

# **DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014 OF THE ORDINARY RESIDENCE**

## **Introduction**

1. I have been asked by CouncilA and CouncilB to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is in relation to the ordinary residence of X from 10 February 2014.

## **The facts**

2. I have taken the facts set out below from a statement of facts that has been agreed and signed by CouncilA and CouncilB on 1 August 2016.
3. X was born on XX XX 1982. He has been diagnosed with a learning disability and epilepsy.
4. Until May 2012 X lived with his parents in the CouncilA area before being moved by CouncilA to a supported living placement in area1.
5. On 21 March 2013 X was detained in hospital under section 3 of the Mental Health Act 1983.
6. In November 2013 X was discharged from hospital to live with his family. It is not clear whether he was provided with services under section 117 of the 1983 Act. The agreed statement of facts makes no reference to section 117 at all. Further, neither party makes reference to X being entitled to after-care services pursuant to section 117 in their written submissions. I therefore proceed on the basis that X did not receive any such services during the material time and that his entitlement to welfare services arose from the National Assistance Act 1948 and the Care Act 2014.
7. Indeed, this is confirmed by the agreed statement of facts, which states as follows:

*8. From 4 February 2014 until the coming into force of the Care Act 2014 (on 1 April 2015) Mr X's needs were met by the provision of care, by organisation1, which was commissioned by CouncilA pursuant to s. 29 of the National Assistance Act 1948. Since the coming into force of the Care Act 2014, Mr X's needs have been met by the provision of care, by organisation1, which was commissioned by CouncilA pursuant to s. 18 of the Care Act 2014.*

8. I am told that by 13 January 2014 the arrangements for X at the family home broke down and he was moved by CouncilA to a residential care home at AddressA1 operated by a care provider called organisation1.
9. On 7 February 2014 the Court of Protection made declarations that it was in the best interests of X to reside at AddressA2.
10. On 10 February 2014 X moved into AddressA2 under the terms of a tenancy agreement between X and the landlord. That agreement was signed on behalf of X by the Director of Adult Social Services at CouncilA.
11. On 30 April 2014 it appears that the Court of Protection recorded that X wished to remain living at AddressA2 and made a final declaration that it was in his best interests to do so based on a finding that he lacked capacity to make the decision himself.
12. On 4 June 2014 CouncilA wrote to CouncilB indicating that they considered X to have attained ordinary residence in CouncilB since 10 February 2014.
13. On 7 October 2015 CouncilB confirmed its view that X was not ordinarily resident in CouncilB. Further correspondence passed between the parties seeking to reach agreement.
14. On 21 March 2016 it was suggested that the matter should be referred to the Secretary of State for determination in the absence of agreement.
15. CouncilA and CouncilB are in agreement that X lacks capacity to decide where to live and that the Court of Protection made final declarations to this effect on 30 April 2014.

## Positions of the parties

### CouncilA

16. CouncilA has provided written submissions (undated).
17. It is the position of CouncilA that X acquired ordinary residence in the CouncilB area from 10 February 2014 when he moved to supported living accommodation at AddressA2.
18. CouncilA submit that from 10 February 2014 until 1 April 2015 X's care was provided by them under s. 29 of the 1948 Act but that the accommodation was provided pursuant to a private law agreement between him and the landlord. Reference is made to the decision in Chief Adjudication Officer v Quinn Gibbon (1996) 4 All ER 72 in support of their position that the accommodation was not provided by them under s. 21 of the 1948 Act.
19. CouncilA argue that as a consequence the deeming provisions under section 24(5) of the 1948 Act do not apply and that by application of the decision of the House of Lords in Shah as interpreted by the Supreme Court in Cornwall X is ordinarily resident in CouncilB from 10 February 2014 until 1 April 2015.
20. CouncilA further contend that from 1 April 2015 to date X has been ordinarily resident in CouncilB by reference to the 2014 Act and/or Article 2 of the Care Act (Transitional Provision) Order 2015.

### CouncilB

21. CouncilB has provided written submissions dated 26 July 2016.

22. Council B question the rationale for moving X to Address A2. Reference is made to the Care Act 2014 and accompanying guidance. It is submitted that a person placed out of area is deemed to continue to be ordinarily resident in the area of the local authority that arranged the care in the specified accommodation and consequently that authority retains responsibility by reference to section 39 of the 2014 Act.
23. Council B make reference to Council A's Director of Social Services signing X's tenancy agreement for Address A2. It is submitted that the 'previous guidance' provides that supported living accommodation is not usually appropriate for persons who need accommodation together with nursing or personal care and that such accommodation should be provided under s. 21 of the 1948 Act. In such circumstances, the deeming provision under s. 24(5) of the 1948 Act would apply.
24. Council B go on to submit that the support package provided to X was so specialised and bespoke that it has more in common with arrangements under s.21 of the 1948 Act than a move to independent living and that the deeming provisions of s.24(4) of the 1948 Act apply. Further, it is submitted that the position did not alter upon the coming into force of s.39(1)(a) of the 2014 Act. In all the circumstances, including consideration of the effect of the Cornwall decision, Council B submit that X remains ordinarily resident in Council A.

## **The law**

25. I have considered all the documents submitted and referred to by Council A and Council B. I have also considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); the provisions of part III of the National Assistance Act 1948 ("the 1948 Act"); the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 ("the 2014 Regulations"); the Care and Support (Disputes Between Local

Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015 (“the Transitional Order”); the Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“Shah”); *Chief Adjudication Officer v Quinn Gibbon* (1996) 4 All ER 72 and *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46* (“Cornwall”). My determination is not affected by without prejudice acceptance of responsibility by CouncilA.

26. Prior to the coming into force of the 2014 Act the principal means by which local authorities were empowered to provide accommodation (outside of the Housing Acts) was pursuant to their powers under Part III of the 1948 Act. The sub-heading to Part III is “*Provision of accommodation*”.
27. Section 21(1)(a) of the National Assistance Act 1948 sets out the power of local authorities to provide residential accommodation for specified persons in need of care and attention not otherwise available to them.
28. Section 21(5) states that references in the 1948 Act to accommodation provided is to accommodation provided in accordance with that section and the next five sections.
29. Section 24(5) of the 1948 Act states that where a person is ‘provided’ with residential accommodation under Part III he shall be deemed to be ordinarily resident in the area in which he was ordinarily resident immediately before that accommodation was provided.
30. Section 26(1) of the 1948 Act states that arrangements for the provision of accommodation under section 21 may include arrangements with a voluntary organisation or any other person who is not a local authority where that organisation or person manages the premises for reward (excluding specified accommodation which does not apply).

31. Section 26(2) of the 1948 Act states that any arrangements made under this section shall provide for the making by the local authority to the other party thereto payments in respect of the accommodation provided as such rates to be determined.

32. Article 6(2)(c) of the Transitional Order provides as follows:

*“Section 39 of the Act (where a person’s ordinary residence is) does not have effect in relation to a person who, immediately before the relevant date in relation to that person, is being provided with-*

*...*

*(c) supported living accommodation (within the meaning of regulation 5 of the 2014 Regulations).”*

33. Regulation 5(1) of the 2014 Regulations provides as follows:

*“(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 may be provided by a person other than the person who provides the accommodation.”*

## **Application of the law to the facts**

34. The agreed statement of facts confirms that X has occupied supported living accommodation at AddressA2 since his move there on 10 February 2014 (see: paragraphs 2 & 7).
35. CouncilA submits that the accommodation has more in common with arrangements made under s.21 of the 1948 Act due to his level of needs. This is not consistent with what was agreed in the statement of facts. Nor is it consistent with the tenancy agreement between X and the landlord. Whilst the Direction of Adult Social Services at CouncilA may have signed that agreement on behalf of X there are no grounds for declaring the agreement void. Whilst the agreement might be voidable it remains valid until declared otherwise by the court. In the circumstances, I conclude that there is a binding tenancy agreement between X and the landlord effective from 10 February 2014 for the let of the accommodation at AddressA2 under which X is responsible for the payment of rent and other charges. I note that there is no evidence that CouncilA paid X's rent for the accommodation under s.21 of the 1948 Act or otherwise.
36. In such circumstances, it is impossible to conclude that as a matter of law the accommodation was provided by CouncilA pursuant to their powers under s. 21 of the 1948 Act. On the information available I find that AddressA2 falls within the definition of supported living accommodation where X has been living since 10 February 2014. This conclusion is supported by the decision in Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184 at 1192 per Lord Slynn and is consistent with the agreed statement of facts.
37. Because X was residing in supported living accommodation immediately before the relevant date (1 April 2015) section 39 of the 2014 does not apply due to the effect of Article 6(2)(c) of the Transitional Order.
38. The issue of X's ordinary residence must therefore be determined by reference to the law that existed prior to the coming into force of the Care Act 2014.

39. Because CouncilA did not provide the accommodation to X under Part III of the 1948 Act so the deeming provisions under section 24(5) cannot apply either. In such circumstances, the correct test is that set out in Shah as modified by the decision in Cornwall. This requires a common-sense approach to the meaning of ordinary residence involving questions of fact and degree including factors such as length of time, intention and continuity but without the requirement for voluntary adoption.

40. The agreed facts in this case are that X has lived in this supported living accommodation in the CouncilB area since 10 February 2014. This accommodation has been his home since that time and is where he has enjoyed activities, community access and the other day-to-day aspects of his life. It is also the place that it has been decided it is in his best interests to reside by reference to his best interests pursuant to the Mental Capacity Act 2005.

## **Conclusion**

41. I conclude that on 10 February 2014 X became ordinarily resident in CouncilB and that he has remained ordinarily resident in CouncilB following the coming into force of the Care Act 2014 to date on the information available.