

## Determination by the Welsh Ministers under section 117 of the Mental Health Act 1983

1. LA1 and LA2 have made a referral to the Welsh Ministers for a determination as to the ordinary residence of X. Although section 40 of the Care Act 2014 is cited by the referring authorities as the relevant power, the facts of the case indicate that this is a case which falls to be determined under section 117(4)(c) of the Mental Health Act 1983 ("MHA").

### The Agreed Facts

2. LA1 and LA2 agree the following facts and they are supported by the contents of the bundles of documents provided by the two local authorities.
3. X has a diagnosis of mild mental retardation, autistic spectrum disorder and epilepsy. His parents live in the locality of LA1 but X has lived at care homes or hospitals in various local authority areas since August 2012.
4. The relevant chronology is as follows.
5. In August 2005, X became known to LA1's adult services department on his return to live with his parents in the locality of LA1. At some point in 2007, X moved to an address in the locality of LA1 where he had a tenancy under his own name.
6. In April 2011, X was admitted to a hospital in a nearby locality (LA3) following an incident in which he threw a heavy woodworking item at a support worker. He then returned to his tenancy property in the locality of LA1 with 20 hours per week personal support.
7. On 6 August 2012, X was placed in emergency respite care at locality LA4 subject to a Guardianship Order made under section 7 MHA. This followed the completion of an assessment under the same act.
8. On 6 June 2013, X's Guardianship came to an end, and he was temporarily admitted for assessment under section 2 of the MHA to a unit in the locality of LA4 before moving to a hospital in the locality of LA2 (the "LA2 Hospital")
9. On 1 July 2013, X's detention at the LA2 Hospital was extended under section 3 of the MHA.
10. On 9 July 2014, X was discharged from the LA2 Hospital. He was placed at care home A in the locality of LA5 for aftercare under section 117 of the MHA.

11. On 28 January 2015, X moved to care home B in the locality of LA5. He was still receiving aftercare under section 117.
12. On 1 April 2015, the Care Act 2014 (“the Care Act”) came into force making significant changes to the law in relation to support for adults in need in England and amending section 117 of the MHA as it applies in both England and Wales.
13. On 2 July 2015, X was formally admitted under section 2 of the MHA to the LA2 Hospital. He was subsequently detained there under section 3 on 24 July 2015.
14. On 6 April 2016, the majority of the provisions of the Social Services and Well-being (Wales) Act 2014 (“SSWA”) came into force, amending the regime for adult support in Wales.
15. On 23 May 2016, X moved from the LA2 Hospital to a care home in the locality of LA6 (the “LA6 Care Home”) under a section 17 MHA extended leave arrangement. X was to have been transferred to a Guardianship Order on 23 July 2016 but the relevant paperwork was not received by LA1 leading to the need for reassessment.
16. On 10 August 2016, X was transferred from section 3 status to a Guardianship Order with LA1 as his Guardian. X was upset by the Guardianship assessment meeting and acted out physically leading to a restraint. At this point, it was agreed that X’s ordinary residence was in the locality of LA5 because he had been resident in the locality of LA5 prior to his detention under the MHA.
17. On 17 August 2016, X became very agitated following a trip out with his father. During the following day, he caused damage to the kitchen of the LA6 Care Home and was arrested and detained by the police overnight.
18. On 6 September 2016, X returned to the LA2 Hospital on an informal basis. He was initially placed under 1:1 supervision for 24 hours. His notes record “...if he behaves abnormally aggressive and seriously irresponsible behaviour nursing and doctors holding power will be implemented with a view to facilitate assessment under MHA if appropriate”.
19. At a Care Programme Approach meeting on 4 November 2016, it was agreed that X would not be able to return to the LA6 Care Home.
20. On 27 November 2016, X became distressed whilst passing through LA7 on a day out and was detained at a hospital in the locality through the application of police place of safety powers under section 136 of the MHA.

21. X was readmitted to the LA2 Hospital under section 2 of the MHA for assessment on 28 November 2016.
22. On 23 December 2016, X was assessed and detained for treatment under section 3 of the MHA. The assessment was carried out on the instruction of LA5 in view of an earlier agreement as to his ordinary residence but LA5 is not party to this request for a determination and neither LA1 nor LA2 contends that LA5 is the local authority for X's future needs.
23. On 1 September 2017, X was placed at the LA2 Hospital by a court in application of its power under section 37 of the MHA. He remains at the LA2 Hospital at the time of this determination.
24. On 8 July 2018, LA1 carried out a mental capacity assessment of X. He was assessed as having capacity to make decisions about where he lives post discharge. LA2 submits that X has communicated his wish to return to the locality of LA1 to be near his family.

#### The issue in dispute

25. LA1 contends that, immediately before X's detention under section 2 of the MHA on 28 November 2016, he had acquired ordinary residence in the locality of LA2 and that LA2 should, therefore, be responsible for X's aftercare pursuant to 117 of the MHA following his discharge from hospital.
26. The issue which the Welsh Ministers are invited to determine is *where X was considered to be ordinarily resident as at the date of his informal admission to the [LA2 Hospital] on 6 September 2016 and subsequent detention under Section 3 of the MHA on 23 December 2016*. The answer to this question will dictate which local authority is responsible for meeting the cost of his aftercare on release (as well as other eligible needs under the Care Act or the SSWA).

#### Relevant Law and Guidance

27. Section 117 of the Mental Health Act 1984 ("the MHA") places a duty on the local social services authority (as well as the local Clinical Commissioning Group in England or the Local Health Board in Wales) to ensure that individuals leaving compulsory mental health detention are provided with aftercare.
28. X's case bridges a change in the law brought about by the coming into force of the Care Act in England and the SSWA in Wales.

29. Section 117(4)(c) of the MHA entitles the Welsh Ministers to make determinations where disputes as to ordinary residence arise between a local authority in England and one in Wales.

#### The old law

30. Prior to the Care Act coming into effect on 1 April 2015, section 117(3) of the MHA provided that the local authority (and health authority) with aftercare responsibility were those for the area in which the individual concerned was resident immediately before being detained. If the individual had no place of residence, then the responsibility was that of the authorities for the area to which the individual was sent on discharge.
31. Separately from the aftercare responsibility, local authorities had duties to provide accommodation and support to certain adults under Part 3 of the National Assistance Act 1948 (the “1948 Act”). Section 24(5) of the 1948 Act provided that those accommodated under Part 3 should be deemed to be ordinarily resident in the area in which they were ordinarily resident before the accommodation was provided to them.
32. The meaning of “residence” and “ordinary residence” and the relationship between their usage in the 1948 Act and the MHA has been the subject of consideration within a significant body of case law.
33. It became established that the “deeming provision” under section 24(5) of the 1948 Act did not apply to section 117 decisions. As LA1 points out within its submissions, on 19 April 2010, the Department of Health’s Ordinary Residence Guidance was revised so as to provide, at paragraph 184:
- “The term “resident” in the 1983 Act is not the same as “ordinarily resident” in the 1948 Act and therefore the deeming provisions (and other rules about ordinary residence explained in this guidance) do not apply”.*
34. This interpretation was confirmed within the decision in R (on the application of Hertfordshire County Council) v London Borough of Hammersmith and Fulham [2011] EWCA Civ77. The court held that responsibility for aftercare lay with the local authority in which the person was “resident” prior to being compulsorily detained, i.e. the deeming provision under section 24(5) of the 1948 Act did not apply for the purposes of section 117. The court recorded:

*“It was not easy to see why Parliament did not simply follow the precedent of the 1948 Act when enacting the duty under s 117 of the 1983 Act. However, Parliament deliberately chose a different formula and accepted the possibility of responsibility changing over the period of detention, including the potential impact on continuity of patient care. Furthermore, s 117 was intended to be a free-standing provision, not dependant on the 1948 Act. To grant the claimant's proposed form of declaration would have been to rewrite the language of the statute to the form that Parliament could have adopted, but did not”.*

35. The proposition that the 'deeming provisions' of the 1948 Act were not intended to be transposed to section 117(3) of the 1983 Act was reaffirmed by the recent Supreme Court case of R (on the application of Worcestershire County Council) v Secretary of State for Health and Social Care [2023] UKSC 31 (“the Supreme Court case”). In the judgement given on 10 August 2023, Lord Hamblen and Lord Leggatt (with whom Lord Reed, Lord Burrows and Lord Richards agreed) provided:

*“We do not accept that section 117(3) of the 1983 Act is functionally equivalent to the deeming or disregarding provisions in the other statutes. Unlike those provisions, section 117(3) does not manifest any intention that the term “ordinarily resident” should be given anything other than its usual meaning. Section 117(3) does not state or imply that providing residential accommodation for an individual in the area of another local authority will not, or is not to be taken to, change the individual’s place of ordinary residence. All it does is to specify the time at which the person’s ordinary residence is to be determined for the purpose of allocating responsibility to provide and pay for their care. This carries no implication that, at the point in time at which the person’s ordinary residence is required to be determined for the purpose of section 117, any special rule or test of ordinary residence different from the normal test should be applied”.*

36. The leading case in relation to the interpretation of the term “ordinary residence” is R v Barnet London Borough Council, Ex p Nilish Shah [1983] 2 AC 309 (usually referred to as “the Shah case”) in which, Lord Scarman said:

*“Unless, therefore, 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”.*

37. The interpretation of the term “ordinary residence”, and the test established by Lord Scarman, by the Shah case were reaffirmed by the recent Supreme Court case, in which the judgement made clear that the term “ordinary residence” in the context of section 117 of the 1983 Act should bear its usual meaning,
38. The Supreme Court case also made clear that the section 117 duty to provide aftercare services will cease if and when the person in receipt of those services is compulsory detained in hospital for treatment (under the relevant provisions specified in section 117(1) of the 1983 Act) or a decision is made by the relevant authorities that the individual is no longer in need of aftercare services. The judgement provides that “...on the best interpretation of section 117 of the 1983 Act, the duty under section 117(2) to provide after-care services automatically ceases if and when the person concerned is detained under section 3 (or another provision specified in section 117(1))” (Para 54).
39. LA1 refers in its submissions to decision in R (on the application of Sunderland City Council) v South Townsend Council [2012] EWCA Civ1232. The Sunderland case is authority for the proposition that an individual admitted to hospital for mental health treatment on an informal basis would, if his or her previous place of residence became available, be held, for the purposes of section 117, to be resident in the hospital or not to be resident anywhere. Being without a residence anywhere was to constitute an ultimate default position which should not be held to apply “except in extreme and clear circumstances”.
40. In Mohamed v Hammersmith Fulham LBC [2001] UKHL 57, Lord Slynn held that residency for the purposes of section 117 of the MHA, denoted a place where a person in fact resided and that: “So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence” (para 18).
41. In the case of R (on the application of Worcestershire County Council) v Essex County Council [2014] EWHC 557 (admin) (“the Worcestershire Case”) it was confirmed that the exclusion of periods of detention under section 3 also extends to any earlier periods of assessment under section 2. His Honour Judge David Cooke recorded at paragraph 14:

*This reasoning in my view extends to a period of detention for assessment under s2 MHA which precedes and leads to subsequent detention under s3. Although s 117 refers to persons "who are detained under section 3 above" and then released, if*

*there has been an immediately preceding detention under s2 for assessment that is part of the process of initiating the detention under s3, and if the intention of Parliament was to exclude the place of detention under s3 it would make no sense to include the place (likely to be the same) of prior detention for assessment.*

42. His Honour Judge Cooke expressly declined to exclude any period prior to detention under section 2 even if, on the facts of the Worcestershire Case, that earlier period might have constituted an unauthorised deprivation of liberty.

43. His Honour Judge Cooke considered the observations in the Shah case amongst others as to the meaning of “residence” in various legal contexts. Having done so, he concluded at paragraph 22:

*“...if a person has a home in one place, he may not cease to reside there if he is away from it either involuntarily, eg because of imprisonment, or voluntarily but temporarily, eg for a holiday or because of admission to hospital, at least for a relatively short period. If he has no other residence, his voluntarily coming to live in a place makes that his residence even if he would have preferred if possible to be elsewhere, or has no choice but to accept it, or it is not a place in which someone would ordinarily reside”.*

44. At paragraph 27, His Honour Judge Cooke recorded:

*The context and purpose of s117 point in my judgment to an interpretation that is as straightforward as possible, the residence of a person being prima facie the place in which he was in fact living eating and sleeping immediately prior to his detention. There may be reasons to conclude that he has not lost an established residence elsewhere, for example because of imprisonment or because he is only temporarily away from that residence on holiday, but if he has no such other place, and in the absence of some other special factor, his actual place of abode is his residence.*

45. The Worcester Case (and all of the authorities upon which its decision rests) was decided prior to the 2014 Act coming into force. His Honour Judge Cooke noted, at paragraph 32 of his judgment:

*“I am told that the matters in issue in this case will not arise in future, because s117 has been amended by the Care Act 2014 to provide for a regime of long term responsibility of an authority, rather than one which may shift as a patient moves around the country. That is no doubt sensible in terms of policy, but as was*

*recognised by the Court of Appeal it is not a result achievable by legitimate interpretation of the earlier statute”.*

#### The current law

46. The change in the law anticipated by His Honour Judge Cooke has not in fact occurred.
47. From 1 April 2015, the Care Act (by virtue of section 75) amended section 117 of the MHA to identify the responsible local authority and health authority as those in whose area the patient was ordinarily resident immediately before being detained. If the patient has no such ordinary residence, the relevant bodies are those in whose area he or she was resident immediately before being detained. If the patient had no such residence, responsibility defaults to the area the patient is sent to on discharge.
48. The Care Act and SSWA are each subject to transitional provisions which have the effect of carrying over an individual’s place of ordinary residence for the purposes of the 1948 Act to the new legislation. The transitional provisions do not otherwise address issues relevant to section 117 determinations.
49. Article 6(1) of the Care Act 2014 (Transitional Provision) Order 2015 provides:
  - (1) *Any person who, immediately before the relevant date in relation to that person, is deemed to be ordinarily resident in a local authority’s area by virtue of section 24(5) or (6) of the 1948 Act (authority liable for provision of accommodation) is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the Act.*
50. The mirror provision in Welsh law is within the Social Services and Well-being (Wales) Act 2014 (Commencement No 3, Savings and Transitional Provisions) Order 2016 at Schedule 1, paragraph 6.
51. The Care Act and SSWA also both contain deeming provisions similar in effect to section 24(5) of the 1948 Act, i.e. they deem an individual to still be ordinarily resident in the placing local authority’s area if they are moved out-of-area. These provisions are contained within section 39(1) of the Care Act and section 194 of SSWA respectively. They operate (together with ancillary regulations) so as to exclude placements in care homes, shared lives arrangements and supported living

accommodation from consideration when determinations are made as to an individual's ordinary residence for the purpose of their care and support needs.

52. The amended wording of section 117(3) does not, however, have the effect of extending these new deeming provisions to aftercare.

53. The Statutory Care Act Guidance says at paragraph 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.*

54. Responsibility for aftercare therefore rests with the authority for the area in which the individual concerned was ordinarily resident (or if there was no ordinary residence, where he or she was resident) without the application of any deeming provisions in relation to care home placements.

55. The local authority with responsibility for aftercare becomes, under the current law, the authority responsible for any other care and support for which the individual is eligible. Section 39(4) of the Care Act provides:

*(4) An adult who is being provided with accommodation under section 117 of the Mental Health Act 1983 (after-care) is to be treated for the purposes of this Part as ordinarily resident in the area of the local authority in England or the local authority in Wales on which the duty to provide the adult with services under that section is imposed; and for that purpose—*

*(a) "local authority in England" means a local authority for the purposes of this Part, and*

*(b) "local authority in Wales" means a local authority for the purposes of the Social Services and Well-being (Wales) Act 2014.*

56. A mirror provision is contained within section 194(4A) of SSWA, which provides:

*(4A) A person who is being provided with accommodation under section 117 of the Mental Health Act 1983 (after-care) is to be treated for the purposes of this Act as ordinarily resident in the area of the local authority, or the local*

*authority in England, on which the duty to provide that person with services under that section is imposed.*

57. In other words, the local authority responsible for aftercare takes on the wider care and support responsibilities; the local authority responsible for aftercare is not necessarily that which was responsible for care and support prior to the individual's detention.

#### The authorities' submissions

58. LA1 submits that X ceased to be ordinarily resident in its locality on 12 June 2013 when he was detained under the MHA and admitted to the LA2 Hospital for the first time. It contends that X's ordinary residence changed several times over the period between 2013 and 2016 but that he is currently ordinarily resident in the locality of LA2.
59. LA1 contends that X had acquired ordinary residence in the locality of LA2 when he returned to the LA2 Hospital on an informal basis on 6 September 2016. It asserts that X was a) living, eating and sleeping at the LA2 Hospital, b) unable to return to his previous placement (the LA6 Care Home) and c) without any other place of residence. LA1 argues that in light of those factors X's residence in the locality of LA2 had a sufficient degree of continuity to be described as "settled" for the purposes of acquiring an ordinary residence.
60. LA2 submits that X did not acquire ordinary residence in its locality on 6 September 2016 as a result of his informal admission to the LA2 Hospital. It contends that X's stay in its locality did not meet the "settled purpose" test set out in the decision in the Shah case because X was only present in the LA2 Hospital for treatment of his mental disorder. LA2 contends that, had X objected to living at the LA2 Hospital, he would have been detained under the MHA and it points to the fact that he was so detained on 28 November 2016.
61. LA2 contends that support for its position is provided by the August 2018 edition of the Local Government Association guidance on the determination of local authority responsibility under the Care Act and the MHA provides. That guidance says at page 37:

*"Where someone goes into hospital on a voluntary basis, they do not lose their previous residence. However, if during voluntary admission the individual loses their previous accommodation, they no longer continue to be resident in the area. In*

*such a case, if their presence at hospital is sufficiently settled they may acquire residence in hospital ...*

*If the presence in hospital is not sufficiently settled (in accordance with the “settled purpose” test in Shah) to amount to residence, they will be of no settled residence and the local authority responsible for aftercare will be of the area to which the individual is sent on discharge...*

*Individuals becoming resident at hospital for determining aftercare responsibility should happen only rarely”.*

62. LA2 says that, in accordance with that guidance, X became of no settled residence when he was unable to return to the LA6 Care Home. It contends that, on discharge from the LA2 Hospital, the local authority responsible for his aftercare will be that of the area to which he moves. Since X has stated that he wishes to live close to his family and to return to the locality of LA1, LA2 contends that aftercare services will be the responsibility of LA1.
63. LA2 also contends (at paragraph 4 of its submission document) that X was ordinarily resident in the locality of LA1 at the time of his detention under section 3 of the MHA by virtue of section 39(1) of the 2014 Act and the ancillary regulations. It contends that X has been ordinarily resident in the locality of LA1 since 2012.

### Decision

64. Section 117 as amended places aftercare responsibility on the local authority for the area in which X was ordinarily resident (or if he had no place of ordinary residence, his place of residence) prior to his detention under section 3 and section 37. The decision in the Worcestershire case is authority for the proposition that periods of section 2 assessment should be treated as part of any subsequent section 3 detention.
65. In X’s case, the relevant period for determination of his ordinary residence is therefore the period prior to his detention for assessment on 28 November 2016.
66. The record of a Clinical Review Meeting undertaken on 19 August 2016 includes the following:

*“Discussion on long-term management was discussed, it was noted that one option would be [X] being admitted informally to [the LA2 Hospital] however it was noted*

*that at present there was no bed ... It was felt that [X] may continue to escalate as he has decided that he does not wish to be at [the LA6 Care Home] anymore”.*

67. It appears therefore that X was already demonstrating a wish to leave the LA6 Care Home as of 19 August 2016.

68. Between 6 September and 27 November 2016, X lived, ate and slept at the LA2 Hospital as an informal patient. There is no entry in the papers to suggest that X objected to being at the LA2 Hospital. He had already spent 11 months of his life there between July 2015 and May 2016. A Multi-Disciplinary Team Report dated 9 September 2016 records:

*“[X] was charged with criminal damage following an incident at [the LA6 Care Home] and agreed to come as an informal patient to [the LA2 Hospital]...”*

69. He was placed under a high degree of supervision initially but the same MDT report later records:

*“Since [X] has returned to [the LA2 Hospital] on the 9/6/16 he has appeared settled in mood... Since being at [the LA2 Hospital] [X] has not expressed a desire to leave”.*

*“[X] needs a period in which he feels ‘contained’ in order to feel more settled.”*

*“[X] was asked why he wanted to return to [the LA2 Hospital], he stated that he wanted to get away and felt safe here”.*

70. Within a CPA Review Meeting record dated 4 November 2016, X is noted to have spoken about *“wishing to remain at [the LA2 Hospital] if he can (he joked about becoming a staff member)”*.

71. The contemporaneous papers show that X was accessing the community during this period and was choosing on each occasion to return to the LA2 Hospital.

72. Whilst there was a contingency plan for X’s admission to formal section, there was no plan that he should move to any other placement. His temporary accommodation in the “bottom middle bungalow” at the LA6 Care Home was considered but not ultimately thought appropriate. Ambitions to move to a placement nearer X’s parents were discussed with him but not as finite short-term plans.

73. On 4 November 2016, it was formally confirmed that X would be unable to return to the LA6 Care Home but, in light of the entries set out above, a return to the LA6 Care Home seems to have been very unlikely from the outset.
74. Whilst his stay at the LA2 Hospital prior to being made subject to a formal section was relatively brief, the case law and guidance envisages situations in which shorter stays might give rise to a change of ordinary residence.
75. It is determined that X did become ordinarily resident in the LA2 Hospital during the period between 6 September and 27 November 2016. He was physically present there throughout that period. There is substantial evidence to show that he was expressing a wish to remain. He did not wish to live at the LA6 Care Home and from 4 November 2016 at latest that accommodation had become unavailable to him. No other accommodation was being mooted as an option for X in the short-term. His presence at the LA2 Hospital could not therefore be said to be a temporary expedient. Applying the straight-forward approach which the case law urges decision-makers to apply, the only reasonable conclusion is that X had become ordinarily resident at the LA2 Hospital by 27 November 2016.
76. If he were not ordinarily resident by that point, he would in any event be resident at the LA2 Hospital. This is not a case in which there is a clear and compelling reason to conclude that he was of no residence.
77. LA2 is therefore the authority with aftercare responsibility for X.
78. Given that LA2 is determined to be the authority responsible for X's aftercare, it follows that LA2 is also responsible for X's eligible needs under SSWA.

Dated: 06 December 2023