

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014 AND SECTION 117(4) OF THE MENTAL HEALTH ACT 1983

1. I have been asked by CouncilA to make a determination under section 40 of the Care Act 2014 and section 117(4) of the Mental Health Act 1983 ("MHA") of the ordinary residence of X. The dispute is with CouncilB.
2. In summary I determine that X was ordinarily resident in CouncilB's area at the relevant time (4 August 2017).

The Facts

3. X was born on XX XX 1939 and is a retired school teacher. She owns a home in Worksop, in the area of CouncilB, in which she has lived for approximately 20 years. X has two sons, one who lives in the area of CouncilA and the other who lives in Australia. The son who lives in CouncilA's area frequently visited X in her home.
4. X has a history of anxiety and psychotic depression. She was detained under the MHA in 2010 and 2012. In 2012 she was discharged under section 3 MHA and remained undischarged from her section 117 MHA aftercare until her detention in August 2017. CouncilB had not previously been aware of X and had not been providing any services to her as part of her aftercare.
5. Around May 2017 her son and daughter in law, who live in CouncilA's, area visited and noticed a deterioration in X's mental and physical wellbeing. She was eating very little, had become listless, slept lots and would sit in wet incontinence pads for a considerable time. CouncilA Healthcare NHS Foundation Trust assessed X and discovered that she was suffering from a UTI but had been taking neither her medication for that nor that prescribed for her low mood and depression. X agreed that she would benefit from a short period of respite care to enable her to recover from her UTI and help re-establish

routine with respect to eating, drinking and taking medication. Arrangements were put in place for a package of care for her in her own address in CouncilB's area for after the respite care. X's family found a care home willing to provide respite care in CouncilA's area from June 2017.

6. X self funded her care and moved to the care home on 15 June 2017.
7. X did not improve as quickly as had been hoped. On 4 August 2017 X's mental and physical health deteriorated following her refusal to eat or drink and she was admitted to the Hospital1A in CouncilA's area and detained under section 3 MHA.
8. On 8 August 2017 X was transferred to the Centre1, where she remained detained under section 3 MHA.
9. X was discharged from the Centre1 in around November/ December 2017 to the care home in CouncilA's area where she had been having respite care prior to her admission to hospital. On 16 November 2017 CouncilA took the view that it would facilitate X's discharge paying for her after care on a without prejudice basis while the dispute concerning her ordinary residence was resolved.
10. In around June 2017, prior to her arriving at the care home, X instructed her son who is resident in CouncilA's, area to look for a property that would be closer to his home. On 1 September 2017, during the time that X was in hospital (during which she had capacity to deal with her own affairs but not to consent or refuse admission or treatment) she bought and then sold a bungalow closer to her son who lived in CouncilA's area. She transferred title in her home in CouncilA to her two sons on the same date.

The Parties submissions

11. CouncilA submit that X was ordinarily resident in CouncilB's area at the relevant time for section 117 MHA. She was present in CouncilA at the time of her admission on 4 August 2017 because she was present for "respite" care only on a temporary basis. She retained her property in CouncilB's area until after

her admission under section 3 MHA. As the new property purchased in CouncilA's area would have required work before it would be habitable X would in all likelihood had to have returned home to the CouncilB property (now owned by her sons) while this was done.

12. CouncilB submits that the move in June 2017 was intended to be more than temporary because X's sister in law had been tasked with finding her a property closer by. CouncilB submit that X had taken steps to register with a GP (although this does not appear in the agreed statement of facts and there is no documentation to show this in the bundle) . It is noted that X was self funding her care at the care home so CouncilB were not providing care under the Care Act 2014 such that the deeming provisions of section 39 apply.

Legal framework

13. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); section 117 of the Mental Health Act 1983 ("MHA") the Mental Capacity Act 2005; 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*"), *Mohammed v Hammersmith & Fulham LBC* [2002] 1 AC 547 ("*Mohammed*"), *R (Hertfordshire County Council) v Hammersmith & Fulham LBC* [2011] EWCA Civ 77 ("the *JM* case") and *R (Sunderland City Council) v South Tyneside Council* [2012] EWCA Civ 1232 ("*Sunderland*").

Aftercare under the 1983 Act

14. Section 117 of the 1983 Act applies where a patient who has been detained under section 3, or admitted to hospital in pursuance of a hospital order made under section 37, or transferred to a hospital in pursuance of a transfer direction under section 47 or 48, then ceases to be detained and leaves hospital.

15. The duty to provide aftercare falls on the patient's "local social services authority" and clinical commissioning group. Section 117(3) states that 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;

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

(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.

16. Where there is a dispute about a person's ordinary residence for the purposes of section 117(3), if the dispute is between local authorities in England, section 40 of the 2014 Act (referred to below) applies to the dispute as it applies to a dispute about ordinary residence for the purposes of Part 1 of that Act (see section 117(4)).

Care and support under the 2014 Act

17. Section 18 in Part 1 of the 2014 Act imposes a duty on local authorities to meet the assessed eligible needs for care and support of adults ordinarily resident in their area (or present in their area but of no settled residence). Examples of what may be provided to meet such needs are set out in section 8.

18. Under section 39(4) an adult who is being provided with accommodation under section 117 of the 1983 Act (after-care) is to be treated for the purposes of Part 1 of the 2014 Act as ordinarily resident in the area of the local authority on which the duty to provide the adult with services under that section is imposed

19. Section 39 of the Care Act 2014 provides:

(1) Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult 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 adult began to live in accommodation of a type specified in the regulations, or

(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.

(2) Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not of the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.

20. Ordinary residence” and “residence” are not defined in the 2014 Act or in the 1983 Act. In the *Shah* case, Lord Scarman said as follows:

“...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.”

21. The test for “residence” is not the same as the test for “ordinary residence”. “Residence” does not necessarily require a settled purpose, but voluntariness has been regarded as an important factor in many cases and, when determining residence under section 117(3)(c), the period of compulsory detention in hospital is excluded. A finding of no residence is a last resort that should not be held to apply except in extreme and clear circumstances (see *JM* and *Sunderland* cited above).

22. I am empowered by section 40 to resolve disputes between local authorities as to where a person is ordinarily resident for the purposes of Part 1 of the 2014 Act.

23. The Statutory Care and Support Guidance (revised October 2018) provides the following:

19.14 The concept of ordinary residence involves questions of both 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. The courts have considered the meaning of ordinary residence and the leading case is that of *Shah v London Borough of Barnet* (1983). ...

19.15 Local authorities must always have regard to this case when determining the ordinary residence of adults who have capacity to make their own decisions about where they wish to live. Local authorities should in particular apply the principle that ordinary residence is the place the person has **voluntarily adopted for a settled purpose**, whether for a short or long duration. Ordinary residence can be acquired as soon as the person moves to an area, if their move is **voluntary and for settled purposes**, irrespective of whether they own, or have an interest in a property in another local authority area. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the **nature and quality of the connection with the new place**.

...(emphasis added)

Mental health after-care

19.62 Under section 117 of the Mental Health Act 1983 (the 1983 Act), local authorities together with CCGs have a joint duty to arrange the provision of mental health after-care services for people who have been detained in hospital for treatment under certain sections of the 1983 Act.⁶ After-care services must have both the purposes of 'meeting a need arising from or related to the person's mental disorder' and 'reducing the risk of a deterioration of the person's mental condition and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder.' The range of services which can be provided is broad.

19.63 The duty on local authorities to commission or provide mental health after-care rests with the local authority for the area in which the person concerned was ordinarily resident **immediately before they were detained under the 1983 Act, even if the person becomes ordinarily resident in another area after leaving hospital**.

19.64 Although any change in the patient's ordinary residence after discharge will affect the local authority responsible for their social care services, it will not affect the local authority responsible for commissioning the patient's section 117 after-care. Under section 117 of the 1983 Act, as amended by the Care Act 2014, if a person is ordinarily resident in local authority area (A) immediately before detention under the 1983 Act, and moves on discharge to local authority area (B) and moves again to local authority area (C), local authority (A) will remain responsible for providing or commissioning their after-care. However, if the patient, having become ordinarily resident after discharge in local authority area (B) or (C), is subsequently detained in hospital for treatment again, the local authority in whose area the person was ordinarily resident immediately before their subsequent admission (local

authority (B) or (C)) will be responsible for their after-care when they are discharged from hospital.

19.65 If, however, a patient is not ordinarily resident in England or Wales immediately before being detained, the local authority responsible for commissioning the patient's after-care will be the one for the area in which the patient is resident. Only if that cannot be established, either, will the responsible local authority be the one for the area to which the patient is sent on discharge. However, local authorities should only determine that a person is not resident anywhere as a last resort.

19.66 Section 39(4) of the Care Act is a deeming provision that applies to any person who is provided with accommodation as part of their after-care. The effect of section 39(4) is that the person is deemed, for the purposes of Part 1 of the Care Act, to be ordinarily resident in the area of the local authority responsible for the person's after-care. Section 39(4) will apply to any person who receives after-care on leaving hospital on or after 1 April 2015, irrespective of the date that they were discharged from detention under any of the relevant provisions cited in section 117(1).

19.67 There are several provisions in the Care Act (section 39(1)-(3) and (5)-(7) and paragraph 2 of Schedule 1) which deem a person to be ordinarily resident in a particular local authority's area in specified circumstances for the purposes of Part 1 of the Act. These deeming provisions do not apply to section 117 of the 1983 Act, nor have they been incorporated into section 117 of the 1983 Act.

19.68 If there is a dispute between local authorities in England about where the person was ordinarily resident immediately before being detained, this will be determined by the process set out in section 40 of the Care Act. Disputes between a local authority in England and a local authority in Wales will be determined by the Secretary of State for Health or the Welsh Ministers. The Secretary of State and the Welsh Ministers have published arrangements for [determining which of them will determine such disputes](#).

Other common situations

Temporary absences

19.69 Having established ordinary residence in a particular place, this should not be affected by the individual taking a temporary absence from the area¹. The courts have held that temporary or accidental absences, including for example holidays or hospital visits in another area, ²[Z1](#) should not break the

¹ *Levene v Inland Revenue Commissioners* (1928) AC 217

² *Fox v Stirk* [1970] 2 QB 463

continuity of ordinary residence, and local authorities should take this into account.

19.70 The fact that the person may be temporarily away from the local authority in which they are ordinarily resident, does not preclude them from receiving any type of care and support from another local authority if they become in urgent need (see Annex H1 for further guidance regarding persons in urgent need). Local authorities have powers in the Care Act to meet the needs of people who are known to be ordinarily resident in another area, at their discretion and subject to their informing the authority where the person is ordinarily resident.

Application of the law to the facts

24. In X's case I am satisfied that she had become ordinarily resident in CouncilB at the relevant time.

25. The relevant time in this case is 4 August 2017, the date of her admission to hospital under section 3 of the MHA.

26. Although she was physically resident in CouncilA's area, this residence was intended to be temporary. The place where she was "settled" had not changed.

27. At this point in time she retained title to her home in the area of CouncilB. Her stay at the care home was intended to be for "respite" care. The "respite" nature of the care is evidenced in a summary assessment completed by Y of CouncilB Healthcare on 14 June 2017 (The agreed statement of facts records that in June 2017 CouncilB had put in place arrangements for her to be cared for at home on discharge. A further Safety Assessment carried out and agreed on 21 June 2017 records that X "has agreed to go into respite while her current UTI clears up and her mood is low."

28. Her home had not yet been transferred to her sons. She had not yet purchased the property in CouncilA's area (and when she did she immediately changed her mind and asked for it to be sold as she did not wish to move to that town). That property was first identified in July 2017 and would not have been fit for immediate habitation in any event. CouncilB state that she had sought to

register with a GP but no evidence of this has been provided with the bundle of documents to me. It is not stated that this occurred before 4 August 2017.

29. The report of the safety assessment completed by CouncilB Healthcare NHS Foundation Trust on 14 June 2016 records that X had agreed “to accept a home care package on her return from respite.”

30. Therefore;

- a. It is clear that X was settled in CouncilB prior to June 2017.
- b. There is insufficient evidence that that had changed, other than on a temporary basis, by 4 August 2017.

Conclusion

31. For the reasons set out above I conclude that X has been ordinarily resident in the area of CouncilB at 4 August 2017.