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.

2. On 1 April 2015 relevant provisions of the Care Act 2014 (“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.

3. Section 40 of the 2014 Act provides that any dispute about where an adult is ordinarily resident for the purposes of Part 1 of that Act is to be determined by the Secretary of State (or, where the Secretary of State appoints a person for that purpose, by that person). The Care and Support (Disputes Between Local Authorities) Regulations 2014 were made under section 40(4) of the 2014 Act and apply to this dispute.

The facts

4. X was born on XX XX 1972 has mental health difficulties, Asperger’s syndrome, and some learning disabilities. He lived in a variety of placements until, in February 2006, he moved into his own accommodation in the CouncilB’s area, under a tenancy agreement with a domiciliary care package.

5. The documents contain the front page only of a 12 month assured shorthold tenancy agreement commencing April 2013, in relation to a property at Address1B, CouncilB. I also have an agreement commencing June 2018, which contains a front sheet and terms and conditions on the reverse. I do not have any other tenancy agreement whether in whole or in part, but according to the Agreed Statement of Facts at paragraph 3.6 X has remained in the same property since he first moved to CouncilB’s area. The landlords are described as Y1 and Y2, of

Address2B, CouncilB, and they appear to be private individual landlords (as distinct from, for example, a company in the business of providing supported living accommodation). I assume, although I have not been provided with evidence either way, that either they or other private individuals have been the landlords since X first moved in since 2006.

6. I made further enquiries of CouncilA as to the nature of this tenancy arrangements and, according to its response (which CouncilB has not either expressly agreed or taken issue with): X has resided at the same address since 2006; the lessors are private landlords; and X is liable to pay the rent under the terms of his tenancy agreement and receives housing benefit.

7. X is provided with care from Organisation1, which until recently was known as Organisation2. According to the most recent assessment that I have available, X is able to wash his whole body only with the presence/or support of one carer. X needs no assistance with using the toilet or managing his continence. So he appears to require some "personal care".

8. On 31 October 2014, CouncilA wrote to CouncilB stating that X had been living in CouncilB's area for over 8 years in a supported living tenancy, that at his last two reviews he had indicated that he would like to stay in CouncilB's area and "be an Ordinary Resident", and asking "for X to be assessed for Ordinary Residence under your eligibility criteria". In essence, CouncilA was asking CouncilB to take responsibility for X on the basis that he was now ordinarily resident in the latter's area.

9. On 10 February 2016, CouncilB confirmed that its legal advice was that X remained the responsibility of CouncilA pursuant to the Care Act 2014.

10. In party/party email correspondence from 2016 (but not in the Agreed Statement of Facts), a representative of CouncilA said that X has no "local connection" in the CouncilB's area but that he had been living there over ten years. She also said that he had no local connections in CouncilA's area either, as his parents both lived abroad.

11. CouncilA chased CouncilB several times over the next few years, but did not receive any substantive responses from CouncilB. In light of this, CouncilA eventually referred the matter to the Secretary of State for determination.

The position of the parties

CouncilA

12. CouncilA accepts that the accommodation it provided down to February 2006 was residential accommodation within the meaning of Part III of the National Assistance Act 1948, and that pursuant to the deeming provisions in that Act X remained ordinarily resident in its area throughout that time. Thereafter, however, CouncilA contends that X lived in supported living accommodation under his own tenancy agreement, and that this was not accommodation provided under Part III of the National Assistance Act 1948. From that point onwards, he had settled and voluntary residence in CouncilB's area, and fell outside the terms of the deeming provision then in force.

CouncilB

13. CouncilB contends, first, that this referral for determination of an ordinary residence dispute is out of time. It contends that the dispute first arose on 10 February 2016 when CouncilB confirmed that X's ordinary residence remained that in CouncilA's area, that the referral ought to have been made within 4 months of the dispute arising, but that it was not.

14. As to the substance, and without prejudice to the foregoing, CouncilB contends that X is ordinarily resident in CouncilA's area in any event. It describes a "consensus of fact" that (i) X was in receipt of services under Part III of the National Assistance Act 1948, and that (ii) CouncilA had an ongoing responsibility to meet X's care needs as he was ordinarily resident there. (It is not clear to me that CouncilA would in fact agree to the second of these two propositions).

15. CouncilB states that it is unclear whether X's accommodation was (i) private residential accommodation, or (ii) supported living accommodation with personal care being provided by CouncilA. At the time of drafting its legal submissions, CouncilB states that it had not had sight of X's tenancy agreement. It does not necessarily accept whether X had a tenancy at all. CouncilB contends that there is no evidence that X had the capacity to sign a tenancy agreement at the relevant time. I note, however, that CouncilB agreed without qualification, in the Agreed Statement of Facts, that X had the (admittedly different) capacity to decide where to live.

16. CouncilB refers to the Care Act 2014 (Transitional Provisions) Order 2015 (set out below). It points out that that Order requires, for those in receipt of services under Part III of the National Assistance Act 1948, to be reviewed prior to 1 April 2016. Thereafter, Part 1 of the Care Act 2014 will apply to that person. CouncilB states that it has received no evidence of such review being carried out. Its contention is that if it is determined that X does not have a lawful tenancy and if what he has been provided with is in fact "specified accommodation" within the Care and Support (Choice of Accommodation) Regulations 2014, then CouncilA would remain the responsibility of CouncilA, pursuant to the deeming provision in s.39 of the Care Act 2014 (set out below).

<u>X's mental capacity</u>

17. According to the Agreed Statement of Facts, the parties agree that, at the time of X's move to CouncilB's area, he had the mental capacity to make the decision to make that move. In party/party correspondence a representative from CouncilA has asserted that "there are no issues in relation to X's mental capacity and therefore no mental capacity assessment has ever been completed". I am required by s.1(2) of the Mental Capacity Act 2005 to assume that X has capacity unless there is evidence to the contrary. I am aware that CouncilB does not necessarily accept that X has the capacity to enter into a tenancy agreement, but I am not aware of any evidence to support that proposition. As such, I assume for the purposes of this determination that X does have the relevant capacity.

<u>Interim provision</u>

18. CouncilA is the lead authority and had been making provision in the interim. I confirm that this has not affected my decision in any way.

Jurisdiction

19. As observed above, CouncilB contends that the Secretary of State does not have jurisdiction to determine this dispute under s.40 of the Care Act 2014. Its submissions are based on the premise that there is a four-month limitation period for referring disputes to the Secretary of State.

20. The relevant provision is regulation 3(7) of the Care and Support (Disputes Between Local Authorities) Regulations 2014. It provides that "If the authorities cannot resolve the dispute between themselves within four months of the date on which it arose, the lead authority must refer it to the appropriate person." This provision does not establish a four-month limitation period, and does not provide that a dispute which has been on-going for longer than four months cannot be referred to the Secretary of State for a determination. As such, it does not remove my duty to determine disputes under s. 40 of the Care Act 2014, which provides that the Secretary of State (or "the appointed person") *is* to determine disputes about where an adult is ordinarily resident for the purpose of Part 1 of the 2014 Act. I therefore find that I do have jurisdiction to consider this dispute.

The Law

21. I have considered all the documents submitted by the two authorities, the provisions of Part 3 of the 1948 Act and the Directions issued 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").

22. I set out below the law as it stood both before and after 1 April 2015, when relevant provisions of the 2014 Act came into force, as this case straddles both statutory regimes. Article 6(1) of the Care Act (Transitional Provision) Order 2015/995 states that any person who, immediately before the relevant 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.

National Assistance Act 1948

Accommodation

23. 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**.**

24. 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).

25. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal

care under section 21 of that Act with any organisation other than a registered care home.

The relevant local authority

26. 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

27. 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. 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."

Welfare services

28. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

<u>The Care Act 2014</u>

The relevant local authority

29. 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

30. 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.

31. 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.

Ordinary Residence

32. "Ordinary residence" is not defined in either the 1948 or the 2014 Acts. 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.

33. 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"*#

34. 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.

35. 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

The applicable statutory provisions

36. Pursuant to Article 2 of the Care Act 2014 (Transitional Provision) Order 2015/995, Part 1 of the Care Act 2014 did not apply to a person who was being provided with support or services immediately before 1 April 2015 until either (a) the local authority carried out a review of that person's care under the Care Act 2014; or (b) 1 April 2016.

37. I have been provided with papers showing that there was a self-assessment questionnaire and support plan produced on or about 5 May 2015. This therefore appears to be the date on which the Care Act 2014 came into force in relation to

X. If I am wrong about that, then the Care Act 2014 came into force in relation to him by the latest on 1 April 2016, when the transition occurred automatically by operation of statute.

38. Article 6(1) of the 2015 Order provides that any person who, immediately before the "relevant date" in relation 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 Care Act 2014. In other words, if a person has "deemed" ordinary residence pursuant to s.24(5) or (6) of NAA 1948 then that is preserved notwithstanding the change in legislation. Article 1 defines the "relevant date", in relation to a person, as the date on which Part 1 of the Care Act 2014 applies to that person by virtue of article 2. In this case that appears to be on or about 5 May 2015 or, if later, then the 1 April 2016.

39. Furthermore, Article 6(2)(c) provides that section 39 of the Care Act 2014 does not have effect in relation to a person who, immediately before the "relevant date" in relation to that person, was being provided with supported living accommodation within the meaning of regulation 5 of the 2014 Regulations, for as long as the provision of that accommodation continues. This applies whether or not a person has "deemed" ordinary residence pursuant to s.24(5) or (6) of the NAA 1948. As observed above, the "relevant date" in the instant case appears to be on or about 5 May 2015.

40. This analysis is summarised at paragraph 19.87 of the Care and Support Statutory Guidance, which provides:

> 19.87 Regardless of when the Secretary of State is asked to make a determination, it will be made in accordance with the law that was in force at the relevant date, in respect of which ordinary residence falls to be determined. Therefore, where ordinary residence is to be determined in respect of a period which falls before 1st April 2015, then the determination will be made in accordance with Part 3 of the National Assistance Act 1948 (the 1948 Act). If, in respect of a period on or after 1st April 2015, then the determination will be made in accordance with the Care Act.

41. The question is therefore where X was ordinarily resident as at 4 May 2015 (or, if later, then the 1 April 2016), which is a date on which the provisions of the NAA 1948 continued to apply to him. Thus this ordinary residence dispute is to be determined in accordance with the principles contained within the 1948 Act and not the Care Act 2014.

Deeming provisions

42. The first issue is whether X's supported living accommodation was provision of residential accommodation under section 21 of the 1948 Act. If it was, X will be deemed to be ordinarily resident in CouncilA's area because of the application of the deeming provision in section 24(5) of the 1948 Act. If X was not provided with accommodation under section 21 of the 1948 Act the next step is to consider whether he should have been, in which case the deeming provisions in section 24(5) may still apply. Finally, if the arrangements did not fall under section 21 at all, the deeming provision will not apply but it will be necessary to determine X's ordinary residence in accordance with the ordinary meaning of the term as interpreted by the courts.

43. In order for a person's accommodation under a private tenancy agreement to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet the requirements of section 26(1A), (2) and (3) of the 1948 Act. Section 26(1A) provides that if arrangements under this section are being made for the provision of accommodation "together with nursing or personal care", they must not be made unless the accommodation is provided in a care home, as defined in the Care Standards Act 2000, and is managed by an organisation or person who is registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008.

44. Address1B does not appear to be registered with the CQC. If any provider were providing personal care "together with" accommodation in this property (regulated activities) without being registered they would be guilty of an offence. For this reason Organisation2 cannot lawfully be providing personal care "together with" accommodation to X in this property.

45. Further, there is no evidence that X's landlords, who appear to be private individuals, are the same legal entity as the care agency, which is a company. Moreover, if they were the same entity, they would be committing a criminal offence by providing personal care together with accommodation. It therefore seems unlikely that that is the arrangement and that it has been the arrangement for the last 12 years. As such, I find that X was receiving the care and attention he required whilst living in private residential accommodation under a tenancy agreement; he was not receiving the accommodation "together with" personal care. As stated above, this is on the assumed factual basis that X's landlords for the last 12 years have been private individuals.

46. If I am wrong about this, and the accommodation at Address1B was being provided "together with" personal care, I will proceed to evaluate whether the other conditions of section 26 of the 1948 Act are met. In *Quinn Gibbon*, Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.

47. In my view, from the little information I have, the tenancy agreement between X and his private individual landlords does not meet the section 26 requirements in order for it to be accommodation falling under section 21. X is provided with an assured shorthold tenancy to occupy a flat. As it is signed in his name, he would appear to be solely responsible for the payment of rent. I have no evidence before me of any obligation on CouncilA in its capacity as an Adult Social Services authority to make any payment for accommodation to the landlords, nor of any recovery of such payments by CouncilA from X. As observed above, this is all on the assumed factual basis that the terms of this tenancy agreement have in relevant part been the same for the last 12 years.

48. However, that is not sufficient to settle the matter. The further question which I then have to address is whether in fact arrangements for Part 3 accommodation for KL *ought to* have been made when she moved to Fairmount in 2010: see *Greenwich* at paragraph 55, where Charles J applied the deeming provision to

the situation as it ought to have been. In *Wahid v Tower Hamlets* [2002] EWCA Civ 287*,* Hale J (as she then was) explained that the section 21(1)(a) duty arose:

a) where the person was in need of care and attention;

b) that need arose because of age, illness, disability of any other circumstances; and

c) care and attention were not available otherwise than by the provision of residential accommodation.

49. The first and second of these are plainly made out on the facts of this case: X had a care package involving 2:1 support on a 24/7 basis, which met needs that arose as a result of X's mental and physical disabilities.

50. As to the third requirement above, the House of Lords observed in *R(Westminister City Council) v National Asylum Support Services* [2002] 1 WLR 2956 (at paragraph 26 *per* Lord Hoffman) that, normally, a person needing care and attention which could be provided in his own home, or in a home provided by a local authority under the housing legislation, is not entitled to accommodation under section 21. I have seen nothing in the present case to suggest that different arrangements, in which accommodation is provided "together with" personal care, ought to have been put in place. In particular, the current arrangements appear to have been successful for the last twelve years. I have seen no suggestion in the papers that X would have been better served by someone providing both personal care and accommodation at the same time.

51. I therefore determine that there was no duty to provide section 21 accommodation to X. If the provision of accommodation does not fall within section 21, the section 24(5) deeming provision does not apply. If section 24(5) does not apply, then X's ordinary residence falls to be determined according to the normal rules on whether a person is ordinarily resident in a particular area.

Determination of ordinary residence if deeming provisions in NAA 1948 do not apply

52. X has been resident in CouncilB's area for the last 12 years. He has capacitously decided that that is the area in which to live[1]. He is there for the purpose of receiving long-term care and support. He had relationships with his neighbours, from whom he is said to buy and sell second hand goods. He enjoys using the local amenities. By contrast, he has not resided in CouncilA's area for the last 12 years, and has no local connection there. Neither parent lives there anymore. Having regard to all of the foregoing, it is clear to me that X resides for a settled purpose in CouncilB's area and can therefore be described as being ordinarily resident there.

53. As I understand it, the plan always was for X to move into his supported living placement as a long-term option. As such, he can be described as having settled and voluntary residence in CouncilB's locale since the date of his move.

Conclusion

54. I therefore conclude that X has been ordinarily resident in CouncilB's area since he first moved there in February 2006.

[1] According to the Agreed Statement of Facts, there is no dispute that X has the capacity to decide where to live. There may be a dispute as to whether X has the capacity to sign a tenancy agreement, but that is not relevant for the purposes of this paragraph.