

## **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.
2. The issue is whether X became ordinarily resident in the area of CouncilA on 22 September 2015 or whether she remained ordinarily resident in the area of CouncilB.

### **The facts**

3. The following information has been ascertained from the agreed statement of facts, legal submissions and other documents provided by the parties.
4. X was born on XX XX 1932 and has a daughter (Mrs Daughter1). She lived in her own tenancy in AreaB for approximately 50 years where she was supported by a carer and the Older People Community Mental Health Team.
5. In April and May 2015 Mrs Daughter1 reported concerns about her mother's condition to CouncilB.
6. On 9 June 2015 Doctor1, consultant in old age psychiatry wrote stating that X "is moderately demented and is also prone to falls. She has been neglecting herself and I have recommended her for 24-hour residential care."
7. On 2 July 2015 an assessment was carried out of X's needs and recorded in a document entitled "Residential Diaries Request". Under the section entitled "Overview" the following is recorded as the final remarks: "X will therefore benefit from residential placement close to her family in AreaA, as requested by herself and family to enhance social inclusion and address isolation."

8. On 29 July 2015 Ms Individual1, CouncilB social worker, notified Mrs Daughter1 that the assessment of X's needs had been completed that the outcome is that she was not eligible for residential care. Ms Individual1 recommended that X "be moved to sheltered accommodation with a care package so that she can be assisted with personal care, medication and all daily living activities." Ms Individual1 went on to state "We will not be able to move mother from AreaB to AreaA as she does not required [sic] 24 hours supervision at the moment, her needs are not for residential placement at the moment."
9. The care records indicate that on 17 August 2015 Mrs Daughter1 was advised that a complex case meeting with managers had met to discuss X and concluded that X did not meet the eligibility criteria for residential care.
10. On 25 August 2015 Mrs Daughter1 challenged this conclusion and made reference to the condition she discovered her mother at home and other evidence of needs including the letter from Doctor1.
11. On 17 September 2015 another assessment of X's needs was completed by CouncilB. This review of needs was completed with Mrs Daughter1 being present. At that time X was being offered and was accepting 2 calls a day of 30 minutes each time. The following is recorded under the section entitled "Overview":
  - "She appeared very well kept during the review ... and reported that she felt well and everything was fine with her. Mrs X is able to attend to her personal care needs ... She is however unable to do her own shopping and has been supported by a support worker ..."
  - "Mrs Daughter1 reported that mother appeared in good mood and she was satisfied with the support offered to mother. Mrs Daughter1 reported that she was fine and mother was attending all her personal

care by herself, she is able to heat food in microwave and complete domestic tasks without the support of others and she was fine with it.”

- “...She is happy with support she receives at home but would like to move close to her daughter.”
- “... During visits Mrs X was able to communicate and had capacity to communicate informed decision.”
- “...Mrs Daughter1 advised that she planned to take Mrs X to AreaA on the 19/09/2015, she only bought a one way ticket for mother to AreaA and if mother likes in [sic] there she will not come back to AreaB. Mrs Daughter1 reported at this time it will not be necessary to arrange for shopping and domestic tasks as mother will be living with her in AreaA and they [sic] will be family support.”
- “Mrs Daughter1 requested to care provider to suspend service from 19/09/2015 as Mrs X will not be at home.”
- “OUTCOME: We agreed social services to suspend service for Mrs X as Mrs X is going to AreaA to live with daughter and there is no return day arranged.”
- The level of need is recorded as being “Low to moderate”

12. This review of needs and service provision decision is also recorded in the case notes held by CouncilB.

13. On 22 September 2015 X was taken to AreaA by her daughter Mrs Daughter1. She notified CouncilA that she was living with X in her one-bedroom property.

14. CouncilA completed their own assessments of X's needs. On 24 December 2015 X was admitted to hospital in AreaA.

15. On 3 January 2016 X's tenancy in AreaB was terminated.

16. On 11 January 2016 X was assessed as lacking capacity to make decisions about her accommodation and care needs. CouncilA assessed X as requiring residential care to meet her needs.
17. On 18 January 2016 X was discharged to a residential care home which was considered to be in her best interests.
18. Attempts were made to resolve the dispute over X's ordinary residence without success.

### **The authorities' submissions**

#### CouncilA

19. CouncilA submit that X remains ordinarily resident in the area of CouncilB who neglected their duty to meet X's needs resulting in her daughter's decision to move her on a temporary basis to AreaA.
20. CouncilA questions why X's capacity was not properly considered by CouncilB and does not accept the assertion that she had capacity at the time she moved.
21. CouncilA asserts that the evidence, including the letter from Doctor1 and the assessment dated 2 July 2015 demonstrates that X needed residential care which CouncilB failed to provide. It is said that this is specified accommodation for the purposes of the deeming provisions under s.39 of the 2014 Act and accompanying regulations.
22. In the alternative, it is submitted that the offer of sheltered accommodation satisfies the definition of supported living accommodation for the purposes of the relevant regulations.

23. CouncilA submit that if X did have capacity she did not move for voluntary or settled purposes.

#### CouncilB

24. CouncilB submits that X was ordinarily resident in AreaB prior to her move to AreaA in September 2015.

25. It is submitted that CouncilB completed an assessment of need and concluded that X was not eligible for residential care but that an offer was made to increase the domiciliary care package or move X to supported living or support a transfer of care to AreaA. It is said that these offers were refused by X.

26. CouncilB submit that there is no reason to rebut the presumption that X had capacity to decide to move to AreaA at the relevant time and that she was clear that she wanted to move to live with her daughter.

27. It is submitted that the move was voluntary, lawful and for settled purposes and that she became ordinarily resident when she moved.

28. CouncilB made the referral to CouncilA on the basis that she was not eligible for residential care and that she had been offered support which had been refused.

#### **The law**

29. I have considered all relevant legal provisions including 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*”), *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“*Cornwall*”) and *R (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576 (Admin) (“*Greenwich*”).

## Care Act 2014

30. Local authorities must undertake an assessment for any adult who appears to have any level of needs for care and support, regardless of whether or not the local authority thinks the individual has eligible needs.
31. The purpose of a needs assessment is to identify the needs and outcomes that an adult wishes to achieve in their day-to-day life, whether those needs are eligible for care and support from the local authority, and how the provision of care and support may assist the adult in achieving their desired outcomes.
32. Where a local authority is satisfied on the basis of a needs or carer’s assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria.
33. If an adult’s needs meet the eligibility criteria the local authority must meet those needs if s/he is ordinarily resident in its area and subject to other specified conditions.

### *Ordinary residence*

34. A local authority’s responsibility for meeting a person’s eligible needs under the Care Act is based on the concept of “ordinary residence”. However, there is no definition of “ordinary residence” in the Act. Therefore, the term should be given its ordinary and natural meaning.

35. 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*. 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.'*

36. The Supreme Court held that where the adult lacks capacity the requirement that he adopted voluntarily and for settled purposes does not form part of the ordinary residence test as applied in *Shah*.

#### Deeming provisions

37. Section 39 of the Care Act, and the 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 when the person is placed in another authority's area. 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 or 'placing' authority, and does not acquire an ordinary residence in the 'host' or second authority. The local authority which arranges the accommodation, therefore, retains responsibility for meeting the person's needs.

38. The regulations specify the types of accommodation to which this provision applies. The regulations explicitly set out three types of accommodation:

- nursing homes/care homes – residential accommodation which includes either nursing care or personal care;

- supported living/extra care housing – specialist or adapted accommodation, in which personal care is also available, usually from a different provider. It should be noted that there are two types of supported accommodation defined in the regulations, and the availability of personal care is not a requirement of the first type, which can be accommodation alone; and,
- shared lives schemes – accommodation in which the person lives with a host family.

39. The deeming provisions should be treated as applying also where a person “should have been” provided with the relevant accommodation. Accordingly, a local authority cannot avoid the effect of the deeming provisions through failure to comply with its statutory duties (see: *Greenwich* at paragraph 55).

#### Mental capacity

40. All issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005 (“the 2005 Act”). Under this Act, it should always 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.

41. The test for capacity is specific to each decision at the time it needs to be made, and a person may be capable of making some decisions but not others. It is not necessary for a person to understand local authority funding arrangements to be able to decide where they want to live.

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

42. Council A asserts that X should be deemed to be ordinarily resident in Area B because Council B have “neglected” otherwise failed to comply with its statutory duties under the Care Act 2014 to provide her with care home or supported living accommodation.

43. It is not for me to interfere with the decisions of social work professionals save where it can be clearly established that a person should have been provided with accommodation under the 2014 Act.
44. I accept that there was evidence that X was in need of care home accommodation. This included evidence that X was not coping on her own at home, the letter from Doctor1 dated 9 June 2015 and an assessment of need dated 2 July 2015 which concluded that X would “benefit” from a residential placement close to her family in AreaA.
45. However, the assessment of need and resulting service provision decision completed on 17 September 2015 carries out significant weight. This assessment did not conclude that X had a need for care home accommodation. It recorded an apparent improvement in X’s condition. It also recorded that both X and her daughter agreed that CouncilB did not need to arrange for support to assist with shopping and other domestic support because she will be living with her daughter with family support.
46. This is not a case where the last assessment of need prior to the move to a different area clearly concluded that CouncilB should provide care home or supported living accommodation. Quite the opposite. The consensus was that CouncilB was not required to provide any services under the 2014 Act in circumstances where X’s condition had improved and both X and her daughter were proposing that no further services were required. I note that this was an outcome which was agreed by both X and her daughter a few days before X left for AreaA.
47. In such circumstances, I am unable to conclude that CouncilB should have provided accommodation to X in AreaA so that the deeming provisions under s.39 of the 2014 Act apply.
48. CouncilA also criticise CouncilB for failing to complete any or any proper assessments of X’s capacity. It is said that it is “highly likely” that X did not

have capacity to make decisions about her accommodation and care when she moved to AreaA. It is further said that CouncilB should not be permitted to benefit from the failure to properly assess capacity in seeking to argue that the *Shah* test applies in its favour. I note that CouncilA completed its own capacity assessments in January 2016 which concluded that X lacked capacity to make decisions in relation to accommodation and care.

49. The assessment of capacity is time and subject specific. Furthermore, there is a statutory presumption under the 2005 Act that a person has capacity until such time as it is established, on the balance of probabilities, that the person lacks it. The only evidence as to X's capacity in the period leading up to her moving to AreaA is from CouncilB which was that she had capacity to make these decisions herself. Whilst there is no evidence of formal capacity assessments there are views expressed by social workers who knew X stating that she had capacity.

50. CouncilA recognise the difficulties in seeking to retrospectively assess a person's capacity. They are correct to do so and I am not able to conclude that the presumption of capacity is rebutted in this case when considering whether X had capacity at the time she moved to AreaA on 22 September 2015. At that point in time the only evidence of capacity was that X had capacity to make her own decisions. X may well have lost capacity by January 2016 but I must proceed on the basis that at the time of her assessment of need and move to AreaA in September 2016, she had capacity to make decisions about her accommodation and care.

51. After concluding that the deeming provisions under s.39 of the 2014 Act do not apply and that X had capacity to make her own decisions as to her accommodation and care needs in September 2015 it follows that I must now consider whether X was ordinarily resident in AreaA when she moved on 22 September 2015 by application of the *Shah* test.

52. I remind myself that the term should be given its ordinary and natural meaning and that 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. I proceed on the basis that X had capacity to make her own decisions as to accommodation and care for the reasons set out above.

53. I place significant weight on the assessment of need completed on 17 September 2015. That confirms that X was clear that she wished to leave AreaB to live with or nearer her daughter in AreaA. She indicated that she did not require any further support from CouncilB as she would be living with her daughter with family support. X travelled with her daughter to AreaA on a one-way ticket. There was an understanding that if X did not like it and returned to AreaB CouncilB would continue to support her. However, I find that X moved to AreaA which she adopted voluntarily and for settled purposes as part of the regular order of her life for the short term at least. I also conclude on the evidence available that whilst X understood that she could return to AreaB if she did not like it she intended the move to AreaA to be a long-term arrangement.

## **Conclusion**

54. For the reasons referred to above I conclude that X has been ordinarily resident in the area of CouncilA since 22 September 2015.