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

2. 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.

3. For the reasons given below I find that during the period of her admission in hospital, X was CouncilB's responsibility. Since the time of her discharge, however, she is the responsibility of CouncilA, either because of her physical presence in that area or because she has acquired ordinary residence there.

The facts

4. The following information has been ascertained from the agreed statement of facts by CouncilA and CouncilB, and other documents provided.

5. X is a 71 year old lady. Until around September 2016, she lived in France, in a home that apparently did not have electricity or running water. It is not known exactly when she came to the UK, or where or what she was doing when she was first here.

6. On 20 October 2016, X had a cardiac arrest in PlaceB, which is in CouncilB's area. Sometime later, X's vehicle was found in PlaceB, full of her belongings including seven bin bags of her clothes.

7. X was airlifted from PlaceB to Hospital1A, which is in CouncilA's area.

8. On 25 October 2016, Hospital1A gave notice to CouncilA pursuant to the Care and Support (Discharge of Hospital Patients) Regulations 2014 asking it to carry out an assessment and assist with X's discharge planning.

9. On 22 November 2016, X transferred from Hospital1A to Hospital2A, also in CouncilA's area, where she was detained under section 2 of the Mental Health Act 1983. She was never detained under section 3 of that Act. An assessment dated 24 November 2016 found that X did not have the capacity to consent to her admission.

10. By no later than 9 January 2017, CouncilA appears to have formed the view that X was self-caring and that as such she was not eligible for a placement in any kind of residential accommodation.

11. On 27 January 2017, there was a best interests meeting attended amongst others by hospital clinicians and by a social worker from CouncilA. X had been assessed by that social worker as lacking the capacity to make decisions about where she should live. Various options were explored but in the end it was decided that X would have to move into a care home because, in X's unique circumstances, there were no other practically feasible options. This was to be an interim arrangement. There appears to have been a general acceptance that X did not need residential care as such, and that the decision was being taken on practical grounds.

12. By 17 March 2017, X was still in hospital. There was a further best interests meeting, at which a CouncilA social worker was again present. X was said to still lack capacity to make decisions about her residence, care, and finances. A best interests decision was again taken that X should move into residential accommodation as an interim arrangement.

13. An IMCA report dated 23 March 2017 recorded that professionals at the hospital had concerns about X going into the community on her own and cooking meals

independently. They were of the view that, because of X's cognitive impairment, she needed 24/7 care.

14. On 10 April 2017, X was discharged to House1A, also in CouncilA's area.

15. On 31 July 2017, CouncilA completed a care needs assessment of X. CouncilA completed a care and support plan for X on 18 August 2017.

16. On 22 September 2017, CouncilA wrote to CouncilB asking the latter to accept that X was ordinarily resident in its area. The two authorities corresponded with each other thereafter as they attempted to resolve their ordinary residence dispute.

17. On 15 December 2017, CouncilA completed a further care needs assessment of X. Amongst other things, this records the views of X's carers as being that X's level of need did not require residential accommodation in a care home as there were lots of things that she was able to do for herself.

18. I have seen very limited direct evidence as to X's capacity. However, on 16 October 2017 the Court of Protection made an order pursuant to s.15 of the Mental Capacity Act 2005 that X lacks the capacity to decide where to live. On that basis, I am satisfied that at the material time X lacked such capacity.

The parties' submissions

CouncilA

19. CouncilA contends that X is ordinarily resident in the area of CouncilB, for the following reasons:
    a. At paragraph 7 of its written submissions, CouncilA appears to submit both that X is a person of no settled residence when she left France and that she was ordinarily resident in CouncilB's area at the time of her cardiac arrest on 20 October 2016;
    b. Either way, s.39(5) of the Care Act 2014 (set out below) applied so as to deem X ordinarily resident in CouncilB through the duration of her hospital stay;

c. S.39(1) of the Care Act 2014 does not apply to X's residence in the care home, as X's needs for care and support are not ones which can only be met if she is living in accommodation of a specified type. She is living in a care home because, given the unique circumstances of her case, it is convenient and less expensive for her to do so. It is not entirely clear from CouncilA's submissions what they say the impact of this is on X's ordinary residence. However, CouncilA does submit that X has no connections to its area.

CouncilB

20. CouncilB contends that X is ordinarily resident in the area of CouncilA. CouncilB contends that, as CouncilA has been providing X's care pursuant to s.18 of the Care Act 2014, it is the responsible authority. CouncilA carried out Care Act assessments of X, the conclusion of which was that X was eligible to be provided with care by CouncilA. These assessments were completed at a time when X was physically present in CouncilA's area. CouncilA did not contact CouncilB until 22 September 2017, which further shows that it accepted responsibility. As CouncilA has, in practice, accepted that it has a duty under the Care Act 2014 to meet X's needs, CouncilA is where she is ordinarily resident. CouncilB has not sought to "export" X's care to CouncilA. Indeed, CouncilB understands that there is a confidential report in Court of Protection proceedings that concludes it is in X's best interests for her to remain in CouncilA (I have not seen a copy of any such report).

21. CouncilB contends that, in the alternative, as X has never needed care and support which can be met only in specified accommodation, the deeming provision in s.39 has not applied at any stage. Her ordinary residence must be ascertained by reference to the nature and character of her current living arrangements. As to this: X is physically present in CouncilA's area; has been for some considerable time; resides there with the settled purpose of receiving care and support in her best interests; X has not resided in any other part of the UK for several years; and X has no links whatsoever to CouncilB's area.

The Law

22. 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"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

The relevant local authority

23. 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

24. 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.

25. Regulation 2(1) of the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014) provides, as amended, that for the purposes of section 39(1) of the 2014 Act, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation.

26. Section 39(1) is expressed to apply "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".

27. Under section 39(3) of the 2014 Act, regulations may make provision for determining for the purposes of subsection (1) whether 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 the regulations. No such regulations have been made.

28. The Care and Support statutory guidance provides, at paragraph 19.51, that:

> "19.51 Need should be judged to be 'able to be met' or of a kind that 'can be met only' through a specified type of accommodation where the local authority has made this decision following an assessment and a care and support planning process involving the person. Decisions on how needs are to be met, made in the latter process and recorded in the care and support plan, should evidence that needs can only be met in that manner. Where the outcome of the care planning process is a decision to meet needs in one of the specified types of accommodation and it is the local authority's view it should be assumed that needs can only be met in that type of accommodation for the purposes of 'deeming' ordinary residence. This should be clearly recorded in the care and support plan. The local authority is not required to demonstrate that needs cannot be met by any other type of support. The local authority must have assessed those needs in order to make such a decision - the 'deeming' principle therefore does not apply to cases where a person arranges their own accommodation and the local authority does not meet their needs."

29. 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

30. "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.

31. 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."*

32. 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.

33. 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."

The Cornwall case

34. 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.

<u>Guidance</u>

35. The Department of Health's Care and Support statutory guidance provides:

> "19.26 Where a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.
>
> 19.27 The Supreme Court judgment in Cornwall made clear that the essential criterion in the language of the statute 'is the residence of the subject and the nature of that residence'.
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> 19.28 At paragraph 51, the judgment says in relation to the Secretary of State's argument that the adult's OR must be taken to be that of his parents as follows:

> ‘There might be force in these approaches from a policy point of view, since they would reflect the importance of the link between the responsible authority and those in practice representing the interests of the individual concerned. They are however impossible to reconcile with the language of the statute, under which it is the residence of the subject, and the nature of that residence, which provide the essential criterion…..’
>
> 19.29 At paragraph 47, the judgment refers to the attributes of the residence objectively viewed.
>
> 19.30 At paragraph 49, the judgment refers to an: assessment of the duration and quality of actual residence.
>
> 19.31 At paragraphs 47 and 52, the judgment refers to residence being ‘sufficiently settled’.
>
> 19.32 Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person’s physical presence, their purpose for living there, the person’s connection with the area, their duration of residence there and the person’s views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.”

No settled residence

36. A person can have no settled residence in any local authority area. Paragraph 19.20 of the Care and Support Statutory Guidance provides that where doubts arise in respect of a person’s ordinary residence, it is usually possible for local authorities to decide that the person has resided in one place long enough, or has sufficiently firm intentions in relation to that place, to have acquired an ordinary residence there. Therefore, it should only be in rare circumstances that local authorities conclude that someone is of no settled residence. For example, if a person has clearly and intentionally left their previous residence and moved to stay elsewhere on a temporary basis during which time their circumstances change, a local authority may conclude the person to be of no settled residence.

Analysis

37. I agree with both parties that, in the unique circumstances of X's case, she was a person of no settled residence as at 20 October 2016. To the extent that CouncilA say that X was also *ordinarily resident* in CouncilB as at 20 October 2016, I do not agree. There is no evidence that X was residing in a settled way in CouncilB's area. On the contrary, she had gone missing from her home in France only a few weeks earlier, a large amount of her possessions were found in her car, it seems that at that time her mental state may have been poor, and there is nothing linking her to CouncilB's area other than the fact that she and her car happen to have been there on the afternoon of 20 October 2016.

38. Given that X was of no settled residence as at 20 October 2016, responsibility for her care fell to the local authority in which she was physically present at the material time (see s.39(5)(b)). X was physically present in CouncilB's area immediately before being provided with NHS accommodation in hospital within the meaning of s.39(6)(a). As such, she was deemed to be ordinarily resident in CouncilB's area throughout the duration of her hospital stay. Up to this point, I therefore agree with CouncilA.

39. X was then discharged from hospital and moved into a care home. As I understand CouncilA's submissions, it contends that s.39(1) of the Care Act 2014 does not apply to X's care home stay, notwithstanding that she resides in a specified type of accommodation, because she has not been assessed as having need that can only be met if she is living in such accommodation. She is living there only because it is convenient and relatively inexpensive, given X's unique situation. Here too I agree with CouncilA's analysis: she has not been assessed as needing to reside in a specified type of accommodation (indeed, the opposite is the case), and therefore the deeming provision in s.39(1) of the Care Act 2014 does not apply.

Conclusion

40. As I observed above, however, it is not clear from CouncilA's submissions what impact it considers the inapplicability of the deeming provision has on her

ordinary residence. In my view, the inescapable conclusion is that, as no deeming provision any longer applies, she became CouncilA's responsibility upon her discharge from hospital, either because she has settled in CouncilA's area for the purposes of receiving care and support or, if she remains of no settled residence, because she is physically present in CouncilA's area.

41. I have considered whether the dictum of Charles J at paragraph 55 *Greenwich* applies, i.e. whether CouncilB should be deemed as being responsible for X because it ought to have assessed X during the period for which it was responsible for her - i.e. during her hospital admission - and thereafter to have placed her. In my view, however, Charles J's observation is not applicable to the facts of this case, because at no time during her hospital admission has CouncilB been made aware of its potential responsibilities. Further and in any event, X's level of need upon discharge was not such as to trigger the deeming provision in s.39(1) of the Care Act 2014, which means that even if CouncilB had taken responsibility and had placed X in a care home in CouncilA's area, X would be regarded as being physically present and/or settled in CouncilA, and therefore the latter's responsibility.

42. As I have observed above, X was only physically present, and not ordinarily resident, in CouncilB's area as at 20 October 2016. However, I would have reached exactly the same final conclusion had I found that she was ordinarily resident in CouncilB's area as at 20 October 2016: CouncilB would have been deemed responsible for her during her hospital stay, but that would have come to an end when X was discharged from hospital, for all the same reasons as those already given above.

43. In light of my conclusion above, I do not therefore need to consider CouncilB's submissions that X became ordinarily resident in CouncilA's area because CouncilA took responsibility for her under s.18 of the Care Act 2014.