

## **DETERMINATION BY THE SECRETARY OF STATE MADE IN ACCORDANCE WITH SECTION 40 OF THE CARE ACT 2014**

1. I have been asked by CouncilA to determine the ordinary residence of X. The dispute is with CouncilB.
2. The question of X's ordinary residence arose under Part 3 of the National Assistance Act 1948 ("the 1948 Act") and would, in the first instance, fall to be determined under section 32(3) of that Act. However, as from 1 April 2015, Part 1 of the Care Act 2014 ("the 2014 Act") came into force for material purposes and the 1948 Act ceased to apply in relation to England except in transitional cases. By virtue of article 5 of the Care Act (Transitional Provision) Order 2015 (S.I. 2015/995), 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 (disputes about ordinary residence). I make this determination accordingly.
3. In determining the issue, I have had regard to the agreed statement of facts; the submissions of both parties; and the bundle of documents provided.
4. For the reasons set out below, I find that X was ordinarily resident in CouncilA's area as at the relevant date in July 2014.

### **Factual Background**

5. X was born on XXXX1948. She is now 68 years old. In 2009, she was diagnosed with mixed Alzheimers and vascular type dementia. Additionally, she has anxiety, an under-active thyroid and degenerative arthritis in her hips. She can communicate verbally but has word finding difficulties. She loses concentration quickly, needs support to make decisions in relation to all aspects of her care and depends on others to anticipate her needs and reduce the risk of harm to her.
6. CouncilA has assessed X as lacking capacity to decide where to live. There is no challenge to that assessment. X's husband has been named as her attorney for both property and affairs and health and welfare matters.
7. Until July 2014, X lived with her husband at their home in the area of CouncilA. X's husband has reported that he was supporting X with all aspects of her care. X was not known to social services until 13 May 2014 when her husband contacted CouncilA to request a seating assessment in relation to X's mobility and transfers at home and a carer's assessment in respect of himself. No issue about residential accommodation was raised at that time. The couple were added to the waiting list for those assessments to be carried out.
8. On 7 July 2014, X went to stay at House1B, a care home located in CouncilB's area. Neither local authority knew about this move at the time. This was arranged by X's husband. X's husband has indicated that the House1B was initially intended for two weeks though I note that the agreement is not itself time limited. X's husband has reported that this was intended as a move for a temporary period while he had adaptation works undertaken to the flooring of their home. I note from the community

care assessment that this work was undertaken because X had had 4 or 5 falls since January 2014 (no injuries other than bruising) and her husband considered that changing the floor might minimise the risk. X's husband signed a contract with House1B as X's attorney. The contract was for a permanent placement but with a four week trial period during which time either party could terminate the arrangement by giving one week's notice. The fee was £820 per week. X's husband arranged to meet those payments.

9. X's husband reports that at the end of the first week, X had appeared to settle very well and had made comments about wanting to stay.
10. X's husband reports that on 14 July 2014, he approached House1B regarding extending the placement to the end of July as he was beginning to see the placement as being for the long term.
11. On or shortly before 17 July 2014, X's husband contacted CouncilA about funding for a permanent placement at House1B. This was the first time that either authority had been approached in relation to the placement. X's husband has indicated that by this time he viewed the placement as permanent.
12. CouncilA referred X's husband to CouncilB. CouncilB established that X did not have more than £23,250 in capital.
13. On 1 August 2014, a social worker from CouncilB wrote to CouncilA's adult social care team, raising the fact that CouncilB had been contacted by X's husband in relation to funding a permanent placement.
14. There is a case record of 20 August 2014 which states:

“Just some further information, [X's husband] has just called us to find out what is happening. Apparently, X only went into respite because he was doing some decorating but since then she had asked that she stay as she likes it so much. She has no savings and husband has only £3,000 left. He can pay for this week and next but then is contemplating bringing her home. When asked if this was manageable he told me 'not really' because she is now wandering at night time and he does not feel he can cope. It does not sound as though a permanent contract has been signed because he cannot commit financially and therefore she is still technically on respite (and this is what CouncilB are apparently arguing)...”
15. On 29 August 2014, CouncilA's legal department emailed CouncilB's legal department in relation to the matter. CouncilA agreed to start the assessment and information gathering process without prejudice to the issue of where X is ordinarily resident.
16. A record of 8 September 2014 states:

“X's husband tells me that X is now permanently resident – I was under the impression that respite had just been extended. I will make enquiries about the date of this. X's husband is aware that there needs to be a decision around ordinary residence first and then consideration on the next steps.”
17. A subsequent note of that date refers to a telephone conversation between the social worker and the manager at House1B. That states: “[The manager at House1B] has

spoken with head office. It appears that no permanent date has ever been entered for X.”

18. On 8 September 2014, CouncilA completed an assessment of X’s needs pursuant to section 47 of the National Health Service and Community Care Act 1990. I note that the assessment states:

“[X]’s husband has advised me that X’s placement at House1B was made on a temporary basis in response to making the home environment more suitable for her.

Since X has been at House1B he has noticed that she has settled well into a routine and on occasion has made comments referring to the placement as her home. He is clear that this is not all of the time and that there are days where she is more anxious than usual, but overall his feeling is that she is happy at the placement.

He has also had a chance to reflect on the level of support he was providing his wife and recognises that over time there has been a gradual deterioration in her ability. This has led him to take on more and more without really appreciating the extent of this.

It is evident that [X’s husband] has given this decision a great deal of thought. He has considered that if his wife were to come home they would need some sort of adaptation on the stairs for her to safely use this as he notes her abilities have continued to deteriorate (this may not necessarily be possible if X is unable to follow directions as for example she would need to remain stationary in a conventional stair lift). He has considered whether he could convert the garage into a bedroom for them both (X is likely to seek out her husband where ever he is and potentially put herself in harms way in the process therefore it would make sense they continue to share a room). X’s husband, in weighing up the available options, has made a decision that it would be in his wife’s best interests to remain at House1B. However, he recognises that the responsible local authority will also need to take a view on this.

X’s husband has been made aware of the council processes and also the ordinary residence issue at this current time. He is mindful and accepting that a decision may take time, but feels that ultimately his wife’s happiness is paramount.”

19. A mental capacity assessment was also carried out. A financial assessment was carried out on 19 September 2014 which showed that X had savings of £7016 and a net income of £151.40 per week.
20. I note that the assessment records that X’s husband told the social worker that “generally his wife’s view of ‘home’ is wherever they happen to be together at that moment in time”.
21. In the course of that assessment, X’s husband provided the information about the circumstances in which X moved to House1B, as summarised above. On 18 November

2014, CouncilA wrote to CouncilB notifying CouncilB that it considered that X was ordinarily resident in CouncilB's area and had been since 17 July 2014.

22. Further correspondence between CouncilA and CouncilB as to the question which authority was responsible but I do not need to set that out.
23. I note that there is a case record of 23 September 2014 which records a conversation between the social worker and the manager of House1B, who advised that House1B did not do respite contracts and that the contract that was signed was a permanent contract.
24. A further record of 15 October 2014 refers to a conversation with X's husband and states:
  - "1) X's husband states that a respite or temporary placement was made 07<sup>th</sup> July 2014 for his wife. Two weeks were booked. This was with the intention to undertake changes to the flooring in the property to minimise the risks of X falling on her return.
  - 2) X confirms that work to the floor has been completed
  - 3) At the end of the first week, his wife had appeared to settle very well – she had also made comments about wanting to stay. On the 14<sup>th</sup> July – X approached the administrator at House1B (who has since left) to extend the stay to the 28<sup>th</sup> July. He was beginning to view this stay as permanent and wanted to give himself more time to approach the relevant parties.
  - 4) X's husband states that he viewed the placement as permanent from the date he contacted CouncilA – this was 17<sup>th</sup> July 2014
  - 5) There was no meeting with management at House1B to make this decision or to formalise this decision
  - 6) X's husband says he verbalised this view to the administrator (who has now left)"
25. A similar account is given in a record of a conversation with X's daughter on 15 October 2014. That also notes that X was initially booked in for a 2 week stay but in the first week she started to like the placement. That states "He is aware that they also looked at House2 – but practically she is glad House1B was chosen as it has turned out that Dad is visiting every day and it would be a lot of travel for him."
26. On 20 March 2015 a checklist was accepted in relation to NHS Continuing Healthcare but as at the date of referral of this dispute, the application had had to be resubmitted because House1B didn't submit relevant documentation on time.
27. On 19 May 2015, I was provided with a bundle of documents including the legal submissions for both parties. The determination of this dispute was stayed pending the judgment of the Supreme Court in *Cornwall*.
28. On 9 December 2016, I published guidance revised in light of the decision in *Cornwall*.
29. By letter dated 13 December 2016, I invited the parties to review their positions having regard to the revised guidance. Both parties made further submissions.
30. While it is agreed that the relevant date in the present case fell in July 2014, there is some disagreement as to what was the relevant date.

## The Law

31. I have considered all the documents submitted by Council A and Council B; the provisions of Part 1 of the Care Act 2014 and the Care and Support (Disputes Between Local Authorities) Regulations 2014; the provisions of Part 3 of the National Assistance Act 1948 (“the 1948 Act”); LA Circular (93)10 (“Directions”)<sup>1</sup>; the Care and Support Statutory Guidance and Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services in England issued by the Department of Health on 15th April 2011 and reissued in 2013 (“previous OR Guidance”); 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”), *R (Wahid) v Tower Hamlets London Borough Council* [2002] EWCA Civ 287, *C v S (A Minor) (Abduction)* [1990] 2 FLR 442 (“C v S”) and *Levene v Inland Revenue Commissioners* [1928] All ER 746 (“Levene”).

32. I set out below the law as it stood at the relevant time<sup>2</sup>.

### *Accommodation*

33. 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.

34. Section 21(2A) of the 1948 Act provides that in determining whether care and attention are available to a person, a local authority must disregard so much of the person’s resources as may be specified in regulations. The relevant regulations are the National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations 2001 (“the 2001 Regulations”). Regulation 2(1) provides that for the

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<sup>1</sup> This is a reference to the ‘Secretary of State’s Approvals and Directions Under Section 21(1) of the National Assistance Act 1948’

<sup>2</sup> The provision of care and support for adults and of support for carers is governed by the Care Act 2014 as from 1 April 2015 and the relevant provisions of the 1948 Act have been disapplied in relation to England by the 2014 Act and Children and Families Act 2014 (Consequential Amendments) Order 2015 (S.I. 2015/914). However, under article 3(3) of that Order, despite the amendments made by the Order, any provision that operates in relation to, or by reference to, support or services provided, or payments towards the cost of support or services made, before or on or after 1 April 2015 and anything done under such provision, continue to have effect for the purposes of that support or those services or payments.

Paragraph 19.87 of the Care and Support Statutory Guidance says: “Regardless of when the Secretary of State is asked to make a determination, it will be made in accordance with the law that was in force at the relevant date, in respect of which ordinary residence falls to be determined. Therefore, where ordinary residence is to be determined in respect of a period which falls before 1st April 2015, then the determination will be made in accordance with Part 3 of the National Assistance Act 1948 (the 1948 Act). If, in respect of a period on or after 1st April 2015, then the determination will be made in accordance with the Care Act. Any question as to a person’s ordinary residence arising under the 1948 Act which is to be determined by the Secretary of State on or after 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act (disputes about ordinary residence) and the new dispute procedure under the Care Act is to be followed”.

purposes of section 21(2A) of the 1948 Act, a local authority is to disregard so much of the person's capital as does not exceed the capital limit for the purposes of section 22 of the 1948 Act.

35. Regulation 2(2) provides that the capital limit for the purposes of section 22 of the 1948 Act means the amount prescribed in the National Assistance (Assessment of Resources) Regulations 1992 ("the Assessment Regulations") as the amount which a person's capital must not exceed if the person is to be assessed as unable to pay for that person's accommodation at the standard rate.
36. The amount prescribed in the Assessment Regulations is £23,250. Therefore this is the amount of capital to be disregarded in determining whether care and attention are available to a person.
37. By virtue of section 26 of the 1948 Act, local authorities can, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal care under section 21 of that Act with any organisation other than a registered care home.
38. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and recovering any unpaid fees).

#### *The relevant local authority*

39. 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 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*

40. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under Part 3 of the 1948 Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

### *Welfare services*

41. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in their area. The list of services which can be so provided is expanded upon by section 2 of the Chronically Sick and Disabled Persons Act 1970.

### *Ordinary Residence*

42. "Ordinary residence" is not defined in the 1948 Act. On the question of identifying the ordinary residence of people in need of community care services, the OR Guidance for local authorities (and certain other bodies) notes at paragraph 18 onwards that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. The concept involves questions of fact and degree. Factors such as time, intention and continuity have to be taken into account.
43. In *Shah*, 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".
44. In *Levene* Viscount Cave said that 'ordinary residence' connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.
45. In *C v S* it was made clear that ordinary residence may be lost in a day. In that case Lord Brandon said: "The third point is that there is significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead".
46. I note that there is no dispute that X did not have capacity to make the relevant decision where she should live. Additional considerations apply where the relevant person lacks capacity to determine (and thus to "voluntarily adopt") their abode. The case of *Cornwall* is relevant here. In *Cornwall* the Supreme Court held that the focus must be on the nature of the residence which is the subject of the decision, which may include having regard to the duration and quality of that residence. The previous OR Guidance notes that all of the relevant circumstances must be considered including the person's physical presence, the purpose of living there, the person's connection with the area, their duration of residence and their views, wishes and feelings (so far as ascertainable) 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. The Care and Support Statutory Guidance was issued following the decision in *Cornwall* and I have had regard to that in making this determination.

## The Parties Submissions

### *CouncilA*

47. At the point X's husband approached CouncilA when it was made clear that he no longer intended X to return, which is likely to be 17 July 2014, that was the first date upon which CouncilA were aware of X's potential need for residential accommodation and, therefore, the first date upon which a duty to assess in relation to residential accommodation was triggered under s47 of the National Health Service and Community Care Act 1990.
48. In accordance with *Greenwich*, ordinary residence falls to be determined at the date an individual *should* have been provided with accommodation under section 21 of the 1948 Act and not the date when it was actually provided.
49. The earliest date which it can be said that accommodation under section 21 of the 1948 Act should have been provided is 17 July 2014 because the duty under section 21 cannot arise *before* the duty to assess the individual's needs has arisen<sup>3</sup>.
50. The duty to assess X was triggered by 17 July 2014 and at that point she met the s21 requirements. So, 17 July 2014 is the relevant date for the determination of ordinary residence.
51. Once X's husband's view about X's stay had changed such that he and other members of his family considered House1B to be the long-term place of residence of X, the nature and purpose of her residence was such that she acquired ordinary residence in CouncilB's area.

### *CouncilB*

52. It was for the local authority for the area where X was ordinarily resident, rather than X's family, to make care home arrangements.
53. CouncilA wrongly treated as determinative the fact that they had not been made aware in advance of X's possible need for either respite or permanent residential care.
54. A person's residence status cannot change from respite to permanent without funding arrangements being in place to facilitate the change, which will require the person's home authority.
55. By 17 July 2014, X had been in CouncilB for purposes of respite for just 10 days and that the purpose, place and duration of her stay negate any suggestion that it had a "sufficient degree of continuity to be described as settled".

## The application of the law

### *Was House1B section 21 accommodation?*

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<sup>3</sup> Reliance is placed on the case of *R(Wahid) v Tower Hamlets LBC* [2002] EWCA Civ. 287 in support of the circumstances in which the duty under s21 of the 1948 arises.

56. The accommodation at House1B was residential accommodation. So, the initial question to determine is whether that accommodation was provision of residential accommodation under section 21 of the 1948 Act. If it was, X will be deemed to be ordinarily resident in the area in which she was ordinarily resident immediately before she was provided with that accommodation, because of the deeming provision in section 24(5) of the 1948 Act. However, if those arrangements did not fall under section 21, the deeming provision will not apply and it will be necessary to consider whether X acquired a new ordinary residence in CouncilB's area.
57. In order for a person's accommodation to fall under section 21, the contractual arrangements between the person, the accommodation provider and the local authority must meet the requirements of section 26 of the 1948 Act as set out above. In *Quinn Gibbon* Lord Slynn held that arrangements for the provision of accommodation must satisfy section 26(2) to constitute the provision of Part 3 accommodation.
58. In my view, the House1B agreement does not meet the section 26 requirements which are necessary for it to be accommodation falling under section 21 of the 1948 Act. In particular, the arrangements do not meet the requirements of section 26(2) as set out above as they do not provide for the making of payments by any local authority to House1B and so do not provide for the recovery of payments by any local authority from X.

*Should section 21 accommodation have been arranged*

59. However, that is not sufficient to settle the matter. The further question which I then have to address is whether in fact arrangements for Part 3 accommodation for X *should have been made* during the period in question. In *Greenwich*, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act and noted that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (paragraph 55 of judgment). Following *Greenwich*, therefore, lack of compliance with section 26 may not be fatal if, in fact, the local authority should have been making section 21 arrangements. In *Greenwich* the date on which it was considered that "a local authority should have made" such arrangements was the date on when the adult in question was going to "pass through the capital financial limit cap".
60. The first limb of the test in section 21 of the 1948 Act is whether or not the person is in need of care and attention. Care and attention was defined by Baroness Hale in *R (M) v Slough BC* [2008] UKHL 52 at paragraph 33: "...the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list."
61. In my view on 14 July X was in need of care and attention and this is not disputed amongst the parties.

62. The second limb of the test in order to determine whether a duty under section 21 exists is to ask whether or not the care and attention needed is available otherwise than by the provision of residential accommodation.
63. In this regard it is necessary to refer to the 2001 Regulations read with the Assessment Regulations. Resources which do not exceed the capital limit of £23,250 are to be disregarded for the purpose of deciding whether care and attention are otherwise available to a person.
64. I am told that on or shortly before 17 July 2014, X's husband contacted CouncilA about funding for a permanent placement at House1B. CouncilA referred X's husband to CouncilB. CouncilB established that X did not have more than £23,250 in capital.
65. It is not clear to me from exactly when X's capital fell below the capital limit or whether it was ever above the limit. However, the case record of 20 August 2014 states: "She has no savings and husband has only £3,000 left." A financial assessment was carried on 19 September 2014 showed that X had savings of £7016. CouncilB's submissions state that X lacked the funds to make her own arrangements and that her finances were "already" below the minimum threshold. On the facts, it appears to me that X did not have capital above the capital limit at the time of her move to House1B.
66. I therefore decide that at the time of her move care and attention were not available to X otherwise than by the provision of residential accommodation and that the arrangements at House1B in respect of her should therefore have been made under Part 3 of the 1948 Act.
67. If the provision of accommodation falls within section 21, the section 24(5) deeming provision applies and it is necessary to consider where X was ordinarily resident immediately before the accommodation was provided for her (or should have been provided).
68. Where a person lacks the capacity to decide where to live, direct application of the test in *Shah* will not assist as the *Shah* test involves voluntary adoption of a place of residence<sup>4</sup>. The "essential criterion" is the residence of the subject and the nature of the residence<sup>5</sup> having regard to the person's physical presence, their purpose for living there, their connection with the area, the duration of residence there and the person's views, wishes and feelings 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.
69. Immediately before the move X was residing in CouncilA's area. That was her home and the place where she lived with her husband. The assessment of needs records that X's husband told the social worker that "generally his wife's view of 'home' is wherever they happen to be together at that moment in time". I consider that the purpose of her residence in CouncilA's area immediately before her move to House1B had a sufficient degree of continuity to be described as settled.
70. I therefore conclude that X was ordinarily resident in CouncilA as at the relevant date in July 2014.

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<sup>4</sup> Care Act Guidance at paragraph 19.26.

<sup>5</sup> Care Act Guidance at paragraph 19.27.