DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014

I have been asked by CouncilA to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.

The facts

1. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by the parties.

2. X is a 61 year old woman with a diagnosis of moderate or severe learning disabilities. She has been assessed as requiring significant levels of care and support with most aspects of daily living. She lived at CouncilB Village, a residential facility managed by an organisation called Org1B, from the early 1960s until 2014 when she moved to new accommodation at Address1B, CouncilB. For the last 20 years of her residence at CouncilB Village she lived in a house called House1B.

3. The full circumstances of the move are not entirely clear. The first reference to a proposed move is in a document titled Support Plan and Property Specification dated November 2011. This document states that:

> *"[X] has lived within CouncilB Village for over 49 years and the majority thought that she would benefit from continuing to live in the local area. [The family] thought she should continue to live in CouncilB Village."*

4. The next document is a FACE Overview Assessment, dated 7 May 2013, which says:

> *"[X's] home will be closing and this has caused difficulties for her & the family. CouncilB Village at present advised that they do not have the capacity for X to be placed within another home in the Village.*
>
> *House1B [sic] will not close until appropriate housing has been found and is organised.*
>
> *A small four bedroom bungalow has been pinpointed but is in need of repair, House1B [sic] residents have been nominated.*

Move on process has been completed, move date will be around August/September 2013 once funding has been agreed.

All three residents from House1B [sic] will be moving together, most of the residents have lived together for over ten years and will be supported by staff present during the day with waking night support."

5. The assessment further states that X *"needs to move into another home"* and that *"family feel she would benefit from staying within the Village she has lived for most of her live".* It notes that, when X moved to CouncilB Village, the family had been assured that it would be a home for life, and the need to move had caused extreme anxiety for all. However, the part of the assessment that addresses the views of the family and carers makes clear that all were in agreement with the proposed move:

   "Family feel that Org1B have been very supportive with any concerns family have had during this process and are pleased and reassured by this outcome. Family feel the lifelong agreement is being fulfilled by the provider. Family feel [CouncilA's] representatives have been very helpful and sympathetic to family requests over this anxious time."

6. Under the heading "other actions" the document identifies the need for mental capacity and best interests to be assessed. These matters are addressed in a FACE Mental Capacity Assessment dated 7 May 2013 (the same date as the overview assessment). Under the heading "what prompted the assessment" the document states:

   "[X's] home for the last 20 years is closing down, as it no longer meets needs and a new home has been found where all residents can live together in a more independent environment. [X] will be moving to a Supported Living environment which means that her benefits will now change [sic] and will be paid to her directly."

7. The assessment concludes that she does not have capacity to make budgeting decisions necessary in moving from residential to supported living. Although the assessment does not, in express terms, determine X's capacity to make decisions about where she wished to live, there is no dispute that she lacked capacity in this regard.

8. The capacity assessment document also includes a section headed "best interests determination". It lists details of the individuals who were consulted

as part of the best interests process, including X's brother-in-law, professionals and care staff. It states that:

> *"Every Person feels that [X] would benefit from moving to her new home with her peers and staff team, this will enable more independence if supported in the right environment as long as [X] is supported to stay within her financial commitments."*

9. The document does not refer, in terms, to the placement at Address1B, but it is clear that a decision was reached that X should move to a new supported living placement. Under the heading "what final decision has been reached?", it states:

> *"That [X] moves to her new home with her peers and within the wider community of CouncilB Village and is able to access her cultural and community needs as required."*

10. A further MDT review took place on 20 February 2014. A note of that review records that:

> *"[X's] home is closing down and all remaining residents will be moving to their new home which is very close to CouncilB Village, the home is in the community, close to the parkland and easy access to the train station and current activities she needs to access in the Village… [X] has been visiting for a few hours most days and hope to move by 31st March 2014."*

11. There is some dispute as to whether House1B was, in fact, closing down. CouncilB have provided me with an email from someone at Org1B, dated 2 March 2018, which states: *"…as far as they remember House1B was refurbished to give the remaining residents more suitable accommodation and more room that was more appropriate to their needs".* They also refer me to a QCQ report in respect of House1B, dated 20 May 2016. It is clear from this document that House1B did not close down completely. The QCQ report states: *"the home had undergone a complete refurbishment which had replaced individual bedrooms and reduced the number of people who could be accommodated to four".*

12. In response to this information CouncilA filed supplementary submissions in which they state that: (i) at the time of the move, they were informed that House1B would be closed permanently and not reopened, as was the case

with approximately 9 other properties at CouncilB Village; (ii) they are now informed that it has reopened but the facility is for service users with more challenging needs.

13. After I received CouncilA's response, CouncilB submitted a further email, dated 24 April 2018, which states *"House1B didn't actually close for the renovations and… once the others had moved out the building work was undertaken with the other residents in situ. So there wasn't actually a temporary closure"*.

14. It appears, therefore, that some residents may have stayed at House1B. I do not have any information about their level of need and CouncilA state that House1B now serves people with higher need. It is apparent from the CQC report that Org1B made a decision to reconfigure their service to reduce the number of residents cared for in the house and I accept that CouncilA were told at the time that the service was closing down. It is not possible, on the documents available, to be sure exactly what occurred in relation to the changes at House1B. However the contemporaneous documentation suggests very strongly that remaining at House1B was not an available option for X.

15. In the event, X moved to Address1B on 7 April 2014. I have been provided with a copy of an assured shorthold tenancy agreement signed on X's behalf by her brother-in-law on 3 April 2014. The landlord is identified as Org1B. The premises are defined as a bedroom within the building and shared use of communal facilities. The document is a standard tenancy agreement under which X is granted the right to peaceful occupation of the premises except where access is required on reasonable notice for inspection or repairs. There is no reference to any care provision under the agreement and there is no obligation under the agreement for CouncilA to make any payments to Org1B. I understand that X's rent for Address1B has, at all times, been paid through housing benefit.

16. The landlord later changed to the Housing Association (or Housing). I have been provided with an email from Org1B, dated 17 June 2015, which states that Org1B rented its properties to Housing who became the landlord *"to ensure a further separation between the Housing and care and support functions".*

17. An assured shorthold tenancy agreement between the Housing Association and X was signed on X's behalf on 14 July 2014. The start date for the tenancy was 8 June 2015. As with the first tenancy agreement, this was a standard tenancy under which CouncilA had no liability to make any payments for the accommodation. A letter sent from Org1B to X on 8 June 2015 states *"your services will continue as normal and there will not be any changes to the support you receive".*

18. An MDT review took place on 6 August 2014. The record of this review notes that X moved to Address1B with her old house mates in April and everyone seemed very happy and relaxed. However, after a few days, X's long term friend passed away and this affected X badly.

19. On 8 August 2014 CouncilA made a formal referral to CouncilB. It is not necessary for me to set out in detail all of the correspondence between CouncilA and CouncilB. It is sufficient to note that CouncilB did not accept responsibility for X.

20. A person centred review of X's care was undertaken on 7 July 2016. The report of that review notes that X did not seem very affected by her friend's death initially but she had a delayed reaction a few months later when she began to refuse to dress and became teary at times. It states that, since moving, X had been through good times and bad times depending on how secure she was feeling at the time. It states that *"assessments pointed towards depression and bereavement"*; referrals were made to psychiatry and psychology services.

21. The parties agreed not to refer their dispute to me pending the outcome of the appeal to the Supreme Court in the *Cornwall* case (cited below). There was some further delay after that judgment was handed down. The matter was referred to me by CouncilA on 9 February 2018. CouncilB filed written legal submissions and further documents on 2 March 2018. CouncilA filed supplementary submissions on 27 March 2018 and CouncilB responded on 25 April 2018.

The Authorities' Submissions

22. CouncilA submits that X became ordinarily resident in the area of CouncilB when she moved to Address1B on 7 April 2014. In short, its position is that:

a. Applying the guidance in the *Cornwall* case, X became ordinarily resident at Address1B when she moved there following a capacity assessment and best interests decision.

b. The deeming provision under the 1948 Act (cited below) did not apply because (i) Address1B was a supported living placement (not accommodation under section 21); and (ii) X did not have a need for accommodation under section 21.

23. CouncilB disputes that X ever became ordinarily resident in its area. It submits that:

a. The move to Address1B was not in X's best interests and did not comply with the requirements of the Mental Capacity Act 2005 and the Code of Practice;

b. X should have been re-assessed under the Care Act 2014 in early 2015 before the new tenancy agreement was signed with the Housing Association. Had this been done the wider deeming provisions under section 39 of the 2014 Act would have applied from that date.

c. On the facts, the accommodation was section 21 accommodation to which the deeming provision applied because:

i. The arrangements were not, in reality, a tenancy situation in that X's high care needs were met by the landlord in a way inconsistent with exclusive possession; and

ii. The accommodation was provided "together with" care (even after the identity of the landlord changed in 2015).

The Law

24. I have considered all the documents submitted by the parties; the provisions of Part 1 of the Care Act 2014 ("the 2014 Act") and the Care and Support (Disputes Between Local Authorities) Regulations 2014; the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it[2]; the Care and Support Statutory Guidance and the earlier guidance on ordinary residence issued by the Department[3]; and relevant case law, including *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 ("Cornwall"); R (Shah) v London Borough of Barnet* (1983) 2 AC

309 ("*Shah*"); *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 ("*Greenwich*"); *Mohammed v Hammersmith & Fulham LBC* [2002] 1 AC 547 (*"Mohammed"*); and *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184 *("Quinn"*). This dispute spans the coming into force of the 2014 Act. It is, therefore, necessary for me to set out below the law as it applied both before and after relevant provisions came into force.

Transitional Provisions

25. Article 5 of the Care Act (Transitional Provision) Order 2015/995 requires any question as to a person's ordinary residence arising under the 1948 Act, determined by me on or after 1 April 2015, to be determined in accordance with section 40 of the 2014 Act.

26. Article 6(1) states that any person who, immediately before the relevant date (i.e. the date on which the person's case is first reviewed under the 2014 Act or 1 April 2016 if no review has taken place before that date), is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the 2014 Act.

27. Article 6(2) states that the deeming provision under section 39 of the 2014 Act does not have effect in relation to a person who, immediately before the relevant date in relation to that person, is being provided with supported living accommodation for so long as the provision of that accommodation continues.

The 1948 Act

28. The following provisions were applicable when X moved to Address1B and at all times up to 1 April 2016, no review under the 2014 Act having taken place before that date (subject to CouncilB's argument that an earlier review should have taken place, which I consider below).

Accommodation

29. Section 21 of the 1948 Act empowered local authorities to make arrangements for providing residential accommodation for persons aged 18 or over who by reason of age, illness or disability or any other circumstances were in need of care or attention which was not otherwise available to them**.**

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

31. 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

32. Section 24(1) stated that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act was, subject to further provisions of that Part, the authority in whose area the person was ordinarily resident. The Secretary of State's Directions provided that the local authority was under a duty to make arrangements under section 24 in relation to persons ordinarily resident in their area and other persons in urgent need.

The deeming provision

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

34. In *Greenwich* (cited above) at [54] Charles J said:

> *"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".*

35. In the following paragraph, Charles J noted that (i) failure to provide accommodation could found a claim for judicial review; and (ii) if the court found that the local authority had acted unlawfully in not providing the accommodation arrangements would be put in place retrospectively. I proceed on the basis that that the *Greenwich* approach applies only where an authority has *unlawfully* failed to do something that it was required to do.

<u>The 2014 Act</u>

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

Duty to meet need for care and support

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

The deeming provision

38. Under section 39, 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 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.

39. The types of accommodation specified under the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 include care home accommodation and supported living accommodation.

Ordinary Residence

40. "Ordinary residence" is not defined in the 1948 Act or the 2014 Act. Guidance has been issued to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

41. In *Shah* (cited above), Lord Scarman stated that:

> *"unless… it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that "ordinary residence" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration"*

42. In *Mohammed* (cited above) Lord Slynn said:

> *"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."*

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

> *"With regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical*

presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.

44. This is the approach that I adopt here.

Application of the law to the facts

45. I shall start by considering, first, the factual circumstances of X's move to Address1B before determining, second, whether any of the statutory deeming provisions apply.

46. There is no dispute that prior to her move to Address1B X was being provided with section 21 accommodation to which the deeming provision under section 24 of the 1948 Act applied. There is also no dispute that Address1B is in the area of CouncilB.

Ordinary residence on the facts

47. On the facts, I have little hesitation in concluding that X has been ordinarily resident in the area of CouncilB since moving to Address1B on 7 April 2014. Whilst the precise details of the changes to X's previous home (House1B) are not entirely clear, the contemporaneous documents indicate strongly that continuing to live at House1B was not an available option for X. The fact that X and her family may not have wanted any move cannot alter the apparent reality that Org1B had decided that X could not continue living there.

48. I reject the suggestion by CouncilB that the move was not in X's best interests. Relevant people were consulted and it is wrong to suggest that the family opposed the plan (even if they would have preferred X to stay at CouncilB Village had this been an option). The documentary evidence as to how the best interests decision was reached is limited, but I cannot infer that appropriate procedures were not followed. The fact that X may have exhibited challenging behaviour after the move is not grounds for impugning the decision that was made at the time (and, in any event, it appears that any

change in X's presentation was related to a bereavement as opposed to any issue with the new accommodation or care).

49. Even if there had been defects in the way that the decision to move X was reached, this would not have led me to conclude that X was ordinarily resident other than in CouncilB. The crucial facts are that X moved to Address1B as a permanent home and no alternative placement was kept open for her.

Deeming provisions

50. I reject CouncilB's argument that statutory deeming provisions do, or should, apply in this case. The placement at Address1B was described as a supported living placement and it was not registered with the CQC as a care home. There was a tenancy agreement in place and all X's rent was paid through housing benefit. CouncilA did not pay anything towards the accommodation and it had no obligation to do so under the agreement. Accordingly, under section 26, the accommodation cannot have been section 21 accommodation.

51. CouncilB asserts that the arrangements were not a true tenancy situation because care was provided by the landlord, and the level of care provided was inconsistent with exclusive possession. However, the tenancy agreement clearly granted X exclusive possession. Accommodation was not contingent on acceptance of care. If X had the relevant capacity she could have denied access to carers. Assuming that she lacked capacity the decision was a best interests decision, but the legal right to refuse access in principle remained.

52. This was the position in law under the tenancy agreement, but the question remains as to whether the arrangements on the ground amounted to provision of accommodation "together with" personal care. Address1B was not registered as a care home and it would have been a breach of legal requirements to offer such provision. The fact that the landlord was also the provider of the accommodation is one factor that could point towards accommodation being provided "together with" personal care. However, this factor alone cannot be decisive. I have not been provided with any evidence as to the internal arrangements put in place by Org1B to ensure regulatory compliance and, in the absence of clear evidence, I am unable to conclude that Org1B acted unlawfully. Accordingly, I find that the accommodation was not, at any time, provided "together with" personal care.

53. The matter was put beyond doubt when the landlord changed to the Housing. From this point onwards X had no direct relationship with Org1B in respect of the accommodation (albeit Org1B acted as managing agent): Org1B provided the care and Housing provided the accommodation. I reject the argument that a review of X's care under the 2014 Act should have been undertaken before the new tenancy was signed. The documents make clear that the change in landlord did not impact materially on X's care and, in any event, an early review would not have made any difference to the issue of ordinary residence as X was already ordinarily resident in the area of CouncilB.

54. I further reject any suggestion that X should have been provided with accommodation under section 21. She was assessed as suitable for supported living and it is not for me to go behind that assessment.

Conclusion

55. It follows from the above that X has been ordinarily resident in the area of CouncilB since she moved to Address1B on 7 April 2014.