

## **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 of the ordinary residence of X. The dispute is with CouncilB.

### **The facts**

2. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by the parties. This includes additional information provided by CouncilB following my request.
3. X is a 70 year old woman (DOB 17.09.47). She suffers from vascular dementia, which was diagnosed about six years ago. She has been assessed as requiring a range of care and support services, in particular residential care. I am told that until 25 July 2016, she lived at Address1A, AreaA. It is not in dispute that she was ordinarily resident at that date in CouncilB. On 25 July 2016, she moved to Residential Home1, a care home in AreaA.
4. The circumstances of the move are that on 15 July 2016, X's husband contacted CouncilA requesting assistance with his wife's care and support. I am told that he contacted CouncilB on the same day. He had investigated possible residential care homes for X both in AreaB and in AreaA. He and X had decided that Residential Home1 was the best option for X, and that alternative care homes in AreaB were not suitable. I do not understand it to be in dispute that Residential Home1 was or is suitable for X's care.
5. CouncilB did not at any time undertake an assessment of X's needs under the Care Act 2014. Mr X1 alleges that proposed assessments by CouncilB did not take place, and that it was suggested that X return to AreaA from Residential Home1 so that an assessment could take place, a suggestion he thought inappropriate.
6. I am told by CouncilB that it was 'agreed' that CouncilB would undertake assessments when X returned to AreaB, and that appointments for the assessment were proposed by CouncilB on 1<sup>st</sup> or 2<sup>nd</sup> September 2016. I am not told of the date of this 'agreement', but I take it to be the 19 July 2016. On that date, X's husband informed CouncilB that four weeks' "respite" for X had been arranged. It is not suggested that CouncilB offered to assess X at

Residential Home1. It has not been suggested that this was either impracticable, nor that it was unreasonable for X and her family to expect the assessment to take place at Residential Home1.

7. I am informed by CouncilB that a further conversation took place between them and X's husband on 16 August 2016. During this conversation, it was said that X would not consider any homes within the area of CouncilB – I take it to be because they were thought unsuitable or of a poor standard – and that X was happy at Residential Home1. CouncilB say that they were informed that the placement was permanent.
8. I note, however, that X's family stated during assessments that they could not afford to support X's placement at Residential Home1, and that they borrowed money in order to fund her care in the short-term only.
9. Subsequently, CouncilA undertook an assessment of X's needs between 14 and 26 September 2016. The assessment found that X required "support within a safe, supportive 24hr environment" and that she fell below the relevant financial threshold and thus qualified for funding. The assessment recommended that she remain at Residential Home1. CouncilA have subsequently funded the placement without prejudice to this dispute.
10. The matter was referred to me by CouncilA on 26 May 2017 under cover of a letter enclosing an agreed statement of facts, legal submissions and other documents.

### **The Authorities' Submissions**

11. CouncilA submits that as X was ordinarily resident within CouncilB when she required care and support, CouncilB should have conducted a Care Act assessment when requested, and that had they done so, they would have met her need for care and support. At that time, she was ordinarily resident within CouncilB, and so CouncilB should meet her assessed needs.
12. CouncilB, on the other hand, argue that X chose to move to CouncilA, to Residential Home1 on a private basis, and so became resident in CouncilA, before then being assessed as requiring care paid for by the local authority. Heavy emphasis is placed upon the Care and Support Statutory Guidance, which states that paragraph 19.31 (now 19.51):

“The local authority must have assessed those needs in order to make such a decision [that needs can only be met through the provision of care] – the “deeming” principle [which is set out below] therefore does not apply to cases where a person arranges their own accommodation and the local authority does not meet their needs.”

13. It also states at Annex H4 (now H21) that:

“When a person moves into permanent accommodation in a new area under private arrangements, and is paying for their own care, they usually acquire an ordinary residence in this new area. If so, and their needs subsequently change meaning that they require other types of care and support, they should approach the local authority in which their accommodation is situated.”

## **The Law**

14. I have considered all the documents submitted by Council B and Council A; the provisions of Part 1 of the Care Act 2014 (“the 2014 Act”) and the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“*Shah*”).

## The 2014 Act

### *Duty to meet need for care and support*

15. Section 18 of the 2014 Act imposes a duty on local authorities to meet the assessed eligible needs for care and support of adults ordinarily resident in their area (or present in their area but of no settled residence). Examples of what may be provided to meet such needs are set out in section 8. These include provision of accommodation in a care home or in premises of some other type.

### *The deeming provisions*

16. Section 39(1) provides that:

*“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 this Part as ordinarily resident—*

*(a) 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, or*

*(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.”*

17. The accommodation specified in the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 includes care home accommodation, shared lives accommodation and supported living accommodation.

### Ordinary Residence

18. “Ordinary residence” is not defined in the 2014 Act. Guidance has been issued to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services. I have noted

19. In Shah (cited above), 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”*

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

20. In my view, Mrs X was for the purposes of the 2014 Act ordinarily resident in Council B at the relevant time. Section 39 specifies that ordinary residence is “*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*”. On the face of it, Mrs X moved into Residential Home 1, which was accommodation of a type specified in the regulations, having been ordinarily resident in Council B. I consider this to be so for the following reasons:

- (a) X requested an assessment for her care needs on 15 July 2016 prior to having arranged the move to Residential Home1. It was not therefore a decision made entirely on a 'private basis' without the involvement of the local authority;
- (b) When she moved to Residential Home1, it was said to be on a temporary basis of four weeks. The move was therefore not initially for a 'settled purpose' – applying *Shah*. On the basis of what I am told by CouncilB, X therefore certainly did not become ordinarily resident on 25 July 2016;
- (c) It appears CouncilB only offered to assess X when she returned to CouncilB. No reason is given for this. It is clear X's husband thought this inappropriate and from the information available this was an entirely reasonable position to take;
- (d) There was a period of 5 weeks in which CouncilB could and should have undertaken a Care Act assessment before being informed that X's move to Residential Home1 was permanent. This was not a case where permanent arrangements were made "before any work could be completed". It would be contrary to the purposes of the Care Act if responsibilities under the Act could be avoided merely by failure to conduct an assessment within a reasonable period.

21. CouncilB are thus responsible for her care.

22. I have considered the guidance and the submissions made. I note that the guidance does not and cannot change the wording or meaning of the statutory provision. It is designed to be of assistance in interpretation of the statutory provision.

23. It is correct to say that the fact that someone moves to a care home, and later requires assessed support, does not mean that ordinary residence remains that which was the case before entering a care home. That is what is set out in Annex H4 of the guidance, as referred to me by CouncilB. However, as stated, in this case support was requested before the move, and the initial move was a temporary one. From the papers it appears that X and her family could not financially support her residence at Residential Home1 for more than temporary respite.

24. That being the case, until X was provided with local authority support, no move to a care home could be regarded as for 'settled purposes' – there was no possibility of settlement without financial support.

25. In any event, I do not accept the submission that limitation to the scope of the deeming provision is brought about by virtue of the guidance; guidance cannot have that legal effect. Rather, the limitation upon sub-section 39(a) is provided by the opening sentence:

*“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...”*

26. The issue of “ordinary residence” only arises where someone is entitled to support, that is “*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*”. Whether or not an assessment of need has been completed is not the relevant question as it is not the question posed in the Act. The assessment by the local authority is the means of determining whether there are “needs for care and support”; but the “needs” must logically subsist prior to that assessment.

27. Paragraph 19.31 of the Guidance (now 19.51) must therefore be read in context. In particular, I note that the final sentence of the preceding paragraph states that “The deeming rule does not apply where a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.” In this case, support was requested before the move was made, and the move to Residential Home1 was always contingent on the provision of local authority support. The need for care and support to be provided by the local authority was therefore always there, from the date X moved to Residential Home1.

## **Conclusion**

28. In these circumstances, I conclude that X is ordinarily resident in the area of CouncilB.