DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF X (OR 8 2013)

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 X for the purposes of Part 3 of that Act.

2. A determination as to X's ordinary residence is necessary as she requires services under section 21 of the 1948 Act. The local authority that has a duty to provide these services is the one in which X is ordinarily resident.

The facts of the case

3. The following information has been ascertained from the agreed statement of facts from CouncilA and CouncilB dated 8 October 2012.

4. X was born on x date 1916 and is aged 96 years.

5. Until October 2007 X lived in sheltered accommodation in Area1 in the area of CouncilA. She is described in the statement of facts as having poor memory skills and cognitive impairment. Her property and affairs are now managed by her NieceT, who lives in the area of CouncilB.

6. In October 2007 X accidentally overdosed on medication and was admitted to Hospital B. Whilst in hospital, X's needs were assessed and it was concluded that she was unable to manage her needs independently. Placement in a residential care home was recommended.

7. On 13 December 2007 NieceT completed and signed financial assessment forms which declared that, apart from her property, X had a total capital of £24,180.16.

8. X moved to CareHomeA in the area of CouncilA on 17 December 2007. She received a 12 week property disregard and, on the basis that – apart from her property – she had capital below the capital limit set in the National Assistance (Assessment of Resources) Regulations 1992, as amended ("the capital limit"), a deferred payment.

9. On 12 September 2008 X moved to CareHomeB, a care home in the area of CouncilB. This decision was made by X in order to be nearer her NieceT, who made the arrangements and both CouncilA and CouncilB agree that X had capacity to make this decision.

10. A lasting power of attorney executed in NieceT's favour on 1 September 2008 was registered on 9 December 2008.

11. X's property in Area1 was put on the market, but was only sold in November 2011. A number of financial assessment forms sent to NieceT

in the intervening period were not returned. A form signed and dated 12 August 2011 disclosed a current account balance of £4,135.51 and a Guaranteed Reserve account with a balance of £45,671.67, sums totalling £49,807.15.

12. Enquiries of NieceT have failed to elicit a clear explanation for the non-disclosure of the latter sum, which put X substantially in excess of the capital limit for local authority funding of her care home placement.

13. On the sale of X's property in November 2011, the redemption figure on CouncilA's charge under the deferred payment agreement of £128,654.35 placed X below the capital limit so that she required funding of her care with immediate effect.

14. CouncilA have agreed to meet the costs of X's care at CareHomeB on an interim without prejudice basis while X's ordinary residence can be determined.

Further information received from the parties

15. Upon reviewing the papers, it became clear to the Secretary of State that the documentary evidence provided did not provide sufficient information to make a determination. On 25 February 2013 the Secretary of State wrote to the parties to ask them for additional information and this was provided under cover of email dated 20 March 2013. This additional

information, on X's financial position in December 2007, together with the emails dated 28 June and 12 July 2013, has been used to make the determination in this case. For the avoidance of doubt, the figures used in the e-mail of 20 March 2013 have been preferred to the figures used for the parties' submissions where there is a difference between the two.

The relevant law

16. In reaching this determination I have considered:

- The documents submitted by all parties;
- The provisions of Part 3 of The National Assistance Act 1948 ("the 1948 Act") as amended;
- The National Assistance (Assessment of Resources) Regulations 1992, as amended
- LAC (DH)(2007)4: Charges for residential accommodation - CRAG amendment No 26
- The Department of Health guidance Ordinary Residence: Guidance on the Identification of the Ordinary Residence of People in Need of Community Care Services, England (publication date 15 April 2011, "2011 Guidance"[1]); and
- The cases that I have been directed to by the two local authorities namely: *R (oao Manchester CC) v St Helens BC [2009] EWCA Civ*

1348 "Manchester" and *R (oao London Borough of Greenwich) v Secretary of State and London Borough of Bexley (2006)* EWHC 2576 *"Greenwich"*

17. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 years or over whom, by reason of age, illness, disability or any other circumstances, are in need of care and attention, which is not otherwise available to them.

18. Section 24(1) of the 1948 Act provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions in that Part, the authority in whose area the person is ordinarily resident. However, local authorities can place people in residential accommodation in another local authority area (an 'out of area' placement).

19. Section 24(5) of the 1948 Act is a deeming provision which sets out that where a person is provided with residential accommodation under Part 3 of the Act they are deemed to continue to be ordinarily resident in area in which they were ordinarily resident immediately before the residential accommodation was provided. In practical terms this means that where a local authority places a person out of their area they will retain the same responsibility for that person as if they were placed in accommodation in their area.

[1]http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH

20. "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".*

21. My determination is not influenced by the fact that CouncilA has accepted provisional responsibility for providing Part 3 services during the period in question.

Submissions

22. CouncilA dispute that they knew or ought to have known that X had capital above the capital limit, they maintain that in the absence of evidence to the contrary, they accepted the accuracy and completeness of the financial assessment and supporting documentation submitted in 2007.

23. CouncilA aver that paragraph 75 of the guidance does not apply to X's case because:

(i) She made the decision to move to CareHomeB in CouncilB (they rely on document 8 – the minutes of the review held on 5 August 2008);

(ii) There is no issue as to X's capacity;

(iii) Although unable to make arrangements herself for the move, X had full support of NieceT as her next of kin and attorney under the lasting powers of attorney. CouncilA were not involved in choosing the home or making arrangements.

24. CouncilB's primary submission is that even if the correct figures for X's capital had been used (they assert that this figure was £39,862.16[2]) then she would still not have acquired ordinary residence in CouncilB. This was because when she moved to CouncilB from CouncilA she still remained the responsibility of CouncilA and this remained the case up until the sale of the property on 11 November 2011. They assert that there was never any contract between X and CareHomeB and that CouncilB have not provided any financial assistance to X. CouncilB's case is contingent on the finding that X would have become eligible for the property disregard on 7 August 2008[3] and therefore she would have moved to CareHomeB during the currency of this agreement. They assert that paragraph 89 of the guidance supports the contention that X would therefore have remained the responsibility of CouncilA. The operation of

[2] This figure has been revised in the light of the 20 April 2013 email.

the deeming provision in 24(5) means that X remained ordinarily resident in CouncilA following the move and therefore they retained responsibility.

Determination

25. In my determination, the correct approach to this case is to work out where X is ordinarily resident had her true financial position been known at all material times.

26. When X moved into CareHomeA she initially incurred charges because her capital was in excess of the capital limit (which was at the material time £21,500[4]). Based on the incorrect statement of her savings, £24,180, she fell below the relevant threshold on or about 12 January 2008 (see CouncilA) letter to NieceT dated 15 January 2008). Between 12 January 2008 until 5 April 2008 X was subject to a 12 week property disregard and after this period (from 6 April 2008) she was a self funder under a deferred payment arrangement with CouncilA.

27. The key question is therefore at what stage would X's capital have fallen below the capital limit if her true financial position had been known and critically whether this was before her move to CareHomeB on 12 September 2008.

[3] This date has been revised in accordance with the email of 28 June 2013.
[4] The National Assistance (Assessment of Resources) Regulations 1992, as amended (1992/2977) and LAC (DH)(2007) 4 Charges for residential accommodation - CRAG amendment No 26

28. Although we know how much capital she was wrongly declared to have at this date (NieceT's finance assessment form in December 2007) and we know that her finance assessment form of 31 August 2011 details capital of £49,807.15, the documentary account evidence do not correlate with these figures and there is no obvious explanation of how these figures relate to each other.

29. I have found it difficult on the basis of the papers before me to work out what X's true financial position was in December 2007 when she was discharged to CareHomeA. This information was not included in the agreed statement of facts and I am therefore basing the following conclusions on the parties' email dated 20 March 2013.

30. On the basis of the email from the parties on this issue, I understand that CouncilA aver that X's savings as at the material time amounted to £42,775.70 and CouncilB maintain that it was £39,862.16. On balance, I prefer CouncilA's assertion that the figure was higher, £42,775.70, for the reasons that they give in their email which are supported by the attached spreadsheet and the content of document 18. In particular, I agree with CouncilA's assertion that the balance of X's saver account in 2007 was not £15,682.51 but £18,595.

When would X's capital have fallen below the threshold?

33. As stated above, CouncilA and CouncilB differ as to the amount of capital X had available at the time of her placement at CareHomeA and differ as

to when they say X would have fallen below the capital limit, which by September 2008 had increased to £22,250[5].

34. The original projection provided by X, was based on CouncilA's calculation and was premised on a different starting capital for X in December 2007. CouncilA have helpfully revised their projection on the basis of the £42,775.70 figure, they now say represents X's true financial position at the time of her initial financial assessment. CouncilA now maintains that X would have fallen below the relevant capital limit soon after 9 October 2008.

35. CouncilB rely on a slightly different figure in their email than they did in their submissions. The difference is, however, slight as it amounts to just £101.84. On their amended projection CouncilB assert that X would have fallen below the threshold on 7 August 2008.

36. From 13 December 2007 to 11th September 2008 I have calculated a period of 39 weeks. Taking the higher figure of £42,775.70 and subtracting the unclaimed Attendance Allowance leaves a sum of £41,971.70. Taking into account weekly income of £199.52 (retirement pension and Attendance Allowance), I calculate that by 11th September 2008 X would still have had £24,402.98, which is £2152.98 in excess of the relevant upper capital limit of £22,250.

[5] The National Assistance (Sums for Personal Requirements and Assessment of Resources)

37. Accordingly, as a finding of fact, I determine that X, had her true financial position have been known and identified when she moved into CareHomeA, would have fallen below the self funding capital limit after her move to CareHomeB on 12 September 2008.

What was X's funding status when she moved to CareHomeB on 12 September 2008?

38. Therefore, as I have preferred CouncilA's figure for X's capital at the time of her admission to CareHomeA (for the reasons set out in paragraphs 29 and 30) and agree that X would not have fallen below the capital limit by the time of her move to CareHomeB, it follows that X would have been self funding as of 12th September 2008.

Where is X ordinarily resident?

39. Paragraph 72 of the guidance provides:

> *"When a person moves into permanent residential accommodation in a new area under private arrangements, and is funding their own care, they usually acquire an ordinary residence in this new area, in line with the "settled purpose" test in Shah. If so, and if they subsequently become in need of community care services, they should approach the local authority in which their residential accommodation is situated."*

Amendment (England) Regulations 2008 (S.I. 2008/593).

40. Therefore in my determination X acquired ordinary residence in CouncilB on 12 September 2008 when she moved to CareHomeB having regard to the principles in Shah and paragraph 22 of the guidance which states:

> *"Ordinary residence can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes" and that "there is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there."*

41. X moved to CareHomeB for settled purposes and she had a close dependent relationship with NieceT who also resided there as well as a number of friends in the area. It is clear from the documents that she intended to live there for the foreseeable future. I agree with CouncilA's analysis that the documents demonstrate that X made a capacitated decision to move to CareHomeB. The minutes of the meeting of 5 August 2008 strongly support this finding:

> *"This was discussed with X who was very clear that whilst she feels CareHomeA have cared for her well, she would like to move nearer her niece to a place that is very familiar to her. X was able to retain this decision throughout the whole review process."*

42. Section 24(5) sets out that where a person is provided with residential accommodation under Part 3 of the Act, they are *deemed* to continue to

be ordinarily resident in the area in which they were ordinarily resident (if any) immediately before the residential accommodation was provided. This means that where a local authority places a person in accommodation out of their area, they will retain the same responsibility for that person as if they were placed in accommodation within their own area. However, the consequence of the finding that X would have been self funding at the time she moved to CareHomeB is that the deeming provision does not arise because CouncilA were not funding her care under Part 3 of the Act. I therefore agree with CouncilA's submissions in this respect. The corollary that flows from this finding is that the *Greenwich* case will have no application to this case because CouncilA were, on the true facts now known, not under a duty to provide X with Part 3 accommodation at the time of her move.

43. I agree with CouncilA's submission that paragraph 75 does not apply to X's case. The guidance at paragraph 75 provides:

> *"Sometimes, a person with sufficient means to pay for their care may not be able to enter into a private agreement with their care home for the provision of their care. This may be because they do not have the mental capacity to do so and have no attorney or deputy to act on their behalf, or it may be that, even though they have the capacity to decide where to live, they are not able to manage the making of the arrangements and have no friends or relatives to assist them. In such cases, the local authority would be responsible for making*

arrangements for the provision of their accommodation under Part 3 of the 1948 Act, with reimbursement from the person as necessary. As such, the deeming provision in section 24(5) of the 1948 Act would apply and the person would remain ordinarily resident in their placing local authority, even where they enter the accommodation in another local authority area."

44. X was clearly assisted by NieceT in her move and in any event it is agreed by the parties in the agreed statement of facts that she had the capacity to make the decision on where to live.

Subsidiary issues

Operation of the 12 week property disregard

45. Given that X did in fact take advantage of this disregard, I find that on the balance of probability she would have taken advantage of this even if her true capital had been known (albeit that she would only become eligible for it at a later date). On the facts now known X would have already moved to CareHomeB when her eligibility for this would have arisen. Accordingly, she would have approached CouncilB and not CouncilA for assistance in funding her continued care under a deferred payment agreement. I therefore also reject CouncilB's assertion that paragraph 89 applies to X's case as her true capital would mean that the 12 week disregard would not have applied to her at the time of her move to CareHomeB.

CouncilA's right to recover expenditure

46. It is beyond the scope of this determination to make any finding as to why X's true financial position was not contained within the documents submitted to CouncilA in December 2007. However, Section 45 of the 1948 Act makes provision for local authorities to recover any expenditure they have incurred as a result of misrepresentation or failure to disclose any material fact by any person. The effect of this provision is two fold – firstly, it is clear that parliament intended and legislated to enable mistakes to be rectified and that therefore it cannot have been intended that duties triggered under the Act in error (in this case under Section 21) are intended to persist once the error has been discovered. Secondly, that CouncilA are entitled to recover the sums they wrongly paid out under Part 3 of the 1948 Act from X.

Directions power under section 21

47. There is a power in the Directions to provide section 21 accommodation where the local authority of ordinary residence consents. In my determination the exercise of this power is not applicable to this case because there is no suggestion in the papers before me that CouncilB or CouncilA corresponded with respect to this issue. Therefore I do not consider that the *Manchester* case has applicability in to this case.

Conclusion

48. For the reasons set out above, I determine that from 12 September 2008 X was ordinary resident in CouncilB.

Signed on behalf of the Secretary of State for Health ……

Dated……

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