REVIEW BY THE SECRETARY OF STATE OF A DETERMINATION IN ACCORDANCE WITH SECTION 40 OF THE CARE ACT 2014

1. I have been asked by CouncilA to review my determination in respect of the ordinary residence of X.

2. The question of X's ordinary residence arose under Part 3 of the National Assistance Act 1948 ("the 1948 Act") but was determined in accordance with section 40 of the Care Act 2014 ("the 2014 Act") (disputes about ordinary residence) by virtue of article 5 of the Care Act (Transitional Provision) Order 2015 (S.I. 2015/995).

3. My determination dated 4 July 2017 was that X is ordinarily resident in CouncilA's area.

4. I have reviewed my determination and, for the reasons set out below, I remain of the view that X is ordinarily resident in CouncilA's area.

The facts

5. The facts are set out in my determination, and I will only briefly repeat them.

6. X (DOB XX XX 1972) has a mild learning disability with autistic tendencies and some behavioural issues.

7. In July 1992, X was received into area of CouncilB's guardianship pursuant to s.7 Mental Health Act 1983. She remains under Guardianship.

8. From 1992 to January 2010 X was placed in a number of residential accommodation placements by CouncilB pursuant to s.21 National Assistance Act 1948. In January 2010, X moved to a supported living placement in CouncilA where she is provided with 2:1 support on a 24/7 basis.

9. X has absconded from her current placement on a number of occasions. When she absconds this is either because she wishes to visit her mother in CouncilB, or because she has become distressed or agitated.

The Determination

10. I considered the documents submitted by CouncilB and CouncilA and the law as it stood at the relevant time, including the provisions of part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it[1], the guidance on ordinary residence issued by the Department[2] 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 and Fulham LBC* [2001] UKHL 57 ("*Mohammed*").

11. My approach was to consider whether the accommodation provided to X in her current placement was provision of residential accommodation under s.21 of the 1948 Act: if it was, X would be deemed to be ordinarily resident in CouncilB's area because of the application of the deeming provision in section 24(5) of the 1948 Act, otherwise the deeming provision would not apply, and it would be necessary to consider whether X acquired a new ordinary residence in CouncilA's area.

12. As X's present accommodation is not a registered as a care home for the purposes of section 26, and the tenancy agreement does not meet the requirements in order for it to be accommodation falling under section 21 of the 1948 Act, I found that there was no provision of residential accommodation under section 21 of the 1948 Act.

[1] Contained in LAC(93)10

[2] Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England issued on 15th April 2011 and reissued in 2013

13. I then considered whether section 21 accommodation should have been arranged and found that there was no obligation to provide X with section 21 accommodation because she could be provided with care and attention in her own home (which is paid for by housing benefit) and that CouncilB were making arrangements other than under section 21.

14. I therefore considered that there was no duty to provide section 21 accommodation, that X's current placement was not to be treated as if it were section 21 accommodation and that the section 24(5) deeming provision accordingly did not apply. I then determined X's ordinary residence according to the normal rules.

15. Having found that X did not have capacity, I took into account her physical presence and the nature and purpose of that presence and concluded that X was ordinarily resident in CouncilA.

The Authorities' submissions

CouncilA

16. CouncilA's submissions are set out in its request for a review of the determination dated 21 July 2017 and in reply submissions dated 6 October 2017. CouncilA submits that:

    a. I have confused the issues of capacity and guardianship under s.7 Mental Health Act 1983. X was required by her Guardian to live at her address in CouncilA and there is therefore no element of voluntariness in her accommodation.

    b. The determination did not consider the evidence that X has frequently absconded and been returned to her accommodation.

c. The test in *Shah* requires the voluntary adoption of a place of residence. This is not present in this case as X is compelled to live at her accommodation by virtue of the terms of the Guardianship.

d. There has been an error in my approach to capacity. At paragraph 57 of the determination it is said that: "*I am required by s.1(2) of the Mental Capacity Act to assume that X lacks capacity unless it is established she lacks it*."

e. At paragraph 58, the determination fails to understand the law relating to Guardianship.

f. The factors in *Cornwall* should not have been considered. X cannot have any settled residence so long as she remains under Guardianship. Her absconding indicates a lack of settled placement and evidences the lack of voluntariness in her placement.

g. All X's placements since 1992 were arranged and funded by CouncilB in the context of a guardianship order. The legal principle established by *Cornwall* applies and CouncilB should not be permitted to export its responsibility by making an out of area placement.

<u>CouncilB</u>

17. CouncilB has submitted submissions in reply. CouncilB submits that:

a. The first question is whether X has capacity. It is common ground that she does not. Therefore *Vale 2* is the appropriate test. The *Shah* test is not applicable and CouncilA are wrong to suggest that the *Shah* test applies to X's case.

b. The *Vale 2* test does not require voluntary adoption of a person's residence. The determination properly considered the *Vale 2* test and reached the right conclusion.

c. CouncilA's submissions confuse the question of capacity and volition. Someone who lacks capacity to consent to where they live is, in a legal sense, always under a compulsion. Whether the placement is reinforced by a Guardianship order does not matter: the placement is never voluntary for someone who lacks capacity.

d. X is not "compelled" to reside at her accommodation under the Guardianship order. This overstates the effect of such an order, which gives the Guardian the power to require the patient to reside at a particular place but is not a deprivation of liberty as would arise from compulsion.

e. CouncilB accepts there is an error in paragraph 57 of the determination but it appears to be a typographical error and in any event the error is immaterial because it is common ground that X lacks capacity.

f. CouncilA has misunderstood paragraph 58 of the determination, the comments in that paragraph were made on the assumption (as an alternative position) that X had capacity.

Review

18. In my view, the finding that X is ordinarily resident in CouncilA was correct and should stand.

19. In reaching this view I have, in particular, borne in mind the following:

a. The essential criterion in determining a person's ordinary residence is the residence of the subject and the nature of that residence. Where a person lacks capacity, the proper approach is to assess the duration and quality of her actual residence (*Cornwall*).

b. It was common ground between the parties that X lacked capacity at the time she moved to CouncilA's area. I have seen evidence that X was assessed to lack capacity to make a decision about where to live in around July 2014. There is also reference to a further capacity assessment dated

1 March 2016 in the bundle where it was determined that X lacked capacity to consent to her current support plans.

c. I am required to apply the presumption in favour of mental capacity in s.1(2) of the Mental Capacity Act 2005 ("MCA"). In my original determination at paragraph 57, I misstated the words of the MCA test but it is clear from my determination as a whole that I properly applied the presumption in favour of capacity. For the avoidance of doubt, in this review I have reconsidered the issue of capacity and applied the MCA presumption. There is no direct evidence of X's capacity at the time she moved to CouncilA's area in 2010. However, there is evidence that in 2014 and 2016 she lacked capacity to make decisions about her residence. X has a diagnosis of a mild learning disability and autistic tendencies and has been under guardianship since 1992. There is no suggestion that her capacity fluctuates or that there was any relevant change in her presentation between 2010 and 2014. In fact, it appears from the evidence that X has been unable to comprehend her care needs since at least 2009. I therefore conclude that she lacked capacity in 2010 when she moved to CouncilA's area.

d. As a result of the above, applying the decision in *Cornwall*, there can be no question that X voluntarily adopted her current residence. The proper approach is to consider all of the facts, including physical presence in a particular place and the nature and purpose of that presence, but without requiring the person to have voluntarily adopted the place of residence.

e. X is physically present in CouncilA. She moved there in order to become more independent. Although she did not have capacity to consent to the move, she expressed a wish to move to CouncilA's area. There is evidence that X has absconded from her current placement. However, the evidence does not suggest that she absconds because she wants to live in CouncilB's area. The view of the professionals charged with her care is that she absconds because she wants to visit her mother, or because she becomes agitated. Contrary to CouncilA's submissions, I have not seen

any evidence that X is aggressive to her carers because she wishes to bring an end to the placement. Applying the *Cornwall* test, X is ordinarily resident in CouncilA.

f. It is necessary to consider the effect of the Guardianship order which is in place. Pursuant to s.8 MHA a guardian has the power to require the patient to reside at a particular place. Accompanying this power is the statutory authority to return the patient to the place where they live should they abscond (see Mental Health Act Code of Practice at 30.13). However, Guardianship must not be used to impose restrictions that amount to a deprivation of liberty (see Mental Health Act Code of Practice at 30.5 and 30.30-30.32). In circumstances where a person has capacity, the Code of Practice states at 30.31:

> "*The power to require patients to reside in a particular place may not be used to require them to live in a situation in which they are deprived of their liberty. Guardianship <u>will not be appropriate for a person who has the capacity to decide where to live and will not reside in the place they are required to live by their guardian</u>…*" (<u>my emphasis</u>)

g. The Guardianship order does not in my view alter my conclusion above in respect of X's ordinary residence. First, the question of whether she has voluntarily adopted her residence does not arise because she does not have capacity. The fact that she is under a requirement to live at her current placement does not change this. Second, the fact that she is required to live at her current placement and may be returned there if she absconds does not mean she is compelled to live in CouncilA's area (as she would be if deprived of her liberty). Guardianship cannot deprive her of her liberty. If X had capacity, the Guardianship order could not be used to make her live in CouncilA's area against her will.

h. If I am incorrect about capacity, in my view this would not make a difference to the outcome of my decision. At the relevant time, X agreed to move to CouncilA's area. If she had capacity, this was a voluntary decision

and she adopted the place of residence for settled purposes, namely, to build a life there and become more independent. For the reasons set out above at (g), the fact that she is under Guardianship does not change the voluntary nature of her decision to move.

Conclusion

20. For the reasons set out above I remain of the view that X is ordinarily resident in CouncilA.