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 the 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 National Assistance Act 194 ("the NAA 1948") 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 is an 84 year old gentleman (dob XX XX 1933). Until December 2013, X resided in his own home in the area of CouncilB. He had lived in CouncilB's area his whole life. From there, he was admitted to hospital. In January 2014, he was discharged home. On 8 January 2014, X was admitted to Nursing Home1B in PlaceB, also in CouncilB's area.

5. At best interests meetings on or around 18 January 2014 and 24 February 2014, CouncilB decided that it was in X's best interests to move to a care home rather than to return to his own home. Further, X's step-daughter had indicated that she would like him to live closer to her in CouncilC, and CouncilB also made the best interests decision that X's Article 8 right to a family life with his step-daughter should take precedence over finding a placement in CouncilB's area. By around

March 2014, X's step-daughter had identified a care home known as Care Home1A. I do not appear to have any evidence of CouncilB taking a formal best interests decision that X should move to Care Home1A, but CouncilB accepts that there was one.

6. On 2 May 2014, CouncilB wrote to X's deputy stating "*Please be advised that X, who had been temporary [sic] placed at Nursing Care Home1B, will be moving into a permanent residential care home in CouncilA's area (Care Home1A). This home has been identified by X's niece Y1…I have advised the Home Manager Mrs Z1 that Mr X is a self-funder and that he has a solicitor who manages his funds. Mrs Z1 has asked for your contact details, which I have forwarded to her.*"

7. On or about 9 May 2014, X moved to Care Home1A, in the area of CouncilA, where he remains. At the time he moved into the home, he had sufficient assets to fund it himself, at least in part because he owned his own home. It is common ground that X lacked capacity at the time of his move to Care Home1A, and there is abundant evidence in the documents before me to rebut the presumption that X had the relevant capacity.

8. The care home contacted his deputy to arrange the funding. The deputy authorised the release of funds for the payment of Care Home1A's fees. CouncilB denies having had any involvement in the arrangement of that placement. The deputy even financed the transport between the two care homes. The deputy takes no view as to the merits of any particular move, and is simply with managing X's finances in his best interests.

9. X is deprived of his liberty at Care Home1A pursuant to the terms of a standard authorisation granted under Schedule A1 to the Mental Capacity Act 2005. That standard authorisation is currently being challenged through the Court of Protection by the Paid Relevant Person's Representative. CouncilA has been treating itself as the supervisory authority although, as will be clear from the below, that fact alone does not provide an answer to the question, which must be decided according to the usual principles for determining a person's ordinary residence.

10. As at 30 March 2017, X was objecting to his placement at Care Home1A, to the extent that it was necessary for an application under s.21A of the Mental Capacity Act to be made to the Court of Protection.

11. The ordinary residence dispute appears to have arisen on 30 March 2017. There has been protracted correspondence since then. It is unnecessary to set out the contents of that correspondence, as both authorities have submitted detailed and helpful written submissions, with the assistance of counsel.

The position of the parties

CouncilA

12. CouncilA contends that X is ordinarily resident in the area of CouncilB. Its submissions can be summarised as follows. Because X lacked the mental capacity to do so, X was unable to make his own decisions or arrangements as to where he should live. Further, there was no-one authorised to make such decisions on his behalf, not least decisions which involved a deprivation of X's liberty: nobody had lasting power of attorney, and he had only a property and affairs (as distinct from a health and welfare) deputy whose remit did not include making decisions about where X should live. As there was nobody authorised to make the relevant decision as to X's residence and care, X was a person for whom care and support was not "otherwise available", within the meaning of s.21 of the NAA 1948 – irrespective of whether he had the funds to pay the care home fees himself. This triggered the duty *on CouncilB* to provide services, including the provision of residential accommodation, under s.21 NAA 1948. As X was placed in a care home, the deeming provisions in the NAA 1948 apply to him, meaning that he remained deemed ordinarily resident in CouncilB's area notwithstanding his move out-of-area. Finally, even if CouncilB had not discharged its duties as it ought, the effect of paragraph 55 of the judgment of Charles J in *Greenwich* (referred to below) is that it should nevertheless be treated as having so complied, such that the deeming provision would still be treated as applying.

13. CouncilA also refers to s.18(4) of the Care Act 2014 which provides that a duty to provide care and support applies where, amongst other things, there is a charge

for meeting the needs (e.g. where someone has the means to pay for all or part of their care home costs for themselves) and (a) the adult lacks capacity to arrange for the provision of care and support, but (b) there is no person authorised to do so under the MCA 2005 or otherwise in a position to do so on the adult's behalf. CouncilA contends that that was effectively the position under s.21 of the NAA 1948 for the reasons given above, albeit that it is now more expressly provided for in the 2014 Act. There is no change between the two regimes in this regard.

14. Further, the fact that CouncilB conducted a best interests meeting prior to X's move to Care Home1A indicates that CouncilB recognised that (a) X lacked the capacity to decide where to live; and (b) that there was nobody else authorised to make a welfare decision on X's behalf – thereby demonstrating that X did not have care and support "otherwise available" to him. CouncilB's adoption of a best interests decision-making framework in this context precludes it from now asserting that it had no, or no sufficient, role in arranging the Care Home1A placement so as to engage the deeming provisions of the NAA 1948.

15. The introduction of the Care Act 2014, including its transitional provisions, do not change the above status quo.

16. If the deeming provisions do not apply, then in any event CouncilA does not accept that X is settled in his current residence in the *Shah* sense, because he is objecting to his placement and requesting to go "home". But it contends that, even if X were settled, then that has only come about because CouncilB failed to recognise its statutory duties, and is therefore irrelevant to the determination of X's ordinary residence.

<u>CouncilA</u>

17. CouncilB contends that X is ordinarily resident in CouncilA's area and has been so since 9 August 2014, which is a notional 3 months from when X moved there.

18. CouncilB refers to ss.24 and 26 of the NAA 1948 and contends that as CouncilB has at no time paid for X's accommodation, the deeming provision in s.24(5) of the NAA 1948 does not apply.

19. In response to CouncilA's submissions, CouncilB contends that X's lack of capacity does not preclude him from being a self-funder, and that because X is a self-funder the deeming provisions do not apply to him. CouncilB contends that the MCA 2005 does not require best interests decisions to be taken exclusively by a duly authorised deputy, someone with a power of attorney, or the Court. They may also be made by a local authority. CouncilB accepts that it made the relevant best interests decision, pursuant to s.4 of the MCA 2005, that X should move to Care Home1A. However, it does not follow from the fact that CouncilB made the best interests decision *about* the accommodation, that CouncilB was either discharging or ought to have been discharging a duty to *provide* the accommodation at Care Home1A (subject to reimbursement). The former is a welfare decision that did not engage s.21 of the NAA 1948, the latter is a financial/administrative decision that would.

20. CouncilB also relies upon LAC(98)19, which was the applicable guidance under NAA 1948 in force at the relevant time. Paragraph 10 of that guidance provides that:

> "It is the Department's view that having capital in excess of the upper limit of £16,000 does not in itself constitute adequate access to alternative care and attention. Local authorities will wish to consider the position of those who have capital in excess of the upper limit of £16,000 and must satisfy themselves that the individual is able to make their own arrangements, or has others who are willing and able to make arrangements for them, for appropriate care. Where there is a suitable advocate or representative (in most cases a close relative) it is the Department's view that local authorities should provide guidance and advice on the availability and appropriate level of services to meet the individual's needs. Where there is no identifiable advocate or representative to act on the individual's behalf it must be the responsibility of the LA to make the arrangements and to contract for the person's care."

21. CouncilB relies on the above paragraph to show that, as long as there is someone (usually a close relative) able to make arrangements for someone with assets above the relevant capital threshold, there is no duty upon the local authority to make such arrangements. CouncilA responds that the MCA 2005 has since been passed and that, under the framework of that Act, there was no other suitable person authorised to make the relevant decision on X's behalf, which left the local

authority as the default body responsible for making the relevant arrangements. Accordingly, paragraph 10 of LAC(98)19 does not assist in this situation.

22. Finally, CouncilB contends that, even if it is wrong about all of the above, the fact that a placement has been made without lawful authority would not as a matter of law prevent the individual in question from becoming ordinarily resident somewhere.

23. CouncilB further contends that, notwithstanding the fact that X expresses a wish to return home, there is evidence that he is nevertheless settled at the home including enjoying group social activities and engaging with both staff and peers. By October 2017, a doctor was reporting that X was not agitated and that he had said to the doctor "I am all right here and happy here". He has been in the home since May 2014; the purpose of his move there was to provide a permanent residence for his long-term care; there is no record of X requesting to return home to CouncilB for around a year after he first moved into Care Home1A; and in any event X's home has been sold. As such, he has settled residence in CouncilA in the *Shah* sense.

Interim provision

24. 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.

The Law

25. 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").

26. 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

27. 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**.**

28. 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).

29. 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

30. 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

31. 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

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

Ordinary Residence

33. "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.

34. 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"

35. 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.

36. 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

<u>The applicable statutory provisions</u>

37. 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.

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. 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."

40. The question is therefore where X was ordinarily resident as at the relevant date, 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.

Analysis

41. 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 CouncilB'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.

42. The critical issue in this case, which provides an answer to both the first and second issues above, is whether X's accommodation at Care Home1A was, or ought to have been, provided pursuant to section of the 1948 Act. On the facts and arguments presented in this case, that in turn depends on the question of who may lawfully make arrangements for the provision of an incapacitated person's care. CouncilB contends that the accommodation at Care Home1A was a private family arrangement, arranged by X's step-daughter and funded by X via his financial deputy. At most, as the relevant adult social services authority at the relevant time, CouncilB was required to make a best interests decision in order to ensure that X's care needs would be met at the chosen accommodation. CouncilB contends that there is nothing unlawful about this approach to making arrangements under the MCA 2005.

43. CouncilA contends, by contrast, that under the MCA 2005 framework only a properly authorised person or body may lawfully make arrangements for the accommodation of an incapacitated person, especially where that accommodation involves a deprivation of the person's liberty. X could not take the relevant decisions for himself, and there was no other person that could – accordingly, the default position was that that responsibility fell to be discharged by CouncilB as the relevant social services authority. Either it did so, or it ought to have done so and should therefore be treated as having done so.

44. I have concluded that I do not agree with CouncilA's contention as to how the system for arranging an incapacitated adult's accommodation operates. Family members are entitled in the first instance to make care arrangements for their incapacitated relatives: that is the ordinary function of carers, day-in day-out,

across the county. If there is a resulting deprivation of liberty of a type falling within Schedule A1 to the MCA 2005, then it is correct to say, as CouncilA does, that that is not something which the family member can authorise as such. The aspect of the arrangements involving a deprivation of liberty will therefore fall to be authorised via the statutory mechanisms contained within Schedule A1 to the MCA 2005. But that does not mean to say that the family member cannot make the arrangement in the first place, subject to proper authorisation by the appropriate supervisory authority.

45. The local authority of course has a supervisory/safeguarding role in all of this and, if there is a dispute as to whether a particular set of private arrangements is in a person's best interests, then the local authority may intervene, including by making an application to the Court of Protection in cases of dispute. But, again, that does not mean that the local authority has a duty in the first instance to make the relevant arrangements.

46. As I understand CouncilA's submissions, they amount to saying that for those lacking capacity without an LPA or deputy, it is by definition for local authorities rather than family members to make the necessary arrangements. That is contrary to the role of local authorities as described by Munby LJ in *A Local Authority v A&C* [2010] EWHC 978 (Fam) at paragraphs 51-52:

> "51. It is suggested that in a case such as this a local authority is not merely "involved" with people in the situation of A and C and their families but that it may also have "complete and effective control … through its assessments and care plans", given that the care plans deal with important aspects of their lives, their care, movement and, in C's case, social contacts. It needs to be said in the plainest possible terms that this suggestion, however formulated – and worryingly some local authorities seem almost to assume and take it for granted – is simply wrong in law. A local authority does not exercise "control", it lacks the legal power to exercise control, over people in the situation of A or C or their carers.
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> 52. Moreover, the assertion or assumption, however formulated, betrays a fundamental misunderstanding of the nature of the relationship between a local authority and those, like A and C and their carers, who it is tasked to support – a fundamental misunderstanding of the relationship between the State and the citizen. People in the situation of A and C, together with their carers, look to the State – to a local authority – for the support, the

> assistance and the provision of the services to which the law, giving effect to the underlying principles of the Welfare State, entitles them. They do not seek to be "controlled" by the State or by the local authority. And it is not for the State in the guise of a local authority to seek to exercise such control. The State, the local authority, is the servant of those in need of its support and assistance, not their master. As Ms Ball put it on behalf of the Official Solicitor in relation to someone in C's position, and in my judgment the same applies to someone like A, while the local authority performs important monitoring and safeguarding roles, its major function in relation to C and others like her is to assess needs and provide services. I agree."

47. This is also consistent with the view expressed by the Department of Health in LAC98(19), i.e. that if there is someone else – usually a close family member – to make arrangements, then the local authority need not do so.

48. Accordingly, the position is that X's step-daughter was entitled to make the arrangements that she did, as funded by X via his deputy. As such, there was care "otherwise available" to X. It follows that no duty under s.21 of the NAA 1948 arose. The deeming provisions in NAA 1948 therefore do not apply, and the introduction of the Care Act 2014 does not alter that status quo.

49. If the deeming provisions do not apply, then that gives rise to the question of whether X has settled residence in the *Shah* sense. In my view, he does. He moved to Care Home1A for the settled purpose of residing there in order to receive long-term care and attention. He has now lived there for over 4 years. His home in CouncilB has been sold. Although he consistently expresses a wish to return "home", it is not clear from the evidence available to me whether he is referring to his home in CouncilB. Further, despite commonly expressing a wish to return home, he appears otherwise settled in his current accommodation. Moreover, there are many situations in which a person is settled in one location, but nevertheless wishes to live in another. This would appear to be such a case. For all these reasons, the evidence points strongly to the conclusion that X has settled residence in CouncilA's area in the *Shah* sense.

Conclusion

50. For the above reasons, I find that X is ordinarily resident in CouncilA's area. CouncilB has suggested a notional period of approximately 3 months, to August 2014, to allow X to settle in, before he acquired ordinary residence in CouncilA's area. However, as set out at paragraph 19.15 of the Care and Support Statutory Guidance, *"Ordinary residence can be acquired as soon as the person moves to an area, if their move is voluntarily and for settled purposes*". It may take some time for a person to settle in, and in some cases that may be relevant to the question of whether a person has moved "for settled purpose". On the facts of this case, it appears that X's move on 9 May 2014 was always intended to be permanent, and can therefore be described as a move for the settled purpose of receiving long-term care and support in a care home. In those circumstances, I do not accept CouncilB's contention, and find that X has been ordinarily resident in CouncilA's area from the date that he moved to his care home on 9 May 2014.