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 CouncilB.

The facts

2. The following information has been ascertained from a statement of facts (not agreed), legal submissions and other documents provided by the parties.

3. X was born on XX XX 1947.

4. X has been diagnosed with a learning disability, schizophrenia and epilepsy along with a number of physical health needs.

5. On 6 October 1964 X was admitted to Hospital1, AreaC for a period of 2 weeks. The basis of her admission is unknown. It is also unclear where she was residing at the time of her admission.

6. On 12 November 1964 X was re-admitted to Hospital1. It is said that this admission was made under s.26 of the Mental Health Act 1959 for observations for a period up to 28 days. I have not seen any evidence confirming where X was residing at the time of this admission.

7. On 7 July 1965 X was re-admitted to Hospital1.

8. It appears that X remained at Hospital1 until 1971 when, on a date unknown, she moved to Hospital2, CouncilB's area.

9. On 16 February 1971 it said that X moved to Hospital3, CouncilB's area.

10. In respect of all of these admissions to hospital I have seen no evidence confirming the legal basis for detention or as to where she was living prior to each admission.

11. Apart from a reference to X being “on leave” from Hospital3 between January and October 1972 it appears that she remained at this hospital until 1992.

12. In 1992 X moved to Hospital4, CouncilB’s area where she remained until 1996. It appears that both her mother and brother were living in AreaD at the time. There is no evidence to confirm X was compulsorily detained during this period.

13. In 1996 X moved to Hospital5, CouncilB’s area where she remained until 2004. Again, I have not seen any evidence that confirms the legal basis for her detention at this hospital. CouncilA confirm that this move was arranged by Organisation1 on behalf of Organisation2.

14. On 6 September 2004 X moved to a residential care home known as Care Home1 Address1B, CouncilB’s area.

15. Prior to X’s move to Address1B relevant professionals from the Organisation3 and CouncilB completed a CPA care plan on 29 July 2004 in which it was identified that X needed 24-hour residential care (no mention of any nursing care requirements).

16. On 7 January 2011 X’s placement was reviewed by Organisation1 who recommended she remained where she was.

17. On 27 July 2011 Organisation1 completed a CPA assessment review noting that X had been stable for some time and that her needs were being met by the team at Address1B. X was discharged from the rehabilitation team and referred back to the care of her GP in CouncilB’s area.

18. On 1 September 2014 X’s placement and needs were reviewed. It was recorded that her presentation was stable and that she was no longer receiving any psychotropic medication.

19. It appears that CouncilA gave a standard authorisation depriving X of her liberty at Address1B for the purposes of the Mental Capacity Act 2005.

20. On 29 September 2014 Organisation1 wrote to CouncilB stating that X no longer qualified for “mental health funding” and that responsibility should pass to CouncilB’s social services authority.

21. On 20 November 2014 CouncilB completed a social care assessment of X’s needs. In addition to setting out X’s care needs the assessment also indicates that X lacks capacity to make decisions as to where to reside and her finances. I note that there is no dispute that X lacks capacity to decide where to live.

22. A dispute crystallised as to X’s ordinary residence between CouncilB and Organisation1 (being represented by legal services at CouncilA).

23. Despite significant correspondence between the parties agreement could not be reached and a referral was made by CouncilA for a determination of X’s ordinary residence. Unfortunately, the parties were unable to submit an agreed statement of facts as required.

The authorities’ submissions

<u>CouncilA</u>

24. Legal submissions have been prepared by CouncilA dated 13 September 2017.

25. CouncilA submit that X has been ordinarily resident in CouncilB’s area “at the relevant time in 2014” and that none of the statutory deeming provisions apply. It is said that X’s stays in hospital from 1964 to 2004 and her care home placement in 2004 were arranged by the NHS and not any social services authority.

26. The only evidence that X was ever subject to compulsory detention was a short period in 1964 and between 1965-1970 under ss. 25 and 26 of the Mental Health Act 1959. There is no evidence that she was ever detained

after 1970 under the 1959 Act or the Mental Health Act 1983. No after-care duty therefore arises under s.51 of the 1982 Act or s.117 of the 1983 Act.

27. Applying the decision of the Supreme Court in *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 and the relevant passages from the care and support guidance it is submitted that X must be considered ordinarily resident in CouncilB's area based on the known facts.

28. It is said that there is no evidence that X has been physically present in CouncilA's area since 1972 and that her family had ceased living there by 1993.

29. CouncilA submit that the relevant statutory provisions are those under the National Assistance Act 1948 and that the deeming provisions contained in the 1948 Act do not apply because the placement in the care home was arranged by the NHS. In the alternative, it is submitted that even if the deeming provisions apply X was already ordinarily resident in CouncilB's area by 2004 or otherwise had no ordinary residence.

30. CouncilA state that CouncilB's position amounts to a dispute over commissioning of services for X which cannot be determined under this referral and dispute framework pursuant to s.40 of the 2014 Act.

<u>CouncilB</u>

31. CouncilB set out their legal submissions in an email dated 29 August 2017 which also refers to further submissions made in another email dated 2 August 2017. Reference is also made to the draft statement of facts.

32. CouncilB submit that Organisation1 has funded X's care save for a period between 31 March 2016 until the end of April 2017.

33. CouncilB raise questions and/or criticisms of the 2014 review completed by Organisation1 leading to the formal notification that X no longer required

mental healthcare services. It is disputed that X does not require mental healthcare services.

34. CouncilB make reference to the legal basis upon which X has been detained in the past. It is said that this gives rise to a duty to provide after-care services under what is now s.117 of the 1983 Act. It is submitted that the 2014 review is insufficient to discharge any such duty due to various inadequacies.

35. In the email dated 2 August 2017 CouncilB submit that they will fund any social care needs but that X's needs arise from her "mental health state". Further criticism is made of the 2014 review and decision that X no longer has mental healthcare needs.

36. CouncilB make reference to X having been admitted to the Hospital1 in 1964 under s.26 of the 1959 Act which makes provision for "admission for treatment" for a period of up to 6 months.

37. CouncilB agree with CouncilA that there is no evidence of any detention under s.3 of the 1983 Act or the 1959 Act prior to the short period or periods in 1964 or 1965.

38. CouncilB assert that s.26 of the 1959 Act was repealed and replaced with s.3 of the 1983 Act when that Act came into force. It is then submitted that those detained and discharged from detention under s.26 of the 1959 Act were entitled to after-care services due to the effect of the Mental Health (Amendment) Act 1982.

39. CouncilB submit that in the circumstances X was detained under s.26 of the 1959 Act and was entitled to after-care services. This turned into a duty to provide after-care under s.117 of the 1983 Act. Such entitlement can only come to an end following a lawful multi-disciplinary team review by both CCG and the local authority.

40. CouncilB submit the 2014 review and decision are not capable of bringing the after-care duty to an end and that the decision that X is no longer entitled to healthcare services is not sound.

The law

41. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); the provisions of Part III of the National Assistance Act 1948 ("the 1948 Act"); the relevant provisions of the National Health Service Act 2006; the relevant provisions of the Mental Health Act 1959 and the Mental Health Act 1983; the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015; 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 (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 ("Cornwall")*.

42. Any question as to a person's ordinary residence arising under the 1948 Act which is to be determined on or after 1 April 2015 ('the relevant date') is to be determined in accordance with s.40 of the Care Act 2014 pursuant to article 5 of the Care Act (Transitional Provision) Order 2015/995.

43. Section 40(1) provides that any dispute about where an adult is ordinarily resident for the purposes of this Part, or any dispute between local authorities under section 37 about the application of that section, is to be determined by the Secretary of State, or where the Secretary of State appoints a person for that purpose (the "appointed person"), that person and s.40(1) allows regulations to be made to make further provision about resolution of disputes of the type mentioned in subsection (1).

44. Article 6(1) of the 2015 Transitional Order provides that any person who immediately before the relevant date is deemed to be ordinarily resident in a local authority's area pursuant to s.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 I of the 2014 Act.

45. Sections 24 (5) and (6) of the 1948 Act provide-

"(5) Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him.

(6) 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."

46. Article 6(2)(a) of the 2015 Order provides that the deeming provisions under s.39 of the 2014 Act have no effect in relation to a person who, immediately before the relevant date, is being provided with non-hospital accommodation within the meaning of article 12 of the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010 which has been provided since immediately before 19 April 2010 for as long as the provision of that accommodation continues. The relevant date is 1 April 2015.

47. Article 12(1) of the 2010 Order provides as follows-

"(1) The amendments made to section 24 of the National Assistance Act 1948 (authority liable for provision of accommodation) by section 148(1) of the 2008 Act do not have effect in relation to a person for whom non-hospital NHS

accommodation is being provided immediately before the appointed day, for as long as the provision of that accommodation continues."

48. Article 11 provides that the appointed day is 19 April 2010.

49. Article 12(2) of the 2010 Order provides as follows-

"(2) For these purposes, "non-hospital NHS accommodation" is NHS accommodation that is elsewhere than at a hospital vested in-

(a) The Secretary of State;

(b) A Primary Care Trust;

(c) A Local Health Board;

(d) A National Health Service trust; or

(e) An NHS foundation trust."

50. Section 148 (1) of the 2008 Act provides-

"In section 24 of the National Assistance Act 1948 (authority liable for provision of accommodation) for subsections (6) and (7) substitute—

"(6)For the purposes of the provision of residential accommodation under this Part, a patient ("P") for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.

(6A)In subsection (6) "NHS accommodation" means—

(a)accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or

(b)accommodation provided under section 117 of the Mental Health Act 1983 by a Primary Care Trust or Local Health Board, other than accommodation so provided jointly with a local authority.""

51. The statutory Care and Support guidance (revised 2017) provides-

"19.26 Where a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.

19.27 The Supreme Court judgment in Cornwall made clear that the essential criterion in the language of the statute 'is the residence of the subject and the nature of that residence'.

19.28 At paragraph 51, the judgment says in relation to the Secretary of State's argument that the adult's OR must be taken to be that of his parents as follows:

'There might be force in these approaches from a policy point of view, since they would reflect the importance of the link between the responsible authority and those in practice representing the interests of the individual concerned. They are however impossible to reconcile with the language of the statute, under which it is the residence of the subject, and the nature of that residence, which provide the essential criterion….'

19.29 At paragraph 47, the judgment refers to the attributes of the residence objectively viewed.

19.30 At paragraph 49, the judgment refers to an: assessment of the duration and quality of actual residence.

19.31 At paragraphs 47 and 52, the judgment refers to residence being 'sufficiently settled'.

19.32 Therefore 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

52. It is necessary to begin by considering whether the relevant "deeming" provisions apply.

53. The deeming provisions of s.39 of the 2014 Act do not apply due to the effect of article 6(2)(a) of the 2015 Transitional Order. This is because immediately before the relevant date (1 April 2015) X was being provided with non-hospital NHS accommodation (Address1B).

54. The deeming provisions contained in s.24 of the 1948 Act require careful consideration. Section 24(5) provides that where a person is provided with residential accommodation under Part 3 of the 1948 Act he shall be deemed to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him. X has never been provided with accommodation under Part 3 of the 1948 Act and so s.24(5) does not have effect.

55. The effect of article 12(1) of the 2010 Order is that the amendments to section 24(6) of the 1948 Act do not take effect. As a consequence, s.24(6) only applies where the person is a patient in a hospital. In 2014, when this ordinary resident dispute arose, X was residing at Address1B. There is, or can be, no dispute that Address1B is a residential care home. It is not a hospital. Section 24(6) therefore does not apply.

56. In the circumstances and for the reasons set out above I conclude that the deeming provisions under s.39 of the 2014 Act and s.24 of the 1948 Act do not apply in this case.

57. I will now consider the point raised by CouncilB which is that X is owed a duty by Organisation1 and CouncilA to provide after-care services under s.117 of the 1983 Act.

58. The after-care duty arises where a person is detained under s.3 or admitted or transferred to hospital under specified powers and then ceases to be detained and leaves hospital.

59. CouncilB suggest that X was detained under s.26 of the 1959 Act which is the equivalent of s.3 of the 1983 Act and therefore was owed an after-care duty pursuant to s.51 of the 1982 Act. It is said that when s.51 was repealed and replaced with s.117, the after-care duty continued.

60. The difficulty with this argument is that s.51 only came into force on 1 September 1983 and there is no evidence that X was ever compulsorily detained on or after that date. It is therefore impossible to conclude that X is owed a duty under s.117 of the 1983 Act or s.51 of the 1982 Act.

61. I now turn to the test for determining ordinary residence by reference to the statutory care and support guidance and the decision of the Supreme Court in *Cornwall*.

62. The statutory Care and Support guidance confirms that where a person lacks capacity to decide where to live, the direct application of the test in *Shah* will not assist since that test requires the voluntary adoption of a place (para 19.26). The focus should be on the residence of the person and the nature of that residence objectively viewed. There should be an assessment of the duration and quality of actual residence which should be sufficiently settled.

63. Such an assessment 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.

64. I have taken into account all relevant factors and given particular weight to the following when considering the question of X's ordinary residence-

- X has indicated a wish to remain in the CouncilB's area and has not indicated any desire to return to CouncilA's area.
- X has been physically present and settled at Address1B since 2004 – a period now exceeding 13 years.
- Address1B is X's 'home' and is where she lives her life from.
- X has been registered with a GP in her local area since 2011.
- X has no ongoing connections to people or activities in CouncilA's area.
- X has lived in the CouncilB's area since 1971.
- It would be contrary to common sense to suggest that X is ordinarily resident in CouncilA's area in the circumstances.

Conclusion

65. For the reasons set out above, I have concluded that X has been ordinarily resident in CouncilB's area since September 2014 when this dispute first arose.