

## **DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X**

1. I am asked by the CouncilA and CouncilB to make a determination for the purposes of section 32(3) of the National Assistance Act 1948 (“the 1948 Act”) of the ordinary residence of Mr X.
2. For the reasons set out below, my determination is that Mr X has been ordinarily resident in CouncilB since October 2005 when the accommodation he was residing in deregistered as a care home and started being provided as shared lives accommodation or, in any event, from 31 March 2006 when he signed a Licence Agreement to enable him to continue living in that accommodation.

### **The facts of the case**

3. The following information has been ascertained from the Agreed Statement of Facts, the submissions of CouncilA and CouncilB and the copy documents provided. Mr X was born on X date 1964. He has a learning disability, Down’s syndrome, autism with challenging behaviour, poor vision and a genetic condition in his left eye. He can participate in interaction but has a consistent difficulty in making himself understood by others or understanding others. He has sensory difficulties which have a significant impact on his social participation and/or activities of daily living. As at 10 August 2012 his overall level of need was assessed as being that he is unable to manage most or all aspects of personal care.
4. CouncilA placed Mr X in a residential educational placement in CouncilB as a child. On X date 1982 Mr X turned 18 and was subsequently placed by CouncilA at Residential Care HomeB1 in CouncilB. In January 2001 CouncilA was informed that Residential Care HomeB1 would be closing down at the end of that month.
5. CouncilA felt that as Mr X had been living in the CouncilB area for some years and to minimise disruption to Mr X, efforts should be made to identify potential placement options close to his former residential care home.
6. On 8 January 2001 the CouncilA Care Manager went to CouncilB and obtained from CouncilB Social Services a list of possible placements in the area in which to place Mr X and enable him to continue attending his day

care placement. The care manager visited two possible placements with Mr X.

7. On 9 January 2001 the CouncilA Care Manager went to the offices of CouncilB Social Services Adult Placement Scheme and their team helped him identify two vacancies within family homes that were located within the catchment area of the day care centre Mr X attended.
8. The Care Manager recommended placement with Mr and Mrs H as the home was registered, was in the same road as Mr X's last placement and had an excellent inspection report.
9. Mr X visited the home for dinner, was best friends with a resident living there and made friends with the other resident.
10. On 18 January 2001 Residential Care HomeB1 was closed and deregistered as a residential care home.
11. On 19 January 2001, Mr X having been successfully matched with his current carers, Mr and Mrs H, went to live with them at addressB1. Mr and Mrs H were registered with the Commission for Social Care Inspection (CSCI) as a small care home.
12. CouncilA entered into a contract with Mr and Mrs H for the provision of residential and respite care to Mr X on 8 November 2001, and funded the placement under section 21 of the 1948 Act.
13. The next significant event seems to have been in 2005. On 8 August 2005 Mr and Mrs H entered into an Adult Placement Provider Agreement with CouncilB.
14. On 3 October 2005 they de-registered with CSCI. On the same day they registered with CouncilB's Adult Placement Scheme and were approved as Adult Placement carers.
15. On 17 February 2006 the Lead Officer of CouncilB Adult Placement Scheme wrote to CouncilA's Financial Department as regards Mr X's placement with Mr and Mrs H: "This is to confirm that as of 3<sup>rd</sup> October 2005 the home where the above person lives has been de-registered and it is now the CouncilB Adult Placement Scheme that is the registered body. The home is no longer categorised as a Small Registered. The

accommodation arrangements are now classed as living in the community with support.”

16. On 31 March 2006 a simple form Licence Agreement for Adult Placements was made between and signed by Mrs H and Mr X.
17. The Licence Agreement states that Mr X will be charged rent of £60.00 per week<sup>1</sup> and that he is expected to make a contribution towards household running costs of £25.18 per week<sup>2</sup>.
18. CouncilA’s adult placement review dated 7 December 2007 notes that the care plan for Mr X was: “To promote his independence and improving his ability to make choices for himself; Supporting him with his day care, Promoting his well-being; Organise his financial benefits”. It also notes: “Mr X is claiming housing benefit from CouncilB and CouncilA is paying the full cost....Since May 2006, Mr X is receiving £57.50 weekly as housing benefit and CouncilA is paying £426.56 per week.”
19. On 3 April 2012 CouncilB wrote to CouncilA and to Mrs H advising that they would discontinue Mr X’s day service provision as of 25 May 2012 because CouncilA was funding Mr X.
20. On 10 August 2012 CouncilA carried out a re-assessment of Mr X’s needs. It was reported that Mr X currently paid a contribution of £60.00 per week towards his home from his benefit. It was also reported that up until 2 years previously Mr X had been receiving housing and council tax benefit from CouncilB but this was stopped because he had sufficient funds in his account to pay for himself.
21. On 4 February 2013 CouncilA made a formal referral to CouncilB on the basis that Mr X was ordinarily resident in CouncilB.
22. On 17 May 2013 CouncilA received a letter from CouncilB stating that CouncilB considered that Mr X was accommodated pursuant to section 21 of the 1948 Act and remained CouncilA’s responsibility by virtue of the deeming provision in section 24(5) of that Act. This was because, the letter said, CouncilA placed Mr X in an Adult Placement as a residential placement under section 21 and it would appear that Mr X lacked capacity

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<sup>1</sup> Licence Agreement, paragraph 1.1.

<sup>2</sup> Licence Agreement, paragraph 1.2.

and was unlikely to have voluntarily adopted Council B as his place of residence. The parties fell into dispute.

23. Council A has accepted provisional responsibility for the provision of services to Mr X pending the making of this determination. It is funding the provision of support to Mr X in the form of prompting and supervision around personal care, particularly with respect to meal preparation and medication, and day care attendance.

### **The relevant law**

24. In making this determination I have considered the Agreed Statement of Facts, the parties' submissions and copy papers supplied. I have also considered the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department<sup>3</sup> ("the OR Guidance") and the case of *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309 ("*Shah*"). My decision is unaffected by the fact that Council A continues to fund services on a provisional basis pending the outcome of this determination.

### **The 1948 Act**

25. 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. Section 24(1) provides 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 under section 21 of the 1948 Act (contained in LAC (93)10) 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".

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<sup>3</sup> *Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England*, published on the Department of Health's website at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/152009/dh\\_131705.pdf.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf.pdf)

26. 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 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 and that the local authority shall either recover this from the person accommodated or shall agree with the person and the establishment that the person will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees). To satisfy section 26(3A), the local authority must also be liable for the rent payments in the event that the person defaults in their payments to the accommodation provider.
27. Section 24(5) of the 1948 Act provides that where a person is provided with residential accommodation under Part 3 of the 1948 Act, he shall be deemed for the purposes of that 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. In accordance with paragraph 58 of the judgement in *R v (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576 ("*Greenwich*"), I interpret the reference to residential accommodation at the end of section 24(5) to mean residential accommodation under Part 3. The relevant date for the deeming provision contained in section 24(5) of the 1948 Act is immediately before such accommodation was or should have been provided.
28. Section 29 of the 1948 Act imposes a duty on local authorities to provide welfare services (non-residential community care services) to adults ordinarily resident in the area of the local authority who have mental disorder, or are substantially and permanently affected by illness, injury or disability. The duty to provide welfare services under section 29 similarly relates to those ordinarily resident in the area of the local authority. Local authorities may also enter into arrangements to provide such services to people who are not ordinarily resident in their area.

### **Ordinary residence**

29. "Ordinary residence" is not defined in the 1948 Act. The OR 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".

### **Shared lives schemes (also known as adult placement schemes)**

30. The OR Guidance provides as follows in relation to shared lives schemes.

31. "Shared lives accommodation is not usually arranged under section 21 of the 1948 Act. This is largely because the concept of shared lives is about "family" and "belonging" with individuals making their own choice to enter a shared lives scheme rather than being placed in the scheme by their local authority. Therefore, local authorities may recommend that a person enters a shared lives scheme. They may also help the person to choose a scheme and facilitate their move but such advice and assistance would usually fall short of "making arrangements" within the meaning of section 21."

32. "However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in shared lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home."

33. "Where a person enters accommodation under the shared lives scheme, they usually pay for their accommodation themselves, often through housing benefit, with any social care needs being met by services provided under section 29 of the 1948 Act. If the person moves to a new local authority for the purpose of entering shared lives accommodation, they generally become ordinarily resident in the new local authority in line

with the settled purpose test in *Shah* (see paragraphs 18-22 (*Meaning of ordinary residence*)).”

34. “The deeming provisions do not apply to section 29 of the 1948 Act. Therefore, in situations where a person’s previous local authority is providing or paying for services under section 29 of the 1948 Act, it does not mean that ordinary residence is retained in the previous authority. Any arrangements between local authorities of the kind referred to in the previous paragraph would not prevent the person from acquiring an ordinary residence in the area in which they are living.”

## **The application of the law**

### **The issue**

35. There is no dispute in relation to Mr X’s original placement with Mr and Mrs H in January 2001. CouncilA accepts that it is likely that this was provision of residential accommodation under section 21 of the 1948 Act<sup>4</sup>. As a consequence of the deeming provision in section 24(5) of the 1948 Act, Mr X is to be deemed to have remained ordinarily resident in CouncilA’s area during the placement.
36. The key issue is whether this remained the case from 3 October 2005 when the accommodation Mr X was residing in deregistered as a care home and started being provided as shared lives accommodation or, in any event, from 31 March 2006 when he entered into a Licence Agreement with Mrs H in respect of the accommodation.
37. If those arrangements continued to fall under section 21, Mr X will be deemed to be ordinarily resident in CouncilA’s area because of the continuing application of the deeming provision in section 24(5). However, if those arrangements ceased to fall under section 21, the deeming provision will not apply and it will be necessary to consider whether Mr X has acquired a new ordinary residence in CouncilB’s area.

### **Characteristics of section 21 accommodation**

38. In order for a person’s accommodation under a private occupancy agreement to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet

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<sup>4</sup> CouncilA’s submissions, paragraphs 50 to 52.

the requirements of section 26(1A), (2) and (3) of the 1948 Act as set out above. In the case of *Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72*, Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.

39. The OR Guidance says: "However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in shared lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home."<sup>5</sup> It also says: "[w]here a person moves from residential care under Part 3 of the 1948 Act to accommodation under a tenancy agreement, it is unlikely that there would be any "arrangements" as required by section 26(2) or (3A)...If that is the case, it would not be possible to say that the care and attention the person needed could only be met through residential accommodation provided by the local authority."<sup>6</sup>

40. In my view, the Licence Agreement between Mr X and Mrs H does not meet the section 26 requirements in order for it to be accommodation falling under section 21.

41. In relation to section 26(1A), "personal care" has a wide meaning and in my view may well cover at least some of the tasks that were undertaken for Mr X. If that is correct, accommodation together with personal care should not have been provided to Mr X under section 21 and it seems likely that accommodation must have been provided to Mr X under some other route.

42. In any event, the arrangements do not meet the requirements of section 26(2) as set out above as they do not provide for the making of payments by a local authority to the accommodation provider (and hence do not provide for the recovery of payments from the person receiving accommodation).

43. Since May 2006, Mr X's rent of £60 per week has been funded by housing benefit payments. A re-assessment of Mr X's needs on 10 August 2012

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<sup>5</sup> OR Guidance, paragraph 125.

<sup>6</sup> OR Guidance, paragraph 95.

noted that housing benefit was paid “up until 2 years previously” and had ceased as Mr X had sufficient money to fund his housing costs from his finances. He currently makes a contribution to his housing costs of £60.00<sup>7</sup>. Thus Mr X’s rent has been funded initially by housing benefit and latterly by himself.

44. CouncilA’s payments to Mrs H have contributed toward Mr X’s care costs, not his accommodation costs. CouncilA states: “CouncilA are not responsible for Mr X’s accommodation costs in any way”<sup>8</sup>. This is evidenced from the components of the costs to CouncilA of funding Mr X’s support namely: costs of day centre, provision of support in home by shared lives carers and an administration fee to CouncilB Shared Lives Scheme for monitoring the agreement<sup>9</sup>. These costs clearly only concern the costs of Mr X’s care services, not his accommodation costs.

### **Was there a duty to provide section 21 accommodation?**

45. This leads me to consider whether or not there was a duty to provide section 21 accommodation from 3 October 2005 or 31 March 2006. In *Greenwich*, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (paragraph 55 of judgment). Following *Greenwich*, therefore, lack of compliance with section 26 may not be fatal if, in fact, the local authority should have been making section 21 arrangements.

46. The first limb of the test in section 21 of the 1948 Act is whether or not the person is in need of care and attention. Care and attention was defined by *Baroness Hale in R (M) v Slough BC [2008] UKHL 52* at paragraph 33:

‘...the natural and ordinary meaning of the words ‘care and attention’ in this context is ‘looking after’. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list.’

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<sup>7</sup> Agreed Statement of Facts, paragraph 36.

<sup>8</sup> CouncilA’s submissions, paragraph 60.

<sup>9</sup> Agreed Statement of Facts, paragraph 14.

47. I take the view that Mr X was in need of care and attention as his care package included support in the home for tasks which he was not capable of doing for himself such as those relating to personal care<sup>10</sup>.
48. The second limb of the test in order to determine whether a duty under section 21 exists is to ask whether or not the care and attention needed is available otherwise than by the provision of residential accommodation. One of the conditions for qualifying for accommodation under section 21 is that, without the provision of such accommodation, the care and attention which the person requires would not otherwise be available to them. In *R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38* (“NASS”) the court confirmed that a person needing care and attention that could be provided in their own home would not normally be entitled to accommodation under section 21.
49. In the case of *R (SL) v Westminster CC [2013] UKSC 27* Lord Carnwath said, at paragraph 44: “What is involved in providing “care and attention” must take some colour from its association with the duty to provide residential accommodation.”
50. At paragraph 45 he asked about care and attention: “.....was it available otherwise than by the provision of accommodation under section 21? Although it is unnecessary for us to decide the point, or to consider the arguments in detail, it seems to me that the simple answer must be yes, as the judge held. The services provided by the council were in no sense accommodation-related. They were entirely independent of his actual accommodation, however provided, or his need for it. They could have been provided in the same place and in the same way, whether or not he had accommodation of any particular type, or at all.”
51. In the light of the authorities (*R Wahid v Tower Hamlets*) (2001) *EWHC Admin 641* (First Instance Judgment of Stanley Burnton J) and (2002) *EWCA Civ 282* (Court of Appeal), it is established that section 21 is a provision of last resort, and that it does not follow that because residential accommodation can mean ordinary housing and the claimant is in need of ordinary housing, a duty arises to provide him with that housing under section 21(1)(a). This analysis was approved by Hoffman J in *NASS*.

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<sup>10</sup> See, eg, CouncilIA’s Pre Review Report of 24 October 2003, read with CouncilIA’s Adult Placement Review dated 7 December 2007, and Agreed Statement of Facts, paragraphs 9 and 13.

52. Shared lives schemes or adult placement schemes are a mechanism for promoting independent living. It is clear to me from the papers that Mr X wants to work towards more independent living.
53. Being able to live in shared lives accommodation provides Mr X with a home family environment and in the event, the services needed by him are provided by the shared lives carer and are paid for by Council A (currently on a provisional basis).
54. Accordingly Mr X has been receiving the care and attention he requires whilst living in private residential accommodation (under a Licence Agreement as from 31 March 2006). However, equally, the services he requires could be provided by another contractor. Those services are not intrinsically linked to the accommodation. Accordingly I find that Council A were perfectly lawfully making arrangements other than under section 21.
55. Section 29 of the 1948 Act and the Directions issued under that section require the provision of certain welfare services to individuals such as Mr X. Such services are provided in the community. The list of services which can be so provided is expanded upon by section 2 of the Chronically Sick and Disabled Persons Act 1970. It is clear that the services provided to Mr X whilst living in private residential accommodation<sup>11</sup> come within the nature of services which can be provided in a person's own home under these provisions.
56. I therefore determine that there was no duty to provide section 21 accommodation to Mr X. As a result, Mr X's residence at address B1 should not, in my view, be treated as if it were accommodation under Part 3 of the 1948 Act. If the provision of accommodation does not fall within section 21, the section 24(5) deeming provision does not apply. If section 24(5) does not apply, then Mr X's ordinary residence falls to be determined according to the normal rules as of the day on which Mr X stopped receiving section 21 accommodation. I find that that date is 3 October 2005 (when the accommodation ceased to be a registered care home) or, in any event, 31 March 2006 (when Mr X signed a Licence Agreement to enable him to continue living there).
57. Such a determination is still necessary because Mr X requires welfare services under section 29 of the 1948 Act. The local authority responsible

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<sup>11</sup> See, eg, Agreed Statement of Facts, paragraph 13 as regards services currently provided.

for the provision of those services will be the one in which Mr X is ordinarily resident.

58. Where it is established that a person has the capacity to make a decision about where he should live, the relevant test of where that person is ordinarily resident is set out in the leading case of *Shah* mentioned above.

### **Mental capacity**

59. I therefore consider it appropriate at this stage to turn to the question of Mr X's mental capacity, and his ability to make decisions about where he wishes to live. There is no consensus between the parties on this issue.

60. Council A is not able to provide an assessment of Mr X's capacity under the Mental Capacity Act 2005 ("the 2005 Act") as at the time when he signed the Licence Agreement in March 2006 since this predated the coming into force of the 2005 Act. There appears to have been no formal assessment of Mr X's capacity until 7 September 2012 at which time he was assessed by Council A as lacking capacity to make decisions about his residence<sup>12</sup>.

61. Council B submit that Mr X's reviews and assessments from 1999 to 2012 indicate a consistent picture in terms of his abilities including his relationships, choice, consent and safety due to his behaviours and learning disabilities. They state that a need for advocacy support is recognised in a number of his reviews but does not appear to have been provided suggesting that Mr X lacked the requisite skills and understanding to express himself effectively.

62. Council A submit that applying the principles of the 2005 Act to Mr X's circumstances as at 2006, it is entitled to assume that Mr X had capacity to sign the Licence Agreement for his accommodation in 2005 or subsequently on 31 March 2006 unless it is established that Mr X lacked capacity at that time. Council A submit that its own mental capacity assessment dated 7 September 2012 cannot be relied on by Council B to rebut the statutory presumption that Mr X had capacity to sign the agreement in 2006. Accordingly Council A submit it is not unreasonable for them to conclude that Mr X was able to make a decision as to where he wanted to reside in 2005 and 2006 and had capacity to sign an easy read Licence Agreement for his accommodation on 31 March 2006.

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<sup>12</sup> Agreed Statement of Facts, paragraph 54.

63. Under section 1 of the Mental Capacity Act 2005 a person must be assumed to have capacity unless it is established that he lacks capacity. The current test for capacity is found in section 3 of the 2005 Act. That section states that a person is unable to make a decision for himself if he is unable:

- (a) to understand the information relevant to a decision;
- (b) to retain that information;
- (c) to use or weigh that information as part of the process of making the decision; or
- (d) to communicate his decision (whether by talking, using sign language or any other means).

64. The current test is very similar to that which applied in March 2006 pending the coming into force of the 2005 Act; this was laid down in *Re MB [1997] 2 FLR426*. The following principles applied:

- the starting point is that all persons are to be assumed to be competent to make a particular decision until the contrary is shown; and
- a person has capacity to make a particular decision if they are able to comprehend and retain information relevant to the decision in question and weigh it in the balance as part of the process of arriving at a decision.

65. The decision in question is where Mr X wished to live at the material time. It is not a decision as to the exact nature of the accommodation arrangements nor does it require understanding of the implications of those arrangements or which local authority might be responsible for funding his care. It seems to me that there is a qualitative difference between complex issues relating to a care package or other issues which might require advocacy support of the kind mentioned by Council B, and relatively uncomplicated issues about where one wishes to live and spend one's time. I am satisfied from the information available to me that Mr X did have the necessary mental capacity at the relevant time i.e. he understood that he wanted to remain in Council B and had capacity to indicate preferences about such a matter.

66. I base my conclusions on the following facts:

- the starting position of a presumption of capacity;
- the reviews of his placement at his previous place of residence, address B1 dated 12 May 1999 and 3 February 2000 recorded that Mr

X was able to express his wishes and feelings about his placement in that he was able to say that he liked living at addressB1;

- the fact that when Mr X's care manager visited two possible placements for Mr X in CouncilB on 8 January 2001, this was done with Mr X which suggests that Mr X had views on the matter and that these were relevant;
- prior to moving into the home in 2001 he had visited the home for dinner and was best friends with a resident living there and made friends with the other resident<sup>13</sup> which suggests the exercise of a conscious choice by him;
- Mr X signed a Licence Agreement and this was specially adapted for him to understand, being an easy read version which, read with the starting presumption of capacity, supports the notion of capacity.

67. If, contrary to my view, Mr X did lack sufficient mental capacity to form an intention as to where he wished to live, his ordinary residence would fall to be determined in accordance with the approach known as "Vale 2" which requires the decision maker to look at all the circumstances of the case, as required by Shah, but without requiring the person to have voluntarily adopted the place of residence.

68. Under this approach, where a person's mental capacity is such that they are not capable of forming an intention to live in a particular place, the fact that the person may not therefore reside voluntarily in that place does not prevent it from being their place of ordinary residence. One must consider the question as if the person were a person of normal mental capacity i.e. one must consider all the facts, including physical presence, and the nature and purpose of that presence, in a particular place as outlined in *Shah*, but without requiring the person themselves to have adopted the residence voluntarily. If contrary to my view, Mr X does lack capacity to decide where to live, I must proceed on the basis that Mr X should be treated as having capacity. My determination below proceeds accordingly.

### **Determination of ordinary residence**

69. I am satisfied that Mr X adopted addressB1 as his home voluntarily and for settled purposes and continues to be ordinarily resident there. To sum up, the factors which I consider to be particularly relevant in this case are as follows.

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<sup>13</sup> Agreed Statement of Facts, paragraph 23.

70. His residence with Mrs H was for settled purposes and for providing for his needs in a family environment. It took him 6 months to settle there and he got upset and annoyed if his routine and environment changed<sup>14</sup>.
71. He had been living in Council B since he was a child<sup>15</sup>. His "FACE" overview assessment dated 10 August 2012 records that he had been living there for 30 years as at that date.
72. He chose to remain living at address B1 when the home de-registered as a care home.
73. He signed a Licence Agreement to enable him to do so. This agreement, which was an easy read version, constitutes an expression of Mr X's wishes with regard to where he lives.
74. Mr X clearly has an important and close relationship with Mrs H as evident from his mental capacity assessment of 7 September 2012 which refers to him liking his carer as she makes him lots of cups of tea.
75. His Independent Mental Capacity Advocate's report of 24 January 2013 states that he appears happy in his placement, that he has built friendships and knows the community where he lives, that his carers also feel they are able to meet his needs and that he is happy in his placement, that Mr X's own wishes are that he is happy there and does not want to move and that he finds change difficult<sup>16</sup>.
76. As at June 2013 he had built up special and supportive relationships with staff and peers at the day care centre he attended in Council B (Council A's letter of 25 June 2013 to Council B).
77. From this it is clear that he regards his current placement as his home for the foreseeable future and has formed links to the area.
78. All the evidence points to the conclusion that Mr X will remain at address B1 for the foreseeable future.
79. He is no longer present in Council A's area.
80. There is no evidence that since being placed in Council B's area Mr X had had any contact with his birth parents or retained links with Council A's area.

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<sup>14</sup> Review officer summary referred to in Agreed Statement of Facts, paragraph 34.

<sup>15</sup> Agreed Statement of Facts, paragraph 15.

<sup>16</sup> Agreed Statement of Facts, paragraph 56.

81. I am therefore satisfied that Mr X has adopted the accommodation as his home voluntarily and for settled purposes as his place of residence. He has therefore acquired a new ordinary residence in CouncilB's area, and CouncilB has become responsible for providing community care services to him.

82. My findings are in line with the OR Guidance which provides that a person is likely to acquire a new ordinary residence in an area if a care home deregisters to provide independent living accommodation on the same site<sup>17</sup>.

83. I am not asked to determine the precise date when Mr X became ordinarily resident in CouncilB, but in my view he became ordinarily resident there from the date when the accommodation provided by Mr and Mrs H deregistered as a care home and started being provided as shared lives accommodation and he was able to live there under private arrangements. This was either from 3 October 2005 when the care home de-registered or from 31 March 2006 when Mr X signed the Licence Agreement.

84. If, contrary to my view set out above, Mr X did initially lack sufficient mental capacity to form an intention as to where he wished to live and in respect of the period from September 2012 when he was found to lack such capacity, considering the case as if Mr X did have mental capacity my determination is still that, for the purposes of the 1948 Act, he is ordinarily resident in CouncilB.

Signed on behalf of the Secretary of State for Health

Date: .....

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<sup>17</sup> OR Guidance, paragraphs 95-97.