Everything you ever wanted to know about s.117 MHA 1983 but were afraid to ask

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Alex Ruck Keene KC (Hon) (Chair)
Sian Davies
Arianna Kelly
Katherine Barnes

Section 117: an overview

What is aftercare?

What is aftercare?

(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).

What is aftercare?

Services which can be provided under s.117 are not defined, and do not specifically refer to accommodation.

Manchester CC v Stennett [2002] UKHL 34

"psychiatric treatment" [7] and "caring residential care" [15] qualify as after-care services

MHA CoP

33.4

CCGs and local authorities should interpret the definition of after-care services broadly. For example, after-care can encompass healthcare, social care and employment services, supported accommodation and services to meet the person's wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient's mental disorder, and help to reduce the risk of a deterioration in the patient's mental condition.

Mwanza

R(Mwanza) v LB Greenwich held that the scope of s.117 is restricted to "… *services necessary to meet a need arising from a person's mental disorder*" [68] following an analysis of law and authority on the question of whether s.117 permitted or required ordinary accommodation to be provided in the circumstances of a person without established immigration status.

- [2010] EWHC 1462 (Admin), see [61]- [82]

Can ordinary accommodation be aftercare?

It has been held that ordinary accommodation is not an after-care need but after-care is capable of including enhanced specialist accommodation: R(Afework) v London Borough of Camden [2013] EWHC 424 (Admin) at [19] per Mostyn J …

https://www.bailii.org/ew/cases/EWHC/Admin/2013/1637.html

Afework (cont'd)

I therefore hold that as a matter of law s117(2) is only engaged vis-à-vis accommodation if:

i) The need for accommodation is a direct result of the reason that the ex-patient was detained in the first place ("the original condition");

ii) The requirement is for enhanced specialised accommodation to meet needs directly arising from the original condition; and

iii) The ex-patient is being placed in the accommodation on an involuntary (in the sense of being incapacitated) basis arising as a result of the original condition.

What is after-care?

Local Government and Social Care Ombudsman's report into a complaint against *Solihull MBC (19 002 160)* concluded that

The accommodation needs to have additional features to it as compared with mainstream housing and those features must arise from or meet a need from the person's mental disorder – over and above a basic need for shelter. In this case, the special features of the accommodation are/were: 24-hour on site staffing, CCTV, organised activities and a welfare check, all of which have the purpose of monitoring Miss A's mental state and reducing the risk of her mental health deteriorating. These features are not available in mainstream housing [24]

https://www.lgo.org.uk/decisions/adult-care-services/assessment-and-care-plan/19-002-160

A need arising from or related to the MH disorder

- Clear connection (not necessarily causative: “related to”)

- General wellbeing or physical disorder may not fall within the definition

Reducing risk of deterioration of mental condition

- Covers more than just one form of mental disorder, and not necessarily limited to the specific disorder for which a person was previously detained, giving rise to the right to aftercare

Hansard HL, Vol 748 col.600

See also Jones, 25th edition, page 574

In practice…

- Needs assessment is important, to identify what qualifies as an aftercare need and where appropriate to distinguish it from a general wellbeing need or one related to a physical health condition

- For s.117 to be capable of being discharged, it is necessary to identify what need was assessed and to consider whether the need no longer exists

Ordinary residence/ residence/ place sent on discharge

Section 117(3)

(3)In this section " the clinical commissioning group or ... Local Health Board **]** " means the clinical commissioning group or Local Health Board**]**, and "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.

Hierarchy of consideration

The hierarchy of consideration

hierarchy of consideration is confirmed at para.19.65 of the Guidance:

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.

“residence”

If no place of OR, so considering “residence” it should be noted that “residence” was the test under s.117 pre- amendment (s.72 Care Act 2014) therefore appropriate to use pre-amendment case law –

R(Sunderland) v South Tyneside

https://www.bailii.org/ew/cases/EWHC/Admin/2011/2355.html

“residence” cont’d

P was student in halls, informal admission to hospital, while informal became s.3 detained. Lost place in halls. Held that the hospital was place of residence on basis of informal admission + nowhere else to live

Court declined to import deeming provisions from NAA 1948 to s.117

Sent on discharge

- In practice, arrangements needed to enable discharge, so being sent to a place on discharge needs engagement from a LA/ ICB even on a without prejudice basis
- This is the last resort area of responsibility, and the approach of SoS is to work hard to find an area of OR or residence before resorting to this

Worcestershire CC v SSHSC [2023] UKSC 31

Katherine Barnes

Facts

- Prior to relevant events, JG ordinarily resident in Worcestershire
- March 2014 JG detained under s.3 MHA for treatment in hospital in Worcester
- July 2014 JG discharged. Lacked capacity to decide where to live so best interests decision made for placement at care home in Swindon. (All agreed Worcestershire to fund at this point)
- June 2015 mental health deteriorated so JG detained again under s.3 MHA at hospital in Swindon
- August 2017 JG discharged. Dispute arose between Worcestershire and Swindon as to which responsible for funding s.117 aftercare services
- Dispute referred to SoS, who decided Worcestershire was responsible. Worcestershire sought JR
- High Court [2021] EWHC 682 (Admin): Swindon responsible
- Court of Appeal [2021] EWCA Civ 1957 (Admin): Worcestershire responsible
- Supreme Court: ?

The Issue (1)

117. After-care.

(1) This section applies to persons who are detained under section 3 […], and then cease to be detained and […] leave hospital.

(2) It shall be the duty of the integrated care board […] and of the local social services authority to provide […] after-care services for any person to whom this section applies until such time as the integrated care board […] and the local social services authority are satisfied that the person concerned is no longer in need of such services […].

(3) In this section "the integrated care board" […] means the integrated care board […], and "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

- All agreed that W responsible for funding following first detention – JG ordinarily resident in W immediately prior to first detention and no decision by W that services no longer needed by JG
- However, where responsibility lay following second discharge posed a "conundrum"…

The Issue (2)

- All agreed Parliament could not have intended duty to be held by more than one authority at once
- On the one hand… S.117(2) indicates the duty applies until the authority decides the person is no longer in need of such services. No decision made here so suggests W remains responsible
- On the other hand… S.117(3) indicates that duty attaches to authority where person ordinarily resident immediately prior to detention. JG ordinarily resident (as normally understood) in Swindon immediately prior to second detention so suggests S became responsible
- How to reconcile? SC considered courts below had not grappled with why Parliament had intended one interpretation to prevail over the other

The Solution

- Duty under s.117(2) ceases when the person is detained under s.3
- So W's duty ended when JG detained for second time. Upon second discharge new duty arose to be determined as per s.117(3) – S responsible since JG ordinarily resident in Swindon immediately prior to second detention
- SC's interpretation grounded in language and purpose of s.117:
  - Duty will cease if decision made services no longer needed but also if s.117 no longer applies because terms of s.117(1) not met
  - Terms of s.117(1) not met when a person is re-detained under s.3. That is because, upon a person's second detention, they are no longer a person who has 'ceased to be detained' but a person who is detained and is in hospital
  - It is implicit in the concept of aftercare that the duty does not apply to people who are currently detained and receiving treatment in hospital (no need); it applies to people who have left hospital

SoS's Cross-Appeal

- SoS argued W responsible for different reasons. "Ordinarily resident" in s.117(3)(a) should not been given usual meaning, but interpreted differently due to a special rule of law…
- Adopting the plain meaning of ordinary residence, JG ordinarily resident in Swindon immediately prior to second discharge:
  - As per Shah [1983] 2 AC 309, ordinary residence must be: (i) voluntarily adopted (i.e. not enforced presence by reason of imprisonment, kidnapping etc); and, (ii) for settled purposes
  - That was the case here. Although JG lacked capacity to decide where to live, the decision to live in Swindon was made voluntarily by those with the power to make the decision on her behalf
- BUT SoS argued it followed from Cornwall [2015] UKSC 46 that plain meaning did not apply. Instead, if accommodation provided by LA for the purpose of performing statutory duty under s.117, then residence in that place should be disregarded in determining ordinary residence for purposes of s.117. In other words, assume deeming provisions from other community care legislation apply in similar way

SoS's Cross-Appeal

- SoS's argument rejected by SC:
  - Cornwall concerned with specific statutory context (NAA 1948 (now CA 2014) and CA 1989), in which there are deeming provisions providing for OR to remain with initial placing authority. No justification for extending to s.117 MHA given no deeming provisions or suggestion in wording of statute that anything other than plain meaning applies
  - SoS's argument contrary to Hertfordshire [2011] EWCA Civ 77 (deeming provision in NAA 1948 did not apply to previous wording of s.117)
  - SoS's argument would make s.39(4) of the CA 2014 otiose (this provides that where somebody receiving accommodation under s.117 MHA then to be treated for purposes of CA 2014 as being ordinarily resident in the area of the authority providing the s.117 services). No need for this provision if ordinary residence under s.117 MHA and the CA 2014 were always the same (i.e. if deeming provisions in CA 2014 (s.39(1)) also applied to s.117 MHA)

The *Worcestershire* case: implications

Recalibrating situations

Recalibrating situations: the short term

- Disputes referred to SoS have been stayed (unless urgent)

- LAs may have agreed to defer referral (although that would be non-compliant with time limits in *Care and Support (Disputes Between Local Authorities) Regulations 2014)*

What needs to happen now…

- Review disputes which have been referred to SoS and stayed pending SC decision
- Review any disputes informally stayed i.e. not referred yet, by agreement
- Consider whether there is now a clear answer to 117 responsibility
- Further correspondence to seek to resolve
- **Ensure P has ongoing service provision and is not prejudiced by dispute**

The medium term

- If no obvious answer to the dispute, identify basis for dispute to continue/ be determined by reference to SC decision
- Agree timetable for revised SoF/ submissions if appropriate
- Re-draft / supplement submissions to SoS
- Financial adjustment if there is a concession

The longer term

- Assess and provide for overall impact of the SC decision (net importer or exporter) on finances, social care workload and disputes
- Financial implications of adjustments agreed or pending
- Consider Memorandum of Understanding between neighbouring boroughs/ within ICP's to include s.117 responsibility

The clear cut-off on redetention

Implications of the clear cut off; MHA CoP compliance

- MHA CoP 33.10 states:

  Although the duty to provide after-care begins when the patient leaves hospital, the planning of after-care needs to start as soon as the patient is admitted to hospital. CCGs and local authorities should take reasonable steps, in consultation with the care programme approach care co-ordinator and other members of the multidisciplinary team to identify appropriate after-care services for patients in good time for their eventual discharge from hospital or prison.

- Arrangements required for swift transfer from LA1 to LA2 at point of re-detention to comply with that

LA's with specialist hospitals in area who are net "importers"

- Placement in area post-s.3 detention is capable of resulting in OR in the "new" area so that area is responsible for meeting needs following a subsequent detention
- Informal admission capable of being "residence" if no place of OR (*Sunderland*)
- Consider resource implications
- Arrangements within ICP/ with neighbouring areas to alleviate "burden"?

Capacity

Capacity and Ordinary Residence

- Important to pull apart capacity and deeming as two separate issues: deeming provisions do not depend on presence or absence of capacity

- *Shah* test:

  "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 of long duration." (p 343G-H)

Capacity and Ordinary Residence

- Current Position
  - *R (Cornwall Council) v Secretary of State for the Home Department & Ors* [2015] UKSC 46
  - The person, PH, was agreed to lack capacity to make decisions as to his residence and care
  - Secretary of State had argued that for people lacking capacity, *'the place which most appropriately represents at the material time, the seat of the person's decision-making power given his lack of capacity to make decisions where to live, the coming to an end of a placement under the 1989 Act, and the extent to which his parents (or those in loco parentis) can and will make the relevant decisions on his behalf.'* [50]
  - Supreme Court rejected this approach on the basis that it was *'impossible to reconcile with the language of the statute'* [51] and conflated deeming provisions and *Shah* OR

Capacity and Ordinary Residence

- Current Position
  - *R (Cornwall Council) v Secretary of State for the Home Department & Ors* [2015] UKSC 46:
    - *it is the residence of the subject, and the nature of that residence, which provide the essential criterion.* [51]
    - *it was perhaps unhelpful to elide the Shah test with the idea of a "base", used by Lord Denning MR in a different context and for a different purpose. The italicised words in the first passage quoted above cannot be read as supporting any more general proposition than that Judith's ordinary residence was to be equated with that of her parents, without reference to the period of her own actual residence with them. Nor in my view should Taylor J's two approaches be treated as separate legal tests. Rather they were complementary, common-sense approaches to the application of the Shah test to a person unable to make decisions for herself; that is, to the single question whether her period of actual residence with her parents was sufficiently "settled" to amount to ordinary residence.* [47]

Capacity and Ordinary Residence

- Current statutory guidance:
  - *19.32 Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.*
  - *19.33 Physical presence provides a starting point for considering ordinary residence but does not necessarily equate to ordinary residence - a person could be physically present in an area but of no settled residence…*

Worcestershire

- The person in *Worcestershire*, JG, had been assessed as lacking capacity to make decisions as to her residence, but this had not featured in any significant way in the legal dispute between the parties

- JG did not appear to have a deputy or attorney, and a best interests decision appears to have been made by consensus:
  - *While she was in hospital, JG was assessed as lacking capacity to decide where to live when discharged. Following consultation with her daughter and others involved in JG's case, a decision was made that it would be in JG's best interests for her to reside in a care home close to where her daughter lives, in Swindon.*

- However, in *obiter dicta*, the Supreme Court made some statements which appeared to row back some of the current position in *Cornwall*

Worcestershire

58. The test articulated in Shah requires adaptation where the person concerned is someone such as JG who lacks the mental capacity to decide where to live for herself. ***It seems to us that in principle in such a case the mental aspects of the test must be supplied by considering the state of mind of whoever has the power to make relevant decisions on behalf of the person concerned. Under the Mental Capacity Act 2005 that power will lie with any person who has a lasting power of attorney or with a deputy appointed by the Court of Protection or with the court itself.*** *Applying this approach, JG's residence in the area of Swindon was adopted voluntarily in the relevant sense, as it was the result of a choice made on her behalf to live in the accommodation that Worcestershire provided for her following the first discharge. Manifestly, her residence in that place was also adopted for settled purposes as part of the regular order of her life for the time being. Thus, if the term "ordinarily resident" is given its usual meaning, it is clear that immediately before the second detention JG was ordinarily resident in the area of Swindon.*

Intention and capacity

- *F v R* [2022] EWCOP 49 – COP asked to restructure person's assets so that they would be excluded for the purpose assessing capital for care and benefits

- SJ Hilder expressed concern that this would be treated as a derpivation of assets, and that it would be the purpose of the MCA decision-maker which would be relevant for intent:

> *48.I agree with the Official Solicitor that there is a clear risk (and I borrow that phrase from paragraph 19 of Mr Rees's first position statement) that if the proposed settlement is authorised by the Court of Protection, the relevant authorities will nonetheless take the view that preservation of means-tested benefits was a significant operative purpose, just as they would if a capacitous person took the same step. Frankly, I cannot see how any other interpretation can be sustained. …*
>
> *51.The Court cannot endorse a proposal whose purpose is to preserve an eligibility for benefits which Parliament has decided does not exist. At this point, it is the Court's purpose that matters, and the only purpose of the application is to preserve R's means tested benefits, whether that is directly or indirectly by giving effect to a supposed intention of T.*

Key points

- This point did not feature in the oral argument before the Supreme Court, nor was it a point before the Court of Appeal nor at first instance:

  *Mr Buley helpfully confirmed that he was not advancing any argument that I should hold that JG was not ordinarily resident in Swindon because she did not have sufficient mental capacity to decide to live there voluntarily or to have a settled purpose. Nor was he submitting that her presence in the accommodation provided to her in Swindon should be discounted on the basis that it was not "voluntarily adopted" in the sense intended by Lord Scarman. The issue of the effect of mental incapacity on Lord Scarman's formulation is discussed in the **Cornwall** case, which I will come to, but suffice it to say that in the light of the case law I agree with Mr Buley's concessions in this regard.*

- Discussion on this from the Supreme Court in *Worcestershire* was obiter dicta, and not the subject of any debate or discussion

Key points

- Phrasing is odd in referring to situations where power lay with '***any person who has a lasting power of attorney or with a deputy appointed by the Court of Protection or with the court itself'*** where JG did not have a deputy or attorney

- Court did not seem to suggest any lack of MCA authority to take a decision on JG's residence on a consensus basis rather than an MCA-nominated decision-maker or court

- However – the modified *Shah* test as articulated in *Cornwall* may be slightly modified in taking into account the purpose for which the MCA decision-maker (whether court, deputy, attorney or consensus-based) decided on the person's residence

Integrated Care Boards

ICB Implications

- S.117(3) - responsible ICB or Local Health Board with responsibility is tautologically defined as: *'In this section "the integrated care board or Local Health Board" means the integrated care board or Local Health Board'*

- Responsibility for ICBs is now defined by The National Health Service (Integrated Care Boards: Responsibilities) Regulations 2022, which put the 2020 *Who Pays?* Guidance on statutory footing – the general position for detentions from 2020 (applied via guidance prior to regulation) is summarised in current *Who Pays* as:
  - *the [ICB] which was responsible for the patient at the point of initial detention under the Act retained responsibility for paying for the detention, subsequent aftercare and any further detentions / aftercare* ***<u>until the patient was ultimately discharged from aftercare.</u>***

ICB Implications

- Transitional arrangements also existed from September 2020 for:
  - Patients already in receipt of s.117 aftercare
  - Patients detained in hospital being funded by a CCG
  - Patients detained in hospital funded by NHS England

- The funding CCG/ICB was to retain responsibility for detention, aftercare and funding for any further detentions or voluntary admissions until the patient was discharged from s.117 aftercare

- Other responsibility for a patient's healthcare (apart from aftercare) may shift to the area in which the patient now resides if patient changes GP registration

ICB Implications

- Regulations are worded purposefully to create continuity of responsibility:
  - ICB responsibility exists for a patient who is detained, and does not end if a further application for detention is made during an 'exclusion period', defined as the period 'beginning with the person's detention under' the MHA and ending 'with the person's next discharge from after-care services'

- Wrinkle created by *Worcestershire* is that a further qualifying detention for the purposes of s.117 is defined as a discharge from existing aftercare services

- *Who Pays* guidance is drafted with a clear purpose that a single ICB remains responsible for a sequence of detentions and aftercare – however, regulations do not entirely align here

ICB Implications

- Potential for an argument to be run that a new application for detention while a person is in hospital is made outside of the 'exclusion period' as aftercare responsibilities have come to an end, and ICB with core responsibility at that time is now responsible for s.117 aftercare

- However, it would not be surprising if there were updated guidance/regulations on this point to re-establish the principle of continuity of ICB responsibility until the person required neither detention nor aftercare

Where next?

The Future

- If Mental Health Bill enacted then deeming provisions in CA 2014 will be expressly applied to s.117 via amendment (clause 39)
- So if enacted when this dispute had arisen, W would have been responsible for funding the services
- However, despite cross-party support, recent reports that MHB to be further delayed and will not make next King's Speech in Nov 2023 (mental health reforms not considered to be a vote winner!)

Any questions?