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. CouncilB considered that CouncilC should also be joined in the determination, and the Secretary of State has done so.

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.

Factual background

3. X is a 21 year old woman (DOB XX.XX.1998) with a diagnosis of acquired brain injury, as a result of which she suffers from epilepsy and learning difficulties.

4. On 11 July 2001, X was adopted by her adoptive parents, who at that time resided at an address in CouncilA.

5. On 8 March 2003, X suffered a significant brain injury. She spent several months at Hospital1 followed by a long period of rehabilitation at The Children's Trust2.

6. On 4 June 2003, CouncilA commenced care proceedings. It appears that an interim care order was made pursuant to which the placement at The Children's Trust2 continued.

7. On February 2005, X's adoptive parents moved to Address1B, an address in CouncilB.

8. On 26 April 2005, X was made subject to a care order in favour of CouncilA, with a care plan that she return to the home of her adoptive parents.

9. On 17 May 2005, X was discharged into the care of her parents. X attended School1B in CouncilB between the ages of 7 and 16, pursuant to a statement of special educational needs maintained by CouncilA.

10. On 1 September 2014, X became a weekly boarder at School2, returning to the family home at weekends. This educational placement was again pursuant to a statement of special educational needs maintained by CouncilA.

11. On 24 January 2016, X turned 18 and the care order expired.

12. On 7 December 2016, CouncilA issued an EHC Plan naming College1, a day college. X's adoptive parents appealed against the naming of College1 in X's EHCP as they were of the view that she required a residential placement.

13. On 11 July 2017, CouncilA requested of CouncilB what it referred to as "an ordinary residence transfer" in respect of X.

14. On 31 August 2017, X's placement at School2 came to an end.

15. On 25 September 2017, CouncilA wrote to CouncilB notifying the latter that in its view an ordinary residence dispute had arisen.

16. On 29 November 2017, in the course of an appeal by X's parents to the First Tier Tribunal (Special Educational Needs and Disability) against the contents of CouncilA's Education, Health and Care Plan, the FTT substituted CouncilB for CouncilA as the authority now responsible for maintaining X's EHCP under the Children and Families Act 2014. At the time of this referral, CouncilB had applied for permission to appeal against that substitution order, but I am not aware of the outcome (if any has yet been reached) of that appeal.

17. As at the time this dispute was referred to the Secretary of State, CouncilA provided £776 per week of direct payments, which are paid to X's parents to enable them to arrange respite care for X when it is required. It is not clear whether this remains the case.

18. In September 2018, X was placed at College1C in CouncilC after consultation with CouncilB and X's parent. X continues to visit her adoptive parents' home in CouncilB regularly.

Parties' submissions

CouncilA

19. CouncilA asserts that X is ordinarily resident in the area of CouncilB, and has been since May 2005 when she was discharged from the rehabilitation centre into her adoptive parents' care pursuant to a care order in CouncilA's favour. It contends as follows.

20. Section 105(6)(c) of the Children Act 1989 provides that, in relation to the determination of a child's ordinary residence for the purposes of that Act, there shall be disregarded any period in which he lives in any place "while he is being provided with accommodation by or on behalf of a local authority". CouncilA accepts that the placements at Hospital1 and The Children's Trust2 rehabilitation centre both involved residence pursuant to an interim care order, and therefore fall to be disregarded for the purposes of determining X's ordinary residence. Accordingly, CouncilA accepts that X was ordinarily resident in its area until May 2005.

21. It is also said that CouncilA was responsible during this period because of s.31(8) of the Children Act 1989. This provides that the local authority designated in a care order must be either the authority in which the child is (a) ordinarily resident, or (b) where the child does not reside in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the order is being made. CouncilA contends that, additionally, it was responsible for X's care under the second such limb.

22. On 26 April 2005, the court made a final care order in CouncilA's favour but naming X's adoptive parents as the place of her accommodation. CouncilA relies upon *Re C (Care Order: Appropriate Local Authority)* [1997] 1 FLR 544 at p.550 for the proposition that when a child is placed with a parent or a person with parental responsibility, the deeming provision in s.105(6)(c) does not apply as the child cannot be described as "being provided with accommodation by or on behalf of a local authority". Accordingly, X's ordinary residence was to be determined in accordance with the natural meaning of that phrase, as described in *Shah* (as to which see further below). Given that X was in fact residing with her parents in CouncilB in what was clearly a permanent and settled way, she was ordinarily resident in CouncilB. CouncilA further contends that, notwithstanding other changes in the legal framework, *Re C* remains good law: see *Sheffield CC v Bradford CC* [2013] 1 FLR 1027 *per* Bodey J at [17]-[19].

23. The weekly boarding placement at the School2 does not alter this analysis: school placements are disregarded for the purposes of determining ordinary residence under the Children Act 1989 (see s.105(6)(a) of that Act). Moreover, X was only a weekly boarder and returned to her adoptive parents' home in CouncilB each week.

24. X's ordinary residence has not changed now that she is of majority and in receipt of care under the Care Act 2014. She continues to reside in a settled manner with her parents in CouncilB. There is no basis for invoking the deeming provisions in section 39 of the Care

Act 2014, as X is not and has never been placed in any form of accommodation specified for the purposes of that section.

25. The policy concerns recited by the Supreme Court at paragraphs 58-60 of *Cornwall* (referred to below) do not apply here:
    a. CouncilA never provided X with accommodation or "placed" her as such with her adoptive family in CouncilB. X's parents moved freely and independently to CouncilB's area – this was nothing to do with CouncilA. CouncilA has never funded any part of X's placement with her parents. X was placed with her parents, in CouncilB, by order of the Court;
    b. Unlike PH in the *Cornwall* case, X was at no material time subject to the deeming provisions in s.105 of the Children Act 1989. At all material times, her ordinary residence fell to be determined in accordance with conventional *Shah* principles;
    c. Unlike PH in the *Cornwall* case, X is not currently provided with a type of accommodation to which the deeming provisions in section 39 of the Care Act 2014 are specified to apply. Again, X's ordinary residence for the purposes of the Care Act 2014 falls to be determined in accordance with conventional *Shah* principles;
    d. The issue in *Cornwall* was whether ordinary residence under the Children Act 1989 continued through transition into adult care under the (then) National Assistance Act 1948. It was not whether a child who resided with parents but subject to a care order had ordinary residence in the borough of parental residence or the borough in whose favour the care order was made. *Cornwall* is therefore not on point.

26. The fact that X's parents have appealed to the FTT (SEND), asking for a residential school placement, does not affect the analysis: at present that it is entirely hypothetical.

<u>CouncilB</u>

27. CouncilB contends that X has always and continues to be ordinarily resident in CouncilA's area. It responds to CouncilA's contentions as follows.

28. CouncilA has always acted on the basis that it was responsible for X's care and support. It is too late for it to reverse that position now more than 13 years after it says ordinary residence ought to have transferred, either as a result of all possible limitation periods having expired, because it is an abuse of process, or because of the principle of estoppel. In particular, the long passage of time means that neither CouncilB nor the Secretary of State can properly investigate the facts. It is also said that this late dispute risks seriously

complicating any issue that may arise in future about which local authority is liable for any aspect of her care, welfare, or education (e.g. any claim in negligence).

29. As a child, X was made the subject of a care order under the Children Act 1989 and the particulars of her accommodation were determined by CouncilA: she is therefore deemed ordinarily resident in that area. It was CouncilA's decision to place X with her adoptive parents, and it is that which matters, not the question of whether CouncilA was "providing" X with accommodation. Were it otherwise, then local authorities would be able to export responsibility by *deciding* to place a child in another area, even if they were not deemed to *provide* the support in question in that area. This is contrary to the policy concerns highlighted in the *Cornwall* case.

30. Further, it made no difference that X happened to be placed with her adoptive parents. *Re C* was decided when the legislation, case law, and statutory guidance were all different. In any case, *Re C* and *Sheffield* both only go to the question of whether a period of time is to be disregarded for the purposes of s.105(6)(c). The law on ordinary residence for those without capacity has since been settled in *Cornwall*, and CouncilA's submission that that case does not apply to her is simply wrong.

31. X's placement at the School2 is disregarded for the purposes of determining her ordinary residence: she therefore remained ordinarily resident in CouncilA notwithstanding this placement.

32. X's ordinary residence did not change with her 18th birthday: see *Cornwall* and the Care and Support Statutory Guidance.

33. X's placement as a day-schooler at College1 (in CouncilD) since 1 September 2017 was also pursuant to a plan made by CouncilA in an EHCP. What is more, X's parents immediately objected to that plan and have lodged an appeal against it.

34. The FTT has now decided that X should be placed in a full-time residential placement at College1C in CouncilC. Although CouncilB was made the respondent to that appeal, an appeal against the FTT's decision in that regard is pending – and, if successful, then CouncilA will remain responsible for maintaining X's EHCP. At any rate, the important point is that at no point has CouncilB ever determined what X's placement should be.

35. CouncilB also contends that, if I determine that CouncilA is not responsible for X under the Care Act 2014, a further issue arises as to whether it is CouncilB or CouncilC that is now responsible, and so directions should be made for that further issue to be determined.

CouncilC

36. Because of CouncilB's contention that X may be ordinarily resident in CouncilC, I invited representations from that authority. CouncilC takes no view as to which of CouncilA or CouncilB X is ordinarily resident within, but contends that at any rate she is not ordinarily resident in CouncilC.

37. CouncilC submits that the College1C provision is supported living and is therefore specified accommodation for the purposes of the deeming provision in section 39(1) of the Care Act 2014, meaning that any time spent in CouncilC at that provision should be disregarded in the assessment of ordinary residence.

38. CouncilC also makes reference to various provisions in education statutes and to the SEND Code of Practice, but none of these appear to me to be relevant for the present purposes of determining X's ordinary residence under the Care Act 2014.

Capacity

39. My papers do not contain any formal assessment of X's capacity to make decisions about where she should live. However, from the other papers available it appears as though X may well lack the capacity to make such decisions. For the sake of completeness, I have considered both alternatives, and the question of X's capacity does not have a material impact on my decision.

Ordinary residence law

40. I have considered all the documents submitted by the two authorities, the guidance on ordinary residence issued by the Department of Health and Social Care, relevant provisions of and case law about the Children's Act 1989, and the cases of *R (Cornwall Council) v Secretary of State for Health and Social Care [2015] UKSC 46 ("Cornwall"); R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 ("Mohammed").

The Care Act 2014

The relevant local authority

41. 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

42. 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.

43. 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 Care Act 2014, the following types of accommodation are specified: care home accommodation, shared lives scheme accommodation, and supported living accommodation.

Ordinary Residence

44. "Ordinary residence" is not defined in either the 1948 or the 2014 Acts. The Department of Health and Social Care 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.

45. 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"*

46. 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.

47. 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

48. In *R (Cornwall Council) v Secretary of State for Health and Social Care (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>

49. The Department of Health and Social Care'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."

Analysis

Jurisdiction

50. CouncilA contends in the course of its submissions that I should find that X has been ordinarily resident in the area of CouncilB since May 2005. CouncilB contends, by contrast, that CouncilA is excluded by way of limitation, estoppel, or fairness from making such a submission.

51. This determination has been referred to the Secretary of State under section 40 of the Care Act 2014. That section provides that any dispute where an adult is ordinarily resident for the purposes of this Part 1 is to be determined by the Secretary of State.

52. There is equivalent provision under the Children Act 1989. Section 30(2) of that Act provides that any question arising under various provisions in that statute "as to the

ordinary residence of a child" shall be determined, in default of agreement between the local authorities concerned, by the Secretary of State. This determination has not been referred to me under that provision.

53. In light of the above, the Secretary of State only has jurisdiction to make a determination in relation to the ordinary residence of X *qua* adult, and for the purposes of provision under the Care Act 2014. I do not therefore venture to make any determination in relation to the period during which X's needs were met under the Children Act 1989. If CouncilA wishes to pursue a retrospective ordinary residence dispute under the Children Act 1989, then it should make the appropriate referral under that Act, and it is open to CouncilB to renew its limitation points in response to any such referral.

54. That said, it is impossible for me to determine the correct position under the Care Act 2014 without drawing some conclusions about the earlier position as it pertained when X was still a child. However, as just stated I only do so as part of the background to the resolution of the dispute under the Care Act 2014; I do not purport to resolve any dispute under the Children Act 2014. Indeed, the Supreme Court took a similar approach in *Cornwall*.

55. Further and in any event, I do not consider that I am debarred from considering these historic issues by any point of estoppel, limitation, abuse of process, or fairness:
    a. The Limitation Act does not apply to disputes under section 40 of the Care Act 2014;
    b. I note the reference to estoppel but CouncilB has not explained how that legal concept is said to apply in relation to the particular facts of this case;
    c. I note the reference to abuse of process, but the Secretary of State is an administrative decision-maker rather than a court or tribunal. The referral for determination was properly made to the Secretary of State under section 40 of the Care Act 2014, and it is my responsibility as decision-maker to decide it on the basis of the available facts and evidence;
    d. As to my ability to make a decision in the face of aged evidence, a decision-maker should always strive to make a decision on the basis of the available facts and evidence, even when they might be said to be stale: see by way of analogy *Constandas v Lysandrou* [2018] EWCA Civ 613. Further and in any event, my attention has not been drawn to any relevant issue or fact which I am unable to determine because of the age of the dispute or absence of evidence. In particular, there appears to be broad agreement between the parties about the relevant chronology, with the disputes in question being largely on matters of law.

Substance

56. It is accepted that X was ordinarily resident in CouncilA as at May 2005, when she was discharged to the care of her adoptive parents, who by that time had moved to CouncilB.

57. As to how to characterise the period from May 2005 onwards, CouncilA relies upon the decision of Wall J in *Re C* to contend that the deeming provisions in s.105 of the Children Act 1989 did not apply to X's placement with her parents. As observed above, Wall J held in *Re C (Care Order: Appropriate Local Authority)* [1997] 1 FLR 544 at p.550 that when a child is placed with a parent or a person with parental responsibility, the deeming provision in s.105(6)(c) does not apply as the child cannot be described as "being provided with accommodation by or on behalf of a local authority". Serious doubts have been expressed about the correctness of Wall J's judgment (see e.g. *R(SA) v Kent County Council* [2011] EWCA Civ 1303 at [23] and [27]). However, it was approved by the Court of Appeal in *Re H (Care Order: Appropriate Local Authority)* [2003] EWCA Civ 1629; [2004] 1 FLR 534. It therefore remains binding law (see *R(SA) (supra)* at [27], [38], [42], [49], and [50]).

58. CouncilB is dismissive of these cases:

    a. First, it says that the legislative, case law, and statutory guidance framework has changed since then. That may well be right, and it may well make a material difference in disputes arising out of factual circumstances which post-date those changes: see e.g. *R(CO) v Surrey County Council* [2015] 2 FLR 485 at [8] *per* Popplewell J. However, I am bound to make my determination according to the – unamended – legal framework as it applied at the material time which, for present purposes, I take to be May 2005.
    b. Second, it says that these cases are concerned with the question of disregarding certain periods of time under the Children Act 1989, not with the determination of ordinary residence disputes under the Care Act 2014. But those cases are concerned with a provision in the Children Act 1989 that makes specific provision for deeming ordinary residence. As observed above, the Supreme Court held in *Cornwall* that the deeming provisions in the Children Act 1989 and in the applicable adult social services legislation should be read as part of a single overarching statutory framework. As such, it is not clear why those provisions are irrelevant.

59. As such, I conclude on the facts and evidence available that the accommodation to which X was discharged in May 2005 was not accommodation to which the deeming provisions in the Children Act 1989 at that time applied.

60. CouncilB further contends that X only resided in CouncilB because CouncilA made a decision that she should do so and that, applying *Cornwall*, she should therefore be deemed to be resident in CouncilA. However, this appears to be a misapplication of *Cornwall*. *Cornwall* invites attention, in the case of a person lacking the capacity to decide where to live, to the nature and character of a person's residence. It dismisses the alternative approach of focussing upon the seat of decision-making. Further, for the reasons given essentially by CouncilA in its submissions, I agree that the policy considerations referred to in *Cornwall* do not apply in the instant case.

61. In the absence of any operative deeming provisions, it is necessary to consider ordinary residence in the everyday meaning of that phrase explained in *Shah* and modified in the case of those lacking the capacity to decide where to live by the Supreme Court in *Cornwall*. As to that, X has resided with her parents in CouncilB for most of the last 13 years, since she was seven years old. When she had a weekday residential educational placement, she returned to her parents in CouncilB each weekend. The arrangement can only be regarded as having been for the purpose of living long-term as part of a family unit that was settled in CouncilB. I am not aware that X had any ongoing links to CouncilA, beyond the fact that CouncilA was administratively and fiscally responsible for her care package and SSEN/EHCP. There can be no doubt but that X was ordinarily resident, in the *Shah/Cornwall* sense, in CouncilB from May 2005. I repeat that I make that decision simply by way of background to the determination I am required to make under the Care Act 2014; the Secretary of State does not have the power upon this referral to make a determination for the purposes of the Children Act 1989.

62. X attended a residential placement at School2 from 1 September 2014 until after she was 18, on 31 August 2017. Periods of residential school are disregarded in any determination of ordinary residence: see s.105(6)(a) of the Children Act 1989. X therefore remained ordinarily resident in CouncilB throughout this period.

63. Between 1 September 2017 and 1 September 2018, X resided with her parents in CouncilB, and did so as an adult. Living in one's own home with one's parents is not specified accommodation for the purposes of section 39 of the Care Act 2014. She lived at her parents' house as a home, and at the relevant time had no alternative place to go.

Her parents' home was the base to which she had consistently returned at weekends during her residential placement at the School2. She lived there for around a year, which is more than enough time to acquire ordinary residence which can be acquired immediately, and whether residence is of short or long duration. It is the place where she had been physically present for the vast majority of her life. In the circumstances, she resided there with settled purpose. Even if she had not previously been ordinarily resident in CouncilB by this stage, she would in any event have acquired ordinary residence there from 1 September 2017 onwards.

64. The recent move to CouncilC also falls to be discounted in the assessment of ordinary residence since, if I have understood the facts correctly, it is a supported living placement as defined and is therefore specified accommodation to which section 39 of the Care Act 2014 applies. In the circumstances, X will remain ordinarily resident in the area in which she resided immediately prior to the placement commencing.

Conclusion

65. For all the reasons given above, I determine that X has for the purposes of the Care Act 2014 been ordinarily resident in CouncilB from the date of her 18th birthday on XX XX 2016. Although I have had to consider, by way of background, the position before that date, I make no formal determination in relation to it.