacceptable behaviour. After initially being placed in bed and breakfast accommodation by CouncilC, she was placed in a flat at ResidenceK44, AreaC, owned and managed by CouncilC. Mr X joined her there which was not permitted but he was allowed to stay since he assisted staff in looking after Ms Y. Mr X had previously resided with his family. Ms Y applied to CouncilC for a flat but I understand this was subsequently declined as it was felt that she was not sufficiently independent and responsible at ResidenceK44. She was served with an eviction order as CouncilC considered that she needed more supportive accommodation which would need to be provided by social services.

4. CouncilA assessed both Ms Y and Mr X in April 2007 whilst at ResidenceK44. They were noted to be co-dependent upon each other. They were referred since they would need “supportive living accommodation as soon as possible as they are about to be made homeless”. The report refers to the fact that Ms Y gave birth to the couple’s daughter in March 2007 and that the child had been placed in foster care as Ms Y was unable to care for her. Mr X and Ms Y were noted to have regular supervised visits to see their daughter. There is reference in Mr X’s assessment to a court case in November 2007 when Mr X would be represented in relation to the placement of his daughter. The summary/conclusion section of Ms Y’s report refers to an occupational therapy report dated 17th November 2006 which stated that Ms Y should have “assistance minimal/supervision” [sic] in order to live in the community. This section goes on to state as follows:

“Ms Y appears to having [sic] difficulty with general activities of daily living, she does not appear realistic regarding her physical and functional level of ability and feels that she is able to manage most daily living tasks, although on assessment it appeared evident that her room was unkempt and very cluttered and that she had some personal hygiene issues. She stated that she was cooking regular, healthy meals, but again there was no evidence that this was the case....Ms Y and Mr X would need a

considerable amount of support in order to live independently. Ms Y and Mr X have shown no motivation to shop, cook or clean themselves”.

With regard to accommodation, the report finds that:

“Ms Y and Mr X would need to live in a small group home where they have independence but also with support from staff when required and to develop [sic] their independence. Housing application has been completed and sent to CouncilC”.

5. Mr X’s assessment refers to an application made to CouncilC for housing for the couple and to an application to go to panel for supported living accommodation through CouncilA. The summary/conclusion section is very similar to Ms Y’s report. It notes that Mr X has very poor living skills and refers to an occupational therapy assessment in March 2002 which concluded that Mr X would be suited to living in a semi-staffed small group home. There was found to be no motivation to shop, cook or clean and the room at ResidenceK44 was always cluttered and untidy which was noted to be unusual for Mr X “as he is normally obsessed with cleanliness and has everything in its proper place”. Mr X was unable to return to his mother’s home and the report goes on to conclude that:

“It is doubtful that Mr X and Ms Y would be able to live independently even with extensive support as neither of them are showing any motivation to shop, cook or clean for themselves...My recommendation would be for a small group home where they have independence but also support from staff when required and where they may be able to develop their independence skills further”.

6. Turning to the Social Services Person Profile Notes of CouncilA I see that there is a note for 10th May 2007 in which a meeting took place with Ms Y’s mother who “felt it would be better if Ms Y were to move away from CouncilC area”. A worker for CouncilA wrote “I said that this would be quite likely in view of the urgency of the situation”.

7. There then follows in the Person Profile Notes for May 2007 some e-mail correspondence between CouncilA and One Step at a Time (“OSAT”) relating to an agreement to purchase a service from OSAT for Ms Y and Mr X. This would relate to a self-contained semi-independent two bedroomed flat. In the e-mail from CouncilA to OSAT dated 15th May 2007, it is noted that “I do have some concerns about Ms Y and Mr X’s ability to develop the necessary skills in the short term to live in the community and that the risks associated with this may be compounded by them being away from CouncilC. I have asked their care managers to talk to CouncilC about housing entitlement in the future before they make this move”. It seems that Ms Y and Mr X moved into the flat at Road55, AreaD on 17th May 2007. This property is within CouncilB’s area. In the Overview Assessment of Mr X undertaken on 10th August 2008 it is reported of the couple that “they both originally moved to CouncilB to attempt to try and be nearer and more involved in their child’s care, who was in foster care”. I understand that the child has since been adopted and the couple have yearly contact by letter.

8. I have seen a copy of an agreement for the provision of domiciliary care services (including supported living) between CouncilA and OSAT of Road77, CouncilE signed in January 2010. Clause 7.2 of this agreement states that:

“The completed fee schedule signed by the Provider and the PO (purchase order) signed by the Council shall form the basis of a contract between the Parties subject to the terms and conditions, specifications and standards contained in this Agreement and subject to the prices detailed in the PO as may be amended from time to time in accordance with this agreement”. I have also seen a copy of the PO starting from 17th May 2007 up until 1st April 2011 together with copies of tenancy agreements, one dated 17th November 2010 but with a first rent payment date of 17th May 2007 in relation to both Ms Y and Mr X and two further separate agreements dated 17th May 2007. I understand that Ms Y and Mr X made a joint application and received housing benefit to pay for the rent and following Ms Y’s departure (see later) Mr X has applied for and is expected to receive housing benefit for the entirety of the rent.

9. There are numerous references in the copy papers to Ms Y and Mr X wanting to live in and to return to AreaC. Before the move, there is a Person Profile Note for 5th April 2007 saying of the couple “they want to live together in CouncilC”. The Self-Directed Assessment Questionnaire for Ms Y dated 21st September 2010 notes that she “has never been happy living in AreaD and her goal is to return to AreaC to live”. Mr X’s Questionnaire dated 11th October 2010 notes that Mr X “would like to return to AreaC to live as this is where his family and friends are. Mr X would like to do a college course in AreaC”. I have also seen Mental Capacity Assessments for Ms Y and Mr X dated 17th November 2010 confirming the view of the assessor that both have capacity to decide where they wish to live.

10. Since the referral for a determination was first made, I am informed that Ms Y and Mr X have now separated. Mr X remains living at Road55 whilst Ms Y, following a period living with a new partner in CouncilF, now resides with her mother in AreaC. I understand that Mr X still wishes to return to AreaC.

The relevant law

11. In addition to the documentation referred to above, I have considered the parties’ submissions and witness statements, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department¹, the leading case of R v Barnet LBC ex parte Shah (1983) 2 AC 309 (“Shah”) and the House of Lords decision in Chief Adjudication Officer v Quinn Gibbon 1 WLR 1184 [1996] (“Quinn Gibbon”). My determination is not influenced by the provisional acceptance by CouncilA of responsibility for funding services.

12. 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, 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

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, subsequently amended, 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.

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 or other persons who are in urgent need thereof".

13. By virtue of section 21(7) of the 1948 Act, a local authority can, where it is providing accommodation under section 21, also make arrangements for the provision on the premises in which the accommodation is being provided of such other services as appear to the authority to be required.

14. 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 nursing or 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 a refund for all or some of the costs of the accommodation 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 any balance (and covering any unpaid fees). Section 26(2) was considered by the House of Lords in "Quinn Gibbon". The leading judgement given by Lord Slynn held (at paragraph 1192):

".....arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include a provision for payments to be made by a local authority to the voluntary organisation at rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2), then residential accommodation within the meaning of Part 3 is not provided...".

15. As paragraph 94 of the guidance on ordinary residence notes, in order for there to be accommodation provided under section 21 of the 1948 Act, it must be possible to say that, without the provision of such accommodation, the care and attention which the person requires would not be available to them. The case of R(on the application of Westminster City Council) V National Asylum Support Service 2002 UKHL 38 confirmed that this would not usually be the case where a person enters into their own tenancy agreement. Paragraph 98 of the guidance provides that it may be possible for a person who is a tenant of their own property still to be in receipt of Part 3 accommodation, but there would need to be contractual arrangements providing that the local authority was to be the payer of default.

16. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3 of that Act “he shall be deemed for the purposes of this 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”.

17. The duty to provide welfare services (non-residential community care services) under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

18. “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”.

The application of the law

19. It seems that Ms Y was evicted from ResidenceK44 since she and Mr X, who was not supposed to be living there, were considered by CouncilC to need more support than could be provided at this property. CouncilA assessed both Ms Y and Mr X and following this assessment identified a semi-independent two-bed roomed flat where both could live and receive support, initially with three daily visits. This was intended to be a “full daily support package to empower them to live independently in the community, in a nurturing and protective setting”(e-mail OSAT to CouncilA dated 11th May 2007). I further understand that CouncilB was chosen given the couple’s wish to be closer to their daughter. Ms Y and Mr X signed a tenancy agreement in which they agreed to pay the stated rent and applied for and received housing benefit to enable them to pay that rent. There is no provision for CouncilA to pay the rent or to pay the rent in the case of default by the tenants. The only agreement CouncilA have with OSAT is for the provision of domiciliary care services (including supported living).

20. In order for arrangements to qualify as the provision of Part 3 accommodation, section 26(2) (as noted at paragraph 14) requires that there must include a provision for the local authority to pay the independent provider at such rates as may be determined by the arrangements. The case of Quinn Gibbon makes it clear that unless this requirement is satisfied, then residential accommodation within the meaning of Part 3 of the 1948 Act is not provided. If Part 3 accommodation is not provided, then the deeming provision does not apply and ordinary residence must be determined in the usual way. It may be possible for a person who is a tenant of their own property to be in receipt of Part 3 accommodation provided the local authority is the payer of default. This is not the case here.

21. The assessed needs of Ms Y and Mr X did not require the provision of residential accommodation by the local authority, although some initial concerns were expressed, since those needs could be catered for in semi-independent accommodation for which Ms Y and Mr X were able to claim housing benefit and which the local authority identified but this assistance did not constitute the making of arrangements and hence the provision of Part 3 accommodation as explained above.

22. It is still necessary to determine ordinary residence to determine responsibility for the provision of services under section 29 of the 1948 Act. I note from CouncilB's submissions that it is not contended that Ms Y and Mr X's residence at Road55, AreaD lacks the characteristics of ordinary residence as defined in the case of Shah. I agree with CouncilA that Ms Y and Mr X adopted their residence in CouncilB voluntarily and for settled purposes, as evidenced by the signing of a tenancy agreement. I also agree that a preference to reside elsewhere does not prevent normal or ordinary residence as Lord Slynn explained in the case of Mohammed v Hammersmith and Fulham London Borough Council [2002] 1 AC 547. I therefore consider that Ms Y and Mr X were ordinarily resident in CouncilB from 17th May 2007 when they moved to Road55 and first paid rent in respect of that property. As noted above, the couple's daughter has now been adopted. The reason for their residing in CouncilB no longer exists. However, the adoption of their daughter does not alter their ordinary residence.

23. As noted above, Ms Y is now living with her mother in AreaC. I make no determination as to Ms Y's ordinary residence since she moved out of Road55. Mr X remains in CouncilB. However, it does not appear that Mr X wishes to remain in CouncilB. If that is the case, I would urge CouncilB and CouncilA to work together to help Mr X find appropriate accommodation in or near his chosen area.

Signed

Dated