DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 1 2011)

1. I am asked by 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 Ms X for the purpose of Part 3 of that Act. The period during which ordinary residence is in dispute is from 18th March 2005 until April 2010 (save for the period when Ms X was in hospital) when responsibility for services has been accepted by CouncilC.

The facts of the case

2. The following information has been ascertained from the statement of facts prepared by CouncilA and agreed by CouncilB and from the copy case notes and correspondence.

3. Ms X was born on xdate 1980 and has moderate learning difficulties and challenging behaviour. She has been diagnosed as having bipolar affective disorder for which she takes regular medication. Ms X lived with her parents and younger sister in CouncilA and in November 1999, Ms X was referred to CouncilA Social Services as she had expressed a wish for respite care. The assessment report dated 2nd December 1999 states that Ms X "..is thinking about her future and thinks she would like to live with other people of her own age with staff support. There is no pressure to action this at the moment". At this time, Ms X attended RCollege for supported learning. The review dated 23rd February 2001 noted that respite care was being given at an Adult Placement setting. The review of this date also noted that Ms X's mother was requesting an application to SResidentialCollege in CouncilB for a three year residential course for Ms X's full potential to be achieved. Furthermore, it was agreed that Ms X has behavioural difficulties and that it is mainly her parents that are targeted with the violent behaviour.

4. The unsigned form entitled "Assessment of Social Care Needs" commencing at page 16 of the bundle, with a queried manuscript date of May 2001, states in the section entitled "Advocacy" that "although Ms X verbalises well she is not able to make informed choices and may be influenced by obscure reasons. Advocacy is needed to assist Ms X with her choices. Ms X's parents advocate on her behalf".

5. A community care assessment completed on 30th March 2004 suggests that Ms X attended SResidentialCollege from 7th January 2002 although the agreed chronology gives a date of September 2001. The course was in independent living and was funded by the local education authority, the residential element at G*Residential Accommodation having been funded by CouncilA social services. That assessment noted that Ms X's placement at SResidentialCollege/G*Residential Accommodation was due to end in December 2004 and that "it would not be in the best interests of Ms X or her parents for her to return home to live when her current placement ends.." In terms of housing, Ms X wanted to share a house with other people her own age and to stay in the CouncilB area. She would need staff "experienced in working with people with learning disabilities and mental health…" with "24 hour support to maintain safety within the house and secure property". Ms X was also noted to be able to do

household tasks and able to complete most personal tasks “when she is feeling well” but needs a lot of support when her mental health is fluctuating as she becomes less motivated. Ms X was reported to have enlisted the help of an independent advocate from the HAdvocacyService. I note that Ms X was admitted to B1Hospital as an informal patient in July 2004 for a period of assessment.

6. In a document entitled “Joint Solutions Panel” at page 37 of the bundle and dated 8th November 2004, Worker22, Community Care Worker gave her opinion that: “..Ms X’s needs could be met in supported housing with staff who are trained in mental health issues, able to monitor Ms X’s mood swings and liaise with other professionals involved in Ms X’s care. I feel the most appropriate housing scheme would be with Healthcare75. This would enable a smooth, seamless transition which would keep Ms X’s anxieties to a minimum. She would have people with her that she was already familiar with and her links in the community would remain the same”. It seems that SResidentialCollege is operated by Healthcare75, who bought HomeInCrescent in CouncilB as a supported housing project to accommodate 3-4 ex students.

7. At page 39 of the bundle there is a letter from the Transition Advocate from HAdvocacy addressed to the Funding Panel dated 25th November 2004. The letter expresses Ms X’s wish to stay in the CouncilB area and to remain in close contact with her friends and to continue her sporting and college activities. The letter also states that Ms X wished to share a home with two or three others, that she was aware she needed to live with a care provider who provided 24 hour care and that her existing care provider would be able to provide a continuous care package.

8. In December 2004, e-mail correspondence took place between CouncilA and CouncilB regarding responsibility for funding Ms X but agreement could not be reached. Ms X moved back to her parents’ address in CouncilA since her bed at G*Residential Accommodation was needed but it was agreed that Ms X could continue to attend SResidentialCollege with transport between her parents’ home and the college funded by CouncilA. This arrangement was to continue until the accommodation in HomeInCrescent was ready.

9. At page 48 of the bundle is a letter from Ms X’s parents to CouncilB’s “Council Monitoring Officer” dated 9th February 2005 saying that Ms X is “believed by all concerned to be capacitated enough to make a decision of where she wants to live now her college placement at “SResidentialCollege” has come to an end. Ms X’s circle of friends, opportunities and her proposed tenancy agreement all centre on CouncilB”.

10. At page 51 of the bundle is an e-mail recording a discussion had between Worker22 of Social Services and Ms X’s parents on 10th January 2005 regarding suitable accommodation for Ms X. A residential home was ruled out as Ms X was felt to need community living and being in CouncilA was also ruled out as this was not where Ms X wanted to be as she would be away from her friends.

11. At page 52 of the bundle is a letter dated 10th January 2005 from Doctor99, Associate Specialist in Learning Disability for the North CouncilC Combined Healthcare NHS Trust to CouncilA Social Services. In that letter, Doctor99 notes that

Ms X "..wants to carry on living in CouncilB where she has many friends and has many social activities".

12. At page 55 of the bundle is a letter dated 31st January 2005 from CouncilA to CouncilB agreeing to fund domiciliary care services, pending the assignment of responsibility for funding, in order to allow Ms X's move to ordinary housing. It is not clear why it took until the autumn of 2010 to refer this matter to the Secretary of State.

13. The statement of facts notes that on 18th March 2005 a care plan was agreed and Ms X moved into 19 HomeInCrescent, CouncilB. At page 246 of the bundle is a document entitled "Healthcare75…Start of Tenancy Sheet" which is dated 18th March 2005. The "project" is "HomeInCrescent-PropertyCompany66". From September to December 2005, Ms X undertook an independent living course at CouncilD College. A review dated 11th November 2005 noted that Ms X "..attends to her own personal care, having help with hair washing if she requests help. Staff help with under arm shaving and with nail care." In April 2006, Ms X started attending the Help&AdviceProject, CouncilC. On 18th September 2006, the statement of facts notes that Ms X signed a tenancy agreement in respect of HomeInCrescent and a copy of that agreement is produced at page 107 onwards of the bundle. The landlord is stated to be PropertyCompany66 of Residence43, CouncilE.

14. The review dated 6th August 2008 noted that Ms X was going through a very low phase of her mental health and needed a lot of prompting and support to get her up in the mornings and to carry out personal care tasks. A meeting of professionals took place on 12th January 2009 during which it was agreed that Ms X needed a comprehensive assessment of her mental health with constant monitoring and supervision. She was noted to have lost most of her skills and to be extremely anxious, especially around her parents' mortality and visits home. A referral to a health resource day centre was agreed. It seems that in February 2009, Ms X had a stay at AnotherHouse before returning to HomeInCrescent.

15. Ms X was subsequently admitted to the Assessment and Treatment Centre at B1Hospital, CouncilB on 5th May 2009 and I have the notes of a review meeting held on 1st July 2009 at page 148 of the bundle. It was agreed that it would not be appropriate for Ms X to return to HomeInCrescent following discharge from hospital. Ms X told the hospital team that she did not wish to return there although had said to HomeInCrescent staff that she wished to return. It was felt that this could be due to her suggestibility and eagerness to please.

16. At page 151 of the bundle is a letter from CouncilA to CouncilC Social services in which it is stated that:

"A lot of work has been done with Ms X to ascertain her wishes about where she lives. Throughout Ms X has remained consistent both to health workers and to Jean that what is important to her is attending the Help&AdviceProject, which she attends four days a week. She has also expressed a wish to continue to live in CouncilB, although not at HomeInCrescent. Ms X's parents, support Ms X's wish to remain in the CouncilB area".

This letter also notes that Ms X's tenancy at HomeInCrescent would end on 29th July 2009. CouncilA asked for CouncilC to pick up responsibility for Ms X.

17. I have at page 154 of the bundle, a letter from Healthcare75 to CouncilA, accepting formal notice to terminate Ms X's tenancy agreement. This letter also asks that all rent be paid up to and including 29th July 2009 although I assume this means that Ms X's social worker was being asked to ensure that Ms X paid her rent up to and including 29th July 2009 from housing benefit since CouncilA's submissions confirm that Ms X's rent was entirely met by way of housing benefit.

18. At page 155 of the bundle is a review summary dated 31st July 2009. This includes the following statement:

"..Healthcare75 feel they cannot meet Ms X's needs and she has no wish to return either. Ms X has been offered the opportunity to return to CouncilA but does not want to do this. She is supported in this decision by her parents who feel most of Ms X's links are in CouncilB."

19. A review dated 11th January 2010 noted Ms X's mother's proposal that Ms X should move to a supported living placement at CHouse in CouncilC following her discharge from hospital. The Assessment and Treatment Unit at B1Hospital were of the opinion that Ms X was ready for discharge.

20. A FACE overview assessment conducted on 3rd March 2010 at page 181 of the bundle states of Ms X's wishes:
"I want to leave hospital. I would like to live in a house with other people I can have fun with and with nice staff".
The assessment noted Ms X has a very severely limited capacity for planning and decision-making.

21. Ms X was discharged from B1Hospital on 24th May 2010 to CHouse in CouncilC where she has a tenancy agreement. The Multi Disciplinary Team Discharge Report noted that
"Ms X is able to make some decisions independently, however, she is highly suggestible and will say to others what she thinks they want to hear, therefore she can be asked the same question by various people and everyone may get a different answer. However, she does know her own mind over some issues and can be consistent in what she says".

22. I am informed that CouncilC County Council accepts social care responsibility for Ms X from April 2010 and the period for which ordinary residence is in dispute between CouncilA and CouncilB is 18th March 2005 to April 2010.

The relevant law

23. In addition to the documentation referred to above and the submissions of CouncilA and CouncilB, I have considered the provisions of Part 3 of the 1948 Act,

the guidance on ordinary residence issued by the Department[1], the leading case of R v Barnet LBC ex parte Shah (1983) 2 AC 309 ("Shah"), Levene v Inland Revenue Commissioners (1928) AC 217 ("Levene"), the House of Lords decision in Chief Adjudication Officer v Quinn Gibbon 1 WLR 1184 [1996] ("Quinn Gibbon") and R v Waltham Forest London Borough Council, ex parte Vale, the Times 25.2.85 ("Vale"). My determination is not influenced by the provisional acceptance by CouncilA of responsibility for services under section 29 of the 1948 Act and section 2 of the Chronically Sick and Disabled Persons Act 1970 from 18th March 2005.

24. 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, disability or any other circumstances are in need of care or 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.

25. By virtue of section 21(7) of the 1948 Act, a local authority can, where it is providing accommodation under section 21, also make arrangements for the provision on the premises in which the accommodation is being provided of such other services as appear to the authority to be required.

26. 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 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 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 a refund for all or some of the costs of the accommodation 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 any balance (and covering any unpaid fees). Section 26(2) was considered by the House of Lords in "Quinn Gibbon". The leading judgement given by Lord Slynn held (at paragraph 1192):

"…..arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include a provision for payments to be made by a local authority to the voluntary organisation at rates determined by or under the

[1] Until 19th April 2010, this guidance was contained in LAC (93)7 issued by the Department. From that date it has been replaced by new guidance entitled "Ordinary Residence Guidance on the identification of the ordinary residence of people in need of community care services in England". This determination refers to the new guidance as the guidance in force at the time the determination was made.

arrangements. Subsection (2) makes it plain that this provision is an integral and necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2), then residential accommodation within the meaning of Part 3 is not provided…".

27. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3 of that Act "he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him".

28. The duty to provide welfare services (non-residential community care services) under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority. The Secretary of State is able to determine ordinary residence in relation to services provided under section 2 of the Chronically Sick and Disabled Persons Act 1970 as he can in relation to any question as to a person's ordinary residence arising under Part 3 of the 1948 Act, in accordance with the amendment made to section 2 by the Health and Social Care Act 2008.

The application of the law

29. The key issue is whether or not Ms X was provided with residential accommodation under Part 3 of the 1948 Act from 18th March 2005 when she moved to HomeInCrescent. If the accommodation was provided under Part 3, then section 24(5) will apply and Ms X will be deemed to continue to be ordinarily resident in CouncilA where both CouncilA and CouncilB accept she was ordinarily resident prior to 18th March 2005. But if it was not provided under Part 3, then Ms X's ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

30. My determination is that Ms X was not provided with accommodation under Part 3 of the 1948 Act on the date she became a private tenant at HomeInCrescent on 18th March 2005. Although there was no written agreement at this stage, I see from the papers that there is a document recording the start of the tenancy, a copy of which is found at page 246 of the bundle. CouncilA confirms that Ms X paid for her rent with housing benefit and that it did not pay any monies in respect of this accommodation at any stage, nor did it act as guarantor. My reasons for reaching this decision are firstly that one of the conditions for qualifying for accommodation under section 21 of the 1948 Act is that, without the provision of such accommodation, the care and attention which the person requires will not otherwise be available to them. In Ms X's case, this condition could not be fulfilled when Ms X started a tenancy at HomeInCrescent. In R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, paragraph 26, Lord Hoffman said that the effect of section 21(1)(a) is that normally a person needing care and attention which could be provided in his own home, or in a home provided by a local authority under the housing legislation, is not entitled to accommodation under this provision. Ms X was living in a private residential arrangement and the funding of her accommodation, i.e. with housing benefit, reflected her independent living arrangement.

31. Secondly, even if Ms X did qualify to be provided with accommodation under section 21, the arrangements which were entered into with a third party do not meet the requirements of section 26 and therefore cannot lawfully be accommodation provided under Part 3 of the 1948 Act. There are two respects in which the requirements of section 26 are not met. These are:

(a) If Ms X was being provided with residential accommodation together with personal care, then the accommodation would have to be provided in a registered care home (see section 26(1A)). This is not to say that accommodation under section 21 cannot ever be provided by way of an ordinary tenancy. The effect of section 26(1A) is only that it cannot be so provided if the provision is by way of arrangements with a third party AND those arrangements relate to both accommodation and personal care.
(b) The arrangement would have to meet the requirements of section 26(2) as set out in paragraph above. These requirements are not fulfilled as there was no provision for the making of payments by CouncilA to PropertyCompany66 in respect of the accommodation provided. Ms X was entirely responsible for the payment of her rent under the tenancy and paid for this with housing benefit.

The effect of this determination is that the deeming provision contained in section 24(5) of the 1948 Act does not apply and Ms X's ordinary residence falls to be determined in accordance with the normal rules.

32. When a person has the mental capacity to make a decision about where to live then the relevant test of where that person is ordinarily resident is the one set out in Shah. Lord Scarman in his judgment stated:

"Unless therefore 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 purposes as part of the regular order of his life for the time being, whether of short or long duration".

33. The guidance on ordinary residence issued by the Department and referred to above, provides that the concept of ordinary residence involves questions of fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account (paragraph 19).

34. In the case of Levene, Lord Warrington of Clyffe said:

" "Ordinarily resident" also seems to me to have no such technical or special meaning….If it has any definite meaning I should say that it means according to the way in which a man's life is usually ordered".

Capacity

35**.** Pending the coming into force of the Mental Capacity Act 2005, the test of capacity was that laid down in the case of Re MB (1997) 2 FLR 426. That case established that a person has capacity to make a particular decision if they are able to comprehend and retain information relevant to the decision in question, weigh it in the

balance and come to a decision. The current test is very similar and is now found in section 3 of the Mental Capacity Act 2005. 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).

36. As the guidance on ordinary residence states at paragraph 27, under section 1(2) of the Mental Capacity Act 2005 it should always be assumed that adults have capacity to make their own decisions relating to their accommodation and care unless it is established to the contrary.

37. I see that an opinion on capacity was sought from Doctor99, Associate Specialist in Learning Disability at B1Hospital. Doctor99 interviewed Ms X on 17th May 2010, her report being dated 19th May 2010 and supplementary report dated 29th September 2010. Doctor99 noted that:
"I feel Ms X does not have the full capacity to weigh up all the factors which influence her mental wellbeing in deciding where she wants to live as her overwhelming preoccupation is being with her mum and dad…". Doctor99 also notes "It is interesting that in 2004 when she finished at SResidentialCollege and she was well she specifically asked to stay in CouncilB because of her social life and friends since moving to SResidentialCollege".

It is this period leading up to the move to HomeInCrescent which is material in ascertaining whether Ms X had capacity at this time to decide where she wished to live. That decision is not one as to what the exact nature of the accommodation arrangements might be nor does it require an understanding of the implications of those arrangements for which local authority might be responsible for funding. Ms X was consistent at this time in her wish to remain in the CouncilB area and Doctor99 recorded this wish in her letter dated 10th January 2005. I consider from the information available to me that at the time of Ms X's move to HomeInCrescent, she had sufficient capacity to decide she wished to stay in the CouncilB area. It seems Ms X had adopted CouncilB voluntarily and for a settled purpose and it is clear Ms X regarded CouncilB as her home for the foreseeable future in line with the authority of Shah..

38. Subsequent reviews confirm that Ms X was enjoying life at HomeInCrescent. However, her mental health deteriorated and she was admitted to B1Hospital on 5th May 2009. I am satisfied that Ms X remained ordinarily resident in CouncilB up to this admission. Ms X remained at B1Hospital until 24th May 2010 when she moved to CHouse and CouncilC have accepted responsibility for her.

39. If I am wrong on the issue of capacity and Ms X did not have sufficient mental capacity to form an intention as to where she wished to live prior to the move to HomeInCrescent and whilst continuing to live there, her ordinary residence falls to be determined in accordance with the case of Vale. In that case, it was held that where a person's mental state is such that they are not capable of forming an intention to live in a particular place, the fact that the person may not therefore reside voluntarily in

that place does not prevent it from being their place of ordinary residence. Such cases must be decided by reference to different considerations. Miss Vale was a 28 year old woman with severe mental disabilities. The solution adopted in her case was to treat her as residing at her parents' home by analogy with the position of a small child because she was so mentally handicapped as to be totally dependent upon a parent or guardian. Even though she resided in a residential care home, her parents' home was her "base". The judge in Vale also set out an alternative approach. This alternative test means that one should consider all the facts of the case, including physical presence and the nature and purpose of that presence in a particular place, as outlined in Shah, but without requiring the person themselves to have voluntarily adopted the residence.

40. In Ms X's case, I do not think it appropriate to treat her as residing at her parents' home by analogy with the position of a small child. Ms X has had a residence independent of her parents for a number of years and whilst she maintains frequent contact with her parents, both with weekend visits and telephone contact, Ms X was clearly settled in CouncilB, with her own social contacts and activities. She is not so dependent upon her parents as to make this solution an appropriate one, although I am aware of her increasing anxieties regarding being close to her parents as a result of the deterioration in her mental health which Doctor99 has described as becoming a "pathological attachment disorder". I am also informed that Ms X's parents cannot have her live with them. The case therefore has to be considered according to the alternative approach set out in Vale i.e as if the person did have mental capacity. In the absence of the deeming provision and given that Ms X had become settled in CouncilB with many local activities and social contacts, it is not possible to conclude that Ms X remained ordinarily resident in CouncilA, the only link there being her parents with whom she no longer resided once starting a tenancy on 18th March 2005. The other alternative is that she had no settled residence which is not appropriate given her links to CouncilB at the material time.

41. CouncilB has made representations to the effect that Ms X did not have a valid tenancy. It is not for the Secretary of State to comment upon the validity or otherwise of her tenancy. The arrangements did not amount to accommodation under section 21 of the 1948 Act and the deeming provision does not therefore apply. I determine for the reasons stated, that Ms X became ordinarily resident in CouncilB as of 18th March 2005 and CouncilB were then responsible for services provided under section 29 of the 1948 Act and section 2 of the Chronically Sick and Disabled Persons Act 1970.

Signed on behalf of the Secretary of State for Health

Dated