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Determination by the Secretary of State of ordinary residence dispute between Council A and Council B of Ms X

1) I have been asked by Council A to make a determination under section 40 ('s.40') of the Care Act 2014 in regard to an ordinary residence dispute with Council B regarding the case of X ('X').

2) I have been asked to determine X's ordinary residence, for the purpose of determining which authority would be responsible for the provision of mental health after-care services pursuant to section 117 of the Mental Health Act 1983 ('the 1983 Act').

3) Both authorities proceeded, in their initial submissions to me, on the basis that the critical issue is where X was ordinarily resident on or immediately before YY/YY/2016, which is the day on which she was detained under section 3 of the 1983 Act.

4) However, for the reasons explained below, I do not agree with this analysis. In summary that is because X was entitled, and had been provided with, after-care services by Council A prior to this date, and indeed as far back as 2005. I do not think that the relatively short interruption of those after-care services in late 2016 to May 2017 meant that Council A's pre-existing duty to provide after-care services was discharged, and there is no evidence that Council A in fact took steps to discharge X. Nor, at the moment, do I see that there is any basis on which Council A could have concluded that it was appropriate to discharge X from after-care services under section 117.

5) Having provisionally arrived at the above analysis, I concluded that both authorities should be given the opportunity to comment upon it. The Secretary of State accordingly wrote to them. Both authorities replied. I now proceed to issue my determination, which is in line with the approach just summarised and as indicated in my letter of 5 June 2018.

Facts

6) The critical facts are not a matter of substantial dispute.

7) X was born on YY/YY/1939. Events up until about 2004 are a little unclear, but it is known, and common ground, that she was residing in a nursing home in Area A (within the area of Council A) when admitted to Home 1 in December 2004. Though admitted under section 2 of the 1983 Act, Council A appear to accept that

she was subsequently detained under section 3 of the 1983 Act and that as a result she became eligible for support under section 117 of the 1983 Act upon her discharge.

8) Council A further accept, and it is common ground, that Council A was the community care authority who was liable to provide X with that section 117 support. X was discharged in 2005 and Council A duly provided her with services under section 117.

9) In 2006 X expressed her wish to move to Council B, and Council A placed her in a care home in Council B, namely Home 2, Council B, on 18 September 2006.

10) It is common ground that this placement did not in itself affect Council A's liability to provide support under section 117 or mean that Council B had such a responsibility. Such liability was already fixed under section 117 by reference to her earlier residence in Area A.

11) X was subsequently moved to other care homes in Council B. The placements were all arranged by Council A and it is common ground that it retained responsibility throughout this period. The last such move was to Home 3 in Area B, on 25 June 2015. All of these placements were in Council B's area.

12) On 15 November 2016, X was detained under section 2 of the 1983 Act for examination, at Ward 1 Hospital 1. On 12 December 2016, she was detained under section 3 of the 1983 Act and moved to Hospital 2.

13) At the date of her detention under sections 2 and 3 of the 1983 Act, X remained entitled to receive after-care services under section 117, and the authority responsible for providing those services was Council A.

14) I have been provided with no information which suggests that Council A considered whether the fact that X was detained (whether under section 2 or 3 of the 1983 Act Act), meant that it was appropriate for her to be discharged under section 117(2). I draw both authorities' attention to this in my letter of 5 June 2018 and neither suggested that Council A had in fact made any such decision. Council A's reply of 15 June 2018 does not address the point, but rather makes legal arguments which I will address below. Council B's letter of 18 June observes that both authorities appear to accept that section 117 was not discharged. Of course Council B cannot bind Council A but Council A's silence on the issue, and my reading of the papers, confirms Council B's observation.

15) Accordingly, I conclude that Council A took no steps, formal or informal, to consider whether X should be discharged under section 117(2). It may or may not be the case that Council A assumed that its duty to provide services was at an end without the need for any decision by it (even that is unclear) but I do not think that that in itself would be adequate to discharge X from her right to receive services under section 117(2).

16) Of course, for so long as X was detained, most and perhaps all of her immediate needs were met in the place of her detention. But it is clear that, at least, planning for the future was required to be continued, and this did take place. I have seen 2 versions of a 'Needs Assessment', on Council B's assessment form, which considered X's ongoing needs. The clear expectation in both assessments was that X would at some point, and perhaps sooner rather than later, be discharged from her detention and again cared for in a care home in the community. Thus, in the earlier assessment, completed on 9 March 2017, the recommendation was for "Social Work support to be provided ... as part of s.117 After Care arrangements ..." which would require the identification of a suitable long-term placement. I of course place no weight on the fact that the expectation here was that that would be paid for by Council A not Council B, since this assessment was carried out by Council B. But leaving aside who would provide after-care, there is no doubt that it was expected that X would be discharged back into the community and her need for after-care services would resume.

17) On 2 May 2017, X was discharged from detention. In fact she was again detained under section 3 of the 1983 Act on 23 May 2017. She was discharged back to Home 2 on 26 July 2017. A further needs assessment was completed, on 5 August 2017, and on 7 August 2017 the manager recommended the transfer to Home 4 as a new placement. That transfer took place on 8 August 2017.

Relevant law

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

19) Section 117 has been amended from time to time, and most recently by the Care Act 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".

20) 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.

21) 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 1983 Act. 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.

22) 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 Care Act 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.

23) 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.”

24) Under subsection 117(4), a dispute between social services authorities in England about a person’s ordinary residence under section 117 may be referred to the Secretary of State under section 40 of the Care Act 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).

Determination

25) A necessary pre-cursor to any decision about a person’s ordinary residence for the purposes of section 117 is to decide when that question falls to be determined under section 117(3). Ordinary residence disputes determined by the Secretary of State often involve a dispute between authorities about when the issue of ordinary residence falls for determination, which may be relevant or even decisive for the purposes of deciding where the person is ordinarily resident.

26) In this case, therefore, I have to consider first when the ordinary residence of X may be relevant. That depends on when any duty under section 117 arose.

27) It is common ground that Council A came under a duty to provide services under section 117 in 2005, which is when X was first discharged from detention under section 3 of the 1983 Act. I have no jurisdiction to consider ordinary residence in 2005, which was not at that time the relevant criterion for assigning responsibility under section 117, but the point is not in issue. It is also common ground that Council A continued to have responsibility under section 117 up until she was detained under section 2 in November 2016. I understand that it is also common ground that that duty continued to subsist at least until December 2016, which is when she was detained under section 3. In so far as that is not common ground, I consider that the duty continued to subsist at least until December. Detention under section 2 does not, without more, cause the duty to lapse and there is not suggested to be any basis for it to do so here.

28) The critical issue, in my view, is therefore whether Council A's duty lapsed at any point during the detention under section 3, from December to May 2017, or in the subsequent shorter period of detention thereafter.

29) I do not consider that Council A's duty under section 117 did come to an end. There are essentially 2 reasons for this:

1. I do not think that the duty will lapse automatically or simply by operation of law simply because X was detained under section 3 of the 1983 Act. There is nothing in the 1983 Act, or the Code, which suggests that this is the case. It would be highly undesirable if this were the case, since it is possible to have short periods of detention under section 3 of the 1983 Act, or indeed repeated short periods of detention with gaps (perhaps with placements in different areas in between). Within such periods of detention it will be necessary and desirable for one authority to take responsibility, and to be planning (even whilst the detention is ongoing) for release into the community. It would not be desirable, in such cases, if responsibility under section 117 were to lapse during the detention, and potentially to shift between 2 or more authorities on each release. There is nothing in the legislation which compels this conclusion. On the contrary, it seems to me that the natural reading of the legislation is that the duty will only terminate if the relevant authority takes a positive and lawful decision that the services are no longer required under section 117(2). That did not happen here, and given the relatively short period of detention it would not on any view have been inevitable that it would be decided that section 117 services would not be needed at the time or in the near future. Accordingly, I conclude that Council A's duty under section 117 continued to subsist throughout X's detention. If that is the case for the first period of detention, then it must also be the case for the second.

2. Though not critical to my decision, I doubt whether it would have been appropriate for Council A to terminate after-care services on the facts of this case even if it had considered the matter. First, it seems to have been clear that X would be released within a relatively shortly period, so that she had a need at least for planning to take place about after-care services to be provided on her release, as well as actual services upon her release. Second, the critical issue under section 117(2) is in my view whether the person has an objective need for services rather than whether that need is being met for the time being in the place of their detention.

30) For these reasons, I conclude that Council A's duty to provide after-care services under section 117 continued throughout the period of her detention under section 3 of the 1983 Act, and therefore continued upon her release.

31) It follows that no new section 117 duty arose upon X's release from detention in May or July 2017, because a duty was already owed to her for other reasons.

32) On this approach, the question of where X was ordinarily resident for the purposes of section 117(3) does not arise for the purposes of determining responsibility under that section. Since the question does not arise, it is not appropriate for me to make any such determination.

33) I would however add that, even if I were wrong on that, it would not in my view mean that she would be ordinarily resident in Council B's area for the purposes of section 117(3)(a) of the 1983 Act.

34) The Secretary of State has recently had to consider how to approach the determination of responsibility under section 117(3)(a) in a number of determinations and "review" decisions under section 40(1) and (2), which are being issued at the same time as this determination. In those, the Secretary of State concluded as follows:

(i) That, in a case where a social services authority owes a duty to provide after-care services under section 117 of the 1983 Act, and discharges that duty by placing the individual in another local authority area, and where the individual is subsequently detained for a second time under section 3 of the 1983 Act, then the effect of the Supreme Court's decision in *R (Cornwall CC) v SSH* [2016] AC 137 is that the individual should be regarded as retaining their ordinary residence in the area of the placing authority for the purposes of deciding where they are ordinarily resident "immediately before being detained" on the second occasion. That is because in such a case they will remain ordinarily resident in the area of the first authority "for fiscal and administrative purposes" in the sense explained by Lord Carnwath at paragraph 58 of his judgment.

(ii) Alternatively, but to similar practical effect, and having regard to the reasoning in *Cornwall*, in the circumstances described above, where a person is detained on more than one occasion, but where they are provided with after-care under section

117 for any intervening period in which they are not detained, section 117(3)(a) should be interpreted as referring to the place that they were ordinarily resident immediately before being detained for the first time, not as the place that they were ordinarily resident immediately before the most recent detention.

35) Fuller reasoning in favour of these conclusions is set out in the review decisions to which I have referred, and which I adopt here.

36) Even if I am wrong in thinking that Council A's duty to X did not lapse in the period from 12 December 2016 to 2 May 2017 (or 23 May to 26 July 2017), so that a fresh duty arose under section 117(1) on her release on 2 May 2017 (or 26 July 2017), the application of either of the above approaches to her case would produce the result that Council A would be responsible for her after-care upon release (either on the basis that she was ordinarily resident there on 12 December 2016 [\[footnote 1\]](#), and 23 May 2017, when detained for the second and third time, applying Cornwall, or that the relevant date for determining her ordinary residence is 2004, before her first detention, as to which there is no dispute that she was resident in Council A).

Determination

37) For the reasons I have given I conclude that Council A's original duty under section 117 did not lapse and that accordingly it continued to have responsibility under section 117 on X's release. Alternatively, but to the same effect, she was ordinarily resident in Council A's area for the purposes of determining, pursuant to section 117(3)(a), which authority was liable for her after-care upon release in May and July 2017.

1. I think there is some room for argument about whether section 117(3)(a) looks to the date of detention under section 3 of the 1983 Act, or section 2, 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 would turn on this on the facts of this case.

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