

REVIEW BY THE SECRETARY OF STATE UNDER SECTION 40(2) OF THE CARE ACT 2014

1. I have been asked by CouncilA to review a determination of the ordinary residence of X handed down on 12 June 2018 (“the original determination”). The dispute is with CouncilB.
2. There is no dispute that, prior to 2012, X was ordinarily resident in the area of CouncilB. He then moved to Care Home1A in the area of CouncilA. The placement was funded as continuing healthcare by what CouncilA refer to as the “CouncilB Health Authority”. In January 2017 X was assessed as no longer eligible for continuing healthcare funding. He remained at the Care Home as a self-funder between February and June 2017 when his assets fell below the relevant threshold. At this point CouncilB were approached to fund the placement but they denied responsibility on the basis that X had become ordinarily resident in the area of CouncilA. The dispute was then referred to me.
3. The determination handed down on 12 June 2018 held that statutory deeming provisions ceased to apply to X when his continuing healthcare funding came to an end, and thereafter, as a self-funder, he became ordinarily resident in the area of CouncilA. The determination found that X’s accommodation was not provided by CouncilB pursuant to Part 1 of the Care Act 2014 during the period when he was self-funding and the failure to make such provision during this period was not unlawful.
4. CouncilA request a review of the determination on two grounds:
 - a. Firstly, they say that the determination was wrong to find that withdrawal of continuing healthcare funding constituted a “break in the chain” for the purposes of the deeming provisions. It asserts that the parts of the Care and Support Statutory Guidance cited in the determination (in particular paragraph 19.75 and paragraph 21 of Annex H4) apply only when a

person moves into a new area, and not where a person remains in the same accommodation.

- b. Secondly, they argue that CouncilB's involvement with the arrangements for X's care after January 2017 was such that X should be treated as remaining ordinarily resident in the area of CouncilB. They rely on minutes of a meeting held on 2 March 2017, attended by X and his family, staff from the Care Home, and two CouncilB social workers. The minutes record that the social workers felt CouncilB should be responsible for funding the placement when X's assets fell below the relevant threshold.

5. I shall address each of CouncilA's grounds of review in turn.

6. As to the first ground, it is correct that the guidance refers to self-funding individuals moving to a new area and not to individuals remaining in the same area with a different source of funding for their placement. However, this does not mean that the deeming provisions can continue to apply indefinitely so long as a person remains in the same placement. This is clear from the wording of the statute:

- a. Section 39(5) applies to a person who is being provided with "NHS accommodation" which (in respect of England) is defined as accommodation under the National Health Service Act 2006 (s.39(6)). When funding under the 2006 Act stops the accommodation stops being "NHS accommodation".
- b. Section 39(1) applies where an adult has needs for care and attention that can only be met if the adult is living in accommodation of a type specified in regulations. One of the types of accommodation specified under the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014/2828 is "care home accommodation". However, regulation 2(2) makes clear that the accommodation is only "specified" if the care and support needs of the adult are being met under Part 1 of the 2014 Act whilst the person is being accommodated.

7. Accordingly, at any given point in time, the above deeming provisions can apply only if: (i) the relevant person's accommodation is being funded by the NHS; or (ii) the relevant person is being provided with care and support under the 2014 Act. It follows- subject to the second point raised by CouncilA which I consider below- that a period of self-funding does, as the original determination held, constitute a "break in the chain" for the purposes of the deeming provisions.
8. As to the second ground of review, the minutes relied upon by CouncilA do make clear that CouncilB social workers were involved in discussions about X's continued placement at the Care Home. However the minutes also record that provision of support from CouncilB was "not an option until such a time as funding is at the set level". I note that the two social workers expressed a view that "funding should be picked up by [CouncilB] at this point". However, their opinion cannot be determinative. It is significant that the social workers were going to seek written confirmation of the position from the legal team and there is no evidence that the legal team did provide such confirmation.
9. The question is whether CouncilB's involvement in X's case after January 2017 was such that:
 - a. X should be treated as "ordinarily resident" in its area as a matter of fact; or
 - b. X should be deemed ordinarily resident in its area, under section 39(1), on the basis that, during the period of self-funding period, he was being (or lawfully ought to have been) provided with care and support under Part 1 of the 2014 Act.
10. On the facts there can be no doubt that X was ordinarily resident in the area of CouncilA and not in the area of CouncilB. CouncilA is where he was living, and had been living from many years. He ate and slept there and he did not have anywhere else to live.
11. The minutes relied upon by CouncilA in this review do demonstrate that that CouncilB social workers were involved in discussions about X's on-going placement. However, that is not enough for the deeming provisions to apply.

There is still nothing to suggest that CouncilB made the actual arrangements with the Care Home or otherwise provided care and support under Part 1 of the 2014 Act during the self-funding period.

Conclusion

12. CouncilA criticise the fact that CouncilB did not engage with the determination process (by contributing to the statement of facts or otherwise). They suggest that it can be inferred from this lack of engagement that CouncilB did not have any meaningful arguments to put forward. CouncilA further submit that CouncilB should not gain an advantage from their lack of engagement. However, it is not for me to speculate as to the reasons why CouncilB did not contribute more fully to the determination process. I must decide this review based on the evidence before me. On that evidence, for the reasons set out above, I conclude that X became ordinarily resident in the area of CouncilA from January 2017 when his continuing healthcare funding ceased. The original determination is upheld.