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

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.

2. The two local authorities have not specified the date from which they wish me to determine the place in which Mr X is ordinarily resident. But CouncilA have requested CouncilB to take over responsibility for meeting his needs from 30 June 2012. Therefore I assume they wish me to determine his place of ordinary residence on that date and I make my determination accordingly.

The background to the case

3. The following information has been ascertained from a statement of facts provided by CouncilA and which has been agreed by CouncilB. In making this determination, I have also considered the legal and further submissions provided by each of the two authorities, the documents listed in the Schedule of Documents and the other documents subsequently provided.

4. Mr X was born on X date 1962.

5. Mr X is diagnosed as having Aspergers Syndrome with a learning disability and problems with his hearing. Since 2006 he has lived in supported living accommodation at addressB1. The accommodation is owned by Community CareB1 who provide specialist care and support for people with autism spectrum conditions.

6. Before moving to addressB1, Mr X lived in a residential care home in locationC.

7. The two authorities do not agree the date on which Mr X moved to address1. A service delivery order from Community CareB1 to CouncilA gives details of services which were provided by them for Mr X from 30 August 2006 and Mr X signed a licence agreement in respect of his accommodation on 1st September 2006.

8. Mr X signed a revised licence agreement dated 10 March 2011 which indicates that his rent is £131.25pw. The two authorities dispute whether the rent is correctly stated. Mr X receives housing benefit of £125pw. CouncilB

assert that the rent is £131.25pw and that the shortfall between the amount of housing benefit and the amount of the rent is met by CouncilA. CouncilA assert that notwithstanding the figure in the agreement, the rent is £125pw.

9. An undated pre-admission assessment of Mr X's needs evidently carried out prior to his move to addressB1 records that he has recurring anorexia and was badly underweight. The assessment states he would not eat enough if left alone. He was assessed as having poor co-ordination and motor brain skills and very poor skills in shaving and hair washing The assessment indicates that he needed no support during the night or to get out and about by public transport or other means during the day but that he required supervision or support in relation to shaving and hygiene, cooking and laundry and budgeting. His living situation at locationC was described as "not ideal" because Mr X had no relationship with other residents and would be far from the whole family once his brother had moved from locationC.

10. According to the agreed statement of facts Mr X currently requires support managing his finances, including budgeting and paying bills and to maintain his personal hygiene, to go shopping, prepare meals and to do his laundry. An assessment of his needs carried out in May 2013 states that he has overall good health and is very able to make his needs known to others. However, he has limited self-care skills and needs considerable support with personal hygiene, is at times incontinent of faeces and urinates next to his bed. It also states that he is known to have a difficulty with hoarding and needs support to maintain his tenancy.

11. The reason for Mr X's move to addressB1 is not agreed by the authorities. CouncilA state he moved there because he wanted to live nearer to his parents' home in CouncilA. CouncilB note that addressB1 is some way from CouncilA and are not satisfied that Mr X had capacity to decide where he wished to live prior to moving to addressB1 and appear to hold the view that Mr X still lacks capacity to decide where to live. CouncilA is about 40 miles from CouncilB and there is a direct train service which takes about 75 minutes.

12. Mr X currently receives 47 hours of support each week from Community CareB1 being a mixture of 1:1 and shared support with other tenants. He also attends one day centre session a week and receives night support 7 days a week which is support which is available to all tenants at addressB1 and is provided at a cost of £6.20 per night.

13. CouncilA have continued to pay for the care and support provided to Mr X by Community CareB1. The current weekly cost of his care package is £957.38.

The relevant law

14. I have considered all the documentation submitted by both parties, the provisions of Part 3 of the 1948 Act, the guidance on ordinary residence issued by the Department of Health ("the Guidance"), the leading case of R v Barnet ex parte Shah (1983) 2 AC 309 (Shah), the House of Lords decision in Chief Adjudication Officer v Quinn Gibbon [1996] (Quinn Gibbon), R v Waltham Forest London Borough Council, ex parte Vale, the Times 25.2.85 (Vale), SL v Westminster City Council [2013] UKSC 27 (SL) and the case of R (Greenwich) v Secretary of State and Bexley (2006) EWHC 2576 (Greenwich). My determination is not influenced by the funding which CouncilA is currently providing for Part 3 services.

15. Section 21(1)(a) 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. The Secretary of State's Directions under section 21 provide that the local authority is under a duty to make arrangements under that section "in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof".

16. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

17. 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 that accommodation is being provided of such other services as appear to the authority to be required.

18. 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.

19. First, subsection (1A) requires that where arrangements under section 26 are made for the provision of accommodation together with nursing or personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated 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 the balance (and covering any unpaid fees).

20. Section 29(1) of the 1948 Act empowers local authorities to provide welfare services and is the power under which domiciliary care services are normally provided. Section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) supplements and relates to the welfare services provided under section 29 of the 1948 Act.

The application of the law

21. I have not been advised of where Mr X was ordinarily resident immediately prior to his move to addressB1. For the purposes of this determination I assume he was ordinarily resident in CouncilA by reason of the deeming provision in section 24(5) of the 1948 Act, even though his home was in locationC. On this basis, if it is shown that the accommodation in addressB1 has been provided under Part 3 of the 1948 Act from the time he moved there to the current day, the deeming provision will apply and he will be deemed to be ordinarily resident in CouncilA. But if the accommodation is not provided under Part 3 then the deeming provision does not apply and his ordinary residence will fall to be determined in accordance with its ordinary meaning as interpreted by the courts.

22. CouncilA asserts that Mr X moved to addressB1 because his brother was moving from locationC and he wanted to live closer to his father in CouncilA. It asserts that he is not being provided with accommodation under Part 3 of the Act but with domiciliary care under section 29 of that Act and section 2 of the CSDPA. CouncilB asserts that CouncilA placed him there and that he is in residential care pursuant to arrangements made by CouncilA under Part 3 of

the 1948 Act or, if not, that he should have been placed in such care by CouncilA and that in either case he remains resident in AreaA by reason of the deeming provision in section 24(5) of the 1948 Act.

23. It is true that the type of accommodation which can be provided by a local authority under section 21 is not limited to placements in residential care. It can also include placements in an ordinary flat or house. However, in order for accommodation to be provided under section 21 certain conditions need to be met. One of the conditions for qualifying for such accommodation is that the care and attention required by the person will not otherwise be available to them. In the case of SL Lord Carnworth made clear that this means that the care and attention which is required under the section must take some colour from its association with the duty to provide residential accommodation and the services provided must be accommodation-related, or effectively useless if the adult in question has no home. He also observed that whether care and attention is otherwise available was a matter best left to the judgement and common sense of the local authorities directly concerned and would not normally involve any issue of law requiring intervention of the court.

24. Mr X does have a home. He is living in a private albeit supported living arrangement, which is a licence of a flat that he has himself signed. Therefore, assuming that his needs are being properly met under the arrangements put in place by CouncilA, it is axiomatic that they can be met otherwise than by the provision of accommodation under Part 3.

25. This is consistent with the case of Westminster City Council) v National Asylum Support Service [2002] UKHL 38 in which 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 housing legislation, is not entitled to accommodation under this provision.

26. Furthermore, as indicated above, by reason of section 26(2) and (3A) the requirements for arrangements of accommodation to be classed as being made under Part 3 are for there to be in place arrangements which provide for CouncilA to make to Community CareB1 payments in respect of the accommodation provided at rates to be determined by or under the arrangements and that CouncilA shall either recover from Mr X or shall agree with Mr X and Community CareB1 that Mr X will make payments direct to Community CareB1 with CouncilA paying the balance (and covering any unpaid fees)

27. As already stated, Mr X receives housing benefit of £125 pw with which to pay his rent. In an email dated 22 March 2013 the General Manager of Community CareB1 states that Mr X's placement was :

"*Based on a shared understanding between Community CareB1 and CouncilA that CouncilA would retain financial responsibility for the full duration of the placement[s].*

I stated that at the time, CouncilA agreed funding another determination and Mr X's placements for their full duration, and that this was confirmed in writing – I provided a copy of this letter signed by a Senior Practitioner"

28. I do not appear to have been provided with a copy of that letter for the purposes of this determination. But I assume that the correspondence referred in the email is the same as or substantially similar to that referred to in paragraphs 13 and 14 of another determination which I made on 18th November 2013. For the reasons given in paragraph 29 of that determination I do not consider that the correspondence between CouncilA and Community CareB1 constitutes an agreement of the type envisaged by section 26 of the Act. In my view, at most they evidence an understanding that CouncilA would continue to fund care and support provided to Mr X under section 29 of the Act.

29. In addition section 26(1A) provides that if arrangements under this section are being made for the provision of accommodation together with nursing or personal care, they must not be made unless the accommodation is provided in a care home, as defined in the Care Standards Act 2000, managed by an organisation or person who is registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008.

30. Personal care is defined in regulation 2 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010[1] as:

    a) physical assistance given to a person in connection with-

        i. eating or drinking,
        ii. toileting,
        iii. washing or bathing,
        iv. dressing,
        v. oral care, or

[1] SI No 781

vi. the care of skin, hair and nails; or

b) the prompting, together with supervision, of a person, in relation to the performance of any of the activities listed in paragraph a), where that person is unable to make a decision for themselves in relation to performing such an activity without such prompting and supervision.

31. The pre-admission assessment referred to in paragraph 9 states that Mr X has recurring anorexia, was badly underweight and would not eat enough if left alone. Therefore it appears that Mr X did have a need for personal care in the form of physical assistance or prompting and supervision to eat or drink when he moved to addressB1. His poor co-ordination and motor brain skills and very poor skills in shaving and hair washing also suggest that he needed personal care in the form of physical assistance or prompting and supervision in connection with washing, bathing and the care of skin, hair and nails.

32. The assessment of his needs carried out in May 2013 states that Mr X has limited self-care skills and needs considerable support with personal hygiene, is at times incontinent of faeces and urinates next to his bed. It also states that without support he will self-neglect through not eating. It seems therefore that Mr X has had a need for personal care continuously since moving to addressB1.

33. As such, if the accommodation together with care and support has been provided by Community CareB1 pursuant to arrangements made by CouncilA in accordance with section 26 of the 1948 Act it must be provided in a care home, as defined in the Care Standards Act 2000, managed by an organisation or person who is registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008.

34. According to the CQC website the addressB1 flats are not registered and appear never to have been registered as a care home. Therefore, Mr X cannot lawfully be being provided with residential accommodation together with personal care by Community CareB1, pursuant to arrangements made by CouncilA.

35. My determination therefore is that Mr X has not been placed in accommodation by CouncilA under Part 3 of the 1948 Act.

36. CouncilB asserts that if he is not in accommodation under Part 3 of the 1948 Act the needs of Mr X when he moved to addressB1 were such that he should have been provided with such accommodation rather than with services under

section 29 of the Act and that following the Greenwich case CouncilA had a duty to provide him with such accommodation and its failure to do so does not affect the application of the deeming provision.

37. In support of its contention that CouncilA had a duty to meet Mr X's needs by the provision of care and support together with accommodation under Part 3 of the 1948 Act, CouncilB assert in essence that Mr X was in Part 3 accommodation immediately prior to his move to addressB1 and therefore, in the absence of evidence to indicate otherwise, his need must have been for the provision of such accommodation when he moved to addressB1. CouncilB also assert that the extent of Mr X's needs are such that they cannot be met otherwise than by the provision of accommodation.

38. It is true that Mr X has very substantial needs. However, in the absence of clear evidence to show that the needs could not be met otherwise than by the provision of Part 3 accommodation, I determine that they were appropriately being met by the provision of community care services under section 29.

39. Therefore my determination is that Mr X ceased to be provided with accommodation under Part 3 when he moved to and signed the licence agreement in respect of his flat in September 2006.

Ordinary Residence

40. The effect of my determination that Mr X is not provided with Part 3 accommodation is that the deeming provision in section 24(5) does not apply. His place of ordinary residence therefore falls to be determined in accordance with the normal rules. Such a determination is still necessary because Mr X still requires the provision of welfare services under section 29 of the 1948 Act. The local authority which has a duty to provide those services is the one in which he is ordinarily resident.

41. I now turn to consider this issue. When a person has the mental capacity to make a decision about where they should live then the relevant test of where that person is ordinarily resident is the one set out in Shah. Lord Scarman in his judgment stated:

"Unless therefore it can be shown that the statutory framework or the legal context in which the words are used requires a differing meaning, I unhesitatingly subscribe to the view that "ordinary residence" 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."

42. The Guidance provides that ordinary residence:

"should be given its ordinary and statutory meaning subject to any interpretation by the courts. 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".

Therefore, the words ordinary residence must bear their ordinary everyday meaning.

43. In my view Mr X's residence at addressB1 has a settled purpose. I consider that he entered into a licence agreement for the property for the purpose of living independently with support from specialist professionals trained to support people with his particular needs. I accept CouncilA's assertion that he moved from locationC to CouncilB area because he wanted to be closer to his father's home in CouncilA area. Although CouncilB area and CouncilA area are some 40 miles apart, I consider the two places are sufficiently close as to make this contention a reasonable one and in this context observe that page 3 of the assessment of May 2013 states that he "*continues to have a close relationship with his father*". I note too that Mr X is free to come and go and he does leave the premises to stay with his father at Christmas and Easter and has been on holiday abroad to stay with friends. There is no evidence to show that he fails to return to his flat of his own volition or that in the seven years he has lived there he has ever expressed a wish not to do so. He is involved in the community in that he is currently a Sideman at a church in CouncilB area and in a written statement states "*I regard my flat as my permanent home as I take part in church* activities". Furthermore, he signed a new licence agreement for the same flat in March 2011, and there is no evidence to show that he did so unwillingly or did not understand the consequences of doing so.

44. In my view these factors indicate that Mr X had adopted CouncilB as his place of ordinary residence by 30 June 2012 which is the date on which CouncilB have been asked by CouncilA to take over responsibility for paying for his needs for care and support.

45. Whether Mr X can be said to have adopted that residence "voluntarily" raises issues about his mental capacity. It could be argued that, if he does not have

the capacity to decide where he wishes to live, *Shah* does not apply and the alternative rules set down in the case of *Vale* should apply instead.

46. The test for capacity 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).

47. Section 1(2) of the Mental Capacity Act 2005 states that it should always be assumed that adults have capacity to make their own decisions relating to their accommodation and care unless it is established to the contrary.

48. The decision in question here is where Mr X wishes to live. There is no evidence before me to suggest that he is not able to make a decision as to where he wishes to live or to communicate that he does not wish to live at CouncilB. In view of the fact that he appears to return to the flat of his own volition after visiting his father and going away on holiday and considering also that he renewed the licence agreement in March 2011, I conclude that he has adopted his abode at CouncilB voluntarily and for a settled purpose and that he is accordingly ordinarily resident in CouncilB for the purposes of the 1948 Act and has been so resident since at least 30 June 2012. In this context I note that CouncilB accept that Mr X wishes to remain in CouncilB area in that their letter to CouncilB of 18 June states "*It is accepted Mr X wishes to remain in CouncilB area; it is how Mr X came to reside in CouncilB area which remains unclear*".

49. If, contrary to my view set out above, Mr X does lack sufficient mental capacity to form an intention as to where he wishes to live, his ordinary residence would fall to be determined in accordance with the body of case law, post-dating Shah and starting with Vale. Vale makes clear that in cases where a person's mental health 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. In the case of a person such as Mr X who has had a residence independent of his parents for a considerable period and is not totally dependent for his everyday needs in the manner of a small child upon the local authority or other care provider, that solution is not appropriate.

50. 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. In the absence of the deeming provision, it is not possible to conclude that Mr X remains ordinarily resident in CouncilA where he is no longer present. The alternatives are therefore that he resides in CouncilB or has no settled residence. The second alternative does not appear to fit the facts in this case. In light of all the facts as set out above, even were Mr X to be held to lack the relevant mental capacity to form an intention as to where he wished to live, my determination would still be that, for the purposes of the 1948 Act, he is ordinarily resident in CouncilB and has been since at least 30 June 2012.

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

Dated……..