

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MS X (OR 9 2011)

1. I am asked by CouncilA and CouncilC 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 for which Ms X’s ordinary residence is in dispute is from 21st August 2009 (when Ms X moved to CouncilC) until the present time.
2. The following facts are derived from the Statement of Facts prepared by CouncilA and commented upon by CouncilC (the authorities have not been able to agree a Statement of Facts between them), the legal submissions of both authorities, and from other papers submitted by them. Notwithstanding the absence of agreement, it is clear that certain facts are not in dispute, and these are set out in paragraphs 5 to 37 below. Where matters are disputed (notably issues relating to CouncilC’s involvement with safeguarding action resulting in the movement of Ms X to JCare Home in CouncilE, and as to how Ms X came to live at 10 KPlace, CouncilC) these disputes appear to me to relate primarily to the interpretation put on the facts in question, rather than to any substantive dispute as to what happened and when. As a result, I am prepared to make a Determination in this case, notwithstanding that The Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 (“2010 Directions”) clearly state (at direction 5(1)(b)) that the Secretary of State must be sent “*a statement of facts signed by each of the local authorities in dispute*”.
3. It is, however, of considerable regret that—
 - i) the authorities have been unable to agree a Statement of Facts;
 - ii) the submissions that were made fail to detail in a clear manner the information specified in direction 5(1)(b)(i) to (viii) of the 2010 Directions;
 - iii) this dispute, which appears from the correspondence to date back as far as the end of 2009, was only referred to the Secretary of State for determination on 18th May 2011¹; and
 - iv) consequently, Ms X finds herself the subject of a second ordinary residence determination in a little over three years².
4. CouncilA has subsequently written to the Secretary of State on 26th July 2011 to state that it has heard from Solicitors for Ms X and her aunt that her aunt supports CouncilA’s representations and that Ms X’s aunt agrees that Ms X’s ordinary residence is now in CouncilC. It is not normal practice to receive representations from the individual whose ordinary residence is in dispute, from their litigation friend, or from their relatives, unless there is a particular factual dispute to which it is felt that they can contribute evidence in addition to that already provided by the local authorities. In this case, it was not felt that these further representations

¹ Direction 4 of the 2010 Directions, which have applied since 19th April 2010, state “*If the local authorities in dispute cannot resolve the ordinary residence dispute within four months of the date on which the dispute arose, they must refer the dispute to the Secretary of State in accordance with direction 5.*”

² See OR 3 2008.

from Ms X's aunt were necessary to enable to Secretary of State to form a full picture.

Facts of the case

5. Ms X was born on xdate 1982 in CountryK. Her native dialect is Language1, a language spoken by less than 5% of the population of CountryK. Whilst the Statement of Facts indicates that she is not able to communicate in English, the witness statement of Safeguarding Practice Advisor for CouncilC dated 23rd September 2010 (prepared for the purposes of proceedings before the Court of Protection) states that Ms X's aunt:

“...has led professionals to believe Ms X [sic] only speaks Language1 and therefore usually acts as interpreter for her. It has now been established following her stay in JCare Home that she is able to understand 3 other languages as well as English. She is able to communicate her needs in simplistic ways using broken English and Language1 and is able to follow clear instructions in English.”

6. Ms X suffers from a mild to moderate learning disability and schizo-affective disorder. For the purposes of section 2 of the Mental Capacity Act 2005, these amount to impairments in the functioning of the mind or brain. Both authorities submit that Ms X lacks the necessary mental capacity to make decisions as to where she should reside.
7. When Ms X was 6-8 years old, her mother left CountryK and eventually settled in the CouncilB, where she married and had three children. Ms X lived with her grandmother in CountryK, often staying with her aunt for extended periods of time.
8. On the 1st October 2001, after the death of her grandmother, Ms X went to live with her mother, step father, 3 half sisters and her aunt in CouncilB (located in CRegion).
9. In 2003 Ms X's aunt applied for asylum in the United Kingdom and was “dispersed” to CouncilA in accordance with the national policy of the Home Office at that time. She took up residence there with her two sons, SonU and SonV.
10. In July 2004 Ms X's mother was arrested for involvement in a child trafficking network (in a fraud known as the ‘miracle baby scam’) whilst she was visiting CountryL. She was subsequently convicted, and imprisoned, in CountryL.
11. On 14th September 2004 Ms X's step-father requested that Ms X be removed from the family home as he could not provide the care she needed and she had displayed aggression towards her half siblings. CouncilB undertook a reassessment of Ms X's needs and placed her in residential accommodation on 24th September 2004.
12. In December 2004 Ms X's aunt requested that Ms X be moved to CouncilA to live with her. A review in June 2005 concluded that Ms X had behavioural problems

rather than mental health issues. A multi-disciplinary team concluded that Ms X would benefit from living with her aunt, and CouncilA was requested to carry out a carer's assessment of the aunt, which concluded that the aunt should be considered to be a suitable carer.

13. On 26th September 2005 Ms X moved to CouncilA to live with her aunt and the aunt's two sons at MCourt. Initially this was expressed to be a visit, but after a six week review CouncilB concluded that Ms X had settled satisfactorily with her aunt and on 14th December 2005 it sent a transfer summary to CouncilA. The Secretary of State later determined that Ms X was ordinarily resident in CouncilA from this point³.
14. On 18th January 2006 discussions took place between a social worker from CouncilA and the aunt about the availability of Language1 speaking support workers to help with Ms X's care. At that time, and it continues to be the case that, there are no known Language1 speaking care assistants living in the CouncilA area.
15. On 30th March 2006 Ms X's aunt received permission to remain in the United Kingdom, and expressed her desire to return to live in CRegion. By 20th April 2006 she had sought support from CouncilA to do so. On 2nd May 2006 Ms X's aunt asked CouncilA not to seek a Language1 speaking care worker prepared to relocate to CouncilA as she had decided to move to CRegion. The aunt applied to various CRegion Councils for housing, but her applications were unsuccessful.
16. On 7th June 2006 Ms X's Solicitors threatened judicial review proceedings against CouncilA on the grounds of failure to carry out a needs assessment for Ms X under section 47 of the NHS and Community Care Act 1990 and failure to fulfil duties under section 21 of the 1948 Act.
17. On 5th October 2006, following CouncilA's response and a pre-action protocol letter from the Solicitors to CouncilB, the Solicitors commenced judicial review proceedings against CouncilB, naming CouncilA as an interested party. On 12th December 2007 the Solicitors suggested that the authorities co-operate and seek an ordinary residence determination from the Secretary of State under section 32(3) of the 1948 Act. On 25th July 2008 the Secretary of State determined that Ms X was ordinarily resident in CouncilA from 14th December 2005.
18. On 30th September 2008, in light of the Determination, the Judicial Review proceedings were settled by means of a Consent Order in the following terms:

*“Upon the interested party having assessed the Claimant within its community care assessment dated [undated] as having an eligible need to live in the CRegion, for the purpose of being enabled to access day care, respite, support services and social links with people able to speak her language (Language1).
And upon the interested party undertaking to assist the Claimant's litigation friend to identify and obtain appropriate rented property within the CRegion by commissioning a brokerage service to identify and assess properties potentially*

³ See OR 3 2008.

appropriate for the Claimant, the Litigation Friend and the Litigation Friend's sons SonU and SonV to occupy.

And upon the Interested Party undertaking to assist the Claimant's Litigation Friend to inspect and approve any property identified as potentially appropriate by taking the following steps:-

- (a) Paying for the Litigation Friend's transport (subject to production of receipts or tickets) between CouncilA and CRegion, and for travel within CRegion, limited to travel to CRegion to approve property.*
- (b) Funding and where necessary providing personal care for the Claimant which becomes necessary during any absences of the Claimant's litigation friend arising from journeys made under (a) above.*
- (c) Paying for the removal costs of the Claimant and her caring family to CRegion.*
- (d) Providing a sum equivalent to a maximum of three months rent to enable to [sic] Claimant or her Litigation Friend to provide bond and advance rent to any landlord.*
- (e) Using its best endeavours to arrange (whether directly or indirectly) for an occupational therapy assessment of any potentially appropriate property (approved by the litigation friend) to be carried out within seven days of approval.*
- (f) Using its best endeavours to make arrangements with the local authority in whose area the suitable and selected property is located for the provision by them (at the Interested Party's expense) of services appropriate to meet the needs of the Claimant as assessed in its community care assessment dated [undated].*

IT IS ORDERED that:-

- 1. The Claimant have permission to withdraw these proceedings on the understanding that the Claimant shall not pursue any future court claims relating to or arising from any aspect of this matter from CouncilB.*
- 2. There be no order for costs save for detailed public funding assessment of the Claimant's costs."*

19. Notwithstanding it having agreed to the making of the Order, CouncilA does not accept that it has ever assessed Ms X as having an eligible need to live in CRegion (where CouncilC is located).

20. On 19th December 2008 the last Assessment before Ms X's move to CouncilC was conducted and noted:

- "It has always been difficult to assess Ms X's level of learning disability because of the language issue."*
- "Ms X needs to feel safe in this country and living with her aunt supports this"*
- "Ms X is very attached to the aunt and her family and it is my strong impression that she wishes to continue to live with them. Ms X clearly feels unsettled if her aunt is not present and not in the company of other Language1 speakers who can reassure her about her time of return. This is also evidenced in her behaviour. In the time that she has lived with them, her behaviour has become less challenging and family members visiting from abroad have suggested that she is more settled, less impatient and less demanding."*

- *“Ms X does not have capacity to make decisions but is able to express clear preferences which are taken into consideration. Ms X can express her preferences in Language1 or via behaviour.”*
- *“A Mental Capacity and Best Interests Decision has been carried out with the outcome to support relocation to CRegion, closer to informal support.”*

21. On 15th January 2009 Ms X’s solicitors wrote to CouncilA regarding Ms X’s placement with her aunt:

“Ms X’s placement

Our client Ms X’s aunt has now spoken to Ms X’s mother about this issue.

Ms X has consistently told her aunt that she would like to remain with her but to visit her mother. This is of course not practically easy whilst Ms X remains living in the region of AreaA (where CouncilA is located).

Her aunt considers that Ms X’s wishes need to be taken very seriously but she does not believe that Ms X has capacity to make a decision about this issue because she is not capable of understanding risks.

The aunt’s view is that Ms X should remain living with her in CRegion (where CouncilC is located) in which place with relative ease she will be able to spend time with her mother as she wishes.

The aunt understands that Ms X’s mother now agrees with her view although of course you will wish to ascertain this yourselves.

In addition to believing in principle that Ms X’s best interests lie in remaining with her, the aunt believes that it would be wholly inappropriate for Ms X to return to live with her mother in her current accommodation.

We understand that this is a two bedroomed flat in CouncilB which is occupied by Ms X’s mother, step-father and 3 siblings aged 17, 12 and 11. The reason why Ms X’s step-father asked social services to look after Ms X in the first instance was that he said that she had been acting aggressively towards her step-sisters.

We have already highlighted the difficulties of the relatively mild overcrowding which exists in the current accommodation and quite clearly it would be contrary to Ms X’s interests for her to return to live with her mother and family in the current accommodation.”

22. In compliance with the Consent Order, CouncilA instructed a broker to identify suitable properties in the CRegion. Discussions took place between the aunt and the broker, and a proposal for the brokerage service was prepared on 4th February 2009. In this proposal it is stated that the aunt had identified CouncilC as a suitable place to live based on her own research of the area.

23. During the first half of 2009 Ms X’s aunt contacted a number of CRegion Councils, but was unsuccessful in securing accommodation. The aunt identified a

number of privately offered properties, but the monthly rent exceeded the Local Housing Allowance, and the question of payment of a 'top-up' of any shortfall was raised with CouncilA.

24. In early August 2009 the aunt identified a property at 10 KPlace, CouncilC, and entered into a tenancy agreement at a rent of £1250 per month — some £50 per month higher than the Local Housing Allowance. The aunt's signature of the tenancy agreement was witnessed by a social worker from CouncilA.
25. On 21st August 2009 Ms X moved to the property with the aunt and her children.
26. Ms X's aunt applied to CouncilC for housing benefit and council tax benefit, and this application was granted on 25th August 2009. An application to CouncilC for a discretionary housing payment of £11.54 a week (to cover the £50 per month shortfall) was rejected on 17th September 2009. CouncilA prepared draft letters for the aunt to send to CouncilC to assist with an appeal against this rejection, and to ask for payment of housing benefit to be backdated to 21st August 2009, when the tenancy began.
27. Since Ms X's move to CouncilC, CouncilA has continued to fund a domiciliary care package for Ms X by means of the provision of a Direct Payment to the aunt to meet Ms X's needs.
28. On 5th October 2009, shortly after Ms X's move to CouncilC, an Assessment was undertaken by CouncilA and noted:
 - *“Ms X will take time before she is prepared to look at and converse with new people and will require either an interpreter or her aunt to be present. Ms X is best able to understand simple language, especially if this is combined with appropriate gestures. Ms X can use behaviour as a means of communicating and this can include bouts of screaming and physical aggression. This was particularly evident when she was unwell in 2005.”*
 - *“When out in the community, Ms X can be unpredictable and she has been known to run away from her carer, become aggressive or sit down and refuse to move. This behaviour has reduced as Ms X has come to feel more secure with her aunt and cousins. At the time of the move to CouncilC, there has been some increase in these behaviours due to her raised anxiety. These have now begun to reduce again but it will be some weeks before Ms X feels as secure as she had become in CouncilA.”*
 - *“[Ms X's aunt] also recognises that Ms X has a particularly strong attachment to her and her sons and knows that she feels safe within their family unit. The aunt feels that she is the best person to provide this care and says that she has had telephone contact with Ms X's mother confirming that it is her wish also that the aunt continues to care for her rather than other family members. Ms X's mother has not made any approach to the aunt to share in the care of her daughter and Ms X has clearly said that she does not want to spend time with her mother.”*
 - *“Ms X was present during most of the [assessment] meeting and was able to contribute her views / opinions. ... Ms X's expressed wish is to stay with her aunt as her main carer, wherever the aunt was to live.”*

- *“A Mental Capacity and Best Interests Decision for Ms X has been carried out with the outcome that Ms X wants to live with her aunt wherever she lives but that the aunt wants to live in the CRegion, closer to informal support networks and where it is more easy to get culturally appropriate support for Ms X.”*
- *“Ms X’s mother, has recently returned from CountryL and CouncilB have provided an assessment as to her suitability to provide care. Ms X does not want to live with her mother.”*

29. On 10th September 2009 CouncilA wrote to CouncilC to advise that Ms X had moved to KPlace (in CouncilC), and on 5th November 2009 wrote again to say:

“Given the content of my previous letter I am now writing to ask that CouncilC Social Services take case responsibility for Ms X as she is now ordinarily resident in your area. If this course of action is acceptable to you I would suggest that we aim to transfer this responsibility within three months of the date of this letter.”

30. On 21st December 2009 a further letter from CouncilA stated that CouncilA intended to hand over case responsibility to CouncilC on 5th February 2010. CouncilC responded by saying that it was aware of the existence of the Consent Order and asking for details of its precise terms. It also stated:

“It would appear that the placement in CouncilC by CouncilA follows the identification of an eligible need relating to the Language1 culture, and as such there has been no voluntary change of ordinary residence on behalf of the family.”

31. Further correspondence ensued between the authorities regarding the terms of the Consent Order, and the relevance or otherwise of that to the question of the ordinary residence of Ms X.

32. On 27th June 2010 the aunt went to CountryK on a two month holiday. Ms X remained at KPlace. An increase in the direct payment / care package was put in place by CouncilA to support Ms X during the time her aunt was away.

33. On 19th July 2010 a planned assessment of Ms X by CouncilA under section 47 of the National Health Service and Community Care Act 1990 took place. A number of concerns were identified, and a decision to refer the matter to CouncilC as the Host Authority under the Safeguarding Adults Policy and Procedures was made. A Safeguarding Strategy meeting was held on 21st July 2010 involving representatives from CouncilC and CouncilA and a decision was taken to remove Ms X to Care Inspiration’s Intensive Rehabilitation Unit in CouncilE while the Safeguarding Adults Investigation continued. CouncilA paid the costs of this.

34. On 29th July 2010 a best interests decision was made to move Ms X to JCare Home, a residential unit in CouncilE. This decision was adopted by the Safeguarding Adults case conference held on 9th August 2010, involving representatives from CouncilC, CouncilA and CouncilC Primary Care Trust.

35. CouncilA applied for and was granted permission to make an application for declarations and Orders in relation to Ms X in the Court of Protection. In the

course of the proceedings, the Official Solicitor interviewed Ms X, who expressed a strong and consistent wish to return to live with her aunt.

36. On 20th October 2010 an interim Order of the Court of Protection declared:

- “1. *Ms X lacks the capacity to litigate.*
2. *Ms X lacks the capacity to make decisions as to where she should reside.*
3. *Ms X lacks the capacity to make decisions about contact with others.*
4. *Ms X lacks the capacity to make decisions regarding the assessment of her care and health needs and how those needs should be met.*
5. *It is lawful being in Ms X’s best interest that she continues to reside at JCare Home, CouncilE, until Tuesday 26 October 2010.*
6. *It is lawful being in Ms X’s best interest that she resides at 10 KPlace, CouncilC from Tuesday 26 October 2010.*
7. *It is lawful being in Ms X’s best interest to have limited contact with Ms X’s mother in accordance with the attached schedule 2.”*

37. Ms X remained resident at JCare Home until 26th October 2010, at which point she returned to her aunt’s home at KPlace. She has resided there since that date.

Relevant law

38. I have considered all the documentation submitted by both parties. This includes the Statement of Facts prepared by CouncilA and commented upon by CouncilC and representations from both local authorities. I have also considered the provisions of Part 3 of the 1948 Act, the Department of Health guidance in LAC(93)7⁴ and “*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*”⁵, the leading case of R v Barnet ex parte Shah (1983) 2 AC 309 (“Shah”), Levene v Inland Revenue Commissioners (1928) AC 217 (“Levene”), the House of Lords decisions in R v Waltham Forest London Borough Council, ex parte Vale, the Times 25.2.85 (“Vale”) and Chief Adjudication Officer v Quinn Gibbon [1996] (“Quinn Gibbon”), and R on the application of the London Borough of Greenwich v the Secretary of State [2006] EWHC 2576 (“Greenwich”). My determination is not influenced by the fact that CouncilA is currently providing Part 3 services.

39. 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 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,

⁴ LAC(93)7 was the guidance applicable at the relevant time, and until 19th April 2010.

⁵ Updated edition of the guidance which replaced LAC(93)7, published on 15th April 2011.

subject to further provisions of that Part, the authority in whose area the person is ordinarily resident.

40. 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.
41. 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 and 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 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....”

42. Section 24 of the 1948 Act 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”*.
43. Section 24(4) of the 1948 Act provides that the local authority in which a person is physically present but not ordinarily resident has a power to provide residential accommodation, as long as they have the consent of the local authority in which the person is ordinarily resident and they would have a duty to provide residential accommodation were the person ordinarily resident in their area.
44. The duty to provide welfare services under section 29 of the 1948 Act similarly relates to those ordinarily resident in the area of the local authority.

Application of the law

45. CouncilC submits that Ms X was placed by CouncilA with her aunt in CouncilC pursuant to the Consent Order and that the provisions of section 24(4) of the 1948 Act govern the financial arrangements currently in place between CouncilA and the aunt. It therefore submits that the deeming provision in section 24(5) of the 1948 Act applies.
46. CouncilA submits that, even though Ms X was determined to be ordinarily resident in CouncilA from 14th December 2005, she was not after that date provided with any accommodation under section 21 of the 1948 Act. CouncilA submits that Ms X was not at any time after 14th December 2005 a person in need, within the meaning of section 21 of the 1948 Act, as Ms X had met and was capable of meeting Ms X's accommodation, care and other needs. Accordingly, CouncilA submits that section 21(5) of the 1948 Act did not, and could not, apply at the time of Ms X's move to CouncilC.
47. The case of R v Tower Hamlets London Borough Council, ex parte Wahid [2002] EWCA Civ 287 is authority for the proposition that arrangements under section 21 of the 1948 Act can include arrangements to provide "ordinary housing" as well as residential care. However, it is clear that the deeming provision in section 24(5) of the 1948 Act cannot apply because the requirements for residential accommodation in the private and voluntary sector as set out in section 26 of that Act (see paragraph 41 above) are not met.
48. The accommodation in CouncilC is being provided by Ms X's aunt, who rents her house from a private landlord; it is not being provided by the local authority under Part 3 of the 1948 Act. The payment arrangements under sections 26(2) and (3A) outlined in paragraph 41 are not met because there is no provision for the making of payments by CouncilA to the aunt in respect of the accommodation provided; the aunt pays the rent for the house and CouncilA does not make any contribution to the rent and has not agreed to make up any shortfall. Indeed, the rent is paid by the aunt using housing benefit provided by CouncilC⁶. Therefore, Ms X's residence at her aunt's house cannot lawfully be accommodation provided under Part 3 of the Act.
49. I also need to consider whether, on the basis of the Greenwich case, Ms X must be treated as remaining ordinarily resident in CouncilA, by virtue of section 24(5) of the 1948 Act, because CouncilA **should have** provided her with residential accommodation under section 21 of that Act.
50. 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 R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, at 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

⁶ Housing benefit claim reference XxxxX.

housing legislation, is not entitled to accommodation under this provision. Ms X is living with her aunt in a private residential arrangement and the care and attention that she requires is and has been available to her in her aunt's home. Therefore, this is not a case where CouncilA should have provided residential accommodation under section 21 of the 1948 Act.

51. On the basis that that Ms X cannot therefore be deemed to continue to be ordinarily resident in CouncilA under section 24(5), her ordinary residence falls to be determined in the normal way in the light of case law and guidance.
52. I should point out, however, that my determination of ordinary residence pursuant to the 1948 Act is without prejudice to the question of whether CouncilA has any obligation to CouncilC, pursuant to the Consent Order dated 30th September 2008, to meet the expense of services for Ms X assessed by CouncilA in the community care assessment referred to in that Order. That is not a matter for the Secretary of State, but is for the two authorities to resolve between themselves.

Capacity

53. The first issue which it is important for me to address is that of Ms X's mental capacity, in particular her ability to make decisions about where she wishes to live. This is because this will affect the test to be applied in determining ordinary residence.
54. The current test is 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).
55. LAC(93)7, which applied at the relevant date, provides guidance about mental capacity; paragraph 13 states that, in general, an adult with a learning disability should be regarded as capable of forming an intention of where he wishes to live.
56. However, both authorities submit that Ms X lacks the necessary mental capacity to make decisions as to where she should reside. This view is supported by the last assessment before Ms X moved to CouncilC (dated 19th December 2008), the first assessment after she moved to CouncilC (dated 5th October 2009) and, more recently, by the interim Order of the Court of Protection given on 20th October 2010. Accordingly, Ms X's ordinary residence falls to be determined in accordance with the case of Vale.
57. Vale makes clear that in cases 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. In Vale, the judge rejected the view that ordinary residence continued at a place which Ms Vale had finally left or that it could be at a place which she anticipated residing in the future. The solution adopted was to treat Ms Vale as residing at her parents' home, by analogy with the position of a small child. That was because, even though she resided in a residential care home, her parents' home was her "base". In this case, Ms X's mother and step-father are unable to look after her and, pursuant to the interim order of the Court of Protection, Ms X has only monitored telephone contact with her mother once a week. Therefore, Ms X's parents' home cannot be described as a "base". Further, I do not consider that the aunt is responsible for Ms X in the way that a parent is for a child and, despite the number of years so far spent acting as carer to Ms X, do not consider that her aunt can be treated, by analogy as a "parent".⁷

58. 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. 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.

59. In Shah, Lord Scarman held—

"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 '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."

Further, 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."

60. LAC(93)7 (which was the guidance applicable until 19th April 2010) provides clear guidance on determining a person's ordinary residence. It states: *"The concept of ordinary residence involves questions of fact and degree, and 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."*⁸

Determination

61. Ms X moved to CouncilC on 21st August 2009 to live with her aunt. With the exception of the period between 29th July 2010 and 26th October 2010 (when she was removed to JCare Home, in CouncilE), Ms X has been residing with her aunt

⁷ A similar determination was made in relation to the aunt's status in OR 3 2008.

⁸ The same point is made at paragraphs 18 and 19 of the most recent guidance: *Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England* (2011).

in CouncilC for over 2 years. There is no indication that Ms X is unhappy living with her aunt, and CouncilA submits that during an interview with the Official Solicitor for the purposes of proceedings before the Court of Protection, Ms X expressed a strong and consistent wish to live with her aunt. She appears to have a strong attachment to her.

62. It is clear that Ms X's move to CouncilC to live with the aunt and her family was planned as a permanent move. This is supported by the judicial review action, the terms of the Consent Order dated 30th September 2008 (although the Order itself has no direct bearing on the determination of ordinary residence in this case, since the involuntary nature of Ms X's move to CouncilC is not relevant under the alternative Vale test), and the subsequent brokerage service proposal. There is no indication on the facts that Ms X did not want to continue to stay with the aunt and her family or that she was unhappy (although it is noted that her behaviour was affected for a period after the move). Since the move, Ms X has no remaining family members in CouncilA, and has no other ties to the area. Ms X appears to be settled in CouncilC.
63. The other alternative is that she had no settled residence, which is not appropriate given her links to CouncilC at the material time.
64. In conclusion, my determination is that since 21st August 2009 Ms X has been ordinarily resident in CouncilC.

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

Dated.....