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 32(3) of the National Assistance Act 1948 ("the 1948 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.

Procedural history

4. On 22 August 2017, CouncilA raised a query with CouncilB, indicating that in its view X was ordinarily resident in the area of the latter. By email dated 11 September 2017, CouncilB replied stating that it took the view that CouncilA was responsible.

5. On 14 September 2017, CouncilA wrote a further letter to CouncilB, setting out its arguments and inviting CouncilB to accept that X was ordinarily resident in CouncilB's area. It put CouncilB on notice that, if no response was received by 22 September 2017, CouncilA would commence a referral to the Secretary of State for a determination of this ordinary residence dispute. It appears that CouncilB did not respond within that deadline.

6. On 22 September 2017, CouncilA wrote again to CouncilB. It said that as no response had been received from CouncilB, it would proceed with a referral to the Secretary of State for resolution of this ordinary residence dispute. It enclosed a draft statement of facts and provided a deadline for response of 26 September 2017.

7. No response was received by that deadline, and so on 27 September 2017 CouncilA referred the dispute to the Secretary of State for resolution. The referral included a brief statement of facts signed only by CouncilA. It appears that CouncilB were duly and timeously notified of this referral.

8. There was cause more than once to chase CouncilB on behalf of the Secretary of State for its representations, as between September and December 2017. This led to an exchange of correspondence in mid-December 2017, during which CouncilB said amongst other things that it was working on the statement of facts and would get this to the Secretary of State “ASAP”. It also mentioned that CouncilB was or would be dealing with the legal submissions too.

9. On 29 December 2017 CouncilB asked for some extra time so that it could “clarify a couple of details”. The Secretary of State was content for that request to be granted, and CouncilA appears to have made no representations for or against it.

10. On 22 January 2018, CouncilA pointed out that CouncilB was yet to provide any information and asked for the determination to be resolved immediately, based only on the information supplied by CouncilA, since CouncilB had had more than sufficient time by then to provide a response.

11. By email dated 23 January 2018, the Secretary of State wrote to both parties indicating that he would now proceed to a determination of the ordinary residence dispute. The email said that the matter should not be delayed any further, when there had been ample opportunity for CouncilB to look into the case.

12. By email dated 25 January 2018, a representative of CouncilB wrote stating “I can only apologise to you” and explaining that the author had only just been able to meet with her client department to confirm matters despite emails going back and forth. By that email, CouncilB “only” asked for evidence that X lacked capacity. A capacity assessment was duly provided.

13. CouncilB has provided no further (late) representations in the intervening period between then and the date of this determination.

14. The Care and Support (Disputes Between Local Authorities) Regulations 2014 are clear on their face as to the need for authorities to cooperate, provide information, to engage in the process, and to do with a degree of expedition.

15. Given the requirements of the Regulations, the fact that CouncilB has had proper notice of each of the steps in the dispute, and the fact that CouncilB had had plenty of opportunity to make representations but has not done so, I conclude that it is fair for me to proceed to determine this dispute notwithstanding the absence of any representations to date from CouncilB.

Factual background

16. The available facts are very limited. I understand them to be as follows. X previously resided in the area of CouncilB. In 2012 X was assessed, by an entity which CouncilA refers to as “CouncilB Health Authority” but which I suspect is NHS CouncilB CCG, as being eligible for continuing health care funding (“CHC”). In the same year, the CCG placed him at Care Home1A, in the area of CouncilA.

17. In January 2017, X was assessed as no longer being eligible for CHC funding. CouncilB carried out a financial assessment of X and concluded that he qualified as a self-funder, but informed him that once his assets fell below the relevant threshold, his care needs would be assessed by them.

18. X self-funded from February to June 2017. CouncilA had no involvement with X during that time.

19. On or around 15 June 2017, X’s assets fell below the relevant threshold, and he contacted CouncilB for further assessment. At that stage, however, CouncilB said

that as X's care home was located in CouncilA area it would no longer regard X as being ordinarily resident within its area.

The parties' legal arguments

20. The legal arguments are equally brief. CouncilA contends that X is ordinarily resident in the area of CouncilB. It points out that s.24(6) of the National Assistance Act 1948 (quoted in full below in the Legal Framework section) provides that someone placed in "NHS accommodation" is deemed to be ordinarily resident in the area in which that person was resident prior to the provision of the accommodation.

21. As a secondary argument, CouncilA contends that as X lacks the capacity to make decisions about where he should live, he cannot in any event have "voluntarily adopted" CouncilA as his place of settled residence.

22. CouncilB has submitted no legal representations. In earlier correspondence, however, it contended that since there was a period during which X was self-funding, there was a break in local authority responsibility as a result of which the relevant deeming provisions ceased to apply and X thereby became ordinarily resident in CouncilA. Indeed, this is a point which I would have considered of my own volition even if CouncilB had not raised it in earlier correspondence.

Capacity

23. I have been provided with an assessment of X's mental capacity. On the basis of that assessment, I agree that on a balance of probabilities X lacks the capacity to make decisions about where he should live.

Interim provision

24. CouncilA has provided for X's needs pending the outcome of this dispute. I confirm that this has not impacted upon 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**.**

The relevant local authority

28. 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

29. Section 24(6) of the 1948 Act provides that:

> "(6) For the purposes of the provision of residential accommodation under this Part, a patient (*"P"*) for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area.
> (6A) In subsection (6) *"NHS accommodation"* means–
> (a) accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006"

30. 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

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

The Care Act 2014

The relevant local authority

32. 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

33. 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.

34. Regulation 2(1) of the Care and Support (Ordinary Residence) Regulations 2014 (SI 2828/2014) provide, as amended, that for the purposes of section 39(1) of the Car Act 2014, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation. Regulation 2(2) provides that the types of accommodation referred to in paragraph (1) are specified in relation to an adult for the purposes of section 39(1) of the Act only if the care and support needs of the adult are being met under Part 1 of the Act while the adult lives in that type of accommodation. (Emphasis added).

35. Section 39(5) and (6) of the Act provide:

> "(5) An adult who is being provided with NHS accommodation is to be treated for the purposes of this Part as ordinarily resident—
>
> (a) in the area in which the adult was ordinarily resident immediately before the accommodation was provided, or
>
> (b) if the adult was of no settled residence immediately before the accommodation was provided, in the area in which the adult was present at that time.
>
> (6) *"NHS accommodation"* means accommodation under—
>
> (a) the National Health Service Act 2006,
>
> …"

36. Paragraph 240 of the government's explanatory notes to the Act explains that "NHS accommodation means accommodation provided as part of the NHS under any relevant NHS legislation. It ensures that a stay in a hospital in England, Scotland, Wales or Northern Ireland will not affect a person's ordinary residence. This means that their care and support must continue to be provided by the local authority in whose area they were ordinarily resident before their hospital stay."

Ordinary Residence

37. "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.

38. 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"*

39. 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.

40. 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

41. 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 on ordinary residence for those lacking capacity to decide where to live</u>

42. 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'.
>
> 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."

Guidance on ordinary residence for self-funders who become council-funded

19.75 People who self-fund and arrange their own care (self funders) and who choose to move to another area and then find that their funds have depleted can apply to the local authority area that they have moved to in order to have their needs assessed. If it is decided that they have eligible needs for care and support, the person's ordinary residence will be in the place where they moved to and not the first authority (for further information on self-funders, see annex H4, paras. 21-23).

43. Annex H4 provides:

21) When a person moves into permanent accommodation in a new local authority area under private arrangements, and is paying for their own care, they usually acquire an ordinary residence in this new area. If so, and if their needs subsequently change, meaning that they require other types of care and support, (or if their financial circumstances change so that they would not have to pay for all of the costs of their care and support, if their needs were met by a local authority) they may approach the local authority in which their accommodation is situated. That local authority will be responsible for assessing whether it should meet their needs. The person will be ordinarily resident in the local authority area where the person's care home is situated.

22) Sometimes, a person with sufficient means to pay for their accommodation in a care home, who was intending to arrange their own care, may not be able to enter into a private agreement with a care home. If this is because they do not have the mental capacity to do so

> and they either have no attorney or deputy to act on their behalf, or another person in a position to do so, the local authority must meet their needs. Therefore if their assessed needs are required to be met by the provision of accommodation in a care home, the local authority must provide that accommodation (and it will do so by arranging for an independent care home provider to provide it) for which the authority may charge the adult.
>
> 23) In other cases, the person may have capacity, but is not able to manage the making of the arrangements without assistance. In these circumstances the authority may provide information, advice and guidance, or refer the person to an independent broker (someone who can help them find and negotiate terms with a care home). Alternatively, under section 19 of the Care Act, it may decide to meet the person's needs by arranging the accommodation (which it will normally do by arranging for an independent care home provider to provide the accommodation). The local authority should consider doing so where the person's wellbeing would otherwise be adversely affected, in particular where there is no one else able to act on their behalf. In either case, if the person's needs which the local authority is meeting can only be met in a type of specified accommodation, the person would remain ordinarily resident in their placing local authority, even if the accommodation arranged by it is in another local authority area. In such circumstances, if the person's needs change, or their financial resources change so that they may not have to pay the local authority all of the costs for meeting their needs, they should approach the local authority which has arranged the placement and is currently meeting their needs.

44. CouncilA has also referred to paragraph 115 of the old Ordinary Residence statutory guidance, and to the associated case study of Maureen. However, the new Care and Support statutory guidance contains similar guidance and the identical scenario, so I refer to that instead as it is current.

Analysis

45. I agree with CouncilA that, because of the deeming provision in s.24(6) of the National Assistance Act 1948 and its successor s.39(5) of the Care Act 2014, X is deemed ordinarily resident in CouncilB until at least January 2017, because he was residing for that period in what the Acts define as "NHS accommodation".

46. The more difficult question is what happened during his brief period of self-funding thereafter. There are two factual alternatives. The first is that the accommodation was provided by CouncilB pursuant to its duties under Part 1 of

the Care Act 2014, which could have been the case even if X's resources meant that he was required to make a full or partial contribution to CouncilB for the cost of those fees under sections 14, 17 and 69-70 of the Care Act 2014 and the Care and Support (Charging and Assessment of Resources) Regulations 2014. If that is how the arrangements were made, then as I have already observed above s.24(6) of the 1948 Act and/or s.39(5) of the 2014 Act would apply so as to deem X ordinarily resident in the location in which he was ordinarily resident immediately prior to the provision of that accommodation, i.e. CouncilB. Further, he would continue to be deemed ordinarily resident in CouncilB by virtue of the deeming provision in s.39(1). There would be no break in the chain.

47. The second alternative is that the accommodation was entirely self-funded and self-arranged, without any input from CouncilB. If so, then it was not accommodation provided under Part 1 of the Care Act 2014, and was therefore not specified accommodation for the purposes of s.39(1) of the Act. If that be the case then, although X was ordinarily resident in CouncilB immediately prior to becoming a self-funder, s.39(1) would not deem him to be ordinarily resident in CouncilB once he started self-funding and self-arranging the accommodation.

48. Even if the deeming provision did not apply, there is still the question of whether X remained sufficiently settled in CouncilB. In my view, he did not. By January 2017 when he became self-funding, X had lived in CouncilA. He lives there for the purpose of receiving long-term care and accommodation. There does not appear to have been any alternative home for him in CouncilB. In the capacity assessment to which I have already made reference above, X's daughter and son are recorded as saying that "they feel their father is settled in the home since 2012 and he is familiar in the environment. Moving to an alternative placement would disrupt and disorientate him". Taking account of all of these factors, and applying the approach in *Cornwall* above, it is difficult to describe X as having settled residence anywhere other than CouncilA.

49. As the issue depends in my view upon whether CouncilB was involved in making the interim arrangements for X whilst he was a self-funder, I made specific enquiries of CouncilA as to whether this was the case. CouncilA was unable to

directly assist, as it had had no contact with CouncilB or X during the relevant period. However, from the available background it appears to me as though CouncilB may not have had any input into X's care during the relevant time. I base this view on the fact that X had been fully funded by CHC (and therefore not the responsibility of CouncilB) for around five years. I also base it on the fact that, when asked, X's family appear not to have reported that they reimbursed CouncilB. Finally, the fact that CouncilB appears in January 2017 to have asked X and/or his family to contact it when his capital fell below the relevant threshold suggests that CouncilB did not have ongoing involvement during that period.

50. I do not regard the facts that CouncilB carried out a financial assessment of X in January 2017, or that it invited X's family to revert to it when X's funds fell below the capital threshold, as altering the above analysis. The fact is that, for the intervening period, X's accommodation does not appear to have been provided by CouncilB pursuant to Part 1 of the Care Act 2014.

51. I have considered whether the principle identified by Charles J at paragraph 55 of the *Greenwich* case applies in this case. In my view, on the facts available to me, it does not. That is because it does not appear to be possible to say that CouncilB was required to do any more than it did in fact do: X appears to have had family members making the appropriate arrangements for X who was, at the relevant time, a self-funder and who therefore was not eligible for Council support. He therefore had no unmet care needs which CouncilB ought to have provided for.

Conclusion

52. As such, I therefore reach the view that, as from the date that X's CHC funding came to an end in January 2017, X has been ordinarily resident in CouncilA.