

DETERMINATION BY THE SECRETARY OF STATE OF ORDINARY RESIDENCE DISPUTE

1. I have been asked by CouncilA to make a determination under section 40 (“s.40”) of the Care Act 2014 (“the 2014 Act”) in regard to an ordinary residence dispute with CouncilB regarding the case of Mr X.
2. I have been asked to determine whether Mr X was ordinarily resident in CouncilA or CouncilB, for the purpose of determining which authority would be responsible for the payment of his mental health after-care services (“after-care”) pursuant to section 117 of the Mental Health Act 1983 (“the 1983 Act”).
3. For the reasons explained below, I conclude that Mr X was not ordinarily resident anywhere at the critical date, 12 December 2016, when he was first detained under section 3 of the 1983 Act. That is the critical date for determining which authority is responsible for the provision of after-care services to him under section 117 of the 1983 Act.
4. That does not, in itself, determine which authority is responsible for the provision of after-care services to him, which must now be decided by reference to section 117(3) of the 1983 Act. However, as I explain below, I do not think that the Secretary of State has jurisdiction to determine those issues, because his jurisdiction is limited to determining the place of Mr X’s ordinary residence. I have nevertheless set out some non-binding considerations on those issues at the end of this determination.

Section 117 of the 1983 Act

5. Section 117(1) of the 1983 Act provides as follows:

(1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a hospital direction made under section 45A above or a transfer direction made under section 47 or 48 above, and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
6. Subsection (2) provides that persons to whom the section applies are entitled to after-care services for so long as they need them. The persons

to whom it applies are persons who have been detained under one or more of the provisions mentioned in subsection (1). I note that that does not include either (a) detention under section 2 of the 1983 Act or (b) detention under powers not contained in the 1983 Act itself.

7. Section 117(3) of the 1983 Act provides, materially, as follows:

(3) In this section ... “the local social services authority” means the local social services authority

(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.

8. I have omitted parts relating to Wales and clinical commission groups.

9. Under this provision, the relevant social services authority will be the one in which a care user is ordinarily resident, *if* they are ordinarily resident somewhere (in England or, where relevant, Wales). If they are not ordinarily resident in either England or Wales, sub-reg (c) requires one to see whether they are nevertheless resident somewhere or, as a matter of last resort, where they are sent on discharge.

Detention under the Mental Capacity Act 2005

10. Under the Mental Capacity Act 2005 (“the 2005 Act”), the Deprivation of Liberty Safeguards (“DOLS”) provide a separate framework for authorising the deprivation of liberty of people who lack the capacity to consent to arrangements made for their care or treatment (in either a hospital or care home) and who meet the qualifying requirements in Schedule A1 of the 2005 Act, including that they need to be deprived of liberty in their own best interests, and to prevent harm to them, and that the deprivation of liberty is a proportionate response to the likelihood and seriousness of that harm.

11. Under paragraph 182 of Schedule A1 (“Schedule A1”) to the 2005 Act, sets out that the supervisory body is the local authority in which the

person is ordinarily resident. Therefore, subject to the provisions below, ordinary residence must be established at the point in time when the hospital requested the DOLS standard authorisation.

12. Under paragraph 183 of Schedule A1 to the 2005 Act, the 'deeming' provisions in section 39(1) of the 2014 Act apply in the DOLS context for the purposes of determining where a person is ordinarily resident so that the local authority that is the supervisory body can be identified. A person remains ordinarily resident in the area of the local authority (A) in which the person is ordinarily resident before that local authority (A) places the person in the area of authority (B) in an arrangement that amounts to a deprivation of liberty. Therefore the placing local authority remains the supervisory body.

13. Where a person is not ordinarily resident in any local authority (for example a person of 'no settled residence'), the 2005 Act provides that it is the local authority in which the care home or hospital is situated that becomes the supervisory body (see paragraph 18(2) of Schedule A1 to the 2005 Act).

14. Where two or more local authorities are in dispute as to a person's ordinary residence, they may apply to the Secretary of State to determine the issue under section 183(3) of Schedule A1 to the 2005 Act.

The Secretary of State's Jurisdiction under section 40 of the 2014 Act

15. Under section 40 of the 2014 Act, the Secretary of State is given jurisdiction to determine "any dispute about where an adult is ordinarily resident" for the purposes of Part I of the 2014 Act.

16. The *purpose* of such determinations is to decide which of a number of social services authorities may be responsible for the provision of care to the adult in question. But whilst that is the purpose, strictly, the Secretary of State's jurisdiction is not to determine responsibility in and of itself. It is

simply to determine where the person was ordinarily resident at material times.

17. Under section 117(4) of the 1983 Act, section 40 of the 2014 Act applies to “a dispute about where a person was ordinarily resident” for the purposes of section 117(3) of the 2014 Act, just as it applies to ordinary residence disputes for Part I of the 2014 Act.
18. Again, there is no doubt that the purpose of resolving such disputes is to thereby resolve dispute about which of a number of social services authorities will be responsible for providing care to the care user to whom the dispute relates.
19. However, responsibility under section 117(3) is not necessarily determined solely by reference to ordinary residence. As set out above, in some cases it will be necessary to look at “residence” and / or the place where the care user is sent on discharge.
20. The Secretary of State does not consider that he has jurisdiction under section 40 of the 2014 Act, read with section 117(4) of the 1983 Act, to determine all issues which go to responsibility for providing services under section 117(3). Rather, his jurisdiction is limited to determining whether, and if so where, a person is ordinarily resident from time to time, and in particular at material times. In a case where the Secretary of State concludes that an individual was not ordinarily resident anywhere at the critical time, the Secretary of State has no power to issue a binding ruling on those other matters. I will return to this issue at the end of this Determination.

Procedural history

21. On 17 January 2017¹, Mr P1, solicitor for CouncilB, sent a letter to Ms P2, Solicitor for CouncilA, regarding the proposed application to the Secretary of State for Health (“the Secretary of State”) for a determination of ordinary residence. In the letter, Mr P1 set out the facts and interpretation of the law according to CouncilB, and stated that he would “draft the necessary statement of facts for an application to the Secretary of State for an urgent determination of the issue” if he did not receive a response by January 31 2017.

22. At some point during January 2017, P3, head of law and governance at CouncilA, wrote a letter acknowledging receipt of CouncilB’s letter dated 17 January 2017. Ms P2 agreed with the facts set out in CouncilB’s letter, but disagreed with their application of the law.

23. On 20 February 2017,² Mr P1 responded to CouncilA’s letter with further legal arguments in support of CouncilB’s case. He concluded by saying that he hoped “to progress this matter towards an application for a determination by the Secretary of State.

24. On 4 May 2017, P3 sent a letter to the Department of Health Quality and Workforce Team Social Care Policy Division (“the Department”) requesting that the Secretary of State determine which Council is responsible for the s.117 aftercare of Mr X. On the same date, the Councils also sent the department an agreed statement of facts (“the Statement of Facts”) which for consideration and determination of Mr X’s OR.

25. On 18 May 2017, Ms P2 sent the Department CouncilA’s legal submissions (“CouncilA’s Submissions”) for consideration and determination of Mr X’s ordinary residence.

¹ The letter is dated 17 January 2016, and refers to 2016 throughout. However, since the events it discusses did not take place until June of that year, I consider that the author intended to refer to January 2017.

² This letter makes the same error. I have made the same corrective assumption.

26. On 31 May 2017, Ms P2 wrote to the department to confirm the receipt of the CouncilA's Submissions. Ms P2 also states in her email that she forwarded a copy of these to CouncilB by email on the 19 May 2017.
27. On 6 June 2017, Ms P4, on behalf of the Department, acknowledged receipt of CouncilA's Submissions.
28. On 13 July 2017, Ms P4 emailed Mr P1 and Ms P5 from CouncilB asking whether they intended to send legal submissions in response to CouncilA's application for an ordinary residence determination of Mr X. It is not known whether Mr P1 was working at CouncilB at this time.
29. On 5 October 2017 and again on 4 December 2017, Ms P2 sent emails to the Department in order to ascertain what was being done about Mr X's ordinary residence dispute.
30. On 15 December 2017, Ms P4 confirmed, on behalf of the Department, that the Secretary of State would proceed to make a determination in the case of Mr X. Ms P4 noted in her email that she did "not want to delay this matter any further when there has been ample opportunity for CouncilB to provide legal submissions or to indicate that they do not intend to do so in writing."
31. I have seen correspondence which suggests that CouncilB were given the opportunity to produce legal submissions in advance of my s.40 determination, but failed to respond to this request. Accordingly, I find that their legal position regarding Mr X's ordinary residence is helpfully set out in two letters addressed to CouncilA dated 17 January 2017 and 20 February 2017. I have treated these in combination as the basis for CouncilB's legal case.

Facts

32. The following findings of fact are taken from the statement of facts, legal submissions, and documents provided to me by both local authorities.

33. Mr X was born in the CouncilA area on XX XX 1972, and is now 45 years old. He still has family who reside in CouncilA.

34. The entries listed on CouncilA's social care system and information provided from AreaA NHS Foundation Trust, Mr X's residence is recorded as being:

a. Address1A from 14 March 2011 until 21 June 2011.

b. Unknown address from 22 June 2011 until 7 January 2015.

c. Address1A from 8 January 2015 until 18 March 2015.

d. Address2A from 19 March 2015 until 13 June 2016.

e. Address1B from 13 June 2016 until 18 September 2016.

35. Focussing on the last of these, in June 2016 Mr X moved into his Address1B (in CouncilB) with his then girlfriend. They signed a joint tenancy agreement ("the Address1B Tenancy"), which stated on 13 June 2016.

36. Two weeks after this move, on the 27 June, Mr X was admitted to CouncilB District Hospital ("CouncilB Hospital") having suffered a cardiac arrest. He was resuscitated following the cardiac arrest but this had caused a hypoxic episode where his brain injury affected Mr X's working and autobiographical memory in both the short and long term.

37. Whilst Mr X was in hospital, his tenancy in Address1B was terminated on 18 September 2016. As a result of this, when he was assessed and

detained under sections 2 and 3 of the 1983 Act, he was recoded as having no fixed abode.

38. Mr X initially received treatment following his heart attack in Council B Hospital where he was placed under a Deprivation of Liberty Safeguards (“DOLS”) standard authorisation on 2 August 2016, before being moved to Hospital 2A in Area A. Hospital 2A is in Council A. In Hospital 2A, he was subject to a further DOLS standard authorisation prior to being detained under section 2 of the 1983 Act on the 15 November 2016 and then section 3 of the 1983 Act on the 12 December 2016.

39. Mr X has now been discharged from hospital and is currently living and being cared for by his mother who lives at Address 3A, in Council A. He is not receiving aftercare services at present but it is anticipated that he will require some services in the near future and is not discharged from section 117 aftercare.

40. A s.117 aftercare plan (“the aftercare plan”) was produced on 23 January 2017 in conjunction with social worker P6 which details the care needs of Mr X. In response to the question on the aftercare plan “was last detention under s.3 MHA when the client was resident in Council A”, the answer provided was that “This matter is subject to ongoing legal discussion between NTC [Council A] and STC [Council B]. In relation to capacity, the aftercare plan states that X is “lacking in capacity around the decision about where to live and about care and treatment”. The aftercare plan states that, due to his brain injury, Mr X requires assistance with all aspects of his care and has been assessed as requiring 24-hour care 7 days a week. In relation to the annual cost of support, the aftercare plan states that no resources are required at the time of writing, but that these may develop in a crisis or emergency situation.

The authorities’ submissions

41. Council A contend that Council B are the local authority with responsibility for providing aftercare to Mr X pursuant to s.117 of the 1983 Act. Council A submit that, on a proper understanding of s.117, the responsible authority is the one in which the person is ordinarily resident immediately prior to being detained under the 1983 Act. Only if this cannot be determined will the responsibility fall on the authority in which one is resident under the 1983 Act, and only failing this, is the responsible authority the one for the area where the person is discharged.

42. Council B contend that Council A are the local authority with responsibility for providing aftercare to Mr X pursuant to s.117 of the 1983 Act. In support of this, they contend that, following the termination of his tenancy on September 18 2016, he was no longer ordinarily resident in Council B. Furthermore, he could not have consented to residence in Council B following his detention in Council B Hospital and Hospital 2A, because he lacked capacity to decide his place of residence at this time. Accordingly, he was not resident or ordinarily resident anywhere, meaning that the responsible authority is Council A where he was sent on discharge.

Analysis of ordinary residence

43. The leading authority on the meaning of OR is *Shah v London Borough of Barnet* [1983] 2 AC 309. Lord Scarman explained that the test for ordinary residence refers to a person's residence "in a particular place... which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being whether for a short or long duration".

44. Applying this test here, there is no doubt that Mr X was ordinarily resident at the Address 1B Tenancy (and therefore in Council B) from 13 June 2016 until 27 June 2016, when he was admitted to hospital (still in Council B). Indeed, both authorities are agreed on this. Further, I consider

that his move to hospital did not displace his ordinary residence at the Address1B Tenancy up until 18 September 2016. For the time being, this remained his home, the place he had chosen to live by choice and to which he had a legal and practical right to return if not detained.

45. However, at that date, Mr X was still detained under the DOLS provisions, not under any provision of the 1983 Act.

46. The Address1B tenancy was terminated on 18 September 2016, and so from this date I do not see how it can be said that Mr X continued to be ordinarily resident at that address. He was not in fact living there, and he had no legal right, nor practical ability, to return there.

47. On the other hand, I do not think that it can be said that he acquired ordinary residence at either CouncilB, for the period that he was there, nor at Hospital2A once he was moved there. I note that if I am wrong on that, then he would have acquired ordinary residence at CouncilB only for so long as he remained there, and his ordinary residence altered to Hospital2A (in CouncilA) once he moved there. If that is the right analysis, then his ordinary residence immediately before being detained under section 3 of the 1983 Act was in CouncilA. But, as I say, I do not think that is the right analysis, because I do not think that enforced presence at either of these hospitals was sufficient to mean that Mr X acquired ordinary residence there.

48. I cannot see that there is any other candidate for Mr X's ordinary residence after 18 September 2016. Having lost his ordinary residence at the Address1B, he plainly did not acquire ordinary residence at any other place, since nowhere had been identified for him to live and he was in fact present in one or other hospital.

49. I therefore conclude that Mr X was of no settled residence from 18 September 2016, and that remained the case until he was detained under section 3 of the 1983 Act.

50. That does not in itself determine which of the two authorities is responsible for his after-care. That will have to be determined applying section 117(3)(c) of the 1983 Act. But, as I have explained, I do not think that I or the Secretary of State have jurisdiction to determine issues under section 117(3)(c). Having concluded that Mr X was not ordinarily resident anywhere at the critical time, I have exhausted the Secretary of State's jurisdiction in relation to this dispute.

Other matters

51. Notwithstanding my conclusions on jurisdiction above, I consider that the parties might find it helpful to have my preliminary views on how responsibility might be determined in this case. I emphasise that I would not regard these views as binding on either authority. However, I do not think that there is anything to prevent me from indicating the Secretary of State's views on this case.

52. If Mr X was not ordinarily resident anywhere as from 18 September 2016, then the next question under section 117(3)(c) is whether he was "resident" somewhere.

53. The meaning of resident in the amended section 117(3)(c) is untested, but I think it must be intended to convey some level of physical presence in a location which does not fully satisfy the *Shah* test. Applying that here, it may be that Mr X would have acquired residence in hospital, first in Council B for so long as he remained there, and then in Hospital 2A in Council A once he was moved there. If that is the right analysis, then it appears that (again) Council A was the place of ordinary residence at the time that he was detained under section 3 of the 1983 Act.

54. However, if that is not correct, and I am by no means sure that it is, then one must fall back on the last part of section 117(3)(c), namely the area to which he was sent on discharge by the hospital in which he was detained. On discharge, Mr X was sent to, and went to live in, Address 3A, which is again in Council A.

55. Accordingly, whichever test one applies under section 117(3)(c), it appears that that points to Council A having responsibility for Mr X's after-care. I emphasise however the view which I have expressed does not bind either authority.

Conclusion

56. For the reasons set out above, my conclusion is that Mr X was of no settled residence on and immediately before 12 December 2016, when he was first detained under section 3 of the 1983 Act.