DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014

1. I have been 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. The dispute is with CouncilB.

2. On 1 April 2015 relevant provisions of the Care Act 2014 ("the 2014 Act") came into force. Article 5 of the Care Act (Transitional Provision) Order 2015/995 requires that any question as to a person's ordinary residence arising under the 1948 Act which is to be determined by me on or after 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act.

The facts

3. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by CouncilA. CouncilB has not made any submissions or provided any documentation.

4. X is a 74 year old woman (d.o.b. XX.XX.41) with a diagnosis of paranoid schizophrenia. She has diabetes, high blood pressure and is incontinent. It is reported that she is compliant with all prescribed medication and attends a diabetes clinic. A placement review conducted by CouncilA on 27 September 2013 records that X is stable in her mental health and has been for some ten years.

5. I am told that, from 27 February 1991, X resided at Address1 in CouncilA. She moved to Address2 in CouncilB on 24 January 2003. CouncilA state that this was a supported living placement run by Organisation1.

6. X moved again, on 20 September 2011, to Address3, also in CouncilB. I am told that, again, this was a supported living placement run by Organisation1.

7. CouncilA state that: X pays for her current accommodation costs by way of housing benefit; support services are provided pursuant to section 29 of the 1948 Act; X does not receive services pursuant to section 117 of the Mental Health Act 1983.

8. CouncilA state that they are not aware of any evidence to rebut the presumption under section 1 of the Mental Capacity Act 2005 that X had

capacity to decide to move to CouncilB in 2003, although no formal capacity assessment was undertaken at the time.

9. CouncilA wrote to CouncilB on 20 January 2014 setting out its position that X is, and has been since 2003, ordinarily resident in CouncilB, requesting a response by 10 February 2014. Having received no response CouncilA again wrote to CouncilB on 10 March 2014 and 7 November 2014.

10. On 26 January 2015 CouncilB legal services responded by letter to CouncilA stating that a social worker from CouncilB would be visiting X on 23 February 2015 to carry out an assessment.

11. On 12 February 2015 CouncilA e-mailed CouncilB stating, in error, that a response had not been received to their letter of 7 November 2014 and requesting a response within 7 days. There being no response, CouncilA again e-mailed CouncilB stating that a referral to the Secretary of State would be made the following day in the absence of a response. A further e-mail was sent by CouncilA to CouncilB on 19 February retracting the earlier e-mail in light of CouncilB's letter of 26 January. A response was requested by 27 February to allow for the fact that CouncilB had said they were going to carry out an assessment on 23 February.

12. No response was received. CouncilA e-mailed CouncilB again on 26 February stating that a referral to the Secretary of State would be made the following day in the absence of a substantive response.

13. CouncilB did not respond to this e-mail and, on 2 March 2015, CouncilA referred this matter to me for determination enclosing a statement of facts and relevant documentation (including placement reviews dated 13 April 2010 and 27 September 2013 and an unsigned tenancy agreement in relation to Address3). CouncilA provided further legal submissions on 12 March 2015.

14. I wrote to CouncilA and CouncilB on 9 April 2015 inviting CouncilB to consider the statement of facts and make submissions within 28 days.

15. On 8 May 2015 CouncilA wrote to me noting that CouncilB had not provided submissions, requesting that I proceed to determine the dispute.

16. On 5 June 2015 I wrote to both parties noting that the deadline for further submissions had passed and that I would proceed to determine the dispute based on the information provided by CouncilA.

17. On 19 January 2016, I wrote to CouncilA requesting further information in relation to: X's move to Address2 in 2003; the funding of X's accommodation, what care and support services were provided and the statutory basis for the same. I also requested copies of any tenancy agreements (in addition to that already submitted).

18. CouncilA responded on 11 December 2015 enclosing a number of documents including the following:

    a. A letter from a Mental Health Social Worker to the Community Mental Health Team, dated 10 February 2003, which states that "in 2003 X was placed in supported living group home". It says that "the placement is funded by PCT (Community Mental Health Team) [but] the social care remains with [CouncilA]". CouncilA have clarified to me that the placement was *commissioned*, but not *funded*, by the PCT.

    b. Placement reviews dated 27 June 2008 and 17 August 2011. These reviews indicate that X was happy at Address2. They refer to a transfer of responsibility from the Community Mental Health Team (CMHT) (a joint service with CouncilA PCT (as it then was) to Adult Social Services Older Persons Service. I am told that this was an internal transfer that did not affect funding. The review dated 17 August 2011 states that "X makes a client contribution of £98pw from her housing benefit which is paid direct to Organisation1". CouncilA state that this was not accurate as the contribution related to the cost of her care; housing benefit was paid direct to Organisation1 but this would not have been used to pay for care and support.

    c. A tenancy agreement for Address2 dated 16 July 2003 signed by X and a tenancy agreement for Address3 dated 20 September 2011. The tenancy agreement for address2 describes "CouncilA Community Mental Health Team" (a joint service provided by CouncilA and, as it then was, CouncilA PCT) as the "guarantor" but the terms of the agreement do not require the Community Mental Health Team to underwrite the rent. Rather, the guarantor is required to "pay to support the tenant provided by the landlord" [sic]. This is stated to include help with daily independent living skills identified in the care plan, assistance maintaining contact with the social services and medical team, general counselling and support, attending CPA meetings, and help with claiming benefits.

d. Housing benefit documents including a letter dated 8 September 2006; confirmation of awards dated 13 December 2007, 18 January 2008, 19 March 2008, 23 March 2009, 10 March 2015; and a schedule of housing benefit payments dating back to 15 September 2003. I note that the amount of housing benefit paid was less that the total rent in respect of all of the awards prior to 10 March 2015.

19. Having reviewed these document, I wrote again to CouncilA on 19 January 2016 seeking further information as to the nature of the guarantee referred to in the tenancy agreement of 16 July 2003 and who paid the shortfall between the rent due under the tenancy agreement and the amount of housing benefit received by X.

20. CouncilA responded by letter dated 25 January 2016, stating that there was no guarantee separate from the tenancy agreement and noting that the relevant term did not require CouncilA to make up any shortfall in rent. CouncilA could not locate a copy of any contractual documentation between them and Organisation1. They provided me with a copy of a tenancy agreement dated 20 September 2009 which does not include the guarantee clause. They state that: "the change of terms was due to recognition across the board that where a single organisation provided both accommodation and support it was necessary to keep the two agreements contractually separate".

21. As to the housing benefit shortfall, CouncilA enclosed an e-mail from Organisation1 stating that: "the rents element for X have been fixed at £120pw for a placement with Organisation1 since 2003. No one paid the rent shortfall when the company was not awarded the full housing benefit."

The Authorities' Submissions

22. CouncilA submits that X is, and has been since 24 January 2003, ordinarily resident in CouncilB. It states that:

a. The accommodation at Address2 and Address3 was not provided under Part 3 of the 1948 Act, so the "deeming provisions" under section 24 do not apply;

b. There is no evidence that X lacked capacity to determine her place of residence;

c. Applying the *Shah* approach, X moved to CouncilB voluntarily for settled purpose.

23. As noted above, CouncilB has not made any submissions in this case.

The Law

24. I have considered all the documents submitted by CouncilA, the provisions of Part 3 of the 1948 Act and the Directions issued under it[2], the guidance on ordinary residence issued by the Department[3], and the cases of *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 ("Cornwall"); R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 ("*Greenwich*"), Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184 ("Quinn Gibbon"), and Mohammed v Hammersmith & Fulham LBC [2001] UKHL 57 ("Mohammed"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

25. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force. Article 6(1) of the Care Act (Transitional Provision) Order 2015/995 states that any person who, immediately before the relevant date, is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the 2014 Act.

Accommodation

26. 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 or disability or any other circumstances are in need of care or attention which is not otherwise available to them.

27. 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 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).

28. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal care under section 21 of that Act with any organisation other than a registered care home.

The relevant local authority

29. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State's Directions 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".

The deeming provision

30. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under Part 3 of 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.

Welfare services

31. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

Ordinary Residence

32. "Ordinary residence" is not defined in the 1948 Act. The Department of Health has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

33. In *Shah v London Borough of Barnet* (1983) 1 All ER 226, 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 "ordinary residence" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration"*

Application of the law to the facts

34. I accept CouncilA's submissions as set out above. I find that X has been ordinarily resident in CouncilB since 24 January 2003. Although the contemporaneous evidence is limited, I am satisfied that X moved voluntarily moved to CouncilB on this date for settled purpose. The signed tenancy agreement is dated 16 July 2003 but the review documents I have seen state that she moved before this date. Later care reviews indicate that she is happy in her current placement and her assessed needs are met. There is nothing before me to rebut the assumption of capacity under section 1(2) of the Mental Capacity Act 2005.

35. As to whether the deeming provisions under section 24 of the 1948 Act apply in respect of all or any of the relevant period, I have considered the significance of the guarantee clause in the tenancy agreement and whether this indicates that arrangements for accommodation should be treated as made under Part III of the 1948 Act. However, I note that the accommodation was not funded by the local authority and the guarantee did not require it to make up any shortfall in rent. As a matter of fact I am told that CouncilA did not make any contributions to rent. On this basis I accept CouncilA's submission that the care services it commissioned were provided under section 29 of the 1948 Act and the deeming provisions did not apply.

36. There is some uncertainty as to how the placement was funded before September 2003, this being the earliest date in respect of which I have seen evidence of housing benefit payments. However, in the absence of evidence to the contrary, I accept CouncilA's submission that the payments it made were purely in respect of care costs.

Conclusion

37. For the reasons set out above, I find that X is, and has been since 24 January 2003, ordinarily resident in CouncilB.