

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014

Introduction

1. I have been asked by Council A to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB but CouncilC have become involved because X has been receiving treatment at HospitalC, AreaC since August 2016 following deterioration in her condition.
2. The issue in dispute is focused on whether House1 is non-hospital accommodation. If it is, the parties agree that X is to be treated as ordinarily resident in CouncilA. Conversely, if House1 is a hospital then X should be treated as ordinarily resident in CouncilB.

The facts

3. The following information has been ascertained from the agreed statement of facts, legal submissions and other documents provided by the parties.
4. X was born on XX XX 1958, until 1992 X lived in CouncilB. In June that year she suffered an acquired brain injury after being assaulted.
5. Between 1992 and 1997 X was treated in hospital and then discharged to the IndividualH1 Unit (the chronology indicates that CouncilB have no evidence to confirm this).
6. In October 1997 X moved to House1 where she remained until August 2016.
7. In August 2016 X was admitted to Hospital1 for assessment following a decline in her physical health and is awaiting discharge.
8. The parties agree that X is becoming increasingly frail and requires full support from two staff to meet her personal care needs. The parties also agree that X lacks capacity to make her own decisions in relation to whether

or not she should be accommodated in a hospital or care home for the purposes of receiving care and/or treatment.

9. I am told that NHS AreaC AreaB CCG is funding X's current placement.

The authorities' submissions

CouncilA

10. CouncilA's submit that House1 is a hospital and that X is ordinarily resident in the area of CouncilB.

11. It is said that X lived in CouncilB for a number of years and members of her family still live there. Other than her stay at House1 she has no other connection with AreaA.

12. CouncilA also point to the fact that X was placed at House1 by CouncilB PCT from the IndividualH1 Unit in the now closed Hospital2 (AreaA). CouncilA state that House1 is part of this unit in a community setting to give more rehabilitation opportunities.

13. CouncilA rely on documentation provided by the CQC which describes the regulated activities carried out at House1, a letter from Individual2, Group Nurse Director, dated 30 March 2016, a letter from Individual3, Director of Specialist Care, a description of what services the IndividualH1 Unit used to provide.

14. CouncilA submit that House1's regulated activities are identical to those given to the definition of a hospital by various provisions of the National Assistance Act 1948 and National Health Service Act 1946, National Health Act 1977 and National Health Service Act 2006. Reference is made to Easter Field Court Residential Home as an example of non-hospital accommodation providing nursing or personal care.

CouncilB

15. Council B submit that House 1 is non-hospital accommodation.
16. Council B refer to the deeming provision in s.24(6) of the National Assistance Act 1948 – meaning residence in a hospital would be ignored for the purpose of determining ordinary residence – applied only to hospital accommodation.
17. Reference is also made to s.148(1) of the Health and Social Care Act 2008 which extended the said deeming provision to cover non-hospital accommodation which was suspended for those already being provided with such accommodation immediately before 19 April 2010 by the Health and Social Care Act 2008 (Commencement No.15, Consequential Amendments and Transitional and Savings Provisions) Order 2010.
18. Council B submit that X went into non-hospital accommodation before 19 April 2010 and continued to be there until her recent hospital admission and therefore the deeming provision in s.24(6) of the 1948 Act does not apply.
19. Council B refer to the fact that X has resided in Area A for 22 years (October 1997 – August 2016) where she has lived throughout this time and where she has received care and community access.
20. Council B confirm it played no part in placing X at House 1 and distinguish this case from the 'Cornwall' case.
21. The reasons why Council B submit that House 1 is non-hospital accommodation include the following:
 - Its CQC registration for the type of service provided as 'Long term conditions, Rehabilitation (Illness/Injury)' rather than under the 'Hospitals' category.
 - Individual 2's letter dated 30 March 2016 refers to House 1 as a 'four bedroomed bungalow'.

- House1 cannot be treated as ‘an extension of Ward 1 Neurobehavioral Ward at Hospital1 because they are separately registered with the CQC.
- The CQC registration details refer to Hospital1 as offering services including ‘Hospitals – Mental health/capacity’ whereas the CQC details for House1 make no reference to ‘Hospitals’.
- Individual3’s letter dated 26 June 2015 describes House1 as providing ‘long term rehabilitation and care in a domestic style setting’ indicates that it is non-hospital accommodation.
- The CQC’s inspector’s description of House1 on 11 September 2013 as ‘a bungalow’ offering rehabilitation and refers to it as ‘the home’ and not as a hospital. Further reference is made to residents being involved in choosing decorations.
- CouncilB also refer to residents at House1 attending their external GPs in contrast to inpatient units where medical interventions would be available onsite.

22. In the circumstances, CouncilB submit that X became ordinarily resident in AreaA since she moved to House1 in 1997.

The law

23. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 (“the 2014 Act”); the provisions of Part III of the National Assistance Act 1948 (“the 1948 Act”); the relevant provisions of the National Health Service Act 2006; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015; the Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“*Shah*”) and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“*Cornwall*”).

24. Any question as to a person's ordinary residence arising under the 1948 Act which is to be determined on or after 1 April 2015 ('the relevant date') is to be determined in accordance with s.40 of the Care Act 2014 pursuant to article 5 of the Care Act (Transitional Provision) Order 2015/995.

25. Article 6(1) of the 2015 Order provides that any person who immediately before the relevant date is deemed to be ordinarily resident in a local authority's area pursuant to s.24 (5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part I of the 2014 Act.

26. Article 6(2)(a) of the 2015 Order provides that the deeming provisions under s.39 of the 2014 Act have no effect in relation to a person who, immediately before the relevant date, is being provided with non-hospital accommodation within the meaning of article 12 of the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010 which has been provided since immediately before 19 April 2010 for as long as the provision of that accommodation continues.

27. Article 12(2) of the 2010 Order provides as follows:

“(2) For these purposes, “non-hospital NHS accommodation” is NHS accommodation that is elsewhere than at a hospital vested in-

- (a) The Secretary of State;
- (b) A Primary Care Trust;
- (c) A Local Health Board;
- (d) A National Health Service trust; or
- (e) An NHS foundation trust.”

28. Section 275 of the National Health Service Act 2006 defines “hospital” as follows:

“...*“hospital”* means—

(a) any institution for the reception and treatment of persons suffering from illness,

(b) any maternity home, and

(c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation,

and includes clinics, dispensaries and out-patient departments

maintained in connection with any such home or institution, and

“hospital accommodation” must be construed accordingly,”

29. Section 275 of the 2006 Act has been in force since 1 March 2007.

30. Section 39 (5) and (6) of the Care Act 2014 provide as follows:

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

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

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

(6) *“NHS accommodation”* means accommodation under—

(a) the National Health Service Act 2006,

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

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

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

Application of the law to the facts

31. As can be seen from the statutory framework identified above, the starting point for considering whether House1 is “non-hospital accommodation” is article 12 (2) of the 2010 Order.
32. Article 12 (2) defines non-hospital accommodation as NHS accommodation that is elsewhere than at a hospital vested in (a) the Secretary of State; (b) a Primary Care Trust; (c) a Local Health Board; (d) a National Health Service trust; or (e) an NHS foundation trust.
33. Section 275(a) of the 2006 Act defines “hospital” as including any institution for the reception and treatment of persons suffering from illness. Section 275(c) of the 2006 Act defines “hospital” as also including any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution.
34. It is apparent that the definition of a “hospital” is widely drawn making reference to “any institution” receiving and treating persons suffering from “illness” including for those requiring convalescence and medical rehabilitation.
35. The information I have been provided from the CQC inspection report of House1 states that AreaA NHS Foundation Trust provides long term rehabilitation care and support at House1 for up to four adults with acquired brain injuries. The types of services provided there are described as long-term conditions services and rehabilitation services. The regulated activities are described as including “Treatment of disease, disorder or injury”.
36. I have no hesitation in finding that House1 falls within the definition of a hospital as defined as an institution which both receives and treats persons suffering from illness including those requiring convalescence and medical rehabilitation for the purposes of. Indeed, the evidence is that X was admitted

to House1 for treatment for her acquired brain injury for both convalescence and/or medical rehabilitation.

37. The fact that the CQC registration details for House1 do not specifically refer to “Hospitals” when describing the type of service does not detract from the clear meaning of “hospital” given by s.275 of the 2006 Act. Nor does the reference to House1 being a bungalow. The description of the type of building or structure is not relevant to the test under s.275 and nor is the reference to it being “a domestic style setting” or a “home”. In relation to the latter I note that a “home” is included as part of the definition of a “hospital” by s.275(c).

38. Further, I do not consider that the fact that those receiving treatment at House1 attend at external GPs forces the conclusion that it is non-hospital accommodation by reference to s.275.

39. Finally, it is apparent that House1 is vested in, meaning in the possession and/or control of, AreaA NHS Foundation Trust.

40. In the circumstances and based on all the information I have been provided, I conclude that from October 1997 X was residing in NHS hospital accommodation at House1.

41. Accordingly, the deeming provisions under s.39(5) of the 2014 Act apply.

42. For the avoidance of doubt, it is the accepted position of CouncilA and CouncilB that if House1 is a hospital, and therefore falls within the definition of NHS hospital accommodation, X was ordinarily resident between October 1997 and when she was admitted to hospital in August 2016.

Conclusion

43. For the reasons set out above, I find that X was ordinarily resident in the area of CouncilB between October 1997 and August 2016.