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

1. I have been asked by the CouncilA to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X The dispute is with the CouncilB.

The facts

2. The following information has been ascertained from the statements of facts, legal submissions and other documents provided by the parties. I note that the statement of facts submitted by CouncilA is agreed save in respect of two paragraphs.

3. X is a 41 year old woman (DOB XX.XX.1975) with a learning disability. She requires support and guidance in all aspects of daily living. On 24 March 2012 she moved to Address1 ("Address1"), a supported living placement in CouncilB. Prior to that date she lived with her mother in a family home in CouncilA.

4. I understand that in or around 2011, X's mother indicated that X would no longer be able to reside with her. A Supported Self-Assessment Questionnaire ("SSAQ") was completed on 27 October 2011. The SSAQ states: *"in the future I will need to live in supported housing".* It records that X requires 24/7 care to meet her mental, social and physical needs, including personal care. X's learning disability is categorised as "severe". The document also records the view of Xs mother that she would like X to live in supported housing in the future and would like to be involved in a "managed" move.

5. In the SSAQ, under the heading "decision making", boxes are ticked indicating that X and the assessor agreed with the following statements: *"I am unable to make decisions about my life. At best I can make a few simple choices about day to day things"* and *"someone else has [sic] must look after all my finances".* The SSAQ also records that X has an appointee responsible for her finances. Under the heading "communication" it is further noted that X *"cannot understand bills and other important correspondence".* The assessor has ticked a box stating that a formal assessment of mental capacity is required.

6. I understand that, notwithstanding the apparent identified need for a capacity assessment, no such assessment was undertaken by CouncilA prior to X's move to Address1. I am told by CouncilA that X visited a number of possible placements and was supported by her mother and carers to decide where she wished to live. I have been provided with a copy of an assured shorthold tenancy agreement for Address1, dated 19 December 2011, which was signed by X and witnessed by her mother. The agreement is with Organisation1. Under the terms of the agreement CouncilA has no responsibility to pay any rent or make up any shortfall. I am told that, although the tenancy agreement was signed in December, X did not move to Address1 until 24 March 2012.

7. In addition to the tenancy agreement, I have been provided with a copy of a service agreement between X, Plus support service and CouncilA, which was signed by X, the service manager and the care manager on 13 February 2012. Under the terms of the agreement, CouncilA are responsible for meeting the costs of care with a contribution from X. A weekly plan appended to the agreement provides for X to attend Organisation2 ("Organisation2"), a day centre in CouncilA, three days per week and to attend church with her mother every Sunday. It is clear from the contractual documentation that care and support were to be provided separately from the accommodation at Address1 by a different organisation.

8. A support plan dated 13 February 2012 records that family and friends are important to X and that she would like to maintain contact when she moves. It also records that she would like to continue to attend Organisation2.

9. Following the move, on 16 August 2012, CouncilA wrote to CouncilB, asserting that, having mental capacity, X had decided that she wanted to live in CouncilB. It invited CouncilB to assume responsibility for funding X's care package. CouncilB did not respond to this letter and CouncilA sent a chaser letter on 6 November 2012. It appears that no action was then taken by either party for several months until 3 July 2013 when CouncilA sent a further chaser to CouncilB seeking a response to their initial letter. It appears from the chronology submitted by CouncilA that, on 9 October 2013, the SSAQ, tenancy agreement, service agreement and support plan referred to above were sent to CouncilB. On 21 January 2014 CouncilA wrote again to CouncilB challenging their failure to respond to previous correspondence and making clear that their continued provision of support for X was on a without prejudice basis.

10. On 4 June 2014 CouncilA carried out a reassessment review of X's placement. I have been provided with a copy of the reassessment and an Adult Independence Plan arising from it. The reassessment records that:

> *"[X] has lived in the present placement for a couple of years and she has become part of the local community. She has developed a network of friends and attends local college, shops and in the process of finding a voluntary job with the local provider".*

11. It further records that [sic]:

> *"[X] is capable of making basic decisions; however when it comes to complex decisions with regards to her finances and future living arrangements. [X] will need the support of the professionals to make such complex decisions. [X's] mum is her financial appointee… [X] is unable to make complex decisions with regards to her finances and future living arrangements. A mental capacity assessment has to be undertaken to ascertain her capacity. If she lacks capacity a best interests meeting must be held to decide on her best interests… [X] is very articulate. She can express herself verbally. If she does not understand your question she entertains anxiety and stammer. She may say she has forgotten if she does not understand question asked. She recognises word. She can read familiar word or word important to her. She can read individual word and not a sentence. She will need support to manage her correspondence."*

12. The reassessment states that X's attendance at Organisation2 is going to reduce to once per week from 9 June 2014 and stop on 7 August 2014. It notes a risk of social isolation from friends at Organisation2 but states that X will be able to *"drop in once in a while to meet up with friends and maintain the contact"*.

13. On 19 August 2014 CouncilB wrote to CouncilA, enclosing a letter to X of the same date. CouncilB stated that they had made attempts to assess X but had been unable to complete an assessment and, accordingly, had closed the referral. CouncilA responded on 28 August 2014 making clear that they did not agree to the referral being closed. CouncilA wrote again to CouncilB on 1 January 2015 requesting that they complete their assessment within 4 weeks.

14. Thereafter, on 27 March 2015, CouncilB sent an e-mail to CouncilA

stating that it accepted ordinary residence for X and a number of other service users who had been referred to it by CouncilA. CouncilB confirmed its position in a letter dated 30 March 2015. However, it failed to take steps to effect transfer of responsibilities and, as set out below, it subsequently sought to resile from its acceptance of responsibility.

15. On 31 July 2015 CouncilA wrote to CouncilB urging it to agree a transfer date of 23 August 2015. CouncilB did not respond substantively to this letter until 28 August 2015 when it wrote to CouncilA indicating that it did not accept ordinary residence in respect of X. CouncilB's letter stated that CouncilA had failed to provide "basic case information" to enable it to carry out its own assessment. There followed a lengthy exchange of correspondence between the parties. It is not necessary for me to set out this correspondence in full, save to note that CouncilA took issue with CouncilB's decision to resile from its acceptance of responsibility and CouncilB asserted that relevant information still had not been provided to it by CouncilA.

16. The dispute was referred to me by CouncilA on 22 March 2016. CouncilA's referral enclosed a statement of facts, chronology and list of documents. CouncilA filed legal submissions on 8 April 2016. CouncilB did not make any formal submissions to me at this stage, but correspondence between CouncilB and CouncilA continued.

17. On 25 April 2016 CouncilB wrote to CouncilA querying whether it had conducted a mental capacity assessment on the issue of residence. CouncilA replied on 3 May 2016 reporting the view of the social worker that X had capacity to decide where to live if supported in doing so by familiar people, if the decision was explained to her in simple language and given time to process the decision. CouncilA asserted that: *"as a result of the professional judgment of our social worker and in applying the Mental Capacity Act it was clear the presumption of capacity applied and there was no need for a Mental Capacity Assessment to be completed."*

18. CouncilB responded on 9 May 2016 requesting relevant documents which showed how the decision not to conduct a capacity assessment was made in light of the recorded view of the social worker in the reassessment that a capacity assessment was required. From the documents I have seen, it appears that no contemporaneous documentation was ever provided by CouncilA (but CouncilA did give an explanation for the lack of assessment in its e-mail of 29 June 2016, as set out below).

19. On 27 June 2016 I agreed to extend the deadline for both parties to consider their respective positions to 29 June 2016.

20. On 29 June 2016 CouncilA wrote to CouncilB informing them that the manager who completed the reassessment reported that, in the reassessment, he was referring to any future moves and, as X was not moving from Address1, there was no need to carry out an assessment. CouncilA also noted that the reassessment referred to complex decisions and asserted that, in relation to where she wished to live, *"X had sufficient capacity as she was supported".* It noted the manager's view that, at the time X moved to Address1, a capacity assessment was not needed because *"[X] had a very supportive mother and a day service provider who were able to support [X] in her decision making and were quite clear that it would be X's choice where to live and the type of accommodation. With full support of her mother and all professionals [X] chose to live in Address1…"*

21. On 1 July 2016 CouncilB wrote to me confirming that they wished me to proceed with the determination, and enclosing their legal submissions. Although these legal submissions were received two days after the date to which I had stated that I would extend time for the parties to consider their respective positions, I have decided, in my discretion, to admit and consider these submissions as part of my determination. There was on-going correspondence between the parties as to the facts underlying the dispute and, in all the circumstances, I take the view that it would not be appropriate or proportionate to exclude CouncilB's submissions from my assessment of this case.

22. On 7 July 2016 I wrote to the parties requesting a signed agreed statement of facts by 21 July 2016 (noting that the statement of facts submitted by CouncilA with its original referral was not an agreed statement of facts). In the event, the parties were unable to reach agreement, and on 4 August 2016 CouncilB submitted its own statement of facts, together with further documentation. I note that the statement of facts submitted by CouncilB was identical to that submitted by CouncilA save in respect of two paragraphs. It is a matter of serious concern that new documents were submitted so late in the process. However, I have agreed to consider them and to use them to fill any gaps in the evidence before me. Admitting these few documents late in the day does not, in all the circumstances of this case, cause any new delay or give rise to any prejudice to the parties.

The Authorities' Submissions

23. CouncilA submits that X has been ordinarily resident in CouncilB since 24 March 2012. In short, it states that:

    a. The deeming provision under section 24 of the National Assistance Act 1948 does not apply as X was not (and is not) provided with accommodation under section 21 of the Act.

    b. X had capacity to decide to move to Address1. c. The move was voluntary and for settled purpose.

    d. X signed a tenancy agreement and, even if she did not have the relevant capacity, this would render the agreement voidable not void ab initio.

    e. Insofar as X's family or X have expressed any recent dissatisfaction with the placement this does not stop her being ordinarily resident there for as long as she remains at the placement.

    f. Even if X did not have capacity to decide to move to Address1, this would not affect her actual residence or the fact that the move was for settled purpose.

24. CouncilB submits that:

    a. CouncilA was under a duty to provide accommodation for X under section 21 of the National Assistance Act 1948 on the grounds that X was in need of care and attention that was not "otherwise available" to her because she lacked capacity to make decisions about her place of residence or to enter into a tenancy agreement.

    b. CouncilA, having identified in its assessments a need for care and attention that was not otherwise available, should be regarded as having placed X at Address1 pursuant to section 21. The deeming provision applies accordingly.

    c. Alternatively, applying *Greenwich* (cited below), the deeming provision should be treated as applying as CouncilA was under a duty to provide accommodation under section 21 with which it failed to comply.

The Law

25. 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 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* CouncilA *Bexley* [2006] EWHC 2576 ("*Greenwich*"), *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 *("Quinn Gibbon"*), *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 ("Mohammed"), *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 ("Westminster"), and *Z v LB Hillingdon* [2009] EWCA Civ 1592 ("Hillingdon"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

26. 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

27. 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**.**

28. In *Westminster* (cited above) Lord Hoffman said that the effect of section 21(1)(a) was that, normally, a person needing care and attention which could

be provided in their own home, or in a home provided by a local authority under housing legislation, was not entitled to accommodation under section 21 of the 1948 Act.

29. 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).

30. 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

31. 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

32. 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.

33. 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

34. 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

35. "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.

36. 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"*

37. 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.

Application of the law to the facts

38. The main issue between the parties in this case is whether the deeming provision under section 24(5) of the 1948 Act applies to X's placement at Address1. If it does, then X would remain ordinarily resident in CouncilA notwithstanding her physical move to CouncilB.

39. 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 there is no dispute that accommodation and care services were provided separately by different organisations under two separate contracts. X had her own tenancy agreement and her 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. I reach this conclusion irrespective of whether or not X had capacity to decide where to live and/or enter into a tenancy agreement. These considerations are not directly relevant to the central point that, as a matter of fact, CouncilA did not make arrangements or agree to pay for the accommodation or meet any unpaid fees in accordance with section 26.

40. I turn, therefore, to consider whether CouncilA should have made arrangements for X to be accommodated under section 21? If the answer to this question is yes then, applying *Greenwich*, the deeming provision under section 24 would apply notwithstanding that such accommodation was not provided.

41. A local authority is under a duty to provide accommodation under section 21 only where care and attention are not otherwise available. A local authority is not generally required to provide Part 3 accommodation where the need for care and attention identified in its assessments can be met otherwise than through provision of accommodation under section 21. Where appropriate care can be provided in a supported living setting, with accommodation funded separately through housing benefit, the local authority will not be under a duty to provide section 21 accommodation.

42. CouncilB rely on the decision of the Court of Appeal in *Hillingdon* (cited above) to support of the proposition that *"*CouncilA *cannot rely on provision of section 29 services to avoid a section 21 NAA duty".* However, that case was

concerned with provision of care and attention to an asylum seeker with no accommodation save for the possibility of NAAS support. The Court of Appeal held that NAAS support is intended to be residual and that the question whether the claimant was within section 21 had to be decided without regard to the putative availability of accommodation from NASS. This reasoning does not apply to other forms of housing or benefits, such as supported living accommodation, which are not intended to be residual.

43. In the present case, all of the evidence indicates that X needs can be met (and are met) appropriately in supported living, with care provided separately from the provision of housing association accommodation. Care and attention was (and is) "otherwise available" and CouncilA was (and is) under no obligation to provide Part 3 accommodation. I reach this conclusion irrespective of whether or not X had capacity to decide to move to Address1 and/or enter into a tenancy agreement. A finding that she did not have the relevant capacity would not lead me to conclude that care and attention were not "otherwise available". As a matter of fact, X's assessed needs could be met in supported accommodation funded through housing benefit. If X did not have capacity to enter into the tenancy agreement, an application to the Court of Protection should have been made to authorise somebody else to sign the agreement on her behalf, but this does not mean that care and attention would not have been "otherwise available". An application to the Court of Protection is a straightforward step and, in any event, I note that, as a matter of fact, X did enter into a tenancy agreement and secure housing association accommodation (and, as CouncilA correctly state, lack of capacity does not render a contract void ab initio, only voidable). Therefore, in light of CouncilA's social work assessments that X's needs could be met in supported housing, I do not consider that CouncilA was under any duty to provide section 21 accommodation. The same was the case regardless of whether or not X had capacity to make her own decision as to where to live and/or enter into a tenancy agreement.

44. This disposes of the points raised by CouncilB in their legal submissions. I conclude that the deeming provision under section 24 does not apply in this case. CouncilB does not contend in its submission that, if the deeming provision does not apply, there is any other reason why X should be treated as ordinarily resident anywhere other than in CouncilB. However, it is still necessary for me to consider all of the facts and circumstances of the case before I can reach a concluded view as to X's ordinary residence.

45. On the facts, I have concluded that X is ordinarily resident in CouncilB. The evidence before me clearly indicates that X moved to Address1 for settled purpose, following assessment and consultation. It is clear that this was intended to be a long term placement. Whilst X maintained contact with her family, church and day centre in CouncilA, none of these factors, in my opinion, are sufficient to outweigh the fact that her abode was in CouncilB. My conclusion is the same whether or not X had capacity to decide voluntarily to adopt CouncilB as her place of abode. If she had capacity, the fact that she signed a tenancy agreement and chose to move to Address1 would be evidence of voluntary intent. However, even if she did not have capacity, her wish to move, alongside the views of her mother and those caring for her, would all be factors pointing towards a change of ordinary residence. The suggestion that the tenancy agreement might be voidable does not affect the practical reality that X moved to Address1 and lived there under the terms of the agreement. The suggestion (not evidenced in the papers) that X or her parents might have expressed some recent dissatisfaction with the placement could not, in itself, change her ordinary residence.

46. In light of the above, it is not necessary for me to make any finding as to whether or not X had capacity to decide to move to Address1 and/or enter into a tenancy agreement. Even taking CouncilB's case at its highest, and assuming that X did lack capacity to decide where to live and to enter into a tenancy agreement, I conclude that X became ordinarily resident in CouncilB upon moving to Address1.

Conclusion

47. For the reasons set out above, I find that X is, and has been since 24 March 2012, ordinarily resident in CouncilB.