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 32(3) of the National Assistance Act 1948 ("the1948 Act") of the ordinary residence of X. The Dispute is with CouncilB.

2. On 1 April 2015 relevant provisions of the Care Act 2014 ("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.

3. 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.

The facts

4. The following information has been ascertained from the agreed statement of facts, legal submissions by CouncilA and CouncilB, and other documents provided.

5. X is a 92 year old woman (dob XX.XX.1923). She was born and brought up in the area of CouncilA.

6. Until December 2010, X lived in a local authority bungalow in the area of CouncilA.

7. In December 2010, X sustained a fall at home, and was admitted to Hospital1. She was assessed by CouncilA prior to being discharged, and appears to have stated that she could no longer manage on her own as she was very prone to falling and confusion. Upon discharge

X planned to, and did in fact, go to live with her Daughter1 at Address1, in the area of CouncilB. X's tenancy at the bungalow in CouncilA was surrendered.

8. X remained at her daughter's home in the area of CouncilB until in or around Autumn 2014. It appears that the arrangement could not continue because the daughter with whom X was living in Address1 was suffering from mental ill health. At this time, members of X's family therefore asked CouncilB for an assessment for permanent residential care.

9. On 12 September 2014, there was a meeting with family and friends at which it was agreed that a move to independent living in CouncilA should be considered. X's expressed wish and preference had consistently been to move to an independent living placement in CouncilA rather than to a care home.

10. However, following this meeting no approach was made to CouncilA to enquire about the availability of supported living placements, nor did X make an application for housing in CouncilA.

11. Instead, CouncilB placed X at a care home known as CareHome1, CouncilB, on 23 October 2014. She was placed there on a short term residential contract, for the purpose of assessing whether she had a need for residential care.

12. The parties are in agreement that, whilst resident at CareHome1, CouncilB, X was ordinarily resident in the area of CouncilB. I agree: indeed, it would appear that X had been ordinarily resident in CouncilB since she first moved there in or around December 2010, surrendering her tenancy in CouncilA.

13. In October 2014, X and her family indicated to CouncilB that she wished to exercise her right of choice under the Choice of Accommodation Directions 1992 and be placed in a residential home in CouncilA. However, before such accommodation could be arranged X sustained an unexplained injury whilst at Carehome1. Her family lost confidence in the management of her care home and so decided to move her instantly. In consequence, the assessment of whether X required residential care did not reach completion, and no final decision was taken about her need for the same.

14. X could no longer return to live with her Daughter1, in CouncilB, because of the latter's mental illness. Her family decided that she should move instead, on a temporary basis, to live with another daughter at Address2, until a permanent placement could be found under the Choice of Accommodation Regulations. On 6 November 2014, X therefore left Carehome1 in CouncilB to stay with her daughter in CouncilA.

15. It appears to be common ground that this arrangement was only ever intended to be temporary in that (a) Address2 was not suitable for X's needs (for example, X needed to share a bed with her daughter as there were no others available); and (b) the family had already decided that X was in need of some a more formal type of arrangement.

16. Since 14 November 2014, CouncilA has arranged residential care for X at ResidentialCare1 in CouncilA, in accordance with paragraph 5 of the Ordinary Residence Guidance.

17. Both parties accept that at all material times X had the capacity to make decisions about where she should live.

The Authorities' Submissions

18. CouncilA submits that X is ordinarily resident in the area of CouncilB. It submits that:

a. X made a capacious decision to give up her tenancy in CouncilA;

b. X has lived permanently in the area of CouncilB since December 2010, and it is not disputed that she was ordinarily resident there as at November 2014. As at November 2014, her community links and doctor's surgery were in CouncilB;

c. As at the time X left CareHome1, CouncilB had statutory responsibility for her under the National Assistance Act 1948;

d. The fact that X had indicated a preference for a care home in CouncilA does not change the position;

e. The deeming provision in section 24(5) of the National Assistance Act 1948 (as to which see below) applies, in that there was a failure by CouncilB to provide accommodation to X in circumstances where it ought to have done so;

f. X only intended to move to Address2 temporarily.
Her move was therefore a temporary absence from the area of CouncilB, and so did not serve to alter the location of her ordinary residence.

19. CouncilB submits that X is ordinarily resident in the area of CouncilA. It submits that:

a. X made a capacitated, albeit "unwise", decision to move from CareHome1 to CouncilA;

b. X has consistently expressed the desire to return to live in CouncilA. Whilst she surrendered her tenancy in CouncilA in 2010, CouncilB believes that this decision was taken by her family and that X did not want this. I have seen no evidence to support this and it does not form part of the Agreed Statement of Facts;

c. As X was removed from CareHome1 before its assessment was complete, CouncilB has never assessed X as requiring residential care;

d. Although the assessment was not completed, early indications were that X would not require 24 hour residential care and that, rather, her needs could be met in an independent supported living setting;

e. The fact that the arrangement at Address2 was only intended to be a temporary arrangement did not prevent X from acquiring ordinary residence in CouncilA, as the intention was for her to move permanently to the area of CouncilA and not to return to the area of CouncilB. CouncilB refers to the Secretary of State's determination OR 5 of 2006, in which it was found that X lost her ordinary residence in CouncilB when she was taken to CouncilA with the intention of making long-term arrangements for her in that locality, notwithstanding the fact that her stay at her son's home in CouncilA was a

temporary arrangement, as there was no intention for her to return to live at CouncilB. X's move to CouncilA was thus not merely a "temporary absence" from CouncilB's area;

f. Even if X lacked the relevant decision-making capacity at the time of her move from CareHome1 to CouncilA, nevertheless applying the case of *Shah v London Borough of Barnet* (1983) 1 All ER 26 X nevertheless became ordinarily resident in CouncilA at the time of her move there.

The Law

20. I have considered all the documents submitted by the two authorities, the provisions of Part 3 of the 1948 Act and the Directions issued under it, the guidance on ordinary residence issued by the Department, 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 CouncilA.

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. 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.

Accommodation

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 residing immediately before the residential accommodation was provided. At paragraph 55 of Greenwich,

Charles J held that "It seems to me that if the position is that the arrangements should have been made — and here it is common ground that on 29th June a local authority should have made those arrangements with the relevant care home — that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority."

Welfare services

27. 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

28. "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.

29. 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"

30. 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.

31. 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 law to the facts

32. I accept the submissions of CouncilB as set out above.
Although I have been provided with no contemporaneous evidence, there is no dispute between the parties that:

a. At all material times, X had the capacity to make decisions about where she should live;
b. Notwithstanding the surrender of her tenancy and the circumstances surrounding it, X had expressed a consistent wish to return to CouncilA;
c. When she moved to CouncilA in November 2014, the intention was that the move to CouncilA would be permanent, even if the specific address to which she immediately moved was only a temporary one;
d. X had no available accommodation in CouncilB's area;
e. It was X's decision to move to CouncilA in November 2014.

33. As such, the move to CouncilA in November 2014 appears to have been a voluntary, capacitated, move by X, for the settled purpose of living in that area long-term. On these facts, the move was not a "temporary absence" from the area of CouncilB. It was a permanent move away from that area. A new ordinary residence can be acquired immediately, as long as the move was for "settled purpose". Here, it is clear that X's move was indeed for "settled purpose".

34. Because the move to CouncilA was the result of a voluntary, capacious decision on X's part, the deeming provision in section 24(5) of the NAA 1948 is of no application. Section 24(5) only applies "Where a person is provided with residential accommodation under this Part of this Act" with disputes typically arising where in one circumstance or another person is accommodated out of area. In the present case, because X made a voluntary decision to move to CouncilA, she was not at that point a person "provided with residential accommodation" under Part III of the Act.

35. Nor was CouncilB in the position of a local authority which "ought to have", but did not, make provision for X. First, X had voluntarily decided to leave the area for CouncilA. Second, there was no completed assessment indicating that X required residential accommodation. Indeed, she had lived with her daughter for the previous four years, and that arrangement only appears to have broken down because of the daughter's mental health needs, not X's needs. There was disagreement amongst family members as to whether X needed residential accommodation or supported living. X herself had expressed a wish to be accommodated in an independent living placement.

36. In short, there was a gap between the time that CouncilB was statutorily responsible for her under Part III of the NAA 1948, and the time that she approached CouncilA, during which X made the capacitated decision to move on her own volition and for settled purpose from CouncilB to CouncilA. During that gap, X acquired a new ordinary residence in CouncilA. It was only afterwards – even if after only a few days – that X approached the statutory bodies to make provision for her again, this time in CouncilA. At the time of that request, the area in which X had been ordinarily resident "immediately before the residential accommodation being provided" was, in the circumstances just recited, CouncilA.

Conclusion

37. For the reasons given above I find that X is, and has been since November 2014, ordinarily resident in the area of CouncilA.