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Guidance

Ordinary residence 2: 2020

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Contents

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Determination by the Secretary Of State Under Section 40 of the Care Act 2014 of the Ordinary Residence of X

1) I have been asked by the Council A and the Council B to make a determination under section 40 of the Care Act 2014 ("the 2014 Act") of the ordinary residence of X.

2) Section 86(2) of the Social Work (Scotland) Act provides that any question arising under that section as to the ordinary residence of a person shall, in a case where there is a dispute about the application of any of paragraphs 1 to 4 of Schedule 1 to the Care Act 2014 (cross-border placements), be determined in accordance with paragraph 5 of that Schedule; and in any other case, the question shall be determined by the Secretary of State.

3) Paragraph 5(3) of Schedule 1 to the Care Act 2014 provides that if there is an ordinary residence dispute between a local authority in England and a local authority in Scotland, the dispute is to be determined by the Secretary of State or the Scottish Ministers. Regulations made under paragraph 5 specify which of these two bodies is to be the decision-maker in particular circumstances.

4) Regulation 2(2) of the Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014/2843 provides that "where the local authorities which are parties to the dispute…include a local authority in England, and the adult or carer to whom the dispute relates…is living in England as at the date the dispute is referred…the dispute is to be determined by the Secretary of State." Accordingly, this is a determination falling within the jurisdiction of the Secretary of State.

The facts

5) X (DOB YY/YY/1991) is 28 years old. He has a diagnosis of cerebral palsy which limits his ability to mobilise and to safely meet his own daily living needs. He is assessed as requiring 24-hour 1:1 support with all aspects of daily living to sustain his independence in the community.

6) In December 2015, X moved to live with his mother in Area 1. Council B accepts that X was ordinarily resident in its area at that time. Council B provided 49 hours care and support to X by way of direct payments. X's mother worked full time as an accountant but was available to provide informal support to X if needed in the evenings and at weekends.

7) In August 2017, X moved to a flat in the area of Council A for the purpose of studying for a post-graduate degree in law with a view to obtaining employment in England thereafter. There was originally a dispute on the face of the submissions as to whether the flat was already wheelchair adapted or whether adaptations were made specifically for MC, but there was no evidence either way as to which it was. Upon further enquiry of the parties, it now appears as though the flat may not be adapted at all. For example, there is a normal bath with over shower, and no rails. The accommodation is owned by a private individual, rather than by an organisation of the kind that might normally be expected to provide supported or extra care living in a planned way. The accommodation appears to have been arranged privately by X and/or his mother.

8) For the first twelve weeks after X's move, Council B continued to fund X's direct payments, on what it describes as a transitional basis.

Capacity

9) The parties agree that at all material times X has had the capacity to make decisions about where he should live, and from the available evidence that is clearly the case.

Interim position

10) Council B has agreed on a without prejudice basis to fund X's direct payments in the interim pending the determination of this dispute. Council B's decision to do so has played no role in my decision.

The parties' submissions

Council A

11) Council A contends that X remains ordinarily resident in the area of Council B notwithstanding his move to its area. It advances 3 grounds for that submission.

12) First, Council A contends that X has moved into specified accommodation, specifically supported living as defined by Regulation 5 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2015. If that is right, then the demining provision in s.39(1) of the Care Act 2014 would be engaged, and X would be deemed to remain ordinarily resident in the area in which he lived immediately prior to his move, i.e. Area 1. In particular, Council A contends that the accommodation into which X has moved is specifically adapted for disabled persons generally.

13) Second, Council A contends that, because X was initially funded by direct payments from Council B, which he used to pay for care and accommodation in the area of Council A, Council B should be treated as having assumed responsibility for arranging what is said to be X's residential placement in supported living.

14) Third, Council A points to the fact that X is in receipt of a student loan from the Student Awards Agency Scotland (SAAS) to fund his course. In order to receive such funding, X is required to be ordinarily resident in Scotland for the purposes of that scheme. As X is treated as ordinarily resident in Scotland for the purpose of that scheme, he must also be ordinarily resident in Scotland for the purposes of the Care Act 2014.

Council B

15) Council B contends that X has become ordinarily resident of Council A. It submits that:

a. The adaptations in X's property were made specifically for him. Accordingly his accommodation does not fall within the definition of "supported living" at Regulation 5 of the 2014 Regulations.

b. X decided to move to the area of Council A of his own volition. Council B did not make the relevant arrangements. Council B did no more than provide transitional funding for 3 months after X moved, provided pursuant to s.86 of the Social Work (Scotland) Act 1968 and related guidance. If the provision of transitional funding in this way amounted to the making of arrangements for the purposes of the Care Act 2014, an individual would almost never be treated as moving of their own accord, which would be inconsistent with the Care and Support Statutory Guidance and therefore cannot be right.

c. SAAS provides 3-year grants to anyone ordinarily resident in Scotland on a relevant date (in this case, the 1 August preceding the start of the course), even if they later become ordinarily resident in another part of the UK. Accordingly, for the purposes of this case nothing can be read into the fact that SAAS continues to fund MC.

Legal framework

16) I have already set out above the provisions conferring jurisdiction upon the Secretary of State to determine this cross-border ordinary residence dispute.

17) I have considered all the documents submitted by the 3 authorities, the provisions of Part 1 of the 2014 Act and the Regulations made under it, the guidance on ordinary residence issued by the Department, and the cases of R

(Cornwall Council) v Secretary of State for Health [2015] UKSC 46 (“Cornwall”); R (Shah) v Area2 Borough of Barnet (1983) 2 AC 309 (“Shah”), R (Greenwich) v Secretary of State for Health and LBC Bexley [2006] EWHC 2576 (“Greenwich”), Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184 (“Quinn Gibbon”), and Mohammed v Hammersmith & Fulham LBC [2001] UKHL 57 (“Mohammed”).

The Care Act 2014

The relevant local authority

18) Section 18 of the Care Act provides that a local authority, having made a determination that an adult has needs for care and support that meet its eligibility criteria, must meet those needs if, amongst other things, the adult is ordinarily resident in the authority’s area or is present in its area but of no settled residence.

The deeming provision

19) Section 39 of the Care Act 2014 provides:

“39 Where a person’s ordinary residence is (1) Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident—

(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or

(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.”

20) Regulation 2(1) of the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014) provides, as amended, that for the purposes of section 39(1) of the Care Act 2014, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation.

21) Regulation 5 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 provides as follows:

5 – Supported living etc.

(1) For the purposes of these Regulations “supported living accommodation” means

(a) accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and

(b) accommodation which is provided –

(i) in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose); and

(ii) in circumstances in which personal care is available if required.

(2) For the purposes of paragraph (1)(b) personal care may be provided by a person other than the person who provides the accommodation.

22) Paragraph 19.48 of the Care and Support Statutory Guidance further elaborates on the meaning of supported living as being either:

- “specialist or adapted accommodation: this means accommodation which includes features that have been built in or changed to in order to meet the needs of adults with care and support needs. This may include safety systems and features which enable accessibility and navigation around the accommodation and minimise the risk of harm, as appropriate to the individual
- “accommodation which is intended for occupation by adults with care and support needs, in which personal care is also available, usually from a different provider.”

23) Paragraph 19.54 of the Care and Support Statutory Guidance explains the circumstances in which a local authority would and would not be considered to have arranged a placement in specified accommodation in a new area:

19.54 The ordinary residence ‘deeming’ principle applies most commonly where the local authority provides or arranges care and support in the accommodation directly. However, the principle also applies where a person takes a direct payment and arranges their own care (since the local authority is still meeting their needs). In such cases, the individual has the choice over how their needs are met, and arranges their own care and support. If the care plan stipulates that person’s needs can be met only if the adult is living in one of the specified types of accommodation and the person chooses to arrange that accommodation in the area of a local authority which is not the one making the direct payments then the same principle would apply; the local authority which is meeting the person’s care and support needs by making direct payments would retain responsibility. However, if the person chose accommodation that is outside what was specified in the care plan or of a type of accommodation not specified in the regulations, then the ‘deeming’ principle would not apply.

Ordinary residence

24) “Ordinary residence” is not defined in either the 1948 or the 2014 Acts. The Department of Health and Social Care has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

25) In Shah v Area 2 Borough of Barnet (1983) 1 All ER 226, 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”

26) The courts have considered cases of temporary residence on a number of occasions, including in Levene, Fox, Mohamed and Greenwich. In Fox, the Court of Appeal considered Levene and Lord Denning MR derived 3 principles: “The first principle is that a man can have two residences. … The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence.” Lord Justice Widgery commented that “Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence”. The Court of Appeal found that the students were resident at their university address.

27) In Mohamed, Lord Slynn said “the ‘prima facie’ meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. 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. If a person, having no other accommodation, takes his few belongings and moves to a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is ‘shelter’ but it is also where he resides.”

Application of law to the facts

28) As both parties recognise, this case turns largely, if not entirely, upon whether X’s current accommodation falls within the definition of “supported living” set out in Regulation 5 of the 2014 Regulations. The evidence on this question is extremely

limited. However, based on the very limited material that has been made available to the Secretary of State, I conclude that the accommodation is not supported living. I base this on the following:

a. X does not appear to have been living in supported living accommodation immediately prior to his move to Council A. Rather, he lived with his mother in Area 1. His mother moved to Area 1 before X did, and so I draw the inference that she lived in an ordinary family home rather than any kind of supported living placement.

b. There is nothing in any of the disclosed care plans or support plans to suggest that X's needs can only be met in a specified type of accommodation.

c. X's most recent personal support plan, produced by Council B on 22 May 2017, states that the adaptations and/or equipment in X's home in Area 1 comprised "A bath board and smaller pieces of equipment (unknown)". That does not appear to be a substantial degree of adaptation.

d. The same support plan suggests that X might need an OT assessment for new accommodation in Area 2, but there is no evidence that any was sought or obtained. If it was possible to source accommodation without an OT assessment, then that suggests that the degree of adaptation required may have been limited.

e. X is described as being able to mobilise using a tripod walker when indoors, and a wheelchair outdoors. It therefore seems likely that he would require a lesser degree of adaptation than someone who is wheelchair-bound even indoors.

f. It appears that X and/or his mother sourced the accommodation in Council A themselves, without the direct support or assistance of a local authority. Typically, where property adapted exclusively or mainly for the use of those with needs for care and support is required, one would expect service-users to seek the support of a local authority for assistance. The fact that X and/or his mother were able to identify the accommodation for themselves suggests that it may have been the type of accommodation that was readily available on the open market, and not specially adapted accommodation.

29) As I mentioned above, there is a factual dispute as to whether or not the adaptations in X's current home were made especially for him or whether they predated his move. It is impossible on the available evidence to resolve that factual question. In my view, however the answer to that question would not in and of itself be determinative. The full Regulation 5 definition is that supported living is "accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible." Key elements of this definition are that:

a. The property is adapted for occupation not just for a specific individual with needs for care and support, but for the whole class of individuals having particular care and support needs;

b. The property is adapted for occupation not just for a person with a disability, but for an adult with needs for care and support. Many disabled adults do not have additional care and support needs. So, for example, adapting a property so that it is wheelchair accessible would not necessarily mean that it is supported living, as there are many wheelchair users who do not have additional care and support needs.

30) If the accommodation in question was not supported living, and was therefore not specified accommodation for the purposes of section 39 of the Care Act 2014, then it follows that the deeming provision does not apply, and the question of ordinary residence falls to be determined according to its natural and ordinary meaning as elucidated in cases such as Shah.

31) Applying the test in Shah, it is clear that X is ordinarily resident in Council A. He chose voluntarily to reside there because it is located in the vicinity of his university course. He has made that choice for the settled purpose of pursuing a course of education with a view to seeking employment.

32) In light of my decision that, on the available evidence, the accommodation in question is not supported living accommodation.

33) For completeness, I deal with Council A's contentions about X's receipt of a grant from the SAAS, which for the following summary reasons I do not accept:

a. Even if Council A's contentions were correct, I would not be bound by the decision of or by the conclusions reached by the SAAS. That is a different organisation which is entitled to reach its own conclusions in light of the information made available to it as part of an application for a grant. It is the Secretary of State's duty under a s.40 referral to make his own determination based on the evidence and submissions presented to it as part of the process.

b. But in any event Council A's contentions do not appear to be correct. The SAAS' general residence conditions are that a person is ordinarily resident in Scotland on the "relevant date", the "relevant date" being 1 August for courses that start between 1 August and 31 December. Both parties agree that, even for the purposes of the Care Act 2014 regime, X was ordinarily resident in Area 1 as at 1 August 2014 before he moved to the area of Council A. The SAAS appears to have taken a similar view. There does not appear to be any requirement that the recipient of the grant remains ordinarily resident in Scotland for the duration of the grant, however.

Conclusion

34) For the reasons given above, I conclude that X is ordinarily resident in the area of Council A and became so when he moved to Area 2 in August 2017.

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