

## **ORDINARY RESIDENCE:**

***Guidance on the identification of the ordinary residence of people in need of community care services, England***

**DH INFORMATION READER BOX**

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<b>Description</b>	This guidance provides information and advice to local authorities (and certain other bodies) on the identification of the ordinary residence of people in need of community care services. This guidance has been updated and now replaces one that was issued on 5 March 2010, which is now revoked. This revised guidance is effective from 15 April 2011.
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<b>Superseded Docs</b>	Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England as issued on 5 March 2010.
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## Glossary of terms

- 1948 Act – National Assistance Act 1948
- 1983 Act – Mental Health Act 1983
- 1989 Act – Children Act 1989
- 1990 Act – National Health Service and Community Care Act 1990
- 2003 Act – Community Care (Delayed Discharges etc.) Act 2003
- 2005 Act – Mental Capacity Act 2005
- Deeming provisions – the provisions in section 24(5) and (6) of the 1948 Act which affect the date at which a person’s ordinary residence falls to be assessed
- Greenwich case - R (Greenwich) v Secretary of State and Bexley (2006) EWHC 2576 (Admin)
- Host authority – the local authority in whose area the person is placed in residential accommodation
- Independent sector accommodation – accommodation that is provided by the private or voluntary sector, rather than by local authorities
- LPA – Lasting Power of Attorney
- Lead local authority – the local authority which has accepted provisional responsibility for providing services under Part 3 of the 1948 Act
- Local authority of the moment – the local authority in which the person in need of services is physically present
- MCA DOLS – Mental Capacity Act 2005 Deprivation of Liberty Safeguards
- NHS CHC – NHS Continuing Healthcare
- NHS accommodation - accommodation within the meaning of section 24(7) of the National Assistance Act 1948, as amended by section 148 of the Health and Social Care Act 2008. This term means: “accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or accommodation provided under section 117 of the Mental Health Act 1983 by a PCT or Local Health Board, other than accommodation so provided jointly with another authority
- Out of area placement – a local authority places a person in accommodation in another local authority area under section 21 of the 1948 Act but retains responsibility for them

- **Part 3 accommodation – residential accommodation provided under section 21, or hostel accommodation provided under section 29(4)(c), of the 1948 Act**
- **PCT – Primary Care Trust**
- **Placing authority – the local authority which places a person in residential accommodation in another local authority’s area**
- **Shah case - Shah v London Borough of Barnet (1983) 1 All ER 226**
- **Vale case - R v Waltham Forest London Borough Council, ex Parte Vale (1985) Times 25 February**

# Executive summary

This guidance explains how to decide where a person is ordinarily resident for the purposes of the National Assistance Act 1948 and certain other legislation. It is applicable to local authorities with social services responsibilities and sets out how to identify where responsibility lies between authorities for the funding and/or provision of care for people aged 18 and over who are assessed as needing social care services.

The guidance may also be of relevance to Primary Care Trusts, NHS Trusts and NHS foundation trusts which are exercising local authority health-related functions pursuant to arrangements made under section 75 National Health Service Act 2006 and the NHS Bodies and Local Authorities (Partnership Arrangements) Regulations 2000<sup>1</sup>. The local authority functions which may be carried out by NHS bodies under such arrangements include functions under Part 3 of the National Assistance Act 1948, to which this guidance mainly relates.

Social care law and policy has moved forward since guidance on ordinary residence was last published in 1993. The shift towards independent living and the demand for services to be delivered in new and innovative ways has led to confusion over the identification of a person's ordinary residence<sup>2</sup>. This guidance aims to clarify the approach to be taken and to set it within the context of modern day social care principles, so that the scope for disputes is reduced. Where disputes do occur, the guidance aims to assist local authorities to resolve the dispute at a local level and minimise the need to seek a determination from the Secretary of State.

This guidance also sets out the changes to the ordinary residence provisions introduced by the Health and Social Care Act 2008.

There are five parts to this guidance:

- **Part 1:** provides advice on the identification of the ordinary residence of people who require social care services.
- **Part 2:** sets out particular situations in which a person's ordinary residence may be an issue.
- **Part 3:** covers other legislation under which an ordinary residence determination can be sought from the Secretary of State.
- **Part 4:** signposts other areas of legislation and guidance which are of relevance to ordinary residence.
- **Part 5:** deals with the procedure for making an application to the Secretary of State for the purpose of seeking an ordinary residence determination.

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<sup>1</sup> S.I. 2000/617, as amended by S.I. 2003/629.

<sup>2</sup> The report, No Place like Home: Ordinary Residence, Discrimination and Disabled People, published by the Voluntary Organisations Disability Group, provides some good examples of the problems that can arise in relation to the identification of a person's ordinary residence.

This guidance supersedes LAC(93)7, which is now revoked. It applies in relation to England only.

### Key principles:

Where two or more local authorities fall into dispute over a person's ordinary residence:

- the key priority of local authorities should be the well-being of people who use services.
- the provision of accommodation and/or services must not be delayed or otherwise adversely affected because of uncertainty over which local authority is responsible.
- one local authority must accept responsibility, in accordance with the directions issued by the Secretary of State<sup>3</sup>, for the provision of social care services until the dispute is resolved.

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<sup>3</sup> See direction 2 of the Ordinary Residence (National Assistance Act 1948) Directions 2010. April 2011

# PART 1: identification of the ordinary residence of people who require community care services

## Introduction

1. Under section 47 of the National Health Service and Community Care Act 1990 (“the 1990 Act”), local authorities have a duty to assess the needs of any person for whom the authority may provide or arrange the provision of community care services and who may be in need of such services<sup>4</sup>. They have a further duty to decide, having regard to the results of the assessment, what, if any, services they should provide to meet the individual’s needs.
2. The term “community care services” is defined in section 46(3) of the 1990 Act and includes services under Part 3 of the National Assistance Act 1948 (“the 1948 Act”). This guidance is mainly concerned with these services, which are also referred to in it as “social care services”.
3. Once a decision has been made on the services that need to be provided, the duty to provide those services, whether these are residential or non-residential, primarily rests with the local authority in whose area the person is “ordinarily resident”.
4. Part 3 of the 1948 Act provides the statutory framework for the provision of residential accommodation and other community care services to people assessed as being in need of such services. It also contains provisions which can affect the determination of a person’s ordinary residence.
5. If there is a dispute between two or more local authorities about the ordinary residence of a person in need of services it should be resolved after the assessment and any provision of services. The provision of services should never be delayed because of uncertainty about which authority is responsible. An agreement to provide and fund services until the issue of ordinary residence is resolved has no bearing on the ultimate outcome. Where there is a dispute as to a person’s place of ordinary residence, one of the local authorities concerned is under a duty to provide any community care services required pending resolution of the issue. The local authority which is to provide services should be determined in accordance with directions issued by the Secretary of State<sup>5</sup> as follows:
  - if the person is already in receipt of services, the local authority providing them should continue to do so;
  - if the person is not in receipt of services, the local authorities in dispute may agree which of them will provide services pending the resolution of the dispute;
  - if the local authorities in dispute cannot agree, the local authority in which the person is living must provide the services; and
  - if the person is not living anywhere, the local authority in whose area the person is physically present (the “local authority of the moment”) must do so.

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<sup>4</sup> See paragraphs 6-8 below for more detail on the duty to assess and ordinary residence.

<sup>5</sup> See footnote 3 above.

## Community care services

### Community care assessments

6. Under section 47 of the 1990 Act, local authorities have a duty to assess the needs of any person for whom the authority may provide or arrange the provision of community care services and who may be in need of such services. Because local authorities have a *power* to provide services to people who live outside of their area, the duty to assess is not limited to people who are ordinarily resident in the authority's area. This gives rise to the question of when it might appear that a person who is not ordinarily resident in an authority's area "may be in need" of services.
7. Local authorities are already required to assess people who are about to be discharged from hospital and may need community care services under the delayed discharges legislation<sup>6</sup>. The Courts have recognised that a pragmatic approach needs to be taken in similar circumstances. For example, it was held in the case of R (on the application of B) v Camden LBC and Camden and Islington Mental Health and Social Care Trust [2005] 1366 (Admin) that the words "a person...may be in need of such services" refer to a person who may be in need at the time, or who may be *about to be* in need. That case concerned a detained patient whose conditional discharge had been deferred until suitable hostel accommodation could be found. A prisoner who will not be given parole until suitable care arrangements are in place would be in a similar position.
8. This pragmatic approach should also be taken in relation to people with firm plans to move to another local authority's area, for example, a person with a job offer who intends to take it up, subject to suitable community care services being available. Such people could be described as "about to be in need" in the local authority's area, even though they may already be in receipt of services in the area which they are leaving. The person's move must be reasonably certain: local authorities would not be obliged to assess a person who was simply considering a move to the area.

## The provision of residential and non-residential community care services

### Residential services

9. Section 21(1) of the 1948 Act provides each local authority with a power, and so far as directed by the Secretary of State, a duty, to provide residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.
10. The Secretary of State has converted the power to provide residential accommodation in section 21(1) of the 1948 into a duty by issuing directions<sup>7</sup>. These directions impose a

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<sup>6</sup> The Community Care (Delayed Discharges etc.) Act 2003.

<sup>7</sup> LAC(93)10: Approvals and Directions for Arrangements from 1 April 1993 contains approvals and directions by the Secretary of State in respect of the provision of residential accommodation and welfare services by local authorities. The Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 also direct local authorities to provide services to individuals pending the outcome of an ordinary residence dispute.

duty to provide residential accommodation to people to whom section 21 applies and who are “ordinarily resident” in the local authority’s area. They also direct local authorities to provide accommodation to people not ordinarily resident in the local authority area, but who are:

- in urgent need of accommodation (including temporary accommodation needed in unforeseen circumstances),
- are, or have been, suffering from a mental disorder, or
- require accommodation for the purposes of the prevention of mental disorder.

The Directions approve the provision of accommodation under section 21 in other cases, such as for people of no settled residence (see paragraphs 43-46), or people ordinarily resident in another local authority’s area where that local authority consents (see paragraphs 51-52).

11. Residential accommodation arranged under section 21 of the 1948 Act (commonly referred to as “Part 3 accommodation”) is usually, but not always, accommodation provided in a registered care home<sup>8</sup>, for the purpose of providing personal or nursing care. However, “care and attention” is a wider concept than “nursing or personal care” and thus Part 3 accommodation may be provided for the purpose of preventing illness as well as caring for those who are ill. The accommodation which may be provided under section 21 also includes ordinary housing where this is the only way to provide the care and attention required. For example, in R v Bristol City Council, ex parte Penfold (1998) 1 CCLR 315, it was held that a person with mental health needs could be provided with ordinary housing under section 21 as this was considered the best way to meet her assessed needs<sup>9</sup>.
12. Local authorities can use section 21 of the 1948 Act to place people in residential accommodation in another local authority area. This is commonly referred to as an ‘out of area’ placement and means the ‘placing’ local authority contracts directly with the accommodation provider in the other local authority area on behalf of the person concerned. Section 26(1) of the 1948 Act provides that local authorities can make arrangements with the independent sector for the provision of Part 3 accommodation, instead of providing the accommodation themselves. Certain restrictions on these arrangements apply. First, where local authorities make arrangements under section 26 for the provision of accommodation together with nursing and/or personal care, the accommodation must be provided in a registered care home. Second, the local authority remains financially liable for accommodation provided by the independent sector, although they are able to recover costs from individuals (see paragraph 13 below). **All references in this document to accommodation provided under section 21 of the 1948 Act, and to Part 3 accommodation, should be read as including accommodation provided by the independent sector in accordance with section 26 of the 1948 Act.**

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<sup>8</sup> From October 2010, subject to Parliamentary approval, “registered” will mean a care home which is managed by an organisation or person registered with the Care Quality Commission under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of a regulated activity (within the meaning of that Part) carried on in the home.

<sup>9</sup> See also R v Newham London Borough Council, ex parte Medical Foundation for the care of Victims of Torture (1997) 1 CCLR 227 and R (Batantu) v Islington London Borough Council (2000) 4 CCLR 445

13. Where section 21 accommodation is arranged, either within the area of the person's local authority or as an out of area placement, section 22(2) of the 1948 Act sets out that local authorities are required to charge individuals such sums as they are assessed as being able to pay. If a local authority makes arrangements for section 21 accommodation to be provided by the independent sector, the local authority may either make arrangements to pay the care home and be reimbursed as necessary by the person using services, or the person may pay the care home direct but with the local authority remaining liable for any excess or unpaid fees (section 26(2) of the 1948 Act).
14. If an out of area placement is arranged, this triggers the application of the "deeming provision" found in section 24(5) of the 1948 Act (see paragraphs 55-59), which can affect the decision as to a person's ordinary residence. The application of this provision can also be triggered in cases where a local authority was under a duty to provide accommodation under section 21, but failed to do so (see paragraph 58).
15. Paragraphs 77-83 (*Making arrangements under section 21 of the 1948 Act*) and paragraphs 92-101 (*People moving into independent living accommodation who have mental capacity*), together with paragraphs 102-104 (*People moving into independent living accommodation who lack the mental capacity to decide where to live*), deal further with the issue of whether a person is being provided with accommodation by a local authority under section 21 of the 1948 Act.

### Non-residential community care services

16. The power for local authorities to provide a range of non-residential community care services, such as care in a person's own home, is found in section 29 of the 1948 Act. Directions issued by the Secretary of State<sup>10</sup> under section 29 of the 1948 Act impose a duty to provide community care services under section 29(1) where a person is "ordinarily resident" in the local authority's area and approve the provision of such services in other cases. They also approve the provision of certain other non-residential community care services. There is a power, but not a duty, to provide services under section 29 to people who are not ordinarily resident in a local authority's area, including people who are in urgent need.
17. Section 2 of the Chronically Sick and Disabled Persons Act 1970 provides more detail on some of the services which may be provided under section 29. Section 2(1) provides individuals with a right to have the arrangements made which their local authority of ordinary residence is satisfied are necessary to meet their needs. This right may be enforced in court.

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<sup>10</sup> LAC(93)10 – see footnote 7 above.  
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## Ordinary residence

### Meaning of ordinary residence

18. Responsibility for the provision of accommodation and community care services under sections 21 and 29 of the 1948 Act is largely based on the concept of “ordinary residence”. However, there is no definition of “ordinary residence” in the 1948 Act. Therefore, the term should be given its ordinary and natural meaning subject to any interpretation by the courts.
19. In many cases, establishing a person’s ordinary residence is a straightforward matter. However, this is not always the case and where uncertainties arise, local authorities should consider each case on its own merits, taking relevant court judgments and Secretary of State determinations (see paragraphs 67-71) into account. The concept of ordinary residence involves questions of 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.
20. The courts have considered the meaning of “ordinary residence” and the leading case is that of Shah v London Borough of Barnet (1983) 1 All ER 226. 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.’*
21. Local authorities should always have regard to this case when determining the ordinary residence of people who have capacity to make their own decisions about where they wish to live (for people who lack capacity to make decisions about their accommodation, one of the alternative tests set out in R v Waltham Forest London Borough Council, ex Parte Vale (1985) Times 25 February (the “Vale case”, see paragraphs 27-34 below) should be used). The starting presumption is that a person does have such capacity unless it is shown otherwise.
22. Particular attention should be paid to Lord Scarman’s statement that ordinary residence is the place a person has voluntarily adopted for a settled purpose for **short or long duration**. Ordinary residence can be acquired as soon as a 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.

### Temporary absences

23. Local authorities should have regard to the case of Levene v Inland Revenue Commissioners (1928) AC 217. This case is particularly useful for considering the effect of temporary absences on a person’s ordinary residence or when assessing whether someone has lost their ordinary residence in a particular place. In this case, Viscount Cave stated:

*‘It [ordinary residence] connotes residence in a place with some degree of continuity and*

*apart from accidental or temporary absences.’*

24. Viscount Cave went on to give examples of temporary absence as being absences for the purpose of business or pleasure, such as a fisherman going away to sea. This issue of absence and its effect on ordinary residence was further considered in the case of Fox v Stirk 1970 2 QB 463. In this case, Lord Denning MR set out the principle that temporary absence does not deprive a person of their ordinary residence:

*‘If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.’*

### Urgent need during temporary absences

25. The fact that a person may be temporarily away from the local authority in which they are ordinarily resident does not preclude them from receiving accommodation and/or services from another local authority if they become in urgent need (see paragraphs 47–50).

### More than one place of residence

26. Although in general terms it would be possible for a person to have more than one ordinary residence (for example, a person who divides their time equally between two homes), this is not possible for the purposes of the 1948 Act. The purpose of the ordinary residence test in the 1948 Act is to determine which single local authority has responsibility for meeting a person’s eligible social care needs, and this purpose would be defeated if a person could have more than one ordinary residence. If a person appears genuinely to divide their time equally between two homes, it would be necessary to establish (from all of the circumstances) to which of the two homes the person has the stronger link. Where this is the case, it would be the responsibility of the local authority in which the person is ordinarily resident to provide or arrange services during the time the person is temporarily away at their second home. Scenario 4 on page 53 provides further guidance on how the ordinary residence provisions operate where a person lives in two different local authority areas.

### People who lack the mental capacity to decide where to live

27. All issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005 (“the 2005 Act”)<sup>11</sup>. 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. The test of capacity is set out in section 3 of the 2005 Act which states that a person is unable to make a decision for himself if he cannot:

- (a) understand the information relevant to the decision;
- (b) retain that information;
- (c) use or weigh that information as part of the process of making the decision; or
- (d) communicate his decision (whether by talking, using sign language or any other means).

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<sup>11</sup> The Mental Capacity Act 2005 Code of Practice is available at the following address:  
<http://www.dca.gov.uk/menincap/legis.htm#codeofpractice>

28. 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.
29. If it can be shown that a person lacks capacity to make a particular decision, the 2005 Act makes clear who can take decisions on behalf of others, in which situations and how they should go about doing this. For example, if a person lacks capacity to decide where to live, a best interests decision about their accommodation should be made under the 2005 Act. Under section 1(5) of this Act, any act done or decision made (which would include a decision relating to where a person without capacity should live) must be done in the best interests of the person who lacks capacity. Section 4 of the 2005 Act sets out how to work out the best interests of a person who lacks capacity and provides a checklist of factors for this purpose.
30. If a person has been placed in accommodation following a best interests decision under the 2005 Act and uncertainties arise about their place of ordinary residence, one of the alternative tests in the Vale case should be used to establish ordinary residence. However, a person's mental capacity should always be taken into account when making any decision about their ordinary residence and the Vale test should only be used where it can be shown that a person is not capable of forming their own decision as to where to live. This is because the Vale tests are based on the assumption that the person lacking capacity cannot have adopted their place of residence voluntarily, as required by the Shah test.

#### Test one

31. In the Vale case, Taylor J held that a young person with severe learning disabilities was ordinarily resident at her parents' house where she was temporarily living at the time. He stated that she was in the same position as a small child who was unable to choose where to live. He set out that where a person's learning disabilities were so severe as to render them totally dependent on a parent or guardian then *'the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise'*. The judge rejected the possibility of the young person having an ordinary residence in a place that she had left or in a place where she may go in the future.
32. Ordinary residence determination 8-2008<sup>12</sup> provides an example of 'test one' in Vale.
33. **However, the approach set out in test one of Vale may not always be appropriate and should be used with caution: its relevance will vary according to the ability of the person to make their own choices and the extent to which they rely on their parents or carers.** This Vale test should **only** be applied when making decisions about ordinary residence cases with similar material facts to those in Vale. For example, in cases involving older people whose parents are deceased, people who have become ordinarily resident in an area and then lost capacity, or younger people who have either lived independently of their parents prior to losing capacity or have limited contact with them, this test may not be appropriate and the alternative approach set out in Vale should be used.

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<sup>12</sup> The Department of Health makes available anonymised copies of determinations at the following web address: [http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/Ordinaryresidence/DH\\_079349](http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/Ordinaryresidence/DH_079349)  
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## Test two

34. The alternative approach involves considering a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in Shah, but without requiring the person themselves to have adopted the residence voluntarily. See ordinary residence determination 5-2006<sup>13</sup> for an example of the alternative Vale test.

## People from overseas

35. The entitlement of overseas visitors to community care services is outside the scope of this guidance. There are, however, two main statutory exclusions from the provision of community care services to certain people from overseas. Firstly, services under section 21 or 29 of the 1948 Act may not be provided to certain groups of people from overseas by virtue of Schedule 3 to the Nationality, Immigration and Asylum Act 2002. These groups include nationals of the European Economic Area, people with refugee status abroad, failed asylum seekers who have not co-operated with removal directions and other individuals unlawfully in the UK and who are not asylum seekers. The exclusion does not apply to these groups if a failure to provide services under sections 21 or 29 of the 1948 Act would breach their rights under the European Convention on Human Rights or under the European Treaties.
36. There is also a restriction in section 21 of the 1948 Act itself, which prevents local authorities, in certain cases, from providing services under that section to people to whom section 115 of the Immigration and Asylum Act 1999 applies (broadly, people subject to immigration control, which includes asylum seekers and failed asylum seekers). Residential accommodation may not be provided under section 21 to such people if the person's need for care and attention has arisen solely because the person is destitute, or because of the physical effects, or anticipated physical effects, of being destitute. This means a person subject to immigration control would not be eligible for residential accommodation if they were merely destitute<sup>14</sup>.
37. A person from overseas who is not excluded from receiving services by virtue of one of these provisions should have their ordinary residence assessed in the usual way. A person's immigration status may be a factor to take into account in determining ordinary residence; for example it may be relevant to the consideration of the person's intentions (in accordance with the Shah case). However, the fact that a person is unlawfully resident in the UK does not of itself mean that they cannot acquire ordinary residence in a local authority's area for the purposes of section 24(1) of the 1948 Act.
- 37b. In ordinary residence determination OR 9 2010 (published on 20/01/2011), the Secretary of State considered that the person's immigration status was not relevant to the consideration of ordinary residence for these purposes.

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<sup>13</sup> See footnote 12 above.

<sup>14</sup> Local authorities may wish to refer to the *No Recourse to Public Funds Network* for practical information and support on issues relating to people with no recourse to public funds.  
[http://www.islington.gov.uk/Health/ServicesForAdults/nrpf\\_network/](http://www.islington.gov.uk/Health/ServicesForAdults/nrpf_network/)

## The statutory framework on ordinary residence in the 1948 Act

38. The statutory framework on ordinary residence is set out in sections 24, 29 and 32(3) to (5) of the 1948 Act, and the supporting directions<sup>15</sup>.

39. Section 24 contains the key provisions on ordinary residence that relate to **residential accommodation**. These provisions set out where responsibility lies between local authorities for the provision of Part 3 accommodation for people with assessed needs:

- Section 24(1) provides that it is the local authority in which the person is ordinarily resident that has power to provide residential accommodation, and directions made under section 21 convert this power into a duty<sup>16</sup>.
- Section 24(3) enables local authorities to treat those of “no settled residence” or “in urgent need” as if they are ordinarily resident in their area and provide them with residential accommodation. Directions made under section 21 convert this power into a duty in relation to people in urgent need (see paragraphs 43-50 for more details on the identification of those of “no settled residence” or “in urgent need”).
- Section 24(4) provides local authorities with a power to provide residential accommodation for persons ordinarily resident in another local authority area, provided they have the consent of the other local authority to do so.
- Section 24(5) sets out the first of two provisions which disapply the normal approach to ordinary residence (referred to in this guidance as the “deeming provisions”) and provides that where a person is provided with residential accommodation under Part 3, they are deemed to continue to be ordinarily resident in the area (if any) in which they were ordinarily resident immediately before the residential accommodation was provided.
- Section 24(6) sets out the second of the two deeming provisions and provides that a person who is in receipt of NHS accommodation<sup>17</sup> is deemed to be ordinarily resident in the area (if any) in which they were ordinarily resident immediately before they were provided with the NHS accommodation (see paragraphs 53-66 for more details on the two deeming provisions).

### **Section 24 applies to residential accommodation only. It does not apply to services provided under section 29 of the 1948 Act.**

40. Section 29(1) provides that it is the local authority in which a person is ordinarily resident that has a power to provide non-residential services, and directions made under this section convert this power into a duty<sup>18</sup>.

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<sup>15</sup> LAC(93)10 – see footnote 7 above.

<sup>16</sup> LAC(93)10 – see footnote 7 above.

<sup>17</sup> In the guidance, the term “NHS accommodation” means accommodation within the meaning of section 24(7) of the National Assistance Act 1948, as amended by section 148 of the Health and Social Care Act 2008. This term means: “accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or accommodation provided under section 117 of the Mental Health Act 1983 by a PCT or Local Health Board, other than accommodation so provided jointly with another authority.

<sup>18</sup> LAC(93)10 – see footnote 7 above.

41. Section 32(3) gives the Secretary of State responsibility for determining ordinary residence disputes arising under Part 3 of the 1948 Act. The procedure for applying to the Secretary of State for a determination is dealt with in Part 5 of this guidance. Section 32(4) and (5) deal with cross-border disputes between English and Welsh local authorities.

42. Some of the above provisions are dealt with in more detail below.

### **Section 24(3): persons of “no settled residence” and persons in “urgent need”**

#### **No settled residence**

43. Under section 24(3) of the 1948 Act, local authorities have a power to treat people of “no settled residence” as if they were ordinarily resident in their area and provide them with Part 3 accommodation.

44. Where doubts arise in respect of a person’s ordinary residence, it is usually possible for local authorities to decide that the person has resided in one place long enough, or has sufficiently firm intentions in relation to that place, to have acquired an ordinary residence there. Therefore, it should only be in rare circumstances that local authorities conclude that someone is of no settled residence for the purpose of providing Part 3 accommodation. For example, if a person has clearly and intentionally left their previous residence and moved to stay elsewhere on a temporary basis during which time their circumstances change, a local authority may conclude the person to be of no settled residence. A local authority may also conclude that a person arriving from abroad is of no settled residence, including those people who are returning to England after a period of residing abroad and who have given up their previous home in this country, although note paragraph 22 of this guidance. For more details on people returning to England after a period of living abroad, see paragraphs 129-132 (*British citizens resuming permanent residence in England after a period abroad*).

45. The courts considered the application of section 24(3) in relation to the meaning of no settled residence in the case of R v London Borough of Redbridge ex parte East Sussex County Council (1992) Times, 31 December. In this case, the judge held that young twins with learning disabilities who had been placed in a residential school in East Sussex by the London Borough of Redbridge, where their parents had previously lived, were of no settled residence when their school closed. At this point, their parents had returned to Nigeria and were therefore no longer ordinarily resident in Redbridge. Consequently, applying the principles outlined in the Vale case the judge found that Redbridge no longer had any duty towards the twins and made a finding of no settled residence. However a duty to make provision fell on East Sussex County Council as the “local authority of the moment”<sup>19</sup> because the twins were physically present in that county and were suffering from mental disorder.

46. However, as set out in the case of R (Greenwich) v Secretary of State and Bexley (2006) EWHC 2576 (Admin) (“the Greenwich case”), local authorities should exercise caution when making a finding that a person is of no settled residence. In this case, the judge said that a factor to take into account when considering whether a person had lost an ordinary residence in one local authority was whether they had acquired one in a new

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<sup>19</sup> In this guidance, “local authority of the moment” means the local authority in which the person in need of services is physically present.

local authority. This is because those of no settled residence under the 1948 Act have a lesser degree of protection than people with an ordinary residence, and the judge said that the desirability of a local authority retaining a duty to the person in question was a relevant factor in the case (see paragraph 87 of the judgement). For practical guidance on the circumstances that are likely to lead to a finding of no settled residence see ordinary residence determinations 1-2008 and 13-2007<sup>20</sup> and the following scenario.

### **Scenario: persons of no settled residence**

David is 20 years old and has a physical disability together with mild learning disabilities. Until four months ago, he lived with his family in local authority A. However, his family relationship broke down and his parents asked him to leave their home for good. They have since changed the locks on their house.

He sought help from local authority A and was placed in a care home for young people with disabilities located in local authority A. This placement was made on a short-term basis until a more permanent solution for David could be found. However, David chose to leave the care home after a few weeks and stayed with friends in local authority B for a short period. However, he has recently presented at local authority B seeking accommodation on the basis that he is a destitute adult who is in need of care and attention. Local authority B provides David with residential accommodation under Part 3 of the National Assistance Act 1948 but falls into dispute with local authority A over his place of ordinary residence.

Local authority B contends that David remains ordinarily resident in local authority A given his previous residence there and his recent discharge from their care. Local authority A argues that David has acquired a new ordinary residence in local authority B.

As David is being provided with Part 3 accommodation by local authority B, section 24(5) of the 1948 Act applies and he is deemed to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him. The day before David presented at local authority B he was staying with friends in that local authority area. His friends made it clear that this was a short-term temporary arrangement, to prevent him becoming homeless upon leaving the care home in local authority A. He had not built up any community ties within the area of local authority B; nor had he chosen to reside in local authority B voluntarily and for settled purposes. Therefore, under the Shah test, David has not acquired an ordinary residence in local authority B.

However, nor does it appear that David has retained his ordinary residence in local authority A where he lived with his parents. He left the care home in local authority A intentionally and has no settled residence to which he can return. As David appears not to have been ordinarily resident in either local

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<sup>20</sup> See footnote 12 above.  
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authority A or local authority B immediately before he presented at local authority B and was provided with Part 3 accommodation, it is decided that he is a person of no settled residence. Section 24(3) of the National Assistance Act 1948 enables local authorities to accommodate people of no settled residence as if they are ordinarily resident in their local authority area. Local authority B can therefore treat David as if he were ordinarily resident in their area and provide him with accommodation. If he is in urgent need, they will be under a duty to do so.

### Urgent need

47. Occasionally, a person who is ordinarily resident in one local authority area may become in urgent need of Part 3 accommodation in another local authority area. Under Directions<sup>21</sup> issued by the Secretary of State, local authorities have a duty to provide Part 3 accommodation to people who are not ordinarily resident in their area but who are in urgent need of such accommodation (direction 2(1)(b)). In particular, local authorities have a duty to provide temporary accommodation to people in urgent need in circumstances where the need for that accommodation could not reasonably have been foreseen (direction 2(2)).
48. For example, an urgent need for accommodation may arise where a person with severe learning disabilities is on holiday or visiting someone with their carer in another area and the carer unexpectedly has to be taken to hospital. In this case, the person with learning disabilities may be without assistance and/or unable to care for himself and may become in urgent need of residential accommodation, albeit on a short term basis. Similarly, an urgent need may arise where an older person, who is ordinarily resident in one local authority area, stays with their family in another local authority area during a holiday period but the caring responsibilities prove too much for the family and they seek assistance from their local authority on the basis that their relative is in urgent need.
49. In circumstances where a person who is ordinarily resident in one local authority area becomes in urgent need in another local authority area, the person's local authority of ordinary residence and the local authority of the moment both have a duty to provide Part 3 accommodation. However, it is the responsibility of the local authority of the moment (that is, the local authority in whose area the person is physically located) to make a community care assessment and provide any necessary accommodation under section 21. On rare occasions, a person with urgent needs who has been provided with Part 3 accommodation by the local authority of the moment may be unable to return to their own local authority because of a change in circumstances. In this situation, decisions relating to ordinary residence must be made on an individual basis: the local authority of the moment and the person's local authority of ordinary residence would need to consider all the facts of the case to determine whether the person's ordinary residence had changed.
50. A person of no settled residence in urgent need of section 21 accommodation is effectively entitled to choose which authority is to provide the accommodation. In R (S) v Lewisham London Borough Council and others (2008) EWHC 1290 (Admin), the High Court considered the case of a woman of no settled residence with severe mental illness. The Court held that whichever authority the woman approached would be liable to provide

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<sup>21</sup> LAC(93)10 – see footnote 7 above.  
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her with accommodation. The application does not have to be made to the authority in whose area the need arose. Physical presence in the authority's area is necessary, however, and a letter sent to another authority is not sufficient to fix it with liability<sup>22</sup>.

### Section 24(4): accommodation provided by one local authority on behalf of another

51. If a person does not come within the terms of section 24(3) of the 1948 Act but nevertheless is in need of Part 3 accommodation in another local authority area, the local authority in which the person is physically present has a power to provide residential accommodation under section 24(4) of the 1948 Act, as long as they have the consent of the local authority in which the person is ordinarily resident.
52. For example, a local authority may need to provide Part 3 accommodation on behalf of another in a situation where a person has been discharged from hospital and needs residential accommodation under the 1948 Act but wishes to remain living in the local authority in which he received hospital treatment, perhaps to be near family members. In these circumstances, the deeming provision in section 24(6) (see paragraphs 60-65) would generally apply and the person would be deemed to remain ordinarily resident in the area in which they were ordinarily resident before they were admitted to hospital. However, the local authority where the person was living on discharge from hospital could provide the residential accommodation, with the consent of his local authority of ordinary residence.

### Sections 24(5) & 24(6): the “deeming provisions”

53. The “deeming provisions” are found in sections 24(5) and 24(6) of the 1948 Act. If they apply, they affect the date at which a person's ordinary residence falls to be determined. Broadly, they set out that a person's prior ordinary residence is retained where that person is placed by a local authority in Part 3 accommodation in the area of another local authority, or is a person provided with NHS accommodation.
54. **The deeming provisions only apply in relation to the ordinary residence of people who are provided with Part 3 accommodation.** If a person is only provided with non-residential community care services, the deeming provisions do not apply.

### Section 24(5): Part 3 residential accommodation

55. Section 24(5) sets out that where a person is provided with residential accommodation under Part 3 of the Act, they are *deemed* to continue to be ordinarily resident in the area in which they were ordinarily resident (if any) immediately before the residential accommodation was provided. This means that where a local authority places a person in accommodation out of their area, they will retain the same responsibility for that person as if they were placed in accommodation within their own area.
56. There may be occasions where it is necessary for a local authority to place a person in accommodation in another local authority area. This may be because the person is in need of specialist accommodation that is only available in another local authority area or they have expressed a wish to live in a particular care home that is outside of the local

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<sup>22</sup> Mohammed N [2003] EWHC 3419 (Admin).  
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authority boundary<sup>23</sup>. In such cases, the person placed “out of area” is *deemed* to continue to be ordinarily resident in the area of the “placing” local authority<sup>24</sup> and does not acquire an ordinary residence in the “host” local authority<sup>25</sup>.

57. If a local authority places someone out of area in accommodation provided by the independent sector, **they should always inform the host authority of the placement.** This is to ensure the host authority is aware of the person in their area and to enable both authorities to agree on the suitability of the placement. The placing authority should also ensure that satisfactory arrangements are made before the placement for any necessary support services, such as day care, and that clear agreements are in place for funding all aspects of the person’s care. For example, the placing local authority may negotiate for support services to be provided by the host authority and reimburse the costs.
58. It should be noted that local authorities cannot escape the effect of the deeming provision in circumstances where they are under a duty to provide Part 3 accommodation, but they fail to make the necessary arrangements. In such a case, the person’s ordinary residence would fall to be assessed at the date immediately before the accommodation should have been provided. This was made clear in the Greenwich case (see paragraph 55 of the judgment).
59. For more details on the Greenwich case and the application of the section 24(5) deeming provision, see the scenarios on pages 27, 31, 34 and 36.

### Section 24(6): NHS accommodation

60. The second deeming provision, found in section 24(6) of the 1948 Act, relates to the ordinary residence of people for whom NHS accommodation is provided. This provision sets out that, for the purposes of the provision of Part 3 accommodation, a person for whom NHS accommodation is provided is to be treated as being ordinarily resident in the place where they were ordinarily resident just before the NHS accommodation was provided. The effect of this is that, where a person is discharged from NHS accommodation, and is then provided with Part 3 accommodation, they are *deemed* to be ordinarily resident in the area (if any) in which they were ordinarily resident before their move to NHS accommodation. The local authority in whose area they were ordinarily resident prior to their admission to NHS accommodation will be responsible for them, even if the Part 3 accommodation is not in that local authority’s area.
61. For example, where a person who is ordinarily resident in the area of local authority A is admitted to NHS accommodation in the area of local authority B and on discharge from that NHS accommodation requires Part 3 accommodation in a specialist care home in the area of local authority C, their ordinary residence remains with local authority A. The person does not acquire a new ordinary residence during their stay in NHS accommodation, or in the area where the Part 3 accommodation is provided, and authority A remains responsible for the provision of their care.

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<sup>23</sup> Under National Assistance Act 1948 (Choice of Accommodation) Directions 1992 local authorities must allow people assessed as needing social care services to exercise genuine choice over where they live.

<sup>24</sup> The “placing authority” is the local authority which places a person in residential accommodation in another local authority’s area.

<sup>25</sup> The “host” local authority is the local authority in whose area the person is placed in residential accommodation.

62. The section 24(6) deeming provision was extended by section 148(1) of the Health and Social Care Act 2008 to apply in all settings where NHS accommodation is provided. This amendment is to reflect changes to the way in which NHS services are being delivered. NHS care is no longer always provided in traditional NHS hospital settings: in order to improve efficiency and flexibility, the NHS is increasingly making use of the independent sector to deliver its services (although such services remain funded by the NHS). Therefore, the amended deeming provision ensures that people living in independent sector residential accommodation which is funded by the NHS, for example those people in receipt of NHS CHC, do not acquire an ordinary residence in that area. For more details on the application of the section 24(6) deeming provision, see paragraphs 112-115 (NHS Continuing Healthcare) and the scenario on page 39.

62b. It should be noted there is an exception to the extended deeming provision for people who were already in non-hospital NHS accommodation when the amendment to section 24(6) came into force (19 April 2010). Under transitional provisions<sup>(26)</sup>, this group are not caught by the deeming provision for as long as they continue to be in that accommodation. This is explained further at paragraphs 115b below.

63. Under section 24(6A) of the 1948 Act (as inserted by section 148(1) of the Health and Social Care Act 2008), "NHS accommodation" is defined as:

- accommodation (at a hospital or elsewhere) provided under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or
- accommodation provided under section 117 of the Mental Health Act 1983 by a Primary Care Trust or Local Health Board other than accommodation so provided jointly with a local authority'.<sup>27</sup>

Section 24(6) of the 1948 Act states:

"For the purposes of the provision of residential accommodation under this Part, a patient ("P") for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided to P, whether or not P in fact continues to be ordinarily resident in that area."

64. The Department's view is that the word "ordinarily" has been omitted from this provision in error, and that this subsection should be read as though the word "ordinarily" were inserted before "resident" in the third line. This is because the context of the section clearly indicates that the area referred to is the area of ordinary residence, rather than actual residence: the reference to "if any" does not readily apply to actual residence which everyone has, whereas not everyone has an ordinary residence. In addition, P is

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<sup>26</sup> Article 12(1) of S.I. 2010/708.

<sup>27</sup> By virtue of section 13 of, and Schedule 1 to, the Health Act 2009, an additional subsection is inserted into section 24 with effect from 19th January 2010, which provides: "(6B) The reference in subsection (6A)(b) to accommodation provided by a Primary Care Trust includes a reference to accommodation- (a) in respect of which direct payments are made under regulations under section 12A(4) of the National Health Service Act 2006, and (b) which would be provided under section 117 of the Mental Health Act 1983 apart from the regulations."

described as *continuing*, or not *continuing*, to be *ordinarily* resident (as opposed to just resident) in the area.

65. In the Department's view, a rectifying construction can be applied to this subsection, to avoid a manifest inconsistency with Parliament's intention. The intention behind the amended section 24(6) was to extend the types of NHS accommodation to which the deeming provision applies, and not to change the fact that the person is treated as being ordinarily resident in their prior area of *ordinary* residence following a period in NHS accommodation, and not their prior area of *actual* residence (which could be different). This intention is made clear in the Explanatory Notes to the Health and Social Care Act 2008<sup>28</sup>. A similar approach was taken by the courts when the word "ordinarily" was unintentionally omitted from the Children Act 1989<sup>29</sup>. This is the approach the Secretary of State will adopt when determining ordinary residence disputes which involve section 24(6).

### Deeming provisions: summary

66. It is important to remember that the only effect of the deeming provisions is to change the date at which a person's ordinary residence falls to be assessed. They do not affect the way in which the ordinary residence assessment should be carried out.

### Section 32(3): Secretary of State determinations

67. Section 32(3) of the 1948 Act (as amended by section 148 of the Health and Social Care Act 2008) provides that any question arising under Part 3 of the 1948 Act as to the ordinary residence of a person shall be determined by the Secretary of State or the Welsh Ministers (see Part 5 of this guidance for more details on the procedure for submitting a request for a determination to the Secretary of State).

68. Subsection 32(4) of the 1948 Act (as inserted by section 148 of the Health and Social Care Act 2008) provides that arrangements for determining cross-border disputes between England and Wales must be made and published<sup>30</sup>. These arrangements set out that where the dispute involves a person who is living in England at the time the dispute is referred, the Secretary of State will determine the dispute, and where the person is living in Wales when the dispute is referred, the Welsh Ministers will determine the dispute.

69. Determinations under section 32(3) of the 1948 Act can be sought in relation to any ordinary residence dispute arising under Part 3 of the 1948 Act, including disputes over the provision of residential accommodation under section 21 of the 1948 Act and disputes over the provision of community care services under section 29 of that Act<sup>31</sup>. However, determinations cannot be speculative: they cannot be sought before a person has been assessed as needing social care services. Once a person has been assessed as being in need of services, one of the local authorities involved in the dispute must accept responsibility for their provision, in accordance with directions issued by the Secretary of State<sup>32</sup>.

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<sup>28</sup> [http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen\\_20080014\\_en\\_1](http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080014_en_1)

<sup>29</sup> *Northamptonshire Council v Islington Borough Council* [1999] Fam Law 687

<sup>30</sup> See: <http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/Ordinaryresidence/index.htm>

<sup>31</sup> Requests for Secretary of State determinations commonly concern the provision of accommodation under section 21 of the 1948 Act. See determination 12-2007 for an example of a determination concerning community care services under section 29 of the 1948 Act.

<sup>32</sup> See footnote 3 above.

70. Determinations can also be sought under section 32(3) of the 1948 Act where a dispute over ordinary residence arises in relation to services provided under section 2 of the Chronically Sick and Disabled Persons Act 1970. The Health and Social Care Act 2008 amended section 2 of the Chronically Sick and Disabled Persons Act 1970 to make this possible. Previously, local authorities had to seek resolution of such disputes from the courts.

71. The Department of Health makes available on its website anonymised copies of determinations it has made<sup>33</sup>. Although these cannot be determinative, as each case must be considered in the light of its own particular facts, they may provide local authorities with useful guidance when faced with similar circumstances.

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<sup>33</sup> See footnote 12 above.

## PART 2: particular situations in which a person's ordinary residence may be an issue

### People who are self-funding their residential care

72. When a person moves into permanent residential accommodation in a new area under private arrangements<sup>34</sup>, and is funding their own care, they usually acquire an ordinary residence in this new area, in line with the “settled purpose” test in Shah. If so, and if they subsequently become in need of community care services, they should approach the local authority in which their residential accommodation is situated.
73. In the Greenwich case, the courts considered the ordinary residence of an older person who had moved into residential accommodation in another area under private arrangements and subsequently needed to be provided with that accommodation by a local authority due to a lack of funds. The court found the person to be ordinarily resident in her new area. The person's ordinary residence fell to be determined at the date immediately before the accommodation was provided for her by a local authority and not immediately before she entered the residential accommodation as a self-funder. This was the case even though it was known at the time of her move that her funds would shortly fall below the upper capital limit in the National Assistance (Assessment of Resources) Regulations 1992<sup>35</sup>. It was argued in the Greenwich case that this meant that she was in imminent need of Part 3 accommodation at the time of her move and therefore remained ordinarily resident in her former local authority area. The judge rejected this argument.
74. The situation would be different if the reason the person made private arrangements was because of a failure by the local authority to provide the accommodation in circumstances where it was under a duty to do so. In that case, the deeming provision in section 24(5) of the 1948 Act (see paragraphs 55-59) would apply, and the person's ordinary residence would fall to be assessed at the date immediately before the accommodation should have been provided.
75. Sometimes, a person with sufficient means to pay for their care may not be able to enter into a private agreement with their care home for the provision of their care. This may be because they do not have the mental capacity to do so and have no attorney or deputy to act on their behalf, or it may be that, even though they have the capacity to decide where to live, they are not able to manage the making of the arrangements and have no friends or relatives to assist them. In such cases, the local authority would be responsible for making arrangements for the provision of their accommodation under Part 3 of the 1948 Act, with reimbursement from the person as necessary<sup>36</sup>. As such, the deeming provision

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<sup>34</sup> Where a self-funder makes arrangements to enter residential accommodation without their local authority taking responsibility for the placement and contracting with the care home (even if the local authority provides assistance with the move), this is commonly referred to as entering residential accommodation under 'private arrangements'.

<sup>35</sup> When carrying out a financial assessment for residential accommodation, local authorities must use the National Assistance (Assessment of Resources) Regulations 1992 in conjunction with the Charges for Residential Accommodation Guide (CRAG). The regulations and CRAG are updated annually.

<sup>36</sup> LAC(98)19 sets out that where an individual with sufficient funds is unable to make their own residential care arrangements, and has no one to act on their behalf, responsibility for making arrangements and contracting for the person's care falls to the local authority.

in section 24(5) of the 1948 Act would apply and the person would remain ordinarily resident in their placing local authority, even where they enter the accommodation in another local authority area.

76. For further guidance on the ordinary residence provisions as they relate to people who self-fund their care, see ordinary residence determinations 5-2006, 4-2007 and 8-2007<sup>37</sup> and the scenario below.

**Scenario: people who are self-funding their residential care**

Wendy is 82 years old and very frail. Following a fall and a stay in hospital, she is assessed as needing residential care under Part 3 of the National Assistance Act 1948. A financial assessment undertaken by her local authority, local authority A, concludes that she does not qualify for local authority financial assistance.

Local authority A provides advice to Wendy and her family on care homes in Local authority A and surrounding areas and help her to select a home that best meets her requirements. The care home is located in local authority B as Wendy has expressed a desire to move closer to her family. Wendy moves into the care home as a self-funder and signs a contract with the care home for the provision of her care.

A few months after Wendy moves into the care home, her savings fall below the capital limit and she approaches local authority A for support. She is advised by local authority A that she is no longer ordinarily resident in their local authority and that she should seek financial assistance from local authority B. Local authority B agrees to fund Wendy's accommodation costs but immediately falls into dispute with local authority A over her place of ordinary residence. Local authority B disagrees with A's argument that Wendy has acquired an ordinary residence in their area and contends that she remains the responsibility of local authority A as that is where she has lived for most of her life.

As Wendy is being provided with Part 3 accommodation, section 24(5) of the 1948 Act applies and she is deemed to continue to be ordinarily resident in the area in which she was ordinarily resident immediately before her Part 3 accommodation was provided. Immediately before Wendy was provided with Part 3 accommodation she was living in the same care home as a self-funder. She had voluntarily left local authority A and moved to the care home in local authority B, which she had adopted voluntarily and for settled purposes. Therefore, Wendy is found to be ordinarily resident in local authority B.

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<sup>37</sup> See footnote 12 above.  
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## Making arrangements under section 21 of the 1948 Act

77. Under section 21 of the 1948 Act, local authorities have a duty to “make arrangements” for the provision of residential accommodation for certain persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. What is meant by the term “make arrangements” has been the subject of court judgments and Secretary of State determinations.
78. Section 26(1) of the 1948 Act allows local authorities to make arrangements under section 21 for Part 3 accommodation to be provided to a person by the independent sector. In that case, section 26(2) requires that the arrangements made must provide for the local authority to pay the care home at such rates as may be determined by the arrangements. If the arrangements are not in accordance with section 26(2), then any accommodation provided does not count as Part 3 accommodation. This was confirmed in the case of Chief Adjudication Officer v Quinn Gibbon 1996 4 All ER 72, where Lord Slynn held that:
- “.....arrangements made in order to qualify as the provision of Part 3 accommodation under section 26 must include a provision for payments to be made by a local authority to the voluntary organisation at rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2), then residential accommodation within the meaning of Part 3 is not provided....”.*
79. Section 26(3) of the 1948 Act provides that, where a local authority makes arrangements for a person to be provided with Part 3 accommodation, the person is liable to refund the local authority the amount of the payments made by the local authority on the person’s behalf to the provider of the accommodation. However, where the local authority is satisfied that the person cannot pay the amount in full, the person must refund such lesser amount (if any) as they are assessed as being liable to pay. Section 26(2) provides that the local authority shall recover from the service user the amount of the refund he or she is liable to make.
80. Section 26(3A) provides an alternative to the local authority recovering contributions from the person in receipt of services. By agreement between the three parties involved, the person in receipt of services can pay the provider direct for the amount for which he/she is liable and the local authority can pay the difference (if any) between this amount and what the local authority would otherwise have been liable to pay. In order to satisfy section 26(3A), there must also be provision for the local authority to be liable for any fees unpaid by the service user. This is because section 26(3A)(a) provides that the local authority is not required to make any payments in respect of the accommodation, and the individual is not required to refund any contributions to the local authority, “so long as the person concerned makes the payments for which he is liable”.
81. In a determination made by the Secretary of State<sup>38</sup>, an older person who had been resident in one local authority area moved to residential accommodation in a new local authority area under private arrangements but with advice and assistance from a social worker in her original authority. When her capital fell below the capital limit, she subsequently sought financial assistance from the new local authority which triggered a

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<sup>38</sup> Ordinary residence determination 3-1996: see footnote 12 above.  
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dispute between the two authorities over her ordinary residence. The new authority argued that the deeming provision in section 24(5) of the 1948 Act applied, as the assistance given to her by her old authority amounted to “making arrangements” under section 21 of the 1948 Act.

82. The Secretary of State determined that the person was ordinarily resident in the new authority. He set out that local authorities can offer advice, information and help in moving to a new home without “making arrangements” under the 1948 Act. He further set out that unless a contract is made between the local authority and care home in question, any assistance given falls short of “making arrangements” under the 1948 Act. It should be noted that if the person is liable for the full amount of their accommodation costs, the contract might only need to provide for the local authority to be liable for any fees unpaid by the service user.
83. The fact that arrangements have not been made in accordance with section 26 of the 1948 Act would not prevent the application of the deeming provision in section 24(5) in a case where the local authority was under a duty to provide Part 3 accommodation but failed to do so (see paragraph 58).

### People who are accommodated under the 12 week property disregard

84. Under the National Assistance (Assessment of Resources) Regulations 1992<sup>39</sup> every person entering residential accommodation who owns a property but who does not have sufficient income or assets (as defined in the regulations), excluding their property, to cover the cost of their care is entitled to have the value of their property disregarded for a 12 week period. This 12 week property disregard provides a period of limited state financial support and offers people an opportunity to consider how best to fund their accommodation. For some people this may involve a decision to sell their home in order to fund their care from the proceeds. For others, it allows time for the arrangement of a deferred payment agreement (see paragraphs 87 to 91 below)
85. During the 12 week disregard period the person’s residential accommodation is provided under Part 3 of the 1948 Act and funded by the local authority in which they are ordinarily resident. The local authority may place the person in residential accommodation in the area of another local authority, for example because they have expressed a desire to be near family members, but remains the responsible authority during this period. However, at the end of the 12 week period, the value of the person’s home is taken into account (unless it remains the home of the person’s spouse, civil partner, partner or certain other relatives). This may result in the person becoming a self-funder and entering into a private contract with the care home for the provision of their care on a permanent basis, rather than continuing to be provided with Part 3 accommodation by their placing authority. In such a case, the person would be likely to acquire an ordinary residence in the new area, in line with the settled purpose test in Shah. If the person subsequently requires local authority funded community care services, including Part 3 accommodation, they should approach the local authority for the area of their care home. However, if they enter into a deferred payment agreement with the original authority or there is another reason, such as

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<sup>39</sup> Under section 22(2) of the 1948 Act, local authorities arranging Part 3 accommodation are required to charge individuals such sums as they are assessed as being able to pay. See footnote 34 above.

lack of mental capacity, as to why they were unable to enter into a private contract with the care home (see paragraph 73), they remain the responsibility of the original authority.

86. If a person enters permanent residential accommodation under private arrangements and has sufficient income or assets, over and above the value of their main or only home, to cover the cost of their care, they are not entitled to have the value of their property disregarded for a 12 week period for charging purposes **at the point at which they enter the care home**. However, if their capital (excluding the value of their home) subsequently decreases to the upper capital limit, they are entitled to have the value of their property disregarded for 12 weeks from the point at which their capital reaches that limit. In such a case, it is likely that the person would have acquired an ordinary residence in the area in which their care home is situated (see paragraph 82 above and paragraphs 72-76 (*People who are self-funding their residential care*)). If this is the case, it would be the local authority in whose area the care home is situated which would be responsible for funding the person's accommodation during the 12 week disregard period.

### People who are party to deferred payment agreements

87. Section 55 of the Health and Social Care Act 2001 provides local authorities with a discretionary power to operate deferred payment agreements. These agreements extend choice and enable people to postpone the sale of their property on entering residential accommodation, if they wish to do so. The individual enters into an agreement with their local authority to have their care home fees paid by the local authority and for these payments to be recovered from their estate at the end of the agreement, at which point the property is usually sold. The individual grants the local authority a charge over their property for this purpose.
88. Although local authorities have discretion as to whether or not to provide deferred payment in individual cases, they should always ensure that individuals who are to become permanent residents are made aware of the possibility of entering into a deferred payment agreement<sup>40 41</sup>. Information about deferred payment agreements should be given at the time the person decides to enter residential accommodation or, where a person is initially accommodated under the 12 week property disregard, during this 12 week period at the latest. It is good practice for local authorities to record any information about deferred payment agreements, including whether a deferred payment was offered, whether an application was made by the individual, and whether this application was accepted or rejected.
89. It is the local authority in which the person is ordinarily resident that has responsibility for offering and funding a deferred payment. Where a person who is ordinarily resident in the area of local authority A has been placed in residential accommodation in the area of local authority B, and the value of that person's home is being disregarded for 12 weeks, local authority A should offer the person the option of having a deferred payment at the end of the 12 week period. If the person accepts the offer and enters into a deferred payment agreement, local authority A remains responsible for funding their care (minus any contributions from means-tested income and assets) and maintaining a contract with the care home on their behalf. These actions constitute the making of arrangements under

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<sup>40</sup> LAC(2001)25.

<sup>41</sup> Local authorities may be challenged if they do not consider exercising their discretion to offer deferred payment agreements (see CI(2002)12). The Local Government Ombudsman found maladministration where a deferred payments scheme had not been introduced (see complaint 04/C/04804).

section 21 of the 1948 Act and the deeming provisions apply: the person remains ordinarily resident in the area of local authority A and does not acquire an ordinary residence in the area of local authority B.

90. However, if the person decides against having a deferred payment, they revert to self-funding status at the end of the 12 week property disregard period. At this point, they would be likely to acquire an ordinary residence in the area of local authority B, in line with the principles set out in the Shah test. If they later require local authority funded community care services, including the option to enter into a deferred payment agreement, they should approach local authority B. The situation would be different, however, if local authority A had failed to offer the person information about deferred payment agreements during the 12 week property disregard period. It was established in the Greenwich case that if arrangements should have been made under section 21 of the 1948 Act but were not, then the deeming provision in section 24(5) should be applied as if the arrangements had been made. Therefore, if information about deferred payment agreements had not given at the time the person entered residential accommodation, local authority A would remain responsible for the provision of a deferred payment agreement should the person require one in the future.
91. The application of the ordinary residence provisions in relation to deferred payment agreements and the 12 week property disregard can be a cause of dispute, as the following scenario sets out.

#### **Scenario: deferred payment agreements**

Robert is 80 years old and has arthritis. He is also hard of hearing and partially sighted. He is assessed by his local authority, local authority A, as needing residential care. A financial assessment is undertaken at the same time. This assessment concludes that Robert, as a home-owner, has capital above the upper capital limit and does not qualify for local authority financial assistance. However, as he doesn't have any savings aside from the capital tied up in his house, he qualifies for the 12 week property disregard. He is advised that the value of his house will need to be taken into account to meet the cost of his care at the end of the 12 week disregard period and is offered the option of having a deferred payment agreement. Robert turns down this offer.

Robert expresses a wish to move to a care home in neighbouring local authority B, so he can be close to his family. Therefore, local authority A enters into a contract with the care home in local authority B for the provision of Robert's accommodation during the first 12 weeks of his stay (the property disregard period). Robert's social worker advises him that at the end of the 12 week period he will need to enter into a private contract with the care home on the basis that he will be funding his own care from the sale of his property.

Robert moves into the care home and settles in well. With help from his family, he puts his house on the market and enters into a contract with the care home for his accommodation following the end of 12 week disregard period. However, his house does not sell quickly and shortly after the end

of the 12 week disregard period Robert and his family approach local authority A to discuss the possibility of him entering into a deferred payment agreement.

Robert and his family are informed by local authority A that its responsibility towards Robert ended at the end of the 12 week disregard period. The authority refuses to grant a deferred payment agreement on the grounds that he has acquired an ordinary residence in local authority B and suggests he approaches local authority B instead. Local authority B argues that it is local authority A's responsibility to provide Robert with a deferred payment agreement because Robert's house is located within its authority.

In this situation, Robert remains ordinarily resident in local authority A during the 12 week disregard period. As local authority A enters into a contract for the provision of Robert's care, this amounts to making arrangements under Part 3 of the 1948 Act and Robert is deemed to continue to be ordinarily resident in local authority A. Had local authority A not ended the contract with the care home at the end of the 12 week period but entered into a deferred payment agreement with Robert, then he would have remained ordinarily resident in local authority A on the basis of section 24(5) of the 1948 Act.

However, as Robert chooses not to take up a deferred payment, and enters into his own private contract with the care home, he acquires an ordinary residence in local authority B on the basis that he has adopted his care home voluntarily and for settled purposes in line with the Shah test. As such, he should speak to local authority B about the possibility of having a deferred payment agreement.

If local authority A had failed to offer Robert a deferred payment agreement during the 12 week disregard period it would be local authority A to which Robert should turn to discuss entering a deferred payment agreement. It was established in the Greenwich case that if arrangements should have been made under section 21 of the 1948 Act but were not, then the deeming provision in section 24(5) should be applied as if the arrangements had been made. Therefore, in this case, if information about deferred payment agreements had not been given, Robert would not have had the opportunity to apply for a deferred payment when he initially entered his residential accommodation. Local authority A's failure to make this information available means it would remain responsible for offering Robert a deferred payment at a later stage.

## People moving into independent living accommodation who have mental capacity

92. In line with Government policy set out in the White Papers, *Valuing People*, *Valuing People Now*, *Our health, our care, our say* and in the *Putting People First Concordat*, many people who require social care support, particularly those people with learning disabilities or physical disabilities, are choosing to move from traditional residential care settings to independent living accommodation.
93. When a person enters independent living accommodation, they usually sign a tenancy agreement for their own house or flat, paid for by housing benefit, with the provision of community care services and other support as necessary. Such arrangements would not normally constitute the provision of accommodation under section 21 of the 1948 Act.
94. In order for there to be accommodation provided under section 21 of the 1948 Act, it must be possible to say that, without the provision of such accommodation, the care and attention which the person requires would not be available to them. The case of *R(on the application of Westminster City Council) v National Asylum Support Service* 2002 UKHL 38 confirmed that this would not usually be the case where a person enters into their own tenancy agreement. In this case, Lord Hoffman said that the effect of section 21(1)(a) was that, normally, a person needing care and attention which could be provided in their own home, or in a home provided by a local authority under the housing legislation, was not entitled to accommodation under section 21 of the 1948 Act.
95. Where a person moves from residential care under Part 3 of the 1948 Act to accommodation under a tenancy agreement, it is unlikely that there would be any “arrangements” as required by section 26(2) or (3A) (see paragraphs 77-83 (*Making arrangements under section 21 of the 1948 Act*)). If that is the case, it would not be possible to say that the care and attention the person needed could only be met through residential accommodation provided by the local authority. This means that the local authority would not be providing Part 3 accommodation and the deeming provision in section 24(5) of the 1948 Act would cease to apply.
96. Therefore, where local authority A places a person in residential care in the area of local authority B (and by virtue of section 24(5) of the 1948 Act, the person retains his ordinary residence in the area of local authority A whilst he/she is living in residential care) and the person subsequently chooses to move out of their residential care and into independent living accommodation in the area of local authority B, they would usually acquire a new ordinary residence in that area. Local authority B would therefore become responsible for the provision of any community care services that the person was assessed as needing, such as care in their own flat or house provided under section 29 of the 1948 Act.
97. The same principles apply where a care home deregisters to provide independent living accommodation on the same site. If a person who had been placed in the care home “out of area” under Part 3 of the 1948 Act decides to remain living on the site under independent living arrangements, and is assessed as being able to do so, they would be likely to acquire a new ordinary residence in that area. The deeming provision would not apply as the person would no longer be in receipt of Part 3 accommodation.

98. It may be possible for a person who is a tenant of their own property still to be in receipt Part 3 accommodation, but it would be necessary for there to be contractual arrangements between the individual, the accommodation provider and the local authority which meet the requirements of section 26(3A) of the 1948 Act. In particular, the local authority would have to be the payer of default and the contractual arrangements would need to stipulate that if the individual failed to pay to the accommodation provider the amount he or she had been assessed as being able to pay in respect of the accommodation costs (which may be the full cost), the local authority would have to pay instead and recover such payments from the individual.
99. Where a person plans to move out of Part 3 accommodation and into independent living arrangements in another local authority area, their move should not be delayed because of disputes over which local authority is responsible for carrying out an assessment and/or the provision of services. The duty to assess is not limited to people who are ordinarily resident in a particular local authority at the time of the assessment: local authorities are required to assess any person who is 'in need' or '**about to be in need**' of services in their area (see paragraphs 6-8 (*Community care assessments*)). Therefore, where a person has firm plans to move out of Part 3 accommodation and into independent living accommodation in a new local authority area, the new local authority can reasonably be expected to carry out the assessment and provide any services the person is assessed as needing.
100. It should be noted that nothing in this guidance affects the existing law on non-residential services provided under section 29 of the 1948 Act. Local authorities have a general power to provide services under section 29 that can be exercised in relation to anyone, although this power becomes a duty when a person is ordinarily resident in a given local authority area. Therefore, local authorities are free to enter into arrangements to provide services to people who are not ordinarily resident in their area and this guidance should not interfere with existing arrangements between local authorities that have been entered into on a voluntary basis. However, any ordinary residence disputes arising in relation to section 29 that are submitted to the Secretary of State for determination will be decided in accordance with the existing legal framework on ordinary residence.
101. The following scenario together with ordinary residence determinations 6/2007, 7/2007, 9/2007 and 10/2007<sup>42</sup> provide examples of how ordinary residence is determined when a person moves from residential care to independent living arrangements.

**Scenario: moving from residential care to independent living**

Emily is 31 years old and has a learning disability. She has recently moved from a residential care home in local authority B to her own flat in an independent living facility nearby. Emily has her own tenancy agreement and receives housing benefit to pay her rent as well as Supporting People money to fund housing related support. She also receives community care services under section 29 of the National Assistance Act 1948.

<sup>42</sup> See footnote 12 above.  
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It is the first time Emily has lived independently and she is very excited about her new flat. However, a dispute between two local authorities over her place of ordinary residence is threatening her new independence. This is causing her considerable anxiety and she is worried that she may be left with no support.

Before moving into the care home Emily had lived with her parents in local authority A. Local authority A arranged her placement in the care home in local authority B under section 21 of the National Assistance Act 1948. Therefore, whilst Emily lived in the care home she remained ordinarily resident in local authority A, despite the fact that her care home was in local authority B. Now that Emily has moved into her own flat, local authority A is arguing that she is no longer receiving Part 3 accommodation and has acquired a new ordinary residence in local authority B. Local authority B contends that local authority A remains responsible for funding Emily's care.

Emily's new independent living accommodation does not amount to the provision of accommodation under Part 3 of the 1948 Act – she is liable for the rent and there is no provision for payments to be made by the local authority to the accommodation provider. Therefore, the deeming provision in section 24(5) of the 1948 Act no longer applies. Emily's ordinary residence falls to be determined in line with the test set out in Shah. As Emily has adopted local authority B voluntarily and for settled purposes as part of the regular order of her life, she has become ordinarily resident in the area of local authority B.

## People moving into independent living accommodation who lack the mental capacity to decide where to live

102. If a person is assessed as having eligible social care needs but lacks the mental capacity to decide where to live, the local authority should carry out a best interests assessment under the Mental Capacity Act 2005 in relation to their accommodation (see paragraphs 27-30). The outcome of this assessment may indicate that the person's needs would best be met by living in their own flat, under independent living arrangements. Alternatively, a person may have the capacity to decide to live in their own flat under independent living arrangements but not have the capacity to manage all, or some, of their financial affairs. In both of these situations, if the person has a lasting power of attorney (LPA) or a deputy appointed by the Court of Protection, the LPA or deputy can enter into a tenancy agreement on their behalf. The person would generally acquire an ordinary residence in the local authority in which their independent living accommodation is located.
103. Where this is the case and a person who lacks capacity moves from residential care under Part 3 of the 1948 Act to accommodation under a tenancy agreement (signed by their LPA or deputy), the local authority is unlikely to be making arrangements under Part 3 of the Act in which case the deeming provisions do not apply. This means that the person would acquire an ordinary residence in the area in which their independent living accommodation is located, even if they were originally placed in that local authority by another local authority under Part 3 of the 1948 Act. This

remains the case even where the deputy is an officer of the placing authority (see the scenario below for more information).

104. In situations where the person does not have a deputy or LPA, the local authority may arrange the person's accommodation under section 21 of the 1948 Act and enter into a contract with the housing provider for the provision of accommodation, with reimbursement from the person as necessary<sup>43</sup>. However, it should be noted that this type of accommodation would not usually be appropriate where the person requires accommodation together with nursing or personal care, as such accommodation must be provided in a registered care home<sup>44</sup>. If accommodation is arranged under section 21, the deeming provision in section 24(5) of the 1948 Act would apply and the person would remain ordinarily resident in their placing local authority, even where they entered into independent living accommodation in another local authority.

#### **Scenario: moving from residential care into independent living**

Matt is 25 years old and has learning disabilities. He has recently expressed a wish to move into a flat share with some friends with similar disabilities under independent living arrangements in the area of local authority B. Matt has the capacity to decide where he wants to live but not the capacity to understand a tenancy agreement or manage his financial affairs. As Matt has no family or friends whom he can nominate to be his lasting power of attorney (LPA), local authority A (the local authority in which Matt is currently living) applies to the Court of Protection to act as Matt's deputy. The Court accordingly appoints a named local authority officer in local authority A to be Matt's property and affairs deputy.

Matt's move goes ahead. Matt's deputy signs the tenancy agreement and manages the payment of his rent, which is funded through housing benefit. Matt also receives some community care services under section 29 of the National Assistance Act 1948. His community care services are initially provided and paid for by local authority A, where Matt lived previously, but after a few months local authority A falls into dispute with local authority B over the provision of these services.

Local authority A argues that Matt is now living in local authority B with his own tenancy agreement and has acquired an ordinary residence there. In response, local authority B argues that as Matt's deputy is an officer of local authority A, the fact that he has signed Matt's tenancy agreement and is managing his financial affairs amounts to "making arrangements" under section 21 of the 1948 Act. Local authority B therefore contends that the section 24(5) deeming provision applies making Matt ordinarily resident in local authority A.

Matt has his own tenancy in local authority B and is, through his deputy, liable for the payment of his rent. There is no agreement between his landlord and

<sup>43</sup> See footnote 34 above.

<sup>44</sup> See footnote 8 for the meaning of "registered".

local authority A in respect of his accommodation. This means that he is not being provided with section 21 accommodation. It does not matter that Matt's tenancy agreement has been signed by a deputy or that the deputy is an employee of local authority A.

As Matt is not being provided with section 21 accommodation, the deeming provision no longer applies and Matt's ordinary residence falls to be determined in line with the Shah test. Matt had the capacity to decide he wanted to live in the flat share in local authority B. He adopted this flat share voluntarily and for settled purposes as part of the regular order of his life. Therefore, he has become ordinarily resident in local authority B.

Had Matt not had the capacity to decide where to live but a best interests assessment had indicated the flat share to be the best way to meet his needs, the outcome of the above scenario would have been the same. The Vale test (test two) would have been applied instead of the Shah test.

Using this test, all the factors of Matt's case would have needed to be considered, including his physical presence in local authority B and the purpose of his presence there but excluding the need for him to have adopted his residence voluntarily. Matt became physically present in local authority B as soon as he moved into the flat share. The move was made for settled purposes as the long-term intention was for him to live more independently with his friends in the flat share. Therefore, in line with the Vale test, Matt would have become ordinarily resident in local authority B as soon as he moved there.

## People moving from one local authority area to another of their own volition

105. When a person who is not being provided with Part 3 accommodation by a local authority chooses to relocate permanently to another local authority area of their own volition, perhaps to be near their family or to move from a self-funded care home into independent living accommodation (see paragraphs 72-76 (*People who are self-funding their residential care*) and paragraphs 92-101 (*People moving into independent living who have mental capacity*)), they generally acquire an ordinary residence in their new area. If the person needs community care services, they would therefore need to approach their new local authority for an assessment (see paragraph 99 above and paragraphs 6-8 (*Community care assessments*)).
106. Each local authority is responsible for setting its own eligibility criteria in accordance with the Department's guidance on eligibility criteria for adult social care *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care*<sup>45</sup>. This means that when a person moves from one area to another and acquires a new ordinary residence, they do not automatically receive the same package of care. However, the guidance on eligibility criteria makes clear that where a person moves (or intends to

<sup>45</sup>See: [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_113154](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113154) This guidance replaces *Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care (2003)*  
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move) permanently from one local authority area to another, the new local authority, when carrying out their assessment and reaching longer-term decisions about what services should be provided, should take account of services that were provided by the person's previous local authority.

## People leaving prison, resettlement units and other similar establishments

107. The deeming provisions in section 24(5) and (6) of the 1948 Act, which provide that a person's ordinary residence is retained where they are placed out of area in Part 3 accommodation or are receiving care or treatment in NHS accommodation, do not apply to people who are leaving prison, resettlement units<sup>46</sup> and similar establishments. However, local authorities could reasonably follow the approach set out in these sections for people who are due for release from prison. Therefore, where a person requires Part 3 accommodation on release from prison, local authorities should start from a presumption that they remain ordinarily resident in the area in which they were ordinarily resident before the start of their sentence.
108. However, determining an offender's ordinary residence on release from prison will not always be straightforward and each case must be considered on an individual basis. It may not be possible for an offender to return to their prior local authority area due to the history of their case and any risks associated with a return to that area. Therefore, any presumption of ordinary residence may be rebutted by a number of factors, including the offender's wishes and intentions about where to live, the length of their sentence and remaining ties with their previous area.
109. In situations where an offender is likely to require community care services on release from prison and their place of ordinary residence is unclear and/or they express an intention to settle in a new local authority area, the local authority to which they plan to move should have regard to paragraphs 6-8 of this guidance (*Community care assessments*) and take responsibility for carrying out the community care assessment. The duty to assess is not limited to people who are ordinarily resident in a local authority's area; it extends to those people who are about to be in need in a local authority's area.
110. Given the difficulties associated with determining some offenders' ordinary residence on release, it is good practice for prisons to initiate joint planning for release at least 3 months before it is due. Prisons should work with the National Offender Management Service, the relevant local authority and Primary Care Trust to support assessment and care planning for those offenders who will require community care services on their release from prison.
111. If a person due for release from prison was not ordinarily resident in any area prior to being sentenced and does not have a permanent place to live on release, they may fall within the provisions of section 24(3) of the 1948 Act and be found to be of "no settled residence" and/or in "urgent need" (see paragraphs 43-50). A prisoner who is transferred to hospital under a hospital direction may on release be entitled to after-care under section 117 of the Mental Health Act 1983 (see paragraphs 182-189 (*After-care services under section 117 of the Mental Health Act 1983*)).

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<sup>46</sup> Resettlement prisons and units are designed to help prisoners, particularly those serving longer sentences, prepare for release.

## NHS Continuing Healthcare

112. When a person has a primary health need (in addition to any social care needs) and is assessed as being eligible for NHS Continuing Healthcare (NHS CHC) under the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (July 2009) and the NHS Continuing Healthcare (Responsibilities) Directions 2009, the NHS must provide a package of care for their assessed health and social care needs. This care package may be provided in a number of settings including hospitals, care homes or the person's own home.
113. Where a person is in receipt of NHS CHC, local authorities do not have a duty to provide social care services that are being provided by the NHS, although they do continue to have a wider role, for example in relation to safeguarding responsibilities. However, if a care review subsequently determines that a person's needs no longer meet the eligibility criteria for NHS CHC - perhaps because they needed intensive health and social care following an operation and they have now recovered - the NHS ceases to be responsible for the provision of the person's social care. Instead, the duty for the provision of social care falls to the local authority in which the person is ordinarily resident under Part 3 of the 1948 Act.
114. The deeming provision in section 24(6) of the 1948 Act, which sets out that prior ordinary residence is retained where a person is provided with NHS accommodation (see paragraphs 60-65), applies to people in receipt of accommodation as part of a package of NHS CHC. Therefore, where a person is placed in a care home (or other accommodation funded by the NHS) in another local authority area for the purpose of receiving NHS CHC, they continue to be ordinarily resident in the local authority area in which they were ordinarily resident before entering the NHS accommodation. Where a PCT places a person in such accommodation, it is good practice for it to inform the person's local authority of ordinary residence and, if the person is placed "out of area", it is also good practice for the PCT to inform the local authority in which the care home is located.
115. Where a person is accommodated in a care home as part of their package of NHS CHC, it is possible that they may cease to be eligible for NHS CHC, but still need to remain in their care home, or to be provided with Part 3 accommodation elsewhere. In such a case, the effect of the deeming provision in section 24(6) of the 1948 Act would be that the local authority in whose area the person was ordinarily resident immediately before being provided with NHS accommodation would be the authority responsible for funding the person's accommodation under Part 3 of the 1948 Act, as the following scenarios shows.

### **Scenario: a person is discharged from NHS Continuing Healthcare**

Maureen is 72 years old. Three years ago, she suffered a stroke which left her severely disabled with complex care needs. She was assessed by her local PCT as needing NHS CHC and was moved from hospital to a rehabilitation unit within an independent sector care home in local authority B. This placement was fully funded by Maureen's local PCT. Before her stroke, Maureen had lived with her husband in local authority A.

A recent reassessment of Maureen's needs concludes that she is no longer eligible for NHS CHC and requires accommodation under Part 3 of the 1948 Act instead. The care home in which Maureen has been living offers her a place on a long-term basis and all those involved in her care agree that this arrangement best meets Maureen's needs.

Local authority B agrees to fund the placement on a 'without prejudice' basis but immediately falls into dispute with local authority A over Maureen's place of ordinary residence. Local authority B contends that Maureen remains ordinarily resident in local authority A, where she had been living with her husband before her placement at the care home began. Local authority A argues that Maureen has acquired an ordinary residence in local authority B due to the length of time she has spent at the care home.

In this situation, when Maureen first enters the care home she is receiving NHS CHC, therefore the deeming provision in section 24(6) of the 1948 Act applies. This section provides that any person for whom NHS accommodation is provided is deemed to be ordinarily resident in the area in which they were ordinarily resident immediately before being admitted to hospital or other NHS accommodation. Therefore, whilst Maureen is receiving NHS CHC at the care home she remains ordinarily resident in local authority A, where she was living before her stroke.

Once Maureen's NHS CHC ceases and she is instead provided with Part 3 accommodation under the 1948 Act, the deeming provision in section 24(5) of the Act applies. This section sets out that any person provided with Part 3 accommodation shall be deemed to be ordinarily resident in the area in which he or she was ordinarily resident immediately before the Part 3 accommodation was provided. Immediately before Maureen was provided with Part 3 accommodation she was living in the care home but was still ordinarily resident in local authority A due to the deeming provision in section 24(6). Therefore, Maureen remains ordinarily resident in local authority A, as that was where she was ordinarily resident **immediately before** she began receiving Part 3 accommodation.

115b. The deeming provision in section 24(6) of the 1948 Act does not apply to anyone who was receiving NHS CHC immediately before 19 April 2010<sup>47</sup> and this remains the case for as long as they continue to be provided with that NHS CHC accommodation. Therefore, in determining the ordinary residence of someone who went into NHS CHC accommodation on or before 18 April 2010 and continued to be there after that date, the ordinary residence rules that applied on the day they went into care should be applied – i.e. the dispute must be resolved in the light of the specific circumstances and not the deeming provisions.

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<sup>47</sup> On 19 April 2010 section 24(6) of the 1948 Act was amended; prior to this date, the deeming provision did not apply to people in NHS CHC accommodation. Transitional provisions preserve the old rules for people who were already in NHS CHC accommodation when the legislation changed (see paragraph 62b above).  
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**Scenario: anyone receiving NHS CHC immediately before 19 April 2010**

Lydia goes into NHS CHC accommodation on 10 April 2010 and stays there until 1 June, when it is decided that she is no longer eligible for NHS CHC and needs to be transferred into residential accommodation under the 1948 Act. In determining Lydia's ordinary residence, do not apply the deeming provision in section 24(6), as her case falls under the old rules, but look at Lydia's individual circumstances to determine where she was ordinarily resident at the date that her entitlement to NHS CHC ceased.

**Joint packages of health and community care services**

116. When a person has health needs as well as social care needs but does not qualify for NHS Continuing Healthcare (see paragraphs 112-115 above), they may be eligible for a joint package of care that contains both health and community care services.
117. Under section 47(1) of the NHS and Community Care Act 1990, local authorities have a duty to assess the needs of any person for whom they may provide or arrange the provision of community care services and who may be in need of such services (see paragraphs 6-8 (*Community care assessments*)). If it becomes apparent during the course of the assessment that the person has health needs, the local authority should notify the person's primary care trust (PCT) and invite them to assist in the assessment<sup>48</sup>.
118. It is the responsibility of the local authority in which the person is ordinarily resident to provide any community care services identified as necessary in the light of the assessment, as outlined in Part 1 of this guidance. Any health services identified by the assessment should be met by the person's PCT (see paragraphs 179-181 (*Establishing the responsible commissioner*) for guidance on how to establish the responsible PCT). PCTs and local authorities should work in partnership to agree their respective responsibilities in relation to the provision of the joint package of care.
119. Where a person is placed in Part 3 accommodation out of area, they remain ordinarily resident in the area of the placing local authority (see paragraphs 55-59 on the section 24(5) deeming provision) and the placing authority remains responsible for the provision of any community care services. However, the person's GP may be based in the area in which they are living and it is this PCT that is responsible for the provision of any health services. This may mean that a local authority and a PCT located several miles apart need to work together to provide a joint package of health and social care. In the case of a person in receipt of NHS Continuing Healthcare, the placing PCT remains responsible for the provision of care, even where the person changes their GP practice (see paragraphs 112-115 and paragraph 181).

**Shared Lives Schemes (also known as Adult Placement Schemes)**

120. Local authorities or independent providers may operate shared lives schemes (also known as adult placement schemes)<sup>49</sup> which offer an alternative form of social care

<sup>48</sup> See section 47(3) of the NHS and Community Care Act 1990.

<sup>49</sup> Shared Lives Schemes currently operate under the Adult Placement Schemes (England) Regulations 2004 which are made under the Care Standards Act 2000. These regulations are due to be revoked when the new registration regime under the Health and Social Care Act 2008 comes into force. From April 2011

accommodation and support for people aged 18 and over. Under the scheme, ordinary family households typically provide accommodation and support to people with social care needs, offering the person the opportunity to become part of the family. However, shared lives services do not always involve the provision of accommodation and can include day care support in the carer's home or kinship support, where a person acts as "extended family" to a person who is living in their own home.

121. Where a person enters accommodation under the shared lives scheme, they usually pay for their accommodation themselves, often through housing benefit, with any social care needs being met by services provided under section 29 of the 1948 Act. If the person moves to a new local authority for the purpose of entering shared lives accommodation, they generally become ordinarily resident in the new local authority in line with the settled purpose test in Shah (see paragraphs 18-22 (*Meaning of ordinary residence*)).
122. If a local authority (A) does not have any shared lives accommodation in its area but a community care assessment identifies a shared lives scheme to be the best way to meet a person's accommodation and support needs, the person may decide to move into accommodation provided by a shared lives scheme in a neighbouring local authority (B). They may be supported in this decision by local authority A who may reach an agreement with local authority B for local authority A to provide support services using its powers under section 29 of the 1948 Act, or for local authority B to provide such services with reimbursement from local authority A. Although local authorities have a duty to provide section 29 services to people who are ordinarily resident in their area, they have a general power to provide services under this section and can exercise this power in relation to people who are not ordinarily resident in their area.
123. The deeming provisions do not apply to section 29 of the 1948 Act. Therefore, in situations where a person's previous local authority is providing or paying for services under section 29 of the 1948 Act, it does not mean that ordinary residence is retained in the previous authority. Any arrangements between local authorities of the kind referred to in the previous paragraph would not prevent the person from acquiring an ordinary residence in the area in which they are living. Ordinary residence disputes arising in relation to services provided under section 29 that are submitted to the Secretary of State for determination will be decided accordingly. See ordinary residence determination 9-2008<sup>50</sup> for an example of how the ordinary residence provisions apply to shared lives schemes.
124. Shared lives accommodation is not usually arranged under section 21 of the 1948 Act. This is largely because the concept of shared lives is about "family" and

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October 2010, subject to Parliamentary approval, the provision of shared lives services will need to be registered with the Care Quality Commission under Chapter 2 of Part 1 of the Health and Social Care Act 2008 to the extent that such services include regulated activities (within the meaning of that Part), such as personal care. The regulated activity of "provision of residential accommodation together with nursing or personal care" will not apply to the provision of accommodation to an individual by an adult placement carer under the terms of a carer agreement.

<sup>50</sup> See footnote 12 above.  
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“belonging” with individuals making their own choice to enter a shared lives scheme rather than being placed in the scheme by their local authority. Therefore, local authorities may recommend that a person enters a shared lives scheme. They may also help the person to choose a scheme and facilitate their move but such advice and assistance would usually fall short of “making arrangements” within the meaning of section 21.

125. However, section 21 of the 1948 Act may occasionally be used by local authorities to place people in shared lives accommodation, on either a short or long term basis, but only where the person requires Part 3 accommodation and not personal care. This is because section 21 of the 1948 Act cannot be used to place people requiring accommodation together with personal care in any setting other than a registered care home<sup>51</sup>.

126. If a local authority does use section 21 to place a person in accommodation under the shared lives scheme, the section 24(5) deeming provision would apply (see paragraphs 9-15 (*Residential services*)) for more information on residential accommodation under section 21 of the 1948 Act). The person would remain ordinarily resident in the area of the placing local authority regardless of where they were accommodated under the shared lives scheme.

127. Occasionally, a shared lives scheme may be based in one local authority area but have households under the scheme located in other local authority areas. Where this is the case, the person would usually be ordinarily resident in the local authority in which their household is located, in line with the Shah test. They would not generally be considered ordinarily resident in the area where the scheme itself is located, but this would depend on all the circumstances. Similarly, if the shared lives carer relocates to a new local authority area, and the person accommodated under the scheme moves with the carer, they would generally acquire an ordinary residence in the area where their new house is located, rather than remaining ordinarily resident in their previous local authority area.

128. Organisations or local authorities operating shared lives schemes should not use ordinary residence as a reason for preventing access by people living outside of the area where the scheme and its accommodation is located. The needs of the individual should be paramount and where a particular shared lives scheme or household best meets the need of the individual involved, the location of the scheme or household and the ordinary residence of the person should be secondary considerations.

## British citizens resuming permanent residence in England after a period abroad

129. British citizens returning to England after a period of residing abroad (who had given up their previous home in this country) are entitled to a community care assessment as soon as they return if they appear to be in need of community care services. If

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<sup>51</sup> Section 26(1A) of the 1948 Act prohibits arrangements being made by a local authority to provide residential accommodation for people who also need personal care under section 21 of that Act with any organisation other than a registered care home. See footnote 8 above for the meaning of “registered”.

they are assessed as requiring services under Part 3 of the 1948 Act, their ordinary residence falls to be determined in the usual way, in line with the Shah and Vale tests (see Part 1 of this guidance).

130. Accordingly, a returning British citizen would usually acquire an ordinary residence in the area in which they chose to locate, if their intention was to stay living there for settled purposes (Shah). For example, they may have family in a particular area and choose to settle there for that reason or they may have no particular reason to locate in a given area. As long as they can demonstrate an intention to remain in the place they are living for settled purposes, they are able to acquire an ordinary residence there.

131. However, if a returning citizen presents to a local authority on their return to England but has no particular intention to settle in that area, the local authority may decide they fall within the provisions of section 24(3) of the 1948 Act and be found to be of “no settled residence” and/or in “urgent need” (see paragraphs 43-50). Each case should be decided on an individual basis.

**132. It should be noted that ordinary residence can be acquired as soon as a person moves to an area, if their move is voluntary and for settled purposes. 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.**

### **Armed forces veterans and the families of armed forces personnel**

133. The ordinary residence provisions apply to armed forces veterans and the families of armed forces personnel in active service in the same way as they apply to other people. If veterans require community care services under Part 3 of the 1948 Act upon leaving the forces, they would usually acquire an ordinary residence in the area to which they chose to locate, in line with the settled purpose test in Shah. If a veteran does not have a permanent place to live on leaving the forces or does not have a settled purpose in relation to where they are living, they may fall within the provisions of section 24(3) of the 1948 Act and be found to be of “no settled residence” and/or in “urgent need” (see paragraphs 43-50).

134. Where family members (who are 18 or over) of armed forces personnel in active service require community care services under the 1948 Act, their ordinary residence would fall to be assessed in accordance with the Shah principles and they would generally be ordinarily resident in the area in which they were living. If the member of the armed forces was subsequently posted to another area of the country, the Shah test would again apply and the family member in need of community care services would usually acquire an ordinary residence in the area to which they were posted. However, if the family member was in receipt of Part 3 accommodation prior to the posting and was placed in Part 3 accommodation in the new area by their original authority in order to be near their family, the section 24(5) deeming provision would apply (see paragraphs 55-59) and they would remain ordinarily resident in the area of the placing authority.

135. In the event of a Service family returning from overseas, the ordinary residence of any family members (aged 18 or over) requiring community care services would be

assessed in accordance with the Shah principles and they would usually acquire an ordinary residence in the area in which they chose to reside for settled purposes. If the family had no settled purpose in relation to where they were living, the family member in need of services may fall within the provisions of section 24(3) of the 1948 Act and be found to be of “no settled residence” and/or in “urgent need” (see paragraphs 43-50). In which case, it would be ‘the local authority of the moment’ to which they would turn for the provision of services.

## Carers

136. Under the Carers and Disabled Children Act 2000, local authorities have a duty, when requested, to assess carers aged 16 or over who provide or intend to provide a substantial amount of care to another person (aged 18 or over) on a regular basis.
137. Practice guidance issued on the provisions in the Carers and Disabled Children Act 2000<sup>52</sup> sets out that where a carer is ordinarily resident in a different local authority to the cared-for person, and the cared-for person is eligible for social care support, it is the local authority in whose area *the cared-for person* lives that is responsible for carrying out the carers’ assessment. The cared-for person’s local authority is also responsible for the provision of any services to the carer, even where such services need to be provided in the carer’s own local authority area. In this situation, where the carer is ordinarily resident in a different authority to the cared-for person, local authorities should work in partnership to ensure that carers’ needs are properly assessed and met.

## Young People in transition from children’s services to adult services

### The statutory framework on the provision of accommodation and services

138. Children who are in need of social care support, including children who are ‘looked after’<sup>53</sup>, are provided with accommodation and/or services under the Children Act 1989 (the “1989 Act”). They may also be provided with services under the Chronically Sick and Disabled Persons Act 1970 (the “1970 Act”) (though they receive universal services such as access to schools and primary health care in the same way as all other children). When a young person with social care needs reaches the age of 18, the duty on local authorities to provide accommodation and services under the 1989 Act usually ceases. From their 18<sup>th</sup> birthday, residential accommodation is generally provided under section 21 of the 1948 Act, and other services are provided under section 29 of the 1948 Act, in conjunction with section 2 of the 1970 Act. These services are provided by the local authority in which the young person is ordinarily resident, which may or may not be the same local authority that was responsible for them under the 1989 Act (see paragraphs 145-158 below).

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<sup>52</sup> [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4006406](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4006406), paragraphs 24-27.

<sup>53</sup> A child who is ‘looked after’ is defined in section 22 of the Children Act 1989 and this term means, broadly, that a child is in a local authority’s care or is provided with accommodation by a local authority.

139. However, where a looked after child's "looked after status" under the 1989 Act ends, the local authority which was formerly responsible for them retains some duties after they reach the age of 18. Some of these young people are referred to in the 1989 Act as "former relevant children" (ie. adult care leavers who have been "looked after" by the local authority for the requisite period of time). Others qualify for advice and assistance from local authority children's services under section 24 of the 1989 Act. Both these groups of young people are referred to collectively in this section of the guidance as "young people eligible for leaving care services" and different duties are owed to different groups.
140. Under section 23C of the 1989 Act (as amended by the Children (Leaving Care) Act 2000), local authorities have a duty to support and assist "former relevant children". By allocating a personal adviser and working with them to maintain a pathway plan that sets out the support and services available (which may include assistance with education or training), former relevant children are provided with the assistance they need to achieve their aspirations. This support may continue until the young person reaches the age of 21 or for longer if they remain in an approved programme of education or training<sup>54</sup>. Where a young person qualifies for advice and assistance under section 24 of the 1989 Act, the local authority may be required to advise and befriend him/her. They may also be required to give him/her assistance in kind and, exceptionally, by providing accommodation or cash.
141. A local authority which is responsible for providing a young person with leaving care services is not under a general duty to provide accommodation. Therefore, when a young person with assessed social care needs who is entitled to leaving care support reaches the age of 18 and requires residential accommodation, their accommodation is usually provided under the 1948 Act, by their local authority of ordinary residence.
142. There are, however, certain powers and duties to provide accommodation to young people eligible for leaving care services in particular cases. Under section 24B(5) of the 1989 Act, local authorities have a duty to provide certain young people who qualify for advice and assistance under section 24 of the 1989 Act<sup>55</sup> with **vacation accommodation** if they are in full-time further or higher education and their term-time accommodation is not available. They also have a power to provide assistance during term-time, such as expenses to cover travel or equipment costs and expenses incurred by the young person in living near the place where he/she is studying.
143. Local authorities **do not** have a duty to provide accommodation to this group of young people during term time. Such accommodation is funded by whatever mainstream funding sources are available to support higher education students. Nor is there a duty under the 1989 Act to provide home care support services to young people eligible for leaving care services who are in higher education - such services would be provided under section 29 of the 1948 Act by the local authority of ordinary residence.

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<sup>54</sup> See section 23CA of the 1989 Act which was inserted by the Children and Young Persons Act 2008. Where a former relevant child resumes a programme of training up to age 25, they are entitled to continuing support from a leaving care personal adviser allocated by their responsible authority.

<sup>55</sup> That is, a young person who is under the age of 25 and who either (a) had a special guardianship order in force in relation to them when they reached the age of 18, and immediately before the making of that order was a looked after child, or (b) was a looked after child before they were 18.

144. Local authorities also have a power to provide accommodation under section 24A(5) of the 1989 Act to a young person whom they are advising and befriending under section 24A. Such accommodation may only be provided in exceptional circumstances and if, in the circumstances, assistance may not be given under section 24B (vacation accommodation). A young person who is eligible for residential accommodation under section 21 of the 1948 Act would be unlikely to be regarded as being in “exceptional circumstances”.

### Determining ordinary residence

145. When a young person reaches 18 and is eligible for residential accommodation and/or services under the 1948 Act, their ordinary residence should be assessed to determine which local authority is responsible for the provision of such services under that Act. The local authority that had responsibility for the young person under the 1989 Act is not necessarily the young person’s local authority of ordinary residence once they become eligible for services under the 1948 Act. However, where a child has been looked after, the local authority responsible for leaving care services will always be the local authority that had responsibility for their care under the 1989 Act.

146. Neither the 1989 Act nor the 1948 Act makes provision for how to determine ordinary residence when a young person moves from being eligible for services under the 1989 Act to being eligible for services under the 1948 Act. Therefore, when making decisions about the ordinary residence of young people in transition to adult services, local authorities should have regard to both Acts. **It is important to note that there is no set procedure for determining ordinary residence in this situation: every case must be decided on an individual basis, taking into account the circumstances of the young person and all the facts of their case.**

147. Although the provisions of the 1989 Act no longer apply once a young person reaches 18 (other than the leaving care provisions, if the young person is eligible for such services), local authorities could reasonably have regard to the 1989 Act and start from a presumption that the young person remains ordinarily resident in the local authority that had responsibility for them under the 1989 Act. Section 105(6) of the 1989 Act provides that, in determining the ordinary residence of a child for any purposes of that Act, any period in which a child lives in the following places should be disregarded:

- a school or other institution;
- in accordance with the requirements of a supervision order under the 1989 Act;
- in accordance with the requirements of a youth rehabilitation order under Part 1 of the Criminal Justice and Immigration Act 2008; or
- while he is being provided with accommodation by or on behalf of a local authority.

148. Therefore, where a local authority has placed a child in accommodation out of area under the 1989 Act, that local authority remains the child’s place of ordinary residence for the purposes of the 1989 Act. In such a case, there would be a starting presumption that the young person’s place of ordinary residence remains the same for the purposes of the 1948 Act when they turn 18.

149. However, this starting presumption may be rebutted by the circumstances of the individual’s case and the application of the Shah or Vale tests (see Part 1 of this

guidance). Under these tests, a number of factors should be taken into account when considering a person's ordinary residence for the purposes of the 1948 Act. These include: the remaining ties the young person has with the authority that was responsible for their care as a child, ties with the authority in which they are currently living, the length and nature of residence in this area and the young person's views in respect of where he/she wants to live (if he/she has the mental capacity to make this decision). If the young person is being provided with residential accommodation under Part 3 of the 1948 Act at the time ordinary residence falls to be assessed, the deeming provision in section 24(5) applies and it would be necessary to assess their place of ordinary residence immediately before such accommodation was provided.

150. In many cases, establishing a young person's local authority of ordinary residence will be a straightforward matter. However, difficulties may arise where a young person has been placed in residential accommodation out of area as a child under the 1989 Act. In this situation, the young person may be found to be ordinarily resident in the local authority that had responsibility for them under the 1989 Act, or they may be found to have acquired a new ordinary residence in the area in which they are living, depending on the facts of their case.
151. For example, where a young person (who has been placed out of area) moves out of their residential accommodation under the 1989 Act and into independent living arrangements in their 'host area' on or around their 18<sup>th</sup> birthday, the starting presumption would be that they are ordinarily resident in the area which had responsibility for them under the 1989 Act. However, in this situation, the starting presumption is more likely to be rebutted than in other situations. By the time the young person reaches the age of 18, they may have been accommodated in another local authority area for several years under the 1989 Act. Shortly before their 18<sup>th</sup> birthday, they may have a well established support network outside of their responsible authority under the 1989 Act which they wish to continue into adulthood. More importantly, they may have made a decision to stay in their host area for settled purposes. In such a case, a consideration of all the facts may lead to the conclusion that, for the purposes of the 1948 Act, the young person is ordinarily resident in the area in which they are living at the time of their 18<sup>th</sup> birthday. Scenarios 1, 2 and 3 below provide some examples of how ordinary residence is determined when a young person moves from accommodation provided under the 1989 to accommodation or services provided under the 1948 Act.
152. Similarly, where a young person is intending to move out of the area which had responsibility for him under the 1989 Act to go to university, the starting presumption would be that they are ordinarily resident in the area that had responsibility for them under the 1989 Act. Again, this presumption may be rebutted. If the young person moves to the area in which the university is located for settled purposes and has no intention to return to his responsible authority under the 1989 Act, then the facts of his case may lead to the conclusion that he has acquired an ordinary residence in that area.
153. Alternatively, if the young person has a base with his parents (or those with parental responsibility for him) in the local authority which had responsibility for him under the 1989 Act and he intends to return to this base during the university holidays (including the long summer holiday) then the facts of his case may lead to the conclusion that he remains ordinarily resident in the local authority which had responsibility for him under the 1989 Act.

154. It is not possible for a person to be ordinarily resident in two different local authorities under the 1948 Act (see paragraph 26 (*More than one place of residence*)). Therefore, where a young person goes away to university or college, it is necessary to establish, from all the facts of their case, to which local authority they have the stronger link. If it is the local authority which had responsibility for them under the 1989 Act, this local authority would be responsible for the provision of services under section 29 of the 1948 Act during term time at university. The young person's absence from their local authority of ordinary residence would not result in their ordinary residence being lost: it would be considered a temporary absence in line with the judgement in Levene (see paragraphs 23-24 (*Temporary absences*)). Scenarios 4 and 5 below provide further guidance on how ordinary residence is determined when a young person attends university in a different local authority area.
155. As detailed in paragraphs 139-140 above, a young person aged 18 or over may be entitled to leaving care services, provided by the responsible authority under the 1989 Act. As leaving care services do not include accommodation (with the exception of vacation accommodation and accommodation that is provided in exceptional circumstances, see paragraphs 142- 144 above), any residential accommodation should be provided under Part 3 of the 1948 Act. If a former relevant child has been placed out of area as a looked after child, and wishes to remain in this area on reaching the age of 18, they may be found to be ordinarily resident there for the purposes of the 1948 Act. In this situation, their accommodation would be provided by the local authority in which they are living but the provision of their leaving care would remain the responsibility of the local authority that had responsibility for them under the 1989 Act.
156. Where this is the case, the 1989 Act and the 1948 Act would operate in parallel. This means the responsible authority under the 1989 Act and the authority of ordinary residence under the 1948 Act would need to work together to ensure the young person eligible for leaving care services was provided with joined up care and support.
157. **It should be noted that where a child has been placed out of area under the 1989 Act and becomes eligible for leaving care services upon reaching the age of 18, this does not automatically mean they are ordinarily resident in the area that had responsibility for them under the 1989 Act.** Whilst the young person remains entitled to leaving care support from their responsible authority, all the circumstances of their case must be considered. Scenarios 3 and 5 below provide examples of how the 1989 Act and the 1948 Act operate in parallel when a young person is eligible to leaving care services under the 1989 Act and accommodation and/or services under the 1948 Act.
158. In addition to the scenarios below, ordinary residence determinations 4/2006, 3-2007 and 5-2008<sup>56</sup> provide further guidance on the ordinary residence provisions as they relate to young people moving from children's services to adult services.

**Scenario 1: transition from accommodation under the 1989 Act to accommodation under the 1948 Act**

Sunil is 18 years old and has physical and learning disabilities. Since the

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<sup>56</sup> See footnote 12 above.  
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age of 10 he has been accommodated in a specialist residential school under section 20 of the 1989 Act. The primary purpose of Sunil's placement is to meet his health and education needs. The school is located in local authority B but paid for by local authority A, the local authority where his family live. For the purposes of the 1989 Act, Sunil is the responsibility of local authority A.

Now that Sunil is 18, he is ready to leave school. His needs are assessed and it is decided that he should remain living in residential accommodation. As Sunil has capacity to make some decisions for himself, he is able to express a desire to remain living in local authority B, near his friends from school and within the local community to which he feels he now belongs. Therefore, at the end of the school year he moves into residential care in local authority B and his accommodation changes from being provided under the 1989 Act to being provided under Part 3 of the 1948 Act.

At this point, local authority B falls into dispute with local authority A over Sunil's ordinary residence. Local authority B's view is that Sunil should remain the responsibility of local authority A. However, local authority A argues that their duty to Sunil ended when he left school and that he has become ordinarily resident in local authority B.

In these circumstances, the starting presumption is that Sunil is ordinarily resident in local authority A as this is the local authority that had responsibility for him under the 1989 Act. However, this is only a starting presumption and it may be rebutted by considering all the facts of Sunil's case under the 1948 Act.

Sunil has been living in local authority B for 8 years and he has expressed a wish to remain there as he feels part of the local community. Although his family still live in local authority A, their home is not a base to which he returns often, other than for short spells over Christmas and other occasional events. Therefore, in line with the settled purpose test in the Shah case, it seems that Sunil has adopted local authority B voluntarily and for settled purposes. As such, the presumption that he remains ordinarily resident in local authority A can be rebutted: for the purposes of the 1948 Act, he is ordinarily resident in local authority B.

As Sunil is being provided with Part 3 accommodation, section 24(5) of the 1948 Act applies and he is deemed to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before Part 3 accommodation was provided for him. Immediately before Sunil entered residential accommodation under part 3 of the 1948 Act, he was living in local authority B where he was ordinarily resident for the purposes of that Act. Therefore, in Sunil's case, the deeming provision does not change his ordinary residence.

## **Scenario 2: transition from accommodation under the 1989 Act to accommodation under the 1948 Act**

Joe is about to turn 18 years old and has severe learning disabilities. He also has cerebral palsy and epilepsy. Since the age of 11 he has been accommodated during the week in a residential facility “out of area” under the 1989 Act, with his parents’ agreement. He spends the weekends and holidays with them at their home in the area of local authority C.

The residential facility is located in local authority D but Joe remains the responsibility of local authority C under the 1989 Act, because the time that he spends in accommodation in local authority D is ignored when establishing his ordinary residence for the purposes of the 1989 Act.

Once Joe turns 18, his needs are reassessed and it is decided that remaining in residential accommodation during the week would be the best way to meet his needs. At the same time as his needs are assessed, an assessment of his capacity is made under the Mental Capacity Act 2005 (MCA). The outcome of this assessment is that Joe does not have capacity to decide where to live. Therefore, a best interests assessment is carried out. This concludes that it would be in Joe’s best interests to remain living in the residential facility in which he is currently living during the week, as this caters for young people up to the age of 21 and his parents are happy for him to continue to spend weekends and holidays with them.

At this point, the legal basis for the provision of Joe’s accommodation changes from the 1989 Act to the 1948 Act. Local authority C continues to pay for Joe’s accommodation but falls into dispute with local authority D over his ordinary residence. Local authority C argues that Joe is not ordinarily resident in their area and that their duty to provide him with accommodation ended when the legal basis for the provision of his accommodation changed to the 1948 Act. However, in response, local authority D argues that Joe remains the responsibility of local authority C and he has not acquired an ordinary residence in their area.

The starting presumption for assessing Joe’s ordinary residence is that he remains ordinarily resident in local authority C as this is the local authority that had responsibility for him under the 1989 Act. However, this is only a starting presumption and it may be rebutted by considering all the facts of his case.

Joe has been living in local authority D for 7 years. However, he maintains a close relationship with his parents and returns to their home each weekend and for holidays. Joe remains dependant on his parents for much of his support and their home can be considered his ‘base’. Joe’s circumstances are similar to those in the Vale case where it was decided that a 28 year old woman who lived in residential care remained ordinarily

resident with her parents. The judge likened her position to that of a small child who was unable to make her own decision as to where to live. Therefore, on this basis, the presumption that Joe remains ordinarily resident in local authority C can be confirmed.

As Joe is being provided with Part 3 accommodation, section 24(5) of the 1948 Act applies and he is deemed to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before Part 3 accommodation was provided for him. Immediately before Joe entered residential accommodation under part 3 of the 1948 Act, he was living in the area of local authority D but was ordinarily resident for the purposes of the 1989 Act in local authority C. He is found to be ordinarily resident in local authority C for the purposes of the 1948 Act also.

Joe's case can be contrasted with that of Sunil, above. Joe maintains a close relationship with his parents and their home remains his base, whereas Sunil does not have a similar base with his parents. Furthermore, Sunil has established links within his host local authority and has expressed a wish to remain living there. Joe has established no such links and does not have capacity to make the same decision as Sunil in relation to his choice of accommodation.

### **Scenario 3: transition from accommodation under the 1989 Act to independent living accommodation with services provided under the 1948 Act**

Rosie is 18 years old and has Down's syndrome. She has been 'looked after' by local authority E from a young age and has spent the last 5 years living with foster carers "out of area" in local authority F. Although she is living in local authority F, she remains the responsibility of local authority E under the provisions in the 1989 Act.

When Rosie turns 18, she is ready to leave care and a community care assessment is carried out to determine her future care needs. A move to independent living is recommended in line with Rosie's own wishes. Rosie's support workers in local authority E, together with her foster carers, help her to find a flat share with friends in local authority F. Rosie signs her own tenancy agreement and the move takes place. She receives housing benefit to pay her rent and Supporting People money to fund housing related support. She also receives community care services under section 29 of the 1948 Act.

Local authority E provides Rosie's section 29 services but immediately falls into dispute with local authority F. In their view, Rosie has acquired a new ordinary residence in local authority F and any community care services should be its responsibility. However, local authority F argues that local authority E's responsibility towards Rosie has not ended simply because her accommodation status has changed.

As Rosie is in transition from being provided with services under the 1989 Act to being provided with services under the 1948 Act, the starting presumption is that her place of ordinary residence is local authority E, the authority that had responsibility for her under the 1989 Act. However, this presumption may be rebutted by looking at all the facts of Rosie's case.

Rosie has been 'looked after' from a young age and has lived in local authority F for 5 years by the time she turns 18. She has no contact with her birth parents and no links with anyone in local authority E other than her social workers. She has a well established support network in local authority F, including her foster parents who she intends to maintain a relationship with. Rosie has chosen to live in local authority F and has a flat share there which indicates that she has a settled purpose to remain there. Therefore, in line with the Shah test, Rosie has acquired an ordinary residence in local authority F: the starting presumption that she is ordinarily resident in local authority E can be rebutted.

As Rosie has been 'looked after' by local authority E for the requisite period of time, she is eligible for after-care services under the leaving care provisions in the 1989 Act. Local authority E, the authority that last looked after Rosie, is responsible for the provision of these services, despite the fact that Rosie is now ordinarily resident in local authority F and receiving services under the 1948 Act from that authority. Therefore, local authority E and local authority F must work together to ensure that Rosie gets a holistic support package that meets all her eligible needs.

#### **Scenario 4: transition from services under the 1989 Act to services under the 1948 Act where a young person goes to university**

Olu is 18 years old and has a physical disability which requires the use of a wheelchair. He currently lives at home with his parents in local authority G but has a place to study at university in local authority H, which is several miles away from his home town. Olu's disability means that he requires help with his personal care needs and this is currently provided by carers in his parents' home under section 17 of the 1989 Act, in conjunction with section 2 of the Chronically Sick and Disabled Persons Act 1970.

Olu starts his university course at the beginning of term. He lives in university accommodation which has been specially adapted for him by the university in line with their duties under the Disability Discrimination Act 1995. His accommodation is funded through mainstream education sources and his personal care is provided by a local domiciliary care agency, arranged by local authority G under section 29 of the 1948 Act.

However, local authority G immediately falls into dispute with local authority H. It argues that Olu has moved to local authority H for settled purposes and has acquired an ordinary residence there. In the authority's view, local

authority H should be providing Olu's services under section 29 of the 1948 Act. By contrast, local authority H argues that Olu is in its local authority on a temporary basis only and has not acquired an ordinary residence there. It believes local authority G remains responsible for the provision of Olu's services under the 1948 Act.

As Olu is in transition from receiving services under the 1989 Act to receiving them under the 1948 Act, the starting presumption is that he remains ordinarily resident in local authority G, the local authority that had responsibility for him under the 1989 Act. However, this presumption may be rebutted by considering all the facts of his case.

Olu has lived in local authority G all his life. He has a close relationship with his parents who provide him with emotional, and some financial, support. He regards their home as his home and plans to return there during his university holidays, and once his course is over. As such, his parents' home can be said to be his "base". Therefore, it does not appear that Olu satisfies the Shah settled purpose test as his move to local authority H is not for settled purposes: his home remains with his parents and his absence from their house can be said to be temporary in line with the advice given in Fox v Stirk (see paragraph 24 of this guidance). The presumption that Olu is ordinarily resident in local authority G has not been rebutted.

As Olu spends a significant amount of time in local authority H, several miles away from his local authority of ordinary residence, local authority G believes it would be more practical for Olu's social care services to be provided and overseen locally. Therefore, it makes arrangements for local authority H to provide services to Olu under section 29 of the 1948 Act on their behalf. Local authority H is able to recover the cost of Olu's care from local authority G under section 32(1) of the 1948 Act.

### **Scenario 5: transition from services under the 1989 Act to services under the 1948 Act where a young person goes to university**

Marcus is almost 18 years old and has a physical disability which requires the use of a wheelchair. He has been a 'looked after' child since the age of 5 and has been accommodated in several different local authority areas, although his responsible authority is local authority J. For the past two years he has lived in a residential school in local authority K where he has made good progress. He has been offered a university place that he wishes to take up. The university is located in local authority L.

When Marcus turns 18 a community care assessment is carried out with a view to putting a package of care in place that will support him at university. He is assessed as requiring assistance with personal care tasks such as washing and dressing as his disability means he has difficulty doing these tasks unaided. He plans to live in university accommodation which has been adapted for his use in line with the university's duties under the

Disability Discrimination Act 1995. This is funded through mainstream education sources.

Local authority J agrees to meet Marcus' personal care needs through services provided under section 29 of the 1948 Act and Marcus's move to university takes place. As Marcus has been a looked after child for the requisite period, he also qualifies for leaving care services under the 1989 Act. Local authority J also arranges these services.

However, local authority J immediately falls into dispute with local authority L over Marcus's place of ordinary residence. In its view, Marcus has moved to local authority L for settled purposes and has acquired an ordinary residence there. As such, Local authority J argues that local authority L should be providing Marcus's services under section 29 of the 1948 Act. However, in local authority L's view, Marcus remains the responsibility of local authority J, who had responsibility for him under the 1989 Act. Local authority L also argues that he may have an ordinary residence in local authority K, the local authority where he last lived. In its view, Marcus' presence in local authority L is temporary in nature and does not amount to a "settled purpose" under the Shah test.

To establish Marcus' ordinary residence, all the facts of his case must be considered. As Marcus is in transition from receiving services under the 1989 Act to receiving services under the 1948 Act, the starting presumption is that he is ordinarily resident in local authority J, the local authority that had responsibility for him under the 1989 Act. However, this presumption may be rebutted.

Marcus has been looked after by local authority J for most of his life. However, he has only lived within local authority J's boundary for brief periods – most of his care placements have been out of area in neighbouring local authorities. Marcus has no contact with his birth parents, who were originally from local authority J, and no intention to return to the area for settled purposes.

Marcus's only real link to local authority J is the fact that it remains responsible for the provision of his leaving care services. However, this in itself is not enough to affirm the presumption that he is ordinarily resident there. In other respects, Marcus has no connection with the local authority area and has no "base" there. Therefore, the presumption that he remains ordinarily resident in local authority J can be rebutted.

Most recently, Marcus has lived in a residential school in local authority K. However, he only lived there for only 2 years, during which time he remained the responsibility of local authority J. He did not build up any relationships outside his school nor did he establish links within the local community. He has no intention to return there. Therefore, Marcus has not established an ordinary residence in local authority K.

Marcus is, however, in local authority L for a settled purpose. He intends to

live there for the duration of his university course and has no other place which can be considered his base. His life is now based in local authority L and he has started to build friendships there and establish links with the local community. Therefore, Marcus acquires an ordinary residence in local authority L. As such, it is local authority L who is responsible for the provision of Marcus' services under section 29 of the 1948 Act.

As Marcus is eligible for leaving care services under the 1989 Act, local authority J, the local authority that last looked after him, is responsible for the provision of his vacation accommodation. Local authority J is also responsible for providing him with expenses during term time to cover things such as travel and equipment costs, as well as offering him general advice and support. Therefore, local authority J and local authority L need to work together to ensure that Marcus is fully supported during his time at university.

Marcus's situation can be contrasted with that of Olu (above, scenario 4). Olu did not acquire a new ordinary residence in his university town because he had a base to which he was intending to return regularly and at the end of his course, and, as such, his presence in his university town was on a temporary basis only. By contrast, Marcus had been a looked after child and had no base in any local authority. Therefore, when he moved to his university town he intended to live there for settled purposes for the duration of his university course.

## **PART 3: other legislation under which an ordinary residence determination can be sought**

### **The Community Care (Delayed Discharges etc.) Act 2003**

159. The Community Care (Delayed Discharges etc.) Act 2003 (“the 2003 Act”) places a duty on local authorities and the NHS to work together to ensure the safe hospital discharge of people with social care needs. Where a person remains in hospital because a local authority has not provided the assessment or services that the person needs to be safely discharged, the local authority is liable to pay the relevant NHS body a charge per day of delay.
160. Direction 2(2) of the Delayed Discharges (Continuing Care) Directions 2009 requires NHS bodies to take reasonable steps to ensure that eligibility for NHS CHC is assessed in all cases where it appears to the NHS body that the person may have a need for such care, in consultation, where it considers it appropriate, with the local authority appearing to the NHS body to be the authority in whose area the patient is ordinarily resident.
161. Where there is no eligibility for NHS CHC but there is a likely need for community care services upon the person’s discharge from hospital, section 2 of the 2003 Act requires the NHS body to notify a person’s local authority of this. Under the 2003 Act, it is the local authority in which the person appears to the NHS body to be ordinarily resident that must be notified by the NHS body.
162. Where a person is not ordinarily resident in any local authority i.e. a person of “no settled residence”, the 2003 Act provides that it is the local authority in which the hospital is situated that the NHS body must notify. Once notification has been received, the local authority must arrange for an assessment of the person’s need for community care services to be carried out and for the provision of any services.
163. If a local authority receives notification from the NHS body of a person who it believes is ordinarily resident in another local authority area, it should inform the NHS body that has issued the notification immediately. If the NHS body agrees that the person is ordinarily resident elsewhere, it should withdraw the notification and re-issue it to the correct local authority. If the NHS body does not agree that the person is ordinarily resident elsewhere, the local authority in receipt of the notification must proceed with carrying out the assessment and arranging for the provision of any necessary services, in accordance with its duty to do so in regulation 18 of the Delayed Discharges (England) Regulations 2003<sup>57</sup>. A person ready for discharge from hospital should not remain in hospital for longer than necessary because two or more local authorities have fallen into dispute about the person’s place of ordinary residence.
164. Where a local authority has provisionally accepted responsibility for a person discharged from hospital but remains in dispute with one or more local authorities over the person’s ordinary residence in relation to which authority should reimburse the NHS body for the person’s delayed discharge, a determination from the Secretary of State can be sought under section 8 of the 2003 Act. Determinations under this section of the 2003 Act should only be sought as a last resort: local authorities should take all steps necessary to resolve the disputes themselves first, in accordance with the Ordinary Residence Disputes (Community Care (Delayed Discharges etc.) Act 2003 Directions 2010.

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<sup>57</sup> S.I. 2003/2277.  
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165. It should be noted that a determination under section 8 of the 2003 Act can only be sought in relation to ordinary residence questions that arise under Part 1 of that Act, i.e. in connection with delayed hospital discharges. Where ordinary residence disputes arise in relation to the provision of social care accommodation or services to a person upon their discharge from hospital, determinations should be sought under section 32(3) of the 1948 Act.
166. Part 1 of the 2003 Act has been brought into force in relation to England only. The duties in the Act therefore do not apply to local authorities and NHS bodies in Wales.

## The Mental Capacity Act 2005 Deprivation of Liberty Safeguards

167. The Mental Capacity Act 2005 Deprivation of Liberty Safeguards (“MCA DOLS”) <sup>58</sup> provide a framework for the deprivation of liberty of people who lack the capacity to consent to arrangements made for their care or treatment (in either a hospital or care home) but who need to be deprived of liberty in their own best interests, to protect them from harm.
168. Under the MCA DOLS, hospitals and care homes (“managing authorities”) must seek authorisation from a PCT or local authority (a “supervisory body”) if they believe they can only care for a person in circumstances that amount to a deprivation of liberty. There are two types of authorisation: standard and urgent. A managing authority must request a standard authorisation when it appears likely that someone will need to be deprived of their liberty in a hospital or care home setting within the next 28 days.
169. In most cases, it should be possible to obtain an authorisation in advance of deprivation of liberty occurring. Where this is not possible and a person needs to be deprived of their liberty in their own best interests before the standard authorisation process can be completed, the managing authority must give itself an urgent authorisation and apply to the supervisory body for a standard authorisation to be issued within 7 calendar days.
170. Where a person needs to be deprived of liberty in a care home, the Mental Capacity Act 2005 (the “2005 Act”) provides that the supervisory body is **always** the local authority in which the person is ordinarily resident. This remains the case regardless of whether the person has been placed in the care home by a local authority or a PCT.
171. If a person is self-funding their care under private arrangements, they usually acquire an ordinary residence in the area in which their care home is located (see paragraphs 72-76 (*People who are self-funding their residential care*)). Therefore, if a self-funder becomes in need of a deprivation of liberty authorisation, it is the local authority in which the care home is located that is responsible for performing the supervisory body role. Where a person is not ordinarily resident in any local authority (for example a person of “no settled residence”), the Act provides that it is the local authority in which the care home is situated that becomes the supervisory body for the purpose of granting a deprivation of liberty authorisation.

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<sup>58</sup> The Mental Capacity Act Deprivation of Liberty Safeguards were inserted into the Mental Capacity Act 2005 by section 50 of and Schedules 7, 8 and 9 to the Mental Health Act 2007 which inserted Schedules A1 and 1A into the 2005 Act.

172. Under paragraph 183 of Schedule A1 to the 2005 Act, the deeming provisions in section 24(5) and 24(6) of the 1948 Act apply for the purposes of the MCA DOLS. This means that where a person is placed in a care home in another local authority area under Part 3 of the 1948 Act and becomes in need of a deprivation of liberty authorisation, the deeming provision in section 24(5) of the 1948 Act applies and they remain ordinarily resident in their placing local authority. Therefore, the placing authority would be the supervisory body.
173. Where a person is deprived of liberty in hospital, section 24(6) of the 1948 Act applies and they remain ordinarily resident in the area in which they were ordinarily resident immediately before they were admitted to hospital. If that person needs to be deprived of liberty in a care home upon their discharge from hospital, and the care home applies for the MCA DOLS authorisation in advance<sup>59</sup>, whilst the person is still in hospital (as would be good practice in this situation), it is the local authority in which the person was ordinarily resident before their admission to hospital which is responsible for exercising the MCA DOLS functions and acting as the supervisory body. This remains the case even where it is planned that the person will be discharged from hospital to a care home located in another local authority area.
174. If the person does not require the local authority to make arrangements on their behalf under section 21 of the 1948 Act and enters that home as a self-funder (usually a deputy would enter into a contract with the care home on their behalf), they would generally acquire an ordinary residence in the area in which their care home is located. However, if the person has not entered the care home at the point when the MCA DOLS application is made, they cannot be ordinarily resident in that local authority, despite any imminent plans to move there. Whilst the person remains in hospital, the section 24(6) deeming provision applies making them ordinarily resident in their previous local authority until they are discharged from hospital. It is likely that the self-funder would become ordinarily resident in the local authority in which their care home is located as soon as their move takes place but their supervisory body under the MCA DOLS would be their previous local authority. The scenario on page 59 below provides more guidance on how ordinary residence is determined when a person moves to a care home in a new local authority area under a MCA DOLS authorisation.
175. Section 24(6) of the 1948 Act applies to all NHS accommodation and not just hospitals (see paragraphs 60-65). This means that where a person is placed in a care home “out of area” by a PCT under NHS CHC arrangements they remain ordinarily resident in the area in which they were ordinarily resident before being provided with NHS CHC. Therefore, if the person in receipt of NHS CHC subsequently needs to be deprived of their liberty, it is the local authority in which they were ordinarily resident immediately before being provided with NHS CHC that is responsible for performing the supervisory body role.
176. Where two or more local authorities fall into dispute over a person’s ordinary residence in respect of which authority should exercise the supervisory body role, the 2005 Act provides that disputes may be determined by the Secretary of State or by the Welsh Ministers<sup>60</sup> where they cannot be resolved locally. Cross-border arrangements made

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<sup>59</sup> A standard authorisation comes into force when it is given, or at any later time specified in the authorisation: paragraph 52 of Schedule A1 to the 2005 Act.

<sup>60</sup> Relevant National Assembly for Wales functions have been transferred to the Welsh Ministers under paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

under paragraph 183(4) of Schedule A1 to the 2005 Act set out which cases are to be determined by the Secretary of State and which are to be determined by Welsh Ministers<sup>61</sup>.

177. It should be noted that a determination under the 2005 Act can only be sought in relation to ordinary residence disputes that arise in connection with which local authority should take on the role of supervisory body for the purpose of granting (and reviewing) a deprivation of liberty authorisation. Where ordinary residence disputes occur in relation to the general provision of social care accommodation or services, determinations should be sought under section 32(3) of the 1948 Act.
178. Regulations made under the 2005 Act<sup>62</sup> put in place arrangements for when disputes occur between local authorities over the ordinary residence of a person who needs to be deprived of liberty. They set out that, in the event of a dispute occurring, the local authority which receives the request for a deprivation of liberty authorisation must act as the supervisory body until the dispute is resolved, unless another local authority agrees to perform this role.

**Scenario: moving from hospital to a care home under a MCA DOLS authorisation**

Geeta is 86 years old and has dementia. She lives on her own in local authority A but receives some services at home under section 29 of the National Assistance Act 1948. She requires a routine operation to remove gallstones and is admitted to hospital in local authority B.

During Geeta's stay in hospital she becomes increasingly confused and starts to wander, making various attempts to leave the ward. She also starts to shout which disturbs the other patients. To ensure Geeta gets the medical treatment and care that she needs, her doctors and nursing staff feel it would be in her best interests to place her in a side room and to restrict her movements to prevent her leaving the ward and endangering herself. As Geeta is being restricted, together with the fact that she is unable to give her consent for the care and treatment she is receiving, hospital staff place Geeta under an urgent MCA DOLS authorisation and apply to PCT A, the PCT in which the hospital is located, for a standard MCA DOLS authorisation to last for the remainder of her hospital stay. The authorisation is granted.

Geeta recovers well from her operation but remains very confused. She continues to shout and wander, and becomes increasingly aggressive. In preparation for her hospital discharge, she is assessed by a multi-disciplinary team who conclude that she is no longer able to live independently in the community and recommends that she enters a care home. A place in a care home specialising in dementia care is found for Geeta in neighbouring local

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<sup>61</sup> The cross-border arrangements are available at:  
[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_097383](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_097383)

<sup>62</sup> The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 (S.I. 2008/1858). These Regulations apply only to England.

authority C. Due to Geeta's worsening dementia and the fact that she is unable to consent to the arrangements being made for her at the care home, the care home manager feels she will need to be deprived of her liberty as soon as she enters the care home, at least for the short-term until she settles in.

The care home manager applies to local authority B for a MCA DOLS authorisation, the area in which the hospital is located, mistakenly believing that local authority B is Geeta's local authority of ordinary residence. Local authority B immediately falls into dispute with local authority A over which authority should act as the supervisory body. Local authority C also becomes involved in the dispute.

Local authority A argues that local authority C should be the supervisory body. Its argument is based on the fact that the MCA DOLS application is to begin as soon as Geeta moves into the care home in local authority C, at which point she will become ordinarily resident there. Local authority B argues that Geeta has not acquired an ordinary residence in their local authority during her hospital stay and, as such, local authority A or C should be the supervisory body. Finally, local authority C argues that as Geeta is still in hospital and has not yet moved to their local authority area, she cannot be ordinarily resident in local authority C, despite her impending move.

As local authority B has received the MCA DOLS application, it is obliged to act as the supervisory body until the dispute is resolved, as set out in the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008. However, local authority C feels strongly that local authority B is not the correct authority to make the MCA DOLS authorisation and agrees to take on the supervisory body role until the question of Geeta's ordinary residence is decided.

To determine Geeta's ordinary residence for purpose of granting and overseeing a MCA DOLS authorisation, the Mental Capacity Act 2005 sets out that the supervisory body is the local authority in which the person is ordinarily resident. Therefore, Geeta's ordinary residence must be established at the point in time when the application for a MCA DOLS authorisation is made.

When the care home makes the application for the MCA DOLS authorisation, Geeta is in hospital in local authority B. As such, the section 24(6) deeming provision applies. This provision sets out that any person in receipt of NHS accommodation shall be deemed to be ordinarily resident in the area in which he or she was ordinarily resident immediately before he or she was admitted to hospital or other NHS accommodation. Therefore, whilst Geeta is in hospital in local authority B, she remains ordinarily resident in local authority A. Although she is likely to become ordinarily resident in local authority C when she moves into the care home, the MCA DOLS authorisation is made before she moves and she cannot be considered ordinarily resident in an area in which she is not yet living. Therefore, local authority A is responsible for fulfilling the MCA DOLS function and granting the authorisation. As such, local authority A must assume responsibility for performing the supervisory body role in place of local

authority C.

MCA DOLS authorisations should be granted for as short a time as possible with the period of authorisation being set by the supervisory body. As Geeta is in transition from hospital to a care home, it would be sensible for local authority A to grant a short MCA DOLS authorisation so her situation can be reviewed once she moves to her new care home. Her ordinary residence can also be reviewed at this point. If the review concludes that a further MCA DOLS authorisation is in Geeta's best interests, the care home should apply for a fresh authorisation to Geeta's local authority of ordinary residence – this is likely to be local authority C as she is likely to have become ordinarily resident there following her move.

## PART 4: other areas of legislation and guidance

### Establishing the responsible commissioner

179. The concept of "ordinary residence" does not apply to the NHS and the NHS has its own rules for determining who pays for the provision of care at a local level. Primary Care Trusts (PCTs) have responsibility for commissioning secondary care for people in need of treatment and care. The legal framework relating to secondary care commissioning responsibilities for PCTs is set out in the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002<sup>63</sup>. Guidance on the application of this legal framework is contained in *Who Pays? Establishing the responsible commissioner*<sup>64</sup>.
180. In general, where a person is registered with a GP in England, the responsible commissioner is the PCT that holds the contract with that GP practice. Where a person is not registered with a GP practice, the responsible commissioner is the PCT in whose geographic area the person is 'usually resident'. 'Usually resident' is largely determined by the person's own perception of where they are resident (either currently, or failing that, most recently) as evidenced by the address they give. If a person is unable to give an address, and their place of residence cannot be established by any other means, the responsible commissioner is the PCT in whose area the unit providing treatment is located.
181. An exception to the general approach for establishing the responsible commissioner exists in relation to NHS CHC<sup>65</sup>. Where a PCT places a person in a care home or independent hospital in the area of another PCT for the purpose of receiving NHS CHC, the "placing PCT" remains responsible for the provision of continuing care, even where the person changes their GP practice. See paragraphs 112-115 for more information on NHS CHC.

### After-care services under section 117 of the Mental Health Act 1983

182. Under section 117 of the Mental Health Act 1983 ("the 1983 Act"), local authorities, together with Primary Care Trusts (PCTs), have a duty to provide after-care services to people who have been detained in hospital under certain provisions of the 1983 Act. This duty stands by itself and is not a "gateway" to the provision of services under other legislation, such as the 1948 Act.
183. Section 117 of the 1983 Act sets out that the duty falls on the authorities "for the area in which the person concerned is resident or to which the person is sent on discharge by the hospital in which the person was detained."

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<sup>63</sup> S.I. 2002/2375 (as amended).

<sup>64</sup> See:

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_078466](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_078466)

<sup>65</sup> See regulation 3(7A) of the 2002 regulations, as amended by the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2006, S.I. 2006/359

184. **The term “resident” in the 1983 Act is not the same as “ordinarily resident” in the 1948 Act and therefore the deeming provisions (and other rules about ordinary residence explained in this guidance) do not apply.**
185. Guidance on section 117 of the 1983 Act was given in the case of R v Mental Health Review Tribunal Ex p. Hall (1999) 4 All ER 883. This case made clear that responsibility for the provision of such services falls to the local authority and PCT for the area in which the person was resident before being detained in hospital, even if the person does not return to that area on discharge. If no such residence can be established, the duty falls on the authority where the person is to go on discharge from hospital.
186. For example, the Local Government Ombudsman’s investigation into the provision of after-care services by Medway Council (06/B/12248) and Wigan Metropolitan Borough Council (06/B12247) considered the case of a man who was detained under section 3 of the 1983 Act and required section 117 after-care following his discharge. He was discharged to a specialist care facility in Wigan Metropolitan Borough Council but had been living in Medway Council prior to his detention. Both local authorities refused to meet the cost of providing after-care services. The Ombudsman considered the man to have been ‘resident’ in Medway prior to his compulsory admission and therefore found Medway Council to be responsible for the provision of the after-care services.
187. The term “resident” is not defined in the 1983 Act, and so, like “ordinarily resident” the term should be given its ordinary and natural meaning subject to any interpretation by the courts.
188. The duty to provide after-care services remains with the same local authority even if the person subsequently becomes resident in another area, unless they are then re-detained under a provision of the 1983 Act which again entitles them to section 117 after-care. In this situation, the rules would need to be applied again from scratch, to decide which authority has responsibility for any after-care once the person leaves hospital again.
189. **Disputes arising in connection with section 117 of the 1983 Act cannot be referred to the Secretary of State or Welsh Ministers for determination under section 32(3) of the 1948 Act.** If such a dispute could not be resolved locally, it would be necessary to involve the courts.

**Scenario: after-care under section 117 of the Mental Health Act 1983**

Padraig is 65 years old and has a history of mental health problems. He lives with his sister in local authority A, but has just been assessed as requiring residential accommodation under Part 3 of the 1948 Act. It is decided that Padraig’s needs will best be met in a care home located in local authority B, so a placement is arranged by local authority A under section 21 of the 1948 Act. While Padraig is in the care home, the deeming provision in section 24(5) of the 1948 Act applies and he remains ordinarily resident in local authority A for the purposes of that Act.

After a few months, Padraig’s mental health takes a sudden turn for the

worse and he is detained in hospital for treatment under section 3 of the 1983 Act. As soon as he is admitted, a decision is taken about which area will be responsible for his after-care under section 117 of the 1983 Act when he leaves hospital. This means deciding where Padraig was “resident” before he was detained.

As the care home in local authority B had become Padraig’s home, it is agreed that this is where he was resident. Although under the 1948 Act Padraig was deemed to be ordinarily resident in local authority A while living in the care home in local authority B, this was for the purposes of the 1948 Act only. The deeming provisions do not apply to section 117 of the 1983 Act. Therefore, it is decided that local authority B (and the PCT for the same area) are responsible for Padraig’s section 117 after-care.

When he leaves hospital, Padraig does not want to go back to his old care home, so as part of his section 117 after-care a place is found for him by local authority B in a care home located in local authority C.

Unfortunately, Padraig’s mental health declines and he is once again detained under section 3 of the 1983 Act. This means a new decision must be taken about who is responsible for his after-care when he leaves hospital. Again, the question is where Padraig was resident before being detained. In this case, it is agreed that he was resident in the care home in local authority C. Therefore, it is local authority C and the PCT for the same area that become responsible for his section 117 after-care (even though it was local authority B which had placed him in the care home under section 117 previously).

## **PART 5: the procedure for making an application to the Secretary of State for the purpose of seeking an ordinary residence determination**

**This part of the guidance should be read in conjunction with:**

- **the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010,**
- **the Ordinary Residence Disputes (Community Care (Delayed Discharges etc.) Act 2003) Directions 2010, and**
- **the Ordinary Residence Disputes (Mental Capacity Act 2005) Directions 2010.**

190. Where two or more local authorities fall into dispute over a person's ordinary residence, and that dispute cannot be resolved locally, the local authorities in dispute may request a determination from the Secretary of State or Welsh Ministers. Determinations can be sought under section 32(3) of the National Assistance Act 1948, section 8 of the Community Care (Delayed Discharges etc.) Act 2003 (in relation to England only) and paragraph 183(3) of Schedule A1 to the Mental Capacity Act 2005 (the Deprivation of Liberty Safeguards).
191. Under section 32(3) of the 1948 Act, as amended by section 148(2) of the Health and Social Care Act 2008, any question arising under Part 3 of the 1948 Act as to the ordinary residence of a person may be determined by the Secretary of State or the Welsh Ministers. Thus, the power for the Secretary of State or Welsh Ministers to make determinations applies to disputes between local authorities both in relation to residential and non-residential services provided under Part 3 of the 1948 Act. This power now extends to disputes arising under section 2 of the Chronically Sick and Disabled Persons Act 1970.
192. The power for the Secretary of State to make determinations under section 8 of the 2003 Act applies to disputes arising between local authorities over which authority should be liable for undertaking an assessment of the patient's needs for community care services and for the payment of any sums in respect of the patient's delayed discharge (see paragraphs 159-166).
193. Under paragraph 183(3) of Schedule A1 to the 2005 Act, the Secretary of State may determine disputes arising between local authorities in relation to which authority should act as the supervisory body for the purpose of granting a MCA DOLS authorisation.
194. The Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010, the Ordinary Residence Disputes (Community Care (Delayed Discharges etc.) Act 2003) Directions 2010 and the Ordinary Residence Disputes (Mental Capacity Act 2005) Directions 2010 ('the Directions') set out the steps that local authorities must take to resolve disputes locally and the procedure for making an application to the Secretary of State for a determination under the above legislative provisions. The following paragraphs of this guidance contain advice on this procedure. The Directions, together with this guidance set out the procedure to be followed in relation to disputes between English local authorities. In relation to cross-border disputes between local authorities in England and

Wales, the arrangements made under section 32(4) of the 1948 Act<sup>66</sup>, set out which of the Secretary of State and the Welsh Ministers will determine the dispute. In the case of a cross-border dispute which is to be determined by the Secretary of State (because the person at the centre of the dispute lives in England), the English local authority should comply with the Directions and the guidance so far as possible, in view of the fact that these are not applicable to the Welsh local authority. In a cross-border dispute which is being determined by the Welsh Ministers (because the person at the centre of the dispute lives in Wales), English local authorities should have regard to any guidance or Directions which may be issued by the Welsh Ministers in relation to the procedure for determining ordinary residence disputes.

195. Nothing contained in this guidance is to be taken to affect the discretion of the Secretary of State in giving a determination. Each case must be considered in the light of its own facts. The Secretary of State's decision is final subject only to judicial review.

## Procedure for seeking a determination

### Acceptance of liability

196. The Directions provide that where two or more local authorities fall into dispute over a person's ordinary residence they should take all steps necessary to resolve the dispute locally. If, having taken appropriate legal advice and considered the position in the light of this guidance and the Directions, they are still unable to resolve a particular dispute, they must apply for a determination under section 32(3) of the 1948 Act, section 8 of the 2003 Act or paragraph 183(3) of Schedule A1 to the 2005 Act.

197. Disputes should not run on indefinitely. The Directions set out that if the local authorities concerned cannot resolve the dispute at a local level within four months, the case must be referred to the Secretary of State for determination. Under the Directions, a dispute arises when one local authority notifies another local authority, in writing (which includes email communication), that it does not accept responsibility for the provision of accommodation or services to a person under Part 3 of the 1948 Act (or that it does not accept it is the right authority to be given a notice under section 2 of the 2003 Act, or that it is liable for acting as the supervisory body under Schedule A1 to the 2005 Act). This written notification marks the start of the dispute between local authorities, and the Secretary of State expects local authorities to put their concerns in writing at an early stage, so that disputes are not prolonged by lengthy verbal exchanges. If the authorities cannot resolve the dispute within four months from this date, they must make an application to the Secretary of State for a determination, and they have 28 days in which to prepare and submit the application following the expiry of the four month period. However, local authorities should note that the Secretary of State expects the majority of cases to be resolved locally. **A determination from the Secretary of State should be sought only as a last resort.**

198. Where a determination is sought, the provision of services to the person at the centre of the dispute should not be delayed as a result. Under regulation 18 of the Delayed

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<sup>66</sup> These arrangements apply in relation to disputes arising under the 1948 Act. Similar arrangements have been published in relation to disputes under the 2005 Act, see footnote 59 above.

Discharges (England) Regulations 2003<sup>67</sup>, the local authority which receives notice from an NHS body is required to assess the individual's need for services and decide which services to provide (and make payments to the NHS) pending resolution of any ordinary residence dispute. Similarly, under regulation 18(1) of the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary residence) Regulations 2008<sup>68</sup> the local authority which receives a Deprivation of Liberty authorisation application is required to act as the supervisory body until any disputes concerning ordinary residence are resolved. These local authorities are referred to in the Directions as the 'lead local authority'.

199. In relation to disputes arising under Part 3 of the 1948 Act or section 2 of the 1970 Act, the Directions set out that before the Secretary of State is approached for a determination, one of the local authorities involved in the dispute must have provisionally accepted responsibility for the person at the centre of the dispute and be providing services. Where local authorities cannot agree which authority should accept provisional responsibility for the provision of services, the local authority in which the person is living or is physically present is directed to accept responsibility until the dispute is resolved. The local authority which has accepted provisional responsibility is referred to in the Directions as the "lead local authority".
200. **The Secretary of State will not make a determination under section 32(3) of the 1948 Act unless there is evidence that one local authority has provisionally accepted responsibility for the provision of services.** The provisional acceptance of responsibility by one local authority does not influence any determination made by the Secretary of State.
201. If a determination by the Secretary of State subsequently finds another local authority to be the authority of ordinary residence, the lead local authority can recover full costs from the authority which should have been providing the relevant services. Such recovery would be under section 32(1) of the 1948 Act, and there is similar provision in regulation 18(4) of the Delayed Discharges (England) Regulations 2003 and regulation 19(6A) of the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008<sup>69</sup>.
202. If the dispute is cross-border between local authorities in England and Wales, arrangements made under section 32(3) of the 1948 Act and paragraph 183(4) of Schedule A1 to the 2005 Act set out who will determine disputes that arise between English and Welsh authorities. These arrangements set out that where the dispute involves a person who is living in England at the time the dispute arises, the case will be determined by the Secretary of State, and where the person is living in Wales when the disputes arises, the case will be determined by the Welsh Ministers.
203. **Local authorities should note that determinations under the 1948 Act can only be sought in relation to accommodation or services that are already being provided.**

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<sup>67</sup> SI 2003/2277.

<sup>68</sup> SI 2008/1858, as amended by the Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments – Amendment) Regulations 2009 (SI 2009/827).

<sup>69</sup> SI2008/1858, as amended – see footnote 66 above.

**The Secretary of State cannot make determinations in relation to services that may be provided in the future.**

204. **Local authorities should also note that where disputes arise in connection with accommodation or services provided under Part 3 of the 1948 Act, the assessed needs of the person using services should be met during the period of dispute.** Local authorities should not provide reduced packages of care pending the outcome of any determination. This is set out in direction 2(1) of the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010.
205. Section 32 of the 1948 Act does not expressly state who may refer ordinary residence disputes to the Secretary of State for determination. It is the Secretary of State's view that, for the purposes of the 1948 Act, a question as to a person's ordinary residence can only arise where two or more local authorities are in dispute about the place of ordinary residence of a person who has been assessed as needing community care services. In such a case, the authorities would be under a duty to apply for a determination in accordance with the Directions. Where the local authorities concerned are in agreement about a person's ordinary residence, but the person using services is unhappy with the decision, the person would have to pursue this with the authorities concerned, and could not apply to the Secretary of State for a determination.

### **Documentation to be submitted to the Secretary of State**

206. A local authority seeking a determination under 32(3) of the 1948 Act, section 8 of the 2003 Act or paragraph 183(3) of Schedule A1 to the 2005 Act should make a request in writing to the Secretary of State. The Directions set out the documents that must be submitted to the Secretary of State for this purpose. Local authorities may find it helpful to use direction 5, in particular, as a checklist when preparing to submit a case for determination. Applications for determinations should be submitted within 28 days of the end of the period of four months during which local authorities have attempted to resolve the dispute themselves.
207. If a lead local authority is in dispute with another local authority about a person's ordinary residence, and that other authority refuses to engage in discussions about the dispute (contrary to its duty to do so as set out in the Directions), the lead local authority should submit to the Secretary of State a statement of facts and the other documentation mentioned in the Directions. It should also provide evidence of the attempts it has made to engage with the other authority which is party to the dispute. If the Secretary of State is satisfied that the lead local authority has done all it can to engage with the other authority, the Secretary of State will, after warning the other local authority of his intention to do so, proceed to make a determination on the basis of the information provided by the lead local authority.
208. The Secretary of State will not allow ordinary residence disputes to run on indefinitely once they have been referred for a determination. The Secretary of State reserves the right, once satisfied that the parties have had adequate opportunities to make representations, to proceed to make a determination. In the event of any local authority persistently failing to comply with the Directions, the Secretary of State will consider whether this should be drawn to the attention of the Care Quality Commission as the body

responsible for assessing local authorities in the performance of their social services functions.

209. Local authorities may wish to seek legal advice before making an application for a determination, although they are not required to do so. If legal advice is sought, local authorities may, in addition to the documentation set out in the Directions, provide a separate legal submission. Where legal submissions are included, there should be evidence that the submissions have been exchanged between the local authorities in dispute.
210. All applications for Secretary of State determinations should be sent to the Department of Health at the address below.

Department of Health  
Dignity and Safety Team  
Social Care Policy Division  
Area 123, Wellington House  
133-155 Waterloo Road  
London SE1 8UG

211. The Secretary of State will endeavour to make a determination within 3 months of receipt of sufficient information to enable a determination to be made.
212. The Department of Health makes available on its website anonymised copies of determinations the Secretary of State has made<sup>70</sup>.

## Enquiries

213. Enquiries about this circular should be sent to the above postal address or emailed to:-

SCPI-Enquiries@dh.gsi.gov.uk

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<sup>70</sup> See footnote 12 above.