



## Determination of ordinary residence disputes under the Care Act 2014

### 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<sup>1</sup>]

1. Following commencement of Part 1 of the Care Act 2014<sup>2</sup> the above note setting out the Department's position in regard to the determination of ordinary residence (OR) disputes referred to the Secretary of State remains applicable and should be read alongside the Update on final Orders under the Care Act 2014 published [[here](#)] ("the update").
2. Paragraphs 19 and 22- 24 of the update relate in particular to ordinary residence.
3. The aforementioned should also be read alongside the Department's statutory guidance to local authorities on ordinary residence<sup>3</sup> but nothing in either 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 the Care Act, taking their own legal advice as necessary.

### Issues in *Cornwall*

4. The central issue is the proper approach to the determination of ordinary residence for the purposes of Part 3 of the National Assistance Act 1948 ("the 1948 Act") where a person lacks capacity to decide where to live.
5. The hearing of the Department's appeal to the Supreme Court took place in March 2015 and judgement is pending.

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<sup>1</sup> 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] [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390383/Note\\_regarding\\_Cornwall\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390383/Note_regarding_Cornwall_2014.pdf)

<sup>2</sup> Care and Support Statutory Guidance Issued under the Care Act 2014 [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/366104/43380\\_23902777\\_Care\\_Act\\_Book.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366104/43380_23902777_Care_Act_Book.pdf)

<sup>3</sup> Care Act p. 343

## **Stay of determinations pending *Cornwall***

6. Pending the Supreme Court's judgment in *Cornwall* the Department's position remains as detailed in the earlier note. The Department proposes to stay the determination of ordinary residence disputes which raise issues similar to those which have been considered by the Supreme Court in *Cornwall*, an issue as to whether a person lacks capacity is raised or disputed between the parties, and the determination requires application of either the *Vale*<sup>4</sup> or *Cornwall* approach.

### **Reasons for and basis of stay**

7. The Department's reasons and basis for this remain as detailed in the earlier note. In the absence of a prescribed time limit for the determination of a question as to ordinary residence under sections 32 of the 1948 Act and section 40 of the Care Act 2014, 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*.
8. 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.
9. As the concept of ordinary residence serves as a mechanism for apportioning responsibility as between authorities for the provision of care and support under the Care Act 2014 and given that the statutory framework provides a mechanism for financial adjustments 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 each case and facts individually.

### **Referrals of disputes where determinations are to be stayed**

10. By virtue of direction 3 of the Directions on ordinary residence<sup>5</sup>, disputes must still be referred to the Secretary of State 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.

### **Financial adjustments between local authorities**

11. Section 41 of the Care Act allows for expenditure borne by a local authority in meeting an adult's need for care and support ( or their carer's needs for support) to be recoverable from another local authority where it transpires that the adult was ordinarily resident in the area of that other local authority.

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<sup>4</sup> R v Waltham Forest London Borough Council ex parte Vale (1985)

<sup>5</sup> The Care and Support ( Disputes between Local Authorities) Regulations 2014

12. By virtue of section 69 of the Care Act 2014, (without prejudice to other methods of recovery and with certain exceptions), sums due under Part 1 of the Care Act are recoverable summarily as a civil debt in accordance with this section.
13. Local authorities are advised to seek their own legal advice as to the implications of section 69 for a stay, for example whether it is advisable to seek protective proceedings in the County Court in respect of their position.