GOV.UK

Department of Health & Social Care (https://www.gov.uk/government/organisations/department-of-health-and-social-care)

Guidance

Ordinary residence 5: 2020

Updated 28 October 2022

Contents

This publication is available at https://www.gov.uk/government/publications/ordinary-residence-anonymised-determinations-2020/ordinary-residence-5-2020

Determination by the Secretary of State of Ordinary Residence dispute between Council A and Council B of Mr X

1) I have been asked by Council A ('Council A') to carry out a review, under section 40(2) of the Care Act 2014 of the Secretary of State's determination ('the Determination') of ordinary residence of X ('X'), following Council A's referral of its dispute with Council B ('Council B') on that issue. X's ordinary residence is in dispute for the purposes of determining which of the two authorities is liable to provide X with after-care services under section 117 of the Mental Health Act 1983 ('the 1983 Act'). Section 117(4) provides for such disputes to be referred to the Secretary of State under section 40(1) of the Care Act 2014.

2) The Determination which I have to review concluded that X was ordinarily resident in Council A at the critical time, in YY/2011. There is perhaps some room for doubt about whether the critical date is YY/YY, the date of detention under section 2 of the 1983 Act, or YY/YY, the date of detention under section 3, but nothing turns on this on the facts of this case.

3) However, having reviewed the Determination in the light of the further submissions made to me, I have concluded that it was wrong to conclude that X was ordinarily resident in Council A at the critical date. X retained his ordinary residence in Council B following his placement in Council A under the Children Act 1989 ('the 1989 Act'), up until his eighteenth birthday. In light of the decision of the Supreme Court in R (Cornwall CC) v SSH [2016] AC 137, it is clear that, as a result of that, he became ordinarily resident in Council B when he turned eighteen, for the purposes of the National Assistance Act 1948, pursuant to which he continued to be provided with accommodation when he turned 18. By parity of reasoning, I think that the logic of Cornwall is that it would be equally wrong to ignore his ordinary residence in Council B, and the fact of his placement under the 1948 Act by Council B, when considering the place of his ordinary residence on YY/YY/2011 for the purposes of section 117 of the 1983 Act. Accordingly, taking account of this, I conclude that X was ordinarily resident in Council B on this date.

4) I reach this conclusion even if I assume that X had capacity to decide where to live throughout this period, from 2007, and/or the date of his eighteenth birthday, to the time of his detention in 2011. But in fact I have also concluded that X lacked capacity, which for reasons given below further reinforces my overall conclusion.

Key facts

5) The key facts are not a matter of dispute and are fully set out in the Determination, at paragraphs 2–13.

6) The key points are that X was born in YY/1991, and diagnosed with a learning disability and ADHD. On YY/YY/1998 he was removed from his mother and placed with foster carers. He lived for a time in Scotland but returned to residential care in Gateshead, in Council B's area. On YY/YY/2005, X was admitted to hospital (Hospital 1) but he was not detained under section 3 of the 1983 Act nor any other power which would give rise to an entitlement to after-care services under section 117 of the 1983 Act on release.

7) Accordingly, up to this time X was cared for by Council B pursuant to its duties under the Children Act 1989 ('the 1989 Act').

8) On YY/YY/2007, whilst still under 18, X was placed by Council B at 'Care Home 1', in Council A. For the purposes of the 1989 Act, he remained ordinarily resident in Council B by virtue of section 101(6)(c) of the 1989 Act, which provides that his residence there was to be disregarded for the purposes of determining his ordinary residence under the 1989 Act at that time.

9) X remained living at Care Home 1 until he was detained under section 2 of the 1983 Act on YY/YY/2011, and shortly thereafter under section 3 on YY/YY/2011.

10) In the meantime however, the basis on which he resided at Time to Care altered. He turned 18 on YY/YY/2009 and thereafter services were provided to him, not under the 1989 Act, but under section 21 of the National Assistance Act 1948. Council B continued to accept responsibility for providing services under the 1948 Act, and in light of Cornwall, it appears that it was right to do so. Accordingly, I work on the basis that, for the purposes of the 1948 Act, as for the 1989 Act, X remained ordinarily resident in Council B at this time.

11) On YY/YY/2011 X was made the subject of a standard authorisation under the Mental Capacity Act 2005, pursuant to which he was deprived of his liberty, and he remained subject to that for the period of some 3–4 weeks prior to his detention under the 1983 Act. However, he remained at Time to Care for this period.

Capacity

12) The parties are agreed that X lacked capacity to decide where to live in 2011, and the Determination also proceeded on that basis. I proceed on the same basis here.

13) A more difficult question is whether X lacked capacity in 2007, when he moved to Care Home 1, and/or in 2009, when he turned 18. The Secretary of State wrote to both authorities on YY/YY/2018 to invite them to address this issue. In that letter he drew attention to a standard authorisation dated YY/2010, which appears to show that X lacked capacity from that date.

14) Council B takes the view that, whilst the evidence is equivocal, there is insufficient information to rebut the presumption that X lacked capacity before YY/2010, when the standard authorisation issued at that time must have decided that he lacked capacity. Council A argues that X lacked capacity from at least 2003.

15) I accept that there is a presumption of capacity, as pointed out by Council B. However, in this case it is common ground that X lacked capacity from 2011 onwards, so the issue is not whether he ever lost capacity, but as to the date at which he lost capacity. Further, this is not a case (as might arise in relation to an elderly person who is showing signs of gradual deterioration) where there is any particular reason to think that X's cognitive abilities were deteriorating over time. Rather, the cognitive problems which led to the conclusion that he lacked capacity were present from an earlier time. In those circumstances, whilst I do not disregard the presumption in favour of capacity, I am inclined to think that it is of less significance than it might otherwise be.

16) However, it is not necessary for me to rely on this point. In response to the Secretary of State's request in YY/2018, Council A has provided a number of reports by psychologists and others dating from 2003 onwards. These reports were not directly concerned with the question of capacity but the picture which emerges from them is consistent, and in line with the conclusions that were reached by Dr Y in 2011. By way of example only, I note that on page 6 of the report of Dr Z dated YY/YY/2004, Dr Z states that X had 'great difficulty in understanding my questions', 'great difficulty in temporal sequencing and with short-term memory', and difficulty in remembering the doctor's name. The overall picture which emerges from these reports is of a child or young adult who consistently lacked the understanding of the consequences of decisions affecting his well-being, including about where he should live.

17) Accordingly, in so far as it is necessary to do so, I consider that I should decide this case on the basis that X lacked capacity to make decisions concerning his accommodation throughout the period of time that I have to consider, and in particular that he did so from at least the time of his move to Council A in 2007.

Legal approach

18) The relevant legal framework, and the basic meaning of ordinary residence, is recited at paragraphs 23–32 of the Determination.

19) For the avoidance of doubt, I consider that I am concerned with the version of section 117(3) which came into force on 1 April 2015 (subject to some non-material amendments in 2016). X was not released from detention under section 3 of the 1983 Act before this date, and accordingly any duty which would arise under section 117 upon his release will arise after this date. Accordingly, the relevant version of section 117 is that in force after this date, which provides (materially) that the relevant social services authority will be that in whose area he resided 'immediately before being detained'. There is nothing 'retrospective' about applying section 117 in this way. It simply involves the allocation of a present and future liability to provide X with after-care services. The mere fact that that future liability is fixed by reference to a past event, namely X's place of ordinary residence at some past date, does not render section 117(3) retrospective or retroactive, and the principle that statutes are to be construed as not to have retrospective effects is not engaged (see generally Wilson v First County Trust [2004] 1 AC 816, especially Lord Rodger at paragraphs 186–210).

20) Accordingly, I consider that the key question is where DT was ordinarily resident in May 2011, which is when detention commenced under section 3 of the 1983 Act. I think there is some room for argument about whether section 117(3)(a) looks to the date of detention under section 2 of the 1983 Act, or section 3, but I do not think that the short period of temporary detention under section 2 would have altered X's ordinary residence and hence nothing turns on this on the facts of this case.

21) I have had regard, in considering this case, to Chapter 19 of the Secretary of State's Care Act Guidance. However, the Secretary of State has recently concluded that that guidance should be revised in certain respects. Further, it cannot override the effect of primary legislation, and the case law to which I refer in this review. Whilst I do not perceive any clear conflict with the guidance in deciding this case as I have, to the extent that there is any conflict, I prefer the approach in this review decision.

Analysis

22) There is no doubt that, up to 11 November 2007, X's ordinary residence was in Council B. That is, of course, why Council B have accepted their responsibility to him under the 1989 Act, which allocates the responsibility for looking after a child according to their place of ordinary residence.

23) As from YY/YY/2007, X was in fact living at Care Home 1 in Council A's area. From this date onwards, he was physically present in, and physically residing in, Council A.

24) Accordingly, if one ignores the issue of capacity, and also ignores the deeming provisions in the 1989 Act and the fact that he had been placed in Time to Care by Council B, it would likely be concluded that he became ordinarily resident in Council A as from this date.

25) However, one cannot ignore these matters. At this time X remained a child and the important question as to his ordinary residence at this time was in relation to the 1989 Act. There is no doubt, and no dispute, that since X was being provided with accommodation at Time to Care by Council B, the effect of section 105(6) of the 1989 Act is that the period of his residence was to be disregarded for the purposes of determining his ordinary residence under the 1989 Act. Accordingly, for the purposes of the 1989 Act, X remained ordinarily resident in Council B's area on YY/YY/2007, and thereafter until he turned 18 in YY/ 2009.

26) Following his 18th birthday, X ceased to be provided with accommodation under the 1989 Act. However, Council B continued to pay for his accommodation and it appears not to be in dispute that they were obliged to, and did, provide such accommodation pursuant to section 21 of the National Assistance Act 1948 ('the 1948 Act'). They can only have done so on the basis that they regarded X as ordinarily resident under the 1948 Act. Further, whilst it may not have been clear at the time, in light of the Cornwall decision they were right to do so. It is instructive to consider why that is so.

27) In Cornwall, the Secretary of State, and ultimately the court, had to determine in which of a number of local authority areas a care user, PH, who lacked capacity was ordinarily resident for the purposes of the 1948 Act on the day that he turned 18. The Supreme Court rejected an argument that PH was ordinarily resident in Cornwall, where his parents lived. That left a choice between South Gloucestershire and Wiltshire. The circumstances were similar to the present case in that PH had been placed by Wiltshire County Council ('Wiltshire'), whilst still a child, in South Gloucestershire Council's ('South Gloucestershire') area, and retained his ordinary residence in Wiltshire for the purposes of the 1989 Act. The question was whether he therefore also retained ordinary residence in Wiltshire for the purposes of the 1948 Act and despite the fact that he had turned 18 so that the deeming provision in section 105 of the 1989 Act ceased to be directly applicable.

28) The Supreme Court held (by a majority) that he did retain ordinary residence in Wiltshire. Lord Carnwath observed (at paragraph 55) that it would be 'highly undesirable' if this were not the case, since 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 the person's placement'.

29) Lord Carnwath explained his conclusion as to why this undesirable result did not arise as follows:

> “ 58) Section 24(5) poses the question: in which authority’s area was PH ordinarily resident immediately before his placement in Somerset under the 1948 Act? In a case where the person concerned was at the relevant time living in accommodation in which he had been placed by a local authority under the 1989 Act, it would be artificial to ignore the nature of such a placement in that parallel statutory context. He was living for the time being in a place determined, not by his own settled intention, but by the responsible local authority solely for the purpose of fulfilling its statutory duties.
>
> “ 59)In other words, it would be wrong to interpret section 24 of the 1948 Act so as to regard PH as having been ordinarily resident in South Gloucestershire by reason of a form of residence whose legal characteristics are to be found in the provisions of the 1989 Act. Since one of the characteristics of that placement is that it did not affect his ordinary residence under the statutory scheme, it would create an unnecessary and avoidable mismatch to treat the placement as having had that effect when it came to the transition in his care arrangements on his eighteenth birthday.
>
> “ 60) On this analysis it follows that PH’s placement in South Gloucestershire by Wiltshire is not to be regarded as bringing about a change in his ordinary residence. Throughout the period until he reached 18 he remained continuously where he was placed by Wiltshire, under an arrangement made and paid for by them. For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live. It may seem harsh to Wiltshire 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.”

30) There are a number of different strands to the reasoning here and it is possible to read it in more than one way. One way of reading this passage is to say that Lord Carnwath is interpreting section 24(5) of the 1948 Act as taking account directly of the deeming provision in the 1989 Act, on the basis that ‘ordinary residence’ in that section must be taken to have the same meaning as in the 1989 Act. Alternatively, it may be that the ‘legal character’ of residence under the 1989 Act is taken to be carried over to residence under the 1948 Act, and/or that the fact of the placement by Wiltshire, who retained responsibility for PH, means that his residence continued to be in the same area as previously.

31) However one reads this passage, however, the effect is clear, that on turning 18, PH retained his ordinary residence in Wiltshire’s area for the purposes of the 1948 Act. By exact parity of reasoning, the same must be true for X when he turned 18, so that he remained ordinarily resident in Council B for the purposes of the 1948 Act because his placement in Council A was by Council B and at a time when it had responsibility for him under the 1989 Act.

32) It follows from this that X was ordinarily resident in Council B's area, for the purposes of the 1948 Act, from the date of his eighteenth birthday. Nothing of significance to his place of ordinary residence occurred between August 2009 and X's admission to hospital in May 2011 (I have already observed that nothing turns on the fact that X was admitted briefly under section 2 of the 1983 Act before his detention under section 3).

33) The question which I have to decide is what was X's ordinary residence, for the purposes of section 117 of the 1983 Act, in May 2011. As I have already said, I am concerned with section 117 in its current form, not with the previous version of section 117 which does not use the concept of ordinary residence (and for that reason I do not think that R (Hertfordshire CC) v Hammersmith and Fulham LBC [2011] PTSR 1623 is of any relevance).

34) Council B submit that Cornwall is of no relevance to this question, since it was not concerned with section 117 of the 1983 Act, but only with sections 21 and 24 of the 1948 Act.

35) However, I do not think that the reasoning in Cornwall can be confined in this way. Just as in Cornwall, the question which I have to answer is as to X's 'ordinary residence' on a particular date, namely 26 May 2011. It is true that section 117 does not expressly cross-refer to the deeming provisions in the 1989 or 1948 Acts, nor does it expressly preserve ordinary residence under one Act for the purposes of determining residence under section 117. But this, as I have pointed out, was equally true in Cornwall, because there was no express cross-reference or deeming provision as between ordinary residence under the 1989 and 1948 Acts.

36) Nor did the outcome in Cornwall turn on the particular wording of the 1948 or 1989 Acts. Rather, Lord Carnwath's conclusion seems to have turned on the following factors:

(i) The undesirability of residence fixed by a placement under one Act not carrying over to the other, having regard to the discernible policy of both Acts 'that the ordinary residence of a person … should not be affected for the purposes of an authority's responsibility by the location of that person's placement' (paragraph 55).

(ii) That it would be 'artificial to ignore the nature of … a placement' made under one Act when determining ordinary residence in a 'parallel statutory context' (paragraph 58).

(iii) That one cannot interpret 'ordinary residence' in one such statutory context so as to ignore the legal characteristics of residence in another (paragraph 59).

(iv) That for 'fiscal and administrative purposes' a person who is placed out of area by a particular authority who retains responsibility for him under a particular statutory regime, and whose residence is determined by that authority, will retain their ordinary residence in the area of the placing authority.

37) None of these factors seems to me to be peculiar to the facts of Cornwall nor to the statutory regimes of the 1948 and 1989 Acts. Just as Council B retained responsibility, including fiscal and administrative responsibility, for X when he turned 18, so it continued to have that responsibility up until the time of his detention under the 1983 Act. Bearing in mind that both the 1948 Act (and now the Care Act 2014) and section 117 of the 1983 Act are concerned with the provision of assistance and accommodation to persons in need of care, and that both now use the same base concept of 'ordinary residence' to determine the identity of the authority which must take responsibility for a person who is in need of such care, they seem to me to be just as much 'parallel' statutory regimes as the 1948 and 1989 Acts.

38) Accordingly, I conclude that the reasoning in Cornwall must apply so that X's ordinary residence in Council B under the 1948 Act (itself preserved by the Cornwall approach from his ordinary residence under the 1989 Act) must be treated as being his ordinary residence for the purposes of section 117 of the 1983 Act at the time of his detention in May 2011.

39) I have reached this conclusion without it being necessary to rely on any lack of capacity in X. I think it is reinforced, and at any rate certainly not undermined, by my conclusion that X lacked capacity from before the time of his move in 2007, and throughout the period up until his eventual detention in 2011.

40) First, I can see no basis on which the conclusions I have reached could be said to be undermined by X's lack of capacity. PH, the care user in the Cornwall case, lacked capacity and that did not prevent the application to him of the reasoning which I have outlined above.

41) Second, however, I think that if anything the conclusions I have reached are reinforced in so far as X lacked capacity. Whilst I do not think that the reasoning in Cornwall is dependent on the fact that PH lacked capacity, it certainly has greater force in relation to a person who does lack capacity, because it reinforces the appropriateness of Lord Carnwath's conclusion that ordinary residence should be determined according to the location of the placing authority which retains responsibility following any move. Accordingly, and to the extent (which I do not believe to be the case) that Cornwall is limited in its application to care users who lack capacity, it is applicable here in any event.

42) Accordingly, I conclude that X was ordinarily resident in Council B at the critical date, YY/YY/2011, that he was detained under section 3 of the 1983 Act.

Determination

43) For the reasons I have given, I conclude that X's ordinary residence for the purposes of section 117 of the 1983 Act was in Council B at the critical date, YY/YY/2011, when he was detained under section 3 of the 1983 Act.

↑ Back to top