

[Home](#) > [Ordinary residence: anonymised determinations 2020](#)

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

Guidance

# Ordinary residence 6: 2020

Updated 28 October 2022

## Contents

[Determination by the Secretary of State of ordinary residence dispute between Council A and Council B of Mr X](#)

[Key facts](#)

[Legal approach](#)

[Analysis](#)

[Determination](#)



© Crown copyright 2022

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit [nationalarchives.gov.uk/doc/open-government-licence/version/3](https://nationalarchives.gov.uk/doc/open-government-licence/version/3) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gov.uk](mailto:psi@nationalarchives.gov.uk).

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at <https://www.gov.uk/government/publications/ordinary-residence-anonymised-determinations-2020/determination-by-the-secretary-of-state-of-ordinary-residence-dispute-between-council-a-and-council-b-of-mr-x>

# 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 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 on that issue. X's ordinary residence is in dispute for the purposes of determining which of the 2 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 I have to review concluded that X is ordinarily resident in Council A at the critical date on which X was detained under section 3 of the 1983 Act (namely YY/YY/2008). However, I have concluded that this was mistaken. There are essentially 2 reasons for that conclusion for this, which are independent of each other although they point to the same conclusion:

i. That X remained ordinarily resident following his placement by Council B in Council A's area because his placement was pursuant to section 25 of the Children Act 1989 "the 1989 Act") and hence was a form of detention which (even assuming he had capacity to choose where to live in other circumstances) negated his will to be there and accordingly meant that his ordinary residence remained in Council B for the short period before he was detained under section 3 of the 1983 Act.

ii. That, quite apart from this, the effect of section 105 of the 1989 Act was that X remained the responsibility of, and ordinarily resident in, Council B's area notwithstanding the placement in Council A, for the purposes of the 1989 Act. This being so, and by parity of reasoning with *\_R (Cornwall CC) v SSH* [2016] AC 137, it is necessary to have regard to the legal characteristics of that placement in considering ordinary residence under the 1989 Act. Accordingly, having regard to that, X remained ordinarily resident in Council B at the time of his detention under section 3 of the 1983 Act.

## Key facts

3) The key facts are not a matter of dispute and are fully set out in the Determination, at paragraphs 4 to 12.

- 4) X was born on YY/YY/1991. He was placed in the care of Council B in 1997, aged 6, and remained in their care (at least) up until his detention in YY/2008. Council B accordingly took responsibility for him under the 1989 Act.
- 5) In YY/2008, X was placed by Council B in Council A's area, at "House 1". There is some discussion in the submissions about whether X was placed in House 1 on a short, medium or long-term basis, but I do not think that that is critical. As at YY/2008, he had been living there for 2 months and there is no suggestion that any move was planned or that he was expressing a desire to be anywhere else.
- 6) With respect to paragraph 7 of the Determination, which expresses some doubt over whether X had moved "after" this placement, I note that it appears that in fact X remained in House 1 up until his detention in YY/2008 (as the second part of paragraph 7 says). In that regard I note that Council B's submissions of 11 January 2017 assert (on the third page) that X remained at House 1 up to this time, and that this was a "placement" by it (and indeed the placement would have remained open if needed). Council A do not dispute this.
- 7) Equally, I therefore proceed on the basis that, not only was X living at House 1 for the time being, but that he was doing so pursuant to a placement by Council B pursuant to its duties to him under the 1989 Act. As such, pursuant to section 105(6)(c) of the 1989 Act, his residence there was to be disregarded for the purposes of determining his ordinary residence under the 1989 Act at that time. That being so, and since he had been ordinarily resident in Council B before it came under a duty to provide him with accommodation under the 1989 Act, he remained ordinarily resident in Council B under the 1989 Act up until his detention in YY/2008.
- 8) Further, however, I note that X's placement was pursuant to section 25 of the 1989 Act. Section 25 of the 1989 Act provides for the use of accommodation restricting liberty where a looked after-child has a history of absconding or where it is considered that, if kept in any other accommodation, he is likely to injure himself or others.
- 9) X was, as I have said, detained under section 3 of the 1989 Act on 26 YY/2008. Given my approach to the law, it is not necessary to consider subsequent events, save to say that he remained in detention under section 3 of the 1983 Act up until the referral of this ordinary residence dispute to the Secretary of State (and therefore until after the coming in to force of critical amendments to section 117 of the 1983 Act concerning ordinary residence).

## Legal approach

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

11) 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 that (materially) 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 to 210).

12) Accordingly, I consider that the key question is where X was ordinarily resident on YY/YY/2008.

13) 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

14) Prior to his placement in House 1 in YY/2008, X’s ordinary residence was in Council B, and it was also subject to section 105(6) of the 1989 Act so that any period of placement out of Council B was to be disregarded for the purposes of the 1989 Act in considering his ordinary residence. Council B have never disputed their responsibility for X under the 1989 Act.

15) Further, by virtue of section 106, X retained his ordinary residence in Council B, for the purposes of the 1989 Act, following his placement in House 1.

16) At the time of his detention under section 3 of the 1983 Act, X therefore remained a child for whom Council B was responsible under the 1989 Act. Further, not only had X been placed in House 1 by Council B, but that placement was made under section 25 of the 1989 Act and involved a deprivation of X’s liberty under that Act.

17) In light of this, I consider that there is more than one basis to conclude that X was ordinarily resident in Council B, and not Council A, for the purposes of section 117 of the 1983 Act at the time of his detention under section 3.

18) First, since the placement in House 1 involved a deprivation of X's liberty, I do not accept that it was capable of altering his ordinary residence within the ordinary meaning of that term. In *R v Barnet LBC, ex parte Shah* [1983] AC 309, Lord Scarman explained that:

“ 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. ...

“ There are two, and no more than two, respects in which the mind of the “propositus” is important in determining ordinary residence. The residence must be voluntarily adopted. **Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.**

“ And there must be a degree of settled purpose. ...”

19) As the words in bold show, a person who is detained in a particular place, including by imprisonment, will not necessarily or normally acquire an ordinary residence there. If that is true of ordinary imprisonment I see no reason why it should not be equally true of detention pursuant to a placement made under section 25 of the 1989 Act. Accordingly, I consider that, even apart from the effect of section 105(6) of the 1989 Act, X's placement at House 1 did not alter his ordinary residence in Council B. Since he remained at House 1 pursuant to this placement up until the time of his detention under section 3 of the 1983 Act, I therefore conclude that he retained his ordinary residence in Council B up to this date. This conclusion does not depend on section 105 of the 1989 Act.

20) Secondly, however, I consider that in light of the Cornwall case, X must have retained his ordinary residence in Council B for other reasons.

21) 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 National Assistance Act 1948 (“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.

22) 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”.

23) 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.”

24) 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.

25) 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.

26) I consider that by parity of reasoning, the same must be true for X following his placement by Council B in Council A. There can be no doubt that, if X had remained in Council A until his eighteenth birthday, he would have been considered ordinarily resident in Council B for the purposes of the provision of adult accommodation to him under the 1948 Act. So the only question is whether a different result should occur for ordinary residence under the 1983 Act as opposed to the 1948 Act.

27) 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).

28) 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. 29) 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. 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.

30) 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.

31) 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.

32) 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 on YY/YY/2011.

33) In reaching this conclusion I have not found it necessary to consider the question of X’s capacity to make decisions about his place of residence. The fact of placement under section 25 of the 1989 Act seems to me to negative any “voluntary” adoption of House 1 by X as his place of residence, even if (which, in the circumstances, may be doubtful) he had full capacity to choose his place of residence and even if (as to which there is no real evidence) he was happy to go there.

34) Accordingly, I conclude that X was ordinarily resident in Council B at the critical date, YY/YY/2007, that he was detained under section 3 of the 1983 Act.

## Determination

35) 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/2008, when he was detained under section 3 of the 1983 Act.

[↑ Back to top](#)

---

## **OGI**

All content is available under the [Open Government Licence v3.0](#), except where otherwise stated

[© Crown copyright](#)