DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 11 2013)

1. I am 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 Mr X.

The facts of the case

2. The following information has been ascertained from the joint statement of facts prepared by the local authorities involved in the dispute, the legal submissions prepared by each of the authorities, and the copy documents supplied by the parties

3. X was born on x date 1969 and is therefore now aged 44. He has learning difficulties, needs prompting with personal care, needs support and prompting with practical daily living tasks, has very limited verbal communication, and has little or no awareness of risk. He is in need of 24 hour care.

4. His family consist of a brother, Z, and two step-sisters, G and H, who all live in the CityB area. His parents are both dead.

5. X lived on the CouncilA with his mother until she had a heart attack in July 2009. He was then provided with respite care at a home for adults with learning difficulties, CareHomeA, also on the CouncilA. Later that year, X returned to live with his mother, but he went back to CareHomeA in January 2010 after his mother became ill again. X's mother died on 28 June 2010.

6. A needs assessment was carried out and X's overall FACS eligibility was assessed as "critical" on 28 September 2010. A financial assessment signed and dated by G on 19 October 2010 recorded that X had capital of £747, described as a refund of Disability Living Allowance, held in an account in G's name.

7. CouncilA made efforts to establish where X wished to live in future. His family said they would like him to move closer to them in CityB. An independent advocate was appointed for X. The advocate reported that X was unclear about the realistic options, having said he wanted to remain living on the CouncilA, but that he wanted to live with his family as well. With the use of communication aids and assisted by a speech therapist and the advocate, X eventually expressed a wish to move nearer to his sister G in CityB, knowing that this would mean leaving the CouncilA. No formal assessment of his capacity was made.

8. CouncilA made enquiries of a number of residential care homes in the CityB area. After visiting some of these, X and his family indicated to

CouncilA that they wished him to be placed at CareHomeB12, TownB, CouncilB.

9. X was placed at CareHomeB12, by the CouncilA under section 21 of the 1948 Act on 28 April 2011.

10. X settled well at CareHomeB12. He is in close contact with his family, and has regular frequent visits to the homes of his brother and his sister G.

11. An unsigned care plan dated 29 April 2011 recorded that X needed 24 hour care to keep him safe. An eligibility review dated 23 May 2011 records his needs in all areas other than mobility and carer support as being “high risk” or “red”. In answer to a question asking whether he has more than £23,250, an adjacent note records that his mother’s will is still to be finalised. The date for the next review is given as “yearly 2012”.

12. In anticipation of his inheritance, G applied to the Court of Protection in June 2011 to be appointed X’s deputy in order to manage his property and affairs. In August 2011, a short report by PsychiatristL stated that X lacked capacity to manage his property and affairs. G was appointed as X’s property and affairs deputy on 4 October 2011.

13. In April 2012, G informed CouncilA that X would be inheriting around £41,000. CouncilA assessed X's resources, and concluded that he was liable to make a full contribution to the costs of his placement. G was informed that X would have to fund his placement out of his resources once he received his inheritance.

14. CouncilA served a discharge notice on CareHomeB12 on 11 May 2012 terminating its purchasing agreement as from 14 May and advising that the reason for discharge was that X would become self funding from 14 May 2012. X received his inheritance of £41,110.43 on 14 May 2012.

15. CareHomeB12 did not enter into a contract with X. From 14 May, it invoiced G, who paid for X's care and accommodation.

16. On 10 August 2012, G informed CouncilA that as from 19 August, X's savings would fall below the capital threshold of £23,250, and accordingly he would no longer be liable to pay the full costs of his care. CouncilA advised G to approach CouncilB to request an assessment of X's needs as he was residing in CouncilB's area.

17. CouncilB declined responsibility for X's placement, and stated that CouncilA was responsible under section 21 of the 1948 Act.

18. On 29 September 2012 CouncilA agreed to fund X's placement on a without prejudice basis pending resolution of this dispute.

The submissions of the authorities

19. Both authorities have made legal submissions. CouncilA submits that X was ordinarily resident in the CouncilA immediately before it arranged residential accommodation for him pursuant to section 21 of the 1948 Act at CareHomeB12 in CityB, and that until 14 May 2012 X was ordinarily resident in the CouncilA in accordance with the deeming provision in section 24(5) of the 1948 Act.

20. CouncilA states that following receipt of his inheritance X was no longer eligible for its financial assistance for his care and accommodation and accordingly its responsibility for X ceased on 14 May 2012. CouncilA submits that from that date section 24(5) ceased to apply, so that X was no longer deemed to be ordinarily resident in the CouncilA.

21. CouncilA submits that X's ordinary residence was thereafter a question of fact, and as a matter of fact, he was ordinarily resident in CouncilB.

22. CouncilA submits that it cannot be suggested that X was ordinarily resident anywhere other than in CouncilB from 14 May 2012, citing *Sunderland City Council v South Tyneside Council* ([2012] EWCA Civ 1232), and observing that X remained voluntarily at CareHomeB12,

that he had regular contact with his brother and stepsister who lived locally, and that he had a settled intention to remain in CouncilB.

23. CouncilA relies on the case of *R(Greenwich) v Secretary of State and Bexley* ([2006] EWHC 2576 (Admin) ("*Greenwich*") in order to submit that X's ordinary residence is to be determined at the date immediately before accommodation was provided by a local authority and not on the date immediately before he became a self funder. In his case this was 19 August 2012, that X was at that date on the facts ordinarily resident in CouncilB, and therefore CouncilB was responsible for providing him with care and accommodation under the 1948 Act.

24. CouncilB submits that CouncilA continued to be responsible for providing X with accommodation under section 21 of the 1948 Act notwithstanding his inheritance. This changed his liability to pay towards the costs of the accommodation, but did not alter the nature of the accommodation, which was provided to him under Part 3 of that Act. CouncilA had a continuing statutory responsibility towards X, therefore the deeming provision in section 24(5) of the 1948 Act applied throughout, and as a result X remained ordinarily resident in the CouncilA.

25. In the alternative, CouncilB submits that where a local authority should have made arrangements under Part 3 of the 1948 Act but did not, the deeming provision should be applied on the basis that the

arrangements had actually been put in place by the appropriate local authority, citing paragraph 55 of *Greenwich*. CouncilB submits that the receipt of the inheritance did not mean that CouncilA no longer owed a section 21 duty to X, referring to section 21(2A) in support. Insofar as it did, CouncilA acted unlawfully in discharging its duty to X by relying on his ability to pay for the costs of the placement. Thus, CouncilB submits, CouncilA ought to have continued to provide the placement at the care home in discharge of its section 21 duty and continued the arrangements it had with the care home provider for the payment of the costs, seeking a refund from X as assessed under the relevant legislation. It is submitted by CouncilB that had CouncilA correctly discharged its duty, the deeming provision would have continued to apply.

26. Finally, CouncilB disputes the relevance of the *Sunderland City Council* and the *Greenwich* cases as relied upon by CouncilA. On the question whether X remained voluntarily at the care home, it doubts whether X had the capacity to decide where to live.

The relevant law

27. Section 21(1)(a) of the 1948 Act empowers, and to the extent that the Secretary of State may direct, requires 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.

28. The relevant Directions provide that a 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”.

29. In determining whether care and attention are available to a person, a local authority must disregard so much of the person’s resources as may be specified in regulations (section 21(2A)). Resources which do not exceed the capital limit of £23,250 are specified for this purpose in the National Assistance (Assessment of Resources) Regulations 1992 (“the Assessment Regulations”).

30. Section 22 makes provision about charging for accommodation provided by a local authority under Part 3, and requires the local authority to recover from the person for whom the accommodation is provided a payment representing the full cost of providing the accommodation (subsections (1) and (2)). But where a person satisfies the local authority that he is unable to pay at that rate, the local authority is to assess his or her means in accordance with the Assessment Regulations, taking into account any sum prescribed to meet weekly personal expenses (subsections (3) to (5)) (The National Assistance (Sums for Personal Requirements) (England) Regulations

2003 and the National Assistance (Sums for Personal Requirements) Amendment (England) Regulations 2012).

31. Section 24 makes provision about the local authority which is liable to provide accommodation under Part 3. By subsection (1) (which must be read with the Directions mentioned above), the authority which is empowered to provide residential accommodation is the authority is whose area the person is ordinarily resident. Subsection (5) provides that where a person is provided with residential accommodation under Part 3 of the Act, the person is deemed to continue to be ordinarily resident in the area in which the person was residing immediately before the residential accommodation was provided.

32. By virtue of section 21(4) and section 26 of the 1948 Act, local authorities may, 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. Where such arrangements are made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home (section 26(1A)).

33. Section 26(2), (3) and (3A) make provision about the arrangements for payment. Subsection (2) provides firstly, that arrangements under section 26 must provide for the local authority to make payments to the other party to the arrangements in respect of the accommodation at

such rates as may be determined by or under the arrangements, and secondly, that the local authority can recover from the person accommodated the amount of the refund for which the person accommodated is liable. Subsection (3) imposes a reciprocal obligation on the person accommodated to refund the local authority for payments made by it in respect of him or her pursuant to the arrangements, and applies the provisions of section 22(3) to (5), with modifications, where a person satisfies the local authority of his or her inability to pay the full rate.

34. As an alternative, subsection (3A) allows for the person accommodated, the local authority and the provider of the accommodation to enter an agreement for the person accommodated to make the payments for which he or she would be liable under subsection (3) direct to the provider, with the local authority paying the provider any balance, including any unpaid fees.

35. "Ordinary residence" is not defined in the 1948 Act. The guidance (paragraphs 18 to 20) 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. Local authorities should always have regard to the leading case of *R v Barnet LBC ex parte Shah* (1983) 2 AC 309 ("*Shah*") when determining the ordinary residence of a person who has capacity to make a decision about where they live. In that case, 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 "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".

36. The starting presumption is that a person has capacity to decide where to live unless it is shown otherwise. Any issue relating to mental capacity should be decided with reference to the Mental Capacity Act 2005.

37. Where a person lacks the capacity to decide where to live, one of the alternative tests in *R v Waltham Forest London Borough Council, ex parte Vale* (1985) The Times 25 February ("*Vale*") should be used (see paragraph 30 of the guidance referred to below).

Application of the law

38. I have considered the joint statement of facts, the additional documentation, the legal submissions provided by CouncilA and CouncilB, the provisions of Part 3 of the 1948 Act, the Guidance on

Ordinary Residence issued by the Department of Health[1] and the relevant case law.

39. My determination is not influenced by the provisional acceptance by CouncilA of responsibility for funding services under Part 3 of the 1948 Act.

40. X was provided with residential accommodation by CouncilA pursuant to its duty to make arrangements under section 21 of the 1948 Act, initially at CareHomeA on the CouncilA and then at CareHomeB12, CouncilB. The latter placement was made on 28 April 2011 by CouncilA in exercise of the power under section 26 of the 1948 for section 21 arrangements to be made with a voluntary or other non-local authority provider.

41. The CouncilA entered into a purchasing agreement with the provider which it terminated on 14 May 2012 by means of a Discharge Notice dated 11 May 2012. The Discharge notice states that the reason for discharge is that "Mr A has become self funding as of 14/5/2012 due to having inherited … monies" (illegible word in original omitted).

42. This reason was subsequently amplified as follows in correspondence: "A financial assessment has been carried out [by] this local authority

[1] *Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England*, published on the Department of Health's website at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf.pdf

and this shows X is no longer entitled to any assistance under s21. Therefore the contract with CareHome7BN has been discharged" (LawyerSocialCare87, CouncilA, to Integrated Learning Disabilities Service, CouncilB, 3 July 2012).

43. X's G paid his care home fees in full out of his inheritance from 14 May 2012 until his savings fell below the capital limit of £23,250 in August 2012. At that point she approached CouncilA, which in turn referred her to CouncilB, and the dispute as to X's ordinary residence which I am asked to determine arose.

44. It is not in dispute that so long as X was being provided with residential accommodation by CouncilA pursuant to Part 3 of the 1948 Act, he was deemed by virtue of section 24(5) of the 1948 Act to continue to be ordinarily resident in the area of the CouncilA, it being the area in which he was ordinarily resident immediately before the residential accommodation was provided for him.

45. X remains at CareHomeB12, which is described in the papers as a "permanent" placement. There is no dispute about his continuing need for 24 hour care, nor about the appropriateness of the setting.

46. The dispute between the authorities turns on the effect on his ordinary residence of X's receipt of an inheritance in excess of the capital limit.

47. CouncilB submits that X's ordinary residence falls to be determined on the basis that the deeming provision applied at all times, either because CouncilA remained under a section 21 duty because the change in X's ability to pay did not alter the nature of the accommodation, which was provided under Part 3 of the 1948 Act, or on the alternative ground that where a local authority should have made arrangements under Part 3 but did not, the deeming provision applies on the basis that the arrangements had actually been put in place.

48. I do not accept the submission that X continued to be provided with Part 3 residential accommodation after 14 May 2012. The deeming provision applies where a person is "provided with residential accommodation under this Part" and this means accommodation provided in accordance with section 21 and the following sections, see section 21(5). Whilst CouncilA had until that date provided the accommodation under section 21 arrangements with CareHomeB12 in accordance with section 26, in light of its action to terminate those arrangements, it is not open to me to conclude that X nevertheless continued to be provided with residential accommodation by it after that date (*Chief Adjudication Officer and another v Quinn and another* [1996] 4 All ER 72 at 80).

49. CouncilB's alternative submission relies upon paragraph 55 of the *Greenwich* decision. In that paragraph, Charles J observes that he is

bound by the decision of the House of Lords in *Quinn* (above), but that in his view, where arrangements should have been made but had not been made, then the deeming provision should be applied and interpreted on the basis that the arrangements had actually been put in place.

50. I do not consider this to be a case where Charles J's proposition applies. It seems to me that, following receipt of his inheritance and having established that G was in a position to make arrangements on his behalf, it was open to CouncilA to conclude that X was not in need of care and attention since X had the funds to pay for his care and someone available to pay the fees on his behalf. This is not therefore a situation where a local authority is in breach of its statutory duty. I do not accept CouncilB's alternative submission.

51. As the deeming provision in section 24(5) ceased to apply in May 2012, X's ordinary residence in August 2012 falls to be determined as a question of fact.

52. CouncilA submits that X was ordinarily resident in CouncilB on the basis of the criteria set out in *Shah*. CouncilB queries whether X had capacity to decide where to live.

53. The first issue I must address is that of capacity. I note that no formal capacity assessment was conducted prior to X's move to CityB.

However considerable efforts were made to establish his wishes, and an advocate was appointed to support him in this process.

54. X has very limited verbal communication. According to his speech therapist he has good verbal comprehension and is able to understand most spoken sentences. His social work overview assessment records that “staff who know me communicate best by offering simple choices. Advocate - getting to know me - to help understand what I want in the future. I need support to make informed choices. I need time to think about decisions.” The assessment also goes on: “advocate is helping me to make an informed choice about my future. It is being explored that I could move to be near my family or stay in CouncilA”.

55. X’s capacity was subsequently assessed in connection with his sister’s application to the Court of Protection by DoctorZO who concluded that he lacked capacity to manage his property and affairs.

56. The test of capacity is set out in section 3 of the Mental Capacity Act, which provides that a person is unable to make a decision for himself if he is unable to:

(a) understand the information relevant to the decision;

(b) retain that information;

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

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

57. The test for capacity is specific to each decision at the time it is made, and a person may be capable of making some decisions but not others. It does not follow from the fact that X lacked capacity to manage his property and affairs that he also lacked capacity to decide where to live.

58. It should always be assumed that a person has capacity to make their own decisions, unless it is established to the contrary. It would appear from the evidence that CouncilA considered that when provided with appropriate support, X did have the capacity to make the decision to move to CityB for himself.

59. CouncilB questions that assessment. I consider this to be a borderline case. However, noting the statutory presumption in favour of capacity, and the process undergone by the advocate and speech therapist, and bearing in mind the test in section 3, I am minded to conclude, on the balance of probabilities that X did have the necessary capacity to decide where to live.

60. In my view, X voluntarily adopted CareHomeB12, CouncilB as his place of residence. Applying the other principles in *Shah*, I note that X was physically present in CouncilB, that he moved to CareHomeB12 to

be close to his family whom he saw regularly, that CareHomeB12 was his only residence, and that he was happy and settled there as his permanent home. I therefore conclude that X was ordinarily resident in CouncilB at the point at which his need for residential accommodation arose in August 2012.

61. If I am wrong as to X's capacity to adopt a place of residence voluntarily, then I must apply one of the tests set out in *Vale.* In *Vale*, Taylor J held that a young person with severe learning difficulties was ordinarily resident at her parents' house where she was temporarily living at the time. Her total dependence on her parents meant that "the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise". However, this test (known as Vale 1) should only be used in a case with similar material facts to *Vale*. In cases involving older people whose parents are deceased or have become ordinarily resident in a place and then lost capacity, the test may not be appropriate and Vale 2 should be used (see paragraph 33 of the guidance). Vale 2 requires consideration of a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Shah*, but without requiring the person to have adopted the residence voluntarily.

62. In this case, X's parents were deceased, and it is clear to me that Vale 2 and not Vale 1 would be the appropriate test. On that basis, applying all the elements of *Shah* other than voluntariness, my conclusion is still that X is ordinarily resident in CouncilB for the reasons set out above.

Signed

Dated