

## **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 of the ordinary residence of X. The dispute is with CouncilB.

### **The facts**

2. The following information has been ascertained from the statement of facts, legal submissions and other documents provided by the parties.
3. X is a 26 year old Somali woman. Home Office records indicate that she has been in the United Kingdom for just over four years, having made a claim for asylum on 26 June 2014. No clear information is available about where she was living prior to 6 March 2018 when she was taken by a family member to the Home Office at Lunar House, Croydon, for a substantive asylum interview.
4. The interview was suspended by the interviewing officer due to concerns about X's mental capacity and because she made disclosures that suggested she was a victim of modern day slavery. Following the interview X was provided with temporary accommodation by the Home Office at Address1B, in the area of CouncilB.
5. On Friday 9 March 2018 X had contact with a Senior Client Advisor from Migrant Help, an organisation that supports and offers advice to victims of trafficking and modern slavery in addition to general support services to migrants. On the same day the Senior Client Advisor sent an email to Emailaddress1B in the following terms:

*"I met with [X] today and have serious concerns about her mental capacity. It is suspected that she is a victim of modern slavery and her family members are currently being investigated by the police. [X] is unable to tell her age or date of birth and has difficulty recounting events in a chronological manner. She has reported abuse from her family members in her recent living situation and has never lived independently.*

*I am requesting a care needs assessment be conducted as soon as possible, as the current environment in a hostel presents many safeguarding risks for her. I believe she is at high risk for exploitation*

*due to lack of mental capacity. It is not clear that she has been able to access health care in her time in the UK and the scope of her needs is unknown.”*

6. On Tuesday 13<sup>th</sup> March 2018 the same message was re-sent to the CouncilB No Recourse to Public Funds (NRPF) team at emailaddress2B. It was then sent on to a Community Support Manager who picked up the referral. He wrote to two Home Office employees, forwarding the referral email and seeking information about any assessments carried out prior to X being accepted for initial accommodation and an update on planning around X's dispersal.
7. One of the Home Office employees replied on 15 March 2018 stating that he believed the London Safeguarding Team had agreed to X's admittance to initial accommodation and he had forwarded the email to them. The Community Support Manager responded stating that he would await a reply from the safeguarding team and repeating his question about the plan around X's dispersal.
8. Also on 15 March 2018, the Community Support Manager received a safeguarding referral by email from a clinical nurse specialist at NHS Foundation Trust1B. The email stated that X displayed impaired cognition and had been referred to the learning disability team, health inclusion team and GP for further assessments. It noted that X was due to be moved out of Address1B to unsupported accommodation and it raised concern that she would not be able to cope living independently in an unsupported environment.
9. The Community Support Manager responded by asking the nurse specialist to telephone him. A telephone conversation took place the same day. This was followed up by an email in which the Community Support Manager noted that there was going to be a further assessment the following day by the health inclusion team. The email recorded their agreement that: *“you'd contact me after this has happened to discuss next steps in terms of further engagement with the Home Office to understand what assessments were carried out prior to her acceptance into initial accommodation, what their current plan is around her dispersal and what intervention is required from [CouncilB]”*. In the event no further contact was made before X was moved out of the area of CouncilB. A further referral was made on 16 March 2018 but this was not a referral to CouncilB.

10. On 20 March 2018 X was moved by the Home Office to accommodation managed by the Trust1A in CouncilA. The Trust1A supports victims of human trafficking and modern day slavery but it is not a registered care provider.
11. On 23 March 2018 the Trust1A made contact with CouncilA stating that they had serious concerns about X. I am told that a CouncilA social worker commenced a care needs assessment of X, under section 9 of the Care Act 2014, on 27 March 2018. That assessment concluded that X had eligible needs for care and support. However, it is unclear when the assessment was concluded. The document provided to me is dated 1 May 2018.
12. On 6 April 2018 CouncilA wrote to CouncilB putting them on notice that CouncilA did not accept responsibility for X and stating that they considered CouncilB had failed in its duty to assess X. There followed extensive correspondence between the two parties concerning who was responsible for X. It is not necessary for me to set out the detail of that correspondence here, save to note that CouncilB disputed responsibility. CouncilA agreed to complete its assessment of X and meet her assessed needs on an interim without prejudice basis.
13. It is unclear exactly when CouncilA first started providing care and support to X. I understand that initially X was provided with day services during the week and three hours 1:1 support at weekends. However, at some point in or around July 2018 a conclusion was reached that the additional support being offered to X was not sufficient to keep her safe, and that her needs could only be met in a residential care setting. I am told that CouncilA commenced searches for a residential placement on 13 July 2018.
14. On or around 2 August 2018 X was admitted to CouncilA General Hospital following an allegation of sexual assault. She was discharged, on 11 August 2018, to Address1C, CouncilC, a residential care placement arrangement by CouncilA. That is where she continues to reside.
15. There is no dispute that X lacks mental capacity to make decisions about her residence and care.

### **The Authorities' Submissions**

16. CouncilA submits that:

- a. CouncilB failed in its duty to assess X under section 9 of the Care Act 2014;
- b. Had CouncilB carried out appropriate assessments it would have concluded that X's needs could only be met in residential accommodation and it would have been required to provide such accommodation;
- c. The deeming provisions under section 39 of the Care Act 2014 should be treated as applying in accordance with the principles set out in the *Greenwich* case (cited below)
- d. On this basis, X should be treated as ordinarily resident in the area of CouncilB.

17. This is disputed by CouncilB. It submits that

- a. It did not fail to discharge its duties: it made reasonable enquiries but X was moved before it had reached the stage of making a decision as to what duty, if any, was owed.
- b. X was moved to CouncilA by the Home Office, not as a result of any failure by CouncilB to discharge its duties.
- c. In any event, it does not accept that any additional steps taken by CouncilB would have led to X being accommodated by CouncilB and/or not dispersed to CouncilA.

## **The Law**

18. I have considered all the documents submitted by the parties; the provisions of Part 1 of the Care Act 2014 ("the 2014 Act"); the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care and Support Statutory Guidance; and relevant case law, including *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*"); *R (Greenwich) v Secretary of State for Health and Social Care and LBC Bexley* [2006] EWHC 2576 ("*Greenwich*"); *R (Barking and Dagenham) v (1) Secretary of State for Health and Social Care* [2017] EWHC 2449 (Admin) ("*Barking and Dagenham*"); and *Mohammed v Hammersmith & Fulham LBC* [2002] 1 AC 547 ("*Mohammed*").

## The 2014 Act

### *Duty to assess*

19. Under section 9 of the 2014 Act, where it appears to a local authority that an adult may have needs for care and support, that authority must carry out a needs assessment.

### *Duty to meet need for care and support*

20. Section 18 of the 2014 Act imposes a duty on local authorities to meet the assessed eligible needs for care and support of adults ordinarily resident in their area (or present in their area but of no settled residence). Examples of what may be provided to meet such needs are set out in section 8. These include provision of accommodation in a care home or in premises of some other type.

### *The deeming provision*

21. Under section 39, 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 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 (or, if the adult was of no settled residence, in the area in which he was present).
22. The types of accommodation specified under the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 include care home accommodation and supported living accommodation.
23. In Greenwich (cited above) at [54] Charles J said:

*“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”.*

24. In the following paragraph, Charles J noted that (i) failure to provide accommodation could found a claim for judicial review; and (ii) if the court determined that the local authority had acted unlawfully in not providing the accommodation, the effect would be that arrangements would be put in place

retrospectively. I proceed, therefore, on the basis that that the Greenwich approach applies only where a local authority has unlawfully failed to provide specified accommodation (see *Barking and Dagenham* (cited above) at [43]).

### Ordinary Residence

25. “Ordinary residence” is not defined in the 1948 Act or the 2014 Act. Guidance has been issued to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

26. In *Shah* (cited above), 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”*

27. In *Mohammed* (cited above) Lord Slynn said:

*“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.”*

28. The Care and Support Statutory Guidance, updated following the decision of the Supreme Court in *Cornwall*, states:

*“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.*

29. This is the approach that I adopt here.

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

30. The only issue raised by CouncilA in its legal submissions concerns application of the *Greenwich* principle. In earlier correspondence with CouncilB it disputed that X was ordinarily resident in its area, as a matter of fact, on the grounds that she was placed there and did not have a choice. However, it appears that this point is no longer pursued.

31. It may be that it is now common ground that, as a matter of fact and subject to any deeming provisions, X became ordinarily resident in the area of CouncilA when she moved to the Trust1A placement on 20 March 2018. However, for completeness, I address this matter briefly at the outset. I start from the position that it is not necessary for there to be a choice of placements in order to establish ordinary residence (see *Mohammed* cited above). When X moved to the Trust1A placement that became her home; she had nowhere else to live; and there were no imminent plans for her to be placed anywhere else. In these circumstances, I find, as a matter of fact, that X was ordinarily resident in the area of CouncilA from 20 March 2018.

32. Thereafter, she was placed in NHS accommodation from which she was discharged to a residential placement. The deeming provisions under section 39 of the 2014 Act apply to both of these placements.

33. The question I must determine is whether the deeming provisions should be treated as applying from any earlier date on the grounds that CouncilB unlawfully failed to provide care home accommodation for X. For the following reasons, I have concluded that they should not:

- a. Firstly, I accept CouncilB's submission that it did not fail in its duty to assess. There is no specific statutory timeframe within which an assessment must be undertaken under section 9. On the information available to CouncilB it was apparent that X had accommodation and was receiving some support and health input. CouncilB did make enquiries with a view to determining what further steps were required. It

could have done more to follow up on those enquiries and/or make earlier direct contact with X, but I do not consider that any delay was so significant as to constitute a breach of statutory duty and/or that CouncilB's actions were otherwise unlawful in a public law sense.

- b. Secondly, even if CouncilB should have done more to assess, it does not follow that it necessarily acted unlawfully in failing to provide care home accommodation for X. I do not consider that an earlier assessment, carried out lawfully, necessarily would have led to X immediately being provided with accommodation under the Care Act (even if this was a possible outcome). It took several months before CouncilA eventually concluded that X required care home accommodation after they accepted interim responsibility for her on a without prejudice basis. It then took them another month to secure appropriate accommodation (the search commenced on 13 July 2018 and X moved to Address1C on 11 August 2018). There is no suggestion that CouncilA acted unlawfully and, if they did not act unlawfully in failing to provide care home accommodation over a period of months, it is difficult to see how they can assert that CouncilB acted unlawfully in failing to provide such accommodation over a much shorter period.
- c. X was only in the area of CouncilB for two weeks before she was moved by the Home Office. One can only speculate as to what might have happened if CouncilB had undertaken a full and/or interim assessment in that time. I certainly do not accept that it is inevitable that CouncilB, acting lawfully, would have concluded that X had needs that could only be met by urgent provision of care home accommodation and/or that it would (or could) have made arrangements for such accommodation to be offered before X was moved by the Home Office to the placement in CouncilA.

### Conclusion

- 34. It follows that X has been ordinarily resident in the area of CouncilA since 20 March 2018. The deeming provisions under section 39 apply only from 2 August 2018.