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 the following individuals: X1, X2, X3, X4 and X5. The dispute is with CouncilB.

The Facts

2. I have received a statement of facts prepared by CouncilA, save that the document has only been signed by CouncilA. By e-mail dated 30 July 2015 to CouncilA, CouncilB stated that they agreed with the statement of facts "*in so far as it is not contested within our legal submissions*". I do not find the approach adopted by CouncilB in this regard helpful. If there are particular facts that are disputed by CouncilB, these should be clearly marked and flagged up in the statement of facts itself or clearly set out in a section of CouncilB's legal submissions. That said, I will do my best to ascertain the disputed facts. I have noted that CouncilB dispute the findings of various capacity assessments conducted by CouncilA.

3. The following information has been gleaned from the agreed statement of facts and supporting documentation.

4. I note that in order to resolve the dispute of principle between CouncilA and CouncilB, the case of X0 was referred to me for determination which is similar on its facts to the five cases that I am now being asked to determine. I decided that X0, who was living in Shared Lives accommodation, was ordinarily resident in CouncilB. I found that there was no duty to provide him with accommodation under section 21 of the National Assistance Act 1948, that he had entered into a licence agreement for his accommodation and that he had voluntarily adopted CouncilB as his place of ordinary residence. I decided that case in January 2014 and I will consider relevant developments in the law when considering these cases and bear in mind that each case turns on its own facts.

5. After receiving the papers and the submissions, I asked both parties for some further information and that information was duly provided to me during the course of September 2017.

6. I set out below the essential facts in relation to each of the five individuals whose place of ordinary residence is in dispute.

X1

7. X1 is a 60 year old woman (I note that the agreed statement of facts erroneously states that she is 48 years old) and has a moderate learning disability.

8. X1 was removed from her parents' care as a child due to severe neglect and then lived in various residential homes before moving to reside in a Shared Lives placement in London in 1990 with the Y0s.

9. She then moved on 25 May 2006 to reside in a Shared Lives placement at Address1B CouncilB to live with carers, Y1 and Y2. There is reference in the agreed statement of facts to X1 now residing at Address2B, CouncilB and I understand that she moved with the same carers to this new address in June 2012.

10. I have seen a copy of an Adult Placement Agreement and Service User Plan dated 25 May 2006. There is a licence agreement dated 22 July 2010, signed by X1 and Y1. The document is headed Organisation1*, CouncilA Adult Placement / Shared Lives Service*.

11. There is a letter dated 13 October 2010 from CouncilB stating that Housing Benefit has been awarded from 23 August 2010 to X1 and that the payment will be sent to her landlord, which appears to be Organisation1.

12. I have seen a CouncilA Shared Information form dated 8 October 2012, which states that X1 needs prompting and encouragement in respect of personal care needs including bathing, washing her hair and oral hygiene.

13. A Support Plan Review dated 24 December 2014 records that X1 needs help and prompting with washing and maintaining her personal appearance and support for oral hygiene. She needs help / prompting with washing her body twice a day [A67] and help once a day using the toilet [A67]. She had very high support needs for social activities and relationships and needed support to plan to go out for the day and required prompts throughout the day [A69]. She was unable to answer the front door to her home and needed support [A71]. She needed ongoing support every hour to help her maintain routines so as to avoid crisis [A72].

14. X1 has friends and accesses community facilities and events in her local area.

15. I note that in March 2010, CouncilA Community Learning Disabilities Team Review recorded that "X1 *does lack capacity however her liberty is not restricted*". However, it is not clear in which domain or domains capacity was being assessed at that time. There is reference in the papers to a further capacity assessment in 2012 which considered that X1 had capacity to decide about her residence. I have seen a copy of a Mental Capacity Assessment dated 29 April 2014, carried out by CouncilA, which records that she has capacity to make a decision about her residence.

16. I note that CouncilB do not accept the findings of the 2014 capacity assessment. However, I start by observing that the presumption under the Mental Capacity Act 2005 is that a person has capacity. I note that she is recorded as stating that she was happy living with Y1 in CouncilB and that she was settled and wished to remain there. I do not consider, on balance of probabilities, that there is sufficient evidence to rebut the presumption of capacity in circumstances of a relatively simple decision about whether she would wish to continue living with her carers (with whom she had resided since May 2006) in CouncilB. CouncilB state that CouncilA had a conflict of interest because of the financial impact of the outcome of the decision on capacity. I do not consider that there is any evidence that the mental capacity assessment was improperly conducted and / or was improperly influenced by CouncilA's financial interest in the outcome.

X2

17. X2 is a 44 year old man with a learning disability.

18. He lives in a Shared Lives placement at Address3B with carers Y3 and Y4.

19. He was fostered as a child by Y3 and moved with her to Address3B in around 1991. I presume that they had previously lived in the CouncilA area. His mother and sister are dead and he has lost contact with his father and two step sisters.

20. On 1 September 2004, the adult placement scheme at Address3B started. I have seen a copy of a Licence Agreement which was signed by Y3 and X2 in 2009.

21. The agreed statement of facts states that Housing Benefit was awarded on 16 May 2005, although the letter from CouncilC in the bundle refers only to Housing Benefit being paid since 29 May 2006. The said letter is addressed to Y5 and his connection with X2 is unclear but it is plain that the Housing Benefit is payable in respect of X2 at Address3B.

22. CouncilA's Shared Information Form, dated 31 October 2013 [B5 - B27], states that X2 needs support and guidance as regards his personal care needs and he is unlikely to carry out personal care needs without prompting. He requires verbal prompts in relation to personal hygiene and receives support to wash himself and his hair, shave and clean his teeth. He can be incontinent of urine and faeces at night. He does not contribute to tasks of daily living. He is unable to cook a meal or do his own laundry or carry out shopping. He has substantial needs in relation to care and support in autonomy and freedom to make choices and could be at risk from verbal or physical abuse by the way he presents himself in certain social situations. He requires monitoring of his absences. He is not able to live independently. The form also stated that X2 has an excellent relationship with his carer Y3 and her family. He also works in a local museum and has a good relationship with his co-workers.

23. A Support Plan Review dated 21 November 2014 records that he needs irregular / infrequent help with personal care particularly when he has absences about three times a week which have a substantial impact on independent living skills.

24. CouncilA carried out a mental capacity assessment of X2's capacity to make a decision about his residence on 22 April 2014. X2 was assessed as having capacity to make that decision. During the course of the assessment, X2 stated how much he enjoyed living in Address3B with Y3, being involved in the local community, volunteering at the museum and that he wished to remain living there. I note CouncilB's view that the capacity assessment is flawed because section 6 refers to a different person called Y6. I agree that some information relating to another person has been incorrectly recorded on the mental capacity assessment form. However, I am satisfied that information pertaining to X2 has been recorded in the other sections of the form and in particular that the information in section 2 relates to him. I am satisfied that the information recorded in respect of X2 supports a finding of capacity. I bear in mind that the presumption under the Mental Capacity Act 2005 is that a person has capacity and I do not consider that presumption has been rebutted on the available evidence.

X3

25. X3 is a 60 year old woman who has a moderate learning disability and lives in a Shared Lives placement at Address4B. Her Shared Lives carers are Y7, Y8 and Y9.

26. The background is that X3's father died in 1999 and her sister and brother-in-law moved into the family home and mistreated her. CouncilA obtained a Guardianship Order. She initially spent time at the Y7, Y8 and Y9s' home on a respite basis. Her Shared Lives placement began on 24 August 2001 at the Y7, Y8 and Y9s' home in CouncilB. She was, accordingly, placed by CouncilA in a Shared Lives placement out of the area.

27. I have seen a copy of a licence agreement between Y7 and Y8 and X3 dated 24 August 2001 in respect of Address4B, CouncilB. This refers to a rent of £266 and the service provider named on the agreement is Organisation2. There is a further licence agreement dated 19 July 2010 between the Y7, Y8, Y9 and X3 pursuant to CouncilA's Shared Lives services, and the service provider is Organisation1.

28. There is a letter from CouncilC dated 5 October 2010 which states that Housing Benefit is awarded to X3 from 15 July 2010. The landlord is named as Organisation1 Ltd.

29. CouncilA's Support Plan review in 2013 records that X3 stated that she wished to continue living with Y7, Y8 and Y9, and everything was working and she was very happy. She did not wish anything to change. She stated that she wished to continue attending Centre1B five times a week.

30. CouncilA's Shared Information Form, dated 3 March 2014, records that X3 needs reminders throughout the day to wash her hands and use the toilet and to clean and wash her hair. She also needs support in the home environment. She does not use public transport alone and can find uneven ground and unknown places difficult to negotiate. She is not able to do her own laundry or prepare a cooked meal.

31. Her Support Plan Review, dated 15 January 2015, records how she loves singing and performing and has taken part in shows. It also records that she has limited independence in using the toilet and needs assistance three times per day and needs support to stay clean including washing her hands [C50]. She needs help once per day with washing her body [C50]. She needs support in the community and can only go out with support [C51]. She can need support when she wakes up during the night [C52].

32. CouncilA carried out a mental capacity assessment on 20 February 2013 to assess X3's ability to make a decision about her residence. She was assessed as having the relevant capacity. I note that she informed the assessors that she wished to remain living in CouncilB for a number of reasons, including that she liked the area, felt safe, enjoyed attending

Centre1B, she had lived there since 2001, had lots of friends and did not wish to return to AreaA where her family had been cruel to her. I note that CouncilB dispute the capacity findings on the basis that X3 would not be able to understand the implications of ordinary residence. In my view, the relevant issue was whether X3 had capacity to make decisions about her residence and whether she had capacity to decide whether she wanted to continue living with the Y7,Y8,Y9s' at Address4B. I do not consider that that required X3 to understand the law of ordinary residence and the legal implications of being the responsibility of one local authority as opposed to another. X3 articulated a number of reasons why she wished to continue to live at that address and be cared for by the Y7, Y8 and Y9. I do not consider that the presumption under the Mental Capacity Act 2005 that X3 had capacity to make decisions about her residence has been displaced on the basis of the available evidence.

X4

33. X4 is a 65 year old woman with a diagnosis of moderate learning disability and epilepsy. She lives in a Shared Lives placement at Address5B with her carers Y10 and Y11.

34. On 15 April 1988, X4 lived with Y10 and Y12 (deceased) in AreaA1 and the agreed statement of facts stated the she moved to Address5B on 19 July 1991 with her carers when the Shared Lives placement at the current address began. However, I note that there is an unsigned licence agreement, dated 15 April 1988, in respect of a Shared Lives placement with Y0 at Address5B. Hence, it is unclear when the Shared Lives placement in CouncilB began but I take it that the latest date for commencement is 19 July 1991.

35. I note that X4 attends Centre2B five days a week.

36. Housing benefit was awarded to X4 from 23 August 2010. The landlord is named on the letter from CouncilB as Organisation1. I have not been

provided with a copy of any licence agreement in respect of the Shared Lives placement since Organisation1 took over as the Shared Lives administrator.

37. CouncilA's Shared Information Form dated 27 March 2014 states that X4 is able to look after her personal care needs with minimal support and guidance and she is able to assist with some basic tasks around the home such as unloading the dishwasher and helping with food preparation. She has a friend who lives with a carer near AreaB. She accesses the community whenever possible and enjoys shows and clubs. She needs support when in the community.

38. CouncilA carried out a mental capacity assessment in relation to decisions about residence on 22 April 2014 and concluded that she had capacity to make a decision about where to live. X4 consistently stated that she wanted to remain living in CouncilB.

39. I note that the support plan review dated 17 December 2014 states that Y10, her carer, reported that X4 was showing signs of confusion and was worried this could mean dementia was developing and that her key worker at the day services reported that X4 was showing signs over the last 18 months of losing memory, for example not finding her way in the new centre. I further note from the Support Plan review dated 17 December 2014 that X4 wished to build upon her independence skills and practical abilities. It is further recorded that she enjoyed her day centre activities and had coped well with the move to a larger day centre. It is recorded that X4 needs prompting to wash and dress and manage her incontinence and to prepare her main meal, carry out housework and shopping and make her medication [D55]. She needed support every 2 – 3 hours to go to and from activities, ensure essential food and drink and take prescribed medication [D57]. She needed support to maintain routines of daily living without which she would be at substantial risk [D59]. She needs reassurance during the night [D60].

40. I do not consider that there is sufficient evidence to show, on the balance of probabilities, that X4 lacked capacity to make a decision about her residence in April 2014. The decision for X4 was a straightforward one. Did she wish to

continue living with her carers (with whom she had resided since 1988) at her current address (where she had lived since July 1991)?

X5

41. X5 is a 36 year old woman who lives in a Shared Lives placement at Address6B with carers Y12 and Y13. She has a learning disability.

42. X5 initially lived with her parents in the CouncilA area until the late 1990s. It is then not clear where she resided until she moved to CouncilB. It is not clear why she left the family home and whether there were safeguarding concerns, although it appears that she suffered from neglect and a poor diet whilst living with her parents. She was placed in a Shared Lives placement at Address6B, CouncilB by CouncilA. There is reference in the papers to her previously residing in a residential home and not being happy there.

43. I have seen a CouncilA Adult Placement Service Agreement and User Plan in respect of X5 dated 5 February 2007. Her APS carer is named as Y13.

44. There is a licence agreement dated 12 January 2007, which is headed "Organisation2 *CouncilA Shared Lives Service (Adult Placement)*". X5 is the licensee and Y13 and Y12 are the householders. The agreement records that the rent is £266. The copy I have seen has not been signed.

45. There is a decision notice from the Benefits Service in CouncilD which is addressed to X5 at Address6B and records that Housing Benefit is payable from 2 April 2012 in the sum of £80 per week. The Notice records that weekly gross rent is £266. The benefit is to be paid directly to Organisation1.

46. I have read the minutes of a Person Centred Planning Meeting on 1 August 2008, in respect of X5, that record: "*X5 has benefited from the support and stability she receives from living at Address6B with Y12 and Y13*". The minutes also note that she has her brother living in CouncilD. The minutes show that X5 has been engaging in a range of activities at the day centre and had completed a NVQ qualification in horse care.

47. CouncilA's Shared Information Form, dated 16 April 2013, records that X5 informed a review meeting, held on 10 April 2013, that she was very happy and wished to remain in CouncilB and that her brother, Y14, lived in a Shared Lives placement nearby. She was attending the Centre1B three times per week and doing a work placement at an equestrian centre on other days. The form also records that she needs encouragement / prompting to complete self-care, without which she would neglect herself. She always needs help and prompting with washing and needs infrequent support with incontinence when she is out and becomes anxious.

48. A support plan review, dated 17 November 2014, records that X5 stated that she was "*just happy here [living with Y13l]*". She had been attending the Centre1B for six years. This form also recorded that she needed support twice a day to check on her and ensure that she had food to eat [E50]. She tended to sleep through the night [E50]. She often needed help using transport [E49]. She had very high support needs for social participation and inclusion to help her with anxiety which causes lapses in memory and concentration [E49].

49. A mental capacity assessment was carried out by CouncilA on 24 March 2015. Her decision making capacity was assessed in relation to "*where to live*". X5 explained that she came to live with Y13 seven years ago and would like to stay. She enjoys visiting her family but is then happy to return home to her Shared Lives placement. She expressed concern about losing services like Centre1B if CouncilA is no longer funding the care package, but did not want to move to avoid that. Her parents were consulted and both expressed the view that X5 is happy living in CouncilB. She travels to visit her parents in CouncilA. X5 is assessed as having capacity to make the decision about where to live. The assessor notes the conflict of interest because the decision has funding implications for CouncilA and he is employed by CouncilA, but notes that a number of people were involved in the assessment and no one said that X5 lacked capacity to make the decision about her residence.

50. An Overview document completed by CouncilB, dated 22 October 2014, states that her capacity to make a decision about her residence is disputed

because when X5 was asked about her rent and licence agreement, she was unable to say how she paid her rent or how much or what the rent was for. X5 did not know what a licence agreement was or what it meant to her.

The Relevant Law

51. 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 LBC 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.

52. 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

53. 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.

54. 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.

55. 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).

56. 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

57. 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

58. 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.

59. 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

60. 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

61. ‘Ordinary residence’ is not defined in the 1948 Act. The Department of Health has issued guidance on the approach to identifying the ordinary residence of people in need of community care services.

62. 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”.*

63. Additional considerations apply where the relevant person lacks capacity to decide where to live.

64. The approach to such cases is set out in the Supreme Court’s judgment in the *Cornwall* case.

65. In relation to adults who lack capacity, the Supreme Court rejected the presumption that the adult’s ordinary residence should be taken to be that of his parents. The Supreme Court clarified that the essential criterion in the language of the 1948 Act is “*the residence of the subject and the nature of that residence*”. Therefore, in order to establish the ordinary residence of adults who lack capacity, local authorities should follow the approach set out in the *Shah* case, but place no regard on the fact that the adult, by reason of their lack of capacity, cannot be said to be living there voluntarily. As set out in the *Shah* case, and reiterated in the Department of Health’s *Cornwall* Guidance, determination of ordinary residence 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 or long or short duration.

The submissions of the parties

66. CouncilA's position is that where the five individuals have chosen, with capacity, to live in CouncilB pursuant to a Shared Lives scheme, and are in receipt of housing benefit pursuant to a licence agreement and liability for rent, and have personal care needs with those needs being met pursuant to section 29 NAA services and are socially integrated in the area, they are ordinarily resident in CouncilB. They rely on the Secretary of State's determination in OR 1 2014 (the case of X0), a case with a similar factual background. In that case, the Secretary of State determined that X0 was ordinarily resident in CouncilB and CouncilA argue that these cases are materially similar to the X0 case.

67. CouncilA accepts that in relation to X5, X3, X1 and X4 that they were being provided with s.21 NAA accommodation. However, following the implementation of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 which permitted the provision of accommodation with personal care in a setting other than a registered care home, these four individuals were provided with accommodation in their own home, pursuant to licence agreements, and received housing benefit. I have since received clarification from CouncilA that it is only X1 who was actually placed in a residential care home before moving to a Shared Lives placement (see e-mail dated 11 September 2017 from the Organisation3A). CouncilA contend that X2 was not ever placed in section 21 accommodation and at all material times was residing in a family placement scheme.

68. In supplementary legal submissions CouncilA identify the key factual issue in this case to be "*does the service user have accommodation in which to have her needs for care and support met or does she require the provision of section 21(1) accommodation?*". CouncilA's view is that all five service users, as a matter of fact, have accommodation within which their needs for care and attention could be met when they moved to the Shared Lives placements funded by housing benefit. They argue that this is consistent with ordinary residence decisions OR 3 2015 and OR 2 2015 as well the Ordinary Residence Guidance (issued in 2013).

69. CouncilB submit that CouncilA is providing all five individuals with residential accommodation in CouncilB pursuant to section 21 NAA and they are deemed ordinary resident in CouncilB by virtue of s. 24(5) NAA. CouncilB argue that the arrangements for all five individuals fall within section 26(2) arrangements under NAA. They dispute the capacity assessments of CouncilA and argue that the five individuals lack capacity to make decisions about their place of residence. CouncilB argues that as a matter of public policy, CouncilA ought not to be permitted to transfer responsibility for these individuals to CouncilB and argues that CouncilA is engaged in a "*cost shunting exercise*".

70. In supplementary submissions, CouncilB agree that the first question for the Secretary of State to determine is whether the five individuals are accommodated under s. 21(1) of the NAA. CouncilB argues that CouncilA cannot rely on the fact of payment of housing benefit to support their argument that services are provided pursuant to s.29 NAA. CouncilB is not responsible for the payment of housing benefit, but that is the responsibility of second tier local authority and they argue that the housing benefit could have been awarded in error. They accept that the five individuals are not residing in residential accommodation but argue that, on the basis of their needs, they ought to be.

Application of the law to the facts

71. All five of these cases concern individuals who were placed some time ago in Shared Lives accommodation. I have considered the Ordinary Residence 2013 Guidance which deals with Shared Lives schemes and sets out that where these arrangements include the provision of accommodation, social care needs are usually met by the provision of s. 29 NAA services. A shared lives placement will not usually be considered to be an arrangement under s. 21 NAA.

> *"120. Local authorities or independent providers may operate Shared Lives schemes (also known as adult placement schemes) which offer an alternative form of social care accommodation and support for people aged 18 and over. Under the scheme, ordinary family households typically provide accommodation and support*

to people with social care needs, offering the person the opportunity to become part of the family. However, Shared Lives services do not always involve the provision of accommodation and can include day care support in the carer's home or kinship support, where a person acts as "extended family" to a person who is living in their own home.

121. *Where a person enters accommodation under the Shared Lives scheme, they usually pay for their accommodation themselves, often through housing benefit, with any social care needs being met by services provided under section 29 of the 1948 Act. If the person moves to a new local authority for the purpose of entering Shared Lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah (see paragraphs 18-22 (Meaning of ordinary residence)).*

122. *If a local authority (A) does not have any Shared Lives accommodation in its area but a community care assessment identifies a Shared Lives scheme to be the best way to meet a person's accommodation and support needs, the person may decide to move into accommodation provided by a Shared Lives scheme in a neighbouring local authority (B). They may be supported in this decision by local authority A who may reach an agreement with local authority B for local authority A to provide support services using its powers under section 29 of the 1948 Act, or for local authority B to provide such services with reimbursement from local authority A. Although local authorities have a duty to provide section 29 services to people who are ordinarily resident in their area, they have a general power to provide services under this section and can exercise this power in relation to people who are not ordinarily resident in their area.*

123. *The deeming provisions do not apply to section 29 of the 1948 Act. Therefore, in situations where a person's previous local authority is providing or paying for services under section 29 of the 1948 Act, it does not mean that ordinary residence is retained in the previous authority. Any arrangements between local authorities of the kind referred to in the previous paragraph would not prevent the person from acquiring an ordinary residence in the area in which they are living. Ordinary residence disputes arising in relation to services provided under section 29 that are submitted to the Secretary of State for determination will be decided accordingly. See ordinary residence determination 9-200850 for an example of how the ordinary residence provisions apply to Shared Lives schemes.*

124. *Shared lives accommodation is not usually arranged under section 21 of the 1948 Act. This is largely because the concept of*

Shared Lives is about "family" and "belonging"' with individuals making their own choice to enter a Shared Lives scheme rather than being placed in the scheme by their local authority. Therefore, local authorities may recommend that a person enters a Shared Lives scheme. They may also help the person to choose a scheme and facilitate their move but such advice and assistance would usually fall short of "making arrangements" within the meaning of section 21.

125. However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in Shared Lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home

…

128. Organisations or local authorities operating Shared Lives schemes should not use ordinary residence as a reason for preventing access by people living outside of the area where the scheme and its accommodation is located. The needs of the individual should be paramount and where a particular Shared Lives scheme or household best meets the need of the individual involved, the location of the scheme or household and the ordinary residence of the person should be secondary considerations"(emphasis added).

72. I note that a Shared Lives scheme could be used to provide s.21 accommodation but not if any individual had personal care needs because s.21 prohibits the placement of persons needing accommodation and personal care in any setting other than a care home (s.26(1A)).

73. There is no dispute in this case that all five individuals have personal care needs. Personal care includes the prompting, together with the supervision of, a person in relation to a number of specified activities, including the care of skin, hair and nails (Regulation 2 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010). They could not, therefore, lawfully be placed in a Shared Lives scheme pursuant to s. 21 NAA. For that reason, I do not consider that the correct question is (as suggested by CouncilB) whether these five individuals are, in fact, being provided with accommodation pursuant to s.21 NAA. The correct question is: do these five individuals have

a need for care and attention which is not available other than by the provision of s.21 NAA accommodation?

74. All five individuals are liable to pay the cost of their accommodation but receive housing benefit to pay the accommodation costs. The housing benefit is paid in each case to the company that manages the Shared Lives service which then pays the housing benefit on behalf of the licensee.

75. I asked for some further information about what guarantees were provided by CouncilA to the carers in terms of payment. I was informed by e-mail dated 11 September 2017 that CouncilA guarantees the sum of £375 to each carer, although the carer and the Shared Lives provider (Organisation2) have to do everything possible to maximise available incomes and those are collected directly and paid to CouncilA. I was also provided with a breakdown of the sources of income available for each of the service users which records that there is a fixed fee of £375 payable to each Shared Lives carer.

76. I remain of the view (as stated in the decision in the X0 case: OR 1 2014) that a guarantee to the Shared Lives carer of a particular fee suggests an arrangement within the scope of subsections (2) and (3A) of section 26 of the 1948 Act because CoucilA is effectively agreeing to pay any balance or unpaid fees and hence, the provision of s.21 accommodation.

77. Accordingly, I turn to consider whether there is a duty in any of these cases to provide section 21 accommodation in a registered care home. In the case of *R v Greenwich & Secretary of State and Bexley* [2006] EWHC 2576, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (para. 55 of the judgment).

78. I propose to consider the question as to whether there is a duty to provide s.21 accommodation in respect of each of the five individuals in turn.

X1

79. The first limb of the test is whether X1 is in need of care and attention (as defined by Baroness Hale in *R(M) v Slough BC* [2008] UKHL 52 at para. 33, namely "*looking after*".

80. I agree with CouncilB that X1 is in need of care and attention by reason of the list of activities of daily living with which she needs assistance. I further accept that the need for care and attention arises by reason of disability so as to fall within s.21.

81. The second limb of the test is as to whether or not the care and attention needed is available otherwise than by the provision of residential accommodation. In the case of *R (SL) v Westminster CC* [2013] UKSC 27, Lord Carnwath held:

> "*What is involved in providing "care and attention" must take some colour from its association with the duty to provide residential accommodation" (para. 44)*
>
> *"..was it available otherwise than by the provision of accommodation under section 21? Although it is unnecessary for us to decide that point, or to consider the arrangements in detail, it seems to me that the simple answer must be yes, as the judge held. The services provided by the council were in no sense accommodation-related. They were entirely independent of his actual accommodation, however provided, or his need for it. They could have been provided in the same place and in the same way, whether or not he had accommodation of any particular type, or at all.*
>
> *The Court of Appeal's contrary view depended on reading the word "available" as meaning not merely available in fact, but as implying also a requirement for the care and attention to be "reasonably practicable and efficacious….Such a loose and indirect link is not in my view justified by the statutory language" (*at paras. 44 – 46).

82. Section 29 of the 1948 Act and the Directions issued thereunder require the provision of certain welfare services to individuals such as X1. Such services are provided in the community and in a person's own home. The list of services is expanded in section 2 of the Chronically Sick and Disabled Persons Act 1970. I am satisfied that the list of needs set out at paragraphs 13 – 14 above can be met by services of a nature that can be provided in a person's own home under these provision. That she is able to live in a

Shared Lives placement enables her to benefit from a home environment and the services needed by X are provided by her Shared Lives carer or otherwise funded by CouncilA (on a provisional basis). I do not consider that the services provided to X are accommodation-related in the sense that they could only be provided with the accommodation. The services could be provided by an external contractor, independent of the accommodation. Accordingly, I conclude that X1's need for care and attention can be met otherwise than through the provision of residential accommodation. I am mindful that I need also to consider the position as it existed in August 2010 when housing benefit was awarded (albeit that CouncilB have focussed on needs assessed in 2014). I am satisfied, having considered her needs as recorded in the Community Learning Disabilities Team Review in March 2010, that her needs were of a materially similar nature in 2010, as might be expected in relation to a person with a life-long learning disability. It follows that I conclude that there is no duty to provide X1 with section 21 accommodation. Nor was there was a duty to provide her with section 21 accommodation in August 2010 (when housing benefit was awarded).

83. While, as noted above, the arrangements including the guaranteed payment to the carers appeared to resemble a s.26 type arrangement, I am satisfied that there is and was, in July 2010, no duty to provide X1 with s.21 accommodation.

84. I note that CouncilB invite me to find on public policy grounds that X1 (and the four other individuals) remained ordinarily resident in CouncilA because their move to a Shared Lives placement in CouncilB was a cost shunting exercise. I reject that argument in respect of X1. First, I do not consider that CouncilA acted unlawfully or improperly by moving X1 from a residential care home to a Shared Lives placement in CouncilA in 1990. That was an available alternative to residential care which enabled X1 to have the benefit of living in a family home. It was not until 2006 that X1 moved to the CouncilB area. In my view, it cannot be suggested that there was any ulterior motive on the part of CouncilA in moving X1 to a Shared Lives placement so as to avoid responsibility for funding her care. She had already lived in a similar

placement for 16 years in the CouncilA area. Secondly, I am satisfied that a Shared Lives placement has been a very successful way of providing care and support to X1. Thirdly, I note that the change in ordinary residence from CouncilA to CouncilB when she moved to a Shared Lives placement in CouncilB accords with the general position in relation to Shared Lives placements: "*If the person moves to a new local authority for the purpose of entering Shared Lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah*" (see para. 121 of the Ordinary Residence Guidance). I do not consider that the application of the usual principles in relation to Shared Lives placement can be said to be inappropriate on public policy grounds.

85. It follows that I find the key factual issue identified by the parties (whether X1 has or had a need for section 21 accommodation) in favour of CouncilA.

86. It follows that the deeming provision in s.24(5) NAA has no application in X1's case and that services have been provided to X1 in her own home since the date of her licence agreement and the award of housing benefit pursuant to s.29 NAA.

87. I turn then to consider the question of ordinary residence for the purpose of s.29 NAA. I asked for clarification as to CouncilB's position on ordinary residence in the event that I conclude that services are provided under s.29 NAA and I was sent an e-mail from CouncilB's legal department 1 September 2017 confirming that CouncilB accepts that all five individuals are ordinarily resident in CouncilB in the event that I conclude that services are provided to them pursuant to s.29 NAA.

88. I do not, therefore, need strictly to consider the question of ordinary residence further. However, I note that elsewhere in their submissions CouncilB have disputed the capacity assessments carried out by CouncilA of these individuals and, in the circumstances, I have gone on to consider the question of ordinary residence for the purpose of s.29 NAA services.

89. I have considered CouncilB's argument that X1 lacked capacity to make a decision about her residence and / or to enter a licence agreement in July

2010. I appreciate that there is a note in a March 2010 learning disability team review that she was considered to lack capacity but it is not clear in respect of which domains that assessment was made. The 2014 capacity assessment concluded that she did not lack capacity to make a decision about her residence. The test for capacity is set out in s.3 of the Mental Capacity Act 2005 and section 1(2) provides that it should be assumed that an adult has capacity to make a decision unless it can be established to the contrary. While CouncilB argue that the 2014 capacity assessment is tainted by a conflict of interest, I do not consider that there is any objective evidence to prove that was the case. Save for the note in March 2010, I have seen nothing in the papers to contradict the finding of capacity. Further, the essential aspects of the licence agreement (which gave her entitlement to occupy a single furnished room and shared use of other parts of the house with obligations in relation to behaviour [A27-A28]) are relatively easy to understand and I consider that X1 had sufficient support to enable her to understand the requirements of living at the placement.

90. I am satisfied in accordance with the *Shah* test that X1 voluntarily adopted CouncilB as her place of ordinary residence in the summer of 2010 and intended to stay there for the foreseeable future. She has been living in CouncilB with the same Shared Lives carers since 2006. She is plainly very happy and settled living with these carers, has friends in the area and is integrated into her local community. She is settled in CouncilB and wishes to remain living there.

91. Even if I am wrong about X1's capacity to make a decision about her place of residence in July 2010, I would come to the same decision regarding her ordinary residence by applying the test set out in *Cornwall*. I have applied the same test as in Shah but placed no regard on the fact that the place of residence is to be voluntarily adopted. Given the circumstances outlined in the paragraph above, I consider that if (contrary to the above) X1 lacks capacity to decide where to live, her residence in CouncilB has a sufficient degree of continuity to be described as settled.

92. CouncilA invite me to conclude that X1 has been ordinarily resident in CouncilB since the date of the grant of housing benefit. Housing benefit was granted on 23 August 2010 on the basis of the evidence provided. I conclude that X1 has been ordinarily resident in CouncilB since 23 August 2010.

X2

93. In considering whether there was or is a duty to provide X2 with s.21 NAA accommodation, I start by asking whether he is in need of care of attention (as defined by Baroness Hale in *R(M) v Slough BC* [2008] UKHL 52 at para. 33, namely "*looking after*".

94. I agree with CouncilB that X2 is in need of care and attention by reason of the list of activities of daily living with which he needs assistance. I further accept that the need for care and attention arises by reason of disability so as to fall within s.21.

95. I then turn to consider whether X2's need for care and attention is available otherwise than by the provision of residential accommodation under s.21. I am satisfied that the list of needs set out at paragraphs 24–25 can be met by services of a nature that can be provided in a person's own home under the s.29 NAA. That he is able to live in a Shared Lives placement enables him to benefit from a home environment and the services needed by X2 are provided by his Shared Lives carer or otherwise funded by CouncilA (on a provisional basis). I do not consider that the services provided to X2 are accommodation-related in the sense that they could only be provided with the accommodation. The services could be provided by an external contractor, independent of the accommodation. Accordingly, I conclude that X2's need for care and attention can be met otherwise than through the provision of residential accommodation. I am mindful that I need also to consider the position as it existed in 2005/2006 when housing benefit was awarded (albeit that CouncilB have focussed on needs assessed in 2014). I do not have specific information about X2's needs at that time. However, I have no reason to believe that his needs then are substantially different to what they were in 2013 when CouncilA completed a Shared Information Form. It follows that I

conclude that there is no duty to provide X2 with section 21 accommodation. Nor was there was a duty to provide him with section 21 accommodation when housing benefit was awarded. I take the date of the award of housing benefit to be 29 May 2006 based on the documents in the bundle. I note that the agreed statement of facts refers to the date of 16 May 2005, but I have not been provided with documentary evidence supporting this date and it is not clear if this is a fact agreed by CouncilB.

96. While, as noted above, the arrangements including the guaranteed payment to the carers appeared to resemble a s.26 type arrangement, I am satisfied that there is and was in May 2006 no duty to provide X2 with s.21 accommodation.

97. As to CouncilB's public policy argument in respect of Mr X1, I reject that argument for the following reasons. First, I understand that X2 has not at any stage resided in a residential care home. He was fostered as a child by Y3 and remained with her as a Shared Lives carer. It would appear that Y3 took the decision to move to CouncilB (along with Mr X1 as early as 1991). There was no decision on the part of CouncilA to move X2 from a s.21 placement to a Shared Lives scheme, nor was he placed out of area into a Shared Lives scheme. His Shared Lives carer had moved to CouncilB long before housing benefit was awarded. Secondly, I am satisfied that a Shared Lives placement has been a very successful way of providing care and support to X2. Thirdly, I note that the change in ordinary residence from CouncilA to CouncilB accords with the general approach in respect of Shared Lives placements (see Ordinary Residence guidance). I do not consider that the application of the usual principles in relation to Shared Lives placement can be said to be inappropriate on public policy grounds.

98. It follows that I find the key factual issue identified by the parties (whether X2 has or had a need for section 21 accommodation) in favour of CouncilA.

99. It follows that the deeming provision in s.24(5) NAA has no application in X2's case and that services have been provided to X2 in his own home since the

date of his licence agreement and the award of housing benefit pursuant to s.29 NAA.

100. I turn then to consider the question of ordinary residence for the purpose of s.29 NAA. I asked for clarification as to CouncilB's position on ordinary residence in the event that I conclude that services are provided under s.29 NAA and I was sent an e-mail from CouncilB's legal department 1 September 2017 confirming that CouncilB accepts that all five individuals are ordinarily resident in CouncilB in the event that I conclude that services are provided to them pursuant to s.29 NAA.

101. I do not, therefore, need strictly to consider the question of ordinary residence further. However, I note that elsewhere in their submissions CouncilB have disputed the capacity assessments carried out by CouncilA of these individuals and, in the circumstances, I have gone on to consider the question of ordinary residence for the purpose of s.29 NAA services.

102. I have considered CouncilB's argument that X2 lacked capacity to make a decision about his residence and / or to enter a licence agreement. The test for capacity is set out in s.3 of the Mental Capacity Act 2005 and section 1(2) provides that it should be assumed that an adult has capacity to make a decision unless it can be established to the contrary. CouncilB correctly point out that some of the information in the mental capacity assessment form dated 22 April 2014 refers to a different person called Y6. However, for the reasons recorded at para 25 above, I am satisfied that the information in section 2 of the form relates to him and that the information therein recorded supports a finding of capacity. I do not consider that there is any objective evidence to prove that the assessment was tainted by a conflict of interest. Further, the essential aspects of the licence agreement (which gave him an entitlement to occupy a single furnished room and shared use of other parts of the house with obligations in relation to behaviour [B1-B2]) are relatively easy to understand and I consider that X2 had sufficient support to enable him to understand the requirements of living at the placement.

103. I am satisfied in accordance with the *Shah* test that X2 voluntarily adopted CouncilB as his place of ordinary residence in May 2006 and intended to stay there for the foreseeable future. He had been living in CouncilB, being cared for by Y3 since 1991. He has no existing connection with CouncilA. He is well integrated into the community and works in a local museum and has expressed clear views that he wishes to continue to reside there.

104. Even if I am wrong about X2's capacity to make a decision about his place of residence in May 2006, I would come to the same decision regarding his ordinary residence by applying the test set out in *Cornwall*. I have applied the same test as in Shah but placed no regard on the fact that the place of residence is to be voluntarily adopted. Given the circumstances outlined in the paragraph above, I consider that if (contrary to the above) X2 lacked capacity to decide where to live, his residence in CouncilB has a sufficient degree of continuity to be described as settled.

105. CouncilA invite me to conclude that X2 has been ordinarily resident in CouncilB since the date of the grant of housing benefit. As stated above, I take that date to be 29 May 2006.

X3

106. I consider that X3 is in need of care and attention and that her need for care and attention arises by reason of disability.

107. However, I consider that the care and attention needed is available other than by the provision of residential accommodation under s. 21 NAA. I am satisfied that the list of needs set out at paragraphs 31–32 above can be met by services of a nature that can be provided in a person's own home pursuant to s.29 NAA. That she is able to live in a Shared Lives placement enables her to benefit from a home environment and the services needed by X3 are provided by her Shared Lives carer or otherwise funded by CouncilA (on a provisional basis). I do not consider that the services provided to X3 are accommodation-related in the sense that they could only be provided with the accommodation. The services could be provided by an external contractor,

independently of the accommodation. Accordingly, I conclude that X3's need for care and attention can be met otherwise than through the provision of residential accommodation. I am mindful that I need to consider the position as at the date when housing benefit was awarded which was 15 July 2010. There is no evidence to suggest that her needs were of a materially different nature in 2010 as recorded in CouncilA's documents from 2013. I conclude, therefore, that there is no duty to provide X3 with s.21 accommodation, nor was there such a duty in July 2010.

108. While, as noted above, the arrangements including the guaranteed payment to the carer appeared to resemble a s.26 type arrangement, I am satisfied that there is and was in July 2010 no duty to provide X3 with s.21 accommodation.

109. I have considered CouncilB's public policy arguments to the effect that I should conclude that X3 remains ordinarily resident in CouncilA so as to avoid a cost shunting exercise. I reject that argument. First, I bear in mind that X3 was living with family members in the CouncilA area but was mistreated. It appears that she was then placed with the Y7,Y8,Y9s in CouncilB, initially on a respite basis. The Shared Lives placement then began in August 2001. She was, accordingly, placed out of area by CouncilA into the Shared Lives placement. As far as I am aware, X3 was not placed in a residential care home at any time. She was cared for in a family home environment. In the circumstances, I do not consider that the move to a Shared Lives placement can objectively be considered to be a device on the part of CouncilA to avoid responsibility for X3. Secondly, I am satisfied that a Shared Lives placement has been a very successful way to provide care and support to X3. Thirdly, I note that the change in ordinary residence from CouncilA to CouncilB when she moved to a Shared Lives placement in CouncilB with the general position in relation to Shared Lives placements: "*If the person moves to a new local authority for the purpose of entering Shared Lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah*" (see para. 121 of the Ordinary Residence Guidance). I do not consider that the application of the usual principles in

relation to Shared Lives placement can be said to be inappropriate on public policy grounds.

110. It follows that I find the key factual issue identified by the parties (whether X3 has or had a need for s.21 accommodation) in favour of CouncilA. It follows that the deeming provision in s.24(5) has no application in X3's case and that services have been provided to X3 in her own home.

111. I turn then to consider the question of ordinary residence for the purpose of s.29 NAA. I asked for clarification as to CouncilB's position on ordinary residence in the event that I conclude that services are provided under s.29 NAA and I was sent an e-mail from CouncilB's legal department 1 September 2017 confirming that CouncilB accepts that all five individuals are ordinarily resident in CouncilB in the event that I conclude that services are provided to them pursuant to s.29 NAA.

112. I do not, therefore, need strictly to consider the question of ordinary residence further. However, I note that elsewhere in their submissions CouncilB have disputed the capacity assessments carried out by CouncilA of these individuals and in the circumstances, I have gone on to consider the question of ordinary residence for the purpose of s.29 NAA services.

113. I have considered CouncilB's argument that X3 lacked capacity to make a decision about her residence and/or to enter a licence agreement. The test for capacity is set out in s.3 of the Mental Capacity Act 2005 and section 1(2) provides that it should be assumed that an adult has capacity to make a decision unless it can be established to the contrary. For the reasons stated above, I am satisfied that X3 had capacity to decide whether she wished to continue living with the Y7 Y8 Y9s in CouncilB. Further, the essential aspects of the licence agreement (which gave him an entitlement to occupy a single furnished room and shared use of other parts of the house with obligations in relation to behaviour [C3-C4]) are relatively easy to understand and I consider that X3 had sufficient support to enable her to understand the requirements of living at the placement. I do not consider that it is arguable that the assessment has been tainted by a conflict of interest on the part of CouncilA.

114. I am satisfied in accordance with the *Shah* test that X3 voluntarily adopted CouncilB as her place of ordinary residence in July 2010 and intended to stay there for the foreseeable future. She had been living with the Y7 Y8 Y9s since 2001 and was well settled in the area. She had no connections with CouncilA other than family members who had mistreated her. On 20 February 2013 she was clear that she did not wish to return to AreaA to family members who had been cruel to her and there is no evidence to suggest that she would have had any different view in 2010.

115. Even if I am wrong about X3's capacity to make a decision about her place of residence in July 2010, I would come to the same decision regarding her ordinary residence by applying the test set out in *Cornwall*. I have applied the same test as in Shah but placed no regard on the fact that the place of residence is to be voluntarily adopted. Given the circumstances outlined in the paragraph above, I consider that if (contrary to the above) X3 lacked capacity to decide where to live, her residence in CouncilB has a sufficient degree of continuity to be described as settled.

116. CouncilA invite me to conclude that X3 has been ordinarily resident in CouncilB since the date of the grant of housing benefit. As stated above, I take that date to be 15 July 2010.

X4

117. I am satisfied that X4 was, and is, in need of care and attention and that her need for care and attention arises by reason of her disability.

118. As regards the second limb of the test, I am satisfied that the care and attention needed by X4 is available otherwise than by the provision of residential accommodation under s.21 NAA.

119. I am satisfied that the list of services set out at paragraphs 38 and 40 above can be met by services of a nature that can be provided in a person's own home pursuant to s.29 NAA. That she has been able to live in a Shared Lives placement enables her to benefit from a home environment and the services provided to X4 are provided by her Shared Lives carer or otherwise funded by

CouncilA (on a provisional basis). I do not consider that the services provided to X4 are accommodation-related in the sense that they could only be provided with the accommodation. The services could be provided by an external contractor, independent of the accommodation. I, therefore, conclude that X4's need for care and attention can be met otherwise than through the provision of residential accommodation. I am mindful that I need also to consider the position that existed in August 2010 when housing benefit was awarded. I am satisfied that her needs as recorded in the 2010 Community Learning Disabilities Team Review document are of a materially similar nature to the needs as recorded in the 2014 documentation. I conclude that there is no duty to provide X4 with s.21 accommodation and there was no such duty in August 2010 when housing benefit was awarded.

120. While, as noted above, the arrangements including the guaranteed payment to the carers appeared to resemble a s.26 type arrangement, I am satisfied that there is, and was in August 2010, no duty to provide X4 with s.21 accommodation.

121. I note that CouncilB invite me to find on public policy grounds that X4 (and the 4 other individuals) remained ordinarily resident in CouncilA because their move to a Shared Lives placement in CouncilB was a cost shunting exercise. I also reject that argument in respect of X4. First, X4 was living with her carers, Y10 and Y11, in the CouncilA area and then moved with them to the CouncilB area in the late 80s or early 90s. CouncilA had, accordingly, placed her in the CouncilA area and her carers made their own independent decision to move to CouncilB. I do not consider, in those circumstances, that CouncilB can argue that the move to their area was a device to avoid responsibility for X4. Secondly, I am satisfied that a Shared Lives placement has been a very successful way of providing care and support to X4. Thirdly, I note that the change in ordinary residence from CouncilA to CouncilB when she moved to a Shared Lives placement in CouncilB accords with the general position in relation to Shared Lives placements: "*If the person moves to a new local authority for the purpose of entering Shared Lives accommodation, they generally become ordinarily resident in the new local authority in line with the*

settled purpose test in Shah" (see para. 121 of the Ordinary Residence Guidance). I do not consider that the application of the usual principles in relation to Shared Lives placement can be said to be inappropriate on public policy grounds.

122. It follows that I find the key factual issue identified by the parties (whether X4 has or had a need for section 21 accommodation) in favour of CouncilA.

123. It follows that the deeming provision in s.24(5) NAA has no application in X4's case and that services have been provided to X4 in her own home since the date of her licence agreement and the award of housing benefit pursuant to s.29 NAA.

124. I turn then to consider the question of ordinary residence for the purpose of s.29 NAA. I asked for clarification as to CouncilB's position on ordinary residence in the event that I conclude that services are provided under s.29 NAA and I was sent an e-mail from CouncilB's legal department 1 September 2017 confirming that CouncilB accepts that all five individuals are ordinarily resident in CouncilB in the event that I conclude that services are provided to them pursuant to s.29 NAA.

125. I do not, therefore, need strictly to consider the question of ordinary residence further. However, I note that elsewhere in their submissions CouncilB have disputed the capacity assessments carried out by CouncilA of these individuals and, in the circumstances, I have gone on to consider the question of ordinary residence for the purpose of s.29 NAA services.

126. I have considered CouncilB's argument that X4 lacked capacity to make a decision about her residence and / or to enter a licence agreement. The test for capacity is set out in s.3 of the Mental Capacity Act 2005 and section 1(2) provides that it should be assumed that an adult has capacity to make a decision unless it can be established to the contrary. I am satisfied that X4 had capacity to decide whether she wished to continue living with Y10 in CouncilB. Further, the essential aspects of the licence agreement (which gave her an entitlement to occupy a single furnished room and shared use of other parts of the house with obligations in relation to behaviour [D1-D2]) are

relatively easy to understand and I consider that X4 had sufficient support to enable her to understand the requirements of living at the placement. I do not consider it arguable that the assessment was tainted by a conflict of interest on the part of CouncilB.

127. I am satisfied, in accordance with the *Shah* test, that X4 voluntarily adopted CouncilB as her place of ordinary residence in August 2010 and intended to stay there for the foreseeable future. She had been living with Y10 in CouncilB for at least 19 years. She was well settled in the area.

128. Even if I am wrong about X4's capacity to make a decision about her place of residence in July 2010, I would come to the same decision regarding her ordinary residence by applying the test set out in *Cornwall*. I have applied the same test as in Shah but placed no regard on the fact that the place of residence is to be voluntarily adopted. I consider that if (contrary to the above) X4 lacked capacity to decide where to live, her residence in CouncilB has a sufficient degree of continuity to be described as settled.

129. CouncilA invite me to conclude that X4 has been ordinarily resident in CouncilB since the date of the grant of housing benefit. As stated above, I take that date to be 23 August 2010.

X5

130. I consider that X5 is in need of care and attention and that her need for care and attention arises by reason of disability.

131. However, I consider that the care and attention needed is available other than by the provision of residential accommodation under s. 21 NAA. I am satisfied that the list of needs set out at paragraphs 47–49 above can be met by services of a nature that can be provided in a person's own home pursuant to s.29 NAA. That she is able to live in a Shared Lives placement enables her to benefit from a home environment and the services needed by X5 are provided by her Shared Lives carer or otherwise funded by CouncilA (on a provisional basis). I do not consider that the services provided to X5 are accommodation-related in the sense that they could only be provided with the

accommodation. The services could be provided by an external contractor, independently of the accommodation. Accordingly, I conclude that X5's need for care and attention can be met otherwise than through the provision of residential accommodation. I am mindful that I need to consider the position as at the date when housing benefit was awarded which was 2 April 2012. There is no evidence to suggest that her needs were of a materially different nature in 2012 than those recorded in CouncilA's documents from 2008 and 2013. I conclude, therefore, that there is no duty to provide X5 with s.21 accommodation, nor was there such a duty in April 2012.

132. While as noted above, the arrangements including the guaranteed payment to the carer appeared to resemble a s.26 type arrangement, I am satisfied that there is, and was in July 2010, no duty to provide X5 with s.21 accommodation.

133. I have considered CouncilB's public policy arguments to the effect that I should conclude that X5 remains ordinarily resident in CouncilA so as to avoid a cost shunting exercise. I reject that argument. First, it appears that X5 was placed by CouncilA out of area in CouncilB after she could no longer be looked after in the family home in CouncilA. However, I have seen reference to the fact that she had at some point been cared for in a residential home and had not been happy there. Further, her brother, with whom she maintains contact, had been placed in a Shared Lives placement in the CouncilB area. In my view, the circumstances of her move to CouncilB do not support a finding that CouncilA had an ulterior motive which was to transfer responsibility for X5. Secondly, I am satisfied that a Shared Lives placement has been a very successful way to provide care and support to X5. Thirdly, I note that the change in ordinary residence from CouncilA to CouncilB when she moved to a Shared Lives placement in CouncilB accords with the general position in relation to Shared Lives placements: "*If the person moves to a new local authority for the purpose of entering Shared Lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah*" (see para. 121 of the Ordinary Residence Guidance). I do not consider that the application of the usual principles in

relation to Shared Lives placement can be said to be inappropriate on public policy grounds.

134. It follows that I find the key factual issue identified by the parties (whether X5 has or had a need for s.21 accommodation) in favour of CouncilA. It follows that the deeming provision in s. 24(5) has no application in X5's case and that services have been provided to X5 in her own home.

135. I turn then to consider the question of ordinary residence for the purpose of s.29 NAA. I asked for clarification as to CouncilB's position on ordinary residence in the event that I conclude that services are provided under s.29 NAA and I was sent an e-mail from CouncilB's legal department 1 September 2017 confirming that CouncilB accepts that all five individuals are ordinarily resident in CouncilB in the event that I conclude that services are provided to them pursuant to s.29 NAA.

136. I do not therefore need strictly to consider the question of ordinary residence further. However, I note that elsewhere in their submissions CouncilB have disputed the capacity assessments carried out by CouncilA of these individuals and in the circumstances, I have gone on to consider the question of ordinary residence for the purpose of s.29 NAA services.

137. I have considered CouncilB's argument that X5 lacked capacity to make a decision about her residence and / or to enter a licence agreement. The test for capacity is set out in s.3 of the Mental Capacity Act 2005 and section 1(2) provides that it should be assumed that an adult has capacity to make a decision unless it can be established to the contrary. I am satisfied that X5 had capacity to decide whether she wished to continue living with Y13 in CouncilB. When her capacity was assessed in March 2015, she had been living with Y13 and her husband for the past seven years and while she enjoyed going to visit her parents in CouncilA, she was happy to return to her Shared Lives placement which she considered home. She appeared to understand the risk that her day centre placement might not continue if funding were to shift to CouncilB but nevertheless she expressed the view that she wanted to remain living in CouncilB. Further, the essential aspects of

the licence agreement (which gave her an entitlement to occupy a single furnished room and shared use of other parts of the house with obligations in relation to behaviour [C3-C4]) are relatively easy to understand and I consider that X3 had sufficient support to enable her to understand the requirements of living at the placement. I do not consider it arguable that the capacity assessment was tainted by a conflict of interest on the part of CouncilA.

138. I am satisfied, in accordance with the *Shah* test, that X3 voluntarily adopted CouncilB as her place of ordinary residence in April 2012 and intended to stay there for the foreseeable future. She had been living with Y13 since 2007 and was well settled in the area.

139. Even if I am wrong about X3's capacity to make a decision about her place of residence in April 2012, I would come to the same decision regarding her ordinary residence by applying the test set out in *Cornwall*. I have applied the same test as in *Shah* but placed no regard on the fact that the place of residence is to be voluntarily adopted. Given the circumstances outlined in the paragraphs above, I consider that if (contrary to the above) X5 lacked capacity to decide where to live, her residence in CouncilB has a sufficient degree of continuity to be described as settled.

140. CouncilA invite me to conclude that X5 has been ordinarily resident in CouncilB since the date of the grant of housing benefit. As stated above, that date is 2 April 2012 and I conclude that X5 has been ordinarily resident in CouncilB since that date.

Conclusion

141. I conclude that all five service users are ordinarily resident in the area of Council B and have been so since the date of award of housing benefit in the respective cases.