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Guidance

Ordinary residence 7: 2020

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Review of the Secretary of State's determination of ordinary residence in the case of X arising from the dispute between Council A and Council B

1) The Secretary of State has been asked by Council A to carry out a review, under section 40(2) of the Care Act 2014 ("the CA 2014") of his determination ("the Determination") of ordinary residence of X ("X"). The Determination was made following a referral to the Secretary of State by Council B of its dispute with Council A, pursuant to section 117(4) of the Mental Health Act 1983 ("the MHA 1983") and section 40 of the CA 2014. X is entitled to after-care services under section 117 because she was detained on 2 occasions ("the First Period" and "the Second Period") under section 3 MHA 1983.

2) In the Determination the Secretary of State concluded that X was ordinarily resident in Council A's area at the relevant time for the purposes of determining responsibility for the provision of after-care under section 117 of the MHA 1983.

3) I have concluded that this is incorrect, and that Council B has, or retains, the responsibility for the provision of after-care for X. I have reached this conclusion for a number of free-standing and independent reasons:

(a) That, applying the approach of the Supreme Court in R (Cornwall CC) v SSH [2016] AC 137, X should be regarded as being ordinarily resident in the area of Council B as at YY/YY/2015 (immediately before the Second Period of detention), on the basis that Council B had itself placed her in Council A pursuant to its obligations to provide her with after-care under section 117 of the MHA 1983 following the First Period. Though physically present and resident in Council A at this date, she remained ordinarily resident in Council B "for fiscal and administrative purposes" in the sense discussed by Lord Carnwath in paragraph 60 of the Cornwall judgment.

(b) In the alternative, I would conclude that on the proper construction of section 117(3)(a), in a case where a person is detained on more than one occasion, and where they are provided with after-care services continuously for any period in which they are not detained, then the phrase "immediately before being detained" in section 117(3)(a) should be interpreted to mean "immediately before being first detained" rather than "immediately before being most recently detained". On this basis the issue of ordinary residence which I have to determine is as to X's ordinary residence immediately prior to the First Period of detention, at which time it is clear (and there is no dispute) that she was ordinarily resident in Council B.

(c) In the further alternative, even if either of the above conclusions is incorrect, I do not accept that Council B's duties under section 117 MHA 1983 arising from the First Period of detention lapsed by operation of law when she was detained for the Second Period, and there is no evidence that Council B ever took a decision that she was no longer in need of such services as required by section 117(2) of the MHA 1983. In those circumstances I would conclude that Council B's duties under section 117 arising from the First Period of detention continued. On that basis, no question as to X's ordinary residence arises but Council B retains responsibility for X under section 117 of the MHA 1983.

Key facts

4) The facts are set out at paragraphs 4 to 17 of the Determination.

5) X has a diagnosis of treatment resistive schizoaffective disorder. She became known to Council B for the first time in around 2011 or 2012 because of her physical and mental health problems. At that time, X was residing at a property in Area 1 which was funded by her housing benefit, and she was clearly ordinarily resident (and "resident") there and hence in Council B.

6) X was admitted to hospital informally on YY/YY/2012, in Area 2. She had periods of leave in YY and YY 2012 and YY 2013, but it is not in dispute that she retained her residence in Area 1 (and Council B) until YY/2013. She was not detained under the MHA 1983 at this time.

7) On YY/YY/2013, alternative accommodation, again in Area 2, was found. She was readmitted to hospital, Hospital 1, first, informally, on YY/YY/2013 and then by way of detention under section 3 of the MHA 1983 on YY/YY/2014. This was the start of the First Period of detention.

8) By reason of this detention, X was entitled to assistance and accommodation under section 117 of the MHA 1983 on her discharge YY/2013. That was provided for her by Council B, and there has not been any dispute about her entitlement nor about Council B's responsibility in this period.

9) On YY/YY/2014, Council B assessed X as lacking capacity to decide where to live. Following consultation, Council B decided that it was in X's best interests to move to a residential placement in Council A, close to her daughter.

10) Thus on YY/YY/2014, X moved to Care Home 1 in Council A. She moved to a different care home, Care Home 2, also in Council A, on YY/YY/2015, and this was also funded by Council B under section 117.

11) However, on YY/YY/2015, X was detained under section 2 of the MHA 1983, and on YY/YY/2015 she was detained under section 3 for a second time ("the Second Period").

12) X was discharged on YY/YY/2015, although she remained as an in-patient subject to a standard authorisation pursuant to Schedule A1 to the Mental Capacity Act 2005 (it being common ground that she continues to lack capacity to decide where to live).

13) The question is which authority has responsibility for X's care under section 117 of the MHA 1983 following this second discharge, if and when she is fully discharged from detention.

Legal framework

14) A person who was detained under various provisions of the MHA 1983 will become eligible for after-care services under section 117 of that Act thereafter.

15) Section 117 has been amended from time to time, and most recently by the CA 2014. However, under subsection (2), and notwithstanding the amendments, it has at all times provided that it shall be the duty of the relevant social services authority (together with the relevant NHS body, to arrange after-care services "until such time as [the relevant bodies] are satisfied that the person concerned is no longer in need of such services".

16) Accordingly, once the duty under section 117 has arisen, and services are provided, they must continue to be provided until such time as the relevant bodies are positively satisfied that the need for such services no longer exists.

17) I note that paragraph 33.21 of the current Mental Health Act Code of Practice advises that after-care services should not be withdrawn solely on the basis that the patient has returned to hospital "informally or under s.2". That does not as such address the position if the patient has been detained under section 3 of the 1983 Act, but I regard it as significant nonetheless. It shows that the mere fact that a person is in hospital for the time being, so that the immediate need for after-care services is reduced or removed because the relevant needs are being met in some other way, does not, at least in and of itself, mean that the need for services no longer exists. If that is correct in relation to informal admission, or detention under section 2, then I do not see why it would be different in relation to detention under any other provision of the MHA 1983. It is true that detention under some other provision, such as section 3, may mean that a new entitlement could in due course arise under section 117, but that does not demonstrate that the existing need for after-care services has disappeared. That is a question of fact, on which there is no difference in principle between the situation where the need for services has been put into abeyance for the time being because of detention under section 2, and that where that need is in abeyance because of detention for the time being under section 3.

18) The question of which social services authority is responsible for the provision of services is determined under section 117(3)-(6). Until the amendments brought in by the CA 2014 came into force on 1 April 2015, that fell to be decided according to the "residence" (not ordinary residence) of the individual, and a considerable body of case law grew up around the meaning of that term.

19) However, in cases where a duty under section 117 first arises after 1 April 2015, the question has to be considered by reference to the version of section 117 in force from that date. Under section 117(3), as now in force, and leaving out of account provisions relevant only to Wales, the relevant social services authority is now:

> " (a) if, immediately before being detained, the person concerned was ordinarily resident in England, for the area in England in which he was ordinarily resident; …
>
> " (c) in any other case for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained."

20) In this case, when X was detained for the second time, she was detained for a period of about one month under section 2 of the MHA 1983 (on 27 May 2015), and then under section 3 (on 23 June 2015). The parties have proceeded on the basis that the relevant date is 23 June 2015. I do not need to decide whether that is correct because it is clear that the outcome of this review would be the same even if the relevant date was the date of detention under section 2 on 27 May 2015.

21) Under subsection 117(4), a dispute between social services authorities in England about a person's ordinary residence within section 117 may be referred to the Secretary of State under section 40 of the CA 2014, which in turn provides for the determination of that dispute. Thus, the Secretary of State's function in such a case is to decide where a person is ordinarily resident for the purposes of section 117(3).

The function of the Secretary of State under section 40 of the CA 2014

22) The Secretary of State's function under section 40(1) of the CA 2014 is to determine "any dispute about where an adult is ordinarily resident" for the purposes of that part of the Act. Where section 40 applies by virtue of section 117(4) of the CA 2014, his function is likewise to determine where a person is ordinarily resident for the purposes of section 117(3).

23) It is implicit in this function, of determining where a person is ordinarily resident for the purposes of section 117(3), that the Secretary of State may have to determine what is the relevant date for the determination of ordinary residence

under section 117(3). His function is to determine the dispute about ordinary residence for the purposes of section 117(3), not the dispute about ordinary residence on a particular date agreed by the parties to the dispute. If the Secretary of State concludes that the relevant date for deciding ordinary residence is some different date than that identified by the parties, he is therefore bound to decide the dispute by reference to that alternative date. Equally, if he decides that no issue about ordinary residence arises at all under section 117(3), for example because one of the authorities is subject to some pre-existing duty, then he is entitled and bound to say so.

24) Under section 40(2) of the CA 2014, the Secretary of State may carry out a "review" of any determination made under section 40(1), provided that that review commences within 3 months of the determination.

25) I note that in its submissions dated 10 October 2014, Council B argues that that the Secretary of State's jurisdiction in "reviewing" a determination pursuant to section 40(2) of the 2014 Act is limited to cases of "error", and does not therefore involve a right to reconsider a determination if no such error is identified. The submission does not spell out what would amount to "error" in this sense but the implication is that it would be confined to cases of legal error or something equivalent to that. Council B would presumably accept that that would include (at least) legal error in the public law sense.

26) I do not think it is necessary for me to consider this issue in any detail for the purposes of deciding this case on review, because the issues on which I disagree with the Determination are all points of legal approach which would come within the scope of "error" even in a narrow sense. For completeness, I should however record that I do not accept that the Secretary of State's jurisdiction on review under section 40(2) is confined to cases of strict legal error. I think that the Secretary of State is entitled to consider any issue which goes to the correctness of his decision. Certainly, he is entitled to alter his decision if he concludes that it is wrong on other than marginal grounds.

Analysis

27) The Determination concludes that X was ordinarily resident in Council A when she was detained for the second time under section 3 MHA 1983 in June 2015, and that on that basis Council A is responsible for funding her after-care under section 117 following any further release from detention. Council A's principal argument in its request for a review of that decision is that, in a case such as this where a person is living in an area as a result of a placement by a social services authority pursuant to its statutory duties, the Cornwall case requires ordinary residence to be determined having regard to that placement and on the basis that a person will retain their ordinary residence in the area of the placing authority.

28) Following Council A's request for a review, the Secretary of State identified further possible issues, namely (a) whether X was discharged from after-care services by CouncilB during the Second Period of detention under section 3 of the MHA 1983, so that Council B's duty to her under section 117 of the MHA 1983 lapsed during that period, and (b) whether, in a case where a person has been detained under the MHA 1983 for more than one period of time, with an intervening period or periods in the community, section 117(3)(a) assigns the responsibility for providing after-care to the authority in whose area the person was detained immediately before the first period of detention, or to the authority in whose area he was detained immediately before the most recent period of detention. The Secretary of State accordingly wrote to both authorities on 11 August 2018 inviting comments on these points.

29) The Secretary of State received responses from both authorities in response to these enquiries. I have considered all of the submissions made by both authorities in reaching my determination on this review.

30) By way of preliminary, and though not in itself determinative of the outcome of this review, there is one aspect of the reasoning in the Determination which I do not think can be supported, namely the statement in paragraph 42 that the current state of the law is to be found in R (Hertfordshire CC) v LB Hammersmith and Fulham [2011] EWCA Civ 77. Hertfordshire was concerned with section 117 as it stood prior to the amendments made under the CA 2014, at which time it used the concept of "residence" rather than "ordinary residence". Further, Hertfordshire was referred to in somewhat critical terms by Lord Carnwath in Cornwall, at paragraph 56.

31) That is not to say that I should assume that Hertfordshire is wrong, or that there has been a deliberate intention to overrule it by the amendments made by the CA 2014. One point that it decides is that periods in detention are ignored when considering the place of residence under the old version of section 117, and that is now made express in the differently worded amended section 117. As to the approach it takes to deeming provisions, that was not the subject of argument and there are at least 2 possibilities, namely that Hertfordshire should be regarded as wrongly decided on this even in relation to the old version of section 117 MHA 1983, or that it was rightly decided in relation that version but that it cannot be read across to statutory provisions (including the amended section 117) which use the concept of "ordinary residence". In any case I do not think that we can treat the "assumption" that was made in Hertfordshire about the approach to deeming provisions when considering the old version of section 117 (referred to by Lord Carnwath in paragraph 56 of Cornwall) as determinative following the amendment of section 117 and the decision in Cornwall itself.

32) I accept that Hertfordshire may have some relevance as part of the background to the current section 117, but it is better, in my view, to approach the interpretation of section 117(3) afresh, having regard to its current terms, and on

the basis that in using “ordinary residence” Parliament must have intended that phrase to be interpreted in line with the more general case law about its meaning in other statutory contexts.

33) Notwithstanding this, I accept that, if the issue was simply whether X was ordinarily resident in Council A or Council B as at YY or YY/YY/2015, before she was detained under section 3 for the second time, and if that issue fell to be determined without regard to her placement in Council A by Council B, then she was ordinarily resident in Council A as at that date. To that extent I agree with paragraph 41 of the Determination.

34) However, I do not think that the issue can be determined on this basis, or that the Determination is right in its legal approach to the determination of ordinary residence following Cornwall. There are 3 separate and freestanding grounds for this decision, each of which provides a sufficient basis to conclude that responsibility for X’s after-care under section 117 fell to Council B at the relevant time.

35) The approach which I have taken is clearly at odds with parts of the Secretary of State’s Care Act Guidance, and in particular with paragraph 19.64 of that guidance. I have had regard to that guidance but it cannot override what I regard as the correct interpretation of the relevant primary legislation and the case law. The Secretary of State is in the process of considering how the Care Act Guidance should be amended, on this and other related points, in light of the approach taken to this and a number of other similar cases.

(i) The effect of the Cornwall case

36) My first ground for this conclusion comes from the Cornwall case, essentially accepting Council A’s argument on this issue.

37) 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 NAA 1948”) 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. PH had been placed by Wiltshire 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 Children Act 1989 (“the CA 1989”). The question was whether he therefore also retained ordinary residence in Wiltshire for the purposes of the NAA 1948 and despite the fact that he had turned 18 so that the deeming provision in section 105 of the CA 1989 ceased to be directly applicable.

38) 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".

39) 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."

40) I do not accept that the reasoning in this passage can be confined to the particular facts of the case. Unsurprisingly for a decision of the Supreme Court, it is clearly intended to be of general application, at least to the extent of determining the approach which should be taken to similar cases where a child who is deemed to retain ordinary residence in the area of a placing authority under the CA 1989

attains adulthood. The Secretary of State considers that this means that the same approach would have to be taken where a child turned 18 and their ordinary residence has to be determined under the CA 2014.

41) I accept however that a more difficult question as to the scope of this reasoning arises in the present case. There are 2 important differences in the statutory context between the present case and Cornwall.

42) The first difference is that Cornwall is not concerned at all with section 117 of the 1983 Act, but with duties to provide care under the NAA 1948 and CA 1989. But I do not think that this can be significant in and of itself. As I read the judgment, it would apply, at least, in parallel cases, where a person is provided with care under a statutory regime (such as the 1948, 1989 or 2014 Acts) which deems them to be ordinarily resident in the area of the authority which has responsibility for them, and it becomes necessary to determine where they are ordinarily resident at the time of detention under the MHA 1983. In such a case, the logic of Cornwall must apply, because the read-across of the deeming provision in the first statutory regime must take effect in relation to the MHA 1983 just as it did in Cornwall in relation to the NAA 1948. For these purposes it does not matter whether the deeming provision in the first regime is that found in the NAA 1948, the CA 1989 or the CA 2014.

43) However, that brings me to the second point of difference between this case and the Cornwall case. The above conclusion, that Cornwall is not limited in scope to the 1989 and 2014 Acts, is not sufficient for the purposes of this case, because the question is not whether a deeming provision in one statutory scheme must be taken account of for the purposes of a different parallel statutory scheme.

44) At the time of her second detention, X was already being provided with care under section 117 of the MHA 1983, i.e. under the same statutory regime that would be used to provide her with care following her second discharge from detention. So, unlike Cornwall, this is not a case where X is moving from care provided under one statutory regime, to care being provided under a different statutory regime.

45) On the other hand, the NAA 1948, CA 1989 and CA 2014 all contain deeming provisions, the effect of which is to preserve ordinary residence in the area of a particular authority when that authority arranges for accommodation to be provided outside of its own area. That is in circumstances where the question of responsibility for the individual has to be considered by reference to their ordinary residence for the time being, so that, for example, if a person being provided with services under section 29 of the NAA 1948, but not with accommodation under section 21, moves area voluntarily, the responsibility for the provision of such services will shift to the new area. But where a move is a result of a placement out of area by the responsible authority, the effect of the relevant deeming provision will generally be to preserve ordinary residence in the area of the responsible authority notwithstanding the move. As Lord Carnwath says in paragraph 55 of

Cornwall, that reflects a “policy discernible” in this legislation that ordinary residence, and responsibility for the provision of services, should not generally be affected by out of area placements.

46) Section 117 of the MHA 1983 contains no such deeming provisions, and it does not depend on considering the ordinary residence of the individual from time to time, or at the time that services are being provided to them. Rather, it fixes responsibility for the provision of services after discharge from detention by reference to the individual’s ordinary residence immediately before they are detained. This is not a deeming provision, i.e. a provision which deems ordinary residence to be in one location even though it is actually somewhere else. It simply asks where the person is ordinarily resident at a particular point in time.

47) Whilst the legislative technique here is different, it may be noted that for most purposes it achieves a similar outcome. In particular, because the responsibility for the provision of services is fixed by reference to their ordinary residence at one particular historical point in time, for most purposes responsibility for the provision of care will not shift just because the individual is placed out of the area of the responsible authority. This being so, for most purposes there is no need for a deeming provision akin to those found in the other community care legislation to which I have referred. For this reason, the absence of such a deeming provision does not in my view undermine the applicability of the remarks of Lord Carnwath.

48) The critical issue is how the logic of the Cornwall judgment applies here.

49) On reflection, I conclude that the reasoning in Cornwall, especially that at paragraphs 58 to 60, is just as applicable to the present case as it was in Cornwall itself.

50) In that regard I think the way that the issue is framed by Lord Carnwath at the start of paragraph 58 is important. The critical issue was as to PH’s ordinary residence on the day before the deeming provision in the NAA 1948 (not that in the CA 1989) applied. But that means asking a question about ordinary residence at a particular point in the past. As Lord Carnwath says, section 24(5) of the NAA 1948 “poses the question” of “in which authority’s area was PH ordinarily resident immediately before his placement”? But though section 117(3)(a) does not contain a deeming provision, an exactly analogous question arises under section 117(3)(a) of the MHA 1983, namely “in which authority’s area was X ordinarily resident immediately before her detention”.

51) There is no doubt that the reasoning by which Lord Carnwath answers the question “posed” by section 24(5) places some reliance on the existence of a deeming provision in section 105 of the CA 1989. But it seems to me that it does not depend simply on reading across the deeming provision from the CA 1989 to the NAA 1948. Rather, it seems to me that the major part, and perhaps all, of Lord Carnwath’s reasoning in paragraphs 58 to 60 is equally applicable to the present case, and despite the fact that section 117 does not contain a deeming provision.

Overall, what is critical in this reasoning, is not that the CA 1989 contained a deeming provision in and of itself, but that the consequence of the deeming provision is that Wiltshire retained responsibility for PH's accommodation following placement out of its area. But, notwithstanding the absence of any deeming provision in section 117, that is equally true in the present case, where Council B retained responsibility for X following the placement in Council A. Thus, assuming for present purposes that the relevant date is YY/YY/2015:

(i) In considering X's ordinary residence at this date, it would be just as "artificial to ignore" her placement by Council B in Council A under section 117 of the MHA 1983 as it would be to ignore PH's placement under the CA 1989 (indeed, since in the present case the placement is under the same statutory regime, the artificiality may be even greater) (paragraph 58). The critical point is that in both cases the placing authority retained responsibility for the care user following the placement, regardless of the legislative mechanism by which that was brought about.

(ii) As at YY/YY/2015, X was "living for the time being in a place determined, not by [her] own settled intention, but by the responsible authority [Council B] solely for the purpose of fulfilling its statutory duties" (paragraph 58, final sentence).

(iii) With respect to paragraph 60, the logic here points strongly to the conclusion that X was not ordinarily resident in Council A as a result of her placement there by Council B. Paraphrasing the reasoning there, X was ordinarily resident in Council B prior to the First Period of detention and, following her discharge, and throughout the period until her second detention, she "remained continuously where [she] was placed by [Council B]", so that "for fiscal and administrative purposes", her ordinary residence continued to be in their area.

52) I accept that it is less easy to apply what is said in paragraph 59 directly to this case, in that it may be argued that when Lord Carnwath refers to the "legal characteristics" of PH's residence in South Gloucestershire, he is referring specifically to the fact that PH's residence was subject to a deeming provision under the CA 1989. But whilst I accept that that is a possible reading, I do not think it is correct when this paragraph is considered alongside paragraphs 58 and 60. Rather, what Lord Carnwath appears to have in mind is that the placement outside of Wiltshire's area did not affect that authority's responsibility for PH's accommodation and care, nor that his residence remained in their area "for fiscal and administrative purposes".

53) Accordingly, I conclude that the application of the reasoning in Cornwall to the present case points to the preservation of X's ordinary residence in the area of Council B, the placing authority in the period between the First Period and Second Period of detention, throughout this period. Accordingly, as at 23 June 2015, when she was detained for the second time, she remained ordinarily resident in Council B.

54) This conclusion seems to me to follow from the strict application of the reasoning in paragraphs 58 to 60 of the judgment. But I note that it is also in accord with the wider thinking of Lord Carnwath in that judgment, in particular the observations in paragraph 55 about the undesirability of responsibility for an individual shifting as a result of a placement out of the responsible authority's area.

55) On this basis, and without reliance on the points which follow, I conclude that X was ordinarily resident in Council B's area as at YY/YY/2015.

(ii) Meaning of "immediately before being detained" in section 117(3)(a) MHA 1983

56) Further and in the alternative to the above, I think it is necessary to consider the meaning of the phrase "immediately before being detained" in section 117(3)(a) of the MHA 1983. This is a point raised by the Secretary of State of his own motion in the letter of 11 August 2018. 57) In response to that letter, Council B submitted that section 117(3)(a) requires one to look on each occasion to the place of ordinary residence immediately before the most recent period of detention under the MHA 1983.

58) Council A, by contrast, submitted that section 117(3)(a) should be interpreted in the way suggested by the Secretary of State in his letter of YY/YY.

59) Having considered the matter further, I have concluded that the approach which the Secretary of State referred to as arguable in his letter of YY/YY, and which is supported by Council A in its most recent submission, is correct. That is, where a patient has been detained on more than one occasion under the 1983 Act, and where they have been continuously provided with after-care services during any intervening period or periods in which they were not detained, section 117(3)(a) is concerned with ordinary residence immediately before the first period of detention.

60) In reaching this conclusion, I do not think that the language of section 117(3)(a) is decisive either way. I accept that it does not spell out the approach which I have decided upon, and does not for example expressly refer to the person's ordinary residence "immediately before being detained for the first time". But equally, it does not spell out the opposite approach, and does not refer to ordinary residence "immediately before the most recent period of detention". The reality is that Parliament may not have had this particular issue in the forefront of its mind. Since the language of section 117(3)(a) is not decisive either way, it is necessary to rely on wider considerations, and to construe section 117(3)(a) in accordance with the general policy of the legislation.

61) Secondly, I accept Council B's argument that R (Wiltshire CC) v Hertfordshire CC [2014] PTSR 1066 does not lend strong support to the position I have adopted. In that case the court concluded that on the facts of that case the old version of

section 117 required one to look back to the place of residence prior to the first period of a person's detention, in a case where they have been subject to a conditional discharge in between 2 periods of detention. Whilst that might be said to give some support to my reading of section 117(3)(a), I take the point that the court by its reasoning confined this ruling to a case of conditional discharge, and drew a distinction with cases of absolute discharge followed a fresh decision to detain under section 3 MHA. Although arguably obiter on that issue, Wiltshire may be said to give support to the opposite approach in a case such as the present.

62) However, for essentially the reasons I have given in relation to the Hertfordshire case, I do not think that this ruling (even if part of the ratio of the case) can be assumed to be good law in relation to the amended section 117, especially given the intervening Cornwall decision.

63) Thirdly, whilst I accept that it is not directly on point, I consider that the reasoning in Cornwall is highly relevant to the interpretation of section 117(3). For these purposes I will assume that the conclusion I have set out above about the direct applicability of Cornwall to the determination of ordinary residence is wrong, so that if I were to consider X's ordinary residence as at YY/YY/2015, I should have to regard her as ordinarily resident in Council A as at that date.

64) However, that would give rise to precisely the "undesirable" and "adverse consequences" identified by Lord Carnwath in paragraph 55 of his judgment. It would mean that, since a person's ordinary residence would shift on each occasion that they are accommodated by an authority under section 117 following a fresh period of detention, there would be a corresponding shift in responsibility under section 117 on each and every such occasion.

65) I recognise that in the present case the decision to house X in Council A was not the result of any deliberate decision to evade responsibility under section 117. Indeed, in this particular case it was the result of X's sister living in Council A, and it is argued by Council B that following the move X has no remaining ties to Council B. But whilst that may somewhat reduce the desirability of continuity of responsibility on the facts of this case, I do not think that it removes it, since there is much to be said for continuity of responsibility so as to avoid transfers between authorities, change of personnel, handover of medical records and so on. Further, it is possible to imagine cases where the advantages of continuity are much greater, for example where a person is subjected to a series of short term detentions under section 3 MHA 1983, each followed by a placement in a different area according to where accommodation can be sourced. Even assuming that each authority acts in good faith in placing an individual out of its own area on each occasion, this would lead to a highly undesirable situation where responsibility for the person may shift on a number of different occasions. Indeed, the problem is in many ways worse than that considered by the Supreme Court in Cornwall because of the possibility that a series of short term detentions could lead to the problem being repeated on a number of different occasions.

66) Notwithstanding the absence of a deeming provision in section 117 akin to that found in the other community care legislation, I think that it is possible to discern in section 117(3) of the MHA 1983 the same policy as was identified by Lord Carnwath in Cornwall, namely 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". As I have explained above, this policy is achieved in the MHA 1983 in most cases by fixing responsibility with reference to ordinary residence at a particular past date, so that subsequent placement out of area does not alter the responsibility of the authority, rather than by way of a deeming provision. But the language of section 117(3) does not spell out what should occur in a case where a person is detained on more than one occasion.

67) This being so, and in so far as the problem identified above is not solved by a more direct application of the Cornwall approach (point (i) above), I think that the better view is that section 117(3)(a) should be interpreted so as to refer to the first period of detention, provided that a person is provided continually with after-care services between that and any subsequent period or periods of detention, when an issue arises about which authority is responsible for the provision of after-care services to them under section 117(3)(a). That interpretation is consistent with the language of section 117(3)(a) and accords with the statutory purpose emphasised in Cornwall.

68) Applying that approach here produces the result that X was ordinarily resident in Council B at the critical date, namely YY/YY/2014, immediately prior to the first occasion on which she was detained under section 3 MHA 1983.

(iii) Whether X was discharged from section 117 after-care during the Second Period of detention

69) At least on the facts of this case, I consider that there is a further basis to conclude that X remains the responsibility of Council B under section 117(3)(a). This is on the basis that I consider that Council B's duty to X under section 117 of the MHA 1983 continued through the Second Period of detention, and hence continued to apply following her discharge from that detention on 12 November 2015.

70) In that regard Council B argues (in its submission of YY/YY/2015) that its duty to X would cease by operation of law when X was detained for the second time.

71) I do not think that that follows from the wording of section 117. In particular, I do not accept that this is the effect of section 117(1), which provides that the entitlement to after-care services arises for a person who, having been detained under various provisions of the MHA 1983, "cease[s] to be detained" and leaves hospital. That governs the conditions for after-care services to arise, not the termination of such services.

72) The circumstances in which the section 117 duty will cease is dealt with expressly in section 117(2), namely where the relevant CCG and social services authority have satisfied themselves that the person concerned is no longer in need of such services.

73) In a case where it is thought appropriate to terminate such services for a person who remains in the community, for example on the basis that their condition has improved to such a point that that services are no longer needed, there would clearly have to be an express decision to terminate services. I see no reason why this should not be equally true for a person who is re-detained under section 3.

74) I accept that there will be circumstances where it would be reasonable for the authority to conclude that the fact that a person has been re-detained under section 3 means that they are no longer in need of services under section 117. In particular, that may be so where they are satisfied that any re-detention is likely to endure for a long period of time, so that there is no foreseeable need for services to be provided to the individual in the community and no need to plan for such services in the fact of a possible imminent release.

75) However, I do not think that that will apply automatically or in every case where a person is re-detained under section 3. Where it is anticipated that a re-detention may be for a relatively short period, followed by a further discharge into the community, it may well be difficult to conclude that the person is not in need of services under section 117. As I have already noted, paragraph 33.21 of the Mental Health Act Code of Practice is inconsistent with the idea that the mere fact that a person is detained for the time being (so that they have no immediate or current need for accommodation under section 117) shows that their need for services has lapsed. Paragraph 33.21 is concerned with detention under section 2 rather than section 3, but once one puts aside the argument that section 117 entitlement lapses by mere operation of law, I can see no basis to say that this is not equally true for detention under section 3. Other things being equal, it may be that detention under section 3 can be expected to endure for a longer period than under section 2, but what is required is a factual assessment in each case to decide whether the need for services has ceased for the purposes of section 117(2).

76) Accordingly, I reject Council B's argument that X's entitlement to services under section 3 MHA 1983 had ceased by operation of law when she was detained for the Second Period. Whilst I do not rule out that Council B (in consultation with the relevant CCG) may have had grounds to terminate services under section 117(2) if it had considered the matter, I do not think that on the facts of this case that was a necessary or obvious outcome, having regard in particular to the relatively short period of section 3 detention (about 5 and a half months). Accordingly, absent any express decision to terminate services under section 117(2), I consider that Council B's duties to X under section 117 continued in this period.

77) On this basis, Council B's duties to X continued until the end of the period of her detention under section 3. This being so, and even if I am wrong in my approach to the Cornwall case, and also wrong in my interpretation of section 117(3)(a), I conclude that X remains the responsibility of Council B for the purposes of section 117.

Conclusion

78) For the reasons I have given I conclude that X was ordinarily resident in Council B for the purposes of determining which social services authority will be responsible for the provision of after-care services to her following the Second Period of detention under section 3 MHA 1983.

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