

## **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.
2. The question of 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 the 1948 Act ceased to apply 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). Section 40 of the 2014 Act provides that any dispute about where an adult is ordinarily resident for the purposes of Part 1 of that Act is to be determined by the Secretary of State (or, where the Secretary of State appoints a person for that purpose, by that person). The Care and Support (Disputes Between Local Authorities) Regulations 2014 were made under section 40(4) of the 2014 Act and apply to this dispute. I make this determination accordingly.
3. For the reasons set out below, I determine that X has been ordinarily resident in CouncilB since or soon after 1 January 2010 until October 2011, immediately after which she continued to be so resident there as she was provided with accommodation under Part 3 of the 1948 Act.

### **The facts**

4. The following information has been ascertained from the agreed statement of facts between CouncilA and CouncilB, and other documents provided. In its submissions CouncilB provides further detail on a number of matters which

appear in the agreed statement of facts. I have indicated where this has been done below.

5. X was born on XX XX 1990. In 1997 she moved to the Country2 from an orphanage in Country1. She has a diagnosis of moderate to severe learning disabilities, bilateral anophthalmus (meaning she was born without eyes and is blind) and epilepsy. In 2005 she was diagnosed with Autism.
6. In 1997 X arrived in the UK and lived with her mother (MotherX) in CouncilA where she attended school.
7. In 2006 she attended the Country2 School for Blind and Partially Sighted Children in CouncilC.
8. In 2007 she moved to a residential placement in CouncilC (HouseC). The placement was funded by CouncilC Primary Care Trust.
9. On 11 December 2009, HouseC closed and a new placement in CouncilB, RoadB care home which is owned/manged by SENSE, was identified. CouncilA contends that MotherX identified this placement. CouncilB is not able to positively agree that is correct.
10. From December 2009, X moved home to live with her mother in CouncilA until a placement at RoadB became available. On 1 January 2010 she moved to RoadB. The placement was funded by CouncilC Primary Care Trust for the first three months. CouncilB Primary Care Trust took over funding from 1 April 2010.
11. On 29 October 2011, CouncilB Primary Care Trust notified MotherX that X was no longer eligible for Continuing Healthcare funding.
12. On 31 May 2012, CouncilA wrote to CouncilB and stated that X was not ordinarily resident in CouncilA.

13. In January 2013, CouncilA wrote to CouncilB and accepted that X was ordinarily resident in CouncilA and that it had funding responsibility for her placement at RoadB. The papers provided do not contain any reasons for CouncilA's decision.
14. On 21 January 2015, CouncilA wrote to CouncilB to suggest that following the decision in *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46, the issue of ordinary residence should be reviewed. Following this a dispute arose between CouncilA and CouncilB as to X's ordinary residence.
15. In an assessment dated 8 May 2015, it is recorded that X was spending approximately one week every four to six weeks at home with her mother (approximately 15 weeks per year).
16. At some stage (it is not clear when), an application was made by MotherX to the Court of Protection in respect of X's capacity to make decisions in relation to her residence and care and to resolve the issue of where she should live. CouncilA was joined as a party to these proceedings. CouncilB was not aware of these proceedings until 5 January 2017. As a result of the Court of Protection proceedings, X moved to a new placement at HouseD in CouncilD.
17. CouncilA is currently funding X's placement at HouseD on a without prejudice basis. CouncilB states that it has no knowledge of this decision.

### **The Authorities' submissions**

18. CouncilA contends that X is ordinarily resident in the area of CouncilB. It submits that:
  - a. X lacks capacity to make her own decisions in relation to where she lives and the care and support she needs to meet her needs.
  - b. X in CouncilB from 1 January 2010 until she moved to HouseD in October 2015. She only lived in CouncilA with her mother for a short time and only then pending the availability of her placement in CouncilB.
  - c. X was physically present in CouncilB and moved there with the intention of it being her home where she would settle and develop her life.

- d. She spent the majority of her time in CouncilB and her pattern of ordinary living points to ordinary residence in CouncilB.
- e. The provisions of the Children Act 1989 do not apply as X was an adult when she moved to RoadB. She was not a “looked after child” when she moved to RoadB and was funded by CouncilC PCT. The guidance dealing with looked after children transitioning from children’s to adult social services does not apply.
- f. The deeming provisions in section 39 Care Act 2014 only applies to arrangements made after 1 April 2015. The previous law under the National Assistance Act 1948 (“the 1948 Act”) applies.
- g. X was not moved to CouncilB by CouncilA but by the relevant health authorities.

19. CouncilB contends that X is ordinarily resident in the area of CouncilA. It relies on the deeming provisions in s.24 of the 1948 Act and submits that:

- a. It is important to have regard to the full history. On return from Country1 in 1997, X lived in CouncilA with her mother. From CouncilA, X was placed in a residential placement by CouncilA in CouncilC. Since that time, every time she has moved, it has been to a residential placement.
- b. CouncilB agrees that the deeming provisions in s.24 of the National Assistance Act 1948 apply.
- c. CouncilA placed X “out of county” and are now seeking to export responsibility for providing necessary accommodation which goes against the ethos of the deeming provisions in the 1948 Act.
- d. CouncilB is unable to confirm or deny that X’s move from CouncilC to CouncilB was funded by the relevant health authorities. Funding by the health authorities ceased in October 2011.
- e. CouncilB relies on the statutory guidance published by the Department of Health in October 2013 which stated at paragraph 115:

*“Where a person is accommodated in a care home as part of their package of NHS CHC, it is possible that they may cease to be eligible for NHS CHC, but still need to remain in their care home, or to be provided with Part 3 accommodation elsewhere. In such a case, the effect of the deeming provision in s.24(6) of the 1948 Act would be that the local authority in whose area the person was ordinarily resident immediately before being provided with NHS accommodation would be*

*the authority responsible for funding the person's accommodation under Part 3 of the 1984 Act..."*

- f. Council B submits that X was ordinarily resident in Council A immediately prior to her being provided with NHS accommodation and therefore funding responsibility reverted back to Council A from October 2011.

## The Law

20. I have considered all the documents submitted by the two authorities, the provisions of Part 1 of the 2014 Act and the Regulations made under it; the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it; the Care and Support Statutory Guidance and the earlier guidance on ordinary residence issued by the Department ("previous OR guidance"); 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") and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 ("Mohammed"). My determination is not affected by provisional acceptance of responsibility by Council A.

21. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force.<sup>1</sup>

### The National Assistance Act 1948

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<sup>1</sup> The provision of care and support for adults and of support for carers is governed by the Care Act 2014 as from 1 April 2015 and the relevant provisions of the National Assistance Act 1948 have been disapplied in relation to England by the Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 (S.I. 2015/914). However, under article 3(3) of that Order, despite the amendments made by the Order, any provision that operates in relation to, or by reference to, support or services provided, or payments towards the cost of support or services made, before or on or after 1 April 2015 and anything done under such provision, continue to have effect for the purposes of that support or those services or payments.

Paragraph 19.87 of the Care and Support Statutory Guidance says: Regardless of when the Secretary of State is asked to make a determination, it will be made in accordance with the law that was in force at the relevant date, in respect of which ordinary residence falls to be determined. Therefore, where ordinary residence is to be determined in respect of a period which falls before 1st April 2015, then the determination will be made in accordance with Part 3 of the National Assistance Act 1948 (the 1948 Act). If, in respect of a period on or after 1st April 2015, then the determination will be made in accordance with the Care Act.

22. 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.

23. 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).

24. 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*

25. 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*

26. 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 ordinarily resident immediately before the residential accommodation was provided.
27. Section 24(6) of the 1948 Act provides a further “deeming” provision in relation to NHS accommodation. The provision, as in force at the relevant time, provided that:
- “For the purposes of the provision of residential accommodation under this Part of this Act, a patient in a hospital vested in the Secretary of State, a Primary Care Trust or an NHS trust shall be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before he was admitted as a patient to the hospital, whether or not he in fact continues to be ordinarily resident in that area.”.*
28. Section 24(6) of the 1948 Act was subsequently amended by section 148 of the Health and Social Care Act 2008 (c.14). Those changes extend the deeming provision in section 24(6) to all settings in which NHS accommodation is provided. As a result of this, people living in independent sector residential accommodation which is funded by the NHS (e.g. NHS Continuing Healthcare) do not acquire an ordinary residence in that area.
29. This amending provision came into force as of 19th April 2010. Transitional provisions provide that the extending deeming provision shall not apply to those in non-hospital NHS accommodation when the amendment to section 24(6) came into force on 19th April 2010 and this continues to be the case for as long as they continue to be in that accommodation. For these purposes, “*non-hospital NHS accommodation*” is NHS accommodation that is elsewhere than at a hospital vested in the Secretary of State, a Primary Care Trust, a local Health Board, a NHS Trust or NHS Foundation Trust.
30. 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.

#### *Previous OR Guidance*

31. The previous OR Guidance provides:

*“112. When a person has a primary health need (in addition to any social care needs) and is assessed as being eligible for NHS Continuing Healthcare (NHS CHC) under the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (July 2009) and the NHS Continuing Healthcare (Responsibilities) Directions 2009, the NHS must provide a package of care for their assessed health and social care needs. This care package may be provided in a number of settings including hospitals, care homes or the person’s own home.*

*113. Where a person is in receipt of NHS CHC, local authorities do not have a duty to provide social care services that are being provided by the NHS, although they do continue to have a wider role, for example in relation to safeguarding responsibilities. However, if a care review subsequently determines that a person’s needs no longer meet the eligibility criteria for NHS CHC - perhaps because they needed intensive health and social care following an operation and they have now recovered - the NHS ceases to be responsible for the provision of the person’s social care. Instead, the duty for the provision of social care falls to the local authority in which the person is ordinarily resident under Part 3 of the 1948 Act.*

*114. The deeming provision in section 24(6) of the 1948 Act, which sets out that prior ordinary residence is retained where a person is provided with NHS accommodation (see paragraphs 60-65), applies to people in receipt of accommodation as part of a package of NHS CHC. Therefore, where a person is placed in a care home (or other accommodation funded by the NHS) in another local authority area for the purpose of receiving NHS CHC, they continue to be ordinarily resident in the local authority area in which they were ordinarily resident before entering the NHS accommodation. Where a CCG places a person in such accommodation, it is good practice for it to inform the person’s local authority of ordinary residence and, if the person is placed “out of area”, it is also good practice for the CCG to inform the local authority in which the care home is located.*

*115. Where a person is accommodated in a care home as part of their package of NHS CHC, it is possible that they may cease to be eligible for NHS CHC, but still need to remain in their care home, or to be provided with Part 3 accommodation elsewhere. In such a case, the effect of the deeming provision in section 24(6) of the 1948 Act would be that the local authority in whose area the person was ordinarily resident immediately before being provided with NHS accommodation would be the authority responsible for*



*funding the person's accommodation under Part 3 of the 1948 Act, as the following scenarios shows. ”*

...

*115b. As a result of paragraph 12(1) of the Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional Provisions), the deeming provision in section 24(6) of the 1948 Act will not apply to anyone who was receiving NHS CHC immediately before 19 April 2010 and this remains the case for as long as they continue to be provided with that NHS CHC accommodation. Therefore, in determining the ordinary residence of someone who went into NHS CHC accommodation on or before 18 April 2010 and continued to be there after that date, the ordinary residence rules that applied on the day they went into care should be applied – i.e. the dispute must be resolved in the light of the specific circumstances and not the deeming provisions.*

*115c. The extended deeming provision will not apply where a person changes their place of non-hospital NHS accommodation post 19th April 2010 whilst still receiving continuing healthcare which commenced in non-hospital NHS accommodation prior to 19th April 2010.”*

#### *Welfare services*

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

#### The Cornwall case

33. In *Cornwall*, it was held that where the question of ordinary residence arises in respect of an adult who lacks capacity, the decision maker should take a common sense approach to the test in *Shah* and should not automatically regard P's parents as their “base” for the purposes of determining ordinary residence. The “*essential criterion*” for establishing ordinary residence is the residence of the subject and the nature of that residence. Further, it was held that the underlying purpose behind the deeming provisions in the legislation under consideration (namely the Children Act 1989 and the 1948 Act) was that “*an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it*” (at paragraph 54).

## Ordinary Residence

34. "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.

35. 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."*

36. Where the person lacks capacity to decide where to live, direct application of the test in *Shah* will not be appropriate. In such cases, all of the facts must be considered, including physical presence in a particular place and the nature and purpose of that presence, but without requiring the person to have voluntarily adopted the place of residence.

37. The courts have considered cases of temporary residence on a number of occasions, including in *Levene, Fox, Mohamed and Greenwich*. In *Fox*, the Court of Appeal considered *Levene* and Lord Denning MR derived three principles: *"The first principle is that a man can have two residences. ... The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence."* Lord Justice Widgery commented that *"Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence"*. The Court of Appeal found that the students were resident at their university address.

38. In *Mohamed*, Lord Slynn said “the ‘prima facie’ meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation takes his few belongings and moves to a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is ‘shelter’ but it is also where he resides.”

#### **Application of the law to the facts**

39. The relevant issue is therefore where X was ordinarily resident immediately prior to being provided with accommodation pursuant to Part 3 of the 1948 Act (i.e. when her CHC funding ended in October 2011). In turn this depends on whether the deeming provision in section 24(6) of the 1948 Act applied to the accommodation provided to her immediately before being provided with accommodation pursuant to Part 3 of the 1948 Act. If it did, then for the purposes of the provision of residential accommodation under Part 3 of the 1948 Act she would be deemed to be ordinarily resident in the area, if any, in which she was resident immediately before the NHS accommodation in question was provided for her. If it did not, then the deeming provision would not apply and it would be necessary to consider whether she has acquired a new ordinary residence in Council B.

40. Between 1997 and 2006, X lived with her mother in Council A. Between 2006 until 2009, she attended school in Council C and was later provided with accommodation in Council C. She returned to Council A briefly for a month in late 2009, pending a placement in Council B, and then was placed in Council B from January 2010 until she moved to Council E.

41. While in Council C, X's placement was funded by NHS Continuing Healthcare. Her placement in Council B was also funded by NHS Continuing Healthcare until October 2011.
42. As the previous OR guidance says, as a result of paragraph 12(1) of the Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional Provisions), the deeming provision in section 24(6) of the 1948 Act will not apply to anyone who was receiving NHS CHC immediately before 19 April 2010 and this remains the case for as long as they continue to be provided with that NHS CHC accommodation, albeit without CHC funding. Therefore, in determining the ordinary residence of someone who went into NHS CHC accommodation on or before 18 April 2010 and continued to be there after that date, the ordinary residence rules that applied on the day they went into care should be applied – i.e. the dispute must be resolved in the light of the specific circumstances and not the deeming provisions.
43. Since X was resident in non-hospital NHS accommodation immediately before 19th April 2010, the deeming provision in section 24(6) would not apply to her for as long as she continued to be provided with that accommodation. She continued to be provided with that accommodation until October 2011. Therefore the deeming provision in section 24(6) did not apply to the entirety of her accommodation in Council B.
44. Therefore I must consider whether she acquired ordinary residence in Council B during this period.
45. Where a person lacks the capacity to decide where to live, direct application of the test in *Shah* will not assist as the *Shah* test involves voluntary adoption of a place of residence (see Care Act Guidance at paragraph 19.26). The “*essential criterion*” is the residence of the subject and the nature of the residence (see Care Act Guidance at paragraph 19.27) having regard to the person's physical presence, their purpose for living there, their connection with the area, the duration of residence there and the person's views, wishes and feelings 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.

46. I consider that X was ordinarily resident in Council B since or soon after 1 January 2010 until October 2011, for the following reasons:

- a. From January 2010 till October 2011 X was physically present in Council B as she was resident at Road B. While she did not adopt Council B as her home voluntarily (because she did not have capacity), it was intended that Road B would be her home and that she would build her life there. That was the purpose for her living there. Her social activities, save for visits to her mother, were all based in Council B.
- b. I do not have much information about the views, wishes and feelings expressed by X but there is nothing in the facts to indicate that these ran contrary to the inference to be drawn from the facts which is that having regard to her connection with the area and the duration of her residence, the purpose of X's residence in Council B had a sufficient degree of continuity to be described as settled.
- c. X only returned to Council A in December 2009 because the placement at Road B was not available until January 2010. This temporary stay is not, in my judgment, sufficient to amount to becoming resident in Council A.

## **Conclusion**

47. Council A has indicated that it wishes to seek a financial adjustment from Council B pursuant to s.41 of the Care Act 2014. However, that is not a question for me, so I do not attempt to resolve it here. My role is to determine the question of ordinary residence and for the above reasons I conclude that X became ordinarily resident in Council B on or shortly after her move there on 1 January 2010 and that she remained so resident until October 2011. Immediately after

she was provided with Part 3 accommodation and under the deeming provisions in section 24(5) of the 1948 Act she would be deemed to continue to be ordinarily resident there.