

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 117(4) OF THE MENTAL HEALTH ACT 1983 OF THE ORDINARY RESIDENCE

I have been asked by CouncilA to make a determination under section 117(4) of the Mental Health Act 1983 of the ordinary residence of X. The dispute is with CouncilB and CouncilC.

The facts

1. The following information has been ascertained from the statement of facts, legal submissions and other documents submitted by the parties. I note that the statement of facts is agreed between CouncilA and CouncilB. Certain paragraphs are not agreed by CouncilC, but CouncilC does not assert a positive case that any of the facts asserted are wrong.
2. X is a 35 year old man of XXXX origin who was born on XX XX 1981. He came to Country1 in or around 1989. In 1993 he moved with his family to a house in AreaB (in the area of CouncilB) where he grew up. He then moved to AreaC where he lived between 2003 and 2008.
3. In January 2008 X returned to his mother's address in AreaB. On or around 19 February 2011 he was arrested following reports that he had assaulted his mother. He was released from police custody on 20 February 2011 and returned to the family home where he assaulted his mother again. He was arrested for a second time and released to a bail hostel in AreaD (in CouncilD) on 22 February 2011.
4. He remained at the bail hostel until 31 May 2011 when he was arrested for arson. On 1 June 2011 he was remanded to Prison1 and on 2 June 2011 he was transferred to Prison2. He was released from prison on 8 August 2011 and placed in temporary bed and breakfast accommodation at the HotelB1 in the area of CouncilB.
5. On 29 August 2011 he was arrested having set fire to a copy of the Koran in his hotel room. He was kept in police custody overnight and released on 30 August 2011. He tried to return to the bed and breakfast accommodation but was denied access.
6. On 5 September 2011 X presented to XXXX Civic Centre seeking "*housing, job, comprehensive full mental health check up...*". X reported that he was

living with his sister at RoadB, AreaB (in the area of CouncilB). The RiO notes indicate that an CouncilB social worker contacted the Placement and Assessment Team for Homeless Singles ("PATHS") who advised that: *"further to X's eviction from Place1 PATHS have no responsibility to house X. The only way they would intervene would be if they were to receive a standard PATHS referral for supported mental health accommodation"*. On 5 September 2011 X was assessed for admission to hospital under the MHA but he was deemed not to meet the criteria for admission. Notes of an email exchange, dated 6 September 2011, indicate that a decision was made by the CouncilB social worker not to refer X to PATHS for supported mental health accommodation. However, arrangements were made for a further walk in/review on 16 September 2011 and an outpatient appointment on 29 September 2011. Attempts were made to contact X about these appointments via his sister. He did not attend the follow up appointment on 16 September 2011.

7. The next contact with CouncilB social services was on 26 September 2011 when a report was received that X had been arrested in AreaC on suspicion of attempted murder of his father. His father later died and he was convicted of manslaughter. The records indicate that X moved to live with his father in AreaC shortly before the index offence. The exact date on which he moved is unclear. A note dated 27 September 2011 records the AMHP who assessed X in AreaC as stating that:

"He had been in AreaC for five days, so presumably he would have left his sister's place in AreaF on or about 20th of this month, last Tuesday, as they were not getting on and she was becoming frightened of him."

8. However, a note of a direct conversation with the sister on 4 October 2011 records that:

"she thought that she had had him to stay with her from about two days before the MHA Ax on 5th, to a few days after- it transpired that this was until 'the Sunday after' which would have been the 11th. At this she had said that she could not have him in the house any longer and had called other family members and a plan had been made with his father that he would move to AreaC and stay with him. Their father sent a car for him and he went directly. He would therefore have been in AreaC for about 2 weeks. His mother was also frightened and did not want him in her house..."

9. I understand that X was arrested for the index offence on 25 September 2011 and taken to Prison3. The documents are unclear as to the date on which X was first detained under the MHA. The RiO notes suggest that X was transferred from Prison3 to Ward1 under section 38 of the MHA on 31 July 2012. However, the date for this entry on the RiO system may be wrong. A social circumstances report and the statement of facts record that X was detained under section 38 of the MHA on 16 February 2012 and transferred to the Secure Unit1 in the area of CouncilA. I note that this part of the statement of facts is agreed by all parties and, accordingly, I accept that 16 February 2012 is the correct date.
10. On 15 November 2012 X was made subject to a final hospital order with restrictions under sections 37 and 41 of the MHA. At present he is detained on Ward2 at HospitalA1 in the area of CouncilA.
11. On 6 November 2015 CouncilA made a referral to CouncilB. On 19 November 2015 CouncilB responded stating that they did not accept responsibility for X's after-care. On 9 December 2015 CouncilA wrote to CouncilC informing them of CouncilB's position and inviting them to accept responsibility. On 9 February 2016 CouncilC legal services wrote to both CouncilA and CouncilB disputing that it was responsible. On 13 May 2016 CouncilB wrote to CouncilA and CouncilC stating its view that CouncilC was responsible. The matter was referred to me on 15 August 2016.

The Authorities' Submissions

12. CouncilA submits that:
 - a. For the purposes of determining where X was ordinarily resident immediately prior to his detention, the period when he was detained under section 38 MHA and the period during which he was in prison should be discounted.
 - b. Prior to his imprisonment X was ordinarily resident in the area of CouncilC. Alternatively, he was resident in the area of CouncilC.
13. CouncilB also submits that X was ordinarily resident in CouncilC immediately before he was detained, but it frames the case slightly differently. CouncilB submits that:

- a. Although X had previously been ordinarily resident in CouncilB, on moving to AreaC he become ordinarily resident in CouncilC.
- b. Either he remained ordinarily resident in CouncilC until the making of the hospital order in November 2012 because his residence elsewhere during the intervening period was involuntary.
- c. Or if he lost the accommodation in AreaC during that period, he became someone without an ordinary residence.

14. CouncilC submits that:

- a. X's ordinary residence must be assessed as at the date he was first detained under section 37;
- b. At no point did he acquire ordinary residence in CouncilC as there was no settled intention and the pattern of his life in 2011 was chaotic.
- c. Even if he did acquire ordinary residence in CouncilC there is no evidence that his late father's accommodation remained available to him and, for that reason, he cannot have remained ordinarily resident in CouncilC at the relevant time.

The Law

15. I have considered all the documents submitted by the parties; the provisions of section 117 of the Mental Health Act 1983 ("the MHA"); section 40 of the Care Act 2014 ("the CA"); the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care and Support Statutory Guidance ("CASG"); and relevant case law, including: *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 ("Cornwall"), *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("Shah"), *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 ("Mohammed"), *R (Hertfordshire County Council) v London Borough of Hammersmith & Fulham* [2011] EWCA Civ 77 ("LM"); *R (Sunderland City Council) v South Tyneside Council* [2013] EWHC 2355 (Admin) ("Sunderland"); *R (Wiltshire Council) v Hertfordshire County Council* [2014] EWCA Civ 712 ("Wiltshire"); *R (Worcestershire County Council) v Essex County Council* [2014] EWHC 3557 (Admin) ("Worcestershire"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

After-care

16. The MHA provides for the treatment and detention of people suffering from a mental disorder in England and Wales. Section 117 of the MHA is about the provision of after-care services to people who leave hospital. Subsection (1) provides that patients detained in a hospital under section 3, or admitted/transferred to a hospital in pursuance of a hospital order/direction under sections 37, 34A, 47 or 48 should receive after-care services when they cease to be detained and leave hospital. After-care services is defined in subsection (6) as services which have both the following purposes – (1) meeting a need arising from or related to the person’s mental disorder; and (2) reducing the risk of deterioration of the person’s mental condition (and, accordingly, reducing the risk of the person requiring admission to the hospital again for treatment for mental disorder). Under subsection (2), the duty to provide after-care is placed jointly on a clinical commissioning group and a local authority. Subsection (3) defines a local authority as meaning:

(a) if, immediately before being detained, the person concerned was ordinarily resident in England, the local authority for the area in England in which he was ordinarily resident;

(b) if, immediately before being detained, the person concerned was ordinarily resident in Wales, the local authority for the area in Wales in which he was ordinarily resident; or

(c) in any other case, the local authority 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.

17. Section 117(4) MHA deals with disputes about where a person was ordinarily resident. It provides that if there is a dispute between two local authorities in England, section 40 of the CA applies to the dispute as it applies to a dispute about where a person is ordinarily resident for the purposes of Part 1 of the CA.

Ordinary residence

18. Ordinary residence is not defined in the MHA or the CA. The leading case on the meaning of the term is *Shah* (cited above). In that case Lord Scarman stated that:

“unless ...it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that “ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration...

There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.”

19. The CASG states:

“19.13 In many cases, establishing a person’s ordinary residence is a straightforward matter. However, this is not always the case and where uncertainties arise; local authorities should consider each case on its own merits.

19.14 The concept of ordinary residence involves questions of fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account...”

Application of the law to the facts

20. Before turning to the detail of this case, it is necessary for me to decide as a preliminary point the relevant date on which I should be assessing X’s

ordinary residence. As set out above, section 177(3)(a) refers to the person's ordinary residence "immediately before being detained". CouncilC submits that, because the duty to provide after-care arises only where a person is detained under specific provisions of the MHA (including sections 3 and 37), the relevant date must be the date on which the person was detained under one of those provisions. I reject this submission. Such narrow construction would not be consistent with the overall scheme of the Act. Detention for assessment under section 2 may be part of the process of initiating detention for treatment under section 3. Likewise, an interim hospital order under section 38 may precede the making of a final hospital order under section 37. Parliament intended that a patient's ordinary residence should be assessed as at the date immediately before they were detained. Where detention under section 2 is followed by detention in the same hospital under section 3, or detention under section 38 is followed immediately by detention under section 37, the earlier detention forms part of the process leading to the detention that engages section 117 and it would make no sense for the patient's ordinary residence to be assessed as at the date on which the statutory basis for the detention changed. Accordingly, I conclude that, where there is a continuous period of detention, the relevant date must be the date on which the person was first detained in hospital under MHA.

21. I note that this interpretation is consistent with the court's approach to the issue of "residence" under section 117(3) before it was amended by section 75 of the CA. Whilst the new section 117(3)(a) must be construed on its own terms, the Court's analysis of effect of sections 2 and 3 in the *Worcestershire* case at [14] accords with my analysis above.
22. CouncilA submits that I should go further and assess X's ordinary residence as at the date on which he was first detained in prison. I reject this submission. As a matter of statutory construction, I do not consider that reference to "detention" in section 117(3) can be interpreted more broadly than detention under the MHA. There is nothing in the wording of Act to suggest that it is intended to cover other forms of detention beyond those governed by the MHA. However, it is well established that "ordinary residence" must be voluntarily adopted and a person does not lose their previous ordinary residence by reason only of enforced imprisonment (see, eg., *Shah* (cited above)).

23. Therefore, I must assess X's ordinary residence as at 16 February 2012 but on the basis that he was not, at that time, ordinarily resident in Prison3C because his presence there was not voluntary. The CASG states that, where a person requires a specified type of accommodation to be arranged to meet their eligible needs on leaving prison, local authorities should start from the presumption that they remain ordinarily resident in the area in which they were ordinarily resident before the start of their sentence (17.48). Each case must be determined on an individual basis and regard should be had to whether it would be possible for the person to return to his local authority area (17.49). These considerations apply by analogy to the present case.
24. Therefore, I start by considering where X was ordinarily resident prior to his arrest and imprisonment. There is no dispute that he was physically present in AreaC. He had been living with his father for something between five days and two weeks. The question is whether his presence there had a sufficient degree of settled purpose to be regarded as ordinary residence. It is difficult to answer this question conclusively as there is very limited information available about the circumstances of X's move to AreaC. I must do the best I can to determine the matter, on the balance of probabilities, based on the evidence before me.
25. There is evidence that X had nowhere else to live. He could not live with his sister or mother as they had both decided they did not want him in their homes. The records also indicate that CouncilB did not accept responsibility for general housing and it had decided not to refer X for specialist mental health accommodation. X's sister is recorded as saying that a plan had been made for X to "move to AreaC" and "stay" with their father. The intended period of the stay is not clear, but there is no evidence that X had anywhere else to go on to or that he was pursuing any other plans. The word "move" tends to suggest at least a degree of permanence. Accordingly, on the limited evidence before me, I conclude, on the balance of probabilities, that X was ordinarily resident in CouncilC at the time of his arrest on 25 September 2011.
26. The next question is whether he lost that ordinary residence at any point between 25 September 2011 and 16 February 2012. In this context, it is relevant to consider whether X's father's home continued to be available to him, but this is not the only consideration. A prisoner who loses a tenancy or gives up a licence to reside in a property in a particular area does not automatically cease to be ordinarily resident in that area. The *Sunderland*

case is distinguishable in that it concerned “residence” not “ordinary residence” and the relevant person was residing *voluntarily* elsewhere at the time the tenancy was terminated.

27. There is no evidence as to where X would have wished to live in the community. It is not known what ties he had to AreaC other than his father’s presence there. However, it is significant that he chose to move to AreaC (there being no evidence to rebut the presumption that he had capacity to make this decision). There is an absence of evidence either way as to whether or not his father’s house remained theoretically available to him. It is not known whether it was owned or rented. Whilst it may be tempting to assume, given that nature of the offence, that X would not have been permitted by any administrators or executors to live there, this is pure speculation. He committed the offence when he was mentally unwell and the RiO notes suggest that the family remained supportive. The administrators or executors may or may not have been family members. X may or may not have been a beneficiary in any Will which could have included an interest in the property. In the absence of any clear evidence that the property was not available to X, and given the fact that he did chose to move to AreaC voluntarily and his departure from his father’s house was enforced by arrest and imprisonment, I cannot conclude, on the limited information before me, that X ceased to be ordinarily resident in the area of CouncilC.

Conclusion

28. Accordingly I find that, for the purposes of section 117(3)(a) of the MHA, X was ordinarily resident in the area of CouncilC immediately before he was detained.