

DETERMINATION BY THE SECRETARY OF STATE REQUESTED UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 OF THE ORDINARY RESIDENCE OF X MADE IN ACCORDANCE WITH SECTION 40 OF THE CARE ACT 2014

1. I have been 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 (“OR”) of X.
2. The question of X ordinary residence arose under Part 3 of the National Assistance Act 1948 (“the 1948 Act”) and would, in the first instance, fall to be determined under section 32(3) of that Act. However, as from 1 April 2015, Part 1 of the Care Act 2014 (“the 2014 Act”) came into force for material purposes and previous social care legislation, including the 1948 Act, stopped applying in relation to England except in transitional cases. By virtue of article 5 of the Care Act (Transitional Provision) Order 2015 (S.I. 2015/995), 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 (disputes about ordinary residence). I make this determination accordingly.
3. For the reasons set out below, I find that X is ordinarily resident in CouncilB and has been since 14 August 2013.

The facts

4. The following information is taken from the statement of facts, legal submissions and bundle of documents (“the bundle”) provided to me by both local authorities and the further information requested by me and provided by CouncilA on 10 June 2015 in regard to arrangements between X, the licensor, the care provider and CouncilA.
5. X was born on x date 1981. He is on the Autistic Spectrum and has associated challenging behaviour and has a diagnosis of moderate learning disability.
6. I am advised on the papers that X lived at a shared flat within a large supported living scheme in HouseA in CouncilA with 24 hour staffing. X had been living at the address since 27 July 2001. However, I am advised that a breakdown in the placement led to X moving to HouseB, in the area of CouncilB on or around 14 August 2013. A letter from CouncilA to CouncilB dated 15 September 2014 states:

“X was taken to HouseB by his then social worker 1. He really liked the house and was pleased that he would be able to choose his own room. X was also glad to see that he knew other people living at the property. Our client instructs X made the decision to move and the social worker recalls that he said he liked HouseB because it was smaller and quieter than his previous accommodation at HouseA.

The reason for moving was not managing his challenging behaviour and so a more suitable placement was sought. HouseB was opened as a service for people with higher needs including challenging behaviour. For this reason, X was asked to consider moving there. X viewed the property and was very

keen to move there. There was no such service available in CouncilA. When it came to signing the license agreement X was fully supported. The agreement was read to him and he was asked to repeat the main points to them. It is important to note that X was provided with an easy-read version and he was deemed to understand what he was signing and why he was signing the document.”

7. The statement of facts records that X is able to prepare simple meals e.g. cereal and hot drinks independently. He requires support when preparing hot meals. He is able to wash and dress independently. He requires prompting to look after his personal care including looking after his hair and shaving.
8. The statement of facts records that X’s aggressive behaviour has to be managed in order to reduce the risk of him becoming distressed and to protect other residents and members of the public from his outbursts. At the time the statement was prepared, X had reached the point where he was able to participate in a 6 week course to develop his skills with the aim of taking up a voluntary role. The scheme was run by “Scheme8”. This is reflected in the FACE Needs profile and assessment.
9. The FACE Needs Assessment dated 30 September 2014 details X’s care needs as follows:
 - X needs verbal prompting to wear clean clothes and appropriate clothing
 - X needs practical support to maintain his personal appearance and prompting and support to shave
 - X needs verbal prompts to maintain his personal care to a satisfactory level
 - X is not on regular medication but is at times prescribed sleeping medication and requires staff to support him with this
 - X needs prompting or support to make hot drinks or meals
 - X needs prompting and practical support to complete domestic tasks
 - X needs support to plan his menu for the week and to maintain a healthy, well balanced diet
 - X needs support to manage his finances, benefits and budgeting and his correspondence and anything important for him to understand needs to be translated into a user friendly format with pictures and explained regularly if it is to impact his daily living
 - X is independent in taking walks to and around familiar places and can use familiar bus and train routes but requires support when accessing new places
 - X needs support in relation to social activities and relationships
 - X is supported by Scheme8and completing a course to enable him to develop the skills needed for voluntary job opportunities
 - X needs support in relation to his psychological well being including maintaining his routines, consistency and provision of information in a simplified user friendly way and with repetition
 - X needs ongoing support and guidance to manage and protect him from a number of risks
10. The FACE Needs Assessment describes his anticipated living situation as “Supp.living/tenancy – continuous support presence”.

11. X signs a license agreement for the payment of rent, service charges and utilities amounting to £208.20 per week. The licensor is SupportedHousingProviderT3 Ltd. X receives £150 in housing benefit each week which covers the rent element of his license charges. I am advised on the papers that X pays the remainder from his own funds.
12. The accommodation at HouseB comprises of 6 bedrooms of which X has license to occupy one. There are communal areas for the benefit of all license holders. There is also an office for staff. Two members of staff are at HouseB from 07:00 am until 11 pm. Thereafter there is one member of staff at night. Support is provided 7 days a week.
13. CouncilA state that they pay for domiciliary care services provided to X at HouseB by CareProviderFM under section 29 of the 1948 Act and section 2 of the Chronically Sick and Disabled Persons Act ("CSDPA"). X receives 6 hours of 1 to 1 support each day.

The Authorities' Submissions

14. CouncilA submits that X became ordinarily resident in CouncilB on 14 August 2013 when he moved to HouseB. The basis for its submission is that:
 - Relying on the presumption in section 1(2) of the Mental Capacity Act 2005 ("the MCA"), heX was deemed to have capacity to choose his own place of residence and he consequently moved to HouseB voluntarily and for a settled purpose
 - X holds a license in relation to HouseB under which he is solely responsible for the license fee which is settled by way of housing benefit and the shortfall met by X, himself
 - Consequently, X is not provided with Part 3 (of the 1948 Act) accommodation so the deeming provisions (section 24(5) 1948 Act) do not apply. X receives domiciliary care services in his own home under section 29 of the 1948 Act and section 2 CSDPA.
15. CouncilB disputes that X he became ordinarily resident in its area on 3 August 2013 or at all. It submits that X should be deemed to remain OR in CouncilA on the following basis:
 - CouncilA has been unable to produce any evidence to prove that X had the mental capacity to choose his place of residence or enter into a license agreement. Furthermore the level and range of needs arising from X learning disability identified in the assessment documents cast considerable doubt on CouncilA's reliance on the presumption of capacity.
 - It is highly unlikely that X had the capacity to understand the terms of the license agreement that he signed but no attorney or deputy was appointed to enter into a license or tenancy agreement on his behalf
 - Consequently X did not make a voluntary choice to move to HouseB for a settled purpose
 - In extending the deeming provisions in section 39(1) of the Care Act 2014 ("the CA") from 1 April 2015 to include people placed in a support living setting "out of area", Parliament has recognised that the needs of vulnerable adults (such as X) will benefit from retaining their established network links and also that local

authorities should not be able to divest themselves of responsibility for such people

Legal Framework

16. I have considered all the documents submitted by CouncilA and CouncilB, 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 (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”), *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 (“NASS”) and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 (“Mohammed”).
17. I set out below the law as it stood at the relevant time, prior to 1 April 2015 when relevant provisions of the 2014 Act came into force.
18. 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 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.”
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. Certain restrictions on those arrangements are included in section 26. 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 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.”

21. Under section 24(5) of the 1948 Act (“the deeming provision”), a person who is provided with residential accommodation under Part 3 of the 1948 Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.
22. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority. Section 2 of the CSDPA supplements and relates to welfare services provided under section 29 of the 1948 Act.

Ordinary Residence

23. “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 (“the guidance”). Paragraph 18 of the guidance 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.
24. 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 a settled purpose as part of the regular order of his life for the time being, whether of short or long duration”*
25. Additional considerations apply where the relevant person lacks capacity to determine (and thus to “voluntarily adopt”) his abode. However, in light of my decision below, it is not necessary to apply the additional incapacity considerations in this case.
26. Section 1(2) of the MCA provides that a person should always be assumed to have capacity to make their own decisions unless it is established to the contrary. Where lack of capacity has been established, section 1(5) provides that decisions as to accommodation and care must be made in the person’s best interests. Section 4 sets out the factors to consider for this purpose.

Application of the law to the facts

27. The first issue is whether the accommodation in HouseB was provision of residential accommodation under section 21 of the 1948 Act. If it was, X will be deemed to be ordinarily resident in CouncilA’s area because of the application of the deeming provision in section 24(5) of the 1948 Act. If X is not provided with accommodation under section 21 of the 1948 Act the next step is to consider whether he should have been, in which case the deeming provisions in section 24(5) will still apply. Finally, if the arrangements do not fall under section 21 at all, the deeming provision will not

apply but it will be necessary to determine X's OR in accordance with the ordinary meaning of the term as interpreted by the courts.

28. CouncilA submits that it provided non-residential services to X at HouseB under section 29 of the 1948 Act. CouncilB has not directly disputed this but submit that X should be deemed to be OR in CouncilA because he did not have the capacity to make a voluntary choice to either move or enter into the license agreement. I consider it necessary to make a finding on the application of section 21.

Characteristics of section 21 accommodation

29. In order for a person's accommodation under a private occupancy agreement to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet the requirements of section 26(1A), (2) and (3) of the 1948 Act. 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, and is managed by an organisation or person who is registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008.
30. HouseB does not appear to be registered with the CQC. If any provider were providing personal care together with accommodation in this property (regulated activities) without being registered they would be guilty of an offence. For this reason neither SupportedHousingProviderT3 nor CareProviderFM can lawfully be providing personal care together with accommodation to X in this property. If I am wrong about this and HouseB is registered as a care home under Chapter 2 of Part 1 of the Health and Social Care Act 2008 I will proceed to evaluate whether the other conditions of section 26 of the 1948 Act are met. In Quinn Gibbon, Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.
31. In my view, the license agreement between X and SupportedHousingProviderT3 does not meet the section 26 requirements in order for it to be accommodation falling under section 21. The arrangements do not meet the requirements of section 26(2) as set out above as they do not provide for the making of payments by a local authority to the accommodation provider (and hence do not provide for the recovery of payments from the person receiving accommodation). X is provided with a licence to occupy a room within a shared home. He is solely responsible for the payment of a license fee and is charged interest on any late payment. I have no evidence before me of any obligation on CouncilA to make any payment for accommodation to SupportedHousingProviderT3. The rent element of the licence fee is funded by housing benefit payments. X is responsible for the shortfall to cover service charges and utilities. The funding provided by CouncilA to CareProviderFM is payment towards X care costs, not his accommodation costs.

Was there a duty to provide section 21 accommodation?

32. However, that is not sufficient to settle the matter. The further question which I then have to address is whether in fact arrangements for Part 3 accommodation for X should have been made when he moved to HouseB in August 2013. In Greenwich, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (paragraph 55 of judgment). Following Greenwich, therefore, lack of compliance with section 26 may not be fatal if, in fact, the local authority should have been making section 21 arrangements.
33. In *Wahid v Tower Hamlets* [2002] EWCA Civ 287, Hale J explained that the section 21(1)(a) duty arose:
- a) where the person was in need of care and attention;
 - b) that need arose because of age, illness, disability of any other circumstances; and
 - c) care and attention were not available otherwise than by the provision of residential accommodation.
34. The first limb of the test in section 21 of the 1948 Act is whether or not the person is in need of care and attention. Care and attention was defined by Baroness Hale in *R (M) v Slough BC* [2008] UKHL 52 at paragraph 33:
- ‘...the natural and ordinary meaning of the words ‘care and attention’ in this context is ‘looking after’. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list.’
35. X requires physical assistance in connection with preparing hot meals, and prompting in relation to the performance of activities such as washing and associated personal appearance tasks. I take the view that the totality of X care package, which includes support in and outside the home amounts to personal care needs as defined in regulation 2 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.
36. The second limb of the test in order to determine whether a duty under section 21 exists is to ask whether or not the care and attention needed is available otherwise than by the provision of residential accommodation. One of the conditions for qualifying for accommodation under section 21 is that, without the provision of such accommodation, the care and attention which the person requires would not otherwise be available to them. In *NASS* the court confirmed that a person needing care and attention that could be provided in their own home would not normally be entitled to accommodation under section 21.
37. In the case of *R (SL) v Westminster CC* [2013] UKSC 27 Lord Carnwath said, at paragraph 44: “What is involved in providing “care and attention” must take some colour from its association with the duty to provide residential accommodation.”

38. At paragraph 45 he asked about care and attention: “.....was it available otherwise than by the provision of accommodation under section 21? Although it is unnecessary for us to decide the point, or to consider the arguments in detail, it seems to me that the simple answer must be yes, as the judge held. The services provided by the council were in no sense accommodation-related. They were entirely independent of his actual accommodation, however provided, or his need for it. They could have been provided in the same place and in the same way, whether or not he had accommodation of any particular type, or at all.”
39. In the light of the authorities *R Wahid v Tower Hamlets* (2001) EWHC Admin 641 (First Instance Judgment of Stanley Burnton J) and (2002) EWCA Civ 282 (Court of Appeal), it is established that section 21 is a provision of last resort, and that it does not follow that because residential accommodation can mean ordinary housing and the claimant is in need of ordinary housing, a duty arises to provide him with that housing under section 21(1)(a). This analysis was approved by Hoffman J in *NASS*.
40. Whether personal care is being provided “together with” accommodation is a question of fact and one of substance rather than form.
41. The Care Quality Commission has provided useful guidance “Supported living schemes: Regulated activities for which the provider may need to register” (“ the CQC guidance”).
42. The CQC guidance identifies factors that may be indicative of accommodation being provided “together with” care. It states that there are a number of possible indicators to be taken into consideration in making a judgment about whether the accommodation and care are provided together. The existence of an agreement between landlord and tenant for example is not in itself determinative. The CQC guidance details indicators which are not dictated as conclusive in their own right.
43. In order to evaluate the whole picture in this case, I asked both local authorities to provide me with further information. CouncilB was not able to assist, not having been involved in X’s care package to date. CouncilA provided me with the following additional documents which I have considered:
Joint working protocol (“ the protocol”),and
CareProviderFM Brochure.
44. I summarise my findings in this respect as follows:
- There is no evidence to show that SupportedHousingProviderT3 and CareProviderFM are the same legal entity. They are separately registered companies albeit with the same registered address.
 - The protocol refers to an Attached Schedule of Properties which has not been provided to me. However as the protocol was provided upon my request in this case I assume that it applies to HouseB.
 - The parties to the protocol are identified as the Care and Support Provider – CareProviderFM and– SupportedHousingProviderT3 . CouncilA is not identified as a party but there are provisions in the protocol which purport to govern how a Council must act.

- X has keys to his own room but the Owner and his staff have unrestricted access for the purposes specified.
 - The license agreement does not explicitly tie occupancy to using the services of CareProviderFM but CareProviderFM is expressly referred to at clause 12 which provides that “the Owner will facilitate such care and support provided by (CareProviderFM)...”
45. In my view, overall there appears to be a close relationship between the provider of accommodation and the provider of care. However I do not consider that this amounts to the provision of accommodation “together with” personal care for the following reasons;
- The purpose of the protocol is to ensure good joint working, good practice and continuity of service with the consequential aspiration of protecting the interests of the residents.
 - There is a clear division of housing management and care service responsibilities throughout the protocol and between the parties to the protocol.
 - Although the landlord must be informed of proposals to terminate or re-commission care services in advance, this remains the responsibility of the Council as does monitoring and periodic review .
 - The care service provider has no responsibility for housing tenancy matters.
 - Both parties and the Council have a responsibility to inform stakeholders of any concerns in regard to performance and agree any action to resolve problems.
 - A Council may terminate a contract with the care service provider and where it does so it is not envisaged that the license will automatically be terminated (it can be agreed that the licensee will continue to live at the premises, subject to the landlords business decisions).
46. In my view X was receiving the care and attention he required whilst living in private residential accommodation under a license agreement. However, equally, the services he required could have been provided by another provider. The amount and nature of the services were not intrinsically linked to the accommodation. Accordingly I find that CouncilA was lawfully making arrangements other than under section 21.
47. Section 29 of the 1948 Act and the Directions issued under that section require the provision of certain welfare services to individuals such as X. Such services are provided in the community. It is clear that the services provided to X come within the nature of services which can be provided in a person’s own home under these provisions.
48. I therefore determine that there was no duty to provide section 21 accommodation to X. If the provision of accommodation does not fall within section 21, the section 24(5) deeming provision does not apply. If section 24(5) does not apply, then X’s ordinary residence falls to be determined according to the normal rules.
49. Such a determination is still necessary because X required welfare services under section 29 of the 1948 Act. The local authority responsible for the provision of those services will be the one in which X was ordinarily resident.

50. Where it is established that a person has the capacity to make a decision about where he should live, the relevant test of where that person is ordinarily resident is set out in the leading case of Shah mentioned above.

Mental capacity

51. I therefore consider it appropriate at this stage to turn to the question of X's mental capacity, and his ability to make decisions about where he wishes to live. There is no consensus between the parties on this issue but I conclude from the documents that I have seen that X had capacity to choose to move voluntarily and did so for settled purpose.
52. Neither local authority has undertaken a capacity assessment in relation to X's capacity to decide where to live or what arrangements should be made for his care. CouncilA submit that the reason for this is because it was presumed X had capacity to decide where to live in accordance with section 1 (2) MCA.
53. CouncilB rely on CouncilA's assessment documents as evidence of X's level and range of needs arising from his learning disability to cast doubt on CouncilA's reliance on the presumption of capacity. CouncilB submit that on the evidence available, there is significant reason to doubt that X had capacity to make a complex choice in regard to where to live or to understand the terms of the license agreement and in fact CouncilA have not provided any evidence that X was given any choice. A doubt that a person has capacity to decide where to live would not be enough to establish that a person did not have capacity but might trigger the need to undertake a more formal assessment of capacity.
54. A person should not be considered to lack capacity merely because of "a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity" (S2 (3)(b) MCA). While it would plainly have been helpful had a capacity assessment been undertaken at the relevant time, the evidence presented does not suffice to establish that X did not have capacity.
55. The current test for capacity is found in section 3 of the MCA. 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).
56. Capacity is time specific as well as decision-specific: a person may have capacity at one time but not at another time. The decision in question is where X wished to live at the material time. It is not a decision as to the exact nature of the accommodation arrangements nor does it require understanding of the implications of those arrangements or which local authority might be responsible for funding his care. It seems to me that there is a qualitative difference between complex issues relating to long term plans, and relatively uncomplicated issues about where one wishes to live and spend one's time. I am satisfied from the information available to me that X understood that he wanted to move to HouseB and was able to express this.

57. I base my conclusions on the following:

- the starting position of a presumption of capacity;
- there is no direct evidence exactly contemporaneous to the date X moved to HouseB. The personal needs questionnaire dates from June 2013. The section entitled “History” notes “...On 24/04/01 at X’s last Care Programme Approach review Meeting it was agreed that he should be on discharged path to the excellent progress at House33. The potential placement was identified in May as X expressed his view to live near CouncilA. This place was called House44and run by the organisation called Provider66. In 2010 he finally moved to House 55. X did not like living on his own and it was felt he needed a placement with access to support 24/7 and more opportunities for socialisation...”. It is noted that he is independent travelling to and from familiar places locally such as shops, town centre, take-aways and to see his girlfriend.
- Under the heading “Making decisions and organising my life”, the personal needs questionnaire states: “X is able to express his needs and wishes...X manages a small amount of daily money independently and chooses his own purchases of small items e.g. drinks and toys. X needs support to budget his money, pay off debt and save for the things that are important to him...X wants to go away to Wales and stay in a caravan with his girlfriend. He is being supported by staff to arrange this with his girlfriend and staff...X would not be able to manage his money, benefits, correspondence, menu planning and shopping without the current level of support”. The questionnaire notes that “X said he likes living at HouseA and wants more time with staff on his own.”
- The FACE Needs Profile dated 17.07.13 appears at 63 – 69 of the bundle. The consideration of mental capacity is “not specified”. Against the question “How would you like your situation to improve”, the Profile states “X would like to move to a smaller shared house with other male service users...”. In relation to Life planning/management, it states that X has high support needs. IT states “X needs support to manage his finances, benefits and budgeting. It is very important X is supported to understand the requirement for him to pay his bills, debts etc because lack of available funds without regular reminding of his circumstances, what he needs to do and why can trigger challenging behaviour. X requires staff to manage his correspondence for him and anything important for him to understand needs to be translated into a user friendly format with pictures and explained regularly if it is to impact his daily living in any way”
- The FACE Needs Assessment dated 30.09.14 appears at 27 – 33 of the bundle. I note that this was after X had moved to HouseB. Again the consideration of mental capacity is “not specified”. The FACE Assessment states in the Background summary “29/7/11 X moved into a shared flat within a large supported living scheme in Road in CouncilA with 24 hour staffing, including a waking night. However, it became clear over time that this service was unable to provide X with the structure and boundaries he needs, resulting in a number of incidents where the police were called. A new specialist service was opened by CareProviderFM HouseB. X visited this service and was keen to move there. He did so in August 2013. He shares a home with other clients”. I note the reference to X having visited HouseB and being keen to go there. The FACE Needs Assessment goes on to note “X now lives in a supported living setting. He shares the home with other male clients. He reported that

he is happy and seems to be making progress with managing his temper. This is because he still receives support in a structured setting which appears to be meeting his needs.” The Life planning/management section is unchanged from the Needs Profile on 17.07.13

- A letter dated 25 September 2014 from CouncilA to CouncilB states:
“...X was taken to HouseB by his then social worker. He really liked the house and was pleased that he would be able to choose his own room. X was also glad to see that he knew other people living at the property. Our client instructs X made the decision to move and the social worker recalls that he said he liked HouseB because it was smaller and quieter than his previous accommodation at HouseA.

The reason for moving to CouncilB

HouseA was not managing his challenging behaviour and so a more suitable placement was sought. HouseB was opened as a service for people with higher needs including challenging behaviour. For this reason, X was asked to consider moving there. X viewed the property and was very keen to move there. There was no such service available in CouncilA.”

58. While the information before me is not very detailed, on balance, the evidence does not displace the presumption that X had capacity to decide to move to HouseB. There is nothing to suggest that the social worker completing the assessments considered that he lacked such capacity. The FACE Assessment notes that he had visited HouseB and was keen to move there. Having regard to the presumption of capacity, I conclude that X did have capacity to decide whether to move to HouseB.
59. Similarly, I find that X had capacity to enter into the license agreement. I am advised in the letter of 25 September 2014 that “When it came to signing the license agreement, X was fully supported. The agreement was read to him and he was asked to repeat the main points to them. It is important to note that X was provided with an easy read version and he was deemed to understand what he was signing and why he was signing the document”. While the reference to being “fully supported” is somewhat vague, I conclude that X had capacity. In any event, even if this is not correct, it would only render the license voidable and not void. The legal enforceability of a license or tenancy agreement is not determinative of ordinary residence as ordinary residence is a matter of fact.
60. On balance, I find that X made a voluntary choice to move to HouseB for a settled purpose on 14 August 2013. The test in Shah applies and, applying that test, it appears on the facts that X adopted his residence there voluntarily and for a settled purpose.

Conclusion

61. CouncilB’s further submission points to Parliament’s introduction of section 39 of the 2014 Act. This section, read with S.I. 2014/2828, provides that certain adults living in care home accommodation, shared lives scheme accommodation or supported living accommodation are treated for the purposes of Part 1 of that Act as ordinary residence in the area in which they were ordinarily resident or present immediately

before they began to live in that type of accommodation. However, pursuant to article 6(2)(c) S.I. 2015/995, section 39 does not have effect in relation to a person who, immediately before the date on which Part 1 of the CA applies to that person (the earliest possible date being 1 April 2015), he was being provided with certain accommodation including supported living accommodation, for as long as that provision continues.

62. Accordingly, this determination is based on the law as it stood at the relevant time in August 2013.
63. For the reasons set out above, I accept CouncilA's submission that X is ordinarily residence in CouncilB or and has been since 14 August 2013.