

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MRS X (OR 20 1012)

1. I am asked by LAE1 to make a determination under section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the ordinary residence of Mrs X.

**The facts of the case**

2. The following information has been ascertained from the agreed statement of facts prepared by the two authorities involved in the dispute, and the supporting documents supplied. The authorities in dispute are LAE1 of England and LAW1 of Wales.

3. Mrs X is a CountryQ national born on xdate 1979. In CountryQ in 2006 she met and married her husband, Mr X, a 76 year old UK national. She entered the UK with her husband on 7<sup>th</sup> August 2006 under a student visa. The visa was for a period until 27<sup>th</sup> May 2010 with a restriction of "no recourse to public funds." Mrs X was granted limited leave to remain based on residing with her husband at their home address, which she did, within LAW1's area at x address.

4. On 13<sup>th</sup> October 2007, Mrs X suffered a road traffic accident resulting in paraplegic injuries and significant fractures to her spine and was admitted to HospitalW2, LAW2.

5. On 20<sup>th</sup> October 2007 she was transferred to HospitalW3.
6. On 26<sup>th</sup> November 2007, Mrs X was moved to the RUnitW4 at HospitalW4, LAW3.
7. In a letter to whom it may concern dated 21<sup>st</sup> February 2008, Mrs X requested a transfer to the HospitalE2 in LAE2, she gave her address as x address, CityE3, LAE3 and stated she wished to be closer to immediate family resident in southern England.
8. According to LAW1, during a telephone conversation on 14<sup>th</sup> March 2008 with the social services in LAW1, social services in CityE3 agreed to accept responsibility for Mrs X upon discharge. This is not admitted by LAE3.
9. On 16<sup>th</sup> April 2008, Mrs X was transferred back to HospitalW2, LAW2.
10. On 7<sup>th</sup> April 2009, Mrs X was transferred to HospitalE1 within LAE1's area for specialist treatment.
11. In preparation for Mrs X's discharge, CityE1's NHS Trust wrote to the authorities in dispute in September 2009. In a letter dated 11<sup>th</sup> September 2009. An address was given for Mrs X's GP in LAE3.
12. On 25<sup>th</sup> May 2010, Mrs X submitted an application for indefinite leave to remain which has been subsequently granted. With effect from 25<sup>th</sup> May

2010, she is no longer subject to the restriction of limited leave to remain with no recourse to public funds.

13. On 12<sup>th</sup> July 2010, given the ongoing ordinary residence dispute and being the authority in which Mrs X was physically present at the moment, LAE1 undertook a community care assessment pursuant to section 47 National Health Service and Community Care Act 1990. During that assessment, it was noted that “her wish is to move into supported accommodation prior to her moving into more independent accommodation near her sister.”

14. On 24<sup>th</sup> September 2010, Mrs X was discharged to NursingHomeEX, TownEX, LAE3. Mrs X has since moved to NursingHomeE3, CityE3, LAE3. LAE1 has funded Mrs X’s accommodation under Part III of the 1948 Act on a provisional basis as the authority of the moment. My determination is not affected by provisional acceptance of responsibility by LAE1.

15. LAE3 occupational therapists have been assisting the housing authority, CityE3 in ascertaining whether particular properties would be suitable for Mrs X. To date no suitable properties have been found.

16. Both LAW1 and LAE1 remain in dispute as to the ordinary residence of Mrs X and the funding duties for any Part III accommodation to be provided under the National Assistance Act 1948 from 24<sup>th</sup> September 2010 to the present day. At present, LAE3 does not take responsibility for Mrs X and has declined to be joined as a party to the referral for determination.

17. All the authorities agree that Mrs X has the mental capacity to decide where she wishes to live.

### **The relevant law**

18. I have considered the agreed statement of facts, the additional documentation, the legal submissions provided by LAW1 and LAE1, the provisions of Part 3 of the 1948 Act and the Directions issued under it<sup>1</sup>, the guidance on ordinary residence issued by the Department<sup>2</sup>, and the cases of *R v Barnet ex parte Shah* (1983) 2 AC 309 (“*Shah*”), *R (Greenwich) v Secretary of State and Bexley* (2006) EWHC 2576 (Admin) (“*Greenwich*”) and *Mohammed v Hammersmith and Fulham London Borough Council* ([2002] 1 All ER 176).

19. 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 and attention which is not otherwise available to them. Section 24(1) provides that the local 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

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<sup>1</sup> Contained in LAC(93)10.

<sup>2</sup> Until 19<sup>th</sup> 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”

authority is under a duty to make arrangements under that section “in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof”.

20. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(6) as in force at the relevant time<sup>3</sup> provided that:

“For the purposes of the provision of residential accommodation under this Part of this Act, a patient in a hospital vested in the Secretary of State, a Primary Care Trust or an NHS trust shall be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before he was admitted as a patient to the hospital, whether or not he in fact continues to be ordinarily resident in that area.”.

21. “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

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issued on 15<sup>th</sup> April 2011. This determination refers to the new guidance as the guidance in force at the time the determination was made.

<sup>3</sup> Section 24(6) was amended on 19 April 2010; the amendments are not material to this determination but in any event the law applicable is the legislation in force at the date that ordinary residence is to be determined (13<sup>th</sup> October 2007).

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**

22. The key issue in this case is where Mrs X was ordinarily resident immediately before her admission to Hospital W2 on 13<sup>th</sup> October 2007.

23. My determination is that on 13<sup>th</sup> October 2007, Mrs X was ordinarily resident at x address. My reasons for reaching this decision are set out in the following paragraphs.

24. From 7<sup>th</sup> August 2006, when Mrs X arrived in the UK with her husband, to the date of her accident on 13<sup>th</sup> October 2007, Mrs X was residing with her husband at their home address within LAW1’s area at x address. Indeed, residing with her husband at this address was, during this period, a condition of her limited leave to remain in the UK.

25. By reason of the deeming provision in section 24(6) of the 1948 Act, a person for whom NHS accommodation is provided is to be treated as being ordinarily resident in the place where they were ordinarily resident just before the NHS accommodation was provided. Accordingly, where a person is discharged from NHS accommodation, and is then provided with Part 3

accommodation, they are deemed to be ordinarily resident in the area in which they were ordinarily resident before their move to NHS accommodation.

26. I refer to paragraph 61 of the Department of Health's guidance on Ordinary residence which explains by way of an example the operation of section 24(6):

“...where a person who is ordinarily resident in the area of local authority A is admitted to NHS accommodation in the area of local authority B and on discharge from the NHS accommodation required Part 3 accommodation in a specialist care home in the area of local authority C their ordinary residence remains with local authority A. The person does not acquire a new ordinary residence during their stay in NHS accommodation, or in the area where the Part 3 accommodation is provided, and authority A remains responsible for the provision of their care.”

27. On the facts of this case, and by virtue of the deeming provision in section 24(6), ordinary residence remains with LAW1 and LAW1 is responsible for the provision of the Part III residential accommodation provided to Mrs X on her discharge from NHS accommodation from 24<sup>th</sup> September 2010 to the present day. Mrs X has not acquired a new ordinary residence in LAE1 or LAE3 during her stay in NHS accommodation, or the area where Part III accommodation is provided.

28. It is recognised that Mrs X's future residence is dependent upon her finding a suitable accommodation. There is no basis for knowing where Mrs X will reside in future. Accordingly, as noted at paragraph 203 of the Guidance, a determination can only be sought in relation to accommodation or services that are already being provided. No determination can be made in relation to the provision of accommodation or service in the future.

### **LAW1's Submissions**

29. In their written submissions, LAW1 make a number of submissions as to why Mrs X's ordinary residence had moved from LAW1. I deal with these in turn:

30. Firstly, LAW1 submit that Mrs X has consistently expressed her view that it was not her intention to settle permanently in LAW1 but to reside in LAE3 (see paragraphs 4 to 6.) The evidence relied upon in this regard is the fact she stated her address to be care of her sister's, the fact she registered with a GP in LAE3 and the fact she stated her intentions in her care assessment. I note that no evidence has been provided which evidences an intention to move from LAW1 being expressed before her accident on 13<sup>th</sup> October 2007.

31. However, regardless of whether Mrs X intended to move away from LAW1 before or after her accident, her ordinary residence is not necessarily determined by her intention. In this context it is helpful to consider the case of *Mohammed v Hammersmith and Fulham London Borough Council* ([2002] 1

All ER 176), in which the issue of “normal residence” for the purposes of the Housing Act 1996 was considered. In that case Lord Slynn of Hadley said:

“So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides.”

I consider that this reasoning can be applied to the present situation. Mrs X was voluntarily residing in LAW1. Although she may have preferred to move closer to her sister, she had accepted residence in LAW1 at her husband’s address. That was where she was in fact resident for the time being and although it may not have been her preferred choice, it does not prevent her acquiring ordinary residence there.

32. Furthermore, in order to establish ordinary residence, there is no requirement to show “a settled intent to remain” as submitted at paragraph 5 of LAW1’s submissions. As cited above, the test for ordinary residence in *Shah* requires the residence to be voluntarily adopted as part of the regular order of life for the time being, whether this is of short or long duration.

33. Secondly, an individual’s intention is not capable of rebutting the statutory deeming provisions as submitted at paragraph 9 of LAW1’s submissions. If the deeming provisions in s24(6) of the 1948 Act apply, then a person’s

ordinary residence is determined in accordance with the legislation and is not rebutted by the strength of the person's wishes.

34. Thirdly, I can see no basis for concluding that Mrs X was ever ordinarily resident in LAE3 during the period in question. LAW1 submit at paragraph 10 of their submissions that in March 2008 LAE3 Social Services agreed to take responsibility for funding Mrs X when she was discharged from hospital. This is not admitted by LAE3 – see their letter to LAW1 dated 28<sup>th</sup> June 2011. However, in any event, it is accepted that there has, to date, been no suitable address identified in LAE3 at which Mrs X could be ordinarily resident. She would not be able to reside at her sister's address at x address CityE3, LAE3.

35. Finally, in the alternative, LAW1 submit at paragraph 11 of their submissions that Mrs X has no permanent residence and is in urgent need so s24(3) of the 1948 Act applies and LAE1 should be responsible for funding her care as it is within LAE1's locality within which she is physically present. I do not accept this. By reason of the operation of the deeming provision in s24(6), Mrs X's ordinary residence remains with LAW1. She is therefore not with no settled residence and accordingly, section 24(3) of the 1948 does not apply. In any event, as set out in the *Greenwich* case, it is noted that local authorities should exercise caution when making a finding that a person is of no settled residence.

36. Therefore my determination is that for the period in dispute from 24<sup>th</sup> September 2010 to the present date Mrs X remains ordinarily resident in LAW1.

Signed on behalf of the Secretary of State for Health

Dated