DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF MR X (OR 12 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 Mr X for the purpose of Part 3 of that Act. The period for which Mr X's ordinary residence is in dispute is from 12th August 2009 (being the date from which CouncilA Primary Care NHS Trust decided that Mr X was no longer eligible for NHS continuing healthcare) until the present time.

The facts of the case

2. The following facts are derived from the agreed chronology and agreed bundle of documents provided by CouncilA.

3. Mr X was born on xdate 1975.

4. On 24th August 1999 Mr X sustained a hypoxic brain injury. At this time he was living in CouncilA.

5. On leaving hospital in 2000 Mr X was admitted to KHouse in CouncilB. KHouse is a neuro-behavioural rehabilitation unit registered as an independent hospital and run by KHouse Ltd which is part of the Disabilities Trust Group ("the Disabilities Trust").

6. On 31st October 2005 Mr X moved to LHouse in CouncilC which is a residential rehabilitation centre run by the Disabilities Trust.

7. On 3rd April 2007 Mr X moved to a transitional living unit linked to LHouse.

8. On 5th September 2007 Mr X moved to a supported living placement house at 54 C1Road, CouncilC which was run by the Disabilities Trust. This placement is based upon shared accommodation with shared domiciliary care. Mr X asked to remain in CouncilC because of the relationships that he had made and because he had a girlfriend in the area. Whilst living there, he was the victim of financial abuse by one of his carers. Mr X requested a move to a new supported living placement.

9. On 13th August 2008 Mr X moved to Flat 43, MLodge, CouncilB. This was another supported living placement run by BIRT (also part of the Disabilities Trust group). It was similar arrangement to that which Mr X had enjoyed at C1Road. Mr X signed a licence to occupy agreement with BIRT, whilst the consultant neuro-psychologist signed a capacity to consent to admission form admitting Mr X to the BIRT (Disabilities Trust) service on the basis that Mr X did not have the capacity to consent. Housing benefit was paid to Mr X by CouncilB. It appears that Mr X was not seeking to make a fresh start in CouncilB, but a placement was by chance available in MLodge and he was able to share with another service user who he had previously shared with. This placement was funded by CouncilA PCT as NHS continuing health care (except in relation to the costs of the accommodation for which Mr X was responsible and in relation to which he received housing benefit).

10. On 12th August 2009 CouncilA PCT reassessed Mr X against Continuing Healthcare criteria and decided that Mr X was no longer eligible for continuing health care. This decision was communicated to Mr X by letter from CouncilA PCT dated 17 August 2009.

11. On 24th March 2010 CouncilA visited Mr X with a view to completing a community care assessment. Following this visit, Mr X assaulted another resident at MLodge. Dr Q, Mr X's consultant psychiatrist who worked for the Disabilities Trust at the time, suggested that this was a reaction to the visit of CouncilA and Mr X believing that this visit might lead to his having to move from MLodge (CouncilB). On 25th March 2010 Mr X left MLodge and went to a pub. Dr Q escorted Mr X from the pub to KHouse with the agreement of Mr X. KHouse Ltd in a letter of 20th January 2011 says that Mr X was admitted to KHouse at the request of CouncilA. This is disputed by CouncilA in its submissions to the Secretary of State.

12. On 31st March 2010, a meeting was held between CouncilA and the Disabilities Trust. The Disabilities Trust recommended that Mr X did not need the level of support provided by KHouse.

13. On 1st April 2010 moved to NHouse which is situated within the grounds of KHouse and which is run by the Disabilities Trust. It is a licensee for the purposes of receiving care and support from the Disabilities Trust. Mr X continues to reside at NHouse.

14. On 18th May 2010 CouncilA wrote to CouncilB setting out its views that CouncilB was responsible for meeting Mr X's needs. On 24th September 2010 CouncilB wrote to CouncilA accepting responsibility for Mr X. However, on 9th March 2011 CouncilB withdrew its acceptance of responsibility by telephone. A letter dated 1st April 2011 from CouncilB to the Disabilities Trust sets out the reasons for this decision.

15. It appears that Mr X has both health and social care needs. CouncilA PCT agreed by letter dated 19th May 2011 to pay for Mr X's cost in relation to his health needs and has agreed to backdate this until August 2009. However, it appears that it has not made any payments to the Disabilities Trust. Neither local authority is making payments in respect of Mr X's care and support. The Disabilities Trust is owed over £152,000 in outstanding fees (as at 28th October 2011). Both local authorities have a duty under the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 to ensure that the existence of an ordinary residence dispute does not prevent, delay or otherwise adversely affect the provision of services to Mr X under Part 3 of the 1948 Act. Those Directions requires that one of the local authorities in dispute must provisionally accept responsibility for the provision of such services to Mr X, pending determination of the dispute. If the local authorities in dispute are unable to agree which of them is to accept provisional responsibility, the local authority in whose area Mr X is living must do so.

Relevant law

16. I have considered all the documentation submitted by both parties. This includes an agreed chronology, agreed index and bundle of documents and representations from both local authorities and responses of the Disabilities Trust to the submissions made by the local authorities. I have also considered the provisions of Part 3 of the 1948 Act, the Department of Health guidance in LAC(93)7[1] and "*Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England.*"[2], 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 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 PCT has agreed to pay Mr X's costs in relation to his health needs or by the fact that CouncilA took responsibility for meeting Mr X's social care needs when CouncilA PCT withdrew funding. Nor, is my determination influenced by CouncilB's letter of 24th September 2010 in which it accepted that Mr X was ordinarily resident in its area in August 2009.

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

18. 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.

19. 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.

20. 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*".

[1] LAC(93)7 was the guidance applicable at the relevant time, and until 19th April 2010. 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". An updated edition of the guidance was published on 15th April 2011.

21. Section 24(6) of the 1948 Act provides that a patient in an NHS hospital, including hospitals that are part of an NHS Trust, should be deemed to be ordinarily resident in the area, if any, in which they were ordinarily resident immediately before they were admitted as a patient to the hospital. Section 148 of the Health and Social Care Act 2008 extended the deeming provision in section 24(6) to include all settings in which NHS accommodation is provided and this amending provision came into force on 19th April 2010. Transitional provisions (article 12(1) of S.I. 2010/708) provide that the extended deeming provision shall not apply to those in non-hospital NHS accommodation immediately before the amendment to section 24(6) came into force on19th April 2010 and this continues to be the case for as long as they continue to be in that accommodation.

22. 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. Section 24 of the 1948 Act applies to residential accommodation only. It does not apply to services provided under section 29 of the 1948 Act.

Application of the law

23. The period for which Mr X's ordinary residence is in dispute is from 12th August 2009 when CouncilA PCT decided that Mr X was no longer eligible for NHS continuing care until the present time.

Submissions of the local authorities and the Disabilities Trust

24. CouncilA considers that Mr X was ordinarily resident in the area of CouncilB CC in August 2009. From August 2009, it argues, that on ceasing to be eligible for NHS continuing healthcare, Mr X was ordinarily resident in the CouncilB area. Mr X was living in settled accommodation and had been living there for a year at the time that CouncilA PCT determined he was no longer eligible for NHS continuing care. Although Mr X lacked capacity, the move to MLodge, CouncilB was in accordance with an expressed wish. CouncilA consider the second test in Vale should apply. Further, the deeming provisions in section 24 of the 1948 Act do not apply as Mr X was living in accommodation funded by housing benefit and was not living in accommodation as part of a NHS continuing healthcare package. The changes made to section 24(6) of the 1948 Act do not apply to anyone who was receiving NHS continuing healthcare immediately before 19th April 2010. Further, Mr X was not provided with accommodation under Part 3 of the 1948 Act at the time that ordinary residence fell to be determined.

25. CouncilB argues that when an individual ceases to be eligible for continuing health care funding, the provision of social care falls to the local authority in which the individual is ordinarily resident. CouncilB also considers that the second test in Vale is the appropriate test to be applied for the purposes of determining Mr X's ordinary residence. CouncilB argues that if Mr X lacked the capacity to enter into a licence agreement in respect of MLodge, CouncilB and was only in CouncilB because of a best interest decision, he cannot be said to have gained ordinary residence in CouncilB. Further, that Mr X did not gain ordinary residence in CouncilB because he was merely residing in CouncilB for the purposes of receiving support with his rehabilitation through the Disabilities Trust. CouncilB does not say in its submissions

where it considers Mr X to have been ordinarily resident in August 2009 or whether it considers Mr X have had no settled residence at that date. However, by letter dated 1st April 2011 it says that Mr X was ordinarily resident in the area of CouncilA.

26. The Disabilities Trust have submitted two documents in which they respond to each of the local authorities submissions. It is not usual for the provider of services to an individual to become involved with an ordinary residence determination. However, it is the Disabilities Trust that it currently bearing the financial cost of providing services and accommodation to Mr X. As I have considered the documents written by the Disabilities Trust's legal consultant, it is right that I should refer to them in this determination. In doing so, it should not be assumed that such documents from a provider of services would be considered in a future case.

27. The Disabilities Trust agrees with the submissions made by CouncilB and in particular, that Mr X moved to MLodge (Council B) in his best interests and because he knew another resident. The moves were merely transfers within the continuum of services and placements available within the Disabilities Trust. At no point has Mr X been in a condition to make a choice about where to live – rather Mr X has accepted what has been arranged in his best interests to further his opportunities for rehabilitation. CouncilA PCT has accepted responsibility for Mr X's health care needs and it would be illogical for Mr X to be ordinarily resident in CouncilA for the purposes of health care funding but ordinarily resident in CouncilB for the purposes of social care.

Discussion

28. The first matter to consider is the operation of the deeming provisions in section 24 of the 1948 Act. When Mr X sustained his brain injury he was living in CouncilA. On leaving hospital in 2000 he was admitted to KHouse, CouncilB which is an independent hospital. He then moved from KHouse, to LHouse, CouncilC which was a residential rehabilitation centre run by the Disabilities Trust.

29. The first point to note is that section 24 of the 1948 Act applies only where residential accommodation is to be provided under Part 3 of the Act. However, Mr X was responsible for the cost of his accommodation at MLodge and received housing benefit to enable him to pay for it. Consequently, the care provided to Mr X was (or should have been) domiciliary services under section 29 of the 1948 Act.

30. Even assuming that a local authority should have provided Mr X with accommodation under Part 3 on the withdrawal of funding by CouncilA PCT, the deeming provisions in section 24(6) of the 1948 have not operated to maintain Mr X's ordinary residence in CouncilA. This is because the version of section 24(6) of the 1948 that applies to Mr X operates only where a person was a patient in a hospital vested in the Secretary of State, a Primary Care Trust or an NHS trust. Section 24(6) of the 1948 was amended with effect from 19th April 2010 and transitional provision was made to exclude the application of the new provision in respect of persons in non-hospital NHS accommodation before that date. Whilst at MLodge, Mr X's accommodation was not provided or paid for by the NHS. Rather, he received NHS services funded by CouncilA PCT until 12th August 2009 when CouncilA PCT withdrew funding.

31. Turning to the question of Mr X's ordinary residence from 12th August 2009. Mr X lacks capacity and so his ordinary residence falls to be determined in accordance with the case of Vale.

32. 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, Mr X lost mental capacity as an adult. He is not dependent on his parents and lived independently for a number of years before he sustained the injury which left him lacking capacity to make decisions regarding where to live.

33. 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.

34. 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.*"

35. 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*."

36. I shall consider the following possibilities in relation to Mr X –

(1) that he was ordinarily resident in the area of CouncilA;
(2) that he was ordinarily resident in the area of CouncilB; and
(3) that he was of no settled residence.

37. In August 2009 Mr X had been living away from CouncilA for a considerable period of time. On leaving hospital in 2000 Mr X went to CouncilB. Since then he has been living in CouncilC and CouncilB. The papers reveal no continuing links with the CouncilA area. Dr Q (Mr X's consultant) in a letter dated 5th August 2010 says that Mr X was afraid of returning to CouncilA. The fact that CouncilA PCT has

funded Mr X's health needs is not a relevant consideration in determining Mr X's ordinary residence. Nor, is it relevant that CouncilA took decisions in relation to Mr X's social care needs.

38. A review report on Mr X prepared by the Disabilities Trust in relation to a review carried out on 30th March 2009 records that Mr X's mother and step father visited him on a fortnightly basis and that he had contact with his sister either by occasional visits or by telephone. His parents lived in CouncilC at the relevant time.

39. Mr X moved to MLodge in CouncilB on 13th August 2008. He had therefore been living at MLodge for a period of a year before CouncilA PCT decided that he was no longer eligible for NHS continuing healthcare. He continued to live at MLodge until 24th March 2010. There is no suggestion in the documents provided that the move was intended to be for a limited or finite period. The licence agreement that was signed on behalf of Mr X was not for a fixed duration. It appears that Mr X was not seeking to make a fresh start in CouncilB, but a placement was available at MLodge and he was able to share with another service used who he had previously shared with. The Disabilities Trust review report of 30th March 2009 records Mr X's social activities in the CouncilB area including visits to Cafe% at KHouse to visit friends two to three times a week and two pub visits a week. It records that Mr X enjoyed a varied and active weekly programme including swimming, going to the gym, visiting the town and socialising. It also refers to Mr X's intention to pursue voluntary work in the local area. The report concluded that Mr X "had made a very successful transition to MLodge, supported house, and has settled in very quickly".

40. The second test in Vale means that there is no requirement that Mr X should have made a choice to live at MLodge. It is not relevant that there was a best interests decision taken in respect of Mr X's residence at MLodge except in so far as it is evidence of a lack of capacity and the need to apply one of the tests set out in Vale.

41. I am mindful of the view taken by the court in Greenwich that finding a person to be of no settled residence is not a conclusion to be reached hastily given that it necessarily results in a lesser degree of protection for the person.

Conclusion

42. I am of the view that Mr X was ordinarily resident in the area of CouncilB from 12th August 2009. It is clear that at this date Mr X's residence at MLodge, CouncilB was of a settled nature and was part of the regular order of Mr X's life at that time.

Signed
Date