

## **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 under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.

### ***Facts***

2. I have taken the following facts from the agreed statement of facts and other documents provided by the parties.
3. X was born on XX XX 1933 and so is now 85 years of age. He has a number of medical conditions requiring daily care and support. Whilst he suffered some cognitive impairment following a stroke there is no suggestion that he lacks capacity to make decisions as to where to reside.
4. Between June 2015 and November 2015 X lived in sheltered accommodation (also referred to as Almshouses) in the area of CouncilA. In November 2015 he was admitted to Hospital1 for assessment and treatment. He was discharged from hospital and on 29 January 2016 moved to Care Home1 in CouncilC. This accommodation and care were arranged and funded by CouncilA pursuant to their duties arising under section 18 of the Care Act 2014.
5. Following arrangements made by his family, X moved into Flat 1, Address1B in the area of CouncilB on 19 November 2016. I understand that he stayed with his daughter for a few days beforehand. Address1B is Extra Care housing and there is no dispute that this amounts to specified accommodation as defined (see further below). According to the agreed statement of facts X's move to Address1B was voluntary and was not arranged by any local authority. The statement of facts refers to the housing provider agreeing to allow X to move to Address1B "subject to a care plan and funding being agreed by CouncilA."

6. X stated that he wanted to move to the area of CouncilB to be nearer his family and his family agreed. CouncilA were notified of X's move to Address1B and state that they agreed to fund his care there for a limited period of 6 weeks prior to the matter being "picked up" by CouncilB. There is no evidence that CouncilB agreed to the arrangement or that they were even aware of X's move prior to it happening. The statement of facts states that the dispute between the two authorities concerning X's ordinary residence arose on 27 July 2017. CouncilA continue to fund X's care pending determination of this ordinary residence dispute. I note that X's accommodation is paid for by housing benefit following an application he has made to CouncilB.
7. The evidence indicates that X appears to have settled into Address1B where his assessed needs are being met and where he is closer to his family who are clearly in regular contact with him. There is no evidence that X is going to move from Address1B.
8. On 3 July 2018 CouncilA provided written legal submissions. These were followed by legal submissions from CouncilB dated 10 July 2018.

### ***Parties' submissions***

9. In summary, CouncilB submit that X should be deemed to be ordinarily resident in the area of CouncilA. It is submitted that prior to X's move to Address1B he was residing in specified accommodation in CouncilA's area and that he moved to Address1B with the knowledge and tacit approval of CouncilA. It is further submitted that CouncilA agreed to fund X's "social care" at Address1B and that without the provision of care by CouncilA the move there would not have been possible. CouncilB deny that the agreement to fund for a limited period of 6 weeks is relevant. It is said that CouncilA cannot have made the payments for care pursuant to s.2 of the 2014 regulations. Reference is made to the decisions in the cases of Greenwich and Cornwall (see further below) to the effect that a local authority cannot escape the effect of the deeming provisions where they have a duty to provide services and should not be able to export its responsibilities by exporting the person who is

in need of it. Finally, CouncilB submit that CouncilA made the arrangements for X to move to Address1B sufficient to warrant that the deeming provisions should be applicable.

10. CouncilA submit that they did not make the arrangements for X to move to Address1B and have not made any payments for or towards his accommodation costs which are funded by way of housing benefit. Whilst CouncilA accept they were informed of X's move to Address1B they did not enter into any contract or other arrangement with them to fund the accommodation. X signed the tenancy for Address1B himself and whilst the housing association / care provider insisted on funding for the care being agreed by CouncilA such agreement was never given. CouncilA submit that they agreed to provide care for 6 weeks pursuant to "s.2" of the Care and Support (Disputes between Local Authorities) Regulations 2014 and such payments should be disregarded for the purposes of this determination. CouncilA submit that they did not make the arrangements for X's move to Address1B which was voluntary at a time he had capacity to make that decision. Finally, it is submitted that X is settled at Address1B and has been ordinarily resident in the area of CouncilB since his move there.

### ***Relevant law***

11. I have considered all of the relevant statutory provisions including those referred to by the parties in their written submissions: sections 18 and 39 of the Care Act 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; and the Care Act 2014 (Transitional Provision) Order 2015. I have also considered the relevant passages from the Care and Support statutory guidance and the relevant case law including *R v Barnet LBC ex p Nilish Shah* [1983] 2 AC 309, *Mohammed v LB of Hammersmith and Fulham* [2002] 1 AC 547, *Al-Ameri – Kensington and Chelsea Royal London Borough Council* [2003] 1 WLR 1289, *R (Royal Borough of Greenwich v Secretary of State for Health and Bexley*

Council [2006] EWHC 2576 (Admin) and R (Cornwall) v Secretary of State for Health [2015] UKSC 46.

12. Section 18(1)(a) of the Care Act 2014, provides:

*(1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—*

*(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, ...*

13. Section 39 (1), (5) and (6) of the Care Act 2014, provides:

*(1) 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.*

*(2) Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.”*

14. The Care and Support statutory guidance provides as follows:

**“Ordinary residence when arranging care and support in another area**

*19.47 There may be some cases where the local authority considers that the person's care and support needs can only be met if they are living in a specified type of accommodation. This could be in a care home, or other kinds of premises that are specified in the legislation (see para. 19.28 for the types of accommodation specified). If the specified accommodation in which*

*the care is provided is located in the area of another authority, it is important that there is no question as to which local authority is responsible for meeting the person's needs.*

*19.48 Section 39 of the Care Act, and the specified accommodation regulations made under it set out what should happen in these cases, and specify which local authority is responsible for the person's care and support. Together, these create the principle that the person placed 'out of area' is deemed to continue to be ordinarily resident in the area of the first authority, and does not acquire an ordinary residence in the 'host' or second authority. The local authority which arranges the care in the specified accommodation, therefore, retains responsibility for meeting the person's needs.*

*19.49 The specified accommodation regulations specify the types of accommodation to which this provision applies. The specified accommodation regulations explicitly set out 3 types of accommodation:*

- ***nursing homes/care homes:*** *accommodation which includes either nursing care or personal care*
- ***supported living/extra care housing this is either:***
  - *specialist or adapted accommodation: this means accommodation which includes features that have been built in or changed to in order to meet the needs of adults with care and support needs. This may include safety systems and features which enable accessibility and navigation around the accommodation and minimise the risk of harm, as appropriate to the individual*
  - *accommodation which is intended for occupation by adults with care and support needs, in which personal care is also available, usually from a different provider*
- ***shared lives schemes:*** *accommodation which is provided together with care and support for an adult by a shared lives carer, approved by the scheme, in the shared lives carer's home under the terms of an agreement between the adult, the carer and any local authority responsible for making the arrangement. The shared lives carer will normally be providing personal care but they will not need to provide it in every case.*

*19.50 Where an adult's care and support needs can only be met if they are living in one of the specified types of accommodation and the accommodation arranged is in another area, then the principle of 'deeming' ordinary residence applies. This means that the adult is treated as remaining ordinarily resident in the area where they were resident immediately before the local authority began to provide or arrange care and support in any type of specified accommodation. The consequence of this is that the local authority which first provided that care and support will remain responsible for meeting the person's eligible needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. However, in circumstances where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements, they would be likely to acquire ordinary residence in the area of the authority where the new accommodation is situated. 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."*

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

15. The key issue in this dispute is whether the deeming provisions under section 39 of the 2014 Act apply. There are two main considerations. First, whether the adult's care and support needs can only be met in one of the specified types of accommodation. Second, whether the originating authority arranged for the adult to move to the specified accommodation in the area of the receiving authority. This is clear from the statutory guidance paragraphs 19.47 to 19.50 (see above). Paragraph 19.48 refers to the first local authority "placing" the person in the area of the host authority and "arranging the care" in the specified accommodation. Paragraph 19.50 confirms that the adult is treated as remaining ordinarily resident in the area where they were resident immediately "before the local authority began to provide or arrange care and support" in any type of specified accommodation. It is therefore clear that for the deeming provisions to apply not only must the adult need to have care and supported provided in one of the specified types of accommodation but the originating authority must also have arranged the same in the area of the host authority.

16. In the instant case I am able to find that X's need for care and support can only be met in one of the specified types of accommodation. This includes Extra Care housing and there is no dispute that Address1B falls within the definition of Extra Care housing. I note that the agreed statement of facts expressly confirms that Extra Care is specified accommodation for the purposes of the relevant regulations (page 3). I therefore find that the first requirement for the application of the deeming provisions is made out on the evidence available to me.
17. The second requirement is that the first authority arranged the care and support in the specified accommodation in the second host authority's area. The evidence I have is that Address1B was found by X's family and not by CouncilA. The agreed statement of facts states that X's move there "was voluntary and arranged by family members" (page 3). It goes on to confirm that X's daughter had applied for her father to move to Address1B and it was she who notified CouncilA that his application had been accepted. It was X's daughter that had also applied for housing benefit from CouncilB and had notified CouncilA that the same had been accepted. There is no evidence that CouncilA were involved in arranging X's move to Address1B and I find as a fact that they were not. The arrangements for X to move there were made by X himself and his daughter.
18. CouncilB submit that CouncilA agreed to fund X's care at Address1B and without that agreement he would not have moved. That may well be the case but the issue is not who is funding the care, although I accept that this is relevant. The question is who arranged X's move to Address1B. That is clear from the statutory guidance read as a whole. On the evidence available I simply cannot find that CouncilA arranged X's move to Address1B. The reality is that X's move to Address1B was arranged by his family and in particular his daughter.
19. CouncilB seek to get around this by submitting that the move would not have been possible but for "the input" of CouncilA. That input amounts to an agreement to pay for X's care for a limited period of 6 weeks. They have of course continued to fund the care on a without prejudice basis pending the

outcome of the ordinary residence dispute. However, I reject the submission that the offer to pay for X's care amounts to CouncilA arranging for X to be placed at Address1B. CouncilA did not identify Address1B. They were not involved in the application process which was handled by X's daughter. It was then X's daughter who notified CouncilA of the outcome of the application. There is no evidence that CouncilA entered into any contract or other agreement for the provision of care and accommodation for X at Address1B. I also note that CouncilA did not and has never agreed to fund X's accommodation costs which have always been met by X's entitlement to housing benefit which he applied for with the assistance of his daughter.

20. CouncilB seek to highlight a short part of the guidance at paragraph 19.50 which refers to the deeming provision not applying where a person has chosen to arrange their own care in specified accommodation and then later asks for local authority support. It is submitted that X did not move and then ask for support – he had already received the agreement of CouncilA to fund his care for 6 weeks prior to his move. However, paragraph 19.50 must be read as a whole, together with the other relevant parts of the statutory guidance. It is clear from such reading that the deeming provisions only apply where the first authority arranges the care in the specified accommodation. I have found as a fact that CouncilA did not arrange X's move to Address1B and agreeing to pay for a limited basis is not sufficient to amount to them making the arrangements for the move. In the circumstances, the deeming provisions under section 39 do not apply and the decisions in Greenwich and Cornwall do not lead to a different conclusion on the facts of this case.

21. This leaves me to consider whether X has acquired ordinary residence at Address1B. He clearly has. His move there was in line with his own stated wishes and feelings so as to be nearer his family with whom he clearly has a close and meaningful relationship. He has resided there since November 2016 and I accept that he is now settled there as part of the regular order of his life.

**Conclusion**

22. For the reasons set out above X has been ordinarily resident in the area of Council B since 16 November 2016.