

# DETERMINATION

## MR X ORDINARY RESIDENCE DISPUTE BETWEEN

COUNCIL A  
COUNCIL B  
&  
COUNCIL C

### Introduction

- 1 By email dated 17<sup>th</sup> June 2016, Council C requested a determination of ordinary residence by the Scottish Ministers in terms of section 86 of the Social Work (Scotland) Act 1968 (“the 1968 Act”) in respect of Mr X (“the Adult”). That email enclosed a statement of facts jointly agreed between Council C, Council B and Council A, “The Parties”, together with separate submissions from each of the three local authorities.  
With reference to this documentation and the applicable legal framework, the Scottish Ministers conclude that the Adult is ordinarily resident in the area of Council A.

### Agreed Factual Background

- 2 The Adult was born on 15<sup>th</sup> November 1961 in the area of Council B, where he was subsequently raised.
- 3 In 1982, at 21 years of age, the Adult was admitted to Hospital, in the area of Council B for hypomania.
- 4 Hereafter, he was intermittently detained in Hospital, in the area of Council B, between 1992 and 2007.
- 5 In 2007, he was transferred to the medium secure hospital facility in the area of Council C, as there was no such facility in the area of Council B at the time.
- 6 In 2010, from Hospital in the area of Council C, the Adult lodged an appeal with the Mental Health Tribunal for Scotland (“MHTS”) to revoke the decision of his Responsible Medical Officer (“RMO”) to extend his hospital based Compulsory Treatment Order (“CTO”) for an additional 12 months from March 2010.
- 7 In June 2010, at the appeal hearing, the Adult’s solicitor asked for a community based CTO to replace the hospital based CTO.

The MHTS noted that the Adult's stay at X was organised and paid for by the NHS for Council B. Because of this, the Adult was considered a Council B patient, and would need to be transferred to Council B's area in order to be assessed, before a community based treatment could be organised. It was noted that this assessment would require a stay in hospital of at least 6 weeks, where the Adult would not be allowed to leave the ward.

The Adult told the MHTS that he was not willing to accept the loss of his existing level of freedom by making this move to the area of Council B and that he wished to be discharged into the community in the area of Council C.

At this time, the Adult's RMO believed that funding would not be available for this, and that transfer to a Hospital in the area of Council B was the only option.

The MHTS agreed that the Adult was ready to live in the community. They directed that appropriate accommodation and support should be identified by Council C's Chief Social Worker, in consultation and collaboration with Council B's Chief Social Worker, in the area of Council C.

- 8 With no local connection in Council C's area, and a brother (local connection) in Council A's area, a social worker at X supported the Adult in applying for accommodation in the area of Council A.
- 9 On the 17<sup>th</sup> August 2010, the Adult was granted homelessness status by Council A, a Section 5 housing request was processed, limiting the Adult's area of housing allocation to the area of Council A, and the vicinity of his brother.
- 10 On the 8<sup>th</sup> October 2010, the Executive Director of Social Work Services for Council B and the Council C's Chief Social work wrote to MHTS confirming accommodation had been identified in the area of Council A, and confirming a support plan and provider.
- 11 On 12<sup>th</sup> October, the MHTS adjourned for 6 weeks to allow the Adult to view the accommodation and sign the lease, if he considered it appropriate .
- 12 In February 2011, the Adult moved to the accommodation within the area of Council A. The community based CTO was terminated in March 2012. He continues to live there.

## **Statutory Framework**

### Duty to Provide Accommodation and/or Services

- 13 Section 25 (1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("The 2003 Act"), states the obligation of the local authority "shall
  - (i) provide, for persons who are not in hospital and who have or have had a mental disorder, services which provide care and support; or

(ii) secure the provision of such services for such persons; and

....may

(i) provide such services for persons who are in hospital and who have or have had a mental disorder; or

(ii) secure the provision of such services for such persons.

- 14 Section 25 (3) of the above Act includes under care and support “without prejudice to the generality of that expression— (i) residential accommodation; and (ii) personal care and personal support”.

#### Accommodation and/or Services: Charging Framework

- 15 Section 86 of the 1968 Act provides for adjustments in relation to expenditure incurred between a local authority which is itself providing accommodation and/or services, and the local authority of the area in which the person, in respect of whom such accommodation and/or services is provided, is ordinarily resident. Including those incurred under sections 25-27 of the 2003 Act.

- 16 Similarly, the Recovery of Expenditure for the Provision of Social Care Services (Scotland) Regulations 2010 (“the 2010 Regulations”) entitles a local authority which incurs expenditure through the provision of services, or facilities in accommodation with support, to a person who is ordinarily resident in another local authority area under arrangements made under section 86(4) of the 1968 Act, to recover those costs from the local authority of the area where the person is ordinarily resident. Any dispute arising in relation to the ordinary residence of a person can be determined by Scottish Ministers under section 86(2) of the 1968 Act, the powers of the Secretary of State, as cited originally in section 86, having transferred to the Scottish Ministers by virtue of section 53 of The Scotland Act 1998.

#### Determining Ordinary Residence: Statutory “Disregards”

- 17 In determining a person’s ordinary residence for the purpose of section 86(1), certain “disregards” apply.

- 18 Circular CCD3/2015 references section 86 and states that disregards include; “Any period during which the individual is provided with accommodation under the 1968 Act, or under sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act”.

- 19 Section 86 (1)(e), of the 1968 Act states; “in the provision, for persons ordinarily so resident, of services under section 25 (care and support for persons who have or who have had a mental disorder),....shall be recoverable from the other local authority.”

- 20 Section 86(3) of the 1968 Act states; “In determining...the ordinary residence of any person or child, any period during which he is provided with accommodation under this Act or under sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003; any period during which he was a patient in a health service hospital ....shall be disregarded”.

#### Homelessness:

- 21 Circular CCD3/2015, paragraph 71, states; “Where a homeless person is in need of urgent social work services, the local authority of the moment should provide these services whilst any dispute about ordinary residence is conducted. Decisions on where the responsibility for the funding of such service rests, based on ordinary residence, should be decided subsequently. The test of ordinary residence is not the same as that of local connection used in the homelessness legislation. Local connection for those purposes is defined in section 27 of the Housing (Scotland) Act 1987”
- 22 Section 27 of the Housing (Scotland) Act 1987 (“the 1987 Act”) sets local connection for homelessness legislation stating that local connection within the Act is defined as:
- “(a) because he is, or in the past was, normally resident in it and his residence in it is or was of his own choice; or
  - (b) because he is employed in it, or
  - (c) because of family associations, or
  - (d) because of any special circumstances
- 23 Section 5 of the Housing (Scotland) Act 2001 (“The 2001 Act”) states the “duty of registered social landlord to provide accommodation;
- (1)Where a local authority has a duty under section 31(2) (duty to persons found to be homeless) of the 1987 Act in relation to a homeless person, it may request a registered social landlord which holds houses for housing purposes in its area to provide accommodation for the person.”

#### Moving between local authority areas

- 24 Paragraph 69 of the Circular CCD3/2015 states;
- “The Scottish Government continues to promote choice of accommodation whenever possible. Where the person has shown a definite intention to move between local authority areas on a permanent basis and has sought the assistance of local authorities, those authorities should provide as much help as possible in facilitating the move. Transitional funding may be needed....At the end of the period of transitional funding, the

new local authority would then become responsible for providing and funding the individual's care."

### **Parties' Submissions**

#### Submissions on behalf of Council A:

- 25 That the Adult is ordinary resident in the area of Council B.
- 26 That both Council C and Council B wrote and reported to the MHTS, stating that Council C had completed a Community Care Assessment, where accommodation had been identified in the area of Council A and a support provider. Both the package of care and the accommodation had been sourced by Council C on behalf of Council B.
- 27 Council A had no involvement in the placing of, or for arranging care and support services for the Adult and was informed that the Adult would move into their area in November 2010.
- 28 That the Adult did not make a voluntary decision to move into the area of Council A.
- 29 The MHTS initially sought to place the Adult in Council B's area but this was not possible due to 'unnecessary restrictions'.
- 30 The Adult expressed a preference for remaining in the area of Council C to the MHTS.
- 31 That in order to procure housing and support for the Adult in Council A's area, a homelessness application had to be made for the Adult. The homelessness application does not change the status of the Adult in this move as being accommodated under Section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("The 2003 Act").
- 32 From March 2012, when the CTO was terminated, the Adult has continued to be provided with services and accommodation under section 25 of the 2003 Act.
- 33 Section 25 of the 2003 Act places a duty to provide care and support services, including accommodation for persons who have or have had a mental disorder. Assessments were conducted to appropriately identify accommodation and a care plan that would meet the Adults needs in the community, as per the duty incumbent on the local authorities concerned.
- 34 That accommodation provided under Section 25 of the 2003 Act, must be disregarded from determination of ordinary residence by Section 86 of the 1968 Act. Therefore the Adult remains ordinary resident in the area of Council B.
- 35 Even if the accommodation in Council A was not provided under Section 25 of the 2003 Act, then the Adult would still be ordinary resident in the area of Council B as the housing application was made and accepted in terms of the 1987 Act. This Act states that residence in a district cannot be of someone's choice, for the purposes of having a local connection,

if they became resident there because they were detained under the authority of any Act of Parliament.

Submissions on behalf of Council B:

- 36 That the Adult is ordinary resident in the area of Council A.
- 37 Council B refer to the case of Regina v Barnet London Borough Council ex parte Shah (1983) 2 AC 309 particularly Lord Scarman's remarks "... ordinary residence refers to a man's abode....which he has adopted voluntarily and for settled purposes".
- 38 That the Adult chose to live in the area of Council A, where in the community he received support and treatment under the 2003 Act and other relevant legislation. He was not placed into the area by any local authority nor did the MHTS place or relocate the Adult there.
- 39 The MHTS acknowledged the Adult's capacity to choose where he would live by taking account of his preferences, allowing time to both inspect the property and to decide to sign the lease.
- 40 4 months after the Adult moved from X, his suspended hospital based CTO was varied by MHTS to a community based CTO. Within this variation, the MHTS did not require that the Adult reside at any specified place despite them having the power to do so under s66(1) (e) of the 2003 Act .
- 41 That the Adult voluntarily moved to the area of Council A and by entering a lease agreement and living in the area demonstrated a degree of 'settled purpose' required by law and nothing further was required by law to determine this. The Adult had capacity to choose where to live and the fact that he required support to source accommodation on discharge from hospital does not negate the Shah test.
- 42 That the Adult was housed in the area of Council A under Section 5 of the 2001 Act. Section 5 does not allow referrals to registered social landlords under the 2003 Act or the 1968 Act. As such the tenancy here should not be 'disregarded' from consideration of ordinary residency.
- 43 Reference is made to The 2010 Regulations and Section 86 of the 1968 Act in so much as the expenditure in respect of the provision of personal care and support to the Adult, in Council A's area, should not be recoverable from Council B. There were no "arrangements" in place between Council B and Council C.
- 44 Reference is made to Circular CCD3/2015, paragraphs 67-69 in terms of local authorities assisting a willing individual to move of their own accord. Council B acknowledges that MHTS intervened here to obtain assistance for the adult and focussed on Council C, as the area of Council C was the Adult's preferred choice of area.

- 45 Reference is made to The 2010 Regulations, as Council B does not support Council C's contention that the care and support the Adult received was under the 2003 Act and should be disregarded and therefore that expenditure for those services would be recoverable from Council B.
- 46 Reference is made to the 1987 Act in refuting the applicability of this Act, in that it defines "a local connection" for the purposes of the 1987 Act and not in respect of The 1968 Act. Reference is made to section 27 (2) of the 1987 Act which states that "a district is not of a person's own choice if he became so resident because he was detained under the authority of any Act of Parliament."
- Council B propose that Section 27 of the 1987 Act can be referred to only in so much as it relates to Part II of that same Act (Homeless Persons) as the Adult was not "detained" in Council A's area. Council B contend that if the issue of local connection is relevant at all, it is only for the purpose of demonstrating that had the Adult been placed in accommodation under the 2003 Act then they would not have had to refer to an argument on local connection.
- 47 That Circular CCD3/2015 states that the test of ordinary residence is not the same as that of local connection used in homelessness legislation, and so Section 27 of the 1987 Act in determining local connection is irrelevant to ordinary residence status.
- 48 That Council C had never been, and were not, instructed to act on behalf of Council B and that the MHTS did not state that Council C was acting on behalf of Council B, only that Council C would identify accommodation and arrange in consultation and collaboration with Council B.

Submissions on behalf of Council C:

- 49 That the Adult was born in an area within Council B, lived in that area (prior to his admission to Hospital in Council B's Area) and is ordinary resident in the area of Council B.
- 50 From the Adult's admission to Hospital in 1982 until he left the Hospital within the area of Council C in 2011, the Adult was ordinary resident in Council B's area, as all his hospital admissions should be disregarded under Section 86 of the 1968 Act.
- 51 As the Adult had a local connection within Council A's area, Council A granted the Adult homelessness status and as a result he was provided with accommodation in the area.
- 52 Section 27 (2) of the 1987 Act states that a person is not resident in a district of his own choice if he became resident because he was detained under the authority of any Act of Parliament. The fact a person is subject to detention means that the Shah test cannot be met.

- 53 That the Adult cannot be referred to as locating to Council A's area voluntarily, it was ultimately the decision of the RMO and the MHTS, as to where a person subject to a CTO resides.
- 54 That the Adult was subject to a CTO when he moved from the Hospital in Council C's area. That a CTO is a compulsory order not a voluntary treatment order. He was provided with personal care and support in Council A's area under Section 25 of the 2003 Act. In line with the 2010 Regulations, the expenditure for such care and support is recoverable from the local authority in which the person is ordinarily resident and he should remain the responsibility of Council B.
- 55 That the MHTS directed Council C to make the arrangements for accommodation and support services in consultation and collaboration with Council B. That the Adult was ordinary resident in Council B's area in June 2010 and the Tribunal directions show Council C was acting as agent of Council B. Therefore, the time the Adult has lived in the area of Council A is to be disregarded because of this and the Adult continues to be ordinary resident in Council B's area.
- 56 Council C and Council B confirmed to MHTS on the 8<sup>th</sup> October 2010 that as a short term measure Council C would pay for the Adult's social care support and that Council C, Council B and Council A would consider long term funding in line with ordinary residence guidelines.

### **Discussion**

- 57 It is well established that accommodation provided under Sections 25-27 of the 2003 Act is to be disregarded from consideration of ordinary residency as outlined and elaborated by Section 86 of the 1968 Act.
- 58 There is no disagreement between the Parties that Council B was the ordinary residency of the Adult prior to February 2011, when the Adult moved to Council A. The 'disregarding' of time spent within the Hospital in Council C's area and previous detentions within Council B's area is accepted by all Parties.
- 59 The function of the Scottish Ministers to determine ordinary residence disputes does not extend to the making of any recommendation or order for payment of costs and expenditure and any claim or dispute arising in that regard should, where necessary, be pursued in the appropriate court.
- 60 The Scottish Ministers recognise the need to allow for the choice of the individual to move within services provided under the 1968 Act or the 2003 Act: when someone is continuing to be accommodated, and where they have shown a definite intention to move, as outlined in Circular CCD3/2015, Paragraphs 67-69.



- 61 The Ministers understand that MHTS have no duties under sections 25-27 of the 2003 Act. Any responsibility remains with the local authority for the provision of accommodation and support provided under the 1968 Act and the 2003 Act, and in this instance the accommodation in Council A's area was not provided under the 1968 Act nor the 2003 Act.
- 62 The Ministers understand that the community based CTO was not tied to a specific address and as such, the Adult had the right to choose accommodation, assistance to find suitable accommodation and a responsibility to inform the MHTS of a proposed address in order for them to permit the community based CTO.
- 63 The wording of Section 25 of the 2003 Act establishes a continuing responsibility of care for someone who has had a mental disorder, however it would appear that the accommodation in this instance was not provided under the 2003 Act but under homeless provisions.
- 64 The Adult was provided with accommodation in Council A's area on the basis of a Section 5 application for Homeless status. On the basis of the acceptance of this he was offered accommodation in Council A's area and was given an opportunity to access the suitability of the accommodation, accepted it and signed a tenancy agreement for it. Thereafter he moved there albeit with assistance from the local authorities.
- 65 The Adult was considered capable of making a choice and decided to move to accommodation provided by Council A and in so doing, made a choice of where to live and with that changed his ordinary residency status.
- 66 Although the Adult's CTO was discharged in 2012 , he has remained in Council A's area since the move in February 2011.

### **Determination**

The Scottish Ministers determine, given the information provided by the Parties, the appropriate legislation and guidance and in line with the discussion outlined above, that the Adult became ordinary resident in the area of Council A in February 2011 and remains resident there.