

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014

1. I have been asked by CouncilA to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB and CouncilC.

The facts

2. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by the parties. The statement of facts submitted by CouncilA is not agreed. Only limited information is available about X's life prior to his arrest and imprisonment in 2006. The dispute concerns X's ordinary residence in the period after he was released from prison in December 2014.
3. I have been able to determine the following facts, on the balance of probabilities, based on the documents before me. X was born in CouncilA on X X 1969. He moved to Country1 with his family when he was 14 years old. He was deported from Country1 in or around 1999, leaving behind his family and long term partner. He went back to CouncilA where he rented a flat and worked as a painter and decorator, then in a factory, before losing his job and claiming unemployment benefits. Following the death of his mother in 2004, X returned to Country1, but he was deported again in or around 2005 for overstaying his visa.
4. It is reported that, on being deported in 2005, X returned to CouncilA where he had his own flat, but he was evicted due to rent arrears. The date of the eviction is unclear. After he was evicted from his flat, it appears that X moved to CouncilB, staying in a homeless shelter for an unknown period. He was evicted from the homeless shelter and for around six months he lived in an unoccupied house, apparently as a squatter. It is reported that he was *“consuming alcohol heavily and spent most of his time walking the streets in*

CouncilB living a vagrant type lifestyle". He is described in CouncilA's assessment as being "street homeless" in the CouncilB area.

5. At some point in 2005 X was convicted of battery and sentenced to 28 days imprisonment. The assessment carried out by CouncilA states that he was arrested on 1 August 2005. It appears that he returned to CouncilB after he was released from prison but the circumstances of this short period of imprisonment are not clear.
6. On 9 December 2005 X was arrested and charged with wounding with intent. He was convicted at CouncilB Magistrates Court on 31 March 2006 and he was sentenced at CouncilB Crown Court on 14 July 2006 to an indeterminate sentence for public protection with a tariff of 2 years and 165 days.
7. X served at least part of his prison sentence at Prison1 in CouncilC. In March 2014, whilst at Prison1, X was referred to Trust1 for assessment. Their assessment records that X had no visitors in prison and was socially isolated. It states that his only family in England were his uncle and aunt who lived in CouncilA; the uncle and aunt could not provide the level of support that X would need on release from prison; and the uncle's last visit was over two years ago. It concluded that, on release from prison, X would need support in maintaining a structured life and assistance in keeping motivated. It recommended a placement at CareHome1, a residential care home in the area of CouncilC. This placement was envisaged as a step down towards greater independence. The assessment states that the placement *"offers a peaceful environment from which to plan and take the next steps in life"* and *"will be a supportive environment where we can work with him to provide life skills, clear boundaries so he can move on to become more independent"*.
8. In August 2014 CouncilC undertook an assessment of X's care needs and completed a "Needs Profile" that was signed by X on 22 August 2014. The needs profile states: *"[X] would like to return to CouncilA where his uncle and aunt live"* and *"UncleH and AuntK – CouncilA. These are all the living relatives that [X] has and so he would like to return to Council A to live"*

near them.”

9. In October 2014 the Probation Service made a referral to CouncilA for a community care assessment. It appears that a proposal was formulated for X to move on to supported accommodation provided by an organisation called CareHome2 in CouncilA. This is referred to in a Parole Board determination dated 10 December 2014 but I have not been provided with any further information about this proposal. CouncilA initially accepted responsibility on the understanding that X had been living in CouncilA prior to the index offence and wished to return there. However, having reviewed the historical facts, it wrote to the Parole Board suggesting that responsibility for X's care should lie with CouncilB. On 5 December 2014 the Parole Board issued directions for the directors of social services from CouncilA, CouncilB and CouncilC to attend a hearing on 10 December 2014 to consider responsibility for funding.
10. On 9 December 2014 CouncilA wrote to the Parole Board agreeing to fund X's placement at the CareHome1, on a without prejudice basis, whilst it pursued discussions with CouncilB over responsibility for X and whilst assessments were undertaken to determine whether X should relocate to CouncilA. On 10 December 2014 the Parole Board approved X's release from prison subject to certain conditions, including a condition that he reside initially at CareHome1 and thereafter as directed by his supervising officer.
11. On 19 December 2014 X was released from prison and moved to CareHome1. The statement of facts submitted by CouncilA states that X was placed at the Carehome1 under sections 21 and 29 of the National Assistance Act 1948.
12. On 12 March 2015 CouncilA carried out an assessment of X's care needs. During the assessment X stated that he had not spoken to his aunt and uncle in CouncilA for over a year; he was not bothered about being in contact with them; he had no specific plans to move back to CouncilA and he was *“not really bothered one way of the other where he lived”*. X stated that he *“enjoyed”* living at CareHome1 and said *“I feel settled it's nice”*.

13. Shortly after X was placed at CareHome1, on 6 January 2015, CouncilA wrote to CouncilB asking it to accept responsibility for funding CouncilC's placement. There followed further correspondence between CouncilA, CouncilB and CouncilC concerning X's ordinary residence. No agreement was reached prior to 2 July 2015 when X was arrested and recalled to prison. The placement at CareHome1 was terminated on 14 July 2015.

14. There followed further correspondence between the parties before the dispute was referred to me on 16 March 2016. Initially I was asked by CouncilA to take no action on the referral to enable further correspondence between the parties. The parties were unable to resolve the dispute and I was asked to proceed with my determination.

The Authorities' Submissions

15. CouncilA submits that:

- a. The issue to be determined is where X was ordinarily resident in December 2014 when he was placed in the area of CouncilC, and which local authority should have been responsible for arranging and funding the placement;
- b. There is a presumption that a prisoner remains ordinarily resident in the area in which they were ordinarily resident before the start of their sentence;
- c. On the facts X was ordinarily resident in CouncilB before the start of his sentence and the presumption that he remained ordinarily resident there should apply;
- d. Alternatively, X acquired ordinary residence in CouncilC upon his relocation there on release from prison.

16. CouncilB submits that:

- a. It is neutral on whether I have jurisdiction to determine where X was

ordinarily resident in December 2014;

- b. The presumption that a person remains ordinarily resident in the place where they were ordinarily resident immediately before they started their sentence is rebuttable and, on the facts, given the nature and length of X's presence in the area of CouncilB, the length of his sentence, his expressed wishes and his lack of ties to the area, he was not ordinarily resident in CouncilB in December 2014.
- c. If I have jurisdiction to decide where X was ordinarily resident in December 2014, I should find that he was ordinarily resident in the area of CouncilA or, alternatively, that he was of no settled residence.

17. CouncilC submit that:

- a. I only have jurisdiction to determine X's current ordinary residence and not where he was ordinarily resident in December 2014;
- b. On the fact, X has no current settled residence;
- c. In any event, immediately prior to his release from prison in 2014, X was not ordinarily resident in the area of CouncilC, and was either ordinarily resident in the area of CouncilA or was of no settled residence.

The Law

18. I have considered all the documents submitted by CouncilA, CouncilB and CouncilC; the provisions of Part 1 of the Care Act 2014 ("the 2014 Act") and the Care and Support (Disputes Between Local Authorities) Regulations 2014; the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it²; the Care and Support Statutory Guidance and the earlier guidance on ordinary residence issued by the Department³; the cases of *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*") and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 ("*Mohammed*"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

19. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force. Article 5 of the Care Act (Transitional Provision) Order 2015/995 (“the 2015 Order”) requires that any question as to a person's ordinary residence arising under the 1948 Act which is to be determined by me on or after 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act. Article 6(1) states that any person who, immediately before the “relevant date”, is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the 2014 Act. Article 6(2) provides that the deeming provisions under section 39 of the 2014 Act have no effect in relation to a person who, immediately before the relevant date, is being provided with supported living accommodation, for as long as provision of that accommodation continues.

20. The “relevant date” for a person in receipt of support or services when the 2014 Act came into force is the date on which that person's case is reviewed or 1 April 2016 if no review has been undertaken before this date. X was in receipt of support and services on 1 April 2015 but his case was not reviewed because he was recalled to prison on 16 June 2015. Accordingly, I agree with Council C that the “relevant date” for X is 1 April 2016.

21. The question of whether I have jurisdiction to determine where X was ordinarily resident before the 2014 Act came into force is addressed below.

Accommodation

22. 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.

The relevant local authority

23. Section 24(1) states 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. The Secretary of State's Directions 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 and other persons who are in urgent need thereof*".

The deeming provision

24. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under Part 3 of the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

Welfare services

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

Ordinary Residence

26. "Ordinary residence" is not defined in the 1948 Act. Guidance has been issued to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

27. In Shah (cited above), 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 "ordinary residence" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration"

28. In respect of persons leaving prison, the Guidance in place at the time X

was released from prison states:

107. The deeming provisions in section 24(5) and (6) of the 1948 Act, which provide that a person's ordinary residence is retained where they

are placed out of area in Part 3 accommodation or are receiving care treatment in NHS accommodation, do not apply to people who are leaving prison, resettlement units⁴⁶ and similar establishments. However, local authorities could reasonably follow the approach set out in these sections for people who are due for release from prison. Therefore, where a person requires Part 3 accommodation on release from prison, local authorities should start from a presumption that they remain ordinarily resident in the area in which they were ordinarily resident before the start of their sentence.

108. However, determining an offender's ordinary residence on release from prison will not always be straightforward and each case must be considered on an individual basis. It may not be possible for an offender to return to their prior local authority area due to the history of their case and any risks associated with a return to that area. Therefore, any presumption of ordinary residence may be rebutted by a number of factors, including the offender's wishes and intentions about where to live, the length of their sentence and remaining ties with their previous area.

29. The Guidance further provides that it should only be in rare circumstances that a person is found to be of no settled residence (see paragraph 44).

Application of the law to the facts

Jurisdiction

30. The first issue I must decide concerns the scope of my jurisdiction: do I have jurisdiction to determine where X was ordinarily resident in the past or must I confine myself to determining X's current ordinary residence? As noted above, under Article 5 of the 2015 Order, any question as to a person's ordinary residence arising under the 1948 Act which is to be determined by me on or

after 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act. Section 40(1) states that I shall determine “*any dispute about where an adult is ordinarily resident for the purposes of [Part 1 of the 2014 Act]*”.

31. Council C relies on this provision- specifically use of the present tense “is”- to assert that I only have jurisdiction to determine X’s current ordinary residence. I reject this submission which I consider to be inconsistent with an ordinary reading of the statutory provisions and inconsistent with the intention of the statutory scheme. The purpose of the scheme is to facilitate resolution of disputes between local authorities which, in order to be fully effective, requires me to determine a person’s ordinary residence over the entire period of any dispute. Where a dispute arises, a lead local authority is expected to take responsibility for provision of care and services on the understanding that adjustments can be made if it transpires that another local authority was responsible for that provision. Such adjustments require a backwards looking assessment of ordinary residence as well as an assessment of current ordinary residence.

32. Section 40(1) should not be considered in isolation. Read in context, it is clear that the “*dispute about where an adult is ordinarily resident*” encompasses the entire period in which two or more local authorities are in dispute. I note that section 40(4) refers to “the dispute” when addressing matters that arise before any referral has been made to me. In particular, it enables regulations to be made for (i) ensuring that care and support is provided to the adult while the dispute is unresolved; and (ii) requiring local authorities in dispute to take specified steps before referring the matter to me.

33. The suggestion that I am limited to determining a person’s current ordinary residence at the date of my determination, moreover, is inconsistent with the statutory provision for financial adjustments under section 41 which applies where “(a) a local authority has been meeting an adult’s needs for care and support, but (b) it transpires (whether following the determination of a dispute under section 40

or otherwise) that the adult was, for some or all of the time that the authority has been meeting the adult's needs, ordinarily resident in the area of another local authority" (s.41(1)). The words in brackets clearly envisage that a determination under section 40 will resolve a person's past ordinary residence as well as his present ordinary residence.

34. Whilst I note that section 40 refers to any dispute about where an adult is ordinary residence "arising under the 1948 Act". I read the transitional provision as requiring me to determine any dispute as to a person's ordinary residence under the 1948 Act in accordance with the new procedures under section 40. I do not read it as preventing me from making any determination as to where a person was ordinarily resident before the 2014 Act came into force.

Ordinary residence: 19 December 2014 to 16 June 2015

35. I turn, therefore, to determine where X was ordinarily resident during his placement at CareHome1 between 19 December 2014 and 16 June 2015. There is no dispute that the placement was provided under Part 3 of the 1948 Act. Accordingly, the deeming provision under section 24 applies, and X's ordinary residence during this period must be determined by reference to where he was ordinarily resident immediately prior his placement (in other words, where he was ordinarily resident immediately prior to his release from prison).

36. There is a presumption, as set out above, that a person who requires Part 3 accommodation on release from prison remains ordinarily resident in the area where he was ordinarily resident before the start of his sentence. However, this is a rebuttable presumption and ordinary residence must be determined in each case on the particular facts.

37. In the present case, I have determined that X was ordinarily resident in the area of CouncilB immediately before he started his sentence. Whilst the evidence indicates that he lived a chaotic lifestyle and he did not have secure accommodation, on the balance of probabilities I find that he was physically present in the area of CouncilB for more than six months before the start of his

sentence. The information available to me is limited but it appears that he did return to CouncilB after serving a 28 day prison sentence and he lived for a significant period in an unoccupied house, indicating a degree of settled purpose.

38. Accordingly, I start from the presumption that, immediately before his release from prison, X was ordinarily resident in CouncilB, and I must consider whether that presumption is rebutted on the facts. I have taken into account that X's

residence in CouncilB was unstable and endured only for a matter of months; that X spent over eight years in prison after a relatively short time in CouncilB; that X had no established ties linking him to CouncilB; and that there is no evidence that he had any wish or intention to return to CouncilB. Taking all these factors into account I have concluded that the presumption is rebutted on the particular facts of this case. In all the circumstances, X cannot properly be said to have been ordinarily resident in CouncilB immediately before his release from prison.

39. Neither do I consider that X was ordinarily resident in CouncilC. Although there was a plan for him to move to the area, X had no other ties to, or connection with, CouncilC. There is no evidence that he had spent any time in CouncilC prior to his release. Therefore, either X was ordinarily resident in CouncilA or he was of no settled residence.

40. It should only be in rare circumstances that a person is found to be of no settled residence and, having carefully considered all of the relevant facts, I conclude that X was ordinarily resident in CouncilA immediately prior to his release from prison. CouncilA is the area with which he had the greatest connection. He was born and brought up in the area and he returned there on two occasions after being deported from Country1. On the evidence before me it appears that CouncilA is the only place in the United Kingdom where X lived a settled life for any significant period of time. His only relatives lived in CouncilA (although I note that they had not visited him for a least a year prior to his release). Crucially, prior to his release from prison, X expressed a wish to return

to CouncilA. Whilst at a later date, when assessed by CouncilA, he said that he was “not bothered”, the assessments carried out at the time, in preparation for his release, did identify a clear wish to live in CouncilA close to his relatives. Moreover, it appears from the assessments and the Parole Board determination that CareHome1 was not considered a permanent placement but a step towards further independence, and there is some evidence of proposals for a step down move to supported accommodation in CouncilA.

41. Therefore, I conclude that X was ordinarily resident in NCC immediately prior to his release from prison and that, pursuant to section 24 of the 1948, he remained ordinarily resident in CouncilA throughout his placement at Country1 between 19 December 2014 and 16 June 2015.

Residence since 16 June 2016

42. I have not been provided with any evidence as to the length of X’s current prison sentence, the plans for his release or any assessments of his current wishes or intentions. In these circumstances, it would not be appropriate for me to make any final determination as to X’s current ordinary residence or the ordinary residence that he may have on release from prison, save to note that the starting point will be a presumption that he remains ordinarily resident in CouncilA.

Conclusion

43. For the reasons set out above, I find that X was ordinarily resident in CouncilA between 19 December 2014 and 16 June 2015. I do not have sufficient information to make a finding as to his current ordinary residence, but there is a presumption that he remains ordinarily resident in CouncilA.