Neutral Citation No: [2018] NIQB 67 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10701** *Delivered: 03/08/18*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

THE WESTERN HEALTH AND SOCIAL CARE TRUST FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR HEALTH

and

LONDON BOROUGH OF ENFIELD (INTERESTED PARTY)

McCLOSKEY J

Preface

This judgment is given in the wake of a hearing conducted on 15 and 28 June 2018, followed by supplementary written submissions from all three parties completed on 25 July 2018. The Court is grateful to all representatives for the quality of their arguments and the assistance and co-operation provided generally.

Introduction

[1] The protagonists in these judicial review proceedings are:

(a) the Western Health and Social Care Trust ("*the Trust*"), the Applicant;

(b) the Secretary of State for Health of England and Wales ("*the SoS*"), the Respondent; and

(c) London Borough of Enfield ("*Enfield*"), *qua* interested party.

The impugned determination is that of the SoS made on 22 July 2017 and affirmed on 21 December 2017 to the effect that a lady whom I shall describe as CM (aged 32 years) is "*ordinarily resident*" in Northern Ireland and has been thus since 2009, with

the result that the care management and funding responsibilities for her have fallen on the Trust, rather than Enfield, since that date. In very brief compass, lying at the heart of this challenge is a funding dispute between the Trust and Enfield.

Anonymity

[2] I have decided that the lady in question, CM, who suffers from severe learning and other disabilities, should have the protection of anonymity. This judgment has been prepared accordingly. It follows that there will be no publication of the identity of CM or of that of any other person or of any information which could result in her being identified.

Factual Matrix

[3] The parties' representatives having co-operated with the court in this discrete matter, what follows in [4]–[12] is a rehearsal of agreed material facts.

[4] CM is 32 years old and has significant learning disabilities. She suffered a neurological insult at birth and has required high level care throughout her life. As a child she was resident with her parents in Enfield.

[5] Between 1991 and 2004 she attended school in Hertfordshire, a 52-week residential placement for children with epilepsy and associated conditions. Thereafter she attended a Camphill Community College in Wales until July 2009. CM then stayed in the family home in Enfield until 18 August 2009 when she moved to another Camphill facility in Clanabogan (hereinafter "*Clanabogan*"). While CM's parents were actively involved in identifying Clanabogan as a suitable facility, the final decision for CM to move there was taken by Enfield as the funding body. [I shall examine this a little more fully *infra*]. The Trust was not involved in this decision and has consistently maintained that it played no role in relation to CM's relocation and that it has no statutory duties in relation to her care. There is a dispute about the precise circumstances surrounding CM's move.

[6] CM's accommodation at Clanabogan is (and always has been) paid for by way of housing benefit. At the time of her move, the costs of her social care were paid for by Enfield. Enfield continued to pay those costs until 1 September 2017, at which time the Trust began paying them, on a without prejudice basis, given the SoS's determination of 27 July 2017.

[7] On 12 August 2009 Enfield, through Ms. Smith, first wrote to the Trust about this matter. She said that CM and her family had taken the decision to move to Clanabogan and that she had expressed herself clearly in wishing to live there in her adult life. Ms. Smith stated that a move there seemed to be 'both in CM's best interests to live near family (in County Cavan) and her preferences in terms of type of provision'. She said that Enfield had agreed to fund for three months in order to

allow for local care management to assess her. She further stated that CM was moving of her own free will and would have her own tenancy agreement there, which would make her ordinarily resident in Northern Ireland. There was no reply to that letter, nor to a further letter from Ms. Smith dated 17 December 2009 nor any answer to a number of telephone messages she left. There is a dispute as to whether this correspondence was received by the Trust given that neither letter was addressed to the Trust.

[8] On 30 March 2010 Rosemary Dunne-Smith for Enfield first wrote to Mr Maginness, the Trust's Chief Legal Adviser, asserting that CM had become ordinarily resident in the Trust's area. Mr. Maginness replied on 30 April 2010, denying that the Trust was responsible for funding CM's placement. Correspondence continued until 18 May 2010, during which, on 17 May 2010, Ms. Dunne-Smith said she had been advised by the SoS that there was no process for determining ordinary residence disputes between English and Northern Irish authorities.

[9] In October 2010, CM's parents lodged a complaint with Enfield's Learning Disability Team about the manner in which her case had been progressed. On 30 December 2010, their complaint was upheld by Enfield, which continued to pay for social care at the placement. In a letter dated 14 January 2011, Enfield accepted financial responsibility for the extant care package. On 12 February 2015 Innes Deuchars for Enfield wrote to Mr. Maginness putting the Trust on notice that Enfield would not pay for care beyond 31 March 2015 and asking the Trust to assess CM's needs. Mr. Deuchars said that Enfield did not consider she was ordinarily resident in its area and that it had been using a power to pay for care (for a person not ordinarily resident in its area) under legislation in force at the time but that it would not be able to do so when it was superseded by the Care Act 2014 ("the 2014 Act"). Mr. Maginness replied on 24 March 2015 saying that the Trust did not accept responsibility for CM's placement.

[10] There followed further correspondence between the parties. During the course of that correspondence, CM was assessed by Dr Ryan McHugh, a Consultant Psychiatrist. Dr McHugh's report of 4 November 2015 concluded: "[CM] knows no real understanding of the differences of living in Northern Ireland than England … she does not have the capacity to make a reasoned and informed judgement with regards to her place of residence. She will always require 24 hours support and wider support in making these sort of decisions".

[11] Enfield conducted a "comprehensive needs assessment" of CM on 25 November 2015. Correspondence between the parties failed to resolve the issue and the matter was referred to the SoS pursuant to section 40 of the 2014 Act. On 5 February 2016 Mr. Deuchars, with the Trust's agreement, wrote to the SoS asking

him to determine the dispute under section 40 of the 2014 Act, which he agreed to do.

[12] On 27 July 2017 the SoS determined that CM had been ordinarily resident in Northern Ireland since she moved there in August 2009. He also found that she lacked capacity to decide where to live. On 1 August 2017, Mr Deuchars wrote to Mr Maginness indicating, inter alia, that Enfield was requesting repayment of the monies it had expended on CM's care since August 2009. On 11 August 2017, Mr Maginness replied indicating that the Trust did not accept that it should have to repay the sums of money involved and that the Trust would be seeking a review of the SoS's determination. He stated that the Trust would assume responsibility for the payment of CM's care costs as of 1 September 2017, on a strictly without prejudice basis. The Trust asked for a review and on 21 December 2017 the SoS affirmed his initial decision.

Statutory Framework

[13] The Trust's challenge unfolds within the following statutory framework. First, at the time when CM moved from the Enfield District to Northern Ireland, (August 2009), the following provisions of the National Assistance Act 1948 (the "*1948 Act*") provided:

Section 21(1)

> *"(1) [Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing] -*
>
> *(a) residential accommodation for persons [aged eighteen 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; [and*
>
> *(aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.]*
>
> *(b) . . . "*

Section 21(4)

> *"(4) [Subject to the provisions of section 26 of this Act] accommodation provided by a local authority in the exercise of their [functions under this section] shall be provided in premises managed by the authority or, to such extent as*

may be [determined in accordance with the arrangements] under this section, in such premises managed by another local authority [, including a local authority in England,] as may be agreed between the two authorities and on such terms, including terms as to the reimbursement of expenditure incurred by the said other authority, as may be so agreed."

Section 24(1)

"*The local authority [empowered] under this Part of this Act to provide residential accommodation for any person shall subject to the following provisions of this Part of this Act be the authority in whose area the person is ordinarily resident.*"

Section 24(5)

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

Part III of this statute, incorporating the above provisions, was repealed, with effect from 6th April 2016, by the Social Services and Wellbeing (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (the "*2016 Regulations*").

[14] The 2014 Act , in the main operative from 01 April 2015, heralded a major statutory reform in this field. It contains the following material provisions.

Section 13(1)

"(1) Where a local authority is satisfied on the basis of a needs or carer's assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria (see subsection (7)."

Section 18(8)

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

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

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

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

(2) Condition 1 is met if the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are at or below the financial limit.

(3) Condition 2 is met if—

(a) the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are above the financial limit, but

(b) the adult nonetheless asks the authority to meet the adult's needs.

(4) Condition 3 is met if—

(a) the adult lacks capacity to arrange for the provision of care and support, but

(b) there is no person authorised to do so under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.

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

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

(b) the adult's accrued costs exceed the cap on care costs.

(6) The reference in subsection (1) to there being no charge under section 14 for meeting an adult's needs for care and support is a reference to there being no such charge because—

(a) the authority is prohibited by regulations under section 14 from making such a charge, or

(b) the authority is entitled to make such a charge but decides not to do so.

(7) The duties under subsections (1) and (5) do not apply to such of the adult's needs as are being met by a carer."

Section 19

"(1) A local authority, having carried out a needs assessment and (if required to do so) a financial assessment, may meet an adult's needs for care and support if –

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

(b) the authority is satisfied that it is not required to meet the adult's needs under section 18.

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

(a) the adult is ordinarily resident in the area of another local authority,

(b) there is no charge under section 14 for meeting the needs or, in so far as there is such a charge, condition 1, 2 or 3 in section 18 is met, and

(c) the authority has notified the other local authority of its intention to meet the needs.

(3) A local authority may meet an adult's needs for care and support which appear to it to be urgent (regardless of whether the adult is ordinarily resident in its area) without having yet –

(a) carried out a needs assessment or a financial assessment, or

(b) made a determination under section 13(1).

(4) A local authority may meet an adult's needs under subsection (3) where, for example, the adult is terminally ill

(within the meaning given in Section 82(4) of the Welfare Reform Act 2012).

(5) The reference in subsection (2) to there being no charge under section 14 for meeting an adult's needs is to be construed in accordance with section 18(6)."

[15] The 2014 Act makes specific provision for "cross-border" cases and the related issue of a person's ordinary residence.

Section 39

"(1) Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident –

(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or

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

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

(3) The regulations may make provision for determining for the purposes of subsection (1) whether an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in the regulations.

(4) An adult who is being provided with accommodation under section 117 of the Mental Health Act 1983 (after-care) is to be treated for the purposes of this Part as ordinarily resident in the area of the local authority in

England or the local authority in Wales on which the duty to provide the adult with services under that section is imposed; and for that purpose –

(a) "local authority in England" means a local authority for the purposes of this Part, and

(b) "local authority in Wales" means a local authority for the purposes of the Social Services and Well-being (Wales) Act 2014.

(5) An adult who is being provided with NHS accommodation is to be treated for the purposes of this Part as ordinarily resident –

(a) in the area in which the adult was ordinarily resident immediately before the accommodation was provided, or

(b) if the adult was of no settled residence immediately before the accommodation was provided, in the area in which the adult was present at that time.

(6) "NHS accommodation" means accommodation under –

(a) the National Health Service Act 2006,

(b) the National Health Service (Wales) Act 2006,

(c) the National Health Service (Scotland) Act 1978, or

(d) Article 5(1) of the Health and Personal Social Services (Northern Ireland) Order 1972.

(7) The reference in subsection (1) to this Part does not include a reference to section 28 (independent personal budget).

(8) Schedule 1 (which makes provision about cross-border placements to and from Wales, Scotland or Northern Ireland) has effect."

[emphasis added]

Section 39(8) and Schedule 1 are the only provisions of the 2014 Act which extend to Northern Ireland.

[16] The subject matter of Schedule 1 is "*Placements from England to Wales, Scotland or Northern Ireland*". Paragraph 1(4) of Schedule 1 provides:

> *"(4) Where a local authority in England is meeting an adult's needs for care and support by arranging for the provision of accommodation in Northern Ireland –*
>
> *(a) the adult is to be treated for the purposes of this Part as ordinarily resident in the local authority's area, and*
>
> *(b) no duty under the Health and Personal Social Services (Northern Ireland) Order 1972 or the Health and Social Care (Reform) Act (Northern Ireland) 2009 to provide or secure the provision of accommodation or other facilities applies in the adult's case."*

Identical corresponding provisions apply to placements in Wales and Scotland, per paragraphs (1) – (3).

[17] Section 56 of the Health and Social Care Act 2001 (the "*2001 Act*"), repealed with effect from 06 April 2016, under the rubric of "Cross-border placements", provided:

> *"(2) Regulations under this section may, in particular, make provision –*
>
> *(a) specifying conditions which must be satisfied before a local authority make any arrangements in pursuance of the regulations in respect of a person;*
>
> *(b) for the application of provisions of the 1948 Act in relation to –*
>
> *(i) any such arrangements, or*
>
> *(ii) the person in respect of whom any such arrangements are made,*
>
> *with or without modifications."*

Such Regulations as may have been made under this provision did not feature in argument.

[18] By Article 15 of the Health and Personal Social Services (NI) Order 1972 (the "*1972 Order*"), entitled "*General Social Welfare*":

"(1) In the exercise of its functions under section 2(1)(b) of the 2009 Act the [Department] shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.

(1A) Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the [social care] on such terms and conditions as may be agreed between the Department and that other body or person.
(1B) The Department may assist any body or person carrying out any arrangements under paragraph (1) by-

(a) permitting that body or person to use premises belonging to the Department;

(b) making available vehicles, equipment, goods or materials; and

(c) making available the services of any staff who are employed in connection with the premises or other things which the Department permits the body or person to use,

on such terms and conditions as may be agreed between the Department and that body or person.

(2) Assistance under paragraph (1) may be given to, or in respect of, a person in need requiring assistance in kind or, in exceptional circumstances constituting an emergency, in cash; so however that before giving assistance to, or in respect of, a person in cash the [Department] shall have regard to his eligibility for receiving assistance from any other statutory body, and, if he is so eligible, to the availability to him of that assistance in his time of need.

(3) Where under paragraph (1) the [Department] makes arrangements or provides or secures the provision of facilities for the engagement of persons in need (whether under a contract of service or otherwise) in suitable work, the [Department] may assist such persons in disposing of the produce of their work.

(4) The [Department] may recover in respect of any assistance, help or facilities under this Article such charges (if any) as the [Department] considers appropriate."

[19] The relevant statutory matrix includes certain measures of subordinate legislation. First, the Care and Support (Disputes between Local Authorities) Regulations 2014 [SI 2014/2829] establishes a mechanism for dispute resolution.

Regulation 2

"Responsibility for meeting needs whilst dispute is unresolved

2. – (1) The authorities must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult or carer to whom the dispute relates.

(2) The local authority which is meeting the needs of the adult or carer on the date on which the dispute arises must continue to meet those needs until the dispute is resolved.

(3) If no local authority is meeting the needs on the date on which the dispute arises –

(a) the local authority in whose area the adult needing care is living; or

(b) if the adult needing care is not living in the area of any local authority, the local authority in whose area that adult is present,

must, until the dispute is resolved, perform the duties under Part 1 of the Act in respect of the adult or carer as if the adult needing care was ordinarily resident in its area.

(4) If the duty under paragraph (3) falls to be discharged by a local authority ("A") which is not one of the authorities already party to the dispute, those authorities must, without delay, bring to A's attention –

(a) A's duty under that paragraph; and

(b) A's status as the lead authority for the purposes of these Regulations.

(5) A is not under the duties in these Regulations until the date on which it is aware of, or could reasonably be expected to have been aware of, its status as the lead authority.

(6) Where the dispute is about the application of section 37 (continuity of care), the authorities must perform their duties under sections 37 and 38 notwithstanding the existence of the dispute."

[20] The Care and Support (Ordinary Residents) (Specified Accommodation) Regulations 2014 contain certain definitions of note.

Regulation 1(2)

"(2) In these Regulations –

'the Act' means the Care Act 2014; …."

Regulation 5

"Supported living etc

5. – (1) For the purposes of these Regulations "supported living accommodation" means –

(a) accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and

(b) accommodation which is provided –

(i) in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose); and

(ii) in circumstances in which personal care is available if required.

(2) For the purposes of paragraph (1)(b) personal care may be provided by a person other than the person who provides the accommodation."

[21] The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) Regulations 2014 establish a mechanism for ensuring continuity of care in cross–border cases involving disputed fiscal responsibilities.

Regulation 5

"Responsibility for meeting needs pending determination of dispute etc

5.—(1) The authorities which are parties to a dispute must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult ("the adult") or carer to whom the dispute relates.

(2) This paragraph applies where a dispute concerns—

(a) section 48(2), 50(3) or 51(3) of the Act (temporary duty to meet needs); or

(b) any of paragraphs 1 to 4 of Schedule 1.

(3) Where paragraph (2) applies—

(a) the authority which is meeting any needs for accommodation of the adult on the date on which the dispute arises must continue to meet those needs; and

(b) if no authority is meeting those needs as at that date, the authority in whose area the adult is living as at that date must do so from that date.

(4) The duty under paragraph (3) must be discharged until the dispute in question is resolved.

(5) The meeting of an adult's needs by an authority pursuant to paragraph (3) does not affect the liability of that authority or any other authority for the meeting of those needs in respect of the period during which those needs are met."

[22] The Care Act (Transitional Provisions) Order 2015 (the "*2015 Order*") has certain provisions of note.

Article 1(2)

"(2) In this Order -

'the Act' means the Care Act 2014;

'the 1948 Act' means the National Assistance Act 1948(1);

'the 1983 Act' means the Health and Social Services and Social Security Adjudications Act 1983(2);

'the 2001 Act' means the Health and Social Care Act 2001(3);

'the 2015 Order' means the Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015(4);

'relevant date' means, in relation to a person, the date on which Part 1 of the Act (care and support) applies to that person by virtue of article 2."

Article 2

"Transitional provision in respect of persons in receipt of services

2.—(1) Except as provided by this Order, Part 1 of the Act does not apply in the case of a person to whom, or in relation to whom, immediately before this Order comes into force, support or services are being provided, or payments towards the cost of support or services are being made.

(2) A local authority providing such support or services or making such payments must, before 1st April 2016, complete a review of that person's case and from the time the local authority has completed that review, Part 1 of the Act will apply in respect of that person's case.

(3) If a local authority fails to comply with paragraph (2), Part 1 of the Act applies in that person's case with effect from 1st April 2016.

(4) In respect of a person to whom paragraph (3) applies, that person is to be treated as—

(a) having needs for care and support or support which meet the eligibility criteria under section 13(7) of the Act (the eligibility criteria);

(b) being entitled to have those needs met under the Act; and

(c) having complied with any requirements in or under the Act to enable the person to have those needs met,

until the local authority has completed a review in that person's case.

(5) A local authority has completed a review in a person's case when—

(a) they conclude that the person does not have needs for care and support or for support (as the case may be) in accordance with the Act;

(b) having concluded that the person has such needs and that they are going to meet some or all of them, they begin to do so; or

(c) *having concluded that the person has such needs, they conclude that they are not going to meet any of those needs (whether because those needs do not meet the eligibility criteria or for some other reason).*"

Article 6 (1)

"6. – (1) Any person who, immediately before the relevant date in relation to that person, is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act (authority liable for provision of accommodation) is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the Act."

Article 6 (2)

"(2) Section 39 of the Act (where a person's ordinary residence is) does not have effect in relation to a person who, immediately before the relevant date in relation to that person, is being provided with –

(a) *non-hospital NHS accommodation (within the meaning of article 12 of the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010(a)) which has been provided since immediately before 19th April 2010;*

(b) *shared lives scheme accommodation (within the meaning of regulation 4 of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014(b)) ("the 2014 Regulations"); or*

(c) *supported living accommodation (within the meaning of regulation 5 of the 2014 Regulations),*

for as long as the provision of that accommodation continues."

The Statutory Guidance

[23] The Care and Support Statutory Guidance was made under section 78(1) of the 2014 Act and came into operation on 1 April 2015. It is a measure of relatively voluminous text. An entire section, Chapter 19, entitled "Ordinary Residence", is designed to guide decision makers on this discrete subject. Its salient provisions are contained in the Appendix to this judgment.

The Decision In Shah

[24] The decision in Shah v Barnet LBC [1983] 2 AC 309 is the first of two decisions of the highest authority bearing on the issues to be determined in the present case. It concerned conjoined appeals in which students who had entered the United Kingdom some three years or more previously for education purposes applied unsuccessfully to local education authorities for awards to finance their proposed further education. In each case the refusal decision was based upon the relevant authorities assessment that the student was not, in the statutory language, "*ordinarily resident*" in the United Kingdom. All five students succeeded ultimately on appeal.

[25] Lord Scarman, with whom the other members of the House of Lords agreed, observed, firstly, that the natural and ordinary meaning of the words in question had been determined authoritatively by the House in two tax cases decided in 1928: see 340F. He continued, at 340G:

> "*Ordinary residence is not a term of art in English law. But it embodies an idea of which Parliament has made increasing use in the statute law of the United Kingdom since the beginning of the 19th century.*"

Lord Scarman next pointed out that the House had construed this term "*in general terms which were not limited to the Income Tax Act*": at 342C. The core of what the House decided is discernible in the following passage, at 34CH:

> "*Unless, therefore, 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 of long duration.*"

[26] Having added that this framework cannot apply to a person whose presence in a particular place or country is unlawful (such as in illegal immigrant), Lord Scarman continued, at 344B:

> "*There are two, and no more than two, respects in which the mind of the 'propitious' is important in determining ordinary residence. The residence must be voluntarily adopted …*
>
> *And there must be a degree of settled purpose ….*

> *That is not to say that the 'propitious' intends to stay where he is indefinitely ….*
>
> *All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.*"

The immediately following passage, at 344E, forms part of the reasoning:

> "*The legal advantage of adopting the natural and ordinary meaning … is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind …*
>
> *If there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only* ***it is adopted voluntarily and for a settled purpose****.*"

The highlighted words encapsulate the essence of the two limbs of the test to be applied. The final excerpt of note from the speech of Lord Scarman is found at 349C:

> "*… has the applicant shown that he has habitually and normally resided in the United Kingdom* ***from choice and for a settled purpose*** *throughout the prescribed period, apart from temporary or occasional absences?*"
>
> [Emphasis added.]

The decision in Cornwall

[27] The correct meaning to be ascribed to the statutory words "*ordinarily resident*" fell to be decided more recently by the Supreme Court in a different legislative context, community care, in R (Cornwall County Council) v Secretary of State for Health and Another [2016] AC 137. The statutory context included certain provisions of the National Assistance Act 1948 and the Children Act 1989. The person at the vortex of the dispute was a male, aged almost 30 years, who had suffered from multiple disabilities from birth and lacked mental capacity. He had enjoyed care placements in three separate Council areas. It fell to the Secretary of State to determine where the beneficiary had been "*ordinarily resident*", under section 24(1) of the 1948 statute, at the time of his 18th birthday. The Secretary of State decided that this was the Council area of Cornwall, where the person had most recently been placed. The essential question was whether the correct legal test had been applied in making this determination. The Supreme Court, by a majority of 4/1, answered this question in the affirmative.

[28] The first feature of what their Lordships decided is that they approved the Shah approach. This is particularly clear from the passages in [39] – [42] and [57]. Second, the legal policy in play was identified in the following terms, at [55]:

> "*It would run counter to the policy discernible in both Acts that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement. It would also have potentially adverse consequences. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority and the people who are cared for in some specialist settings may come from all over the country. It would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long term financial burden which would potentially follow.*"

The third stand out feature of the decision in Cornwall was the recognition that the Shah test could not be applied to the particular factual matrix without qualification: this is clear particularly from [41] – [42] and [45] – [47]. Citing with approval the decision of Taylor J in R v Waltham Forest LBC [The Times, 25 February 1985], Lord Carnwath JSC, at [46], endorsed the approach in that case:

> "*.. they were complimentary, common sense approaches to the application of the Shah test to* ***a person unable to make decisions for herself, that is to the single question whether her period of actual residence with her parents was sufficiently 'settled' to amount to ordinary residence.***"

The critical passage in the judgment of Taylor J is the following:

> "*Where the [subject] …. is so mentally handicapped as to be totally dependent upon a parent or guardian, 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. She is in the same position as small child.*"

[29] Each of the two limbs of the Shah test draws attention to the state of mind of the subject. The first question is whether the subject voluntarily adopted the place or country concerned for the purpose of residing there. The second is whether he had a settled purpose. While, admittedly, Lord Scarman highlighted that the long established House of Lords formulation is one "*depending more upon the evidence of*

matters susceptible of objective proof than upon evidence as to state of mind", at 344E, two observations seem to me apposite. First, Lord Scarman did not suggest that the test is devoid of subjectivity. Second, the breakdown of the test to the two questions formulated immediately above appears to me to lead ineluctably to the conclusion that they involve consideration of, *inter alia*, the subject's state of mind. That said, it is not difficult to conceive of some of the objective factors which will typically arise in the context of an ordinary residence assessment: (inexhaustively) the duration of the residence to date, the person's residence history, their nationality, nature and permanence of employment, family situation, breaks in residence, the duration of a projected educational course and other connections with the local authority area in question.

[30] I consider that the decision in Cornwall makes clear that in the particular case of a person of mental incapacity, the Shah test is stripped of subjectivity. Thus decision makers are not to apply either of the two questions formulated in [29] above. Rather, as Lord Carnwath stated without ambiguity, the "*single question*" is whether the past period of actual residence under scrutiny was sufficiently settled to amount to ordinary residence on the part of the person concerned: see [46]. In thus deciding the majority of the Supreme Court explicitly rejected the argument that in the case of a person mentally incapable of making decisions, the criterion should be that of "*the seat of the person's decision making power*" or "*the ordinary residence of the decision maker*": see [50].

[31] The conclusion of the Supreme Court was that the subject's place of ordinary residence remained at all material times within the area of the first of the three local authorities concerned. He had been cared for in the area of the first of the three local authorities during the first five years of his life, the area of the second authority between the ages of 5 and 18 and in the area of the third authority during the following 10 years. Lord Carnwath observed, at [60]:

> "*For fiscal and administrative purposes, his ordinary residence continued to be in* [the first local authority's area] *regardless of where they determined that he should live. It may seem harsh to* [the first local authority] *to have to retain indefinite responsibility for a person who left the area many years ago. But against that, there are advantages for the subject in continuity of planning and financial responsibility. As between different authorities, an element of arbitrariness and 'swings and roundabouts' may be unavoidable.*"

The Impugned Decision

[32] On 27 July 2017 the Deputy Director of Social Care Oversight of the Department of Health (the "Deputy Director"), acting on behalf of the SoS, made a formal determination under section 40 of the 2014 Act that:

> *"… CM is and has been since she moved in 2009 ordinarily resident in Northern Ireland."*

This conclusion was preceded by 47 paragraphs of text consisting of factual matrix and reasoning. The Deputy Director rehearsed a series of statutory provisions, many of them set forth above, together with references to and excerpts from certain reported judicial decisions, including Shah and Cornwall.

[33] The key passages in the impugned decision are the following:

> *"[39] The assessment is lacking in detail but, on the balance of probabilities, I accept that CM was not able to understand differences between living in Northern Ireland and England and that, accordingly, she lacked capacity to decide for herself where to live.*
>
> *[41] I proceed, therefore, on the basis that CM did not have capacity to decide where to live and that she did not "voluntarily" adopt Northern Ireland as her place of residence. WHSCT submit that, applying Shah and Cornwall, this is determinative of the issue of ordinary residence. I disagree.*
>
> *[42] My approach to determining ordinary residence of persons who lack capacity following the Cornwall Judgment is set out in the amended statutory guidance cited above. It is necessary to consider all the facts to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled. Applying this approach, I conclude that Northern Ireland became CM's place of ordinary residence when she moved there, notwithstanding the long-running dispute about who should pay for her care. It is clear that the placement was actively advanced by her parents and CM was positive about the move. The local authority had assessed it as appropriate to meet CM's needs and it was intended to be a long term placement.*
>
> *[43] Against this conclusion, WHSCT places particular reliance on a Scottish case: Milton Keynes Council v Scottish Ministers [2015) CSOH 156 in which a judge of the Outer House of Session held that a lady with dementia who had been moved by her daughter from England to Scotland in circumstances where she lacked capacity to agree to the move voluntarily, remained ordinarily resident in England. This is a case that turned*

on its particular facts. The judge held that there was no legal authority in place to authorise the daughter to make decisions on behalf of her mother. Whilst this may have been correct as a matter of Scottish law, I am concerned here with the laws of England and Wales and of Northern Ireland. Under sections 4 and 5 the Mental Capacity Act 2005, a decision about where a person should live can properly be made without any formal authorisation or court order (see paragraphs 6.8 to 6.14 of the Code of Practice). Whilst LBE did not carry out a formal capacity assessment, the evidence before me indicates that the decision about where CM should reside was made in her best interests. It appears that the move was initiated by CM's parents, who believed it was in CM's best interests. It was assessed and funded by the local authority and to that extent it was a joint decision. It is clear that CM's wishes and feelings were taken into account as were other relevant factors.

[44] In these circumstances, I do not consider that the move was unlawful and it led to a change in CM's place of ordinary residence. Insofar as the Milton Keynes case may be authority for any more general proposition that the ordinary residence of a person who lacks capacity cannot change when that person moves to a different area unless the move is arranged by a person with express legal authority (in the form of an instrument equivalent to a Scottish guardianship order) to act on that person's behalf, it is not binding on me and I decline to follow it. I do not read Shah or Cornwall as imposing such a requirement.

Public policy and deeming provisions

[45] Finally, I must consider whether, notwithstanding my finding that CM is in fact ordinarily resident in Northern Ireland, any provision of policy or statute compels me to a different conclusion in law. WHSCT submits that, as a matter of policy, the Cornwall case requires that any adult lacking mental capacity who is placed by a local authority in another administrative area should be treated as remaining ordinarily resident in the area of the placing authority. However, in Cornwall the relevant person moved from accommodation under section 20 of the Children Act 1989 to accommodation under section 21 of the 1948 Act. The Supreme Court held that it would create an unnecessary and avoidable mismatch if the deeming provisions under the 1989 Act were ignored for the purposes of the deeming provision under

the 1948 Act. It did not hold that a person lacking capacity should always remain the responsibility of a placing authority even absent any deeming provision. Therefore, CM cannot be treated as remaining ordinarily resident in the area of LBE unless one of the statutory deeming provisions applies to the current placement.

[46] Section 24 of the 1948 cannot apply because the placement is not a care home and the accommodation was funded by way of housing benefit. There is no evidence to suggest that the local authority assumed any responsibility for paying (or making up any shortfall in) rent. Moreover, the accommodation in Northern Ireland cannot have been accommodation under Part 3 of the 1948 Act as the relevant provisions did not permit cross-borderplacements.

[47] Paragraph 1(4) does not apply either: I accept LBE's submission that it is not meeting CM's needs for care and support "by arranging for the provision of accommodation". As noted above, the accommodation is paid for by way of housing benefit and the local authority's funding is provided in respect of CM's care. The Care and Support statutory guidance makes clear that schedule 1 does not cover cross-border placements in supported living. Therefore, I conclude that none of the relevant statutory deeming provisions apply in this case.

Conclusion

[48] For the reasons set out above, CM is and has been since she moved in 2009, ordinarily resident in Northern Ireland."

[34] I have extracted the above passages from what I have described as "*the impugned decision*". The SoS in fact made a further decision on review, in December 2017. This affirmed the initial decision. While it is in substance indistinguishable from its predecessor, all are agreed that the focus must be on the first of the two decisions.

The Competing Arguments

[35] Mr McGleenan QC and Mr Anthony (of counsel), on behalf of the Trust, formulated two central submissions. First, the SoS misdirected himself in relation to the temporal application of the "*ordinary residence*" test, in that the focus of attention was a series of facts and factors applicable at the date of the decision, rather than

those which were applicable at the time when the subject made the transition from Enfield's area to that of the Trust. Second, the SoS of State erred in law as regards paragraph 1(4) of Schedule 1 to the 2014 Act.

[36] The constituent elements of this submission are that from the date when the transfer was effected CM was placed in a special facility combining both care provision and accommodation; the accommodation element has been funded by Housing Benefit; the care provision has been funded by Enfield; in the statutory language Enfield has "arranged for" accommodation at the facility in question in order to meet CM's needs for "*care and support*"; and it is immaterial that Enfield is not funding the accommodation element of the arrangement. The misdirection, it is argued, is particularly identifiable in [47] of the impugned decision (reproduced in [33] above).

[37] To summarise, the Trust's case is that the conclusion that Enfield is the responsible fiscal authority is dictated by either of two routes. The first is that CM has at all material times been "*ordinarily resident*" in the area of Enfield. The second, independent of the first, is that by a combination of statutory provisions this financial responsibility devolves on Enfield, rather than the Trust.

[38] On behalf of the SoS, Mr McAteer (of counsel) formulated two main submissions. First, in cases where the person concerned lacks mental capacity, the Shah test is adapted, focusing on whether the period of residence under scrutiny is sufficiently settled to amount to ordinary residence. The exercise required entails an assessment of the duration and quality of the person's actual residence in the competing areas. This entails a shift towards evidence of matters susceptible of objective proof, to be contrasted with evidence as to the person's state of mind.

[39] Mr McAteer's second main submission is directed to the complex web of statutory provisions set forth in [13]–[22] above. The frontal contention developed is that paragraph 1(4) of Schedule 1 to the 2014 Act is of no application. The outworkings of this contention are:

(a) Paragraph 1(4) did not apply having regard to the Transitional Provisions Order 2015.

(b) In the alternative to (a), even if paragraph 1(4) applied, it does not embrace supported living arrangements made by an authority in England for a placement into a second authority in Northern Ireland.

(c) In the further alternative, it was for the SoS to determine whether Enfield was meeting CM's needs for care and support by arranging for the provision of accommodation in Northern Ireland. The SoS's answer to this question is challengeable only on Wednesbury principles, a species of challenge which the Trust does not advance.

[40] On behalf of Enfield, the submissions of Mr Harrop-Griffiths (of counsel) began with the following acknowledgement. Enfield does not dispute that CM was ordinarily resident in its area prior to moving to the Trust's area in August 2009. She had not been residing at the placement in question from 21 July 2009, which marked the beginning of a very brief period, just weeks, of living with her parents in Enfield's area. On the issue of mental capacity, while Enfield's failure to make a mental capacity assessment was recognised, it was submitted that in substance this was undertaken, Mr Harrop-Griffiths emphasising the factor of the wishes, feelings and views of both CM and her parents (per section 4 of the Mental Capacity Act 2005). Enfield's failure in this respect was characterised as a "*failure of process*".

[41] Mr Harrop - Griffiths concentrated particularly on the statutory dimension of the Trust's challenge (viz the second of their two central contentions *supra*) and submitted that paragraph 1(4) of Schedule 1 to the 2014 Act is of no application for the following reasons:

(a) Paragraph 1(4) is concerned with meeting the needs for care and support of the person concerned under section 18 or section 19 of the 2014 Act. On the date when this provision came into operation, 01 April 2015, Enfield was impotent to act under either section 18 or section 19 since, at this stage, CM was not as a matter of law ordinarily resident in its area.

(b) As Enfield has at no time been financing the accommodation dimension of CM's placement in the Trust's area, but only the care element, it has not, in the statutory language "*arranged for*" CM's accommodation in the Trust's area.

(c) The statutory term "*accommodation in Northern Ireland*" does not encompass the species of accommodation of which CM has been the beneficiary since August 2009, namely supported living accommodation.

(d) The effect of Article 6(2) of the Transitional Provisions Order 2015 is that Schedule 1 to the 2014 Act has at no time applied to CM.

Conclusions

[42] The omnibus question is whether the SoS, in making the impugned decision outlined in [1] above, erred in law. This, in my view, breaks down into two discrete questions, namely:

(i) Is the impugned decision compatible with the Shah/Cornwall principles?

(ii) Is the impugned decision harmonious with statute, specifically paragraph 1(4) of Schedule 1 to the 2014 Act? More generally, is it vitiated by any element/s of the statutory framework?

I shall examine each of these questions in turn.

[43] As regards (i), while the Court has received much eloquent and elaborate argument, I remind myself of the essential simplicity of the single test formulated by the Supreme Court in Cornwall to be applied to the question of ordinary residence in the case of a person lacking mental capacity, ie the instant case: was the past period of actual residence under scrutiny sufficiently settled to amount to ordinary residence on the part of the person concerned? (See [30] above.) This test falls to be applied to what the SoS decided, on the basis of all the available evidence, at the time of the decision viz July 2017.

[44] Fundamentally, the conclusion that the decision maker – the SoS's Deputy Director – directed himself correctly in law is invited if, in substance, he asked himself the question of whether as of July 2017 CM's residence during the previous ten years approximately in the Trust's area was sufficiently settled to amount to ordinary residence on her part. I refer to the critical passages in the impugned decision reproduced in [33] above. The test formulated by the decision maker is readily extracted:

> "*It is necessary to consider all the facts to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled.*"

While the decision maker did not refer explicitly to the duration and continuity of CM's residence in Clanabogan in this discrete passage, I consider it clear from the determination as a whole that these factors were reckoned. Given that, in the particular factual context, the decision maker was applying a notional retroscope to a past period of so many years' duration, I further consider that as a matter of law these were plainly material factors.

[45] It is clear from, *inter alia*, [33] of the impugned decision that the decision maker was influenced by those parts of the Statutory Guidance relating to a person's lack of capacity: see in particular paragraphs 19.16/23/26/32 reproduced in the Appendix to this judgment. I am satisfied that these passages are harmonious with the Shah/Cornwall principles. These passages, in short, divert attention from the subjective choice of the individual beneficiary who lacks mental capacity, emphasising rather objective facts and factors – correctly so, in my judgement.

[46] The first conclusion made by the decision maker was that CM lacked capacity to decide for herself where to live. I can identify no legal flaw in either this conclusion or the underlying reasoning. I consider that it is not undermined by Enfield's failure in 2009 to assess CM's mental capacity in accordance with the 2005

Act. Furthermore, it seems to me that in essence all three parties support this conclusion. Indeed, the evidence points firmly to the view that CM has never had the capacity to choose her place of residence. For completeness and insofar as material (which I doubt) I reject the contention that Enfield complied in substance with the relevant statutory provisions. First, this lacks the necessary evidential foundation. Second, in the abstract, it seems unlikely that in a matter of such gravity, some kind of casual, accidental or fortuitous observance of elements of the statutory regime will suffice.

[47] Having concluded, correctly, that CM lacked capacity, the next stepping stone in the decision maker's approach entailed, in substance, a recognition that the unadulterated Shah test did not fall to be applied in determining CM's place of ordinary residence. Rather, given the factor of lack of capacity, a broader view of the factual matrix was appropriate. In this context the decision maker highlighted in particular that the Clanabogan placement was actively advocated by CM's parents, CM was positive about it, Enfield had assessed this placement as appropriate to meet CM's needs and it was intended to be a long term placement. The decision maker had earlier recorded the evidence that CM had expressed a preference for a Northern Ireland placement, that the proposed placement would locate her close to her extended family, that CM had visited it several times and that the parents' expectation was that in due course they would return from the Enfield area (where they worked) to Northern Ireland. I am unable to identify any flaw in either the decision maker's second conclusion or the supporting reasoning. The critical contentious issue which he had to resolve arose out of the Trust's contention that CM's lack of capacity impelled to the conclusion that Enfield remained her place of ordinary residence. This argument was rejected, correctly in my view, having regard to the Cornwall recalibration of the Shah test for persons lacking capacity.

[48] In common with the decision maker I consider that the decision in Milton Keynes Council v Scottish Ministers [2015] CSOH 156 – a first instance decision with its own factual matrix and distinctive legal framework – has no bearing on the determination of CM's ordinary residence. There was no submission of substance to the contrary.

[49] The second main question which the decision maker examined was whether CM was to be treated as remaining ordinarily resident in Enfield's area by virtue of any statutory deeming provision. Answering this question in the negative the Deputy Director made two discrete conclusions:

(a) Section 24 of the 1948 Act did not apply because CM's placement was not in a care home or in accommodation under Part 3 of the statute, which did not permit cross-border placements, and it was funded by Housing Benefit.

(b) Paragraph 1(4) of Schedule 1 to the 2014 Act did not apply as Enfield was not meeting CM's needs for care and support "*by arranging for the*

> *provision of accommodation*"; the accommodation was funded by Housing Benefit; Enfield was funding CM's care only; and Schedule 1 does not apply to cross-border placements concerned with supported living.

[50] The Deputy Director's conclusion relating to the provisions of the 1948 Act was plainly correct. Indeed, the Trust's case does not entail any contrary contention. Rather, the central focus of the statutory provisions limb of the Trust's case is paragraph 1(4) of Schedule 1 to the 2014 Act, reproduced in [16] above. I consider that the question arising is the following: has Enfield at any material time, ie from August 2009 to December 2017 (and, effectively, to date), been "… *meeting* [CM's] *needs for care and support by arranging for the provision of accommodation in Northern Ireland …*"? If this question, one of pure statutory construction, attracts an affirmative answer then CM, by virtue of paragraph 1(4)(a) of Schedule 1 is to be treated for the purposes of the 2014 Act as ordinarily resident in Enfield's area and the Trust has/has had no duty to provide or secure the provision of accommodation or other facilities for her.

[51] The statutory language invites careful examination of the conduct of Enfield in August 2009 and subsequently. The relevant passages in the statement of agreed facts are at [5] – [7] and [9] (third sentence) above. I refer also to some further detail contained in the impugned decision, in particular [6] – [9] thereof. Therein it is recorded, *inter alia*¸ that in May 2009 Enfield's funding panel agreed in principle to fund CM's move to Clanabogan; it was envisaged that the funding would be of three months duration; CM would have her own tenancy and would be supported to apply for Housing Benefit and other statutory benefits; and CM and her parents favoured the envisaged move. On 12 August 2009 Enfield wrote to the Trust in the following terms:

> "*I am writing to inform you that* [CM] *and her family have taken the decision that she should move to Camphill Community at Clanabogan.* [CM] *and her parents were offered the choice of suitable provision in Enfield (where her parents work). However, they have refused this on the basis that* [CM] …. *prefers the Camphill Community way of life and that she would benefit from being near to her extended family who live in your area.* [CM's] *parents also feel that they eventually would wish to move back to Northern Ireland ..*
>
> … [CM] *has visited a number of times (this was facilitated by her parents) and has expressed herself clearly in wishing to live there in her adult life …*
>
> *The family applied to Clanabogan separately of Enfield Care Management but since they have been accepted and this seems to be both in* [CM's] *best interests to life near*

> *family and her preference in terms of type of provision, it has been agreed that we shall fund for a period of three months. This is to allow time for local care management to assess her.*
>
> *.. Enfield's care management and funding responsibilities will end as of 18 November 2009.*"

The decision maker, while noting the contentious aspects of this letter, recorded the absence of any dispute that CM's parents were "*.. actively involved in identifying Clanabogan as a suitable placement for CM...*"

[52] The statutory phrase "*arranging for* .. [etc]" is not a term of art. I consider that it invites a straightforward construction, shorn of subtlety and sophistication. In particular, it directs attention to who was doing what at the material time and, more specifically, who was orchestrating, driving and bringing to fruition the placement under scrutiny. In my view the agreed facts and supporting evidence point decisively to the assessment that the prime and dominant movers in CM's Clanabogan placement were her conscientious parents. They took the initiative at all times. Their conduct during the pre-August 2009 period indicates that they must have been proactively engaging with Clanabogan management for some time. This is consistent with [9]–[11] of the mother's first affidavit and [5]–[7] of her second affidavit, together with inferences to be reasonably drawn therefrom. Ultimately, in August 2009 CM's transfer to Clanabogan was the product of the proactive and conscientious conduct of her parents, which included in particular the submission of a formal placement application to Clanabogan management.

[53] My assessment of the agreed facts and supporting evidence is that Enfield was essentially inert, a spectator, throughout this critical period. In the language of the assessment report of May 2009, Enfield's role was confined to agreeing in principle to the proposed placement. To this end, CM's care plan was to be updated and some time-limited post-placement funding was also to be provided. In addition, Enfield was clearly satisfied that the proposed placement would be in CM's best interests.

[54] Enfield's involvement in "*arranging for*" the Clanabogan placement was confined to the immediately foregoing summary, together with a single letter dated 12 August 2009, to the Trust. This was essentially a letter of information which, in summary, conveyed clearly that all relevant preparations, arrangements and decisions had been those of CM's parents. CM has resided at Clanabogan ever since. In my judgement, the agreed facts and supporting evidence impel clearly to the conclusion, a factual one, that the conduct of Enfield has at no time involved "*arranging for*" the Clanabogan placement. This conclusion is not undermined by Enfield's initial willingness to provide the requisite funding for a period of three months and its subsequent willingness to continue to fund CM's care (only) while the fiscal dispute between the two authorities staggered on unresolved. While I consider that, in principle, the act of funding could, in conjunction with other conduct, be embraced by the statutory language "*arranging for* [etc]", the provision of

funding in the present case seems to me a single, isolated (albeit continuing) aspect of the broader factual matrix. I add that while that the impugned decision of the SoS suffers from an inappropriate emphasis on the factor of the funding of all aspects of CM's Clanabogan placement, I adjudge this to be immaterial for the reasons given above.

[55] Giving effect to the foregoing analysis and reasoning, I conclude that the deeming provision in paragraph 1(4) of Schedule 1 to the 2014 Act does not avail the Trust.

[56] I now address the further argument on behalf of the SoS that CM's Clanabogan placement has at no time constituted "*supported living accommodation*", drawing attention to paragraph 12(5) of Schedule 1 and Article 15 of the 1972 Order. The kernel of this argument is that CM's accommodation has been provided pursuant to a private tenancy agreement between CM and an unspecified landlord, funded by Housing Benefit. I reject this submission on the ground that it lacks the necessary evidential foundation and entails the *prima facie* unsustainable assertion that CM, a person lacking mental capacity, has at all times been a party to some undisclosed tenancy agreement.

[57] It follows from the above that I accept submissions (a) and (c) of Mr Harrop – Griffiths, rehearsed in [41] above, while rejecting submission (b).

[58] I turn to consider submission (d). I take the following starting point: it is abundantly clear – and not, on my understanding disputed by any of the three parties - that as a matter of fact CM's placement at Clanabogan has the essential traits of "supported living accommodation". The question arising is whether a placement in Northern Ireland is, as a matter of law, embraced by the applicable statutory definition (cf [20] above). Having considered the parties' further written submissions on this discrete issue, I determine it in the following way.

[59] Supported living accommodation is one of the three types of accommodation embraced by Article 6(2) of the Transitional Provisions Order 2015. The deeming provisions of section 39(1) and 39(5) apply to these accommodation types. There was no corresponding deeming provision in the 1948 Act. Enfield's submission, stated succinctly, is that by virtue of Article 6(2) of the Transitional Provisions Order 2015, Schedule 1 to the 2014 Act has at no time applied to CM. Mr Harrop-Griffiths submits that Article 6(2) is designed to make clear that section 39 has no retrospective effect as regards any of these accommodation types. It is further submitted that section 39(8), giving effect to Schedule 1, has no retrospective effect as regards a person in such accommodation in Wales, Scotland or Northern Ireland.

[60] This submission is, in substance, supported by Mr McAteer on behalf of the SoS. He further contends that the definition in regulation 5 of the 2014 Regulations is concerned only with the essential traits of supported living accommodation and contains nothing preventing it from applying to accommodation in Northern

Ireland. Article 6(2) is the bridge whereby regulation 5 of the 2014 Regulations, which did not apply to Northern Ireland, became applicable in this jurisdiction (the court's summary/formulation).

[61] The competing argument of Mr McGleenan and Mr Anthony on behalf of the Trust draws attention to section 125(7) of the 2014 Act. This statutory provision did not feature previously in argument and is hereby reproduced:

> *"(7) A power to make regulations or an order under this Act –*
>
> *(a) may be exercised for all cases to which the power applies, for those cases subject to specified exceptions, or for any specified cases or descriptions of case,*
>
> *(b) may be exercised so as to make, for the cases for which it is exercised –*
>
> *(i) the full provision to which the power applies or any less provision (whether by way of exception or otherwise);*
>
> *(ii) the same provision for all cases for which the power is exercised, or different provision for different cases or different descriptions of case, or different provision as respects the same case or description of case for different purposes of this Act;*
>
> *(iii) any such provision either unconditionally or subject to specified conditions, and*
>
> *(c) may, in particular, make different provision for different areas."*

The next step in the argument entails reference to section 128 of the statute, whereby while section 39(1) does not extend to Northern Ireland, section 125(7) does. The resulting submission is that the definition of "*supported living accommodation*" within regulation 5 of the 2014 Regulations does not embrace a placement in Northern Ireland.

[62] In resolving this discrete issue I chart the following path through the relevant provisions of the statutory labyrinth. While Article 6(2) of the Transitional Provisions Order 2015 is the key provision for the purpose of this exercise it must be considered not in isolation, rather in conjunction with the series of statutory provisions, of both primary and secondary legislation, to which it is linked. This

focuses attention particularly on the commencement date of the 2014 Act and the "*relevant date*" provisions of Articles 1 and 2 of the Transitional Provisions Order, in conjunction with section 39 of and paragraph 1(4) of Schedule 1(2) to the 2014 Act. The most significant aspect of the factual matrix to be considered in this exercise is the date when Enfield reviewed CM's case, namely 23 November 2015, this being the statutory "*relevant date*".

[63] Regulation 6 of the Transitional Provisions Order 2015 regulates, in transitional mode, how the place of a person's ordinary residence is to be determined. The mechanism which it devises operates by reference to the "*relevant date*" (supra). It expressly disapplies section 39 of the 2014 Act in relation to a person who "*immediately before the relevant date*" is being provided with any of three specified types of accommodation.

[64] In CM's case the accommodation type under consideration is that of "*supported living accommodation (within the meaning of regulation 5 of the 2014 Regulations)*". There is no dispute among the parties that CM's accommodation, in the Enfield area, immediately before the relevant date satisfies the statutory definition of "*supported living accommodation*". The real question, in my view, is whether there is any statutory basis for the suggestion that the disapplication of section 39 of the 2014 Act, effected by Article 6(2), does not operate in CM's case. I am unable to identify any such basis. Significantly, Article 6(2) applies to the whole of section 39 of the 2014 Act. While this, as a matter of constitutional law, given the primacy of primary legislation, cannot dilute section 128 of the statute, whereby section 39(1) does not extend to Northern Ireland, it applies fully to the remaining provisions of section 39. It follows, in my view, that section 39(8), which applies Schedule 1 to cross-border placements to and from (*inter alia*) Northern Ireland, had no application to CM, in the statutory language, "*for as long as the provision of that accommodation continues*" ie, for as long as her supported living accommodation in the Enfield area endured.

[65] Elaborating on the above, as a matter of agreed fact – see [5] above – CM was the beneficiary of an Enfield orchestrated placement in Wales between 2004 and 2009 and, following a sojourn of approximately one month in the family home in Enfield, in July/August 2009, moved to the Northern Ireland facility in Clanabogan on 18 August 2009. Article 6(2) requires the Court to focus on the period "*immediately before*" 23 November 2015, being the "*relevant date*". Article 6(2) proclaims unambiguously that section 39 of the 2014 Act has no application to cases where the person concerned is the recipient of supported living accommodation immediately before the relevant date. CM is, plainly, a person embraced by this statutory provision. I am unable to identify anything in the inexhaustive and essentially mechanical provisions of section 125(7) of the 2014 Act which operates to undermine the foregoing analysis. I accept the submission of Mr McAteer that – albeit by a somewhat labyrinthine and opaque route – Article 6(2) did indeed have the effect of applying the definition of "*supported living accommodation*" in the 2014 Regulations to placements in Northern Ireland.

[66] Thus the substance of the submissions of Mr Harrop-Griffiths and Mr McAteer is to be preferred to the competing argument of Mr McGleenan and Mr Anthony. It follows that I find merit in submission (d) rehearsed in [41] above.

Omnibus Conclusion

[67] On the grounds and for the reasons elaborated above, I dismiss the application for judicial review.

APPENDIX

THE CARE AND SUPPORT STATUTORY GUIDANCE

Paragraphs 19.1 – 19.3

19.1 It is critical to the effective operation of the care and support system that local authorities understand for which people they are responsible; and that people themselves know who to contact when they need care and support. Many of a local authority's care and support responsibilities relate to the entire local population (for instance, in relation to information and advice or preventive services). However, when it comes to determining which individuals have needs which a local authority is required to meet, the local authority is only required to meet needs in respect of an adult who is 'ordinarily resident' in their area (or is present there but has no settled residence (see heading 'People with no Settled Residence' below).

19.2 Ordinary residence is crucial in deciding which local authority is required to meet the care and support needs of adults and their carers. Whether the person is 'ordinarily resident' in the area of the local authority is a key test in determining where responsibilities lie between local authorities for the funding and provision of care and support.

19.3 Ordinary residence is not a new concept – it has been used in care and support for many years. However, there have been in the past and will continue to be cases in which it is difficult to establish precisely where a person is ordinarily resident, and this guidance is intended to help resolve such situations. The Care Act also extends the principle of 'deeming' certain people to be ordinarily resident in a particular local authority's area when some types of accommodation are arranged for them in another area, and the guidance also describes how these provisions should be put into practice. Local authorities cannot escape the effect of the deeming provision where they are under a duty to provide or to arrange for the provision of services (see para. 55 of R(Greenwich) v Secretary of State and Bexley (2006) EWHC 2576).

Paragraphs 19.14 – 19.16

19.14 The concept of ordinary residence involves questions of both fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account. The courts have considered the meaning of ordinary residence and the leading case is that of Shah v London Borough of Barnet (1983). In this case, Lord Scarman stated that:

> ***"unless ... it can be shown that the statutory framework or the legal context in which the words***

are used requires a different meaning I unhesitatingly subscribe to the view that ordinarily resident refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."

19.15 Local authorities must always have regard to this case when determining the ordinary residence of adults who have capacity to make their own decisions about where they wish to live. Local authorities should in particular apply the principle that ordinary residence is the place the person has voluntarily adopted for a settled purpose, whether for a short or long duration. Ordinary residence can be acquired as soon as the person moves to an area, if their move is voluntary and for settled purposes, irrespective of whether they own, or have an interest in a property in another local authority area. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the nature and quality of the connection with the new place.

19.16 For people who lack capacity to make decisions about their accommodation and for children transitioning into adult social care services, the judgment in the case of R (on the application of Cornwall Council) Secretary of State & Ors [2015] UKSC46(Cornwall) is appropriate because a person's lack of mental capacity may mean that they are not able to voluntarily adopt a particular place of residence.

Paragraph 19.23

All issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005 (the 2005 Act) [55]. Under this Act, it must be assumed that adults have capacity to make their own decisions, including decisions relating to their accommodation and care, unless it is established to the contrary.

Paragraph 19.26

Where a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.

Paragraph 19.32

Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.

Paragraphs 21.3 – 21.5

People's health and wellbeing are likely to be improved if they are close to a support network of friends and family. In a small number of cases an individual's friends and family may be located in a different country of the UK from that in which they reside.

In the production of a care and support plan, [74] ***the authority*** [75] ***and the individual concerned may reach the conclusion that the individual's wellbeing is best achieved by a placement into care home accommodation ('a residential placement') in a different country of the UK. Schedule 1 to the Care Act sets out certain principles governing cross-border residential care placements.***

As a general rule, responsibility for individuals who are placed in cross-border residential care remains with the first authority. This guidance sets out how the first and second authorities should work together in the interests of individuals receiving care and support through a cross-border residential placement.

Paragraphs 21.10 – 21.12

21.10 Authorities should follow the following broad process for making cross-border residential placements. Authorities may wish to adapt this process to fit their needs; but in general, authorities should aim to follow, as far as possible, the processes set out below.

21.11 Authorities may wish to designate a lead official for information and advice relating to cross-border placements and to act as a contact point.

21.12 These steps should be followed whenever a cross-border residential placement is arranged by an authority, regardless of whether it is paid for by that authority or by the individual.

Paragraphs 21.27 – 21.31

21.27 The second authority has no power to 'block' a residential care placement into its area as the first authority contracts directly with the provider. In the event of the second authority objecting to the proposed placement, all reasonable steps should be taken by the first authority to resolve the issues concerned before making the placement.

21.28 Following the initial contact and any subsequent discussions (and provided no obstacles to the placement taking place have been identified) the first authority should write to the second authority confirming the conclusions of the discussions and setting out a timetable of key milestones up to the placement commencing.

21.29 The first authority should inform the provider that the placement is proposed – in the same way as with any residential placement. The first authority should ensure that the provider is aware that this will be a cross-border placement.

21.30 The first authority should contact the individual concerned and/or their representative to confirm that the placement can go ahead and to seek their final agreement. The first authority should also notify any family/friends that the individual has given permission and/ or requested to be kept informed.

21.31 The first authority should make all those arrangements that it would normally make in organising a residential care placement in its own area.

NOTE: Annex H of the Statutory Guidance ("Ordinary Residence") did not feature in any of the parties' submissions.