

## **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 (“the 2014 Act”) of the ordinary residence of X. The dispute is with CouncilB.

### **The facts**

2. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by CouncilA and CouncilB.
3. X is a 30 year old man with a diagnosis of mild/borderline learning disability and autistic spectrum disorder. It is reported that he can demonstrate verbally aggressive and challenging behaviour patterns.
4. He lived with his parents and three siblings in CouncilA prior to August 2008 when he moved to Address1B a supported living placement in CouncilB. This is where he continues to reside. He has his own room and fridge-freezer and shares other facilities with two other residents. I have been provided with a copy of an assured shorthold tenancy agreement for Address1B signed by X on 1 March 2011.
5. A FACE Overview Assessment dated 1 July 2013 states that X’s home staff support him in maintaining positive behaviour. It is reported that X “*desires to move into a more independent accommodation i.e. to live more independently in a flat*” although it is also reported that X gets on well with staff at Address1B.
6. It is not disputed that X has capacity to make decisions about where he should live. The agreed statement of facts, signed by both parties on 12 January 2016, records that X made a conscious decision to move to his current accommodation under a supported tenancy agreement which he signed. It further states that X has, over the years, established strong connections to CouncilB, having a GP in the borough and engaging in social activities centred around the borough.
7. The FACE assessment records CouncilA’s view that X has been ordinarily resident in CouncilB since 2008. On 1 August 2014 CouncilA sent notice of its position to CouncilB Community Team for People with Learning

Disabilities. On 20 August 2014 the service manager responded stating that she assumed the letter was intended for social care, who were not based at the address to which the letter was sent, and that no further action would be taken by her team. On 1 January 2015 CouncilA sent an e-mail to the social care team at CouncilB setting out its position that X had acquired ordinary residence in CouncilB, inviting CouncilB to assume responsibility for funding X's care.

8. On 27 July 2015 CouncilA sent a further letter to CouncilB requesting a response within 14 days. Another chaser letter was sent on 21 August 2015 which was acknowledged by CouncilB on the same date. A social worker from CouncilB attended Address1B on 27 August 2015 to carry out an assessment. The social worker's note records that she attended at 10.30am but X had left the placement at 6am having informed the key worker that he did not want to meet with the social worker. Certain further information about X was provided to the social worker by the key worker and the social worker's note records that *"from the information provided... it would appear that X does not meet the National Eligibility Threshold and would therefore not be eligible for support"* The key worker informed the social worker that the only time a meeting with X could be guaranteed was Sunday late afternoon when his mother visits once a month. No evidence has been provided of any further attempts made by CouncilB to meet with or assess X.
9. On 8 September 2015 CouncilA sent a further e-mail to CouncilB chasing a response to their referral. CouncilB responded on 23 October 2015 stating that it did not accept that X was ordinarily resident in CouncilB, noting that X had refused to engage in any assessment, and suggesting a round table meeting. CouncilA replied on 21 December 2015 querying the purpose of the proposed round table meeting and suggesting that the matter should be referred to me. There was further correspondence between the parties concerning the agreed statement of facts.
10. This matter was referred to me on 12 January 2016 by letter enclosing an agreed signed statement of facts and supporting documentation. I wrote to the parties on 8 February 2016 setting out the requirements of the Care and Support (Disputes Between Local Authorities) Regulations 2014 and requesting any legal submissions within 14 days.
11. Both parties filed legal submissions on 22 February 2014. CouncilB's legal submissions were accompanied by a letter from a solicitor who had recently

taken over the case which enclosed further documents and stated “I would require the details contained in the above documentation to be added to the chronology and statement of facts before I was prepared to sign this”. I wrote to the solicitor on 15 March 2016 clarifying that the statement of facts had already been agreed and signed by both parties.

12. However, notwithstanding the late submission of the additional documents and the absence of reference to them in the agreed statement of facts, I have taken them fully into account in reaching my decision set out below.

### **The Authorities’ Submissions**

13. Council A submits that X is ordinarily resident in Council B. It states that:

- a. The deeming provisions under the 2014 Act do not apply as X was already in supported living accommodation in Council B prior to the 1 April 2015 and he continues to live there;
- b. The “old” deeming provisions under the National Assistance Act 1948 (“the 1948 Act”) do not apply as X holds his own tenancy and the care and attention that he requires is available otherwise than in residential care;
- c. On the facts, the placement in Council B was voluntarily adopted for settled purpose;
- d. Council B’s purported assessment of X and its conclusion that he has no need for care and support is not material to the question of ordinary residence.

14. Council B submits that X is not, and never has been, ordinarily resident in Council B. It states that X has expressed a wish to live independently and there is no evidence that the placement in Council B was adopted voluntarily. In any event, it asserts that I have no jurisdiction to determine X’s ordinary residence on the basis that:

- a. X’s needs do not meet the threshold for care services;
- b. X has, by his actions, refused assessment;
- c. This dispute was not referred to me within 5 months of the date on which the dispute arose.

## The Law

15. I have considered all the documents submitted by Council A and Council B; the provisions of Part 1 of 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<sup>2</sup>; the Care and Support Statutory Guidance and the guidance on ordinary residence issued by the Department<sup>3</sup>; 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 Council A.

16. 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, 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*

17. 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.

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. 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).

19. 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*

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".

#### *The deeming provision*

21. 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*

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. 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.

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 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**

25. Applying the law to the facts of this case, I conclude that X is, and has been since 2008, ordinarily resident in Council B. I have reached this conclusion having regard to all the circumstances, including the fact that X has been living in Council B for eight years; he has signed a tenancy agreement; and he has connections to the local area, including a local GP and social activities centred around the borough. It is not suggested by any party that the deeming provisions of 1948 Act or the 2014 Act apply.

26. I note the reference in the FACE assessment to X wishing to live more independently, but I do not consider that such a generally stated wish should be taken to mean that X did not move to Council B voluntarily for settled purpose. There is no dispute that he has capacity to decide where he should live and he signed a tenancy agreement. There is no evidence to suggest that he was in any way forced or coerced into signing the agreement and there is nothing in the care plan which suggests he is not free to leave. A wish to live in different circumstances does not, in itself, mean that a person is ordinarily resident otherwise than at his current placement. Whilst it is recorded that X would like to live independently, there is no evidence that he has any intention to move elsewhere and he has remained at his current placement for many years. I note that X's family live in Council A but there is no evidence that he wishes to live with, or especially near to, them. He has not expressed a wish to live outside Council B.

27. I reject Council B's assertion that I have no jurisdiction to determine this dispute. Section 40 of the 2014 Act empowers me to determine any dispute about where an adult is ordinarily resident for the purposes of Part 1 of the Act. As a matter of fact, X is receiving care and support funded by Council A under this part and there is a dispute as to his ordinary residence. This is sufficient to found my jurisdiction notwithstanding Council B's assertion that X has no eligible needs. The Care and Support (Disputes Between Local Authorities) Regulations 2014 do not include any sanction for non-compliance with the timescales for referral and I reject the suggestion that failure to comply with the timescales deprives me of jurisdiction.
28. The procedure for referral of disputes to me is intended to provide an efficient, effective and proportionate means of determining issues of ordinary residence without the need for expensive and time consuming litigation. If Council B's contention were correct and I was not empowered to resolve this dispute, it would leave the question of X's ordinary residence unanswered and might necessitate an application to the Administrative Court. This would be an unattractive outcome wholly inconsistent with the intentions section 40.
29. The nature and extent of X's care needs are conceptually distinct for the question of his ordinary residence. It is not necessary, and it would not be appropriate, for me to determine any dispute as to whether X has eligible care needs. However, I do note that Council B is yet to carry out a full formal assessment and, on the information before me, it appears that just one attempt was made to meet X. I have no power to direct Council B to take any further steps in this regard. However, in light of my determination on ordinary residence (over which I do have jurisdiction), I would urge Council B to liaise with Council A, and take further steps to meet with and assess X, with a view to ensuring effective transfer of responsibilities between the authorities. I note that, even if Council B maintain their conclusion that X does not have eligible needs which must be met under section 18 of the 2014 Act, it will still have to consider whether to exercise its discretion to meet some or all of those needs under section 19 and, in any event, it will owe safeguarding duties to X.

## **Conclusion**

30. For the reasons set out above, I find that X is, and has been since August 2008, ordinarily resident in Council B.