

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

## Introduction

1. I have been asked by CouncilA to make a determination of the ordinary residence of X under section 40 of the Care Act 2014. The dispute is with CouncilB.

## Facts

2. I have taken the facts set out below from the documents provided to me. Regretfully, the parties were unable to agree a statement of facts despite the requirements of the 2014 Regulations and encouragement to do so. I have therefore proceeded as best I can on the information available.
3. X was born on XX XX 1962 and lived with his parents in CouncilA. There is reference to him being diagnosed with a learning disability and having been assessed with various medical health conditions including diabetes, high blood pressure, high cholesterol, an under-active thyroid and problems with his kidneys which now only function to approximately 17% of their normal capacity. X is clearly a vulnerable adult who requires daily care and support to meet his needs and his outcomes.
4. In 1979 X attended Special Needs School1A in CouncilA.
5. In 1984 X attended the ATC Centre. That same year X was referred to a Speech Therapist employed by CouncilA for an assessment and received x2 assessments.
6. In 1985 X stopped attending the ATC Centre. In February 1985 X was referred to the psychology team at Hospital1A and was assessed that year on a number of occasions.

7. In 1986 X attended a work training scheme 4 days a week which he continued until October that year.
8. In March 1986 X was referred to CouncilA's social services department in Area of CouncilA for assessment and a possible care package including respite for his parents. I understand this was the first contact CouncilA had with X.
9. In August 1988 X was referred to Centre1C in CouncilC by P1, Acting Principal Psychologist at Hospital1A.
10. X continued to reside with his parents in CouncilA until the end of 1988.
11. In 1989 X was moved from his parent's house to a care home known as and situated at HouseB1, CouncilB.
12. According to CouncilA in 2002 X moved to another care home known as and situated at Flat2B, Address2B, Area of CouncilB. It is unclear whether CouncilA informed CouncilB of X's presence in their area. In any event, CouncilB submit that X moved to Flat2B in 2006.
13. On 30 March 2011 there was a best interests meeting about X. CouncilB submit that they were not aware of this meeting. At that meeting the issue of supported living was raised.
14. On 10 January 2013 X's capacity was assessed. The exact terms of reference for this assessment are unclear. The assessment itself records the following "*... on this occasion it can be assumed that Mr X does not have the capacity to undertake, understand or independently manage a Housing Tenancy Agreement.*" I will return to this and the issue of X's capacity below.
15. On 8 April 2013 Flat2B was re-classified – which I take to mean re-registered – as supporting living accommodation. There is a dispute between the authorities as to whether CouncilB was notified of this change in status by CouncilA. CouncilA refer me to a letter dated 23 December 2013 to the CouncilB Learning disability Team in which it states that X "*... has moved to a supported living accommodation in CouncilB area since April 2013.*"

16. In any event, an assured shorthold tenancy agreement has been provided to me dated 8 April 2013. It is for the let of Flat2B, Area of CouncilB and is between Housing Association and X. The start of the tenancy is identified as 1 April 2013 for a rent of £154.50 per week plus service charges of £44.85 per week. It is signed on behalf of the Association but no signature appears for X.
17. CouncilB submit that this created a tenancy and that the cost of the provision of his accommodation was met by way of housing benefit and not by CouncilA under their statutory community care duties.
18. Between 2013 and 2014 CouncilB were actively aware of and/or engaged in safeguarding concerns raised in relation to X whilst at Flat2B.
19. I have been provided with a letter dated 23 December 2013 sent from a social worker, Y1, at CouncilA to the CouncilB Learning Disability Team. The letter is not signed. Whilst reference is made to "CouncilD" in the subject title it is clearly address to CouncilB where it is asserted that X has become ordinarily resident. CouncilB submit that it was not copied to X or his next of kin (although I am not aware of how they can confirm that) and invite me to find that as a fact that the letter was not sent.
20. On 22 September 2015 an assessment of need was completed by CouncilA. A support plan was completed in light of that assessment on 30 September 2015. The assessment and support plan concluded that X's needs could be met by way of supported living accommodation and that X had indicated that this is what he wanted to happen whilst remaining at the same site.
21. On 13 January 2016 CouncilA wrote to CouncilB requesting them to accept responsibility for X.
22. On 29 January 2016 CouncilB responded asserting that X remained ordinarily resident in CouncilA.
23. On 26 February 2016 District Judge Z1, sitting as a nominated judge of the Court of Protection, made an order authorising CouncilA to enter into or terminate a tenancy agreement in respect of Flat2B, Area of CouncilB.

24. I have been provided with a copy of a further assured shorthold tenancy agreement between The Community Housing Association Ltd and X for the let of Flat2B area of Council B. The total payments for the premises are identified as being £279.73 per week with a date of 8 June 2015 for the start of the tenancy. The final part of the agreement which would normally contain the dates and signatures has not been included.
25. The parties engaged in correspondence over the issue of X's ordinary residence but agreement could not be reached.
26. By letter dated 14 February 2017 Council A acting as 'lead authority' referred this matter to the Secretary of State for determination as to where X was ordinarily resident since 8 April 2013.
27. X continues to reside at Flat2B where he receives care and support funded by Council A who will seek reimbursement of the associated costs should I determine that X has been ordinarily resident in Council B's area since 8 April 2013.

### **Parties' submissions**

28. Council A submit that X's ordinary residence is to be determined by reference to the relevant provisions under the National Assistance Act 1948 ("the 1948 Act") assert that X has been ordinarily resident in the area of Council B since 8 April 2013. It is submitted that this was the date that his accommodation ceased to be accommodation provided under Part III of the 1948 Act. It is said that as a consequence of X acquiring a tenancy of supported living accommodation the deeming provisions no longer apply from that date and the normal rules for determining ordinary residence apply. Applying those rules X is ordinarily resident in the area of Council B where Flat2B is situated.
29. Council B also submit that the relevant statutory provisions for determining X's ordinary residence are those arising under the 1948 Act. It is submitted that the relevant date is 22 September 2016 being the date of the first review after the

coming into force of the Care Act 2014. Council B deny that X should be treated as being ordinarily resident in their area as at 8 April 2013 or at all. It is said that X lacked capacity to make decisions as to where to live and that the deeming provisions contained in section 24(5) of the 1948 Act continued to apply when he moved to Flat 2B and when the same changed from being a care home to supported living accommodation.

## Relevant law

30. I have considered all relevant legal provisions including Part III of the National Assistance Act 1948 (“the 1948 Act”); Part 1 of the Care Act 2014 (“the 2014 Act”); the Mental Capacity Act 2005; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015; the 2013 Ordinary Residence guidance issued by the department of Health; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“Shah”), *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 (“Quinn”), *R (Greenwich LBC) v Sec of State for Health* [2006] EWHC 2576 (Admin) (“Greenwich”), *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“Cornwall”) and *R (LB of Barking and Dagenham) v Sec of State for Health & LB of Redbridge* [2017] EWHC 2449 (Admin) (“Dagenham”).
31. Any question as to a person’s ordinary residence arising under the 1948 Act which is to be determined on or after 1 April 2015 (‘the relevant date’) is to be determined in accordance with s.40 of the Care Act 2014 pursuant to article 5 of the Care Act (Transitional Provision) Order 2015/995 (‘the Transitional Order’).
32. Article 6 of the Transitional Order provides as follows:

***Transitional provision relating to where a person’s ordinary residence is***

**6.—(1)** *Any person who, immediately before the relevant date in relation to that person, is deemed to be ordinarily resident in a local authority’s area by*

*virtue of section 24(5) or (6) of the 1948 Act (authority liable for provision of accommodation) is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the Act.*

*(2) 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—*

*(a) non-hospital NHS accommodation (within the meaning of article 12 of the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010(7)) which has been provided since immediately before 19th April 2010;*

*(b) shared lives scheme accommodation (within the meaning of regulation 4 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014(8)) (“the 2014 Regulations”); or*

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

*for as long as the provision of that accommodation continues.*

33. The “relevant date” means, in relation to a person, the date on which Part 1 of the Act (care and support) applies to that person by virtue of article 2: article 1(2).

34. Article 2(1) & (2) provide:

*2.—(1) Except as provided by this Order, Part 1 of the Act does not apply in the case of a person to whom, or in relation to whom, immediately before this Order comes into force, support or services are being provided, or payments towards the cost of support or services are being made.*

*(2) A local authority providing such support or services or making such payments must, before 1st April 2016, complete a review of that person's case and from the time the local authority has completed that review, Part 1 of the Act will apply in respect of that person's case.*

*(3) If a local authority fails to comply with paragraph (2), Part 1 of the Act applies in that person's case with effect from 1st April 2016.*

35. The Transitional Order came into force on 1 April 2015 being the date that section 1 of the 2014 Act came into force.

36. Section 40(1) provides that any dispute about where an adult is ordinarily resident for the purposes of this Part, or any dispute between local authorities under section 37 about the application of that section, is to be determined by the Secretary of State, or where the Secretary of State appoints a person for

that purpose (the “appointed person”), that person. Section 40(1) also provides that regulations may make further provision about the resolution of disputes of the type mentioned in subsection (1).

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

37. I am requested by CouncilA to determine X’s ordinary residence.

38. As to the relevant law, section 39 of the 2014 Act does not apply due to the effect of Article 6(2)(c) of the Transitional Order. The relevant law is therefore Part III of the 1948 Act together with the relevant statutory ordinary residence guidance (2013).

39. As to the relevant date, CouncilA request that I determine X’s ordinary residence as at 8 April 2013 being the date that X’s tenancy commenced. CouncilB submit that the relevant date is 22 September 2016 being the date of the first review completed following the commencement of the 2014 Act. The relevant date for determining the relevant law is 1 April 2016 due to the effect of Articles 2 and 6 of the Transitional Order.

40. In 2002 X was placed at Flat2B by CouncilA. The care home accommodation was provided under Part III of the 1948 Act. Even though Flat2B was in the area of CouncilB, responsibility for X remained with CouncilA due to the effect of the deeming provisions pursuant to section 24(5) of the 1948 Act which provides:

*“...Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this 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.”*

41. X remained the responsibility of CouncilA for so long as he was being provided with accommodation under “this Part” – i.e. Part III of the 1948 Act.

42. However, on 8 April 2013 Flat2B was re-classified or more accurately was re-registered with the CQC as supported living accommodation. CouncilA assert that X began to reside in Flat2B under the terms of his own tenancy and that

pursuant to that tenancy agreement X was liable to pay rent for his accommodation which was paid for by way of housing benefit.

43. Council B dispute the effect of the tenancy agreement but do not seek to argue that X was in receipt of housing benefit to meet the cost of his accommodation. In any event, Council A submit that they ceased to fund the accommodation under Part III due to X being in receipt of housing benefit. As a matter of fact, I accept the assertion made by Council A that from 8 April 2013 they ceased to fund the accommodation under Part III of the 1948 Act and that X began to pay for the same by way of housing benefit.

44. In such circumstances, it follows that from that date X was no longer “provided” with accommodation under Part III of the 1948 Act. Accordingly, the deeming provision of section 24(5) no longer applied. To this end I apply the interpretation as to meaning and effect of section 24(5) as provided in Quinn.

45. For the avoidance of doubt, I have considered the Dagenham case and the passage cited on behalf of Council B. That provides that “...*the deeming provision in section 24(5) applies for so long as a person remains in residential accommodation provided pursuant to section 21.*” I have already found as a fact that the residential accommodation ceased to be “provided” under section 21 following its re-classification as supported living accommodation and payments for the same were made by way of housing benefit as opposed to be Council A pursuant to section 21. As a consequence of Council A not providing the accommodation under section 21 the deeming provisions under section 24 cannot apply.

46. I have also considered the Cornwall case in this regard and the passage cited on behalf of Council B. In that case the child was entitled to accommodation under the Children Act 1989 and then section 21 of the 1948 Act. There was no issue as to entitlement under the 1948 Act – the question was which authority was responsible. The Supreme Court was concerned to avoid an artificial result where the “fiscal and administrative” arrangements continued to be made by the originating authority. That is not the case here. Upon Council A ceasing to fund the supported living accommodation they were no longer providing it for

the purposes of Part III of the 1948. This in turn meant that X was not entitled to accommodation under section 21 and also that CouncilA were no longer responsible for the fiscal and administrative arrangements that comes with such entitlement. The artificiality that arose in the Cornwall case therefore does not arise in this case. Further, and in any event, nothing in Cornwall changes the conclusion that when accommodation is no longer provided under section 21 the deeming provisions under section 24 fall away.

47. The question of whether X lacked capacity to enter into a tenancy agreement does not alter this conclusion. As a matter of law, X was no longer being provided with accommodation under Part III of the 1948 Act from 8 April 2013 and so the relevant deeming provisions do not apply.

48. The 'normal' principles for determining a person's ordinary residence apply. Those principles are taken from Shah with assistance from the statutory guidance. This requires consideration of a person's abode in a particular place 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. The relevant 2013 guidance confirms this approach: paragraph 22.

49. When considering the case of a person who lacks capacity to decide where to live one must start from the statutory presumption of capacity under section 1 of the Mental Capacity Act 2005. Whilst X may have lacked capacity to enter a tenancy there is no evidence that as at 8 April 2013 he lacked capacity to decide where to live.

50. Even if such evidence existed the Supreme Court in Cornwall confirmed that the Shah test applies to those that lack capacity save that the requirement that such a person voluntarily adopts the particular residence does not apply.

## **Conclusion**

51. In the circumstances I conclude that X has been ordinarily resident in the area of CouncilB since 8 April 2013.