DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 6 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.

The facts of the case

2. The following information has been ascertained from the agreed statement of facts prepared by the two authorities involved in the dispute, the chronology and the copy documents supplied. Ms X was born on xdate 1966 and has a mild learning disability, emotionally unstable personality disorder (borderline type), dissociative disorder, a history of post traumatic stress disorder and recurrent depressive disorder. She takes a number of medications.

3. Ms X was born in CouncilC. At about eighteen months of age, Ms X's mother suspected she was not progressing as she should but was reassured by the doctor she consulted. At the age of 3 years, Ms X was referred to a paediatrician in CouncilD for speech delay. Ms X's mother was told that Ms X was "slightly damaged". Ms X attended primary school in CouncilD for two years and the family then moved to AreaR. At the age of seven, Ms X was transferred to a special school in AreaQ. At around this time, Ms X's parents experienced marital difficulties and Ms X was described as being aggressive in school and was seen by a child guidance counsellor. At the age of nine years Ms X's parents separated. Her mother met another man who was later killed in a road traffic accident.

4. Ms X's difficulties became more evident during her adolescence. She was referred to Child Psychiatric Services in 1983 when she was 17 for being "sexually precocious" and vulnerable. Shortly afterwards, in 1984, her parents divorced. In July 1985, Ms X was admitted to SHospital, from the family home following an emotional crisis when her sister left CouncilE, where the family now resided.

5. Between 1986 and September 1990, the chronology states that Ms X lived in accommodation provided by CouncilF under the 1948 Act. The agreed statement of facts states that there are no records as to Ms X's residence between September 1990 and February 1992. Between February 1992 and January 1996, Ms X lived at 75a High Street, Area1A, an address now falling within the area of CouncilA, which was by way of a tenancy from CouncilG.

6. As of 1st April 1996, CouncilF was abolished and the councils of CouncilA and CouncilB were established. Ms X was allocated to CouncilA for social services support.

7. On 30th September 1997, Ms X was voluntarily admitted to THouse, a National Health Service psychiatric assessment and treatment unit in AreaE1, CouncilE, within the area of CouncilA, following a breakdown in a personal relationship. As of 13th November 1997, Ms X lived with her mother but kept her flat at 75a High Street, Area1A where she returned in June 1998. In October 1998, Ms X moved to 20

UClose in Area1A. This was private rented accommodation with support from CouncilA social services. On 2nd October 2000, Ms X moved to 8 VRoad, AreaA2, again within the area of CouncilA.

8. There followed a further hospital admission in August 2001 under the Mental Health Act 1983 and in September 2001, Ms X moved to a flat in WHill, AreaA2 rented from YHousing Association. Ms X had a further admission to THouse in January 2002 returning to live at WHill in July 2002. Ms X was again admitted to THouse in January 2003 and remained there until February 2004 when she moved to YCare Home, AreaE2, CouncilE, where she had her own flat in a residential care home for people with challenging needs. This placement was funded by CouncilA.

9. Ms X remained at Y care home until September 2007 when she was again admitted to THouse under the Mental Health Act 1983 until her discharge back to Y care home on 25th March 2008 with an enhanced package of care funded by CouncilA. Unfortunately, Ms X's mental health deteriorated and the staff at Y care home felt they could not accommodate Ms X's needs. CouncilA referred Ms X to Community Therapeutic Services Limited ("CTS") and Ms X was re-admitted informally to THouse on 4th April 2008 (section 136 of the Mental Health Act 1983). CouncilE Primary Care Trust carried out an assessment for National Health Service Continuing Health Care funding("CHC") or National Health Service Funded Nursing Care which concluded on 20th May 2008 that Ms X had a primary health need and was eligible for CHC and would be funded from the date of her placement at CTS.

10. Ms X moved from THouse to ZCare Home, (also referred to as ZCare HomeSquare in the copy papers), AreaB1, a specialist residential centre able to deal with challenging behaviour, run by CTS on 14th July 2008. This accommodation is located in the area of CouncilB. Initially Ms X was unsettled complaining she wanted to return to THouse or to live with her parents (page A119 of the bundle) and she wrote to her social worker asking why she had not been placed in CouncilA where she stated she wanted to be (page A121 of the bundle). However, Ms X was seen by a Consultant Psychiatrist in Learning Disabilities on 2nd December 2008 who reported that "she seems to have settled into her new environment very well". The Consultant Psychiatrist goes on to report that: "Ms X informed me that she liked her new environment "better than AreaE2" and appeared to relate fairly well to the staff team working around her. She attends on two evenings for activities at College008 and at present, with the help of the staff team, is exploring various social situations where she could continue to have contact with others of similar ability"(page A133 of the bundle).

11. Ms X's eligibility for CHC was reviewed on 18th March 2009 and a panel review conducted on 4th June 2009 concluded that Ms X was no longer eligible for CHC. The letter communicating this decision dated 10th June 2009 was stated to be copied to CTS, CouncilA and Ms X's GP, however, CouncilA maintain they did not receive a copy at this time. The dispute between CouncilA and CouncilB concerns which authority is responsible for the payment of Ms X's fees once CHC ceased. The letter dated 10th June 2009 (page A173 of the bundle) states that CHC would cease 28 days from the date of that letter. The agreed statements of facts states at paragraph 2.13 that fees for ZCare Home ceased to be paid from 9th July 2009.

The relevant law

12. 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"), the House of Lords decision in Chief Adjudication Officer v Quinn Gibbon 1 WLR 1184 [1996] ("Quinn Gibbon"), R(Greenwich) v Secretary of State and Bexley (2006) EWHC 2576(Admin) ("Greenwich") 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 CouncilB of responsibility for funding services.

13. 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. 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 or other persons who are in urgent need thereof".

14. 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.

15. 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

[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.

"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 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…".

16. 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". In accordance with paragraph 58 of the judgment in Greenwich, I interpret the reference to residential accommodation at the end of this subsection to mean residential accommodation under Part 3.

17. Section 24(6) as it read at the time of Ms X's move to CTS[2] (14th July 2008) 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.".

18. "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 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".

The application of the law

19. In the Agreed Statement of Facts at paragraph 3.4, I have been asked to determine: (i) the date upon which ordinary residence falls to be determined; (ii)

[2] See paragraph 21 below

whether Ms X had capacity at the material time to decide where she wished to live; (iii) whether or not Ms X was ordinarily resident in the area of CouncilB at any point; (iv) whether or not I have jurisdiction to determine ordinary residence between 14th July 2009 and 29th July 2010 and (v) whether I have jurisdiction under section 32 of the 1948 Act to direct repayment of fees (if appropriate) to the relevant local authority, together with interest.

20. On 9th July 2009, the date which paragraph 2.13 of the Agreed Statement of Facts states that fees for ZCare Home ceased to be paid by way of NHS CHC, Ms X became a person who, by reason of illness, disability or other circumstance, was in need of care and attention which was not otherwise available to her in accordance with section 21 of the 1948 Act. The fact that no authority contracted with CTS at this time does not affect the fact that a duty was owed by the authority in whose area Ms X was ordinarily resident when her need arose. In the Greenwich case it was stated that if a local authority should have made arrangements under section 21 of the 1948 Act then the fact that they failed to do so does not mean that the deeming provision in section 24(5) of the 1948 Act no longer applies. The deeming provision in section 24(5) should be read as applying not only to those actually provided with Part 3 accommodation but also to those who should have been so provided if the authority had been fulfilling its statutory duties (see paragraph 55 of the judgment in Greenwich). If Part 3 accommodation should have been provided, as is the case here, the Secretary of State has jurisdiction under section 32(3) of the 1948 Act to determine the question of a person's ordinary residence when the accommodation should have been so provided. Such jurisdiction pertains to any question arising as to a person's ordinary residence and will consequently determine which local authority is responsible for funding social care. It does not extend to awarding costs and interest

21. The relevant date to determine Ms X's ordinary residence is immediately before Part 3 accommodation should have been provided and I interpret this to mean the day before that accommodation should have been provided, namely 8th July 2009. It has been accepted by the parties to this dispute that the deeming provision in section 24(6) of the Act does not apply here. The deeming provision as it was in force as of 8th/9th July 2009 applied to those in NHS hospital accommodation only. The amendment inserted by section 148 of the Health and Social Care Act 2008 extending this deeming provision to those in non-hospital NHS accommodation applies to those placed post 19th April 2010. CouncilB in their legal submissions refer to paragraph 14 of the superseded ordinary residence guidance (LAC 93/7) which 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 also states that "any dispute must be resolved in the light of the specific circumstances". In my view, paragraph 14 of the previous guidance merely suggested one possible approach that could be followed by local authorities in relation to persons leaving prisons, resettlement units or other similar establishments, but it did not say that this approach had to be followed. In terms of this determination, I am required to determine Ms X's ordinary residence in accordance with the relevant legislation and case-law and it is not open to me to apply the section 24(6) approach by analogy. Moreover, I consider that the nature and overall purpose of the accommodation at ZCare Home is not one to which paragraph 14 was intended to apply.

22. CouncilB in their submissions at paragraph d)v) refer to evidence suggesting that the move from THouse to ZCare Home was a time limited stay for a particular purpose, however, the document entitled "Panel Request & Decision" at page A99 of the bundle notes as follows:

"Ms X clearly benefits from living in an environment where there is an expectation that she uses her significant skills for independent living. However, this needs to be robust enough to be able to actively manage her more challenging behaviour and avoid further hospital admissions. Further, if Ms X's serial placement breakdown is also to be avoided then she is likely to benefit from close clinical support and some form of psychologically therapeutic intervention so the root cause of her behaviour can be addressed-hence the request for this placement provided by Community Therapeutic Services at ZCare HomeSquare".

23. It is clear from the above that Ms X did not move to ZCare Home just to receive NHS treatment. Ms X's place of ordinary residence as of 8th July 2009 falls to be considered in accordance with the normal meaning of that term and in the light of the cases of Shah and Vale.

Ordinary Residence

24. As noted above the leading case on ordinary residence is that of Shah. CouncilB argues that Ms X did not acquire an ordinary residence at ZCare Home as she did not adopt the residence voluntarily and for settled purposes. On the question of voluntary adoption and settled purpose, Lord Scarman in Shah said as follows:

"The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity for escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus intends to stay there indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".

25. I have been referred to the case of R(on the application of Mani) v Lambeth Borough Council [2002] All ER 112 ("Mani") and the case of Mohamed v The London Borough of Hammersmith and Fulham [2001] UKHL 57 ("Mohamed") which was cited in Mani. Mani considered "ordinary residence" for the purposes of section 21 of the 1948 Act and found that an asylum seeker was ordinarily resident in the area of accommodation provided to him by the National Asylum Support Service. Mani cited the Mohamed case and Lord Slynn's comments below on ordinary/normal residence. Mohamed considered "normal residence" for the purpose of the Housing Act 1996. Lord Slynn in Mohamed referred to the case of Shah and went on to say that:

“It is clear that words like ordinary residence and normal residence may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves into a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is "shelter" but it is also where he resides. Where he is given interim accommodation by a local housing authority even more clearly is that the place where for the time being he is normally resident. The fact that it is provided subject to statutory duty does not, contrary to the appellant authority's argument, prevent it from being such.”.

26. I understand CouncilB to be suggesting that these comments are not applicable to the present case because we are not considering the case of an asylum seeker without a previous ordinary residence in the UK and in the case of Mohammed, the comments arose in the context of the particular legislation. However, I do consider the comments of Lord Slynn to be relevant to a consideration of a person’s place of ordinary residence since they clearly expand upon the test in Shah, namely that an ordinary residence is gained if it is for “settled purposes as part of the regular order of his life for the time being, whether of short or of long duration” by saying that a preference for different accommodation does not prevent a place from being a person’s place of normal or ordinary residence.

27. I consider that Ms X’s presence at ZCare Home had a sufficient degree of continuity to be described as settled as of 8th July 2009. As to whether or not she voluntarily adopted the residence (CouncilB argue she did not) raises questions as to her mental capacity.

Mental Capacity

28. 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).

29. 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.

30. CouncilA argue that there is no or insufficient evidence to rebut the presumption of capacity. CouncilB argue that it is doubtful whether Ms X had capacity to choose where she wanted to live when she moved to CTS in July 2008.

31. It seems that no formal assessment under the Mental Capacity Act 2005 has taken place. However, the discharge summary dated 5th August 2008 at page A122 of the bundle states that "capacity (to consent) varies according to her mental state: when unwell-distressed-angry, she does not have capacity to make any informed decisions about her medical treatment. Even at these times, however, calm explanations from familiar carers can often reveal a high level of understanding." The Care Plan dated 17th May 2010 at page A241 of the bundle states that "Ms X's mental capacity fluctuates with her mental health status. She would need a Mental Capacity Assessment regarding specific decisions". As part of the Care Plan assessment, the following was noted at page A205 of the bundle:

"When Ms X is well she can change her mind about the choices that she wants to make. For example, during this assessment, she was sure that she wanted to leave ZCare Home. However, she became very distressed at the end of the assessment and during the period that staff spent with her afterwards she stated she wanted to remain."

At page A253 of the bundle, the profile notes for 16th July 2010 note:
"When Ms X is more unstable her cognitive functioning is impaired and she is not able to make basic decisions. E showed that the decision support tool states in high that 'the individual finds it difficult (…) to make decisions about key aspects in their lives' rather than saying that they cannot make decisions".

These latter notes refer to a Continuing Healthcare assessment meeting, "E" being the social worker. I take this comment to explain that the "Decision Support Tool", intended to assist in grading, states in the "high" category that the person would find some decisions difficult rather than saying they could not make any decisions at all so that placing someone in the high cognitive impairment category would not necessarily mean that the view was that the individual could not make any decisions.

32. There are a number of entries in the copy papers where, for example at pages A134 and A274, whilst not a formal assessment of capacity, Ms X has been noted to have the capacity to consent, particularly to medication. She has also been noted to be possibly suggestible (page A90) although this was not formally assessed.

33. The decision in question here is whether Ms X had capacity to decide where she wished to live as of July 2009? That is not a decision which relates to the exact nature of the accommodation nor does it require an understanding of the implications for which local authority would be responsible for funding her care. It is clear to me from reading the copy papers that Ms X's capacity generally to make decisions varies according to her mental state at the relevant time. As of 8th July 2009, Ms X had been

residing at ZCare Home for one year. She had not been detained there under the Mental Health Act. The CHC panel decision form dated 4th June 2009, at page A168 of the bundle, following a review seemingly in March of that year, noted in relation to cognition that Ms X was "Able to make simple choices and assess basic risks". I consider that Ms X probably did have capacity as of July 2009 to decide where she wanted to live given her generally more settled mental state and there is insufficient evidence to displace the presumption that she had capacity at this time.

34. If Ms X had capacity, did she want to be at ZCare Home as of 8th July 2009. The copy case notes reveal that in August 2008 Ms X said she wanted to leave and again in October 2008. Her presentation was noted as fluctuating from being problematic at times to being very settled and pleasant and when upset Ms X stated she wanted to go back to CouncilE (CHC funding review March 2009, page A142). The report of Dr99, Consultant Psychologist dated 24th May 2010 at page A231 of the bundle noted that Ms X had come to regard ZCare Home "as her home". This report also comments upon a pattern of unstable interpersonal relationships in Ms X's case and notes that Ms X "will often state that she does not want to see her parents but then feels sad and rejected when they do not visit".

35. It seems that there were times when after the initial move to ZCare Home, Ms X did not wish to be there and wanted to be nearer to her parents and indeed wrote in such terms to her social worker as referred to at paragraph 10. When she saw Dr Consultant Psychiatrist in December 2008 (page A133 of the bundle), she said she liked her new environment better than AreaE2 , being the YCare Home in CouncilE funded by CouncilA. She was by then attending College008 two evenings per week and exploring various social situations. The document at page A138 of the bundle reports of Ms X that "sometimes I like it here and sometimes I don't". She is noted at page A139 to have regular outings for a coffee with staff and to be keen on an office based work placement.

36. In the Mohamed case, Lord Slynn in the paragraph reproduced at paragraph 25 said that when considering the meaning of normal or ordinary residence, voluntary acceptance is not negated by the person preferring to be elsewhere. It is true that the placement was chosen for Ms X as the place which best met her needs but I consider she has become settled at ZCare Home and it has become her home. She has connections with the local community in AreaB1 and for most of the time now wishes to be there. I consider that on balance this was the case as of 8th July 2009 and determine that she was accordingly ordinarily resident in CouncilB as of this date.

37. If I am wrong as to capacity and Ms X did not have capacity to decide where she wished to live as at July 2009, 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.

38. Ms X has not lived with her parents for a number of years, living predominantly in rented accommodation with social services support and with hospital admissions and residential care when her mental health deteriorated. She has difficult interpersonal relationships in particular with her family and veers between wanting to be near them and not wanting to see them. I do not consider Ms X to be so dependent upon her parents as to make her parents’ home her base as was the solution adopted in Vale. I must therefore consider the second test and consider all the facts including physical presence and the nature and purpose of that presence without requiring voluntary adoption. It is true that when Ms X first moved to ZCare Home, she received CHC as she was considered to have a primary health need and her needs could be met at this establishment. The accommodation is, however, a self contained flat in a residential home and Ms X has recovered some aspects of independent living there with access to the community to aid her development as well as help to prevent a deterioration in her mental health. The presence is of a settled nature and was so by 8th July 2009 when her ordinary residence falls to be assessed. I therefore determine that, even without requiring Ms X to have voluntarily adopted CouncilB as her place of ordinary residence for the purposes of the 1948 Act, she was so resident as of 8th July 2009 and has remained so.

Signed

Dated