

## **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 statement of facts, legal submissions and other documents submitted by CouncilA. CouncilB failed to engage in the dispute and did not submit any documents to me.
3. X is a 38 year old man (DOB XX/XX/1978) with Down's syndrome. He attended school in CouncilA but left because his father was in the Royal Air Force (I assume the father was posted elsewhere). Between 1995 and 1998 X attended a further education college in Area1C, CouncilC. Thereafter, he moved to a group home in Area2C and, in 2003, he moved to a supported living placement also in Area2C.
4. On 16 March 2009 X moved to Address1B in the area of CouncilB. Address1B is described in the chronology submitted by CouncilA as a "supported living" placement, but, whilst living there, X did not receive any care or support under the National Assistance Act 1948 or the Care Act 2014. An assessment undertaken by CouncilA records that the accommodation was as a self-contained one bedroom flat in a building that was manned between 9am and 5pm daily, with on-call support at night. X received housing related support under the Supporting People programme. The CouncilA assessment records that X's mother said X had 5 hours support per week for maintaining his flat and writing shopping lists, whereas a note of a conversation between a CouncilA social worker and the scheme manager records that he received 9 hours funding per week and that there was 24 hour support if required (as one of the other resident in the block received 24 hour care).
5. A note of a conversation between a CouncilA social worker and X's mother records that CouncilB were involved in the process when X moved from Area2C to Address1B. The note also records that X required support "a few years ago" for anxiety. An email from CouncilB to CouncilA states that the last contact was in 2013.

6. On 18 December 2015 X's mother contacted CouncilA to request an assessment. It appears that, prior to this date, X had stayed with a supported living provider in CouncilA on a number of occasions, and that now he wanted to move there permanently. A permanent placement was available from January 2016. A CouncilA social worker spoke to X's mother on 8 January 2016 but the social worker was unable to confirm whether or not CouncilA would fund care for X. On 12 January 2016 the social worker spoke to the Address1B scheme manager and sent a blank assessment form to X's mother to be completed and returned. Thereafter, on 17 February 2016, the CouncilA social worker contacted X's mother to inform her that CouncilA would not fund X's care as he was ordinarily resident in CouncilB and an assessment should be requested from them. Significantly, X's mother responded that "[X] has already given notice to his flat and is moving to CouncilA soon".
7. On 18 February 2016 the CouncilA social worker spoke to a social worker from CouncilB. This is the first time, since the referral in December 2015, that CouncilA were in contact with CouncilB. The CouncilB social worker said that, as X had capacity and his family had organised the move, CouncilA would have to fund his care. On the same date a solicitor from CouncilA wrote by email to the CouncilB social worker (he did not have contact details for their legal department) requesting an up to date Care Act compliant assessments and support plans, noting that it appeared that X had a need for care and support that would require him to be supported through the day if this support was not provided by his parents. The email erroneously suggested that X lived with his parents. It stated that it appeared that current arrangements had broken down and that X would therefore have needs that must be met by CouncilB. It referred to the deeming provision under section 39 of the Care Act 2014 and concluded that, if CouncilB allowed X to move to CouncilA without assessing his needs, it would effectively be seeking to avoid the consequences of the deeming provision.
8. The CouncilB social worker responded on the same date, stating that:

*"[X] lives in sheltered accommodation and has done since 2009 and the only support he receives is part of his tenancy from his social landlord. No formal needs have ever been identified or requests made for an assessment by him, his family or the landlord during this time and I cannot find any historic records on our system... the first we knew of the planned move on Monday was the phone call today from*

*[the CouncilA social worker] - the last telephone contact was back in 2013."*

9. CouncilA wrote again to CouncilB on 18 February 2016 enclosing a copy of an assessment of X's needs undertaken by the CouncilA social worker. That assessment (which I am told was started on 12 January 2016 and completed on 9 February 2016) noted that X was no longer happy in CouncilB and wished to move to CouncilA. It stated that, when X first moved to Address1B, he received support to access the community and there was more socialisation. It also stated that the people living at Address1B had changed and were now older than X, and it recorded X's mother's view that X's mental health had deteriorated. The assessment found that X required "*support in a supported living placement*".
10. CouncilA suggested to CouncilB, in the email enclosing this assessment, that there were two options: either CouncilB could dispute ordinary residence in which case CouncilA would fund X's care and support on an interim basis pending determination of the ordinary residence dispute; or CouncilB could accept that X remained ordinarily resident in their area and urgently carry out their own assessment and come to their own decision on eligibility.
11. CouncilB did not respond to this email prior to 23 February 2016 when X moved to Address1A, a supported living placement in the area of CouncilA. Neither authority was involved in arranging or facilitating the move and, at the time of the move, neither authority had agreed to meet any of X's needs for care and support at Address1A under Part 1 of the 2014 Act or otherwise.
12. On 14 March 2016 CouncilA agreed to pay for X's support, in the interim, backdated to 23 February 2016. I am told that the package currently consists of 59 hours shared care; 2.5 hours 1:1 support per week; and sleep-in care every night.
13. CouncilA wrote to CouncilB on 22 March 2016 requesting a formal response to their email of 18 February 2016. It followed this up with a further letter to CouncilB's legal department on 24 May 2016. On 26 May 2016 CouncilA wrote formally to CouncilB citing the Care and Support (Disputes Between Local Authorities) Regulations 2014 and enclosing a draft statement of facts. CouncilA chased for a reply but CouncilB failed to respond at all prior to 9 August 2016 when CouncilA referred the dispute to me. CouncilA submitted

an un-agreed statement of facts, supporting documents and legal submissions.

14. I wrote to the parties inviting asking them to submit an agreed a statement of facts and requesting any legal submissions from CouncilB. However, CouncilB failed to respond to further correspondence from CouncilA seeking to agree the facts and it did not submit any legal submissions to me.

### **The Authorities' Submissions**

15. CouncilA submits that X did not become ordinarily resident in its area when he moved to Address1A on 23 February 2016 or at all. It relies on the deeming provision under section 39 of the Care Act 2014 Act to submit that X should be treated as remaining ordinarily resident in the area of CouncilB. It submits that: both Address1B and Address1A were "specified accommodation" as defined in the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; CouncilA was under a duty to assess and review X's care needs; had CouncilA undertaken reviews of X's needs it would have known of his desire to move to CouncilA and been under a duty to facilitate such a move; and it cannot escape the effect of the deeming provision where it was under a duty to provide or to arrange for the provision of services.
16. As noted above, CouncilB completely failed to engage with CouncilA in its attempts to resolve this dispute before the matter was referred to me and CouncilB did not make any submissions to me.

### **The Law**

17. I have considered all the documents submitted by CouncilA; the provisions of Part 1 of the Care Act 2014 ("the 2014 Act") (and earlier community care legislation and guidance insofar as it is relevant to CouncilA's submissions); the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 (as amended); the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*") and *R (Greenwich) v Secretary of State and Bexley* (2006) EWHC 2576 ("*Greenwich*"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

18. "Ordinary Residence" is not defined in the 2014 Act. Therefore, the term should be given its ordinary and natural meaning. 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"*

19. However, this general approach is subject to the deeming provision under section 39 which provide that:

*(1) Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident—*

*(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or*

*(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.*

*(2) Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not of the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.*

20. The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014/2828 specify the types of accommodation to which section 39 applies. Regulation 2 states:

*(1) Subject to paragraph (2), the following types of accommodation are specified for the purposes of section 39(1) of the Act (where a person is treated as ordinarily resident)—*

*(a) care home accommodation (see regulation 3);*

*(b) shared lives scheme accommodation (see regulation 4); and*

*(c) supported living accommodation (see regulation 5).*

*(2) The types of accommodation referred to in paragraph (1) are specified in relation to an adult for the purposes of section 39(1) of the Act only if the care and support needs of the adult are being met under Part 1 of the Act while the adult lives in that type of accommodation.*

21. The explanatory note to the Care and Support (Miscellaneous Amendments) Regulations 2015/644, which amended the above provision to include subparagraph 2, states that:

*“The effect of the amendments is that the deeming of ordinary residence applies only from when the person living in one of the specified types of accommodation begins to receive care and support under the Act.”*

22. Supported living is defined in regulation 5 as:

*(a) accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and*

*(b) accommodation which is provided—*

*(i) in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose); and*

*(ii) in circumstances in which personal care is available if required.*

23. The approach to be adopted in applying the above deeming provision and regulations is set out in the Care and Support statutory guidance as follows:

*19.50 Where an adult's care and support needs can only be met if they are living in one of the specified types of accommodation and the accommodation arranged is in another area, then the principle of 'deeming' ordinary residence applies. This means that the adult is treated as remaining ordinarily resident in the area where they were resident immediately before the local authority began to provide or arrange care and support in any type of specified accommodation. The consequence of this is that the local authority which first provided that care and support will remain responsible for meeting the person's eligible needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. However, in circumstances where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements, they would be likely to acquire ordinary residence in the area of the authority where the new accommodation is situated. The deeming rule does not apply where a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.*

*19.51 Need should be judged to be 'able to be met' or of a kind that 'can be met only' through a specified type of accommodation where the local authority has made this decision following an assessment and a care and support planning process involving the person. Decisions on how needs are to be met, made in the latter process and recorded in the care and support plan, should evidence that needs can only be met in that manner. Where the outcome of the care planning process is a decision to meet needs in one of the specified types of accommodation and it is the local authority's view it should be assumed that needs can only be met in that type of accommodation for the purposes of 'deeming' ordinary residence. This should be clearly recorded in the care and support plan. The local authority is not required to demonstrate that needs cannot be met by any other type of support. The local authority must have assessed those needs in order to make such a decision - the 'deeming' principle therefore does not apply to cases where a person arranges their own accommodation and the local authority does not meet their needs. (emphasis added)*

## Application of the law to the facts

24. The present case is unusual in that, although arrangements for the placement at Address1A were made by X's family, an assessment was undertaken just before he moved. It is further complicated by the fact that the assessment was undertaken not by the authority in which X was residing at the time, but rather by the authority in which the proposed placement was situated. Accordingly, this case does not fall neatly within paragraph 19.50 of the guidance which refers to cases in which a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.
25. As noted above, under regulation 2 of the Specified Accommodation Regulations (as amended), the deeming provision under section 39 of the 2014 Act applies only from the time when the person living in one of the specified types of accommodation begins to receive care and support under the Act. In the present case, as a matter of fact, X was not receiving any care or support under the Act when he moved to Address1A on 23 February 2016; he started receiving care and support on 14 March 2016 (albeit payments were backdated to 23 February 2016). Therefore, I start from the position that, on a simple factual analysis, the deeming provision under section 39 of the 2014 Act did not apply to X when he first moved to the area of CouncilA.
26. However, this is not the end of the matter. As CouncilA rightly submits, local authorities cannot escape the effect of the deeming provision where they are under a duty to provide or to arrange for the provision of services (see Greenwich (cited above) at [55]). Therefore, I must consider whether CouncilB was in breach of any statutory duties; and whether, had it complied with those statutory duties, care and support under Part 1 of the 2014 Act would have been provided to X when he first moved to his current placement (such that the placement would have met the requirements of regulation 2(2) of the Specified Accommodation Regulations).
27. I am hindered in my assessment of this issue by the complete lack of any submissions or evidence from CouncilB. However, I must do my best to assess the situation on the limited information before me. The critical question is whether CouncilB was in breach of its statutory duties in not providing care and support to X at Address1A from the time he first moved there.



28. I accept that, under section 9 of the 2014 Act, Council B may have been under a duty to assess X's need for care and support from 18 February 2016 when Council A first contacted it about X. The duty arises where it appears to a local authority that an adult may have needs for care and support. There is no requirement that the adult should requested an assessment (see R v Gloucestershire CC, ex p RADAR (1997-98) 1 CCLR 476, QB). However, a local authority is entitled to take reasonable time to complete an assessment before they are in breach of their statutory duty. The evidence here indicates that, by the time Council B was informed of X's intention to move, X had already given notice to his flat in Council B and the move date was just give days hence. Although there was reference, in the assessment sent by Council A to Council B, to a deterioration in X's mental state, there was nothing in the information provided to Council B to suggest that assessment was exceptionally urgent. Therefore, I do not consider that Council B's failure to carry out an assessment and make a service offer in the five days between receiving notification of X's circumstances and the move taking place could be said to amount to a breach of statutory duty.

29. Council A submits that Council B was under a duty to assess X, and to review his care at least annually, from 2009 when it first assisted him to arrange the placement at Address 1B (and/or from 2013 when it had further contact with X). Council A argues that, had Council B complied with its duty, it would have identified X's need for supported living accommodation and been aware of his wish to move to Council A, and would have been under a duty to facilitate this move.

30. Whilst I have some sympathy for Council A's position, I consider that this submission is too speculative to found a conclusion that Council B was under a statutory duty to provide care and support for X from the point he first moved to Address 1A. I note that the arrangements put in place in 2009 involved provision of support through the Supporting People scheme. There is no evidence that these arrangements, at the time, were not sufficient to meet X's needs. Accordingly, I am not in a position to conclude that Council B was in breach of any substantive duty in failing to provide community care services in 2009. Likewise, there is evidence of contact between X and Council B in 2013 but I have no evidence to suggest that, at this point in time, X had any eligible unmet community care needs. The obligation to review relates to review of a support plan; it follows that if there was no duty to implement a community care support plan, there was no duty to review. However, even if a

support plan should have been produced and reviewed, the review could have taken place annually. I have seen no evidence as to when X first decided that he wished to move to CouncilA, so one can only speculate as to whether or not X's wish to move would have come up on any particular review.

31. Overall, I consider that the move from CouncilB to CouncilA was a private arrangement to which the deeming provision does not apply. When X first moved to Address1A he was not in receipt of care and support under Part 1 of the 2014 Act and, on the evidence before me, I am not in a position to conclude that CouncilB was in breach of its statutory duties in failing to make such provision. The situation may have been different had X contacted CouncilB to seek assistance with the move, or had CouncilA notified CouncilB sooner of X's wish to move; but having received notification only after all arrangements for the move had been made, and just five days before the move actually took place, I do not think that CouncilB can be criticised for failing to assess and offer care and support to X on the date of his move.

32. CouncilB's subsequent conduct in failing to engage with CouncilA in seeking to resolve the ordinary residence dispute certainly can (and should) be criticised. However, this conduct does not affect my overall assessment of the substantive issue in this case.

## **Conclusion**

33. I conclude that on 23 February 2016 X became ordinarily resident in the area of CouncilA.