

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

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.

The Facts

2. X was born on XX XX 1924. She is currently 94 years old. She lived at Address1B within CouncilB in a 3 bedroom council house. Around 2015 CouncilB became involved and started providing support.
3. In 2015 her nieces terminated the support provided by CouncilB and made private arrangements for support at her home. On 7 September 2016 her nieces arranged for her to be placed on the waiting list for a care home, House1A, within CouncilA's area, closer to where they lived. CouncilB have stated in submissions that if a place had become available sooner X would have moved at that time. CouncilB states that there are case notes where the conversation the social worker had with the family are recorded.
4. On 6 June 2017 CouncilB carried out a mental capacity assessment with X. This assessment records that a concerned neighbour had reported concerns about X wandering out of her house late at night and the early hours of the morning. She had been knocking on doors. She had disabled the exit sensor and care line and was unplugging her telephone. X believed that her mother (who was dead) was visiting her regularly. She believed that sometimes she went out with her mother. The assessment concluded that X had dementia and her capacity to make a decision regarding her care, safety and place of residence was permanently impaired. No advance decision had been made.
5. A best interests assessment was carried out on 16 June 2017. Given the risks of X remaining at home it was decided by the social worker from CouncilB that

it was in the best interests of X to move to a care home closer to where X's nieces live in LocationA, within CouncilA's area. No needs assessment under section 9 of the Care Act 2014 appears to have been carried out at this stage. No records showing a financial assessment having been carried out was conducted. It does not appear from the papers provided that CouncilB contacted CouncilA at this stage. CouncilB states that one of X's nieces informed CouncilB that X had £29,630 in savings.

6. Records show that X had £25,363.79 in her bank account on 23 June 2017.
7. On 26 June 2017 X was placed in House1A, paying privately at the rate of £800 per week. The contract start date is listed as 26 June 2017. Clause 5.2 records that X was admitted initially on a trial period of 1 month. The contract provided for payment to be made in advance and for X's niece to act as guarantor for payment of all fees. The first payment was made on 23 June 2017. The second was made on 1 July 2017. Payments have since been made on the first of the month in advance.
8. On 5 July 2017 one of X's nieces contacted CouncilA and stated that she had less than £21,370 in the bank and was below the threshold limit. The threshold limit is £23,250.
9. X's council tenancy came to an end on 24 December 2017, X's nieces having continued to pay rent until the end of November. Keys were returned on 22 November 2017.

The Parties submissions

10. CouncilA submits that X was ordinarily resident in CouncilB's area at the time and therefore it was CouncilB's responsibility to make care home-arrangements in accordance with the Care and Support and After-Care (Choice of Accommodation) Regulations 2014 and to assist with funding under sections 18-20 of the Care Act 2014. CouncilA submit that CouncilB should have been aware from 16 June 2017 that X's funds would shortly drop below the threshold.

Council A rely on paragraph 25 of the Care and Support Statutory Guidance. X had insufficient funds when she entered the care home on 26 June 2017.

11. Council A further relies on *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 ("*Cornwall*") for the proposition that, where a person lacks capacity it would not be appropriate for the placing authority to export its responsibility for providing the necessary accommodation by exporting the person.
12. Council B submits that X was a self-funder when she entered the care home and that she had done so "privately." Council B accept that it did not assist or make arrangements to move X to House 1A "because the decision and arrangements had been done by X and her family back in 2016." Had a place become available sooner it is asserted that X would have moved sooner.
13. Council B submit that X is in a parallel position to "Wendy" in Annex H to the Care and Support Statutory Guidance.

Legal framework

14. I have considered all relevant legal provisions including 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 Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 ("*Cornwall*").

15. Section 9 of the Care Act 2014 provides:

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—
(a) whether the adult does have needs for care and support, and
(b) if the adult does, what those needs are.

(2) An assessment under subsection (1) is referred to in this Part as a “needs assessment”.

(3) The duty to carry out a needs assessment applies regardless of the authority’s view of—

- (a) the level of the adult’s needs for care and support, or*
- (b) the level of the adult’s financial resources.*

(4) A needs assessment must include an assessment of—

- (a) the impact of the adult’s needs for care and support on the matters specified in section 1(2),*
- (b) the outcomes that the adult wishes to achieve in day-to-day life, and*
- (c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.*

(5) A local authority, in carrying out a needs assessment, must involve—

- (a) the adult,*
- (b) any carer that the adult has, and*
- (c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult’s welfare.*

(6) When carrying out a needs assessment, a local authority must also consider—

- (a) whether, and if so to what extent, matters other than the provision of care and support could contribute to the achievement of the outcomes that the adult wishes to achieve in day-to-day life, and*
- (b) whether the adult would benefit from the provision of anything under section 2 or 4 or of anything which might be available in the community.*

16. Once a determination of eligibility is made under section 13 of the Care Act 2014, sections 18- 20 of the Care Act provide that a local authority “must meet” the needs which fit the eligibility criteria. The Care and Support and After-care (Choice of Accommodation) Regulations 2014 provide for an authority to provide the preferred choice of care home provided it meets the conditions in regulation 3.

17. Section 39 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 of 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.

18. In the Shah case, Lord Scarman said as follows:

“...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 “ordinarily resident” refers to a man’s abode in a particular place or country 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.”

19. The Statutory Care and Support Guidance (revised 2017) provides the following:

19.25 If it can be shown that a person lacks capacity to make a particular decision, the 2005 Act makes clear how decisions should be made for that person. For example, if a person lacks capacity to decide where to live, a best interests’ decision about their accommodation should be made under the 2005 Act. Under section 1(5) of the 2005 Act, any act done, or decision made (which would include a decision relating to where a person without capacity should live), must be done or made in the best interests of the person who lacks capacity. Section 4 of the 2005 Act sets out how to work out the best interests of a person who lacks capacity and provides a checklist of factors for this purpose. “

19.26 Where a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.

19.27 The Supreme Court judgment in Cornwall made clear that the essential criterion in the language of the statute ‘is the residence of the subject and the nature of that residence’.

19.28 At paragraph 51, the judgment says in relation to the Secretary of State’s argument that the adult’s OR must be taken to be that of his parents as follows:

‘There might be force in these approaches from a policy point of view, since they would reflect the importance of the link between the responsible authority and those in practice representing the interests of the individual concerned. They are however impossible to reconcile with the language of the statute, under

which it is the residence of the subject, and the nature of that residence, which provide the essential criterion.....'

19.29 *At paragraph 47, the judgment refers to the attributes of the residence objectively viewed.*

19.30 *At paragraph 49, the judgment refers to an: assessment of the duration and quality of actual residence.*

19.31 *At paragraphs 47 and 52, the judgment refers to residence being 'sufficiently settled'.*

19.32 *Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.*

...

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 65 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

People who arrange and fund their own care

19.75 People who self-fund and arrange their own care (self funders) and who choose to move to another area and then find that their funds have depleted can apply to the local authority area that they have moved to in order to have their needs assessed. If it is decided that they have eligible needs for care and support, the person's ordinary residence will be in the place where they moved to and not the first authority (for further information on self-funders, see annex H4, paras. 21-23).

Annex H

21) When a person moves into permanent accommodation in a new local authority area under private arrangements, and is paying for their own care, they usually acquire an ordinary residence in this new area. If so, and if their needs subsequently change, meaning that they require other types of care and support, (or if their financial circumstances change so that they would not have to pay for all of the costs of their care and support, if their needs were met by a local authority) they may approach the local authority in which their accommodation is situated. That local authority will be responsible for assessing whether it should meet their needs. The person will be ordinarily resident in the local authority area where the person's care home is situated.

22) Sometimes, a person with sufficient means to pay for their accommodation in a care home, who was intending to arrange their own care, may not be able to enter into a private agreement with a care home. If this is because they do not have the mental capacity to do so and they either have no attorney or deputy to act on their behalf, or another person in a position to do so, the local authority must meet their needs. Therefore if their assessed needs are required to be met by the provision of accommodation in a care home, the local authority must provide that accommodation (and it will do so by arranging for an independent care home provider to provide it) for which the authority may charge the adult.

23) In other cases, the person may have capacity, but is not able to manage the making of the arrangements without assistance. In these circumstances the authority may provide information, advice and guidance, or refer the person to

an independent broker (someone who can help them find and negotiate terms with a care home). Alternatively, under section 19 of the Care Act, it may decide to meet the person's needs by arranging the accommodation (which it will normally do by arranging for an independent care home provider to provide the accommodation). The local authority should consider doing so where the person's wellbeing would otherwise be adversely affected, in particular where there is no one else able to act on their behalf. In either case, if the person's needs which the local authority is meeting can only be met in a type of specified accommodation, the person would remain ordinarily resident in their placing local authority, even if the accommodation arranged by it is in another local authority area. In such circumstances, if the person's needs change, or their financial resources change so that they may not have to pay the local authority all of the costs for meeting their needs, they should approach the local authority which has arranged the placement and is currently meeting their needs.

20. Example 1 in Annex H reads as follows:

Wendy is 82 years old and very frail. Following a fall and a stay in hospital, she is assessed as having eligible needs for care and support under the Care Act. A financial assessment undertaken by her local authority, local authority A, concludes that she does not qualify for local authority financial assistance.

Wendy wants to arrange her own care and support, but does want some help in choosing the right care home. Local authority A provides advice to Wendy and her family on care homes in Local authority A and surrounding areas and help her to select a home that best meets her requirements. The care home is located in local authority B, as Wendy has expressed a desire to move closer to her family. Wendy moves into the care home as a self-funder and signs a contract with the care home for the provision of her care.

Sometime after Wendy moves into the care home, her savings fall below the capital limit and she approaches local authority A for support. She is advised by local authority A that she is no longer ordinarily resident in their local authority and that she should seek financial assistance from local authority B. Local authority B conducts a needs assessment and agrees Wendy's needs can only be met in residential accommodation like the care home she is living in and agrees to meet the costs, but immediately falls into dispute with local authority A over her place of ordinary residence and therefore which local authority should pay the costs. Local authority B disagrees with A's argument that Wendy has acquired an ordinary residence in their area and contends that she remains the responsibility of local authority A as that is where she has lived for most of her life.

Under the Care Act, Wendy is deemed to continue to be ordinarily resident in the area in which she was ordinarily resident immediately before her accommodation was provided by a local authority under the Act. Immediately before Wendy was provided accommodation, she was living in the same care home, but was responsible for paying for her own care. She had voluntarily left local authority A and moved to the care home in local authority B, which she had adopted voluntarily and for settled purposes. Therefore, Wendy is found to be ordinarily resident in local authority B.

21. Example 2 reads as follows:

Ewan is a frail and older man who has been referred to his local authority for a needs assessment following a hospital admission after a house fire at the bungalow which he owns. His resources are assessed as above the financial limit. The injuries he sustains have resulted in a physical disability, which compounded by his frailty mean he has eligible care and support needs which can only be met in a care home. Ewan has no other family.

His only friends are in a care home in a neighbouring local authority. Ewan is well enough to leave hospital but is finding it difficult to come to terms with his situation. When the local authority he lives in (local authority A) offers information and advice about his options, he asks if they could arrange his care directly in a care home in a neighbouring local authority (local authority B) so he can be with his friends. Local authority A decides to use its powers under section 19 of the Act to meet his needs by arranging a contract between themselves and the care home provider of Ewan's choice in local authority B, and arrange to recover the costs from him. Once this arrangement is put in place, Ewan had been ordinarily resident in local authority A immediately before his accommodation was provided by that authority in a care home in local authority B, he therefore remains ordinarily resident in local authority A. Local authority A currently has a contract with the care home and recovers the amount from Ewan.

A year later Ewan becomes eligible for social care funding because his resources have depleted, though, following a needs assessment, his needs have not significantly changed. Local authority A continues to be responsible for meeting his needs, and is required to fund them in accordance with charging regulations.

22. Annex B sets out the relevant upper and lower capital limits;

Upper and lower capital limits

24) *The capital limits set out at what point a person is able to access local authority support and how much support they receive. However, local authorities have discretion to set higher capital limits for people receiving care other than in a care home. Subject to the above the local authority must apply the capital limits. The capital limits for financial year 2015 to 2016 are:*

(a) upper capital limit: £23,250

(b) lower capital limit: £14,250

25) *If a person clearly has capital in excess of the upper capital limit, there is no need to make a wider assessment. If a person is near the upper capital limit, the local authority should be mindful of the need to plan ahead for when assets have been spent down and a person may therefore fall below the upper capital limit.*

This will help reduce burdens on both the local authority and the person from needing to repeat the financial assessment within a short timeframe.

26) *The capital which a person has below the lower capital limit must be disregarded in the calculation of tariff income (see below).*

23. In *R(London Borough of Greenwich) v Secretary of State for Health* [2006] EWHC 2576 (Admin) ("*Greenwich*") the legislative scheme which preceded the Care Act 2014 came before Charles J. He considered at [55]-[56], in a passage which is obiter dicta, where ordinary residence would lie, if arrangements for care provision ought to have been made under the preceding legislative scheme by a second authority, but were not. At [56] he stated:

56 In the arguments advanced in this context on behalf of the Secretary of State it was accepted that (a) a failure to comply with that statutory duty would be the subject of judicial review, and (b) if and when the court found that a local authority had acted unlawfully in not entering into the arrangements, the effect would be that the arrangements would be put in place retrospectively, not in the sense of contract, but in the sense that the result would be that the local authority would have to make the appropriate payments from the relevant date. That, it seems to me, supports the conclusion I have reached."

24. This passage was considered by Justine Thornton QC sitting as a Deputy High Court Judge in *R (Barking and Dagenham v (1) Secretary of State for Health* [2017] EWHC 2449 (Admin) ("*Barking and Dagenham*"). The Deputy Judge held that [56] of *Greenwich* would apply only if the Secretary of State was satisfied that the second authority had unlawfully failed to provide the accommodation, in the sense which would be likely to have resulted in relief

being granted through judicial review (had such an application been made at the time).

Application of the law to the facts

25. In X's case I am satisfied that she had become ordinarily resident in CouncilA at the relevant time.

26. I must follow the statutory presumption that X had capacity to decide where to live until such time as she was found to lack capacity. Paragraph 19.32 of the Guidance provides that where a person lacks capacity the approach is to follow the Shah test but to discount the need for that person to have voluntarily adopted their place of residence.

27. Although X had lived most of her life within CouncilB and only a short time in the area of CouncilA, it appears that X's views, wishes and feelings before she ceased to have capacity, were that she wished to move her ordinary residence to House1A within the area of CouncilA once she required the care of a care home. CouncilB has stated that X's nieces had informed social workers that X and they had together decided that when a place became available at House1A, she would move there. CouncilA has not sought to cast doubt on this. X's nieces lived in the area of CouncilA. They are her only surviving relatives. The move would enable X's nieces to visit her more frequently.

28. Although the contract with House1A had a one month trial period and the Council tenancy was maintained until December 2017, no party has sought to describe the move to House1A as temporary. X's nieces contacted CouncilA and not CouncilB when the funds dropped. The second payment to House1A was made on 1 July 2017. A whole month's fees were paid. This was less than a month after 26 June 2017. This appears to be consistent with an intention to make a permanent move. Having paid a whole month's fees on 1 July 2017 is not consistent with an intention that X might leave House1A during the trial period. I therefore conclude that the move to House1A was, in X's case, intended to be permanent.

29. I find that Council A is correct in submitting that Council B failed to comply with their duties under section 9 of the Care Act 2014 to carry out an assessment for X in June 2017. In light of that breach, applying Greenwich and Barking and Dagenham I must ask what would have happened if those duties had been complied with and whether, had an application for judicial review been made, the Court would have granted relief requiring Council B to provide accommodation at House 1A.

30. Although there has been a breach of section 9 of the Care Act 2014, it is most unlikely that the Administrative Court, on an application for judicial review, would have ordered Council B to have placed X in House 1A and to fund that placement in June 2017. This is because

- a. Although it was found to be in X's best interests to move to House 1A, at the time of the best interests decision, X had funds in excess of the threshold.
- b. Her funds were close to the threshold. Annex B paragraph 25 of the Guidance reminds authorities to be mindful of the need to plan ahead, but the Guidance and the legislation would not have imposed a mandatory duty on Council B to have placed X in House 1A as at 16 June 2016, when the best interests decision was made. Nor would they have done so at 26 June 2016 when she actually moved. Being mindful of the need to plan ahead does not require a local authority to actually fund a move to a particular place.
- c. It appears that Council B were persuaded that X and her nieces would not in any event have wanted Council B to have arranged a placement in a care home, as they had previously declined assistance from Council B and had themselves privately made arrangements with at home carers and with House. As X had previously refused home based care from Council B, this suggests that it would not have been consistent with X's previously expressed wishes and feelings for X's nieces to have asked Council B to have found and arranged the Care Home placement for her in June 2016.
- d. It seems unlikely that the Administrative Court would have ordered Council B to have arranged a placement for X in House 1A at the time of

the best interests decision or at the time she, in fact, moved. Her move there through private means was already in train.

31. X's situation therefore appears to have more in common with the example of Wendy in the Guidance than the example of Ewan, although her case is much less clear than Wendy's.

- a. Her funds were depleted more rapidly than the example of Wendy.
- b. In Wendy's case there is no breach of the Care Act 2014 by Local Authority A.

32. However, had Council B acted as Local Authority A did in Ewan's example, X's nieces are unlikely to have accepted assistance from Council B in arranging X's care home placement. It is likely to have been consistent with X's previously expressed wishes for X's nieces to have arranged for X to move privately to House 1A immediately following the best interests decision, which is what they did. Applying the *Shah* test, as modified by *Cornwall*, I find that X's ordinary residence had moved to House 1A, in the area of Council A by the time her funds had dropped below the threshold.

33. No party has sought to rely on *Milton Keynes v Scottish Ministers* [2015] CSOH 156. I find that this case has no application in England. The Mental Capacity Act 2005 permits a best interests decision to be made as to a person's residence where that person lacks capacity to decide where to live where there is no advance decision or formal legal authorisation. The lack of an advance decision in this case does not mean that X had not adopted ordinary residence in House 1A at a point prior to her funds dropping below the threshold.

Conclusion

34. For the reasons set out above I conclude that X has been ordinarily resident in the area of Council A since 26 June 2017.