

Residence and “Ordinary Residence”: How can it possibly be that difficult!

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1. This is a talk about the meaning of the words “residence” and “ordinarily resident”. But it is actually about who is responsible for what and crucially which local authority pays for whom. The NHS has guidance which is refreshingly honestly titled “Who Pays Determining responsibility for payments to providers¹.” The most recent Secretary of State’s Guidance² on determining ordinary residence is slightly more circumspect but amounts largely to the same thing.
2. In some ways one can ask “how on earth can it be so difficult”. The answer is that, for the majority of cases, it is not. It is blindingly obvious where someone resides and hence, if needed, where a person ordinarily resides. However there are a limited number of people for whom their place of ordinary at a particular time is far from straightforward. When this happens, lawyers argue about angels on heads of pins in order to assert that a person is ordinarily resident at place A or place B as the interests of their client dictate.
3. I should also confess to being one of the lawyers who has caused some of the trouble by challenging the traditional approach to determining the place of ordinary residence for persons who lack capacity. I had hoped that the result of the decision of the Supreme Court in *R (Cornwall Council) v Secretary of State for Health*³ would be available by now since this was argued last month. But the Supreme Court justices have not yet delivered their judgments on how an adult’s place of ordinary residence can be determined if the person lacks capacity, so we left in suspense.

¹ See <http://www.england.nhs.uk/wp-content/uploads/2014/05/who-pays.pdf>

² See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252864/OR_Guidance_2013-10-01_Revised_with_new_contact_details_New_DH_template.pdf

³ See *R (Cornwall Council) v Wiltshire Council & Ors* (Rev 1) [2012] EWHC 3739 (Admin) and in Court of Appeal at [2014] 1 WLR 3408, [2014] 3 All ER 603, [2014] EWCA Civ 12.

4. This talk cannot possibly address every aspect of this subject but over the next 40 minutes or so I will attempt to outline some of the main issues that face local authority lawyers attempting to work out whether their authority is or is not responsible for providing and funding for a service user whose place of residence is unclear.

5. Defining a person's place of residence or ordinary residence can have a variety of legal consequences and the proper approach can vary depending on the circumstances. There are 3 reasonably clear categories:
 - a. Category 1: A person's place of residence can define whether a person is liable to pay tax, make a payment or face any other form of legal penalty. The concept of ordinary residence is relevant for tax years that ended before 6 April 2013, i.e. tax years up to and including 2012/13. The concept of ordinary residence was abolished for the purposes of tax years starting after 5 April 2013 and it's now based on the number of days residence in the UK.

 - b. Category 2: A person's place of residence can create an entitlement for that individual to a state benefit or government service. In such a case the place of residence or ordinary residence defines the citizen's rights against the state.

 - c. Category 3: A place of ordinary residence can define which public body takes on the responsibility for providing a service to a service user and paying for the service. In such a case the place of ordinary residence defines which public body owes primary duties or how statutory duties are divided between public bodies, and crucially "who pays". However this should not be seen solely as an "accounting function" because at its heart it's about which public bodies owes a range of financial and statutory service obligations to a citizen.

6. There can be subtle variations in the approach to determining ordinary residence depending on whether the issue of ordinary residence is being considered in category 1, 2 or 3. To illustrate the problems consider section 4 of the Representation of the

People Act 1983 which provides that an eligible person can join the electoral register in the place one is “resident”. As long ago as 1970 Lord Denning considered the problem of a person who spends part of the year in different places. The case of *Fox v Stirk* involved university students who only spent part of each year in a university hall of residence. Lord Denning explained that a place of residence was not the same as a home. He observed (in argument) “*But a man may have two residences whereas a home is only one place*”. The approach to “residence” taken by the ERO was, perhaps, not straightforward:

“The electoral officer at Cambridge held that scholars and exhibitioners are entitled to be on the register: that commoners are *not* entitled to be on the register if their parental home is in England, but *are* entitled if their parental home is not in England”

7. Such fantastic subtlety did, wholly unsurprisingly, not commend itself to the court. Lord Denning said there were 3 principles:

“The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account”

Hence the court decided that students could be “resident” in both places so had a right to be on the electoral register in both places. This means the politically sophisticated could choose to vote in either constituency but not vote in both of course unless they adopt the “vote early, vote often” approach which is “traditional” in some parts of the UK.

8. The leading case on ordinary residence, at least until the Supreme Court hands down judgment in *Cornwall Council* (and probably thereafter), is *Shah v Barnet LBC* [1983] 2 AC 309. That was a Category 2 “entitlement” case about student grants where Barnet and other councils tried to get out of paying grants to students who originally came from overseas but the principles have been applied to both category 1 and category 3 cases. Lord Scarman, who gave the substantive speech, said:

“Ordinary residence is not a term of art in English law. But it embodies an idea of which Parliament has made increasing use in the statute law of the United Kingdom since the beginning of the 19th century”

He then observed at p.341A:

“Though the meaning of ordinary words is, as Lord Reid observed in *Cozens v. Brutus* [1973] A.C. 854, a question of fact, the meaning to be attributed to enacted words is a question of law, being a matter of statutory interpretation.”

9. At p.343 Lord Scarman concluded which observations which have, possibly mistakenly, been treated as having almost the same authority as statutory words:

“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.”

10. Thus, determining a person’s place of “ordinary residence” involves establishing both a **physical presence element** and a **mental element**. The physical presence element is largely denoted by identifying the place of a person’s residence and the mental element involves whether the person is “ordinarily” resident at that place.

11. However there is a caveat to the physical presence element in that, in an entitlement case, the presence must be lawful. An unlawful presence cannot be ordinary for entitlement but it can nonetheless create an obligation to meet a liability. So a person cannot avoid income tax by saying it was earned when living in the UK unlawfully.

12. A place of a person's residence is a matter of fact, not a matter of desire. A person can be ordinarily resident somewhere he factually lives even if he has not chosen to live there. Conversely, a person cannot be ordinarily resident somewhere where he would prefer to live but does not in fact live. In *Mohammed v Hammersmith and Fulham LBC* [2002] 1 AC 547 Lord Slynn explained this at §18:

“It is clear that words like "ordinary residence" and "normal residence" may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. 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. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides.”

13. The importance of physical presence in a residence test was reiterated by a majority of the Supreme Court in *A v. A (Children) (Habitual Residence)* [2014] A.C. 1. That case concerned the habitual residence of a child. The mother was habitually resident in the UK (as were her other 3 children) but her 4th child was born whilst she was held against her will in Pakistan. This child had never been physically present in the UK. Baroness Hale said that establishing physical presence – i.e. factual residence – was necessary before the court considered whether the residence could be habitual

residence. It follows that the 4th child could not be habitually resident in the UK because she had not been physically present here and so was not “resident” in the UK.

14. As far as the mental element of settling a place of ordinary residence is concerned, Lord Scarman in *Shah* said:

“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”

This all seems fairly straightforward – well fairly straightforward. But then it gets a touch more complex for a number of reasons.

When can a person only have one place of ordinary residence?

15. If we are in category 3, that is resolving which local authority has to pay and discharge statutory duties to a service user, there cannot be more than one place of ordinary residence. Only one local authority can be liable to meet the bill for services under the Children Act 1989 or under the Care Act 2014 (or formerly under the National

Assistance Act 1948). The Court of Appeal confirmed this recently in *R (Sunderland City Council) v SF & Anor* [2012] EWCA Civ 1232 where Lloyd LJ said at paragraph 30:

“... it is clear that for the purposes of section 117 of MHA a person cannot have more than one residence, whereas for other legislative purposes (including *Fox v Stirk* as well as tax provisions) the person in question could be resident in two different places at the same time”

16. Hence a person can have 2 places of residence or even ordinary residence for some statutes but only 1 place of residence for others. The test in such cases is where a person is perhaps more ordinarily resident than anywhere else.

The effect of statutory deeming provisions.

17. Secondly, there are the dreaded statutory deeming provisions. For example section 105(6) of the Children Act 1989 provides:

“In determining the “ordinary residence” of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place—

- (a) which is a school or other institution;
- (b) in accordance with the requirements of a supervision order under this Act;
- (ba) in accordance with the requirements of a youth rehabilitation order under Part 1 of the Criminal Justice and Immigration Act 2008; or
- (c) while he is being provided with accommodation by or on behalf of a local authority”

Hence a child that is placed by local authority A in a placement in the area of local authority B cannot change their place of ordinary residence “for any purpose of this Act”, i.e. for any purpose under the Children Act 1989.

18. The legal effect of a deeming provision is to require a legal decision maker to treat a hypothetical state of affairs as a matter of legal fact whether or not that fact is actually true (and usually it will not be factually true). Careful attention must be paid to the scope of the deeming provision and the hypothetical state of affairs cannot be extended beyond that proscribed by the statute. This approach was explained by Megarry J in *Polydor Limited and R.S.O. Records Inc. v Harlequin Record Shop Limited and Simons Records Limited* [1980] 1 C.M.L.R. 669 at §11:

“The hypothetical must not be allowed to oust the real further than obedience to the statute compels”

19. It follows that, unless it says otherwise, a statutory deeming provision only operates for the purpose of the particular Act in question and does not operate for the purpose of another Act (unless the deeming provision indicates otherwise): see *R (M) v London Borough of Hammersmith and Fulham* [2010] EWHC 562 (Admin) and on appeal reported as *R (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council* [2011] PTSR 1623 (Court of Appeal). In that case the Court of Appeal decided that a “deemed residence” for the purposes of the National Assistance Act 1948 operated only for that Act and hence did not affect the decision as to where someone lived for the purposes of s117 of the Mental Health Act 1983. Hence, as the Court of Appeal accepted in the *Cornwall* case, the deeming provision in section 105 of the Children Act 1989 applies for the purpose of that Act alone and does not apply where services are provided under a different Act of Parliament.
20. There are slightly different statutory deeming provisions for determining where a person is deemed to be ordinarily resident in section 39(1) of the Care Act. This section provides:

“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”

21. The statutory deeming under section 39(1) of the Care Act 2014 appears to be different from the statutory deeming provision in section 24(5) National Assistance Act 1948 because, reversing the effect of the *Hammersmith and Fulham* case, the deeming provision is not limited to placements under community care legislation. Specific provision is also made for a deeming effect where accommodation is provided as “after-care” under the Mental Health Act 1983 in section 39(4) and for accommodation funded by the NHS under section 39(5).

The effect of confusingly drafted statutory provisions.

22. Some statutes concerning ordinary residence are (or were) just plain awkward. For example section 117 of the Mental Health Act 1983 (“MHA”) sets up a statutory duty on both a local authority and (now) a clinical commissioning group to provide “aftercare” services to persons who were formerly detained under the MHA. But the wording of the statute used to be far from clear about which local authority is responsible. Until April 2015 it provided:

“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, 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”

23. In *R v Mental Health Review Tribunal ex parte Hall* Scott Baker decided that a person was not ordinarily resident at the place where he was detained under the MHA were not to be treated as being ordinarily resident in the hospital in which they were detained on the “prison or desert island” principle in *Shah*. Primary responsibility, so the Judge decided, lay on the local authority for the area in which the individual lived before the person was detained. However there is still no guidance on how local authorities and clinical commissioning groups are supposed to divide up responsibility between them for section 117 services for which they are both liable. The starting point is probably a 50/50 split unless a local agreement provides for something different.
24. This particular provision has now been clarified in statute as a result of changes to section 117 as a result of changes introduced by section 75 of the Care Act 2014 which came into force on 1 April 2014. It now reads:

“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.

25. Hence the statute has been changed to reflect the interpretation the court has placed in fairly opaque language.

Who is the ordinary residence decision maker?

26. Fourthly, the local authority is the final merits decision maker about a person's place of ordinary residence. If the local authority is challenged on its decision it will end up directly in a court decision as to whether the local authority was right or wrong. But other statutory schemes provide that the Secretary of State has an adjudication function where there is a dispute about ordinary residence which causes particular issues. Typically the latter will be cases where there is a dispute between 2 public bodies.

27. The Secretary of State had this function under section 32 of the National Assistance Act 1948 and retains the function under section 40 of the Care Act. The Care and Support (Disputes Between Local Authorities) Regulations 2014 have been made under this section. Regulation 2(3) provides:

“If no local authority is meeting the needs on the date on which the dispute arises—

(a) the local authority in whose area the adult needing care is living; or

(b) if the adult needing care is not living in the area of any local authority, the local authority in whose area that adult is present,

must, until the dispute is resolved, perform the duties under Part 1 of the Act in respect of the adult or carer as if the adult needing care was ordinarily resident in its area”

28. The Secretary of State has published extensive guidance about ordinary residence to guide local authorities and hence avoid excessive disputes being referred to the Secretary of State. This is not statutory guidance under section 7 of the Local Authority Social Services Act 1970 and so allows local authorities greater scope to deviate from the guidance. Some of this guidance has found its way into the Statutory Guidance under the Care Act 2014, which is guidance to which section 7 applies. The Secretary of State's Guidance on the identification of the ordinary residence of people in need of community care services, England (2013)⁴ runs to 80 pages but a word of caution, because the Guidance has not been updated after the *Cornwall* case in the Court of Appeal. It seems highly likely that part at least of this Guidance will have to be rewritten when judgment is handed down by the Supreme Court.
29. A challenge to the decision of the Secretary of State exercising his determination function is by way of judicial review. Any challenge must therefore show that the Secretary of State misdirected himself on the facts or the law, not just that he reached a conclusion that was not the most appropriate result on the facts.
30. There have been a few challenges to determinations by the Secretary of State but perhaps *R (London Borough of Greenwich) v Secretary of State for Health & Anor* [2006] EWHC 2576 (Admin) is the most interesting because it shows how subtle the law can be in this area. This was a challenge based on a complaint that a service user, Mrs D, was "encouraged" to move across the border from Bexley to Greenwich just about the time that her capital to pay her own nursing home fees ran out. The claim came before Charles J and failed. The judgment is perhaps inevitably far from straightforward. The Judge noted that Greenwich local authority had not in fact made the placement because they did not know about Mrs D. But he said at paragraph 55:

"It seems to me that if the position is that the arrangements should have been made -- and here it is common ground that on 29th June a local authority should

⁴ See

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252864/OR_Guidance_2013-10-01_Revised_with_new_contact_details_New_DH_template.pdf

have made those arrangements with the relevant care home -- that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority”

31. That approach involves deeming that something to have happened when it did not happen. It probably cannot now be supported following the approach of Lady Hale in *R (M) v London Borough of Hammersmith and Fulham* [2008] UKHL 14 [2008] 1 WLR 535 where at paragraph 44 Lady Hale refused to treat the actions of a Housing Authority as if they were the actions of a Social Services Authority. Hence the idea that, for the purpose of determining a place of ordinary residence, the actions of one local authority can be deemed to be the actions of another local authority, as Charles J assumed, is probably no longer good law.

32. Further Charles J said at paragraph 74:

“It was accepted, in my judgment rightly, before me on behalf of the Secretary of State that the fact that a person, here Mrs D, does not have a place of residence, or an existing right to reside at a place in Bexley, and did not have that right on 28/29th June, is not determinative of the issue. However, it is pointed out, and I agree -- and it was, as I understood it, not disputed -- that it is a significant factor to be taken into account”

33. That approach also may need to be revised in the light of the decision of the Court of Appeal in *R (Sunderland City Council) v South Tyneside Council* [2013] PTSR 549, [2012] EWCA Civ 1232. *Sunderland* was a dispute about section 117 MHA funding for a person who was in and out of mental health detention over a number of years. It was a direct judicial review as opposed to a challenge to a decision by the Secretary of State. Amendments to section 117 now give the Secretary of State an adjudication role but this case preceded those amendments. However in the *Sunderland* Lloyd LJ said that a person could not retain a prior place of residence if, in fact, there was nowhere in that area for the person to reside. Whilst it sounds obvious, the Court of

Appeal decided that a person cannot continue to have a place of ordinary residence in an area unless, in fact, there is a defined place in that area where a person is able to reside. The rules for determining a person's place of ordinary residence for the purposes of section 117 on immediate discharge from detention under the MHA was said to be a recognised exception to this rule.

The difference between who provides and who pays?

34. There can be a different test as between the duty of the local authority to provide services to the service user, at least in the first instance, and the question as to which local authority finally picks up the bill. If a person has no place of ordinary residence, statutory schemes provide that the duty is owed by the local authority to the person in a local authority area, which means physically present in. Hence the confused pianist who turned up in Kent with amnesia a few years ago was Kent's responsibility.

35. But even if a person has a place of ordinary residence, the local authority where the person is physically present can have immediate duties. The duties under part 3 of the Children Act 1989 are owed to any child "within their area": see section 17(1). Hence the primary duty is owed to any child in the area of a local authority regardless of the child's place of ordinary residence. However section 29(7) provides:

"Where a local authority provide any accommodation under section 20(1) for a child who was (immediately before they began to look after him) ordinarily resident within the area of another local authority, they may recover from that other authority any reasonable expenses incurred by them in providing the accommodation and maintaining him"

36. The Secretary of State has a determination function under section 30(2) of the Children Act 1989 if the local authorities cannot agree where a child has his place of ordinary residence.

And finally to Cornwall.

37. I propose to end with the examination question that was presented to lawyers and judges in the Cornwall case. The facts were beguilingly simple. PH was born to parents who lived in Wilshire. He had severe learning difficulties and needed specialist care from the age of 4. Wiltshire exercised functions under the Children Act 1989 by placing him with specialist foster parents in South Gloucestershire. This was a great success and he thrived there until age 18. Meanwhile, when he was 6, his parents moved to Cornwall where his father happened to become Director of Education for Cornwall Council. Wiltshire made unsuccessful attempts to persuade Cornwall to become interested in the case when PH was a teenager but they resisted.
38. Wiltshire overlooked that PH was a looked after child so there was no pathway plan, personal advisor and the like. They sought to transition PH from children to adult services in one step, without addressing leaving care issues as an intermediate step. They purported to exercise powers under section 21 of the National Assistance Act 1948 to place PH in Somerset. Then, 1 year later, someone at Wiltshire asked why they were still paying for PH and the case was eventually referred to the Secretary of State for adjudication.
39. The issues emerging from these “simple” facts were:
- a. Where was PH’s place of ordinary residence when he turned 18;
 - b. Could Wiltshire exercise powers under part III NAA if PH fell outside of any category that allowed them to exercise these powers;
 - c. Were Wiltshire in fact exercising powers as a Children’s Services Authority by providing leaving care services even if they thought they were acting under the NAA.
40. The Secretary of State only addressed issue 1 and said he was ordinarily resident in Cornwall following the decision in *R v. Waltham Forest LBC, ex parte Vale* (The Times

25 February 1985) (*Vale*). That case proposed the “Vale 1” test under which adults with learning difficulties should be treated in a like way to small children and take their place of ordinary residence from their parents.

41. Cornwall challenged the Secretary of State’s decision in front of Beatson J and lost on all grounds⁵. Cornwall appealed and the Court of Appeal decided against Cornwall on issues 2 and 3 but said that *Vale* was not good law and that PH was ordinarily resident in South Gloucestershire because (a) the statutory deeming under section 105(6) CA only applied for the purpose of that Act and not the NAA and (b) adopting the approach in *Re A* [2013] UKSC 60, a person without capacity’s place of residence was “the place which reflects some degree of integration by the child into the social and family environment”. Hence *Vale* is confined to the judicial history books.
42. The Secretary of State appealed to the Supreme Court and the decision is awaited. It would not be right to speculate how their Lordships will approach the matter but I would not put money on *Vale* re-emerging as a proper approach and perhaps the court will approach the matter on the basis that parliament chose a residence test to fix the responsible local authority, not a test that is focused on the relationship an adult with learning difficulties has with his parents. However we shall see.

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⁵ See <http://www.bailii.org/ew/cases/EWHC/Admin/2012/3739.html>