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 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.

The facts

2. The following information has been ascertained from the statements of facts, legal submissions and other documents provided by the parties.

3. X is a 75 year old man (XX XX 1941) with a diagnosis of moderate learning disability with autistic traits and challenging behaviour. He has been assessed as lacking capacity to make decisions about his accommodation and care. Capacity is not in dispute.

4. I have been provided with very limited information about X's life prior to 20 April 2011 when he signed a tenancy agreement in respect of a placement at Address1B.

5. A care review document, dated 2 December 2014, describes the "start date" for "supported living" as December 2005 and states that X moved to Address1B on 20 April 2011. A high cost review, dated 8 February 2015, indicates that X previously lived in an independent hospital and was "resettled" in 2005. It states that X "moved in" on 30 November 2005 which seems to suggest that he was living at Address1B for a significant period of time before he signed the tenancy agreement that I have seen.

6. It is very difficult to reconcile the statements in these two reviews. However, what is clear is that X has been living at Address1B, in the area of CouncilB, since at least 20 April 2011 when he signed the tenancy agreement. That agreement is in fairly standard terms and it makes no reference to care provision. I understand that CouncilA were involved in arranging X's placement and they were responsible for his community care at the time. That said, there is no evidence to suggest that CouncilA had any responsibility for meeting X's accommodation costs. I am told that the accommodation was funded by way of housing benefit and that care was provided separately pursuant to section 29 of the National Assistance Act 1948. The accommodation is described as a supported living placement.

7. The placement was reviewed from time to time by the local authority. The high cost review, dated 8 February 2015, records that "the current accommodation suits his needs" and a best interests meeting, held on 3 March 2015 (attended by a social worker, support worker and IMCA), concluded that it was in X's best interests to remain at Address1B.

8. CouncilA first wrote to CouncilB on 17 September 2014 notifying them of X's presence in their area and inviting them to accept responsibility for his community care. This letter was followed up with further correspondence on 21 January 2015, 12 March 2015, 24 March 2015 and 27 March 2015. CouncilA responded substantively on 16 April 2015 stating that it was not able to accept responsibility for X until it has carried out its own assessments. It raised concerns that it had not been invited to the best interests meeting; that the best interests meeting did not adopt a multi-agency approach; and that X was deprived of his liberty. CouncilB replied on 22 April 2015 addressing the matters raised and, in a separate email, attaching a draft statement of facts. The statement of facts was not agreed prior to 29 May 2015 when the dispute was referred to me.

9. The letter referring the matter enclosed legal submissions from CouncilA, an (unagreed) statement of facts and supporting documents. CouncilB did not provide formal legal submissions but did set out their position in an email to me dated 8 September 2015. CouncilA replied to these submissions by letter dated 20 October 2015.

10. This determination was stayed pending the decision of the Supreme Court in *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46*. Following the judgement in that matter and publication of updated guidance, on 13 December 2016, I wrote to the parties inviting them to review their positions and confirm whether they wished me to proceed with the determination. By email dated 13 December 2016, CouncilA confirmed that it did wish me to proceed.

The Authorities' Submissions

11. CouncilA invites me to determine X's ordinary residence from 20 April 2011 when he signed the tenancy agreement in respect of Address1B. They submit that X was ordinarily resident in the area of CouncilB on the basis that:

a. The deeming provisions under section 24 of the National Assistance Act 1948 do not apply; and

b. X's residence at Address1B, with a tenancy agreement, was for the purpose of remaining in that accommodation, he regarded it as his home, he had lived there for many years, he was settled and he had built up networks in the local area.

12. CouncilB dispute that X was ordinarily resident in their area. They submit that:

a. He lacked capacity to decide to move to their area and was "placed" there;

b. It is highly unlikely that he had capacity to enter into a tenancy agreement and, as such, the agreement is "void";

c. Absent a tenancy agreement X "cannot argue… that the chain of responsibility for X has been broken and that they no longer retain funding responsibility for X".

13. In reply, CouncilA point out that an agreement entered into by a person who lacks capacity generally is voidable not void, and even if there was no agreement this would not mean that X was not entitled to housing benefit or that the placement would fall within the deeming provision.

The Law

14. I have considered all the documents submitted by CouncilA and CouncilB; the provisions of Part 1 of the Care Act 2014 ("the 2014 Act") and the Care and Support (Disputes Between Local Authorities) Regulations 2014; the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it[2]; the Care and Support Statutory Guidance and the earlier guidance on ordinary residence issued by the Department[3]; and relevant case law, including *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"*), as well as the authorities cited in the parties' submissions. My determination is not affected by provisional acceptance of responsibility by CouncilA.

15. 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 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. Article 6(1) states that any person who, immediately before the relevant date (i.e. the date on which Part 1 of the 2014 Act applies to that person), 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. Article 6(2) provides that the deeming provisions under section 39 the 2014 Act have no effect in relation to a person who, immediately before the relevant date, is being provided with supported living accommodation, for as long as provision of that accommodation continues.

Accommodation

16. 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**.**

17. 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).

18. In *Quinn Gibbon* (cited above) Lord Steyn held that:

"…arrangements made in order to qualify as the provision of Part III accommodation under section 26 must include a provision for payments to be made by the local authority to the voluntary organisation at the rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and a necessary part of the arrangements referred to in subsection (1) . If the arrangements do not include a provision to satisfy subsection (2) then residential accommodation within the meaning of Part III is not provided and the higher rate of income support is payable."

The relevant local authority

19. Section 24(1) states 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

20. 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.

21. In ***Greenwich*** (cited above) Charles J held that the deeming provision also applies where a local authority should have provided accommodation under Part 3 but failed to do so.

Welfare services

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.

Ordinary Residence

23. "Ordinary residence" is not defined in the 1948 Act. Guidance has been issued to local authorities (and certain other bodies) on the question of

identifying the ordinary residence of people in need of community care services.

24. In *Shah* (cited above), 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"*

25. The Care and Support Statutory Guidance, as updated following the decision in of the Supreme Court in *Cornwall*, states:

> *"with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration."*

Application of the law to the facts

26. I accept CouncilA's submission that, at least from 11 April 2011, X was ordinarily resident in the area of CouncilB. Unless the deeming provision under section 24 of the 1948 Act applies, the fact that CouncilA were involved in "placing" X in the area of CouncilB does not, in itself, mean that they retained responsibility for his community care.

27. The starting point is to consider the nature of the placement. As noted above, section 24(5) applies only where arrangements are (or should have been) made under Part 3 of the 1948 Act. Arrangements which are not in

accordance with the requirements of section 26 do not count as Part 3 accommodation (see *Quinn Gibbon*). Here X had his own tenancy agreement and his rent was met through housing benefit. CouncilA had no responsibility to pay or make up any shortfall in rent. Accordingly, I find that X's accommodation was not provided under Part 3 and the deeming provision did not apply.

28. The fact that X may have lacked capacity to enter into the tenancy agreement that he signed does not affect the nature of the accommodation provided. I agree with CouncilA that an agreement entered into by a person who lacks capacity is voidable rather than void and, in any event, lack of a binding agreement would not have been determinative of his entitlement to housing benefit or the status of the placement.

29. Given that the deeming provisions did not apply, there can be little doubt that X was ordinarily resident in the area of CouncilB at least from the date on which he signed the tenancy agreement. Address1B was a long-term home for X; the assessments I have seen indicate that his needs were appropriately met there; and there is no evidence that he had anywhere else to live. The fact that CouncilA may have been instrumental in arranging the placement cannot outweigh these important factors which point strongly to Address1B being his place of ordinary residence.

Conclusion

30. For the reasons set out above, I find that X was ordinarily resident in the area of CouncilB from 20 April 2011.