

# *Worcestershire: the background*

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# S.117 Duties

*(2) It shall be the duty of the clinical commissioning group...and of the local social services authority to provide or arrange for the provision of...after-care services for any person to whom this section applies **until such time as the clinical commissioning group... and the local social services authority are satisfied that the person concerned is no longer in need of such services ; but they shall not be so satisfied in the case of a community patient while he remains such a patient.***

# S.117 Duties

*(6) In this section, “ after-care services ”, in relation to a person, means services which have both of the following purposes—*

- (a) meeting a need arising from or related to the person's mental disorder; and*
- (b) 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).*

# S.117 Duties

- Pre-Care Act framework (and case law) was on the basis of ‘residence’ rather than ‘ordinary residence’
- However, s.117(3) now states the relevant local authority is the LA:
  - (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.*

# S.117 Ordinary Residence

- *Shah* test
- S.39 Care Act deeming provisions:
  - (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...*

# S.117 Ordinary Residence

Care Act duties follow s.117 duties under s.39(4) if they exist, so no scenario in which there can be a dispute between two local authorities over whether a duty to meet needs falls under Care Act or MHA:

*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.*

# Care and Support Statutory Guidance

*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.*

# 2020 DHSC Policy Reversal

- In a series of 8 Ordinary Residence determinations in 2020, the Secretary of State set out that he considered the existing statutory guidance at odds with statute and case law – one of these was *Worcestershire v Swindon*
- Also considered that *Wiltshire v Hertfordshire* was not good law following change from ‘residence’ to ‘ordinary residence’
- Following *Worcestershire* judicial review, there has been a long-standing stay on Ordinary Residence determinations which raise the same issues – this remains in effect pending permission application to the Supreme Court



# Facts of the case

- 2011/2012: JG living in Worcestershire, known to community services
- July 2012: JG informally admitted as an inpatient
- August 2013: JG left hospital and went to ordinary accommodation in Worcester
- November 2013: JG readmitted to hospital as an informal patient.
- March 2014: JG detained in hospital under s.3 MHA 1983 She was assessed as lacking capacity to decide where to live in April 2014.
- July 2014: JG discharged to a residential care home in Swindon pursuant to duties under s.117 MHA 1983. Worcestershire moved JG to a second care home in Swindon in February 2015.
- May 2015: JG detained in hospital in Swindon under s.2 MHA 1983; she was further detained under s.3 MHA 1983 in June 2015. JG's care home placement in Swindon was surrendered by Worcestershire.
- November 2015: JG was discharged from her s.3 MHA 1983 detention in November 2015, but remained an informal patient until August 2017 for the purposes of the MHA 1983, but was detained under the MCA 2005
- August 2017: JG left hospital

# 2020 DHSC Policy Reversal

- Care and Support Guidance on point has never actually been withdrawn, despite DHSC view that it is wrong for three reasons
    - *Cornwall*: While there is no s.117 deeming provision, the consequence of attaching responsibility to the LA where the person was ordinarily resident pre-detention is effectively the same as a deeming provision. The ‘placing authority’ had responsibility for the person even if they were out of area, and by the reasoning of *Cornwall*, the person retained OR in the ‘placing authority’
    - *‘Immediately before being detained’*: for a person experiencing multiple detentions, the relevant OR is before the first period of detention. A policy can be discerned that a person’s OR is not affected by being placed elsewhere by an LA, and statute is not specific on whether OR is determined at first detention or most recent detention.
    - *Previous s.117 duty doesn’t end just because a person is detained again*: The s.117 duty continued through a second period of detention, and remained in effect on discharge. Does not end by operation of law simply due to a person being re-detained. Ending of the duty is set out in s.117(2), and duty only ends when a person is no longer in need of such services.
- Particularly the case for short periods of detention.

# Judicial Review

- Heard before Linden J [2021] EWHC 682 (Admin), judgment given on 22 March 2021
- **Headline findings:**
  - *Cornwall*: The court rejected this argument and found it wrong as a matter of law, primarily on the basis of *R (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council* [2011]. In the *Cornwall* case, the Supreme Court had not questioned the correctness of *Hertfordshire*. S.117 responsibilities are free-standing to the Care Act and NAA.
  - ‘*Immediately before being detained*’: S.117 not ambiguous or unclear, and ordinary residence falls to be determined when the person leaves hospital. OR is from the time prior to each detention.
  - *Previous duty hadn’t ended*: Rejected. Earlier duty ended by operation of law on release from re-detention. In order to bring a s.117 duty to an end, a decision must be taken to this effect – not automatic on the basis of re-admission (though may be ‘almost invariably...the position’)

Siân Davies

# WORCESTERSHIRE - THE COURT OF APPEAL JUDGMENT

# SoS's appeal allowed

The Court of Appeal, in a decision of Coulson LJ with whom Carr LJ and William Davies LJ agreed, allowed the SSHSC's appeal.

# The outcome

It held there could only be one duty under s.117 at any one time (no concurrent duties).

That duty rested with Worcestershire unless and until it came to an end, either on the facts or as a matter of law.

# How does a s.117 duty end?

A subsequent period of detention was held not to have the effect, as a matter of law, of ending the s.117 duty [49]: **the duty could only end with a decision being taken by the relevant medical/social care staff at the authority that they are satisfied that the patient is no longer in need of after-care services (s.117(2)).**

# Had there been a cessation of duty?

The next step in that approach is to consider whether there had been a cessation of duty. As it was accepted that there had not, the fact that JG had become ordinarily resident in Swindon immediately prior to the second period of detention did not cause there to be a competition, or to switch the duty from Worcestershire to Swindon: there was only ever one duty and, as long as the original duty subsisted, the question of competing duties did not arise [50 & 54].



# A common sense approach?

CoA “sense-tested” its conclusion and found it to accord with common sense [56] because of **the need for care planning to occur throughout the period of detention,** (MHA CoP) which would be less likely if there were to be a change of responsible local authority.

# The ordinary meaning of the words...

- Where did JG live? The answer was, applying *Shah v Barnet*, immediately before the second period of MHA detention, Swindon [60-61]
- Was there a reason to depart from that conclusion?

# HertfordshireR (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council [2011] PTSR 1623

- Still applicable and binding: “is resident” (pre- amendment) does not mean “is ordinarily resident”

# Deeming provisions in s.117

- Importing deeming provisions by use of the word “ordinary” was a “seismic change” not “...known to the person responsible for the legislation that brought it about [73] and not included in guidance post-amendment
- Deeming provisions from CA 2014 were not imported

# *Cornwall* approach?

CoA was invited by the SSHSC to determine the appeal in a manner consistent with the approach of the Supreme Court in *R (Cornwall CC) v Secretary of State for Health* [2016] AC 137.

# What is a Cornwall approach?

In Cornwall, it was held that ordinary residence “deeming provisions” in the National Assistance Act 1948 permitted consideration of the placement of a (then) child out of borough under the Children Act 1989, so that the placing borough retained responsibility for meeting adult community care needs. That approach was taken by the Supreme Court for policy based reasons, namely, to prevent responsibility from being exported to another area.

# Limits to the Cornwall approach

The same approach was held in *Worcestershire* not to apply to s.117 MHA, it not being possible to read across the policy based approach to a different statutory scheme which, importantly, **did not incorporate the same deeming provisions** as were found in the National Assistance Act 1948 and now appear in s.39 Care Act 2014 [97 – 98].

# Key points from Worcestershire CoA decision (1)

**1. The local authority which is responsible for meeting s.117 after-care needs retains that responsibility unless and until there is a determination that the patient is no longer in need of after-care services.**



# Key points (2) & (3)

**2. That responsibility is capable of surviving an out of area placement**

**3. 117 responsibility also survives a subsequent detention.**

# Next Steps

- Worcester has applied for PTA to UKSC
- SSHSC continues to stay decisions determinations, unless there are exceptional circumstances
- Disputes must still be referred if LAs cannot resolve the dispute within 4 months of the date when it arose

# Next Steps

- Care Act 2014, s 41

(1) This section applies where—(a) a local authority has been meeting an adult's needs for care and support, but (b) it transpires (whether following the determination of a dispute under [section 40](#) or otherwise that the adult was, for some or all of the time that the authority has been meeting the adult's needs, ordinarily resident in the area of another local authority.

...

(3) The local authority concerned may recover from the other local authority the amount of any payments it made towards meeting the needs in question at a time when the other local authority was instead liable to meet them under [section 18](#) or [20\(1\)](#) (as the case may be).

s 69 (1) Any sum due to a local authority under this Part is recoverable by the authority as a debt due to it.

- Mental Health Act 1983, s 117

(4) Where there is a dispute about where a person was ordinarily resident for the purposes of subsection (3) above— (a) if the dispute is between local social services authorities in England, [section 40](#) of the [Care Act 2014](#) applies to the dispute as it applies to a dispute about where a person was ordinarily resident for the purposes of [Part 1](#) of that Act;

- SSHSC Guidance: Section 41 of the Care Act 2014, read alongside section 117(4) of the Mental Health Act 1983, allows for expenditure borne by a local authority in the provision of section 117 after-care, for a person ordinarily resident in the area of another local authority, to be recoverable from that other authority.
- Restitution – *Surrey County Council v NHS Lincolnshire CCG* [2020] EWHC 3550

# Next steps

- Formalising decisions to cease s. 117 support
- Need to ensure a proper record of assessment to identify whether the need has ceased