

## **DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014**

### ***Introduction***

1. I have been asked by CouncilA to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.

### ***The facts***

2. The following information has been taken from the agreed statement of facts, legal submissions and other documents provided by CouncilA and CouncilB.
3. X was born on XX XX 1989. He has a diagnosis of Oppositional Defiant Disorder, Attention Deficit Disorder, Autism Spectrum Disorder and a Learning Disability. I note that there is no assessment that X lacks capacity to make decision as to where to live and that neither party asserts that the presumption of capacity is rebutted at any of the relevant times.
4. X has a forensic history which includes charges of rape in 2008 which were subsequently dropped and further (and separate) charges of rape in relation to an incident in 2009 which led to a conviction and suspended sentence of 24 months in duration. Part of his sentence included a requirement to reside in the area of CouncilA.
5. On 25 August 2010 X was "moved" to supported living accommodation at Address1B, in the area of CouncilB. It appears that this is a form of supported living accommodation whereby residents are assisted to live as independently as possible. It is not stated who moved X although CouncilB indicate it was arranged by CouncilA. The landlord of the accommodation was Homes1. The statement of facts does not confirm

how the accommodation was funded but reference is made to X receiving a care package comprising 28 hours support per week at a cost of £896.68 p/w. I understand that this is currently funded by CouncilA.

6. In 2013 CouncilB completed an assessment of X's care and support needs which concluded that he was not eligible for services by reference to the FACS criteria.
7. On 14 October 2013 X entered a tenancy agreement for his own flat on The Avenue which is said to have been granted by Golden Lane Housing Limited. This is described as being part of a project to provide supported housing for people with learning disabilities where tenancies are granted to facilitate the provision of support for the tenant.
8. In March 2016 CouncilB completed a further assessment of X's care and support needs by reference to the Care Act 2014 and concluded that he does have social care eligible needs including prompting for personal care, eating a healthy diet and preventing him from abusing others or being abused himself. This assessment does not record that X's needs can only be met by living in supported living accommodation or any other type of specified accommodation. The assessment also stated he did not want services from CouncilB and was not ordinarily resident in the area of CouncilB.
9. In November 2016 CouncilA completed an assessment of X's care and support needs under the Care Act. It does not conclude that he is eligible for services. In particular, it does not conclude that his needs can only be met by living in supported living accommodation or other specified accommodation. I note that it records that "he is not fully using the support available to him" and says he wants to live independently.
10. X has continued to reside at his flat in CouncilB but has expressed a wish to return to live in CouncilA and is said to spend a lot of his time at his girlfriend's house in CouncilC.

11. Attempts to resolve the dispute informally were unsuccessful and CouncilA referred the matter for a determination of X's ordinary residence. The parties agree that the dispute between them arose on 22 November 2017.

### ***The authorities' submissions***

12. CouncilA submit that it is necessary to consider whether X's current accommodation is provided by them under Part 3 of the National Assistance Act 1948 which would determine whether the deeming provisions under section 24 of that Act apply. It is submitted that the accommodation was not so provided as the rent for the same is paid solely by X by way of housing benefit. CouncilA has never agreed to pay for the accommodation. In the circumstances the deeming provisions under section 24 do not apply. CouncilA further submit that X must be treated as having capacity to decide where to live and that whilst he has since indicated a wish to move to CouncilA he voluntarily moved to his current accommodation for settled purposes. CouncilA submit that X is ordinarily resident in the area of CouncilB and has been since 16 November 2012.

13. CouncilB submit that whilst X is living in their area, he is deemed to be ordinarily resident in the area of CouncilA due to the effect of section 39 of the Care Act and /or because he did not adopt his current accommodation voluntarily and did not and does not wish to remain there. CouncilB submit that the current accommodation falls within the definition of supported living accommodation and that X did not voluntarily adopt it but rather was placed there. Reliance is placed on the statutory guidance, in particular paragraph 19.47. CouncilB state that they have "doubts" whether X lacks capacity but do not positively assert that the presumption of capacity is rebutted in this case.

### ***The law***

14. I have considered all relevant legal provisions including Part III of the National Assistance Act 1948; Part 1 of the Care Act 2014 (“the 2014 Act”); the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015; the Care and Support Statutory Guidance and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“Shah”), *Chief Adjudication Officer and Another v Quinn* [1996] 1 WLR 1184 (“Quinn”) and *R (Cornwall Council) v Secretary of State for Health and Social Care* [2015] UKSC 46 (“Cornwall”).
15. From 1 April 2015, any dispute about an adult’s ordinary residence shall be determined in accordance with section 40 of the Care Act 2014.
16. Section 24 of the National Assistance act 1948 provides, so far as relevant, as follows:
- (1) The local authority empowered under this Part of this Act to provide residential accommodation for any person shall subject to the following provisions of this Part of this Act be the authority in whose area the person is ordinarily resident.*
- (3) Where a person in the area of a local authority—*
- (a) is a person with no settled residence, or*
- (b) not being ordinarily resident in the area of the local authority, is in urgent need of residential accommodation under this Part of this Act,*
- the authority shall have the like power to provide residential accommodation for him as if he were ordinarily resident in their area.*
- (4) Subject to and in accordance with the arrangements under section twenty-one of this Act, a local authority shall have power, as respects a person ordinarily resident in the area of another local authority, including a local authority in England, with the consent of that other authority to provide residential accommodation for him in any case where the*

*authority would have a duty to provide such accommodation if he were ordinarily resident in their area.*

*(5) Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him.*

17. Section 18(1) of the Care Act 2014, provides:

*(1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—*

*(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,*

*(b) the adult's accrued costs do not exceed the cap on care costs, and*

*(c) there is no charge under section 14 for meeting needs or, in so far as there is, condition 1, 2 or 3 is met.*

18. Section 39 (1), (2) and (3) of the Care Act 2014, provides:

*(1) 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 this Part as ordinarily resident—*

*(a) 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, or*

*(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.*

*(2) Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.*

*(3)The 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.*

19. The concept of ordinary residence involves questions of both fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account. In the case of Shah, Lord Scarman stated:

*'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 "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.'*

20. The guidance states in relation to how to determine ordinary residence as follows:

*9.14 The concept of ordinary residence involves questions of both fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account. The courts have considered the meaning of ordinary residence and the leading case is that of Shah v London Borough of Barnet (1983). In this case, 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 ordinarily resident refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."*

*19.15 Local authorities must always have regard to this case when determining the ordinary residence of adults who have capacity to make their own decisions about where they wish to live. Local authorities should in particular apply the principle that ordinary residence is the*

*place the person has voluntarily adopted for a settled purpose, whether for a short or long duration. Ordinary residence can be acquired as soon as the person moves to an area, if their move is voluntary and for settled purposes, irrespective of whether they own, or have an interest in a property in another local authority area. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the nature and quality of the connection with the new place.*

21. In relation to the adult's mental capacity the guidance goes on to state as follows:

*19.23 All issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005 (the 2005 Act). Under this Act, it must be assumed that adults have capacity to make their own decisions, including decisions relating to their accommodation and care, unless it is established to the contrary.*

22. In respect of the 'deeming provisions' under section 39 of the Care Act the following is highlighted:

*19.47 Section 39 of the Care Act, and the specified accommodation regulations made under it set out what should happen in these cases, and specify which local authority is responsible for the person's care and support. Together, these create the principle that the person placed 'out of area' is deemed to continue to be ordinarily resident in the area of the first authority, and does not acquire an ordinary residence in the 'host' or second authority. The local authority which arranges the care in the specified accommodation, therefore, retains responsibility for meeting the person's needs.*

*19.49 Where an adult's care and support needs can only be met if they are living in one of the specified types of accommodation and the accommodation arranged is in another area, then the principle of 'deeming' ordinary residence applies. This means that the adult is treated as remaining ordinarily resident in the area where they were resident immediately before the local authority began to provide or arrange care and support in any type of specified accommodation. The consequence of this is that the local authority which first provided that care and support will remain responsible for meeting the person's eligible needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. However, in circumstances*

*where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements, they would be likely to acquire ordinary residence in the area of the authority where the new accommodation is situated. The deeming rule does not apply where a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.*

*19.50 Where an adult's care and support needs can only be met if they are living in one of the specified types of accommodation and the accommodation arranged is in another area, then the principle of 'deeming' ordinary residence applies. This means that the adult is treated as remaining ordinarily resident in the area where they were resident immediately before the local authority began to provide or arrange care and support in any type of specified accommodation. The consequence of this is that the local authority which first provided that care and support will remain responsible for meeting the person's eligible needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. However, in circumstances where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements, they would be likely to acquire ordinary residence in the area of the authority where the new accommodation is situated. The deeming rule does not apply where a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.*

*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.*



## **Application of the law to the facts**

23. The applicable law that applied at the relevant times must be considered.

CouncilA assert that X has been ordinarily resident in the area of CouncilB since 16 November 2012. CouncilB's position is that X should be deemed to be ordinarily resident in the area of CouncilA (although I note they only make reference to the Care Act provisions and not those under the 1948 Act). I begin by considering the relevant provisions that existed from 16 November 2012. At that time the relevant provisions were contained in section 24(5) of the 1948 Act.

24. It will immediately be clear that those deeming provisions only apply where the accommodation "is provided" by the local authority. In Quinn the House of Lords held that this meant that the first authority had to fund the accommodation itself or enter into other funding arrangements (see: page 1192B). In the instant there is no evidence that CouncilA funded X's accommodation in the area of CouncilB either when he moved there in 2012 or at any time. The evidence I have been provided and which is not challenged by CouncilB is that X's accommodation was funded by way of housing benefit paid by X himself following his application. In the circumstances, I find as a fact that CouncilA has never funded X's accommodation in the area of CouncilB. Applying the decision in Quinn I conclude that the deeming provisions under section 24(5) of the 1948 Act do not apply.

25. I now turn to whether the deeming provisions under the Care Act apply.

Section 39(1) starts by explaining that the deeming provisions apply where an adult has needs for care and support that can only be met in one of the specified types of accommodation, including supported living accommodation. If that is established then a person is "deemed" to be ordinarily resident in the area they lived in immediately prior to the specified accommodation in question.

26. The statutory guidance assists when considering whether section 39(1) is satisfied in any given case, i.e. is this a case where the adult has needs for care and support that can only be met in specified accommodation. Paragraph 19.51 states that the local authority must have decided that the adult has needs that can only be met through the provision of this type of accommodation as part of the assessment and care planning process. The guidance goes on to state that *“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.”*

27. I have been provided with assessments of need by both Council A and Council B and there is no reference in any of these assessments to a decision that X has needs that can only be met in supported living accommodation or any other specified type of accommodation. I note that in one of the assessments it is said that X does not actually utilise most of the support available in his supported living accommodation and spends most of his time elsewhere. On the evidence provided to me I cannot find as a fact that X has or had needs which can only be met by the provision of specified accommodation. As a consequence the deeming provisions under section 39 do not apply.

28. I now turn to whether X has acquired ordinary residence in the area of Council B despite the assertions that others may have placed him there and his stated wish to leave and return to live in the area of Council A. I start by considering the evidence as to X’s mental capacity and conclude that there is insufficient evidence to rebut the presumption that he has had, at all relevant times, capacity to make his own decisions were to live. There is no evidence that X was coerced into moving to his accommodation in the area of Council B or has been detained there against his will since. I further note that there has never been any

deprivation of liberty order by the court or otherwise requiring him to remain there.

29. I also note the decision in Shah and the statutory guidance. Lord Scarman said that the concept of *ordinarily resident* refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration. I remind myself of paragraph 19.15 of the guidance which states that *ordinary residence can be acquired as soon as the person moves to an area, if their move is voluntary and for settled purposes, irrespective of whether they own, or have an interest in a property in another local authority area. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the nature and quality of the connection with the new place.*

30. I have taken into account all of the submissions made by CouncilB including that X may have been placed at the accommodation in their area and that he does not want to remain there and wants to return to live in the area of CouncilA. However, I find that X acquired ordinary residence in the area of CouncilB as soon as he moved to his accommodation there in 2012. He had capacity to move there and must be treated as having agreed to go in circumstances where he had capacity to make that decision. Further, there is no minimum period of occupation required. As soon as he moved to his accommodation, he was settled in the area of CouncilB as part of the regular order of his life. Dissatisfaction with a particular area and a wish or preference to move to another area does not prevent ordinary residence from arising and I find that it does not do so on the facts of this case.

### **Conclusion**

31. For the reasons referred to above I conclude that X has been ordinarily resident in the area of CouncilB since 16 November 2012.