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 ("the 2014 Act") in respect of the ordinary residence of X. The dispute is with CouncilB.

The facts

2. The following information has been ascertained from the agreed statement of facts, legal submissions and other documents submitted by the parties.

3. X is a 101 year old woman (d.o.b XX.XX.14) of Polish origin. She has extensive care needs and requires assistance with many aspects of daily living. She lived alone in her own home, with a privately arranged care package, prior to 28 May 2013 when she moved to Address1B Residential Care Home in CouncilB. On 10 July 2013 CouncilB took over funding of the placement pursuant to its duties under section 21 of the National Assistance Act 1948 ("the 1948 Act"). On 19 July 2013 X's son, Son1, agreed to make third party "top up" payments of £100 per week towards the cost of the placement. A placement review dated 25 July 2013 records that X liked the care home and her needs were being met. X was confirmed as a permanent resident there on 21 August 2013.

4. On 22 November 2014 X was admitted to hospital with shortness of breath and suspected pulmonary oedema. She was discharged back to Address1B on 28 November 2014. Thereafter, on or around 1 December 2014, X's son, Son1, gave one week's notice to Address1B that he would be moving his mother to a care home in CouncilA.

5. On 2 December 2014 a social worker from CouncilB sent an e-mail to Son1 asking him to complete and sign a form confirming his agreement to make top-up payments. The e-mail requested *"details of the care home of your choice"* and stated that *"our ceiling is £466pw. Your top up will be the weekly fee of the care home minus 466".* The attached form named Address1A as the care home.

6. It is not clear whether this form ever was completed but an internal e-mail, dated 4 December 2014, records that Son1 had written to CouncilB agreeing to pay the required top up of £600 per week. It notes that a care review was

due and that Son1 had requested that the review be carried out by a Polish speaking social worker.

7. A case note dated 4 December 2014 refers to a fax received from Son1 but the fax itself cannot be located. The note records details of a telephone conversation in which Son1 stated that he would like X to move to Address1A so she could be closer to him. He stated that her needs had changed and he felt that she was not being managed well at Address1B. The note further records that:

> *"[Son1] expressed that he would like [X] to move into this new care home identified over the weekend. I explained to him that [X] could only be moved into the care if he will be privately pay for [X's] stay in the care home. I explained to him that customer would need to be re-assessed ie procedures and protocols follows if CouncilB Social Services is to continue to contribute towards her care in this new care home." [sic]*

8. The agreed statement of facts states that:

> *"[CouncilB] indicated that X would need to be re-assessed and other procedures followed before [CouncilB] could make any decision to commit to contributing to any further placement for X and that if Son1 was minded to move his mother X over the coming weekend it was on the basis that he would be making a private arrangement with the care home, to which [CouncilB] was not a party."*

9. The agreed statement of facts further records that Son1 informed CouncilB that he was going to move X to a care home nearer to him in CouncilA. Representatives from Address1A visited Address1B and carried out an assessment of X. The manager of Address1B reported that it was her impression that X did not mind moving to the new placement and cooperated with the assessment. She appeared to be looking forward to living closer to her son.

10. A CouncilB file note, dated 5 December 2014, records that X's case had been allocated and a review/reassessment was to be completed. Also on 5 December 2014 Son1 received advice from Independent Age Advice Services ("IAAS") concerning ordinary residence which suggested that X would remain the responsibility of CouncilB on moving to CouncilA. The agreed statement of

facts records that *"Son1 was of the understanding that X should still be considered as the responsibility of [CouncilB] should X move to a care home within another local authority area".* However, on the evidence before me, it appears that he did not put this advice to CouncilB or make any further enquiries of them in light of the apparent inconsistency between this advice and CouncilB's position, as communicated to him, that it would have to undertake further assessments and follow other procedures before it could commit to funding any further placement.

11. On the evidence I have seen it appears that Son1 proceeded to move X to Address1A without any further consultation with CouncilB. A filed note dated 8 December 2014 records that CouncilB received a telephone call from the manager of Address1B who reported that: Son1 was moving X to a new care home outside of London that afternoon; he had booked an ambulance for 2pm; and he had given notice a week ago. It was agreed that the contract between CouncilB and Address1B would end that day.

12. There is no dispute that X moved to Address1A on 8 December 2014. I have had sight of a residency agreement dated 9 December 2014. In that document the fee for the placement is given as £975 per week, underneath which is written "private" with the words "local authority" deleted. The type and period of stay are described as "permanent". The document is signed on behalf of Address1A but not by X or Son1. CouncilB did not have any involvement in setting up or agreeing the placement at Address1A. However, Son1 maintains that his mother was moved to Address1A on the understanding that CouncilB would be responsible for funding X's placement. On 16 December 2014 the manager of Address1B informed CouncilB that X had been in agreement or at least not objected to moving to the new home as it was closer to her son.

13. There is no evidence of any contact between X or Son1 and CouncilB, regarding X's placement, between 8 December 2014 and 5 January 2015 when CouncilB received a telephone call from Address1A. CouncilB advised that it was not responsible for funding X's placement as it had been arranged privately by X's son. On the same date CouncilB spoke to Son1 and advised him that they would not be responsible for funding his mother's placement. The file note records that Son1 was advised to contact CouncilA. Son1 said that he was paying £1200 for his mother's placement.

14. The date on which Son1 approached CouncilA is not clear but I have had sight of a FACE Overview Assessment which gives a start date for the assessment as 22 January 2015. The assessment concluded that X had a need for residential care at the present level though she might within a short period of time require nursing care. It noted that X was funded by CouncilB prior to her move to Address1A and it recorded the assessor's view that CouncilB should fund the new placement. Under the heading "outcome and notes", the assessment states: *"[X] was transferred from CouncilB funded placement by her son under the advice of CouncilB Social Services that they would continue to support the placement through funding".* Further, under the heading "analysis", it says*: "CouncilB advised that reassessment would be required to establish needs prior to move. [Son1] felt that the process was too slow and therefore liaised with [social worker1] who confirmed in writing to [Son1] that [X] could transfer placements and [CouncilB] would continue to pay £466 (UP for residential care) to the new placement until social services in CouncilB had reassessed her need."* I note, based on the evidence and documents before me and the agreed statement of the facts that the above accounts appear to be wrong. I have seen no evidence of any written confirmation that CouncilB would continue to pay £466 per week and the file notes bear no record of any such agreement, rather they make clear that Son1 was told that if he moved his mother prior to assessment it would be on a private basis. It appears from the other documents that the advice relied upon by Son1 was that of a third party advice agency.

15. Following the FACE assessment, on 19 March 2015, CouncilA wrote to CouncilB asserting that X remained ordinarily resident in CouncilB and that it was CouncilB's responsibility to fund X's placement at Address1A. This was disputed by CouncilB. There followed a lengthy exchange of correspondence over a number of months before the dispute was referred to me on 23 May 2016.

The Authorities' Submissions

16. In summary, it is CouncilA's case that:

    a. X should be treated as ordinarily resident in CouncilB by virtue of the deeming provisions under section 24(5) of the 1948 Act;

    b. CouncilB cannot rely on its inaction to justify transfer of responsibility or arranging and funding X's residential accommodation;

c. CouncilB "deliberately misled" Son1 in stating that if he moved X to an out of area placement it would cease to be responsible for funding;

d. X and her family expressed a preference for accommodation in CouncilA which CouncilB were under a duty to provide;

e. It is irrelevant that Son1 arranged the move and that CouncilB did not enter into a contract with the accommodation provider.

17. CouncilA do not dispute that X moved to Address1A for settled purpose and did so voluntarily. They accept that she had *"settled presence other than under compulsion from the outset".*

18. In response, CouncilB submit that the deeming provisions do not apply:

a. CouncilB did not enter into any contractual arrangements with Address1A and, accordingly, X was not provided with accommodation within the meaning of section 24(5);

b. Although it owed a duty to provide X with accommodation under Part III of the 1948 Act, this duty was discharged by provision of a placement at Address1B and it was not under a duty to provide accommodation at Address1A;

c. A duty to provide preferred accommodation only arises where the conditions of the Choice of Accommodation Directions 1992 are met;

d. CouncilB did not have an opportunity to satisfy itself that the relevant conditions were met before X was moved under private arrangements to Address1A.

19. Both parties agree that X had mental capacity to decide to move to a different care home.

The Law

20. I have considered all of the documents submitted by the parties, the provisions of Part III of the 1948 Act and the Directions issued under it[2], the guidance on ordinary residence issued by the Department[3], 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 CouncilA.

21. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force. Article 6(1) of the Care Act (Transitional Provision) Order 2015/995 states that any person who, immediately before the relevant date, is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the 2014 Act.

Accommodation

22. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 or over who by reason of age, illness or disability or any other circumstances are in need of care or attention which is not otherwise available to them**.**

23. By virtue of section 26 of the 1948 Act, local authorities can, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements, and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

Choice of Accommodation

24. The National Assistance Act (Choice of Accommodation) Directions 1992 require a local authority that has assessed a person, and decided that

accommodation should be provided under section 21 of the 1948 Act, to make arrangements for such accommodation at the place of that person's choice ("preferred accommodation") if that person has indicated a wish to be accommodated in preferred accommodation.

25. However, the local authority is only required to make such arrangements if:

    a. the preferred accommodation appears to the authority to be suitable in relation to the relevant person's needs as assessed by them;

    b. the cost of making arrangements for the relevant person at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs;

    c. the preferred accommodation is available;

    d. the person in charge of the preferred accommodation provides it subject to the authority's usual terms and conditions, having regard to the nature of the accommodation, for providing accommodation for such a person under Part III of the 1948 Act.

26. Under regulations 4 of the National Assistance (Residential Accommodation) (Additional Payments and Assessment of Resources) (Amendment) (England) Regulations 2001, where conditions (a), (c) and (d) above are met but the cost of providing the resident with preferred accommodation would require the authority to pay more than the authority would usually expect to pay, the authority is still required to provide the preferred accommodation if a third party (or the resident in certain limited circumstances) agrees to make additional payments and can reasonably be expected to make those additional payments for the duration of the arrangements.

The relevant local authority

27. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State's Directions provide that the local authority is under a duty to make arrangements under that section "in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof".

The deeming provision

28. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under Part 3 of the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

29. In *Greenwich* (cited above) Charles J held:

> *"55. …It seems to me that if the position is that the arrangements should have been made [for provision of accommodation under Part III]… the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority.*
>
> *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*.

30. Accordingly, the guidance in force at the time X moved to CouncilA stated that:

> *"58. It should be noted that local authorities cannot escape the effect of the deeming provision in circumstances where they are under a duty to provide Part III accommodation but they fail to make the necessary arrangements. In such a case, the person's ordinary residence would fall to be assessed at the date immediately before the accommodation should have been provided. This was made clear in the Greenwich case."*

Ordinary Residence

31. “Ordinary residence” is not defined in the 1948 Act. The Department of Health 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. This is the guidance that was in force at the time X moved to Address1A.

32. In *Shah* (cited above), 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”*

Application of the law to the facts

33. The central issue in this case is application of the deeming provisions under section 24(5) of the 1948 Act. The deeming provisions apply where a person is- or, on the reasoning of Charles J in *Greenwich*, should have been- provided with accommodation under Part III of the 1948 Act.

34. Here, it is not suggested that CouncilB played any active part in arranging the placement at Address1A and it did not, at any stage, enter into a contract with them. It follows that, as a matter of fact, on moving to Address1A, X was not provided with residential accommodation under Part III of the 1948 Act.

35. The question, therefore, is whether X should have been provided with such accommodation. In other words, were CouncilB under a duty to provide accommodation with which they failed to comply? In answering this question, I start from the position that X’s needs were such that she did have a requirement for accommodation under section 21 of the 1948 Act. This much is conceded by CouncilB. However, I accept CouncilB’s submission that in providing accommodation at Address1B their duty was discharged.

36. On the facts, I find that X voluntarily chose to move out of Address1B. Son1 was told that if he moved his mother before necessary assessments were undertaken and procedures followed, this would be on a private basis and CouncilB would not be responsible for the funding. In these circumstances, it cannot be said that, when she left Address1B, X should have been provided

with accommodation under Part III or that CouncilB was in breach of any duty in not doing so.

37. CouncilA assert that CouncilB were under a duty to provide preferred accommodation at Address1A and that CouncilB were wrong in what they said to Son1 about responsibility for funding. Indeed, they go so far as to suggest that CouncilB "deliberately misled" Son1. I find that there is no evidence to support the assertion that CouncilB deliberately misled Son1 and such serious allegations should not be made without a firm evidential basis. Further, I have concluded, based on detail set out in the file note and the agreed statement of facts, that what Son1 was told about responsibility for funding was reasonable and appropriate.

38. The Choice of Accommodation Directions (set out above) do not provide an absolute right to provision of preferred accommodation. There is no duty on a local authority to provide preferred accommodation unless the conditions set out in the directions are met, and a local authority is entitled to a reasonable period of time from the point of any expression of preference to assess whether those conditions are met. Where a service user chooses to act unilaterally rather than waiting a reasonable period for the necessary assessments to be undertaken, the local authority cannot be said to be in breach of duty in failing to fund a new placement in respect of which there has been no assessment.

39. It appears that Son1 thought CouncilB would continue to be responsible for funding X's placement after the move but, on the facts, he made no contact with CouncilB for approximately one month after choosing to move her out of Address1B, having been told that it would have to be on a private basis if he moved her before assessments were undertaken. In this period, on the evidence before me, there is no reason why CouncilB would, or should, have assumed any on-going responsibility to take further steps to assess or make provision for X. At this point, on the information known to them, X had chosen to make private arrangements and their responsibilities had been discharged.

40. Accordingly, I find that the deeming provisions under section 24(5) of the 1948 Act did not apply when X first moved to Address1A or for at least four weeks thereafter. In early January 2016 CouncilB had contact with Address1A and with Son1 about funding, and Son1 also approached CouncilA. It could be argued that, at this stage, Part III accommodation should have been provided (whether by CouncilB or CouncilA). However, I do not need to determine this

point as, for the reasons set out below, I consider that, by this time, X was ordinarily resident in CouncilA.

41. I reach this conclusion applying ***Shah*** and the other case law and guidance cited above. There is no dispute that X had capacity to decide where to live and she was happy to be (or at least did not object to) moving closer to her son. There is no dispute that the move was for settled purpose and the residence agreement dated 9 December 2016 records X's status as "permanent". I have taken into account the uncertainty as to funding, the fact that no contract was signed, and that Son1 thought CouncilB would continue to be responsible for funding but, in my view, none of these factors are sufficient to outweigh the fact that X moved voluntarily to Address1A intending it to be a permanent placement and that the contractual arrangements for her residence in CouncilB were cancelled.

Conclusion

42. For the reasons set out above, I conclude that X is, and has been since December 2014, ordinarily resident in CouncilA.