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 ("the 2014 Act") of the ordinary residence of X. The dispute is with the CouncilB.

The facts

2. X largely grew up in CouncilB's area.

3. In April 2010, when X was 14, CouncilB accommodated X pursuant to its duties under section 20 of the Children Act 1989. X was placed in a number of different residential provisions in the area of CouncilA and, on 30 June 2011, moved to Address1A. CouncilA suggests that the reason for the out of area placement was that CouncilB did not have appropriate provision in its own area.

4. On XX XX 2014, X turned 18. CouncilB continued to provide accommodation to X at Address1A after that date. Such accommodation must have been provided pursuant to s.21 of the National Assistance Act 1948.

5. On 19 May 2014, CouncilB wrote to CouncilA asking the latter to carry out a needs assessment, on the basis that CouncilB considered X's ordinary residence to have transferred to CouncilA on or shortly after her 18th birthday. CouncilB contended that its obligations under the Children Act 1989 lapsed upon X's 18th birthday, and that thereafter X chose to remain in AreaA for settled purposes. She had thus adopted AreaA as her home, in accordance with the principles in *Shah v London Borough of Barnet* (1983) 1 All ER 226. (From 2010 until X's 18th birthday, on XX XX 2014, all parties agree that X was ordinarily resident in CouncilB, pursuant to the deeming provision in s.105(6)(c) of the Children Act 1989). CouncilA points out that it was given no prior notice of X living in its area.

6. CouncilA initially resisted this suggestion. But on 15 December 2014 it wrote to CouncilB saying that it would undertake a community care assessment in early 2015. In the event, this was carried out on 27 January 2015.

7. On 27 February 2015, CouncilA accepted a statutory duty to meet X's needs for care and attention, and took over the funding of the placement. This acceptance was based on CouncilA's understanding of the "Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England 2013." CouncilA considered that, in light of that guidance, any application to the Secretary of State for a determination would inevitably have gone against it; it therefore made no such application.

8. On 2 March 2015, X's section 20 accommodation ceased.

9. On 8 July 2015, the Supreme Court handed down judgment in *R(Cornwall Council) v Secretary of State for Health* [2015] UKSC 46.

10. CouncilA considered that, in light of that judgment, X's ordinary residence had not in fact transferred to CouncilA upon her 18th birthday. On 20 July 2015, CouncilA therefore wrote to CouncilB setting out its arguments in relation to *Cornwall*. CouncilB replied the same day saying that *Cornwall* applied only to 18 year olds lacking capacity and that, as X had capacity, it did not apply on the facts of her case.

11. On 29 July 2015, X moved from Address1A (a private residential home) to Address2B (a supported living placement).

12. In October 2015, the Department of Health circulated a note informing practitioners and local authorities that there would be further guidance in the wake of the *Cornwall* case.

13. In February 2016, the Department of Health issued draft guidance on the position in light of the *Cornwall* case.

14. Both parties agree that at all material times X has had the capacity to make decisions about where she should live. CouncilB contends that X has expressed a wish to remain living in the CouncilA area.

The Authorities' submissions

15. CouncilA contends that X is ordinarily resident in the area of CouncilB. It relies entirely on the *Cornwall* case and the Department of Health Guidance published in light of it. It submits that:
    a. X was placed in CouncilA's area by CouncilB pursuant to s.20 of the Children Act 1989;
    b. Until her 18th birthday, she was deemed ordinarily resident in CouncilB by virtue of s.105(6)(c) of the Children Act 1989;
    c. As a result of this placement, X was living in a place determined not by her own settled intention, but by CouncilB solely for the purpose of fulfilling its statutory duties;
    d. Upon turning 18 and ceasing to be a child for the purposes of the Children Act 1989, CouncilB made arrangements for providing X with residential accommodation pursuant to s.21 of the National Assistance Act 1948. It continued to provide such accommodation until 22 December 2014, having first notified CouncilA of X's presence in its area on 16 May 2014. The section 24(5) deeming provisions in the 1948 Act applied to this accommodation, such that X remained ordinarily resident in CouncilB's area;
    e. Upon turning 18, X transitioned to accommodation to which the adult deeming provisions applied and was, immediately prior to transition, being provided with accommodation under the Children Act 1989 and so was deemed ordinarily resident in CouncilB's area at that time;
    f. X chose to move to supported living on 29 July 2015. But as s.39(1) of the Care Act 2014 and the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014) had already come into force by that date, the deeming provisions continued to apply to her despite this move;

g. CouncilA also points out that there are policy reasons for treating X as remaining with CouncilB. CouncilA has a disproportionately high number of specialist providers. If ordinary residence were to transfer upon the 18th birthday of all those service-users, it would be shouldering an unfair share of the burden. This would provide a perverse disincentive to CouncilA fostering this network of providers; and a perverse incentive to other authorities not to make their own provision locally.

16. CouncilB submits that X is ordinarily resident in the area of CouncilA. It contends that:
    a. *Cornwall* was concerned with a transitioning 18 year old who lacked capacity, and that its reasoning is not applicable to those (such as X) who do have capacity;
    b. In respect of those who have capacity, as long as they have a continuous need to be provided with a prescribed form of residence, they will never be able to establish ordinary residence in any authority other than that which looked after them as a child;
    c. Moreover, as X can make a capacitous decision about where she should live, including whether to remain in CouncilA's area or return to CouncilB, the policy concerns about "exporting" duties out of borough do not apply, or at least do not apply to the same extent;
    d. The test thus reverts to that in *Shah* (as to which see below). On the *Shah* test, X is to be regarded as having voluntarily decided to remain in CouncilA's area for settled purposes. Her education was there, her social network is there, and she decided to move on to a supported living placement there. By contrast, she has only a historic connection to CouncilB's area, and has not made a decision to return there;
    e. CouncilB appears to accept that the revised statutory guidance treats the decision in *Cornwall* as being applicable to both those with capacity and those without it. It submits, however, that the guidance is wrong:
        i. The starting point in *Cornwall* was "an assessment of the duration and quality of P's actual residence in any of the competing areas [49]". If it were the case that a former looked after child always retained ordinary residence in the borough responsible for her as a

looked after child, that assessment of duration and quality would not be relevant;

ii. *Cornwall* was about an individual who lacked capacity, so the issue of what happens when someone has capacity did not arise for determination;

iii. There is an incompatibility between a blanket approach to ordinary residence for policy reasons, and the rights of an adult with capacity to decide her place of ordinary residence. On the approach in the guidance, an adult with capacity cannot "choose" their place of ordinary residence;

iv. Policy concerns about exporting responsibility cannot override the "starting point" referred to at paragraph [49] of *Cornwall*;

v. All factors, including both the policy considerations expressed by the Supreme Court but also the quality of the person's connection to the place in question, should be taken into account in the mix in deciding the place of a person's ordinary residence.

17. CouncilA has agreed to continue funding the placement pending the resolution of this dispute. My decision is not affected by CouncilA agreeing to fund X's care in the interim.

Jurisdiction

18. CouncilB contends that the Secretary of State does not have jurisdiction to determine this dispute under s.40 of the Care Act 2014. Its submissions are based on the premise that there is a four-month limitation period for referring disputes to the Secretary of State.

19. The relevant provision is regulation 3(7) of the Care and Support (Disputes Between Local Authorities) Regulations 2014. It provides that "If the authorities cannot resolve the dispute between themselves within four months of the date on which it arose, the lead authority must refer it to the appropriate person." This provision does not establish a four-month limitation period, and does not provide that a dispute which has been on-going for longer than four months cannot be

referred to the Secretary of State for a determination. As such, it does not remove my duty to determine disputes under s. 40 of the Care Act 2014, which provides that the Secretary of State (or "the appointed person") *is* to determine disputes about where an adult is ordinarily resident for the purpose of Part 1 of the 2014 Act. I therefore find that I do have jurisdiction to consider this dispute.

The Law

20. I have considered all the documents submitted by the two 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 London 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").

Children Act 1989

21. Local authorities are required to provide support, including accommodation (where needed), to children in need, pursuant to Part III of the Children Act 1989. Section 105(6)(c) of that Act provides that "In determining the *"ordinary residence"* of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place while he is being provided with accommodation by or on behalf of a local authority."

The National Assistance Act 1948

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**.**

23. 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 at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

24. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal care under section 21 of that Act with any organisation other than a registered care home.

The relevant local authority

25. 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 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

26. 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 ordinarily resident immediately before the residential accommodation was provided.

Welfare services

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

The Care Act 2014

The relevant local authority

28. 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

29. Under section 39(1) of the 2014 Act, 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 Part I of the 2014 Act as ordinarily resident 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.

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

The Cornwall case

31. The majority of the Supreme Court held as follows:

> "54 The question therefore arises whether…there is a hiatus in the legislation such that a person who was placed by X in the area of Y under the 1989 Act, and remained until his eighteenth birthday ordinarily resident in the area of X under the 1989 Act, is to be regarded on reaching that age as ordinarily resident in the area of Y for the purposes of the 1948 Act, with the result that responsibility for his care as an adult is then transferred to Y as a result of X having arranged for his accommodation as a child in the area of Y.

55 It is highly undesirable that this should be so. It would run counter to the policy discernable in both Acts that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement. It would also have potentially adverse consequences. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority, and the people who are cared for in some specialist settings may come from all over the country. It would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long term financial burden which would potentially follow.

(…)

58 Section 24(5) poses the question: in which authority's area was PH ordinarily resident immediately before his placement in Somerset under the 1948 Act? In a case where the person concerned was at the relevant time living in accommodation in which he had been placed by a local authority under the 1989 Act, it would be artificial to ignore the nature of such a placement in that parallel statutory context. He was living for the time being in a place determined, not by his own settled intention, but by the responsible local authority solely for the purpose of fulfilling its statutory duties.

59 In other words, it would be wrong to interpret section 24 of the 1948 Act so as to regard PH as having been ordinarily resident in South Gloucestershire by reason of a form of residence whose legal characteristics are to be found in the provisions of the 1989 Act. Since one of the characteristics of that placement is that it did not affect his ordinary residence under the statutory scheme, it would create an unnecessary and avoidable mismatch to treat the placement as having had that effect when it came to the transition in his care arrangements on his eighteenth birthday."

32. The Care and Support Statutory Guidance has been updated to reflect this judgment. It now provides:

"19.38 This means that for the purposes of the 2014 Act, and where relevant, the 1948 Act, any person who moves from accommodation provided under the 1989 Act to accommodation provided under the 1948 Act or 2014 Act, which is accommodation to which the deeming provisions under the 1948 Act or the 2014 Act apply, remains OR in the local authority in which they were ordinarily resident under the Children Act. This includes a situation where a child has been placed out of area under the 1989 Act as a looked after child and requires residential

accommodation under the 1948 Act or the 2014 Act at age 18 as well as leaving care support under the 1989 Act."

Ordinary Residence

33. "Ordinary residence" is not defined in the 2014 Act. The Department of Health 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.

34. In *Shah v London 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."*

35. 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 three 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.

36. 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 the law to the facts

37. I do not agree with the contentions of CouncilB that the reasoning in *Cornwall* does not apply to those with capacity.

38. On the question of transitioning 18 year olds, the Supreme Court was concerned with construing the overall statutory framework, and in particular with whether the deeming provisions in each of the Children Act 1989 and the National Assistance Act 1948 were relevant only within their own piece of legislation or also with respect to the other piece of legislation. That is an objective matter of statutory construction rather than of fact-specific application of the law to a particular set of facts in any given case. The Supreme Court's construction exercise happened to rely (in part) upon policy considerations, which is a recognised tool of statutory construction. But whether or not those policy considerations apply with greater or lesser force in certain types of cases, the statutory framework can only have one meaning; it cannot be construed in different ways for different people.

39. Moreover, even if *Cornwall* does not apply, strictly speaking, to those who have capacity (because that question did not arise for determination on the facts of that case), in my view the reasoning in the judgment nevertheless applies with equal force to those who have capacity:

    a. I do not agree with CouncilB's contention that there is an inherent contradiction between the notion that the deeming provisions should be regarded as running without hiatus through the Children Act 1989 and the National Assistance Act 1948 and the ability of an adult with capacity to

choose where to live. In principle, it should make no difference to the adult in question where they are ordinarily resident: the ordinary residence provisions are purely fiscal and administrative, and should not impact upon the level of care that an adult receives. Having mental capacity is of no relevance to that system;

b. That is just the nature of the deeming provisions in all three of the Children Act 1989, the National Assistance Act 1948, and the Care Act 2014: the whole point of them is that they treat the individuals to whom they apply as remaining ordinarily resident in the placing authority despite the fact that their settled residence is likely in many cases to be the hosting authority;

c. Even if the effect of the above is that a former looked after child will remain ordinarily resident in the area of the authority which looked after her so long as she continuously has a need to be placed in a prescribed form of accommodation, that is simply the effect of the statutory provisions. The Supreme Court recognised in *Cornwall* at [60] that this was a possibility and may seem harsh, but considered that there were policy reasons both for as well as against such an approach. There would appear to be no reason why, from a fiscal and administrative perspective, the effect of the Supreme Court's approach should differ depending on whether or not the individual had capacity;

d. This approach is no different from that which pertains to adults, who are also deemed to remain in the original placing authority even when they have voluntarily chosen their place of residence, as long as they continuously remain resident in a prescribed form of accommodation;

e. It is generally correct that the starting point in any ordinary residence dispute will be an assessment of the nature and quality of a person's connection to a particular area. However, as the Supreme Court made clear in *Cornwall*, that test is not to be applied "without qualification" where the deeming provisions apply. Where the deeming provisions apply, the key thing is the way in which the statute operates (see paragraph [52]).

40. It follows that in my view the relevant part of the statutory guidance is correct.

Conclusion

41. In light of all of the foregoing, X is ordinarily resident in CouncilB.

42. CouncilA has indicated that it wishes to seek a financial adjustment from CouncilB pursuant to s.41 of the Care Act 2014. However, that does not form part of the process for seeking the determination of a dispute pursuant to s.40 of the Care Act 2014, so I do not attempt to resolve it here. If it wishes to pursue an adjustment, CouncilA must do so with CouncilB directly.