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

1. I am asked by CouncilA 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. The other local authority involved in relation to this matter is CouncilB.

2. I have received an agreed statement of facts and chronology prepared by CouncilA and signed by both CouncilA and CouncilB together with associated correspondence between the two authorities, two Care Programme Approach (CPA) Reports dated 23rd April 2013 and 29th October 2013 respectively, legal submissions of CouncilA and a letter from CouncilB in response to CouncilA's application for a determination dated 14th March 2014. Both authorities have been asked if they have any further relevant papers in their possession. No further papers have been provided so the Secretary of State has decided to make a determination on the basis of the papers submitted to him.

The facts of the case

3. The following information has been ascertained from the agreed statement of facts and the supporting documents supplied.

4. X was born in 1968 and lived in her own property in CouncilA's area. On 11th December 2001, she experienced a hypoxic brain injury following a drugs overdose and was admitted to a hospital in CouncilA. During 2002, she continued to receive health care funded by the NHS both at UnitT in CouncilM and hospital in CouncilN's area

5. On 21st May 2003, she was transferred by CouncilA's Primary Care Trust (PCT) to Accommodation31 in CouncilB's area for assessment to determine her needs in relation to a long term placement. According to their website, Accommodation31 is run by an independent provider.

6. On 16th August 2004, X moved to RehabilitationCentre312 for brain injuries in CouncilB's area. According to their website, this is managed by HealthcareProvider98, a company registered as a charity providing mental healthcare.

7. In February 2009, X was awarded 100% Continuing Healthcare funding and her care continued to be fully funded by CouncilA's PCT. The PCT placed X in Accommodation47 in CouncilB's area, a locked residential facility promoting community based recovery and reintegration, also managed by HealthcareProvider98. Since then, X has lived at this address continuously.

8. In January 2012, X's care needs were reviewed and she was re-assessed as no longer being eligible for 100% continuing healthcare but meeting the criteria for joint funded care with 60% social care need to be funded by the local authority and 40% health care needs to be funded by the NHS.

9. As set out in her CPA review reports, X has a diagnosis of organic personality disorder, affecting her emotions, needs and impulses. She presents with severe cognitive impairment and memory deficits. It is agreed by both local authorities that she lacks mental capacity to decide where to live.

10. Since January 2012, CouncilA has funded X's social care services under either Part 3 of the 1948 Act and/or section 2 of the Chronically Sick and Disabled Persons Act 1976 on a provisional basis pending determination of the dispute.

The relevant law

11. I have considered all the documents submitted by Council A and Council B, the provisions of Part 3 of the 1948 Act and the Directions issued under it, the guidance on ordinary residence issued by the Department, and the cases of *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Vale) v Waltham Forest London Borough Council* The Times 25.2.85 ("*Vale*"), *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 ("*Greenwich*") and *R (Cornwall) v Secretary of State for Health* [2014] EWCA Civ 12 ("*Cornwall*"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

12. Local authorities have power to provide people with accommodation under Part 3 of the 1948 Act. Section 21 of that Act provides:

> "Subject to, and in accordance with, the provisions of this Part of this Act, a local authority may, with the approval of the Secretary of State, and to such extent as may direct shall, make arrangements for providing-
>
> > (a) resident accommodation for persons aged 18 or over who by reason of age, illness or disability or any other circumstances are in need of care and attention which is not otherwise available to them…".

13. The Secretary of State's Directions issued under section 21 include directing local authority to make arrangements in relation to persons who are ordinarily resident in their area.

14. Section 24(3) states that:

> "Where a person in the area of a local authority-
>
> > (a) is a person with no settled residence; or
> >
> > (b) not being ordinarily resident in the area is in urgent need of residential accommodation under this Part of this Act,
>
> the authority shall have the like power to provide residential accommodation for him as if he were ordinarily resident in their area.".

15. Section 24(5) of the 1948 Act contains a "deeming" provision which covers arrangements where a person is placed by one authority within the area of another local authority. This states:

> "Where a person is provided with residential accommodation under this Part of this 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."

16. This provision applies to arrangements made by local authorities to place individuals in residential accommodation under section 21 of the 1948 Act.

17. Section 24(6) of the 1948 Act provides a further "deeming" provision in relation to NHS accommodation. The provision, as in force at the relevant time, 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. Section 24(6) of the 1948 Act was subsequently amended by section 148 of the Health and Social Care Act 2008 (c.14). Those changes extend the deeming provision in section 24(6) to all settings in which NHS accommodation is provided. As a result of this, people living in independent sector residential accommodation which is funded by the NHS (e.g. NHS Continuing Healthcare) do not acquire an ordinary residence in that area.

19. This amending provision came into force as of 19th April 2010. Transitional provisions provide that the extending deeming provision shall not apply to those in non-hospital NHS accommodation when the amendment to section 24(6) came into force on 19th April 2010 and this continues to be the case for as long as they continue to be in that accommodation. For these purposes, "non-hospital NHS accommodation" is NHS accommodation that is elsewhere than at a hospital vested in the Secretary of State, a Primary Care Trust, a local Health Board, a NHS Trust or NHS Foundation Trust. Since X was resident in "non-hospital NHS accommodation" before 19th April 2010, this determination must be based on the law as it existed prior to that date.

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.

21. The meaning of the term “ordinary residence” has been considered by the courts. In the leading case of *Shah*, 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.”

22. He went to say (on page 344 of the judgment)-

> “this is not to say that the “propositus” intends to stay where he is 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…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.”

23. The statement of facts asserts that Ms X did not have sufficient mental capacity at the appropriate time to form an intention as to where she wished to live. Although no expert opinion has been provided to me on this point I have no reason to doubt this assertion given the nature of X’s injury, her diagnosis and level of care.

24. Although the "voluntary and settled purpose" approach proposed in Shah cannot readily be used in these circumstances, the fact that a person does not have the ability to form a view or exercise choice in regard to their place of residence does not prevent them from having a place of ordinary residence. In such cases an alternative approach involves considering all the facts of the matter and the circumstances of the person, 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.

25. In the past this has been called the Vale approach and was considered by the Court of Appeal in *Cornwall.* In Cornwall the court considered *Mohamed v Hammersmith and Fulham LBC [2002] 1 AC 547* and *Re A (Children) (Habitual Residence)* [2014] AC 1, observing that the significance of the place of actual residence could not be ignored and in the context of severely incapacitated adults, there was much to be said for adopting an assessment of ordinary residence similar to that of habitual residence adopted for dependent children in *Re A* , namely that the ordinary residence would be the place which could properly be described as the centre or focus of the child's social and family environment.

26. Cornwall is currently subject to an appeal to the Supreme Court ("the appeal"). In view of this, the Department has proposed that it may stay determinations pending the appeal in cases which raise issues similar to those which are to be considered by the Supreme Court in *Cornwall* and the determination requires application of either the Vale or Cornwall approach.

The application of the law to the facts

27. The chronology attached to the statement of facts accepts that X was ordinarily resident in CouncilA's area immediately before sustaining her injury.

28. However, neither of the deeming provisions in section 24(5) nor (6) of the 1948 Act applies for the period from 21st May 2003 when X was transferred to accommodation in CouncilB's area. Section 24(5) does not apply because the placement was not initially made under Part 3 of the 1948 Act. The placement was made under the NHS Act 2006. Section 24(6) does not apply to prevent X from acquiring an ordinary residence while placed by the NHS at either Accommodation31, RehabilitationCentre312 or Accommodation47 because, given that they are all establishments run by independent providers, none are the type of accommodation referred to in section 24(6) prior to its amendment by section 148 of the Health and Social Care Act 2008 on 19th April 2010.

29. As from January 2012 when X was reassessed from having 100% NHS Continuing Healthcare to 60% local authority funded social care, it is the case that, essentially, the same placement became a placement under Part 3 of the 1948 Act. In *Greenwich*, it was considered whether the words "the residential accommodation" at the end of sub-section (5) could be taken to refer to the accommodation **prior** to it being provided under Part 3. The Court concluded that it could not and that, for the purpose of the deeming provision, the key date is the date on which Part 3 accommodation is actually provided – in this case from 1st January 2012.

30. The issue of X's ordinary residence therefore falls to be interpreted according to case law and guidance in order to determine where she was ordinarily resident immediately before Part 3 accommodation was provided from 1st January 2012.

31. Under the law as it applied prior to 19th April 2010, the Department's general approach in cases such as Ms X's is to make a starting, but rebuttable, presumption that the person will not acquire an ordinary residence while in NHS funded accommodation, but then to consider the application of that presumption to the particular facts of the case in light of all the relevant factors.

32. Both parties agree that X lacks mental capacity but in my view, there is nothing to suggest that X was in the same position as a child or young adult who retained a base with her family in CouncilA's area. I note that Ms X receives regular visits from her sisters who live in CouncilA's area and she has been on home visits to them from time to time, although, her daughter does not wish to have any contact with her at present. I also note that one of Ms X's sisters is her appointee for welfare benefits and that appropriate contact with her family is encouraged to promote a positive social network. However, there is nothing in the papers to suggest that her family have retained any responsibility for Ms X's care. Consequently the facts of this matter are neither similar to those of Cornwall nor to be considered on the appeal.

33. As a result, in my view, the alternative approaches apply; either the alternative approach in *Vale* (i.e. consider all facts including physical presence, nature and purpose of that presence, but without requiring X to have voluntarily adopted the residence) or the *Re A* assessment as applied in *Cornwall* (i.e. consider all the facts including the centre of the focus of X's social and family life.) For the reasons set out below, I think the application of <u>either</u> approach comes to the same result on the facts of this case and for that reason this determination has not been stayed pending the appeal.

34. On the basis of the information provided, the factors which I consider to be particularly relevant are as follows:

a) X was physically present in CouncilB's area on 1st January 2012 (when NHS Continuing Healthcare ceased) and had, at that stage, been living in CouncilB's area for over 8 and a half years;

b) After X's period of assessment at Accommodation31, X lived at addresses within the same care establishment - RehabilitationCentre312 and Accommodation47 – to enable her to receive the most appropriate care for her needs. There is no indication within the papers that her residence is intended to be merely temporary. Both her last CPA rep orts dated 23rd April and 29th October 2013 record that X is happy at the Accommodation47. There is no suggestion that she or her family want her to move. In relation to discharge planning, the reports state:

> "Ms X is an informal patient and so can leave of her own volition. She is currently residing on Accommodation47, a community based group home providing a supported living environment in a domestic setting with six residents. Accommodation47 offers more independent quality of life to help maximise X's potential to reach her optimum level of independence.
>
> There are currently no plans to discharge X from Accommodation47 and the MDT [Multi-Disciplinary Team] working with her feel she still benefits from the structure and support it provides her. Should any plans for discharge be considered, these will need to be made in close liaison with X's family, local care/commissioning team and, as best as possible, Ms X herself."

This indicates to me that there is a settled intention and purpose behind her placement at RehabilitationCentre312 and Accommodation47.

c) Although X has continuing links with the CouncilA area (i.e. her sisters continue to live there), there is no evidence that this area is the main focus of her life and activities from 1st January 2012 onwards. She has a structured timetable of activities in place at Accommodation47 and visits local shops regularly and attends escorted visits when organised. In addition, X attends WI meetings every month and participates in a sheltered work placement scheme on site. There is no suggestion that X's family want her to return to CouncilA's area to be closer to them.

35. On balance therefore, in the light of the apparently settled nature of the CouncilB area's placement, and all the other circumstances of the case (including the focus of X's social and family life), I conclude that the presumption against an ordinary residence being acquired in an NHS funded accommodation is rebutted in this case. I accordingly find that X was ordinarily resident in CouncilB's area immediately before 1st January 2012 and that she remains so resident during the time that Part 3 accommodation continues to be provided to her at this location.

Signed on behalf of the Secretary of State for Health

Dated