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 ("the 2014 Act") of the ordinary residence of X. The dispute is with CouncilB.

The facts

2. X (DOB XX XX 1933) lived in CouncilB all his life.

3. In February 2016, X was admitted to Hospital in the area of CouncilB following a fall at home.

4. X had a nephew, X1, who lives in CouncilA and who visited X regularly.

5. On 12 April 2016 there was a meeting at the hospital to assess whether X was eligible for Continuing Healthcare Funding from the NHS. Present were the nurse assessor, X2 (the wife of X1 and thus X's niece by marriage), the ward nurse, an occupational therapist, and a social worker from CouncilB. It appears from a fax subsequently sent from CouncilB to CouncilA on 15 June 2016 that a decision was taken at that meeting, apparently by X's family member acting in his best interests, that X should move to a nursing home.

6. On 22 April 2016, X moved to Nursing Home1, in CouncilA. X1 later described this move to CouncilA as being on a "private, permanent, basis".

7. On 26 April 2016, X1 contacted CouncilA Adult Services. He advised that X's savings were £25,000 and he required financial assessment. X1 paid the care home fees from 22 April 2016.

8. On 8 August 2016, CouncilA carried out a financial assessment and determined that, since 20 June 2016, X had been eligible for funding from adult social services. CouncilA have thus funded X's placement, from that date onwards,

without prejudice to my determination in this case. This temporary assumption of responsibility has not affected my decision in any way.

The parties' legal submissions

CouncilB's submissions

9. CouncilB contend that from the date of his admission to Nursing Home1 on 22 April 2016, X was ordinarily resident in CouncilA, for the following reasons.

10. CouncilB contends that there is insufficient evidence to suggest that, as at the date of X's admission to Nursing Home1 on 22 April 2016, the presumption that he had capacity to make decisions about his place of residence was displaced.

11. CouncilB contends, however, that whether or not X had capacity is not relevant. They rely on *R (Cornwall Council) v Secretary of State for Health* [2016] AC 137 at paragraphs 49 and 51 for the proposition that, in determining an incapacitated adult's place of ordinary residence, it is the person's actual residence, and the nature of that residence, which must be considered. It contends that an adult's lack of capacity to voluntarily accept their place of physical residence is not inconsistent with them being ordinarily resident in the place they in fact reside in. It also relies upon paragraph 19.32 of the Care and Support Statutory Guidance, to the effect that with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the *Shah* approach (referred to below), 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.

12. CouncilB say that they did not place X at Nursing Home1, such that the deeming provision in s.39 of the Care Act 2014 does not apply. His placement did not start out, between 22 April 2016 and 20 June 2016, as a placement pursuant to Part 1 of the Care Act 2014. It was only when his finances dropped below the financial limit that the placement began to be arranged by a local authority and, by that stage, X was ordinarily resident in CouncilA having originally moved there on a private and permanent basis.

CouncilA's submissions

13. CouncilA contends that X was ordinarily resident in CouncilB at a time when CouncilB ought to have taken responsibility for him.

14. CouncilA suggests that from the evidence available at the time of the ward meeting on 12 April 2016, it appears that X lacked the capacity to make decisions about where he should live.

15. CouncilA states that X's nephew did not have any legal authority to make a decision on X's behalf about where he should live. As such, CouncilB ought to have made a formal best interests decision about where X should live, which it did not do. CouncilA is of the view that had CouncilB done this then, whilst X1 would no doubt have been involved in the decision-making process, CouncilA would have become the responsible decision-maker. And if as responsible decision-maker CouncilA had decided to place X in a care home (which is where in the event he was placed, albeit by X1) then the deeming provision in s.39 of the Care Act 2014 would have applied.

The Law

16. I have considered all the documents submitted by the two authorities, the provisions of Part 1 of the 2014 Act and the Regulations made under it, the guidance on ordinary residence issued by the Department, and the cases of *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 ("Cornwall"); R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 ("*Greenwich*"), Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184 ("Quinn Gibbon"), and Mohammed v Hammersmith & Fulham LBC [2001] UKHL 57 ("Mohammed").

The Care Act 2014

The relevant local authority

17. Section 18 of the Care Act provides that a local authority, having made a determination that an adult has needs for care and support that meet its eligibility

criteria, must meet those needs if, amongst other things, the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence.

The deeming provision

18. Under section 39(1) of the 2014 Act, where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of Part I of the 2014 Act as ordinarily resident in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations.

19. Regulation 2(1) of the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014) provide, as amended, that for the purposes of section 39(1) of the Car Act 2014, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation. Regulation 2(2) provides that these types of accommodation are specified only insofar as the care and support needs of the adult are being met *under Part 1 of the 2014 Act* while the adult lives in that type of accommodation. Accordingly, the deeming provision does not apply when a person is living in a specified type of accommodation which they have arranged and funded themselves. It only starts to apply when that accommodation begins to be provided by the local authority under Part 1 of the Care Act 2014.

The Cornwall case

20. In *R(Cornwall Council) v Secretary of State for Health (supra)*, the Supreme Court held that in deciding where a person was ordinarily resident under the 1948 National Assistance Act (which for present purposes is materially identical to the Care Act 2014), "it is the residence of the subject, and the nature of that residence, which provides the essential criterion." The Supreme Court further referred to the following as being relevant factors: "the attributes of the residence objectively viewed" (see paragraph 47), "the duration and quality of actual residence" (see paragraph 49), and residence being "sufficiently settled" (paragraphs 47 and 52). The Supreme Court rejected the argument that (absent

any deeming provisions) a person should be ordinarily resident in whichever local authority made the decision to place them in their current residence.

21. This is reflected in paragraph 19.32 of the Care and Support Statutory Guidance, which provides that:

> "19.32…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."

The Greenwich case

22. At paragraph 55 of *Greenwich*, Charles J held that "It seems to me that if the position is that the arrangements should have been made — and here it is common ground that on 29th June a local authority should have made those arrangements with the relevant care home — that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority." Although *Greenwich* was decided under the 1948 Act, this principle appears to be equally applicable to section 39(1) of the 2014 Act.

Ordinary Residence

23. "Ordinary residence" is not defined in the 2014 Act. The Department of Health has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

24. 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."

25. The courts have considered cases of temporary residence on a number of occasions, including in *Levene, Fox, Mohamed and Greenwich*. In *Fox*, the Court of Appeal considered *Levene* and Lord Denning MR derived three principles: "*The first principle is that a man can have two residences. … The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence.*" Lord Justice Widgery commented that "*Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence*". The Court of Appeal found that the students were resident at their university address.

26. In *Mohamed,* Lord Slynn said "*the 'prima facie' meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves to a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is 'shelter' but it is also where he resides.*"

Application of law to the facts

27. It is common ground that X was placed at Nursing Home1 pursuant to a private arrangement, made by his family member, on what was intended to be a permanent basis. As it was a private arrangement he was not placed there by CouncilB, which means that s.39 of the Care Act 2014 does not directly apply: see Regulation 2(2) of the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014).

28. This is also consistent with the factual scenario described at paragraph 19.75 of the Care and Support Statutory Guidance:

> "19.75 People who self-fund and arrange their own care (self funders) and who choose to move to another area and then find that their funds have depleted can apply to the local authority area that they have moved to in order to have their needs assessed. If it is decided that they have eligible needs for care and support, the person's ordinary residence will be in the place where they moved to and not the first authority."

29. Moreover, as this was intended to be a permanent arrangement, it must be regarded as "settled residence" as opposed to temporary presence, for the purposes of the tests set out in *Shah* and *Mohamed*.

30. Everything else being equal, there would thus be no doubt that X was ordinarily resident in CouncilA at the material time.

31. CouncilA's contention, however, is that X's alleged lack of capacity to make decisions about where he should live should lead to a different outcome. Although CouncilA does not refer to it explicitly, I understand CouncilA to be employing the logic of Charles J in *Greenwich*, namely that for the purposes of applying the deeming provision when determining ordinary residence a local authority is to be regarded as having done that which it ought to have, but did not in fact, do. Here, CouncilA contends that CouncilB ought to have made a formal best interests decision about where X should live, ought to have decided pursuant to that decision that X should live at Nursing Home1, and therefore ought to be deemed responsible pursuant to s.39 of the Care Act 2014.

32. Whether or not CouncilB ought to have made a best interests decision that X should live at Nursing Home1 makes no difference to the analysis in my view. Making a decision that it is in a person's best interests to live in a particular placement is not the same thing as providing a person with that placement pursuant to Part 1 of the Care Act 2014, or even as deciding that a person should be provided with that placement pursuant to Part 1 of the Care Act 2014. Making a best interests decision is not therefore sufficient to trigger the deeming provision in section 39 of the Care Act 2014, where the underlying arrangements in question are made by a private third party.

33. Alternatively, CouncilA may be contending that as it was CouncilB that made (or ought to have made) the decision about where X should live in his best interests, X should be regarded as ordinarily resident in CouncilB because that was the seat of his decision-making power. However, that argument was rejected by the Supreme Court in *Cornwall*.

34. As observed above, X was in fact resident in CouncilA, in a settled way, at the time he became the responsibility of a local authority under Part 1 of the Care Act 2014, and thus satisfied the *Shah/Mohamed/Cornwall* tests.

35. CouncilA refer to CouncilB "exporting responsibility" for X, who lived in their area. However, CouncilB should not be regarded as "exporting responsibility", because X moved as the result of an arrangement made privately by his family.

36. There is a dispute in this case about whether or not X had the capacity to make decisions about where he should live. I have seen no direct evidence to displace the statutory presumption that X had the capacity to make decisions about his residence, but I accept there is some circumstantial evidence to suggest that he may have done. In light of my reasoning above, however, it is not necessary for me to decide for present purposes whether X lacked the capacity to decide where to live: for a number of reasons, the outcome would have been the same either way.

37. There is also some dispute about whether CouncilB followed the correct procedures when X moved to CouncilA. This too is not relevant to my determination and so I do not attempt to resolve it.

Conclusion

38. For all the reasons given above, X is therefore ordinarily resident in CouncilA.