**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 statement of facts, legal submissions and other documents provided by the parties.

3. X is a 59 year old woman (DOB XX/XX/1958) with a diagnosis of Down's Syndrome and learning disability. Prior to March 2015 X lived in supported housing at Address1A in CouncilA, where she had resided for over 30 years. She received a limited package of care including two daily visits. Overnight care was not available at Address1A.

4. CouncilA undertook a review of X's care needs in January 2015. That review, completed on 15 January 2015, concluded that X needed a higher level of support. It also noted that the dynamics in the Address1A house made X unhappy, and that she was keen to move. The review recommended a move to a supported living placement.

5. An assessment of X's capacity to decide where to live was undertaken by her social worker on 16 February 2015. The assessment concluded that X had capacity to make the decision. It noted that there were vacancies at two supported living placements run by an organisation called Organisation1, one in AreaC and one in AreaD. After viewing both potential placements X particularly liked AreaD. X's family friends, who played an important role in supporting X, were also in favour of a move.

6. A further capacity assessment in respect of a tenancy agreement was completed on 12 March 2015. The assessment concluded that X did have the relevant capacity and, on 26 March 2015, X signed a tenancy agreement for the supported living placement at AreaD. The precise date on which she moved to AreaD is not completely clear.

7. I am told by CouncilA that X's rent for the AreaD placement is (and at all times was) paid through housing benefit, and that X receives a package of care pursuant to section 29 of the National Assistance Act 1948.

8. CouncilA wrote to CouncilB on 30 March 2015 stating that X had chosen to live at AreaD and that she would become ordinarily resident in their area from the date of the tenancy agreement. CouncilB responded on 21 April 2015, disputing responsibility for X, stating that the need for supported living would have to be reviewed after the move and that, as such, the placement could not be considered "settled". There followed further correspondence between the parties which it is not necessary for me to set out in full.

9. I do note, however, that CouncilA continued to fund X's care on a without prejudice basis, undertaking a care and support review on 27 April 2016. The review records a number of concerns, particularly around communication between staff at the Organisation1 placement and X's family friends. However, it states that X had settled very well at the new placement; developed a good working relationship with staff; and become familiar with the local neighbourhood, accessing local shops and restaurants independently. It also notes that X was getting along well with housemates and had formed a particular strong friendly relationship with one other resident.

10. The matter was referred to me on 22 March 2017.

**The Authorities' Submissions**

11. CouncilA submit that X has been ordinarily resident in CouncilB since she moved to AreaD in March 2015. They submit that:

    a. X made a capacitous decision to move to CouncilB for settled purpose; and

    b. The deeming provisions under section 39 of the Care Act 2014 and section 24 of the National Assistance Act 1948 do not apply.

12. CouncilB dispute that X is, or ever has been, ordinarily resident in their area. They submit that:

    a. X lacked capacity to decide where to live;

    b. CouncilA "placed" X (rather than her making a decision of her own volition) and she was not offered any choice.

c. The deeming provisions under the 1948 Act apply; and

d. CouncilB never accepted the referral of X.

**The Law**

13. 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 relevant case law, including *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 *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 *("Quinn Gibbon"*). This dispute spans the coming into force of the 2014 Act. It is, therefore, necessary for me to set out below the law as it applied both before and after relevant provisions came into force.

Transitional Provisions

14. 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.

The 1948 Act

15. The following provisions were applicable when X moved to AreaD.

*Accommodation*

16. Section 21 of the 1948 Act empowered 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 were in need of care or attention which was not otherwise available to them**.**

17. By virtue of section 26 of the 1948 Act, local authorities could, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who was not a local authority. Certain restrictions on those arrangements were included in section 26. Firstly, subsection (1A) required that where arrangements under section 26 were being made for the provision of accommodation together with personal care, the accommodation had to be provided in a registered care home. Secondly, subsections (2) and (3A) stated that arrangements under that section had to provide for the making by the local authority of payments in respect of the accommodation at rates determined by or under the arrangements, and that the local authority had to either recover from the person accommodated or agree with the person and the establishment that the person accommodated would make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

18. 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*

19. Section 24(1) stated that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act was, subject to further provisions of that Part, the authority in whose area the person was ordinarily resident. The Secretary of State's Directions provided that the local authority was 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*

20. Under section 24(5) of the 1948 Act, a person who was provided with residential accommodation under Part 3 of the Act was deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

The 2014 Act

21. The above sections of the 1948 Act were repealed and replaced by relevant parts of the 2014 Act, subject to transitional provisions (material parts of which are set out above).

*Duty to meet need for care and support*

22. Section 18 of the 2014 Act imposes a duty on local authorities to meet the assessed eligible needs for care and support of adults ordinarily resident in their area (or present in their area but of no settled residence). Examples of what may be provided to meet such needs are set out in section 8. These include provision of accommodation in a care home or in premises of some other type.

*The new deeming provisions*

23. Section 39(1) provides that:

> *"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."*

24. The accommodation specified in the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 includes care home accommodation, shared lives accommodation and supported living accommodation.

*Ordinary Residence*

25. "Ordinary residence" is not defined in the 1948 Act or the 2014 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.

26. 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"*

27. The Care and Support Statutory Guidance, updated following the decision of the Supreme Court in *Cornwall*, states:

> *"with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) 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."*

**Application of the law to the facts**

*Capacity*

28. Applying the above provisions to the facts of this case, I shall start by considering capacity. I note that capacity is time and issue specific. At the time X moved to AreaD she was assessed by CouncilA as having capacity to decide where to live. The assessment was undertaken by X's social worker who also carried out the contemporaneous care needs review and compiled the support plan. She visited the AreaD property with X on a number of occasions. The assessment notes that she had worked with X over a period of time and was aware of her changing needs.

29. The assessment clearly records that X was able to understand that she had a choice about where to live and that moving meant leaving and not going back. X retained information relating to the decision and she was able to weigh relevant factors concerning the move, including: her unhappiness at the current placement; the fact that she would have more support at the new placement; and that she already knew some people at the new placement.

30. CouncilB submit that I should not accept the contemporaneous assessment because it is inconsistent with other assessments undertaken by an independent psychiatrist, Doctor1, on 26 June 2012 and 24 September 2016; and inconsistent with an assessment undertaken by a different CouncilA social worker on 22 August 2013. CouncilB also rely on references in the March 2015 care review to assessments of capacity to make decisions about medication and document disclosure, and to the view of X's family friends, recorded in March 2015, that X did not have capacity to enter into a tenancy agreement.

31. The assessment undertaken by the CouncilA social worker in August 2013 concerned X's capacity to decide whether or not to disclose information. The first report of Doctor1 addressed decisions about "accommodation, level of care and finances". Doctor1 saw X on one occasion for the purposes of preparing this report. The report records that Doctor1 saw X in the company of family friends and that X seemed relaxed. However, it notes that X used stock phrases and often said "I don't know" or "I don't remember" when a question was too difficult. The report concludes that X was unable to understand information regarding her choice of accommodation but it does

not provide detail as to the specific information that X was unable to understand, retain or weigh. It states that, because of her diagnosis, X had a tendency towards wanting to remain in her current situation because of inflexibility and the need for things to remain the same.

32. Doctor1 met X twice for the purposes of his second report (approximately 4 years after the first report). However this report is brief. It states that X could answer very simple questions that required yes or no answers, but that she could not talk about her emotions and would become distressed if asked something that was “beyond her ability to answer”. It is not clear on what basis Doctor1 concluded that the distress was caused by X’s inability to answer the question. The report states that X was unable to understand complex concepts, such as legal matters or relationships; and concludes that X lacked capacity to make decisions about her “welfare, care and residence”. However, again, it does not set out the specific information about the accommodation decision that X was unable to understand, retain or weigh.

33. Having carefully considered all of the evidence on capacity, I conclude, on the balance of probabilities, that X did have capacity to decide voluntarily to move to AreaD in March 2015. The social worker’s contemporaneous assessment provides specific detail as to the information that X was able to understand, retain and weigh; and I have no reason to doubt that the facts set out in that assessment are true.

34. CouncilB assert that the nature of X’s condition is such that her capacity is unlikely to fluctuate. However, a person with a fixed underlying condition may still present differently with different people on different occasions. The March 2015 care review specifically recorded that X’s ability to make decisions could be dependent on her mood; that she required others to be patient and to prompt her; and that when she did not want to talk about things she would say she does not know or can’t remember. These are the stock phrases that Doctor1 noted her to use.

35. It is apparent that the social worker, who had known X over a period of time, was able to elicit more meaningful response from X than Doctor1 was able. For example, Doctor1 states that X could not talk about her emotions whereas X did speak to the social worker about her feelings concerning the home dynamic. Doctor1 also states that X's inflexibility meant that she had a tendency towards wanting to remain in her current situation, whereas X was open to discussing with the social worker the possibility of a move to different accommodation.

36. I do not consider that the conclusions in other assessments that X lacked capacity to make decisions about medication or disclosure of information are inconsistent necessarily with the conclusion that she had capacity in March 2015 to decide to move to AreaD. These are different decisions that required the understanding, retaining and weighing of different information.

Placement/lack of choice

37. On the evidence, I accept that X moved voluntarily to AreaD for settled purpose. I reject CouncilB's submission that X was placed there and not offered any choice. There is clear evidence that two alternative placements were offered to X and that she preferred the AreaD placement. There is also nothing to suggest that she was forced to leave Address1A. The review documents record that it was her wish to move elsewhere. Accordingly, applying the approach in *Shah* (as set out above), I conclude that X did become ordinarily resident in CouncilB when she moved there in March 2015.

38. For the reasons set out above, I accept that X had capacity to make the decision to move. However, even if she did not have capacity to make the decision voluntarily, I still would have concluded that her ordinary residence changed upon moving to AreaD. The move plainly was for settled purpose: it was fully supported by all those concerned in her care (including professionals and family friends); X signed a tenancy agreement (which, even if she lacked capacity to enter into the agreement, would have voidable not void); and she moved out of Address1A to AreaD with no expectation that she would return.

Deeming provision

39. I reject CouncilB's submission that X should be deemed under statute to remain ordinarily resident in CouncilA. CouncilB seek to rely on a passage from the Care and Support Statutory guidance that concerns section 39 of the 2014 Act. However, for the reasons set out above, under the relevant transitional provisions, X's ordinary residence must be determined by reference to section 24 of the 1948 Act. Section 39 does not apply to persons already in supported living accommodation at the relevant date for so long as they remain in that accommodation. X moved to supported living before the relevant date and she has not moved again since.

40. Section 24 applies only where residential accommodation is provided under Part 3 of the 1948 Act. That was not the case here. X had her own tenancy and the accommodation was not provided together with care. I am told that the rent, at all times, was funded by way of housing benefit, and the care package was provided separately under section 29 of the 1948 Act. There is no evidence to suggest that CouncilB accepted any responsibility to pay (or make up any shortfall in) X's rent. Therefore the accommodation was not provided under Part 3 and the deeming provision does not apply.

**Conclusion**

41. For the reasons set out above, I conclude that X became ordinarily resident in CouncilB when she moved to AreaD in March 2015. The precise date on which she moved is unclear. However, the wording of CouncilA's letter of 30 March 2015 suggests that X had moved on or before that date. I therefore take 30 March 2015 as the date on which X became ordinarily resident in CouncilB.