

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTIONS 37 and 40 OF THE 2014 ACT

1. I have been asked by CouncilA to make a determination under section 40 of the Care Act 2014 (“the 2014 Act”) as to whether section 37 of the 2014 Act applies to X. The dispute is with CouncilB.
2. On 1 April 2015 relevant provisions of the 2014 Act came into force. Article 5 of the Care Act (Transitional Provision) Order 2015/995 requires that any question as to a person's ordinary residence arising under the National Assistance Act 1948 (“the NAA 1948”) which is to be determined by me on or after 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act.
3. Section 40 of the 2014 Act provides that any dispute about where an adult is ordinarily resident for the purposes of Part 1 of that Act, or any dispute between local authorities under section 37 of the Act 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, by that person). The Care and Support (Disputes Between Local Authorities) Regulations 2014 were made under section 40(4) of the 2014 Act and apply to this dispute.

The facts

4. X (dob XX.XX.88) is a 30 year old man. He had a mild learning disability and is independent in most activities of daily living. He lived in residential accommodation in CouncilA, funded by CouncilA, for around ten years until November 2016. Since then, he has lived in a supported living arrangement in his own flat in PlaceA (still in CouncilA’s area).
5. There is no doubt that X is currently ordinarily resident in the area of CouncilA and that CouncilA is therefore responsible under the 2014 Act for meeting X’s assessed eligible needs.
6. X’s mother has had a longstanding plan to move to the area of CouncilB, and X has indicated that he would wish to move to CouncilB when his mother does. X

has no immediate plans to move to CouncilB. It is not clear when, or if, his mother will move, as she is waiting for a housing transfer from her current accommodation in London and has been for some time.

7. On 6 September 2017, CouncilA wrote to CouncilB pursuant to s.37 of the 2014 Act (set out below), notifying the latter of X's intention to move to CouncilB. CouncilA requested that the continuity of care process under the 2014 Act should commence, and requested confirmation that CouncilB viewed the move as "genuine". There was further correspondence between the two authorities over the next few months, the outcome of which appears to have been that:

- a. CouncilB indicated that, at that time, there were no available supported living placements in its area;
- b. CouncilB and CouncilA agreed to keep in touch, from time to time, so that CouncilB could keep CouncilA up to date as to the current availability of supported living placements; CouncilA
- c. CouncilB took no view as to whether X's intention to move is genuine;
- d. CouncilB asserted that CouncilA would remain responsible for X even if he were to move to specified accommodation in its area as, notwithstanding the continuity of care provisions, he would be deemed to be ordinarily resident in CouncilA pursuant to s.39 of the 2014 Act.

Capacity

8. CouncilA has assessed X as having capacity to make decisions about where he should live. CouncilB has not carried out its own capacity assessment, but does not dispute CouncilA's findings in this regard. I have seen a copy of CouncilA's capacity assessment, and based on that assessment, together with the description of X's general abilities and the presumption of capacity in s.1 of the Mental Capacity Act 2005, I am satisfied that there is no reason to displace that presumption on the facts of this case as provided to me.

Legal submissions of the parties

CouncilA

9. CouncilA accepts that X is currently ordinarily resident in its area but seeks guidance as to whether the deeming provision will apply if X moves to the area of CouncilB.

10. CouncilA refers to the fact that it wrote to CouncilB on 6 September 2017 with a view to invoking ss.37-8 of the 2014 Act. It contends that pursuant to those provisions, and in light of Chapter 20 of the Care and Support Statutory Guidance, it is clear that adults who are receiving care and support under the 2014 Act have the right, like everyone else, to move out of borough and live in the area of another local authority, if that is what they choose to do. Where they do so choose, those provisions and that guidance makes clear that the receiving local authority becomes responsible for looking after them. The continuity of care statutory provisions and guidance do not exclude from their application individuals who reside in specified types of accommodation. Furthermore, as ss.37-8 of the 2014 Act and the statutory guidance make it the responsibility of the second authority to make the relevant arrangements in the new local authority area, it would not be a case to which the deeming provisions in section 39 of the 2014 Act applies: section 39 only applies where it is the first authority that is making arrangements for the adult to be placed out of borough, and here (because of the transfer of responsibility under the continuity of care provisions) that would not be the case. It is said that CouncilB is not willing to arrange the care and support envisaged by ss.37 and 38 of the 2014 Act, and that they have indicated that any move should be arranged by CouncilA pursuant to section 39 of the 2014 Act. CouncilA has also asked four questions for “clarification”:
 - a. Does s.37/s.38 2014 Act apply in X’s situation?
 - b. Is CouncilB under a duty to consider X’s request to move and under an obligation to assist and arrange the move to CouncilB’s area pursuant to s.37 and s.38 of the Care Act 2014 and Chapter 20 of the Statutory Guidance and, if so, would that mean that X will be ordinarily resident in CouncilB’s area upon his move?
 - c. Can X make the choice to move areas and invoke the procedure contained within s.37 and s.38 of the 2014 Act even if he is currently being

provided with specified accommodation under Specified Accommodation Regulations by CouncilA?

- d. In the circumstances that a person is being provided with specified accommodation, would that mean that s.39 trumps s.37/s.38 of the 2014 Act and any requests for a move should be considered by the LA responsible under s.39 of the 2014 Act?

CouncilB

11. CouncilB has contended in correspondence with CouncilA that there is no dispute capable of being referred to the Secretary of State, and has argued that the Secretary of State's determinations process should not be used as a means of obtaining legal advice about hypothetical situations that are yet to develop. It has not maintained that argument in its formal legal submissions and has, instead, provided the substantive representations set out below.
12. CouncilB states that it has informed CouncilA that when the proposed move is a realistic prospect, then CouncilB will assist CouncilA by liaising with them regarding potential available placements in the area of CouncilB. It will also assist with providing details of day services and other support services available in the area of CouncilB that may be appropriate for CouncilA.
13. CouncilB contends that as X will be moving from specified accommodation in CouncilA to specified accommodation in CouncilB's area, he will remain ordinarily resident in CouncilA pursuant to the deeming provision in s.39 of the 2014 Act. Section 39 applies whenever there are consecutive periods of residing in specified accommodation. CouncilA will therefore continue to be responsible for ensuring X's care and support needs are being met and will be responsible for funding his ongoing care.
14. It points to Chapter 19.48 to 19.54 of the Statutory Guidance, which expand upon the concept of deemed ordinary residence, and appear to show that whenever a person is placed by one local authority in specified accommodation in the area of

a second local authority they will remain deemed ordinarily resident in the former. It points in particular to paragraph 19.50, which provides that:

“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.”

15. It further points to paragraph 19.54, which provides:

19.54 As part of their involvement in the planning process, where the local authority is arranging the person’s accommodation the person will also have a right to make a choice about their preferred accommodation (see chapter 8 and Annex A on choice of accommodation). This right allows the person to make a choice about a particular individual provider, including where that provider is located. Provided that certain conditions are met, the local authority must arrange for the preferred accommodation. The ordinary residence rules described above will apply when the person’s preferred accommodation is in the area of another local authority.

16. Council B notes that Chapter 20.1 of the statutory guidance, upon which Council A relies as summarised above, appears to distinguish between those out of borough moves in which ordinary residence will change, and those out of borough moves in which it will continue. It is only where an individual’s ordinary residence changes as a result of a move that a new local authority will take on the responsibility for meeting an individual’s needs.

17. Council B accepts that X has the right to make a choice about his accommodation, including deciding to live in Council B. It contends, however, that in light of the above guidance Council A will retain responsibility for making the relevant arrangements, as the authority in whose area X is currently ordinarily resident.
18. Council B submits that the continuity of care provisions do not take precedence over section 39 of the 2014 Act or the Regulations made thereunder, and that there is nothing in the deeming provisions which suggest that they do not apply in such cases.

The Law

19. I have considered all the documents submitted by the two authorities, the provisions of Part 1 of the 2014 Act and the Regulations made under it, the guidance on ordinary residence issued by the Department, and the cases of *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“*Cornwall*”); *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“*Shah*”), *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 (“*Greenwich*”), *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 (“*Quinn Gibbon*”), and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 (“*Mohammed*”). My determination is not affected by provisional acceptance of responsibility by Council A.

The relevant local authority

20. Section 18 of the Care Act provides that a local authority, having made a determination that an adult has needs for care and support that meet its eligibility criteria, must meet those needs if, amongst other things, the adult is ordinarily resident in the authority’s area or is present in its area but of no settled residence.

The deeming provision

21. Under section 39(1) of the 2014 Act, 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 Part I of the 2014 Act as ordinarily resident 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.

22. Regulation 2(1) of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 (SI 2014/2828) provide, as amended, that for the purposes of section 39(1) of the 2014 Act, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation. Regulation 2(2) provides that these types of accommodation are specified only insofar as the care and support needs of the adult are being met *under Part 1 of the 2014 Act* while the adult lives in that type of accommodation. Accordingly, the deeming provision does not apply when a person is living in a specified type of accommodation which they have arranged and funded themselves. It only starts to apply when that accommodation begins to be provided by the local authority under Part 1 of the 2014 Act.

23. Section 39(1) is expressed to apply “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”. By contrast, the equivalent provision in the predecessor legislation, s.24(5) of the National Assistance Act 1948, is expressed to apply “where a person is provided with residential accommodation under Part III of the Act.” The words “which can be met only if the adult is living in accommodation of a type specified in the regulations” are new.

24. Under section 39(3) of the 2014 Act, regulations may make provision for determining for the purposes of subsection (1) whether 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 the regulations. No such regulations have been made.

Ordinary Residence

25. "Ordinary residence" is not defined in the 2014 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.

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

27. The courts have considered cases of temporary residence on a number of occasions, including in *Levene, Fox, Mohamed and Greenwich*. In *Fox*, the Court of Appeal considered *Levene* and Lord Denning MR derived three principles: *"The first principle is that a man can have two residences. ... The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence."* Lord Justice Widgery commented that *"Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence"*. The Court of Appeal found that the students were resident at their university address.

28. In *Mohamed*, Lord Slynn said *"the 'prima facie' meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few*

belongings and moves to a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is 'shelter' but it is also where he resides."

Application of law to the facts

29. There does not appear to be any dispute under s.39 of the 2014 Act, as both parties agree that X is currently ordinarily resident in the area of CouncilA.

30. CouncilA has contended in correspondence with CouncilB (although not in its formal legal submissions to the Secretary of State) that this is, rather, a dispute under section 37 of the 2014 Act as to whether that section applies, which is also an issue upon which the Secretary of State may pursuant to section 40 of the 2014 Act be asked to provide a determination.

31. However, I also do not understand there to be any dispute between the authorities as to whether section 37 of the 2014 Act applies, at least at the current time. Section 37(1) provides that:

(1) This section applies where—

(a) an adult's needs for care and support are being met by a local authority ("the first authority") under section 18 or 19,

(b) the adult notifies another local authority ("the second authority") (or that authority is notified on the adult's behalf) that the adult intends to move to the area of the second authority, and

(c) the second authority is satisfied that the adult's intention is genuine.

32. Subsections 1(a) and (b) are made out on the facts of the case, but CouncilB has so far reserved its position as to whether X's intention is genuine until such time as the potential for a move becomes reality. I agree that it would be premature to regard section 37 as applying for as long as X's move remains only a hypothetical possibility for some point in the future. Anything could change between now and then, and it will be necessary to assess whether section 37 is engaged based on the facts that pertain at that time. In the meantime, I do not consider that X can be described as having a genuine intention, in the sense of a

current and concrete intention, to move to CouncilB's area. To that extent, therefore, I conclude that section 37 of the Care Act 2014 does not apply on the current facts.

Conclusion

33. The remainder of the referral in fact appears to be a request by CouncilA for legal advice, from the Secretary of State, as to whether the deeming provision in s.39 of the 2014 Act is ousted in circumstances where the continuity of care provisions in ss.37-38 of the Act apply. As CouncilB has pointed out in correspondence with CouncilA, the s.40 dispute resolution process is for the purposes of resolving concrete disputes rather than providing legal advice or clarification. In any event, the Secretary of State considers that the position is adequately set out in the Department of Health's Care and Support Statutory Guidance, particularly at paragraph 19.50 onwards.