DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948

1. I have been asked by CouncilA to make a determination under section 32(3) of the National Assistance Act 1948 of the ordinary residence of X. The dispute is with CouncilB.

2. I have considered the legal submissions submitted by parties, the further legal submissions, the agreed statement of facts and the bundle of documents provided.

3. I find that X is ordinarily resident in the area of CouncilA and has been since 17 November 2014.

Legal Framework

4. It is common ground that this matter falls to be determined in accordance with the provisions of the National Assistance Act 1948 rather than the Care Act 2014. I therefore set out below the law as it stood at the relevant time, prior to 1 April 2015 when relevant provisions of the 2014 Act came into force.

5. I note that there is no argument that the arrangements in place in respect of X amount to the provision of accommodation under Part 3 of the National Assistance Act 1948. Plainly, they do not. However, section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

6. "Ordinary residence" is not defined in the 1948 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[1] ("the guidance"). Paragraph 18 of the guidance 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.

7. 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 a settled purpose as part of the regular order of his life for the time being, whether of short or long duration"

[1] From 19th April 2010, this guidance was contained in "Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England" issued on 15th April 2011 reissued October 2013. Save where expressly stated otherwise, this determination refers to this guidance as the guidance in force at the relevant time for which the determination falls to be made.

8. For the purposes of the 1948 Act, a person cannot have more than one ordinary residence. Paragraph 26 of the guidance in place at the relevant time states:

> "Although in general terms it would be possible for a person to have more than one ordinary residence (for example, a person who divides their time equally between two homes), this is not possible for the purposes of the 1948 Act. The purpose of the ordinary residence test in the 1948 Act is to determine which single local authority has responsibility for meeting a person's eligible social care needs, and this purpose would be defeated if a person could have more than one ordinary residence. If a person appears genuinely to divide their time equally between two homes, it would be necessary to establish (from all of the circumstances) to which of the two homes the person has the stronger link. Where this is the case, it would be the responsibility of the local authority in which the person is ordinarily resident to provide or arrange services during the time the person is temporarily away at their second home"

9. Additional considerations apply where the relevant person lacks capacity to determine (and thus to "voluntarily adopt") his abode. This issue was addressed by the Supreme Court in the *Cornwall County Council* case. The Supreme Court held that the focus must be on the nature of the residence of the subject of the decision (paragraph 51) which may include having regard to the duration and quality of that residence (paragraph 49). The published guidance on ordinary residence notes that all of the relevant circumstances must be considered including the person's physical presence, the purpose of living there, the person's connection with the area, their duration of residence and their views, wishes and feelings (so far as ascertainable) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration. Revised guidance was issued following the decision in the *Cornwall County Council* case.

Factual Background

10. X was born on XX XX 1962. She has Downs Syndrome with an associated congenital heart defect (hole in the heart), learning disability, autistic traits and dementia.

11. X was born in Country1 but moved with her family to Country2 24 years ago. X's mother was her primary carer until her death in July 2007. The statement of facts indicates that since her mother's death, X has moved between family members and been unable to settle in one placement for a long period of time. X has two brothers and three sisters.

12. From May 2009 until January 2010, X was living with one of her sisters. X attended a day centre in AreaC for six days a week and respite care at House1, once a month.

13. X then went to live with her brother, Y1, and sister-in-law. On 11 March 2011, the police were called to an incident in the home. X alleged that her sister in law had slapped her. X was removed from that house to the home of her sister, Y2. Y2 requested services from CouncilB. Since March 2011, X lived with Y2 in the area of CouncilB.

14. Unfortunately, X and her sister were the victims of racial abuse from neighbours. Y2 decided to sell the house.

15. I have been provided with an undated assessment completed by CouncilB. From the contents of that assessment it appears to have been completed when Y2 was considering moving.

16. That assessment stated:

> "Y2 is the main carer. However she works as cabin crew so needs irregular, flexible respite to continue this. When she is on standby, the respite can be lengthy as she needs to be able to go at a moment's notice. X cannot respond in such a way, so has to stay with another sister so that Y2 can leave when she needs to."

17. I note that that assessment identifies the support as being a direct payment for 18 days a month. That also noted "Y2 is requesting an additional 2 days per month while she is house hunting for herself and X. She is planning to move to CouncilA's area."

18. On or around 17 November 2014, X relocated to live with her sister at Address1A, CouncilA's area. This is a privately owned 2 bedroom property. X's main carer remains her sister, Y2. Y2 also works full time as cabin crew.

19. On 4 December 2014, CouncilB wrote to CouncilA requesting CouncilA to take over responsibility for X's care. I will not set out all of the correspondence that ensued but only those points relevant for the determination.

20. On 10 December 2014, CouncilB provided an updated community care assessment.

21. On 22 January 2015, X's social worker, Y3 of CouncilB, sent a copy of a mental capacity assessment in relation to managing her direct payments. The assessment concluded that X did not have capacity to do so. She has no understanding of basic money values, though she understands that she needs money to buy things she wants. The assessment records:

> "X has every appearance of being happy living with her sister. During the assessment visit, X stroked her sister's face and said with great warmth "I stay with her. This is my house. Everybody comes here." This last was a reference to the other family members who come to visit her or pick her up…"

22. The assessment goes on to state:

> "…moving in with Y2 in 2011. X attended day services following that move, but was not happy as she did not always want to do the activities provided. She would refuse to go. The placement then broke down.
>
> Since she has been supported by family members through direct payments, X has been much happier as they know her very well and can provide the flexibility she needs. She is able to stay overnight at their homes and keep personal items there. Her family also understand her behaviours and are able to support her appropriately.
>
> Family members would not be able to provide this high level of support without financial reward as they need employment. Direct Payments is the only way this can happen."

23. On or around 27 February 2015, CouncilA completed its own community care assessment. On 23 March 2015, CouncilA Law Plus wrote to CouncilB to the effect that CouncilA "understand that X spends the equivalent of 23 days and nights a month in CouncilB's area. We are also instructed that X's sister informed our client department that they have not really settled in CouncilA's area and go back to CouncilB's area very frequently, even to do their food shopping. Furthermore, X has not changed her GP and is still accessing health services in CouncilB's area." CouncilA contended that X had a stronger link with CouncilB's area than with CouncilA's area.

24. The assessment itself states that the care by way of direct payments is made of 25 full days a month. The assessment also states that Y2 states that X coped with the move to CouncilA's area "amazingly well and played a full part in deciding the house they eventually moved to."

25. I note that the statement of facts states at paragraph 29 that CouncilB legal services advised CouncilA legal services that: "Y2, X's sister, who is very upset with the position CouncilA are taking and in her words the assessing social worker 'has taken my words out of context'…" It is not clear to me exactly to what that comment relates.

26. On 1 May 2015, CouncilA made an application for a determination in accordance with direction 5(2) of the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010. Consideration of the determination was suspended

pending the decision of the Supreme Court in the *Cornwall County Council* case, in light of which both parties have made further submissions.

X's Assessed Needs and Care Package

27. X needs support to attend to her personal care e.g. brushing hair, cutting nails and prompting to wash and dress. She needs help when cleaning herself after using the toilet. She has lost her skills in being able to use cutlery and prepare snacks and drinks. Her mobility is restricted because of arthritis which affects her knees.

28. X receives a direct payment of £140 per 24 hours for 23 days a month to cover periods of care when Y2 is working and recovering from jetlag after returning home from a shift. This is provided to X in her own home in CouncilA's area and sometimes with a paid carer in CouncilB's area. Another sister also provides respite for X.

29. I invited the parties to provide further details in relation to the care provided for X. I received the following information, which I understand is agreed between the parties:
    - Y2 is X's sister and sole carer. They have lived together in CouncilA's area for almost three years.
    - They have been registered at GP surgery CouncilA's area for one and a half years.
    - There are no other informal carers as all other care is provided via direct payments currently funded by CouncilB.
    - X has been a resident of CouncilA for almost 3 years.
    - Most of the Direct Payment workers are family or friends. X would previously stay with them in CouncilB's area or AreaC when Y2 was working away but since having a new bed, the workers now come to X's home (over last 8 weeks) .
    - X contributed to the decision to move to CouncilA's area and Y2 said that she had the capacity to do this at the time.

Capacity

30. Paragraph 9 of the agreed statement of facts states that CouncilA and CouncilB are agreed that X lacks capacity to decide where to live. I note that X's sister claims that X had capacity to decide where to live at the time of the decision to move. I also note that CouncilB's original legal submissions state: "the evidence adduced by CouncilB confirms that X was able to make this decision and that she has adopted the CouncilA voluntarily and for a settled purpose". CouncilA's original legal submission also states: "…there is far from sufficient evidence to suggest that X lacks capacity to decide where to live" (paragraph 30). Thus although the agreed statement of facts refers to X lacking capacity, in fact both

sets of submissions proceeded on the basis that there was inadequate evidence to rebut the presumption of capacity.

31. I note that the further legal submissions of CouncilA refer to paragraph 9 of the agreed statement of facts, and the correspondence from CouncilB on 23 January 2015, the further submissions do not in fact appear to proceed on the basis that X lacks capacity.

32. In these circumstances, the statement that there is agreement that X *lacks* capacity to decide where to live in the agreed statement of facts appears to be an error. At any event, I agree with the position adopted by the parties in the original legal submissions that the evidence before me does not rebut the presumption that X had capacity to decide where to live.

The parties submissions

33. CouncilA submits:
    - X has not adopted residence in the area of CouncilA and remains ordinarily resident in CouncilB's area. X spends the majority of her time with family members in CouncilB's area and, at the relevant date, continued to be registered with a GP in CouncilB's area and to receive health services in CouncilB's area.

34. CouncilB submits:
    - X has adopted CouncilA voluntarily with the intention of continuing to live with her sister, with whom she has lived since March 2011 and with whom she has a good relationship. CouncilB played no role in the decision to move, which was made by X.

Analysis

35. The parties agree that X has capacity to make decisions with regards to her residence. X had been living with her sister, Y2, in the area of CouncilB since March 2011. Y2 is her main carer, but as a consequence of Y2's job she also requires support when Y2 is away, which is currently provided through direct payments to family members. She moved with Y2 to the property in CouncilA when Y2 decided to sell her property as a consequence of racial abuse.

36. The mental capacity assessment completed by CouncilB on 9 January 2015 which was completed states:

> "X has every appearance of being happy living with her sister. During the assessment visit, X stroked her sister's face with great warmth 'I stay with her. This my house. Everybody comes here."

37. The CouncilA FACE Overview Assessment states with reference to the move to CouncilA:

> "...However, they return very frequently (to CouncilB) even to do grocery shopping, so admit that they haven't really put down roots in CouncilA's area yet or got to know anybody. A number of relatives still live in CouncilB's area and it is with these people that X stays while her sister works as cabin crew out of Airport1."

38. However, it goes on to note:

> "… (However, Y2 said that she coped with the move amazingly well and played a full part in deciding the house they eventually moved to)."

39. It is clear, then, that X lives with Y2 as her primary carer and that she does so of her own volition as an adult with capacity to decide where to live. She considers Y2's home to be her home. The fact that X and Y2 continue to shop in the area of CouncilB and retain ties there does not mean that they have not moved from a position of being resident in CouncilB to being resident in CouncilA: it is not uncommon for people living in one area to shop or maintain ties in another. Nor is it unusual that there is a delay before registering with a new GP, or indeed for a person to retain a GP within a different local authority area. While I note that at the relevant date, X in fact spent most of her time sleeping in the area of CouncilB because she needs care when Y2 is working, there is no evidence that X considered her time spent with relatives in the area of CouncilB to be time spent at "home" and no evidence that the time spent in any particular place within the area of CouncilB gave rise to a stronger connection than the time spent in the area of CouncilA. X considers her home to be in CouncilA, where she lives with her primary carer when her primary carer is not working and I am satisfied that she has adopted CouncilA as her home voluntarily and for a settled purpose and that that is where her strongest links are.

Conclusion

40. In these circumstances, I conclude that X is ordinarily resident in the area of CouncilA and has been since 17 November 2014.

41. For the avoidance of doubt, I note that I would reach the same conclusion even if X had been found to lack capacity. This is not a case of one authority placing a person in the area of another authority; and having regard to the nature, duration and quality of X's residence in light of the decision of the Supreme Court in the Cornwall County Council case I am satisfied that X's ordinary residence is in the area of CouncilA on either analysis. In this case the same reasons that establish that X's strongest link is with CouncilA also establish that that is where she should be considered to be ordinarily resident even if she had not capacity to decide to move: the property she shares with Y2 as her primary carer would remain the property properly considered to be her home.