DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MRS X (OR 14 2012)

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 Mrs X.

The facts of the case

2. The following information has been ascertained from the joint statement of facts prepared by the two authorities involved in the dispute and the copy documents supplied. Mrs X was born on xdate 1957. Her health began to suffer in 1988 and she contacted CouncilB Social Services for assistance. In 1991 her health declined further such that she was unable to attend to her personal care and activities of daily living. CouncilB provided a package of care services.

3. Mrs X was admitted to HospitalK on 17th May 2006 having suffered a dense cerebro-vascular accident which left her with paralysis on her left side and partial paralysis on her right. She had been living at the G44Housing Association in Town1B, CouncilB where she had a tenancy. Mrs X needs the use of a wheelchair and her speech has been affected. The parties are agreed that Mrs X has retained the mental capacity to make decisions regarding her care and accommodation needs.

4. On discharge from HospitalK Mrs X was eligible for National Health Service Continuing Healthcare funding ("CHC") and moved to Z88Nursing Home in Town1A, CouncilA on 21st August 2006 funded in full by CouncilB Primary Care Trust("PCT"). On 16th October 2006 Mrs X moved to Care CentreQ33, also in Town1A and funded by CHC. It seems that this care home is run by the same company as Z88Nursing Home. The statement of need and care plan dated 23rd February 2011 at page 1 onwards of the bundle of copy papers refers to Mrs X's view that she had been away from her family for too long and that her placement at Care CentreQ33 was not suitable for her. ResidentialPlacement22 in CouncilC assessed her and felt they could meet her needs. Mrs X was noted to be "desperate to move closer to her children and grandchildren in CouncilC".

5. Mrs X moved to ResidentialPlacement22 on 1st March 2011 and remains there to date. This is accommodation provided pursuant to Part 3 of the 1948 Act and is funded by CouncilA on a provisional basis.

6. It is of note that on 11th April 2007 CouncilB NHS advised CouncilB that Mrs X no longer met the criteria for CHC and requested that CouncilB carry out a reassessment. CouncilB carried out that assessment on 17th April 2007. A dispute over funding has continued between the authorities since this time and CouncilB PCT has paid the fees until the move to ResidentialPlacement22.

The relevant law

7. I have considered the agreed 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[1],the leading case of R v Barnet LBC ex parte Shah (1983) 2 AC 309 ("Shah") and the case of R (Greenwich) v Secretary of State and Bexley [2006] EWHC 2576 ("Greenwich"). My determination is not influenced by the provisional acceptance by CouncilA of responsibility for funding services under Part 3 of the 1948 Act.

8. 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".

9. Under section 21(5) of the 1948 Act, a person who is provided with residential accommodation under 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.

10. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(6) as in force prior to 19th April 2010 provided that:

"For the purposes of the provision of residential accommodation under this Part of this Act, a patient in a hospital vested in the Secretary of State, a Primary Care Trust or an NHS trust shall be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before he was admitted as a patient to the hospital, whether or not he in fact continues to be ordinarily resident in that area".

11. Section 24(6) of the 1948 Act was amended by section 148 of the Health and Social Care Act 2008 ("the 2008 Act") to extend the deeming provision in section 24(6) to all accommodation funded by the NHS, whether that accommodation was provided in a hospital or elsewhere. That amendment came into effect on 19th April 2010. Transitional provisions[2] provide that the amendments made by section 148 of the 2008 Act do not apply to a person receiving non-hospital NHS accommodation on 19th April 2010 for as long as that accommodation continues to be provided. Instead the previous legislation applies.

12. "Ordinary residence" is not defined in the 1948 Act. The guidance (paragraph 18 onwards) notes that the term should be given its ordinary and natural meaning subject

[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.

[2] Article 12 of S.I. 2010/708.

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. The leading case on ordinary residence is that of Shah. In this 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".

Submissions of the parties to the dispute

13. CouncilA asserts that ordinary residence falls to be assessed on one of a number of possible dates and that in all likelihood the law that applies to this case is that existing before the amendment to section 24(6) of the 1948 Act. It also asserts that Mrs X cannot be said to have adopted CouncilA voluntarily and with a settled purpose because she was not given any other option, that she has no family ties to CouncilA and that she requested a move to CouncilC. It also refers to a presumption in determination 9 of 2009 and in the ordinary residence guidance that a person will not acquire an ordinary residence whilst in NHS funded accommodation. All this, it is argued, points to Mrs X having retained an ordinary residence in CouncilB.

14. CouncilB asserts that the deeming provisions in the 1948 Act do not apply here and that Mrs X was fully involved in the proposal to move to nursing home accommodation in CouncilA, did so voluntarily and with a settled purpose. CouncilB also asserts that her wish to move to CouncilC came about after a number of years of living in CouncilA when her daughter moved from CouncilB to CouncilC.

The application of the law

15. The Joint Statement of Facts provides that on 11th April 2007 CouncilB NHS advised CouncilB that Mrs X no longer met the criteria for CHC. It is clear that her need for services under Part 3 of the 1948 Act arose on this date and I will determine Mrs X's place of ordinary residence on the basis of the approach taken in the case of Greenwich. 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 the judgment). Had arrangements been made the deeming provision in section 21(5) of the 1948 Act would apply.

16. Immediately before 11th April 2007 (I understand this to mean the day before), Mrs X was resident in the Care CentreQ33 in Town1A. She had moved here from Z88Nursing Home Care Home, also in Town1A, CouncilA, on 16th October 2006.

17. CouncilA asserts that there is a presumption that a person will not acquire an ordinary residence whilst in NHS funded accommodation albeit that this can be rebutted on the facts of a particular case.

18. As noted above at paragraph 11, transitional provisions provide that the amendments made by section 148 of the 2008 Act do not apply to a person who was receiving non-hospital NHS accommodation on 19th April 2010; instead the previous legislation remains applicable to that person for as long as that accommodation continues to be provided. Instead the usual rules apply and I must look to the tests set out in the leading case of Shah.

19. Before I do that, I must address the assertion by CouncilA that there is, according to revoked and current guidance, a rebuttable presumption that a person will not acquire an ordinary residence in NHS-funded accommodation. Paragraph 14 of the previous guidance (LAC 93/7) suggests that local authorities could reasonably apply the section 24(6) approach by analogy to people leaving prisons, resettlement units or other similar establishments. However, paragraph 14 of the previous guidance merely suggests one possible approach that could be followed by local authorities in relation to persons leaving prisons, resettlement units or other similar establishments, but it does not say that this approach must be followed. This paragraph also states that "any dispute must be resolved in the light of the specific circumstances". In terms of this determination, I am required to determine Mrs X's ordinary residence as of 10th April 2007 in accordance with the relevant legislation and case-law and I do not consider that it is open to me to apply the section 24(6) approach by analogy although I note that previous determinations have proceeded on the basis of a rebuttable presumption that ordinary residence is not acquired where one is receiving NHS funded care. Mrs X is not in a similar situation to that set out in paragraph 14 of the previous guidance; her CHC was received in a long-term residential care home. Paragraph 60 of the new guidance refers to the position post the amendment made by section 148 of the 2008 Act.

20. It is accepted by the parties that Mrs X has the capacity to decide where she wishes to live. It is therefore necessary for me to consider the tests set out in the leading case of Shah, namely whether as of 10th April 2007 Mrs X had adopted her residence in CouncilA voluntarily and for a settled purpose.

21. There is some argument between the parties as to whether Mrs X had other options available to her other than Z88Nursing Home in CouncilA or whether this was effectively the only option. The copy case notes refer to brochures being requested from a few homes but it seems that Z88Nursing Home may have been the only home Mrs X visited, perhaps due to travel costs. However, a note for 10th August 2006 notes that Mrs X liked Z88Nursing Home and arrangements were made for her move there. An earlier note for 13th July 2006 confirmed that Mrs X wished to go into a care home.

22. It seems that Mrs X was not happy at Z88Nursing Home and wished to move to another home. A note for 12th October 2006 recorded that Mrs X had visited Care CentreQ33 Lodge, a care home in Town1A and that she liked it. There is an e-mail in the copy papers from Ms P dated 7th June 2007 which refers to a meeting with Mrs X on 12th April 2007 in which Mrs X "clearly indicated to me that she wishes to remain at Care CentreQ33 in CouncilA. She talked with pride about her room and the good care the staff are giving her. She said "I would like to stay here, the staff are nice, it's like a family". There is reference in the Community Care Assessment completed on

17th April 2007 to Mrs X enjoying shopping and a wish to attend a day centre three times a week.

23. At some stage the daughter who had been living in Town1B moved to CouncilC. There is a letter dated 7th April 2009 relating to a safeguarding investigation in relation to Mrs X initiated on 6th January 2009. That letter states that "Prior to this safeguarding investigation Mrs X has been repeatedly requesting her family to be moved to a care home in the CouncilC area where the majority of her family reside. During the safeguarding conference again Mrs X clearly stated that she was now uncomfortable being in Care CentreQ33 care home and was even more persistent regarding a move to CouncilC." In the Decision Support Tool for NHS Continuing Healthcare, Panel copy dated 9th December 2009, it is recorded that "Ms X's family live in the CouncilC/CouncilD area and Ms X is keen to move there as soon as possible to be nearer them". There is also an e-mail in the copy papers dated 21st June 2010 from Social Services WorkerOne to Social Services WorkerTwo which states that "Mrs X is now requesting a transfer to a home in CouncilC to be near her family". It seems that a vacancy in the home in CouncilC was available but could only be kept open for a few days. Unfortunately, this place was lost and the dispute as to responsibility for funding continued.

24. The options available to me in terms of determining Mrs X's place of ordinary residence as of 10th April 2007 are that she was ordinarily resident in CouncilB, CouncilA or that she was of no settled residence. It is not possible to determine that she was resident in an area she anticipated residing in the future.

25. I do not consider it appropriate in this case to determine that Mrs X was of no settled residence given that she had been living in CouncilA since August 2006 and was going out into the community for shopping and requesting trips to a local day centre. Mrs X had terminated her tenancy in CouncilB and whilst one of her daughters still resided there for a time, this seems her only remaining link to the area. I therefore determine that Mrs X was ordinarily resident in the area of CouncilA as of 10th April 2007. I conclude that she moved there voluntarily with the settled purpose of receiving care and conducting her life there and that initially she liked her placement at Care CentreQ33. After a period and most likely once her daughter had moved away, Mrs X wanted to move to CouncilC.

26. Even if Mrs X's desire to move to CouncilC had arisen as early as 10th April 2007, I would still determine that Mrs X's ordinary residence was in CouncilA. As Lord Slynn explained in the case of Mohammed v Hammersmith and Fulham London Borough Council [2002] 1 AC 547, a preference to reside elsewhere does not prevent normal or ordinary residence.

Signed ……..

Dated ……...