DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32 (3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF X IN ACCORDANCE WITH SECTION 40 OF THE CARE ACT 2014.

1. I have been asked by the CouncilA and CouncilB to make a determination under section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the ordinary residence of X.

2. On 1 April 2015 relevant provisions of the Care Act 2014 ("the 2014 Act") came into force. Article 5 of the Care Act (Transitional Provision) Order (SI 2015/995) requires that any question as to a person's ordinary residence arising under the 1948 Act 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. I make this determination accordingly.

3. For the reasons set out below, I find that X was ordinarily resident in CouncilB for the period 14 September 2012 to 17 December 2014.

The facts

4. The following information is taken from the statement of facts and legal submissions prepared by CouncilA, and CouncilB's response to these documents by way of correspondence to me dated 19 February 2015 and 6 March 2015 and other documents supplied by the authorities.

5. X is 22 years old. He has learning disabilities and autistic spectrum disorder and also exhibits challenging behaviours. The FACE overview assessment, completed by CouncilA on 21 January 2012, was the consequence of a request from X's mother in anticipation of X leaving school in July 2012. This includes the following assessment:

   " has difficulty with most or all aspects of personal care and everyday activities. Significant risk also present when unattended for extended periods e.g. of falling or of having an accident in the home. The provision of adequate support would be expected to be onerous for carers,.."

6. I am advised on the papers that originally X lived with his parents in CountryX. In 2005, aged 12 years, X attended school and resided at SchoolD, CouncilD following earlier attendance as a day pupil. X later transferred to another residential school

named SchoolE in TownE, CouncilE in September 2008. Upon completing his education, X moved in with his mother in CouncilA in July 2012 until he moved to his current supported accommodation at AccommodationT4T on 14 September 2012. X resides at this address as a secure tenant and his rent is paid by housing benefit.

7. The tenancy agreement for the payment of rent amounting to £379.30 per month is between the LandlordQ and X. The tenancy agreement is in a user friendly format and states that staff at LandlordQ shall assist X with various every day and domiciliary tasks such as weekly shopping and budgeting. X has access to 7 hours domiciliary support at his address each day. CouncilA submit that this has been funded by them under section 29 of the 1948 Act.

8. X attends the CouncilF College twice per week. X's mother moved to Town in August 2012 but X spends Friday – Monday of each week with her.

9. CouncilA rely on the mental capacity assessment dated 10 September 2012 (" CouncilA's MCA") as evidence that X has capacity to decide where he wishes to live.

10. CouncilA legal services referred X to LegalServicesW, who represent CouncilB, on 13 October 2014 requesting a response by 10 November 2014. The referral letter enclosed a draft statement of facts, and a draft list of documents together with enclosures including a copy tenancy agreement and CouncilA's MCA together with additional evidence that X had exercised choice in moving to AccommodationT4T.

11. CouncilA chased this correspondence until a response was received indicating that the original correspondence had not been received. The original correspondence was re sent on 22 October 2014. CouncilA continued chasing LegalServicesW for a response and were advised on 18 November 2014 that a response would be forthcoming. LegalServicesW advised on 25 November that they had not been instructed by their client department in regard to [this] matter. CouncilA legal pursued LegalServicesW for details of matters upon which they were not instructed and contact details for a representative within their client department. No response was forthcoming until the deadline date given by CouncilA of 12 December 2014, in which LegalServicesW advised that they were seeking instructions. CouncilA therefore applied for this determination on 16 December 2014.

12. In their letter to me dated 19 February 2015, LegalServicesW state that CouncilB accept the ordinary residence of X in CouncilB from 17 December 2014 (the date of their initial assessment of X's capacity). CouncilA do not accept that this is the date upon which X obtained ordinary residence in CouncilB, which they submit is 14 September 2012, the date he moved to AccommodationT4T. There therefore remains a period between 14 September 2012 and 17 December 2014 that remains in dispute between these authorities and is a question in regard to ordinary residence which I shall determine.

13. By email to me on 24 December 2014, LegalServicesW requested further time to consider the matter, make submissions and comment on the statement of facts, asking that no determination be made until after the end of January 2015. I agreed to further time for the authorities to attempt to resolve the dispute until 2 February 2015. I was advised by CouncilA that CouncilB had not communicated further with them. On 13 February 2015 I advised both authorities that my determination would proceed on the papers submitted and provided a further 7 days for additional submissions or observations to be made.

The Authorities' Submissions

14. CouncilA submit that X has capacity to determine his own place of residence and became ordinarily resident in CouncilB on 14 September 2012 when he moved to AccommodationT4T voluntarily and for a settled purpose.

15. CouncilB have not agreed the statement of facts or made formal submissions in support of their position. In correspondence to me dated 19 February 2015 LegalServicesW detail the capacity screening interview completed by a CouncilB care manager on 17 December 2014 and conclude by accepting ordinary residence in CouncilB from the date of this assessment. They decline to accept ordinary residence from an earlier period as they submit that the referral from CouncilA was incomplete and lacked basic information such as a properly conducted assessment and tenancy agreement.

16. In their further correspondence to me dated 6 March 2015, LegalServicesW request me to consider that "it would be inappropriate and unfair ... to have to backdate responsibility from the date [X] first moved to CouncilB". CouncilB submit that they

can only take responsibility from the date of their assessment as [X] was not previously known to them.

The Law

17. I have considered all the documents submitted by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act and the Directions issued under it[i], the guidance on ordinary residence issued by the Department[ii], and the cases of 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"), R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38 ("NASS"), R (M) v Slough BC [2008] UKHL 52, Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72 and R (SL) v Westminster CC [2013] UKSC 27. My determination is not affected by provisional acceptance of responsibility by CouncilA advised to CouncilB in their letter dated 13 October 2014.

18. I set out below the law as it stood at the relevant time.

19. 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.

20. 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).

21. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal care under section 21 of that Act with any organisation other than a registered care home.

22. 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".

23. 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.

24. In addition, section 29 of the 1948 Act empowers local authorities to provide a range of non-residential community care services which is similarly converted into a duty by the Directions for those who are ordinarily resident in the local authorities' area.

Ordinary Residence

25. "Ordinary residence" is not defined in the 1948 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[iii] (" the guidance"). Paragraph18 of the guidance onwards notes that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. The concept involves questions of fact and degree. Factors such as time, intention and continuity have to be taken into account.

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. Additional considerations apply where the relevant person lacks capacity to determine (and thus to "voluntarily adopt") his abode. However, in light of my decision at paragraph 47 below, it is not necessary to apply the additional incapacity considerations in this case.

Application of the law to the facts

28 The first issue is whether the accommodation in AccommodationT4T was provision of residential accommodation under section 21 of the 1948 Act. If it was, X will be deemed to be ordinarily resident in CouncilA's area because of the application of the deeming provision in section 24(5) of the 1948 Act. However, if those arrangements did not fall under section 21, the deeming provision will not apply and it will be necessary to consider whether X has acquired a new ordinary residence in CouncilB.

29 CouncilA submits that it provided non-residential services to X at AccommodationT4T under section 29 of the 1948 Act. CouncilB have not disputed this or suggested that accommodation at AccommodationT4T was provided under section 21 of that Act. However, since X's ordinary residence whilst residing at AccommodationT4T is in dispute, I consider it necessary to make a finding on this point in any event.

Characteristics of section 21 accommodation

30 In order for a person's accommodation under a private occupancy agreement to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet the requirements of section 26(1A), (2) and (3) of the 1948 Act as set out above. In the case of Chief Adjudication Officer v Quinn Gibbon [1996] 4 All ER 72, Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.

31 In my view, the tenancy agreement between X and LandlordQ does not meet the section 26 requirements in order for it to be accommodation falling under section 21. In particular, the arrangements do not meet the requirements of section 26(2) as set out above as they do not provide for the making of payments by a local authority to the accommodation provider (and hence do not provide for the recovery of payments

from the person receiving accommodation). X is provided with a secure tenancy in which he is solely responsible for the payment of rent. I have no evidence before me of any obligation on CouncilA to make any payment for accommodation to the landlord. X's rent under the tenancy agreement has been funded by housing benefit payments. The funding provided by CouncilA is payment towards X's care costs, not his accommodation costs.

Was there a duty to provide section 21 accommodation?

32 However, that is not sufficient to settle the matter. The further question which I then have to address is whether in fact arrangements for Part 3 accommodation for X should have been made during the period in question. In Greenwich, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (paragraph 55 of judgment). Following Greenwich, therefore, lack of compliance with section 26 may not be fatal if, in fact, the local authority should have been making section 21 arrangements.

33 The first limb of the test in section 21 of the 1948 Act is whether or not the person is in need of care and attention. Care and attention was defined by Baroness Hale in R (M) v Slough BC [2008] UKHL 52 at paragraph 33:

'…the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list.'

34 I take the view that X was in need of care and attention as his care package included support in the home for tasks which he was not capable of doing for himself such as weekly shopping and budgeting.

35 The second limb of the test in order to determine whether a duty under section 21 exists is to ask whether or not the care and attention needed is available otherwise than by the provision of residential accommodation. One of the conditions for qualifying for accommodation under section 21 is that, without the provision of such

accommodation, the care and attention which the person requires would not otherwise be available to them. In R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38 ("NASS") the court confirmed that a person needing care and attention that could be provided in their own home would not normally be entitled to accommodation under section 21.

36 In the case of R (SL) v Westminster CC [2013] UKSC 27 Lord Carnwath said, at paragraph 44: "What is involved in providing "care and attention" must take some colour from its association with the duty to provide residential accommodation."

37 At paragraph 45 he asked about care and attention: "…..was it available otherwise than by the provision of accommodation under section 21? Although it is unnecessary for us to decide the point, or to consider the arguments in detail, it seems to me that the simple answer must be yes, as the judge held. The services provided by the council were in no sense accommodation-related. They were entirely independent of his actual accommodation, however provided, or his need for it. They could have been provided in the same place and in the same way, whether or not he had accommodation of any particular type, or at all."

38 In the light of the authorities (R Wahid v Tower Hamlets) (2001) EWHC Admin 641 (First Instance Judgment of Stanley Burnton J) and (2002) EWCA Civ 282 (Court of Appeal), it is established that section 21 is a provision of last resort, and that it does not follow that because residential accommodation can mean ordinary housing and the claimant is in need of ordinary housing, a duty arises to provide him with that housing under section 21(1)(a). This analysis was approved by Hoffman J in NASS.

39 In my view X was receiving the care and attention he required whilst living in private residential accommodation under a tenancy agreement. However, equally, the services he required could have been provided by another provider. Those services were not intrinsically linked to the accommodation. Accordingly I find that CouncilA were perfectly lawfully making arrangements other than under section 21.

40 Section 29 of the 1948 Act and the Directions issued under that section require the provision of certain welfare services to individuals such as X. Such services are provided in the community. It is clear that the services provided to X come within the nature of services which can be provided in a person's own home under these provisions.

41 I therefore determine that there was no duty to provide section 21 accommodation to X. As a result, X's residence at AccommodationT4T should not, in my view, be treated as if it were accommodation under Part 3 of the 1948 Act. If the provision of accommodation does not fall within section 21, the section 24(5) deeming provision does not apply. If section 24(5) does not apply, then X's ordinary residence falls to be determined according to the normal rules.

42 Such a determination is still necessary because X required welfare services under section 29 of the 1948 Act. The local authority responsible for the provision of those services will be the one in which X was ordinarily resident.

43 Where it is established that a person has the capacity to make a decision about where he should live, the relevant test of where that person is ordinarily resident is set out in the leading case of Shah mentioned above.

Mental capacity

44. I therefore consider it appropriate at this stage to turn to the question of X'S mental capacity, and his ability to make decisions about where he wishes to live. There is no consensus between the parties on this issue but it is clear from the documents that I have seen that X had capacity to choose to move voluntarily and for settled purposes.

45. CouncilB do not specify that they submit X lacked capacity in regard to the decision to move to AccommodationT4T. I do however note the contents of an initial screening of X completed by a care manager on 17 December 2014. This is set out in a letter to me dated 19 February 2015 and states that a further capacity assessment would be undertaken by CouncilB as X " did not have the capacity to make a decision on long term plans". Under the subheading CAPACITY it also states that X " does not have the capacity in making long term plans or decisions".

46. Under section 1 of the Mental Capacity Act 2005 a person must be assumed to have capacity unless it is established that he lacks capacity. The current test for capacity is found in section 3 of the 2005 Act. That section states that a person is unable to make a decision for himself if he is unable:

(a) to understand the information relevant to a decision;

(b) to retain that information;

(c) to use or weigh that information as part of the process of making the decision; or

(d) to communicate his decision (whether by talking, using sign language or any other means).

47. The decision in question is where X wished to live at the material time. It is not a decision as to the exact nature of the accommodation arrangements nor does it require understanding of the implications of those arrangements or which local authority might be responsible for funding his care. It seems to me that there is a qualitative difference between complex issues relating to long term plans, and relatively uncomplicated issues about where one wishes to live and spend one's time. I am satisfied from the information available to me that X did have the necessary mental capacity at the relevant time i.e. he understood that he wanted to move to AccommodationT4T and had capacity to indicate preferences about such a matter.

48. I base my conclusions on the following:

- the starting position of a presumption of capacity;
- the CouncilA MCA, which concludes that X had capacity to make a decision and was completed contemporaneously to the date of X's move to AccommodationT4T. The CouncilA MCA explains, in some detail, what questions were asked of X and how he responded;
- in addition, the care manager undertaking the CouncilA MCA included information regarding the steps taken prior to the MCA to facilitate X's understanding of the accommodation options available to him and allow him time to visit, discuss and consider these options before exercising his own choice. The care manager also discussed tenancy agreements for both property options with X and was satisfied that X understood and was able to retain the information in order to make an informed choice;
- X signed a tenancy agreement and this was a version that was easy for him to understand, being in user friendly format.

49. I find that the contents of this assessment, as detailed in the letter to me, are not evidence that X lacks capacity in regard to the decision whether he wished to move and live at AccommodationT4T.

50. Furthermore, even though CouncilB state that X mentioned that he misses his mother, likes to be with his mother and preferred when he was at school all the time, these are not comments that vitiate the settled purpose of the voluntary move to AccommodationT4T.

X may understandably wish to live with his mother if circumstances were different but he also expresses his satisfaction at AccommodationT4T and that he " is happy with the place where he lives" .

Determination of ordinary residence

51. I am satisfied that X adopted AccommodationT4T as his home voluntarily and for settled purposes during the period in question. X has lived at AccommodationT4T for a continuous period of almost two and a half years, he moved with the intention of obtaining support for more independent living and appears to have a regular pattern of living at AccommodationT4T which includes attendance at college.

52. He signed a tenancy agreement which was an easy read version and constitutes an expression of his wishes with regard to where he wishes to lives. He also expresses his satisfaction at AccommodationT4T and that he " is happy with the place where he lives".

53. All the evidence points to the conclusion that X will remain at AccommodationT4T for the foreseeable future. He is no longer present in CouncilA's area.

54. I am therefore satisfied that X has adopted the accommodation at AccommodationT4T as his home voluntarily and for settled purposes. He therefore acquired ordinary residence in CouncilB from 14 September 2012.

55. Finally, CouncilB submit that " it would be inappropriate and unfair .. to have to backdate responsibility from the date [X] first moved to CouncilB". Neither ordinary residence per se nor transfer of ordinary residence is subject to any legal duty or requirement to notify a host local authority. Ordinary residence is a question of fact.

56. For the reasons set out above, I find that X was ordinarily resident in CouncilB for the period 14 September 2012 to 17 December 2014.

Signed on behalf of the Secretary of State for Health

Dated