

## **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.
2. In determining this issue I have had regard to the agreed statement of facts and the submissions of both local authorities, the bundle of materials provided and further material provided by email at my request on 19 January 2017 and a copy of the "House Rules" of 2011 provided on 23 February 2017.
3. For the reasons set out below, I find that X is ordinarily resident in CouncilB and has been since 7 October 2013.

### **Factual Background**

4. X is a 79 year old man with a learning disability. The agreed statement of facts indicates that he is in good physical health and generally very independent.
5. Up until his mid 20s, X had lived at home with his mother in CouncilA. In 1963, X's mother died and he moved to live with his aunt. That arrangement broke down and X was "put into an institute". He was then placed in residential accommodation at Address1B. He remained there until 2011.
6. The agreed statement of facts indicates that for some time X had expressed a wish to move into more independent living and that plans were made for him to move into supported accommodation in CouncilA. However, after visiting a few properties in CityA, X indicated that he wished to remain in AreaB, which was quieter and where he had a job in the village and engaged in various activities. Local accommodation options were canvassed. The agreed statement of facts states that after all assessments were completed, staff from Organisation1 who knew him well, worked with him to understand what it meant to move using easy read and visual support so that he could make an informed decision as to where to move.
7. An advocacy report dated 9 March 2011 states:  
"Advocacy Referral: CouncilA are the local funding authority and the decision maker. They have proposed a move into a supported living setting in CouncilA. No Functional Capacity around making a decision to move to supported living has been completed. It is believed X has capacity, although this has not been tested."
8. I note that the report stated:  
"X has good verbal skills. X is a very forthright and is able to give his views clearly. He appears to have a good understanding of any questions put to him. Although X is clearly stating that he would like to move out of the village, it may be difficult for him to make a completely informed choice. He does not appear to fully understand the implications around a move away from the Village. His Capacity to make this decision has not been tested."

9. The report goes on to note that X was taken to see properties in AreaA on 20 January but that although he liked the properties, he wanted to stay in the local area. It stated that he had viewed a property in Address2B, which he was very keen to move into but that it was felt he was not the same client group as the existing two residents.
10. The report noted that X had a job in the stores and attending cooking classes, the rowing club and the railway club. It stated that he was able to walk into AreaB and visit the shops unaccompanied but that "I am informed that X has little awareness of road safety or stranger danger." That report recommended that a functional test for capacity would need to be carried out.
11. In a report dated 31 March 2011, Individual1, assistant psychologist, assessed X's capacity to make decisions with regards to his residence. That report noted that X was extremely positive about Address2B. That report concluded:

"...On the balance of probabilities it is felt that X has the capacity to make this decision. He clearly understands what the move would entail and mean. He can retain all the relevant information over a long period. X appears to have thought through what impact a move would have on his life. Lastly X is very clearly communicating that he would like to move to Address2B."
12. I note that paragraph 14 of the agreed statement of facts indicates that CouncilA and CouncilB agree that X had and has the capacity to decide where to reside.
13. An assessment dated 26 July 2011 completed for X's move to supported living records that his diagnosis is of "Mild Learning Disability". The assessment noted that staff would need to support X in booking and attending medical appointments, on a monthly basis. He would need support with monitoring and reviewing health issues on a quarterly basis and staff assistance with health action planning on a quarterly basis. He was not on medication but if he was required to take medication, he would need staff to assist him with this. He needed verbal prompts to ensure that he washed properly, amounting to some 30 minutes support on a daily basis. X could independently check the water but staff would also check this.
14. Under the heading "communication", it noted that X could spend long periods of time in his own company which could lead to him withdrawing and staff need to ensure X is in good mental health. 2 minutes 1:1 support daily was identified as needed in relation to this.
15. Under the heading "managing tenancy", it was noted that X would need yearly help with this of about 1 hour 30 minutes. He would need quarterly support with the support agreement. It was noted that once he had been told house rules, he would abide by them. He needed 15 minutes 1:1 support weekly with budgeting.
16. As to daily living skills, it was noted that staff would need to remain with X for safety when operating the oven and that he would need reminding in relation to the safe preparation of meat. That section noted that X could shop for small items independently but would need assistance to write a shopping list for general everyday shopping and "if large quantise (sic) of money needed staff support maybe required to ensure correct money and change exchanged."

17. As to travel and the community, it was noted that X can walk safely in the local community. As to travel on the bus, it was noted that he would require support to use public transport initially. It was noted that he would need support withdrawing money from a cash machine and support from staff to ensure that X was not hoarding money in his flat.
18. As to safety in the home, it was noted that X was independent with answering the door but may need reminding of stranger danger from time to time, that he could alert staff to get help if needed when in the home but would need to be shown how to contact staff when not in the home.
19. As to cultural and spiritual support, it was noted that X is XXXX and should stick to a XXXX diet but will choose what he wants to eat. It was noted that he may want some input when certain festivals are on.
20. A weekly plan of activities noted 1 hour of 1:1 support with personal care in the evening and noted some community activities with 1:1 support and some unsupported.
21. On 16 August 2011, an assessment of X's capacity to enter into a tenancy agreement was carried out. The outcome of that assessment is not very clear to me from the record completed by Individual2 which states:

"X and I had discussed his moving to Address2B on several occasions. We had discussed rent and his responsibility in relation to house sharing.

Today we met to ensure that X understood what been (sic) a tenant meant. He said he had to keep the house tidy and to look after it.

I asked what he had to do to be able to live there and he responded pay £10 and pay for his TV license. He said he had money in the bank to do this. I informed X that it would likely cost more than £10 but he would get housing benefit paid into his account and then his rent would be paid out of his account.

X then repeated back to me my benefit goes to my bank and then I pay £10 to live in Address2B. I keep it tidy and I look after it.

Although X believed the rent to be only £10, he did understand that he had to pay rent and that he had to look after the house whilst he lived there."
22. It seems implicit that Individual2's conclusion was that X did have capacity to sign a tenancy agreement.
23. On 30 August 2011, X moved to Address2B under an arrangement where he held a tenancy. I note that the agreed statement of facts states that this is in the area of CouncilC. A 6 week review noted that X had described his new home as magnificent.
24. A FACE overview assessment was completed on 21 November 2011. That noted: "X had wanted to move for quite a long time and has now been living in his new home within a supported living scheme just outside the village, which he is enjoying...". As to his personal background, it noted: "X is very independent in many ways and is able to complete most daily living tasks unaided...". As to whether he received formal or paid care or support, the assessment stated: "X lives within a supported living scheme."

25. A FACE Overview assessment was completed on 26 November 2012. It is in similar terms to that of 21 November 2011.
26. X moved out of Address2B and into another property between July and October 2013 while a new property was being purchased and redecorated for him and his housemates from Address2B.
27. On 7 October 2013, X moved into the newly purchased and redecorated accommodation at Address3B. That home was owned by Organisation1 and was intended to be a permanent home unless X chose to move. The home is in the area of CouncilB.
28. I note that there is a tenancy agreement signed by X and dated 7 October 2013. I note that the obligation to pay the rent falls on X. There is no provision for anybody else to be obliged to pay the rent. The tenancy agreement also made provision for X to pay a weekly service charge in relation to heating, water, lighting and grounds maintenance. The description of the premises that are the subject of the tenancy is "...1 bedroom 'the Room(s)' with shared use of the following communal facilities Lounge, Kitchen, hallway stairs...". I note that the tenancy grants X possession of "the Premises", and provides that Organisation1 will not interrupt or interfere with the tenant's right to occupy the Premises except where access is required subject to reasonable notice to inspect the condition of the Premises or carry out repairs or other work to the Premises or adjoining property or the Agent is entitled to possession at the end of the Tenancy.
29. The bundle includes a CSD-MDT review form dated 20 February 2014. That stated: "X lives in a supported living placement which he still shares with two others (in CouncilB). That noted that X was travelling without support to familiar places and working for a company called Company1 where he delivered leaflets and walked very long distances. He had a job coach to support him to do this work. He attended a cookery course. He had been on a holiday to Country1. The review noted "X has been spoken to by staff due to vulnerability regarding opening the front, X has been made aware that he should not open the front door to let people in or when there's a shadow which he is known to do, measures are in place to make sure this does not happen, new doors to be put up to block direct viewing for access to front door, hoped to be a preventative measure." The review stated "X is living with two others and is becoming increasingly independent."
30. Correspondence in relation to the issue of ordinary residence in this commenced by a letter dated 1 May 2014 from CouncilA to CouncilB. That correspondence is summarised at paragraphs 15 of the agreed statement of facts and I do not repeat it in full here. I note that the letter dated 1 May 2014 indicated that CouncilA's position was that prior to 7 October 2013, X was being supported by CouncilA in accordance with the provisions of s. 21 of the National Assistance Act but from that date had been living in supported living accommodation and that CouncilA's position was that CouncilB should be responsible for the care package from 7 October 2013. CouncilA's position subsequently became that X had been ordinarily resident in CouncilB since 30 August 2011.
31. In August 2014, X's needs were reviewed. That review was in essentially the same terms as that of February 2014. I note that a "Summary" stated:

“X seems to be coping well with his move and the new home. CouncilA have informed that we will be requesting Ordinary Residence from CouncilB. An assessment was carried out last on the 15<sup>th</sup> July 2014 by CouncilB Local Authority, who spoke with X about his home, staff member Individual3 completed the assessment, staff expressed that this seemed to be quite quick as X answered all her questions and she felt that it was a small package of care. Awaiting confirmation of date in Funding take over from CouncilB in making X a permanent resident via Ordinary Residence completion, CouncilA will request a date of Clarity. No Capacity Assessment needs to be completed as X is more than able to make informed choices.”

32. I note that on or around 13 August 2014, CouncilB carried out a capacity assessment in relation to X’s capacity to sign a tenancy agreement. I requested a copy of that assessment which was provided by email on 19 January 2017. That report concluded that X did not have capacity to sign a tenancy agreement. It is not entirely clear to me from the report what process was followed. There are numerous typos in the document which I have not reproduced below. There is a section entitled “Describe efforts to make the information more accessible to the person” which states:
- “X was with Individual4 his key worker at the meeting we asked X if he knew what a tenancy agreement was and he said he thought it was something to do with where he lived. X was asked if he had read the tenancy agreement and if he understood what it was. Individual4 said that X had been issued with an easy read version of the agreement. X was asked if he knew who his landlord was and who he had to pay his rent to and how much it was. Basic information was asked to X.
1. Who was the landlord
  2. How much was your rent
  3. The property needed to be kept clean and tidy
  4. What happens if you don’t pay your rent on time.
  5. Who would you contact if repair work needed doing.
  6. Not making too much noise and having respect for the neighbours.”
33. It is then said that after discussing the basic needs of the tenancy agreement, “we asked him 3 times all of the above questions...The only thing X was clear about was that if he didn’t comply and made too much noise that he would have to be re-housed. X did not know who the landlord was or how much his rent was. Individual4 also informed us that X’s housing benefit had been stopped and his rent was not being paid at the moment. X could not recall what would happen if he didn’t pay his rent on time, and did not know who to contact regarding any repair work despite being prompted by Individual4.”
34. It was concluded that, at that point, X did not have capacity to enter into a tenancy agreement.
35. I note that on or around 11 June 2015, CouncilA wrote to indicate that it would be prepared to conduct a further joint capacity assessment with CouncilB in relation to the question of X’s capacity to enter into a tenancy agreement but this does not appear to have been taken further.
36. I note that the bundle includes a letter dated 8 June 2015, which appears to be in draft form and addressed to the tenants of Address3B, informing them that Organisation1 had

finalised a partnership agreement with Housing Association1 and that the tenancies would now have Housing Association1 as landlord, with Organisation1 as Managing Agent. An email of 17 June 2015 from Individual5, Housing Management Officer at Organisation1, to Individual6 indicates that following "...completion of [Organisation1]'s agreement with housing association1 (HA1) to lease our Organisation1 owned properties to them, we have now issued new tenancy agreements to those in Organisation1 owned properties with Housing Association1 as their Landlord. This is to ensure a further separation between the Housing and care and support functions. As well as making our supported living services viable for the future...Organisation1 will continue to act as managing agents and services will continue as usual..."

37. A new tenancy agreement was enclosed with that email.

38. I note that there is an email from a Individual7 of Organisation1 dated 10 September 2015 which states:

"X Address3B – Organisation1

Hi Individual8 [Individual8, of CouncilA legal services]

I am following up on some previous email correspondence between yourself and Individual9 re the above property and its supported living status.

I am happy to have a conversation with you to clarify details re the property, how it functions and it being covered under Organisation1 supported living service covering support under our Domiciliary Care Registration with CQC.

I am aware that there has been an increase in ordinary residence challenges by a number of Local Authorities and this has been the case in the authorities in Berkshire that we have services in.

For your awareness another of our services was deemed by CouncilC to be a satellite care home, it is a 24 hr 1:1 provision, as they had received an ordinary residence request and were challenging this.

This went to CQC for their view and standing on this and they last week found in Organisation1 favour in confirming that we were able to evidence the clear distinct separation between the tenancy of the property of the care and support provision, also provided by us.

As I am sure you will appreciate, this only relates to the specific service but sets a level of precedence in evidencing that Organisation1 comply with guidance as outlined by Solicitor1 [solicitor from CouncilB Joint Legal Team] in previous correspondence..."

39. There followed lengthy correspondence between the legal services department of CouncilD (on behalf of CouncilB) and the CQC in relation to whether Organisation1 may have been operating in breach of condition of registration. In particular, CouncilD sought clarification as to whether the CQC was of the view that care and accommodation were sufficiently separated. I don't need to set that correspondence out in detail. I note that the CQC considered that there "may" have been an insufficient separation between accommodation and care prior to June 2015 (see the CQC's letter of 11 February 2016). As to the subsequent position, a CQC report dated 29 March 2016 states:

“Organisation1 is a domiciliary care agency providing a supported living service. A range of support is provided to people living in their own homes, some of whom share accommodation with others...”

## The law

I set out below the law as it stood at the relevant time, prior to 1 April 2015<sup>1</sup> when relevant provisions of the 2014 Act came into force. I do not agree with the submission made by CouncilD on behalf of CouncilB that X’s ordinary residence necessarily falls to be determined by reference to the provisions of the Care Act 2014, save to the extent stated below. The Care and Support Statutory Guidance at paragraph 19.87 makes it clear that when I am asked to make a determination: “...it will be made in accordance with the law that was in force at the relevant date, in respect of which ordinary residence falls to be determined. Therefore, where ordinary residence is to be determined in respect of a period which falls before 1st April 2015, then the determination will be made in accordance with Part 3 of the National Assistance Act 1948.... If, in respect of a period on or after 1st April 2015, then the determination will be made in accordance with the Care Act. 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 (disputes about ordinary residence) and the new dispute procedure under the Care Act is to be followed.”

40. 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 and attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State’s Directions under section 21 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.”
41. Under section 24(5) of the 1948 Act (“the deeming provision”), a person who is provided with residential accommodation under Part 3 of the 1948 Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.
42. 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 made for the provision of accommodation together with nursing or 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

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<sup>1</sup> The provision of care and support for adults and of support for carers is governed by the 2014 Act as from 1 April 2015 and the relevant provisions of the 1948 Act have been dis-applied in relation to England by S.I. 2015/914. The period in dispute starts from before the 1 April 2015 commencement date.

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).

43. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority. Section 2 of the CSDPA supplements and relates to welfare services provided under section 29 of the 1948 Act.

### *Ordinary Residence*

44. "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<sup>2</sup> ("the guidance"). Paragraph 19 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.
45. 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 a settled purpose as part of the regular order of his life for the time being, whether of short or long duration"*
46. Additional considerations apply where the relevant person lacks capacity to determine (and thus to "voluntarily adopt") his abode. However, in light of the fact that there is no dispute as to X's capacity to decide where to live, it is not necessary to apply the additional incapacity considerations in this case. I will briefly address the issue of X's capacity to enter into a tenancy agreement below.
47. Section 1(2) of the MCA provides that a person should always be assumed to have capacity to make their own decisions unless it is established to the contrary. Where lack of capacity has been established, section 1(5) provides that decisions as to accommodation and care must be made in the person's best interests. Section 4 sets out the factors to consider for this purpose.

## **Application of the law to the facts**

### ***The position as of 30 August 2011***

48. I note that as of 29 August 2011, X was living at Address1B. There is no dispute that this was a residential placement under s. 21 of the National Assistance Act 1948 and that X had been placed at Address1B by CouncilA. By virtue of s. 21(5) of the NAA

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<sup>2</sup> From 19<sup>th</sup> April 2010, this guidance was contained in "Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England" issued on 15<sup>th</sup> April 2011 reissued October 2013. Save where expressly stated otherwise, this determination refers to this guidance as the guidance in force at the relevant time for which the determination falls to be made.



1948, while placed at Address1B by CouncilA, X was deemed to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before that residential accommodation was provided for him i.e. in the area of CouncilA.

49. On 30 August 2011, X moved to Address2B. The agreed statement of facts states that this is in the area of CouncilC. CouncilC is not a party to this determination. CouncilA contends that from 30 August 2011, X was ordinarily resident in the area of CouncilB. CouncilB contends that at this point, X was either ordinarily resident in CouncilA (if CouncilA remained responsible) or CouncilC but not CouncilB.
50. I agree with CouncilB that as of 30 August 2011, X cannot be said to have been ordinarily resident in CouncilB. For the duration of his placement at Address1B, he was deemed to be ordinarily resident in CouncilA. When he moved to Address2B, he was no longer in the area of CouncilB: he was in the area of CouncilC. I can see no basis for concluding that at the point at which he left the residential placement at CouncilB to go to what purported to be a supported living placement in the area of CouncilC, he became ordinarily resident in the area of CouncilB.

***The position as of the move to Address3B on 7 October 2013.***

51. The first issue is whether the accommodation in Address3B 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 (on the assumption that he was ordinarily resident in CouncilA immediately before the residential accommodation was provided). If X is not provided with accommodation under section 21 of the 1948 Act the next step is to consider whether he should have been, in which case the deeming provisions in section 24(5) will still apply. Finally, if the arrangements do not fall under section 21 at all, the deeming provision will not apply but it will be necessary to determine X's OR in accordance with the ordinary meaning of the term as interpreted by the courts.
52. CouncilA submits that it provided non-residential services to X at Address3B under section 29 of the 1948 Act. CouncilB submit that in fact the arrangements made for X amount to accommodation in a care home. I consider it necessary to make a finding on the application of section 21.

**Characteristics of section 21 accommodation**

53. 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. Section 26(1A) provides that if arrangements under this section are being made for the provision of accommodation "together with nursing or personal care", they must not be made unless the accommodation is provided in a care home, as defined in the Care Standards Act 2000, and is managed by an organisation or person who is registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008.
54. Address3B is not registered as a care home with the CQC. If any provider were providing personal care together with accommodation in this property (regulated

activities) without being registered they would be guilty of an offence<sup>3</sup>. While I note that the CQC indicated in correspondence on behalf of CouncilB that Organisation1 may have been operating in breach of a condition, there was no finding to the effect that it was in fact operating in breach of a condition. I note that the CQC's inspection report of March 2016 refers to the arrangements at Address3B as a supported living arrangement and that the CQC does not appear to consider that Address3B now needs to be registered. I also note that the reviews of February and August 2014 describe the placement as a supported living arrangement.

55. I will go on to consider whether the other conditions of section 26 of the 1948 Act are met. In *Chief Adjudication Officer v Quinn* [1996] 1 W.L.R 1184, Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.
56. In my view, the tenancy agreement between X and Organisation1 dated 7 October 2013, and the subsequent tenancy agreement between X and the XXXX Community Housing Associated Limited dated 8 June 2015, do not meet the section 26 requirements in order for Address3B to be accommodation falling under section 21. 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 solely responsible for the payment of rent. I have no evidence before me of any obligation on CouncilA (or any other local authority) to make any payment for accommodation to Organisation1 or the XXXX Community Housing Associated Limited. The rent element is funded by housing benefit payments. The funding provided by CouncilA is payment towards X's care costs, not his accommodation costs.
57. In these circumstances, I do not consider that X is in fact being provided with accommodation pursuant to section 21.

### **Was there a duty to provide section 21 accommodation?**

58. 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 when he moved to Address3B in October 2013. 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.
59. In *Wahid v Tower Hamlets* [2002] EWCA Civ 287, Hale J explained that the section 21(1)(a) duty arose:
  - a) where the person was in need of care and attention;
  - b) that need arose because of age, illness, disability of any other circumstances; and

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<sup>3</sup> Section 10 Health and Social Care Act 2008.

c) care and attention were not available otherwise than by the provision of residential accommodation.<sup>4</sup>

60. 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.'
61. I accept that, on the totality of the evidence before me, X has personal care needs in the relevant sense.
62. 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 *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.
63. 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."
64. 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."
65. 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 Lord Hoffmann in *NASS*.
66. Address3B was a placement which X appears to have accepted voluntarily and was intended to represent a step down from residential care to supported living. It is clear that

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<sup>4</sup> Para 30.

X has been receiving the care and attention he requires whilst living in this placement which was private residential accommodation, under a tenancy agreement. I am not satisfied that the presumption that X had capacity to enter into a tenancy agreement has been rebutted. The tenancy agreement does not allow for X to be evicted because he refuses care or receives care from a different provider. The extent of the care provided and the manner in which it was provided was consistent with a supported living placement. Accordingly, I find that CouncilA were perfectly lawfully making accommodation arrangements that fell outside of section 21.

67. 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.
68. I therefore determine that there was no duty to provide section 21 accommodation to X. 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.
69. 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.
70. 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. That is so whether or not a person has capacity to enter into a tenancy agreement.
71. As noted above, it is not suggested that X did not have capacity to decide where to live. I find that X made a voluntary choice to move to Address3B for a settled purpose in or around 7 October 2013. As noted above, the home was purchased and redecorated for X and those with whom he had been living at Address2B and there does not appear to be any dispute that X occupies Address3B as his home.
72. I note CouncilB's submissions in relation to the effect of the *Cornwall* case, but I do not agree that that case affects the outcome in the present case. X had capacity to decide where to live. The fact that the arrangements for identifying the placement were made by the local authority does not displace the application of the *Shah* test for determining ordinary residence.

### **Has the position changed subsequently?**

73. I consider that ordinary residence is to be determined as of 7 October 2013 i.e. from the start of the period in dispute. If, as at 7 October 2013, X was ordinarily resident in CouncilB, he would continue to be ordinarily resident there absent a change of circumstances. Ordinary residence is a question of fact which, from the date at which the Care Act applied to X, is displaced only to the extent set out in Article 6 of the Care Act 2014 (Transitional Provision) Order 2015. Article 6(1) provides that if the deeming provision under section 24 of the National Assistance Act 1948 applied, then it continues

to apply. I have already found that section 24 did not apply. Article 6(2)(c) provides that the deeming provision under section 39 of the Care Act 2014 does not apply if, immediately before the date on which the Care Act applies to that person, the person was being provided with supported living. In light of my findings above, on any view of the “relevant date” for the purposes of Article 1 of the Transitional Provision Order, X was living in supported living accommodation before the relevant date. Therefore, the deeming provision in section 39 does not apply. There is nothing to indicate any change of circumstances which would alter X’s ordinary residence since 7 October 2013.

### **Conclusion**

74. For the reasons given above, I conclude that X is ordinarily resident in the area of Council B and has been since he moved to Address 3B on 7 October 2013.