



Department of Health

Note of the Department's position as regards the determination of ordinary residence disputes pending the outcome of *Cornwall Council v Secretary of State for Health and Others* [*Cornwall*]

1. This note sets out the Department's position in regard to the determination of questions of ordinary residence ("disputes") referred to the Secretary of State under section 32 of the National Assistance Act 1948 ("the 1948 Act") pending the Department's appeal to the Supreme Court in the case of *Cornwall Council v Secretary of State for Health and Others* (*Cornwall*).
2. This note is to be read alongside the Department's guidance to local authorities on ordinary residence¹ but nothing in the note is to be read as constituting legal advice to local authorities. The Department cannot provide legal advice – it is for local authorities to take decisions as to the appropriate course of action in the discharge of their functions under Part 3 of the 1948 Act, taking their own legal advice as necessary.

Issues in *Cornwall*

3. The central issue is the proper approach to the determination of ordinary residence for the purposes of Part 3 of the 1948 Act where a person lacks capacity to decide where to live.
4. The hearing of the Department's appeal to the Supreme Court is scheduled to take place in March 2015.

Stay of determinations pending *Cornwall*

5. Pending the Supreme Court's judgment in *Cornwall* the Department proposes to stay the determination of ordinary residence disputes which raise issues similar to those which are to be considered by the Supreme Court in *Cornwall* if the question of whether a person lacks capacity is raised or disputed between the parties, and the determination requires application of either the Vale or Cornwall approach.

Reasons for and basis of stay

6. In the absence of a prescribed time limit for the determination of a question as to ordinary residence under section 32 of the 1948 Act, the determination falls to be made within a reasonable time. In the Department's view, where disputes raise similar issues to those in *Cornwall*, it is reasonable to determine them once the Supreme Court has given judgment in *Cornwall*.
7. The Department therefore considers it to be in the interests of good administration, certainty and consistency to decide certain disputes once it has final clarification, from the Supreme Court, as to the correct approach to ordinary residence.
8. As the concept of ordinary residence serves as a mechanism for apportioning responsibility between authorities for the provision of services under Part 3 of the 1948 and given that the statutory framework provides a mechanism for the recovery of expenditure between authorities (as to which please see further below), the Department does not consider a stay to be prejudicial to the parties generally but shall consider facts individually.

¹ Guidance on the Identification of the Ordinary Residence of People in Need of Community Care Services, England (publication date 15 April 2011).



Referrals of disputes where determinations are to be stayed

9. By virtue of direction 4 of the Directions on ordinary residence², disputes must still be referred if the local authorities in dispute cannot resolve the dispute within four months of the date on which it arose. On receipt of a referral, the Department will consider, on a case-by-case basis whether the circumstances warrant a stay.

Recovery of expenditure

10. Section 32 of the 1948 Act allows for expenditure borne by a local authority in the provision of accommodation under Part 3 of the Act, for a person ordinarily resident in the area of another local authority, to be recoverable from that other authority.
11. By virtue of section 56 of the 1948 Act, (without prejudice to other methods of recovery and with certain exceptions not relevant to this note), sums due under the Act are recoverable summarily as a civil debt. Proceedings for the recovery of any sum summarily as a civil debt may be brought at any time within three years after the sum became due.
12. Authorities are advised to seek their own legal advice as to the implications of section 56 for a stay, for example whether it is advisable to seek protective proceedings in the County Court in respect of their position under section 56.

² The Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010.