

Ordinary residence & the Law

Luke Clements

Care Act 2014

Assessing social care needs

The duty to assess adults in need and carers' does not depend upon 'ordinary residence'

s18 Care Act 2014

The duty to provide social care support:

- The adult / carer must have been assessed as 'eligible' for support;
- Must have savings less than the capital maximum (£23,250);
- Must be ordinarily resident in LA.

Luke Clements Training

S117 Mental Health Act 1983

Patients detained under:

- Section 3; or
- one of the criminal provisions.

When discharged from hospital, entitled to free after care services under s117 MHA 1983.

Luke Clements Training

Part III Children Act 1989

- s17 ~ very wide range of services (including accommodation)
- s20 ~ accommodation (ie voluntary care)

Luke Clements Training

Choice of Accommodation regulations

- Right to choose prescribed accommodation in England
- Right for third parties to 'top-up' the cost of more expensive accommodation.
- A positive duty to advise potential residents / carers of these rights
- Care planning and 'locational need' ;

Care and Support & After-care (Choice of Accommodation) Regulations 2014 / Annex A Statutory Guidance

Luke Clements Training

Deferred payments rights

Right to a deferred payment arrangement ~ CA 2014 ss34-36 & chapter 9 Statutory Guidance
Right arises where:
(a) the needs are to be met by the provision of care in a care home;
(b) the assets (excluding the value of the person's home, are less than (or equal to) the capital limit; and
(c) their home is not disregarded
A positive duty to advise potential residents / carers of this right

Luke Clements Training

Self funders

Capital limits

- £23,250

Treatment of property

- Mandatory disregards
- Discretionary disregards

Luke Clements Training

Capital disregards ~ property

First 12 weeks of a permanent stay;
If stay is temporary
If permanent, disregarded if occupied by:

- the resident's partner or former partner; or
- a relative who:
 - is aged 60 or over, or
 - is aged under 18 and is a child whom the resident is liable to maintain, or
 - is incapacitated.

s39 Care Act 2014

The 'deeming provisions'

Luke Clements Training

1. A person is deemed to be ordinarily resident in the area in which s/he was ordinarily resident immediately before prescribed accommodation was provided.

2. A patient for whom NHS accommodation is provided is deemed to be ordinarily resident in the area in which s/he was resident before the NHS accommodation was provided.

Ordinary residence cases

Luke Clements Training

Shah v Barnet LBC (1983)

- long-term future intentions / expectations not relevant;
- a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences.
- A person's attitude is only relevant in two respects;
 - the residence must be voluntarily adopted, and
 - there must be a settled purpose in living in the particular residence.
- whether of short or long duration.

Ordinary residence cases

Luke Clements Training

R v Waltham Forest LBC ex p Vale (1985)

- 28 year-old profound LD totally dependent on parents.
- 'concepts of voluntarily adopted residence and settled purpose did not arise'.
- ordinary residence was that of her parents, not because it was her real home, but because it was her 'base'.

4

Ordinary residence cases

R v Redbridge LBC ex p East Sussex CC (1993)

- twins profound LD boarded in East Sussex, but whose parents lived in Redbridge.
- *Vale* ~ twins OR in Redbridge.
- parents went to live in Nigeria.
- twins ceased to have any settled residence and accordingly the responsibility of East Sussex.
- LAC (93)7 - except in cases involving severe LD 'an adult with LD should be regarded as capable of forming own intention of where to live

Ordinary residence cases

R (Mani) v Lambeth LBC (2002)

- Asylum seekers
- Q = 'voluntarily adopted' & dispersal
- Applicant living in National Asylum Support Services (NASS – now 'NAM') accommodation for six months,
- 'sufficiently voluntary'

Ordinary residence cases

Mohamed v Hammersmith & Fulham (2001)

- 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.

Luke Clements Training

Self funders

A person will only be considered to be a 'self funder' if:

- S/he has financial assets above the maximum levels for residential care charging purposes; and
- S/he has the ability / capacity to enter into a contract with the care home; or
- There is someone (family / advocate / friend etc) willing and able to do this on his or her behalf.

Luke Clements Training

Self funders

Deeming provisions apply if LA 'made placement & contract' for the accommodation

1996 decision

- SW assessed & assisted by taking resident to the home. However resident made own contract
- Therefore considered to be OR in the new area.
- Taking someone to the home did not constitute making the placement

Luke Clements Training

Self funders

1999 decision

- young man lacked capacity & residential accommodation provided by council A in council area B
- inheritance above capital limit & a receiver to look after finances
- Council continued contract with the home

Held - by contacting the home, arranging a visit by the manager to see the young man & his subsequent transfer, & the issuing of invoices to the council by the home, amounted to 'the characteristics of an arrangement for the provision of residential accommodation under Part III of the 1948 Act'.

Self funders

R (Greenwich LBC) v SS Health (2006)

- D – a self funder in a Bexley residential home
- Due to problems at the home had to move urgently.
- The only suitable placement put forward by Bexley was a home in Greenwich – to which she moved.
- 4½ weeks later entitled to funding under s 21 NAA 1948.

Held – Although Bexley had contacted the home & arranged a visit for D, such that she had not chosen the new home - nevertheless D had ceased to be 'OR' in Bexley. Her house had been sold and she was no longer living in the area, and therefore her ties were severed.

R (Greenwich LBC) v SS Health (2006)

Charles J

- what the position would be if the arrangements should have been made but had not been made. It seems to me that if the position is that the arrangements should have been made ... 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.

Scenarios 1

Questions 1 – 5

12 week disregard

- If during this period LA A places resident in LA B area and enters into contract with home;
- Then at end of 12 week period 'deeming provision' apply;

UNTIL

- LA A terminates the contract.

Moving out of prescribed accommodation

If resident funded by a LA outside its area:

- Moves out of prescribed accommodation into some other living arrangement;

Moving out of residential care pre-CA 2014 decision

2006 decision

- Young man moderate LD. Care home deregistered & grants tenancy (rent covered by HB).
- On deregistration he ceased to be accommodated under the NAA 1948
- thus 'deeming provision' no longer applied.

Held ~ the residence 'voluntarily' adopted as the young man had made links in the area and had entered into a tenancy agreement.

Luke Clements Training

Deeming rule applies:

-
-
-
-
-
-

Luke Clements Training

- [illegible]

Luke Clements Training

Moving out of NHS care

- Persons in NHS care deemed to be OR in the area in which s/he OR immediately before admission as a patient
- NHS care includes s117 payments if NHS making 100% payments;
- Where s/he was not OR in any area prior to admission, the responsible LA will be the one in whose area s/he is at that time.

No settled residence

- When a person presents him/herself to a social services authority and claims to have no settled residence or fixed abode, the authority is advised that it should normally accept responsibility
- *R (S) v Lewisham LBC, Lambeth LBC & Hackney LBC* (2008) 'that the provision of services ... should not be delayed because of uncertainty about which authority is responsible'

Children Act 1989

Within their area

- CA 1989 s17 duties owed by LAs to children 'within their area' .

Ordinary residence

- Financial responsibility for certain accommodation services rests with LA in whose area the child is OR.

Children Act 1989

R (Stewart) v Wandsworth, Hammersmith & Lambeth (2001)

- S applied to Hammersmith for housing (homeless). Hammersmith accommodated her in hostel in Lambeth
- Then determine S intentionally homeless & get possession order.
- S requests Hammersmith assess children under CA 1989.
- Hammersmith refuse on the basis Lambeth responsible.
- Lambeth refused as did Wandsworth LBC (the children's school being within their area).
- Court decides that 'within their area' simply a question of physical presence
- Accordingly Lambeth and Wandsworth responsible

Children / Community Care Interface

Children (Leaving Care) Act 2000.

- Looked after children
- Child placed by LA A with carers in LA B area
- Child becomes 18
- S/he remains the responsibility of LA A until 21 (or beyond in the case of certain education and training costs).
- A 2004 protocol exists for such inter-authority arrangements for care leavers

Children (Leaving Care) Act 2000

Eligible child

- looked after,
- aged 16 or 17, and
- has been looked after by a local authority for:
 - a period of 13 weeks,
 - or periods amounting in total to 13 weeks, which began after she/he reached 14 and ended after she/he reached 16

Children (Leaving Care) Act 2000

Relevant child

- a) not looked after,
- b) aged 16 or 17, and either
 - (i) before she/he last ceased to be looked after, an eligible child or
 - (ii) when 16 was detained (i.e. on remand or hospital) and before this was looked after by a LA for at least 13 weeks after the age of 14; or
 - (iii) Although formerly looked after, has lived for 6 months with someone with parental responsibility or a residence order and the living arrangements break down 16

Scenarios 2

Questions 6 - 10

R (Cornwall CC) v. SS Health 2015

- young man with physical and significant LD
- born in Wiltshire;
- placed by Wiltshire in a foster placement in South Gloucestershire.
- Parents moved from Wiltshire to Cornwall
- continued to be involved in decisions affecting his BI.
- He had regular contact with them, but only stayed with them for brief periods.

R (Cornwall CC) v. SS Health 2015

Luke Clements Training

- After he became 18 he was placed in care homes in Somerset.
- Court held that the placement in South Gloucestershire by Wiltshire did not change his ordinary residence and Wiltshire remained the responsible authority.

R (Cornwall CC) v. SS Health 2015

Luke Clements Training

- Revised Statutory Guidance (at para 19.22) highlights the Court's reference to the 'underlying purpose' of the OR regime (and the 'deeming provisions – discussed) namely:
- to ensure that 'an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it' (para 54 of the judgment).

S117 MHA 1983

Luke Clements Training

Joint responsibility of CCG & LA either

- for the area in which the person is resident; or
- to which s/he sent on discharge

R v Mental Health Review Tribunal ex p Hall (1999):

- envisages an alternative so that there is always some authority that will be responsible
- One or other authority is responsible but not both;
- Generally, for s117 purposes the person's OR on admission to hospital will be determinative.

S117 Mental Health Act 1983

Luke Clements Training

- **R (M) v Hammersmith & Fulham LBC (2010)**
- Accommodated [under NAA 1948/ now CA 2014] by Hammersmith in Hammersmith: therefore OR in..... ?
- Admitted to hospital after an accident: and on discharge enters Sutton care home funded by Hammersmith: therefore OR in..... ?
- Admitted to a psychiatric unit in Sutton under s2 MHA 1983 and on discharge returns to same care home: therefore OR in..... ?
- Admitted again but this time under s3 and on discharge returns to same care home: therefore OR in..... ?

S117 & Ordinary Residence

Luke Clements Training

Primary social care obligation rests with LA in which the person was OR immediately before being detained.

- if OR in LA (A) before detention and moves on discharge to LA (B) and moves again to LA (C)
- LA (A) will remain responsible
- Unless patient, having become OR in (B) or (C), is subsequently detained in hospital for treatment again

Para 19.65

Prisons s76 CA 2014

Luke Clements Training

- While in prison – responsible local authority is the one in whose area the prison is located;
- On discharge the presumption is that the person ordinarily resident in the local authority area s/ he was based before imprisonment;
- Easily rebutted however to become the one to which s/he is sent on release

Care Act 2014

Where a carer lives in LA A and carers for someone living in LA B;

It will be LA B that is responsible for the provision of any carers services under s20 CA 2014.

Disputed OR ~ s40 CA 2014

1. one LA must provisionally accept responsibility
2. an agreed statement of facts including:
 - full information about the person;
 - details of his/her prior residence;
 - details of the statutory provisions under which services have been provided.

Disputed OR

Cross border arrangements

Depends on where the resident is.

1. If in England (and the dispute is with a Welsh or Scottish authority) then the Department of Health
2. Vice versa – with Welsh Assembly Government or Scottish Parliament.

Luke Clements Training

Disputed OR ~ Children Act 1989

s30(2) CA 1989

1. Essentially the same as for CA 2014
2. No formal process for determining '*within their area*'

Luke Clements Training

NHS & the 'responsible commissioner'

NHS Regulations

1. Primarily linked to registration with a GP; but
2. If not registered with a GP it is based on where they are 'usually resident'

Luke Clements Training

NHS & the 'responsible commissioner'

Registration with a GP

- CCG ~ GP practice is a member

If not registered with a GP

- based on where 'usually resident':
- the address the person gives; or
- the most recent address he or she can give, or
- if the usual address cannot be established the patient will be treated as usually resident in the area where the person is present

Luke Clements Training

NHS Continuing Care & the 'responsible commissioner'

However

The placing CCG ceases to be responsible if

- The person independently chooses to move to a different part of the country -
- In which case it the 'host CCG' will be responsible – albeit that CCG's have a duty to cooperate and will generally have a transitional protection arrangement (3 months?)

Luke Clements Training

Cross border placements

From England to another UK territory

- If placement is to a care home then English local authority responsible for care home accommodation;

From another UK territory to England

- If placement is to a care home, supported living or shared lives then placing local authority (in other territory) responsible.

Luke Clements Training

Scenarios 3

Questions 11 - 17

Shah v Barnet LBC (1983)

- long-term future intentions / expectations not relevant;
- a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences.
- A person's attitude is only relevant in two respects;
 - the residence must be voluntarily adopted, and
 - there must be a settled purpose in living in the particular residence.
- whether of short or long duration.

Housing and 'local connection'

Housing Act 1996 s199

A person has a local connection with a LA for homelessness purposes if :

- s/he is normally resident there, and that residence is or was of his own choice,
- s/he is employed there,
- because of family associations, or
- because of special circumstances.

Housing and 'local connection'

Asylum and immigration ~ special rules:

local connection if at any time provided with accommodation by the LA under the immigration legislation; unless

- subsequently provided with accommodation in another LA under the immigration legislation, or
- the accommodation was in an accommodation centre in the LA area

Homelessness Code

LAs must assess people who apply as homeless and cannot turn them away because they do not have a 'local connection' with their area.

Generally a LA decides a person has a local connection if ...

- they have lived out of choice in the area for six out of the last 12 months
- or they have close family who have lived in the area for at least five years.

Social services duties ~ relevant factors

Over 18?

- *Under 18 different Children Act rules apply*

Over 25

- *Under 25 & formerly in care – then 'Children Leaving' Care rules may apply*

In NHS funded care (that is coming to an end)

- *Deeming rule ~ Ordinary Residence is the LA area before entered NHS funding*

Relevant Factors

Is in LA funded care home

- Deemed to be the responsibility of the funding LA

Self funder – but LA made the arrangements

- Deemed to be the responsibility of the funding LA - if LA made the contract

Self funder – but LA should have made the arrangements

- Deemed to be the responsibility of the LA that should have made the arrangements

Relevant Factors

Not getting LA funding but lacks capacity to make arrangements

- Has s/he voluntarily chosen their OR?

Has profound learning disabilities

- Vale – is it arguable that the OR should be of his / her parents?

NHS Continuing Care – what is the key

- CCG of which his/her GP practice is a member
