Ordinary residence & social care in Wales

Luke Clements[1]

Introduction

Responsibility for the provision of social care services rests with local bodies – most commonly local authorities but occasionally Local Health Boards (LHBs). The responsible local authority is generally the one in which the person is 'ordinarily resident' – although different criteria determine which local NHS body is responsible and these are considered separately below.

Ordinary residence – social services

The Social Services and Well-being (Wales) Act 2014 (SSWA 2014) has, by its repeal of the many statutes dealing with the provision of community care support services, removed many of the complexities that bedevilled this branch of law prior to April 2016.[2] The 2014 Act broadly adopts the conception of 'ordinary residence' as defined in the National Assistance Act (NAA) 1948 including its 'deeming provisions'. It is in relation to these 'deeming provisions' that material differences continue to exist between the ordinary residence rules under the 2014 Act and the Mental Health Act (MHA) 1983 and consideration of the rules relating to the 1983 Act are dealt with separately below.

The ordinary residence provisions in the SSWA 2014 are very similar to those in the English Care Act 2014. The most significant difference in the two schemes concerns one aspect of the 'deeming provisions' – and this is discussed below.[3] It is however Care Act 2014 (Sch 1) that contains the detail as to responsibilities for cross-border placements to and from Wales, Scotland or Northern Ireland – and these too are considered further below.

Ordinary residence and the SSWA 2014

The SSWA 2014 s194 places primary responsibility for the provision of its services on the authority in which the relevant person is 'ordinarily resident'.

The duty to provide care and support under the SSWA 2014 applies only to persons who are (among other things) ordinarily resident in the local authority's area, whereas a power exists to provide services for most other persons.[4]

Although from an individual's perspective it will often be academic as which authority has the responsibility for providing their care and support services, this will not always be so – particularly where they are suffering as a result of an inter-authority dispute as to which is responsible. Two further problems can arise. The first concerns the

---

[1] Solicitor, and Cerebra Professor of Law & Social Justice, School of Law, Leeds University.

[2] For a detailed analysis of these rules see L Clements and P Thompson *Community Care and the Law* (LAG 2011) chapter 6.

[3] Put simply if a local authority in England places a person in either (1) a care home; or (2) supported living; or (3) shared lives accommodation in another English local authority's area then the placing authority continues to be deemed that person's place of ordinary residence; in Wales this rule only applies to the first category of accommodation – namely a care home.

4 SSWA 2014 s36(2) and see also *R v Berkshire CC ex p P* (1997–98) 1 CCLR 141, QBD.

administrative delay that may occur where a person's ordinary residence changes – the delay in the new authority undertaking an assessment and providing substitute services. The second arises where the new authority has a less generous approach to care and support provision than the former. In relation to these (often associated) problems it has been said that they characterise the 'worst aspects of the Poor Law system of outdoor relief ... not least the fact that entitlement to support is lost on crossing 'parish (the local authority) boundary'.[5]

The SSWA 2014 (section 56) endeavours to streamline the process by which one local authority hands over to another its responsibility for a person's social care needs services. Welcome as the 'portability of care and support ' provisions are, it is nevertheless likely that individuals will continue to experience an interruption to their care packages when a change in their ordinary residence occurs. Where material harm results from the handover of responsibility from one authority to the other a formal complaint may be appropriate:[6] that the authorities are failing to 'work together' contrary to the requirements of the Part 11 Code of Practice (p.28) that the determination of ordinary residence:

> The determination of ordinary residence should not delay the process of assessment or determination of eligible needs, nor should it stop the local authority from meeting the person's needs. In cases where ordinary residence is not certain, the local authority should meet the individual's needs first, and then resolve the question of residence subsequently. This is particularly the case where there may be a dispute between two or more local authorities.

The inter-authority duty to ensure that a person's needs are addressed extends to situations where there is little or no doubt over the person's ordinary residence. In *R (AM) v (1) Havering LBC and Tower Hamlets LBC*[7] Cobb J held that even though there was no ongoing duty on the authority (from which the person had moved) it was nonetheless 'an inexcusable failure of good social work practice to 'wash its hands' of the family …; continuity of social work involvement and practice best meets the obligations under statute and is indeed the most cost-efficient.

The question of ordinary residence is also of importance when authority boundaries change. In *R (J and others) v Southend BC and Essex CC*[8] a number of service users had in effect become stranded when Southend became a unitary authority and ceased to be part of Essex County Council. Although initially some Essex service users continued to attend a day centre in the new unitary council area, when Southend BC decided to restrict its use to its residents, the court found no duty on Southend to assess an Essex resident prior to this decision – that responsibility lay with Essex.

Defining ordinary residence

The SSWA 2014 does not define 'ordinary residence' and but it is clear that previous court judgments concerning the interpretation of this phase remain relevant.[9] The key is in the word 'residence'. It will generally be the place where a person normally resides: where their normal residential address is to be found. The Part 11 Code of Practice (p.28) states that the phrase involves questions of fact and degree, and

5 See eg the comments of Baroness Campbell of Surbiton, House of Lords Hansard 22 May 2008: Column GC641.
6 See for example precedent letter Council and/or health officials are arguing about who's responsible for helping us at http://w3.cerebra.org.uk/help-and-information/legal-help/precedent-letters/
7 [2015] EWHC 1004 (Admin) para 46.
8 [2005] EWHC 3457 (Admin), (2007) 10 CCLR 428.
9 Part 11 Code of Practice (p.28) which makes specific reference to the case of *R v Barnet LBC ex p Shah* [1983] 1 All ER 226; [1983] 2 AC 309.

factors such as time, intention[10] and continuity (each of which may be given different weight according to the context) have to be taken into account.[11] The Code then cites the 'leading case' of *R v Barnet LBC ex p Shah*[12] and Lord Scarman's judgment that:

> unless … 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.

In *ex p Shah* Lord Scarman's held that in determining a person's ordinary residence, their long-term future intentions or expectations were not relevant; the test was not what was a person's real home,[13] but whether a person could show a regular, habitual mode of life in a particular place, the continuity of which had persisted despite temporary absences.[14] 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.

The Part 11 Code of Practice (p.29) summarises this finding in the following terms:

> In particular, local authorities should apply the principle that ordinary residence is the place the person has voluntarily adopted for a settled purpose, whether for a short or long duration. Ordinary residence can be acquired as soon as the person moves to an area, if their move is voluntary and for settled purposes, irrespective of whether they own, or have an interest in, a property in another local authority area. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the nature and quality of the connection with the new place.

Voluntarily adopted

The question of whether a residence has been 'adopted voluntarily' raises a number of issues, particularly where the individual was unable to make that choice – through lack of sufficient mental capacity or otherwise. In *R (Mani) v Lambeth LBC*[15] the applicant had had no choice over his residence, having been 'dispersed' there by the National Asylum Seekers Support Service. The court held that since he had been living there for six months, it was sufficiently voluntary. In doing so, the court relied on Lord Slynn's analysis in *Mohamed v Hammersmith and Fulham,*[16] 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. 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.

10 In view of the comments of Lord Scarman in *R v Barnet LBC ex p Shah* [1983] 1 All ER 226, [1983] 2 AC 309, intention must be given a restrictive interpretation.
11 This advice is identical to that provided in relation to the Care Act 2014 Statutory Guidance and the former guidance issued in England under the NAA 1948 – see Department of Health *Ordinary Residence – Guidance on the identification of the ordinary residence of people in need of community care services, England* (2011) para 19.
12 House of Lords [1983] 2 A.C. 309 at 343: a case concerning the interpretation of 'ordinary residence' for the purposes of the Education Act 1962.
13 Ibid at para 349.
14 Ibid at para 344.
15 [2002] EWHC 735 (Admin), (2002) 5 CCLR 486.
16 [2001] UKHL 57, [2002] 1 AC 547, [2001] 3 WLR 1339, [2002] 1 All ER 176 para 18: a case concerning the meaning of 'normally resident' under Housing Act 1996 s199, which, however, the court held to have the same meaning as 'ordinarily resident'.

There will be cases where the individual lacks sufficient mental capacity to decide where to live. The case law on the ordinary residence implications in such situations has been conflicted although the 2015 Supreme Court judgment in *R (Cornwall Council) v. Secretary of State for Health*[17] has provided some clarification as to the general approach that should be taken.

The *Cornwall* judgment concerned a young man with physical and significant learning disabilities, who was born in Wiltshire and placed by Wiltshire in a foster placement in South Gloucestershire. His parents moved from Wiltshire to Cornwall and continued to be involved in decisions affecting his best interests. Although he had regular contact with them, he only stayed with them for brief periods. After he became 18 he was placed in care homes in Somerset. The Supreme Court held that the placement in South Gloucestershire by Wiltshire did not change his ordinary residence and Wiltshire remained the responsible authority when he became 18.

The Part 11 Code (p.33) in its summary of the *Cornwall* judgment highlights the court's reference to the 'underlying purpose' of the ordinary residence regime (and the 'deeming provisions' – discussed below) was 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).

The range of contexts that will exist in relation to adults lacking the mental capacity to decide where to live will be considerable and these will significantly impact on the eventual ordinary residence determination. Two cases illustrate this point.

R v Waltham Forest LBC ex p Vale[18] concerned a 28-year-old applicant with profound learning disabilities such that she was totally dependent on her parents, albeit that she had from an early age been boarded in community homes. Importing principles from child care law[19] the court determined that her ordinary residence was that of her parents, not because it was her real home, but because it was her 'base'. The Supreme Court in *Cornwall* considered this to be an unusual fact case and that the key question to ask in such cases was 'whether her period of actual residence with her parents was sufficiently "settled" to amount to ordinary residence' (para 47). *Vale* is probably best considered as a factual 'outlier' – the evidence suggested that the applicant had become 'severely disturbed due, it was thought, to her distance and detachment from her family'.

R v Redbridge LBC ex p East Sussex CC[20] which concerned two adult male twins with profound learning disabilities who were boarded at a school in East Sussex, but whose parents lived in Redbridge. Applying the principles enunciated in the *Vale* decision, the court held that the twins were at law ordinarily resident in Redbridge. Subsequently, however, the parents went to live in Nigeria. It was held that when this occurred, the twins ceased to have any settled residence and accordingly became the responsibility of East Sussex.

Although each case concerning adults without the requisite mental capacity will have to be judged on its specific factual context there are probably two key presumptions. The first is that unless the person has particularly severe learning difficulties, they should be regarded as capable of forming their own intention of where they wish to live'.[21] The second (the 'public policy' ground) is that if a local authority has accepted responsibility for care managing the person's needs, then it should not be able to 'export its responsibility' to another authority simply by making an out of county

17 [2015] UKSC 46.
18 (1985) *Times* 25 February, QBD.
19 See eg *In re P (GE) (an infant)* [1965] Ch 568.
20 (1993) *Times* 3 January; [1993] COD 265, QBD.
21 This advice was given in Department of Health Circular LAC (93)7 para 12 (now revoked) and see also *R v Kent CC and Salisbury and Pierre* (2000) 3 CCLR 38, QBD.

placement. In most situations such action will be caught by the 'deeming provisions' (discussed below).

The role of attorneys and deputies

Milton Keynes Council v. Scottish Ministers (2015)[22] concerned an elderly woman (Mrs R) who formerly lived in in Milton Keynes and for whom Milton Keynes Council was appointed her property and affairs deputy (she lacked capacity to decide where she should live). Her daughter identified a care home in Scotland near to where she lived and to which Mrs R moved: although the home was in the area East Lothian Council, it had no involvement in the placement. Subsequently the daughter was appointed deputy in place of Milton Keynes Council (ie with property and affairs powers) and the question arose as which authority was responsible. The Scottish ministers (upheld by the Court of Session) held that as she lacked capacity, ordinary residence could only change where there had been appointed a welfare guardian or attorney who gave legal authority. The daughter's lack of capacity to make decisions regarding her mother's personal welfare was fatal to any prospect of a finding that, notwithstanding the duration of Mrs R's presence in Scotland, there had been a change of her ordinary residence from Milton Keynes to East Lothian. Arguably this finding might have been otherwise (in an England / Wales context) had the move occurred after the daughter had obtained her attorney powers and had effected the move as a s5 MCA 2005 'act' and/or the mother had shown that she wanted to remain and felt content in Scottish placement.[23]

Ordinary residence and the Children Act 1989

Ordinary residence disputes are not confined to issues of social care: similar inter-authority wrangles concern such matters as the liability to maintain Special Educational Needs Statements; the production of transition plans;[24] the duty to assess under the Children Act 1989;[25] and the funding of costs associated with Special Guardianship Orders[26] – and in relation to which, an exasperated Hedley J was moved to hope that 'many citizens of this state will feel a touch of shame that things could work out as they appear to have done in this case'.[27]

As a matter of principle, children are presumed to have the ordinary residence of their parents.[28] The SSWA 2014, however, adopts a different test for determining responsibility for children in need. The section 21 duty to assess the needs of a child for care and support are owed by social services authorities to children 'within the authority's area'. However, financial responsibility for certain accommodation services provided under the Act[29] rests with the local authority in whose area the child is 'ordinarily resident'. Thus a child may be ordinarily resident in local authority A but 'within the area' of local authority B. Accordingly provision is made in SSWA 2104 s76 (2) for local authority A to take over the responsibilities of local authority B.

---

22 Opinion of Lord Armstrong in *Milton Keynes Council v. Scottish Ministers* Outer House, Court of Session [2015] CSOH 156 P672/15

23 In this regard see para 19.32 Care and Support Statutory Guidance to the Care Act.

24 In this respect, see for instance *R (L) v Waltham Forest LBC and Staffordshire County Council* [2007] EWHC 2060 (Admin).

25 See for example *R (J & W) v Worcestershire CC* [2014] EWCA Civ 1518.

26 See for example Suffolk County Council v. Nottinghamshire County Council (2012) [2012] EWCA Civ 1640

27 Between Orkney Island Council and Cambridgeshire *O v L, I and Orkney Island Council* [2009] EWHC 3173 (Fam).

28 See eg *In re P (GE) (an infant)* [1965] Ch 568.

29 See SSWA 2014 ss76(2), 193(4) and (5).

Within the area

A series of English cases have considered the question of which authority is responsible for carrying out an assessment of children in need – and thus the true construction of the phrase 'within their area'. In England the Children Act 1989 has equivalent duties to children as found in the SSWA 2014. In *R (Stewart) v Wandsworth LBC, Hammersmith and Fulham LBC and Lambeth LBC*[30] the applicant applied to Hammersmith LBC for housing (under the homelessness provisions). Hammersmith accommodated her in a hostel in Lambeth and then determined that she was intentionally homeless and obtained a possession order against her. The applicant then requested that Hammersmith assess her children's needs under the Children Act 1989. Hammersmith refused on the basis that this was Lambeth's responsibility. Lambeth refused as did Wandsworth LBC (the children's school being within their area). The court decided that 'within their area' was simply a question of physical presence (even though that might mean that more than one authority could be under the duty to assess). Accordingly it held that Lambeth and Wandsworth were responsible but Hammersmith was not.

The decision was followed in a similar fact case, *R (M) v Barking and Dagenham LBC and Westminster LBC*[31] where the court agreed that the relevant test was physical presence. It noted that no formal guidance existed to deal with such jurisdictional problems and encouraged inter-authority co-operation in such cases:

> . . . to avoid any impression that local authorities are able to pass responsibility for a child on to another authority . . . To put it shortly, the needs should be met first and the redistribution of resources should, if necessary take place afterwards. It is also important, quite plainly, that the parents of children should not be able to cause inconvenience or extra expense by simply moving on to another local authority . . .

Ordinary residence: the Children Leaving Care responsibilities

The financial obligations imposed by the Children Leaving Care provisions (now found in the SSWA 2014 ss 105-115) are the responsibility of the local authority which looked after the young person immediately before he or she left care.[32] This responsibility generally extends until the age of 21 (or beyond in the case of certain education and training costs).

The Children Leaving Care duties are complex and different levels of duty are owed to the different categories of young person defined in section 104. The cessation of these duties is also complex - ie the circumstances / young person's age that result in the duty coming to an end. As noted above in general this will be when the young person is 21 unless in education / training and if so, the upper age is generally 25. However in every case the specific (section 104) category of the young person will need to be checked. The Children Leaving Care duties do not generally extend to the provision of accommodation which will mean that if after a young person becomes 18 they require residential accommodation, this may fall on the local authority in which they are 'ordinarily resident'. The Part 11 Code at p.33-34 advises as follows:

> When a young person with social care needs reaches the age of 18, the duty on local authorities to provide accommodation and services under children's legislation usually ends. If a child or young person has been placed in residential accommodation in the area

30 [2001] EWHC 709 (Admin), (2001) 4 CCLR 446 and see also *R (Liverpool City Council) v Hillingdon LBC* [2008] EWHC 1702 (Admin).
31 [2002] EWHC 2663 (Admin), (2003) 6 CCLR 87.
32 See also revised Statutory Guidance Annex H para 40.

of a different local authority, and they subsequently turn 18, they are likely to remain the responsibility of the placing authority.

In *R (Cornwall) v Secretary of State for Health*[33] the Supreme Court held that a young person, who had been placed in foster care in South Gloucestershire which had been arranged by Wiltshire Council under the Children Act 1989, continued to be ordinarily resident in Wiltshire when he reached 18. The Court set out that the underlying purpose of both children's and adult legislation is 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" and it would be highly undesirable for there to be a hiatus in the legislation whereby a young person placed in a different area would become ordinarily resident in that area on their 18th birthday.

In some cases the young person may have 'looked after status'. This broadly means that the child or young person is in a local authority's care by virtue of a care order or is provided with accommodation by a local authority under Part 6 of the Act. A young person's 'looked after status' ends when they reach 18, but the local authority which was formerly responsible for them retains ongoing duties, for example to provide advice and assistance. These duties continue after the person has reached 18, and would normally be the responsibility of the placing authority. However, the residential accommodation may be provided under adult legislation.

The 'deeming' provisions under SSWA 2014 s194

Section 194 of the 2014 Act contains two so-called 'deeming' provisions: situations where a person, although resident in one area, may be 'deemed' to be resident elsewhere for the purposes of the 2014 Act. One such provision relates to persons in local authority arranged placements and the other to persons being discharged from NHS accommodation. The 2014 Act also contains provisions relating to the ordinary residence of people in prison or other approved premises – and this is considered separately below.

The first 'deeming' provision: local authority arranged accommodation

The NAA 1948[34] contained a deeming provision in relation to residential accommodation placements made by a local authority: namely that persons provided with such accommodation by a social services authority are, in effect, deemed to be ordinarily resident in the placing authority's area even if the accommodation is situated in the area of another authority. The 2014 Act continues this principle and in so doing, adopts a form of wording that is best described as contorted. It is relevant to note, however, that this wording is identical (except its reference to 'England' not 'Wales') to that in the Care Act 2014 (s39(1) and (2)).

Section 194(1) and (2) provides:

(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 Wales of a type so specified, the adult is to be treated for the purposes of this Act 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.

[33] *R. (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46.
34 NAA 1948 s24(5).

(2) Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not of the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.

Although section 194 makes provision for regulations, these have only been issued in relation to the type of accommodation that is covered by this deeming rule[35] – ie care homes[36] (considered below). This means that explanations as to the meaning of key (and potentially contentious) phrases such as 'which can be met only' do not have a statutory interpretation.

The intention behind subsections (1) and (2) appears to be clear, namely that where a local authority (LA A) assesses an individual and as a result decides to 'fund'[37] that person in accommodation of a specified kind in LA B, then nevertheless LA A is deemed to be the person's ordinary residence. In England this point has been confirmed by an amendment[38] that specifies that the rule only applies 'if the care and support needs of the adult are being met [under the Act] while the adult lives in that type of accommodation'. Presumably, since the ordinary residence regime in the 2014 Act is essentially the same as that in England, this must also be the case in Wales. This view is reinforced by the fact that the Code of Practice (11) adopts almost identical wording to that in the English Guidance[39] - the Code stating (page 30):

> The adult is therefore treated as remaining ordinarily resident in the area where they were resident before the placement began. The consequence of this is that the local authority which arranges the accommodation will remain responsible for meeting the person's needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. The 'placing' authority's responsibility will continue in this way for as long as the adult's needs are met by the specified type of accommodation.

The Code indicates that this presumption only applies where the local authority makes the necessary arrangements (ie with the care home provider), stating (page 31):

> However, if the person chose accommodation that is outside what was specified in the care and support plan or of a type of accommodation not specified in the regulations (for example, if the person moves into a shared lives arrangement or into supported living accommodation), then the 'deeming' principle would not apply

The 'can be met only if' criteria

There is an additional condition that must be satisfied before the first deeming rule is triggered and this concerns the requirement that the person's support needs 'can be met only if' living in accommodation of the specified type. This is potentially problematical, given that a person's care needs may be capable of being met in many

[35] The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015 1499 SI (W.171). Separate regulations The Care and Support (Disputes about Ordinary Residence, etc.) (Wales) Regulations 2015 SI 1495 (W.166) have been issued relating to ordinary residence disputes (considered below).

[36] The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015 reg 2.

[37] As noted below in cases where the person is in effect a self-funder – the key question is likely to be whether the local authority enters into the contract with the provider.

[38] To the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014, regulation 2(2), via the Care and Support (Miscellaneous Amendments) Regulations 2015/644 reg 4.

[39] Para 19.50 Department of Health Care and Support Statutory Guidance issued under the Care Act 2014.

settings – for example in their own home with a substantial care package or in a residential care home.

The regulations do not appear to explain what is meant by the 'can only be met' requirement. The Codes also appear to be silent on this question,[40] although some indication can be taken from Code 11 p.31 (tangentially and albeit in the context of direct payments) which states that the deeming rule only applies 'if the care and support plan stipulates that the person's needs can be met only if the adult is living in care home accommodation'. This suggests that it is for the local authority to determine if the 'can only be met' criteria are met – however it is questionable how many care and support plans actually use this form of words – ie 'that person's needs can be met only if the adult is living in care home accommodation'.

The criteria also appear in the Care Act 2014 and the English Statutory Guidance[41] is considerably more informative as to how it should be interpreted, stating:

> Need should be judged to be 'able to be met' or of a kind that 'can be met only' through a specified type of accommodation where the local authority has made this decision following an assessment and a care and support planning process involving the person. … Where the outcome of the care planning process is a decision to meet needs in one of the specified types of accommodation and it is the local authority's view it should be assumed that needs can only be met in that type of accommodation for the purposes of 'deeming' ordinary residence. This should be clearly recorded in the care and support plan. The local authority is not required to demonstrate that needs cannot be met by any other type of support. The local authority must have assessed those needs in order to make such a decision - the 'deeming' principle therefore does not apply to cases where a person arranges their own accommodation and the local authority does not meet their needs.

Welcome as this clarification is, it is lacks the status it would have if expressed in a regulation. It is also far from conclusive: the use of the phrase 'it should be assumed' appears to create a rebuttable presumption rather than a final determination. If this provision becomes contested, it is to be hoped that more extended guidance will be issued by the Welsh Government in due course.

Status of past OR decisions, guidance and determinations

The first deeming provision is, as noted, in principle the same as that which applied under the 1948 Act and it appears that the clear policy intention is that the previous case law should continue to be of relevance under the new scheme.[42] The 'determinations' made by the English and Welsh Governments (ie arising out of local authority disputes) will also continue to be of relevance[43] as must be guidance issued under the 1948 Act. This guidance was much more detailed and up-to-date in

---

[40] As noted below the 'choice of accommodation' right is triggered by a local authority deciding that it 'is going to meet needs … by providing or arranging for the provision of care home accommodation …' which would appear to be a different test – see Care and Support (Choice of Accommodation) (Wales) Regulations 2015 reg 2 amended by the Care and Support (Choice of Accommodation, Charging and Financial Assessment) (Miscellaneous Amendments) (Wales) Regulations 2017.

[41] Para 19.51 Department of Health Care and Support Statutory Guidance issued under the Care Act 2014.

[42] The Law Commission did undertake a review of the meaning of 'ordinary residence' – see Law Commission Adult Social Care Law Com No 326, Stationery Office HC 941 para 10.4. In England the publication by Cornerstone Barristers *Ordinary Residence & The Care Act 2014* (February 2015) endorsed by the Department of Health, the Association of Directors of Adult Social Services and the Local Government Association states at para 25 that 'local authorities should apply the case law developed as to the meaning of ordinary residence under the National Assistance Act 1948'.

[43] Available on the at Gov.UK website under 'Department of Health Ordinary Residence'.

England[44] and is referred to in the subsequent text as the '2013 guidance'[45] and secretary of state 'determinations' are cited by their departmental reference numbers – eg 'OR 5 2006'.

Did the local authority make the residential care arrangements?

The first deeming rule would not appear to arise where a person makes their own arrangements to move into accommodation of the specified kind and this will be the general case even if the local authority assists with the move, provided it does not make the contract with the home:[46] Assistance with finding a placement but falling short of making a contract does not constitute making the arrangements: taking someone to the home does not, in itself, constitute making the placement.[47] However where the local authority is a contracting party, the rule applies even if the person is in effect a 'self-funder' but has relied upon the local authority to make the placement and contract with the care home.[48]

In an unpublished determination, the secretary of state[49] found that a young man who lacked capacity and who had residential accommodation arranged for him remained the responsibility of that council after he moved to another authority in spite of an inheritance which meant he could afford to pay for his own care. Although he had a receiver to look after his finances, the council had not contacted her with a view to her making the contract with the home and there was no evidence that it expected her to do so. The invoices were sent to the council. The secretary of state found that the authority, by contacting the home in the new area, arranging a visit by the manager to see the young man and his subsequent immediate transfer, and the issuing of invoices to the council by the home, amounted to 'the characteristics of an arrangement for the provision of residential accommodation' under the 1948 Act.

Where a person is placed by a local authority in another area within the 12-week property disregard, or has agreed to a deferred payment arrangement, then that person is the responsibility of the placing authority. Where, however, the local authority contract comes to an end after the 12-week period and the resident specifically declines a deferred payment arrangement then they cease to be the placing authority's responsibility.[50] It follows that if the resident subsequently needs support (for example, because their capital falls below the maximum threshold) they would then need to approach the authority in whose area the care home is situated. However, those who have the benefit of a deferred payment arrangement are deemed to remain ordinarily resident in the area of the placing authority.[51]

---

[44] See L Clements and P Thompson *Community Care and the Law* (LAG 2011) para 6.10.

[45] Department of Health Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England (2013)

46 2013 guidance, paras 72, 81 and 82; see also determinations OR 3 1996, OR 5 2006, OR 4 2007 and OR 8 2007, OR 5 2010; and see also *Chief Adjudication Officer v Quinn and Gibbon* [1996] 1 WLR 1184, [1996] 4 All ER 72, (1997–98) 1 CCLR 529, HL Where Lord Slynn held: considered it essential that the accommodation must include a provision for payments to be made by a local authority (albeit that the specific provision being considered in the 1948 Act (s26(2)) is not found in the 2014 Act).

47 Determination OR 3 1996.

48 For instance because they wish to make use of the deferred payment arrangements or because they lack capacity to make a contract with the home and there is no one else willing and able to do so on their behalf.

49 Determination dated 20 July 1999 (not published).

50 Unless of course the person does not have the capacity to enter into their own contract and there is no one willing and able to do so on the resident's behalf.

51 2013 guidance paras 84–91.

Did the local authority fail to do something that was material?

In *R (London Borough of Greenwich) v the Secretary of State*[52] Charles J considered that question of whether a local authority could avoid liability for care home fees, by failing to properly advise a resident – for example, by failing to offer a deferred payment arrangement. In his opinion if 'arrangements should have been made but had not been made', then 'the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority'.

The 2013 guidance picks up this point, by advising that where a local authority fails to make arrangements which it should have done, so the person was forced to make their own arrangements in another authority's area, then the person's ordinary residence would fall to be assessed at the date the person should have been provided with accommodation.[53]

Specified accommodation and ordinary residence

Under the 1948 Act, the first deeming provision only applied while individuals lived in registered residential care / nursing homes. This gave rise to a number of disputes when they moved into a non-residential care setting or, for example, the care home 'de-registered' (see below). Although the English Act has addressed these problems (by extending the first deeming rule to include 'supported living and 'shared lives' accommodation) this has not been followed in Wales and so these challenges will remain.

SSWA 2014 s194 (1) provides for regulations which identify the types of accommodation that constitute 'specified accommodation' for the purposes of the first deeming rule. The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015, reg 2 specifies that this is 'care home accommodation' which (by reg 1) 'means accommodation in a care home within the meaning given by section 3 of the Care Standards Act 2000'.

De-registration of a care home

The limitation of the first deeming rule, in Wales, to care home accommodation will perpetuate the ordinary residence problem that arises when a care home de-registers. On this questions the Part 11 Code advises as follows (p.31):

> In these circumstances the placing authority (i.e. the local authority where the person is deemed to be ordinarily resident) should reassess the individual's care and support needs to determine whether their needs could be met by the new service, or whether their needs can only be met through accommodation in a care home. If it is determined that the individual's needs could best be met by staying with the new service, and the individuals chooses to remain in that setting, then the status of the individual will change from that of a care home resident to a tenant in supported living accommodation. The individual's place of ordinary residence will therefore have changed, and responsibility for meeting their care and support needs will transfer to the local authority where they are living. Where, following re-assessment, it is decided that the person's needs can still only be met by being accommodated in a care home, the placing local authority will need to arrange a different care home placement for that person. In these circumstances, the deeming provisions will continue to apply and responsibility for meeting that person's care support needs will remain with the placing authority.

52 [2006] EWHC 2576, para 55, (2007) 10 CCLR 60.
53 2013 guidance para 74, and in relation to the failure to offer a deferred payment para 92.

Direct payments

Technically the SSWA 2014 permits direct payments to be used for funding long term placements in residential care. The ordinary residence implications of such a payment are potentially complex. This issue is not covered in detail in these notes as it appears to be rare for direct payments to be used this purpose. The Part 11 Code gives brief advice on the use of direct payments to pay for residential care at p.31. This advice states (as noted above) that from Code 11 p.31 the deeming rule only applies 'if the care and support plan stipulates that the person's needs can be met only if the adult is living in care home accommodation'.

The following example may illustrate difficulties that could occur with a direct payment in such cases.

1. A disabled adult has an assessed need for 24 x 7 care and support; and
2. The local authority has a policy of limiting care and support payments in such cases to the cost of residential care; and
3. The family has wealth (so the individual pays the maximum £70pw charge) and is prepared to take this sum as a direct payment and top up the additional costs for the adult's care and support needs from their own resources;
4. Eventually it is decided by the adult and the family that she should move into a residential care home and they decide upon one in a neighbouring authority;
5. It would seem that from the Code 11 p.31 quote above that the deeming rule would only apply 'if the care and support plan stipulates that the person's needs can be met only if the adult is living in care home accommodation'. So if this was not in the plan (which in this case would appear to be almost certain) then on moving to the neighbouring authority, that authority would become responsible for the care and support.

The second 'deeming' provision: people formerly in NHS care

People who are being provided with 'accommodation under a health enactment' are deemed to be ordinarily resident in the area in which they were ordinarily resident immediately before the accommodation was provided – SSWA 2014 s194(4)(a).[54] If they had no settled residence immediately before the accommodation was provided then they will be deemed to be ordinarily resident in the area in which the adult was present at that time (s194(4)(b)).

The Part 11 Code (p.32) explains that the presumption that a person's ordinary residence is the local authority area where they were living before they went into hospital 'applies regardless of the length of stay in the hospital'. The second deeming provision is not however restricted to hospital care. SSWA 2014 s194(5) defines 'NHS accommodation' as accommodation provided under the NHS (Wales) Act 2006 (and the English, Scottish, and Northern Irish equivalents[55]). This means that if a person is provided with NHS Continuing Healthcare funding then if this comes to an end the responsible local authority will be the one in which the person was ordinarily resident

[54] Replicating in large measure NAA 1948 s24(3) and (6): however prior to the 19 April 2010 the 'deeming provision' only applied if the person was in an NHS facility. Section 24 of the 1948 Act was amended by Health and Social Care Act 2008 s148 to cover NHS continuing healthcare funded by the NHS in care homes and the 2013 Ordinary Residence guidance at para 115b clarified the transitional provisions for those in accommodation provided by the NHS prior to this amendment.

[55] ie the National Health Service (Scotland) Act 1978, the National Health Service Act 2006 and Article 5(1) of the Health and Personal Social Services (Northern Ireland) Order 1972 – and see also para 19.62 of the revised Statutory Guidance.

when they were accommodated by the NHS (ie when they entered the ambulance / the hospital ward or were declared eligible for NHS Continuing Healthcare funding).

The 2013 ordinary residence guidance[56] gave more detailed advice on the various scenarios that may arise in this context and advised that:

> where a [health body] places a person in [accommodation funded by the NHS] it is good practice for it to inform the person's local authority of ordinary residence and, if the person is placed "out of area", it is also good practice for the [health body] to inform the local authority in which the care home is located (para 114).

No settled residence

The SSWA 2014 (as with the scheme under the 1948 Act) encompasses people who are without an ordinary residence – referred to as having 'no settled residence'. Section 194(1)(b) states that if the adult has of no settled residence then the general principle is that they are the responsibility of the local authority in whose area they are present. In this context, the Part 11 Code (p.29) advises:

> Where doubts arise in respect of a person's ordinary residence, it is usually possible for local authorities to decide that the person has resided in one place long enough, or has sufficiently firm intentions in relation to that place, to have acquired an ordinary residence there. Therefore, it should only be in rare circumstances that local authorities conclude that someone is of no settled residence. For example, if a person has clearly and intentionally left their previous residence and moved to stay elsewhere on a temporary basis during which time their circumstances change, a local authority may conclude the person to be of no settled residence.

The lack of a 'settlement' under the Poor Law was a particular problem for individuals and parishes and the 1948 Act retained provisions that perpetuated this distinction: local authorities only had a power (not a duty) to accommodate people in that situation.[57] The SSWA 2014 does away with this distinction – local authorities are under a duty to meet the eligible needs of adults in need and carers[58] even if they have no settled residence (provided they are present in the local authority's area).

The Part 11 Code (p.30) gives as an example of someone who may be found to have no settled residence someone arriving 'after a period of residing abroad and who have given up their previous home in this country'.

Urgent need

The power of local authorities to provide support in urgent situations for individuals who are ordinarily resident in another authority is continued by the SSWA 2014 (section 36). The situation of a person of no settled residence and in urgent need of residential accommodation was considered (in the context of the NAA 1948) in *R (S) v Lewisham LBC*[59] which held that when a person physically presents him/herself to a local authority as being in urgent need of residential accommodation, whichever authority is approached is obliged to provide the accommodation (provided it is assessed as needed).

---

[56] Department of Health Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England (2013) paras 112-115c (including examples). The guidance has been cancelled.

[57] This was one of the reasons why courts considered it of importance to finding an ordinary residence for individuals, where possible – see *R (Greenwich LBC) v Secretary of State for Health* [2006] EWHC 2576, para 87, (2007) 10 CCLR 60.

[58] Section 35(2)(b) and section 40(2)(b).

59 (2008) EWHC 1290 (Admin) and see 2011 guidance para 50.

The English Statutory Guidance (Annex H) goes into greater detail concerning the duty to provide support in cases of urgency (than the Welsh Codes). The obligation on the local authority 'of the moment' is expressed as a strong one: it 'should exercise their power to meet the urgent needs' and in so doing it 'should notify the other authority of its intention to do so, to ensure that information is shared on the individual case'.[60] As with Wales, the legislation does not require the consent of the other authority – merely that it be notified.[61] In such cases, the Part 4 Code states:

> 43. Where a local authority (A) meets the urgent needs of person who is ordinarily resident in the area of another local authority in Wales (B) and the other local authority has consented to this, then authority A can recover the costs from authority B. This is a requirement under Section 193, Part 11 of the Act.

Prisoners

Section 185(1) – (3) of the 2014 Act makes it clear that the local authority responsible for providing care and support for adult prisoners[62] under the SSWA 2014 is the one in which the prison is situated. As noted below the position may be different for some prisoners eligible for support under the MHA 1983, s117.

There are no statutory 'deeming' rules for prisoners[63] but the English Statutory Guidance advises that 'local authorities should start from a presumption that they remain ordinarily resident in the area in which they were ordinarily resident before the start of their sentence' (para 17.48). Since many prisoners may not wish to (or be able to) return to the area where they lived before their period in custody, the guidance indicates that this is a presumption that is easily rebutted (para 17.50).

The Part 11 Code (p.11) advises however that on an impending release:

> the local authority responsible for the care and support of the individual while they were detained (the sending authority) will be responsible for contacting the local authority to which the individual will relocate (the receiving authority) as soon as possible. Both authorities will need to work together, and share appropriate information, to ensure continuity of care and support is maintained, until the receiving authority undertakes a re-assessment of the individual's needs for care and support,

Cross border placements by local authorities

Cross border placements have the potential to create considerable confusion. The general complexity stems from the mismatch between policy and legislation and the fact that the different residential and nursing care funding systems are devolved responsibilities.

Schedule 1 of the Care 2014 Act, regulations and chapter 21 of the English Statutory Guidance explain how it is to be determined where an individual's ordinary residence is – when they move from one of the UK's four 'territories' to another.

The English Statutory Guidance stresses the importance of authorities being 'person centered' in the way they approach such moves (para 21.7) and suggests that there will, overall be little 'financial disadvantage by making cross-border placements' and

[60] Paras 3 and 4 Annex H revised Statutory Guidance.
[61] SSWA 2014 s36(2).
[62] The responsibility for the care and support needs of a Welsh child falls on their Welsh home local authority, that is, the local authority in whose area the child was ordinarily resident prior to being in custody – Code Part 11 p.7..
[63] This was also the position under the NAA 1948 and the 2013 guidance (paras 107 – 111) provided very similar advice to that now located in the English Statutory Guidance.

that ‘all authorities are expected to co-operate fully and communicate properly’ (para 21.8). In the succeeding paragraphs it then sets out a four stage process, namely:—

(1) care and support planning;
(2) initial liaison between “first” and “second” authority;
(3) arrangements for on-going management of placement;
(4) confirmation of placement.

The general principles of cross-border placements

In so far as any general principle governs such placements it appears placing authorities should be subject to the same responsibilities as are authorities in that nation making a similar placement. In other words, an English authority placing someone in Wales is subject to the same responsibilities as a Welsh authority placing someone in Wales and a Welsh authority placing someone in England is subject to the same responsibilities as an English authority placing someone in England. This approach appears to create problems for Welsh authorities. As noted below, where an English authority places someone in supported living or shared lives accommodation in Wales, responsibility that person appears to transfer to the Welsh authority, but not vice versa. Although the Care Act 2014 Schedule 1 para 10 makes provision for regulations which can modify this general principle, it does not appear that any such regulations have been issued.

‘Accommodation’ placements from England to Wales, Scotland or Northern Ireland

Schedule 1 para 1 provides that the first deeming rule applies where an English authority is meeting an adult's needs for care and support by arranging for the provision of **accommodation in Wales**,[64] Scotland[65] and Northern Ireland.[66] In such cases the individual is deemed to remain ordinarily resident in the English local authority area.

Schedule 1 para 12 defines **accommodation in Wales** as accommodation in Wales of a type specified in regulations to s194 of the SWBA 2014. As noted above the relevant regulations[67] specify this to be ‘care home accommodation’.

This would appear to mean that an English authority placing someone in a care home in Wales will retain responsibility for that person (ie they will remain ordinarily resident in the English authority) but that responsibility would transfer to the Welsh authority of the placement was to a supported living or shared lives placement.

Placements from Wales, Scotland or Northern Ireland to England

Schedule 1 para 2 contains a reciprocal provision, accordingly when, as a result of an assessment, a person is placed in **accommodation in England**[68] by a Welsh,[69]

---

[64] CA 2014 Schedule 1 para 12 defines this as accommodation of a type specified in regulations under section 194 of the Social Services and Wellbeing (Wales) Act 2014.
[65] CA 2014 Schedule 1 para 12 defines as residential or other accommodation of a type which may be provided under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972.
[66] CA 2014 Schedule 1 para 12 defines this as residential or other accommodation of a type which may be provided under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972.
[67] The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015, reg 2.
[68] CA 2014 Schedule 1 para 12 defines this as accommodation of a type specified in regulations under section 39.
[69] CA 2014 Schedule 1 para 2 in discharge of its duty under the Social Services and Well-being (Wales) Act 2014 s35

Scottish[70] or Northern Irish[71] authority the individual is deemed to remain ordinarily resident in the Welsh, Scottish or Northern Irish authority's area.

Schedule 1 para 12 defines **accommodation in England** as accommodation in England of a type specified in regulations to s39 Care Act 2014. The relevant regulations[72] specify this to be 'care home accommodation', shared lives scheme accommodation and supported living accommodation.

This would appear to mean that a Welsh authority placing someone in a care home in England will retain responsibility for persons placed in shared lives and supported living accommodation in addition to care home accommodation: ie a wider range of individuals than if the placement was in the other direction.

Cross-border placements – general care planning principles

Paragraphs 21.6 – 21.41 of the English Statutory Guidance describe the choreography of cross border placements where the placing authority (the 'first' authority) retains responsibility. This includes discussion with the individual and family/friends; identification of a suitable placement; contact with the authority in whose area the accommodation is situated (the 'second' authority); liaison and ongoing care management of the placement. At para 21.37 the guidance stresses the need for:

> Any such arrangement should be detailed in writing – being clear as to what role the second authority is to play and for how long. Clarity should also be provided on the regularity of any reporting to the first authority and any payment involved for services provided by the second authority

Significant complexities arise in relation to the reimbursement obligations consequent upon the introduction of free personal care in Scotland and the advent of the NHS paying for registered nursing care in England and Wales.[73] Although the 2014 Act and the Codes do not appear to address this issue directly the previous guidance remains relevant. This provided, in summary, that Scottish authorities can arrange, but are not allowed to charge for personal and nursing care, and that English and Welsh authorities can charge for personal care but are not allowed to arrange or pay for registered nurse care. In practice, however, it appears that authorities endeavour to agree an arrangement whereby residents are in the same position in respect of charges as they would have been had they remained within their home authority.[74]

At para 21.78 of the English Statutory Guidance a 'case study' example is given of an elderly person moving from England to Scotland. Everything goes smoothly in this hypothetical example – possibly because it avoids reference to the financial implications of such a move.

Choice of accommodation

In Wales the 'choice of accommodation' right is triggered by a local authority deciding

---

[70] CA 2014 Schedule 1 para 2 in discharge of its duty under section 12 or 13A of the Social Work (Scotland) Act 1968 or section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003.
[71] CA 2014 Schedule 1 para 2 in discharge of its duty under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972.
[72] The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014, reg 2.
73 As opposed to Scotland where it is still the local authority that pays for nursing care - see generally the Community Care and Health (Scotland) Act 2002 and the Community Care (Personal Care and Nursing Care) (Scotland) Regulations 2002 SI 303 (as amended)..
74 See however OR 10 2010 which involved a dispute between an English and Scottish authority.

that it 'is going to meet needs … by providing or arranging for the provision of care home accommodation'. This is of course a slightly different test to that for ordinary residence – which is predicated on a local authority determining that a person 'has needs for care and support which can be met only if the adult is living in' care home accommodation.

The right derives from s57 SSWA 2014 and regulations.[75] These state that:

- where a local authority is going to meet a person's needs either in the exercise of its duty or its power under the 2014 Act;
- by providing or arranging for the provision of care home accommodation in the UK which is longer than 8 weeks;
- then if the person for whom the accommodation is to be provided expresses a preference for a particular care home; and
- various conditions are met (ie as to availability, suitability, cost etc see below);
- the local authority is under a duty to arrange for the provision of that accommodation

The choice of accommodation right differs from that in England, in that in England:

- the right is limited to accommodation in England (ie it does not extend to Wales, Scotland or Northern Ireland); and
- the right to chose is not limited to a care home, but includes supported living and shared lives accommodation.

The regulations permit the 'topping up' of payments for accommodation more expensive than that funded by the local authority, provided the authority meets its duty to fund a placement that meets the eligible needs of the person in question.[76]

Deferred payments

In Wales where a local authority has decided that (among other things):

- it is going to meet an adult's care and support needs by the provision of accommodation in a care home;
- the adult is liable to pay for this care and support;
- the adult has an interest in a property, the value of will not been disregarded;
- the adult's capital, less the value of that interest, does not exceed the capital limit.

Then, provided the adult agrees to (among other things) a charge being put on their property, the local authority must offer the adult a deferred payment – enabling the home to be preserved until such time as the agreement comes to an end. During the currency of the agreement the adult will be deemed to be ordinarily resident in the area of the funding local authority.

The right to be offered a deferred payment arrangement derives from s68 SSWA

[75] The Care and Support (Choice of Accommodation) (Wales) Regulations 2015 reg 2 amended by the Care and Support (Choice of Accommodation, Charging and Financial Assessment) (Miscellaneous Amendments) (Wales) Regulations 2017.
[76] Guidance on choice of accommodation and additional cost payments is provided in Part 4 and 5 Code of Practice (Charging and Financial Assessment) para 10.1 and Annex C.

2014 and regulations[77] – and is the subject of detailed guidance.[78]

Ordinary residence and Mental Health Act 1983 s117

The duty to provide services under Mental Health Act (MHA) 1983 s117 is a joint health and social services responsibility. MHA 1983 s117(3) stipulates that the responsible bodies in Wales are the CCG/ LHB and the social services authority in which the person was ordinarily resident 'immediately before being detained'. Perplexingly however s117(3)(c) then adds that 'in any other case' it is the CCG/ LHB / local authority (in England or Wales) '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'.

It might appear, therefore, that MHA 1983 s117(3) gives a choice of responsible authorities – either the health/social services authorities in whose area the person was resident at the time of admission to hospital[79] or those to which he or she is sent on discharge. The basic principle is, however, that primary responsibility rests with the CCG/local authority in which the person was resident at the time of admission. This was clarified by Scott Baker J in *R v Mental Health Review Tribunal ex p Hall,*[80] who observed that:

> Section 117 does not provide for multi social services department or health authority responsibility. The words 'or to whom he is sent on discharge from Tribunal' are included simply to cater for the situation where a patient does not have a current place of residence. The sub-section does not mean that a placing authority where the patient resides suddenly ceases to be 'the local social services authority' if on discharge the Applicant is sent to a different authority'.[81]

The identification of a person's ordinary residence under s117 of the 1983 Act is a distinct process to that under the SSWA 2014. This stems from the fact that the first deeming rule under the 2014 Act is not replicated under the scheme of the 1983 Act (see revised Statutory Guidance para 19.47). This incongruity (which existed with the 1948 Act) was highlighted in *R (Hertfordshire CC) v (Hammersmith and Fulham LBC and JM*[82] - where the Court of Appeal held that although it was not clear why Parliament had decided to take a different approach to ordinary residence under section 117, that is what it had done. The Court agreed with the first instance decision[83] of Mitting J, that: (1) there was little or no difference in meaning between 'resident' and 'ordinarily resident' – they both connoted settled presence in a particular place other than under compulsion; and (2) that the first deeming rule had no application for section 117 purposes. On this basis, therefore he held that responsibility for section 117 purposes lay with the local authority in which the person was 'resident'[84] in a care home at the time he was admitted to hospital under section 3 of the Mental Health Act 1983 (albeit

---

77 The Care and Support (Deferred Payment) (Wales) Regulations 2015.
78 Guidance on choice of accommodation and additional cost payments is provided in Part 4 and 5 Code of Practice (Charging and Financial Assessment) para 9.2 and Annex D.
79 A person does not cease to be resident in the area of an authority by reason only of his or her admission to hospital – *Fox v Stirk* [1970] 2 QB 463.
80 [1999] 3 All ER 132, (1999) 2 CCLR 361, QBD. Although the case went to the Court of Appeal – [2000] 1 WLR 1323, (1999) 2 CCLR 383 – the question of the responsible department was not argued in that court.
81 This is paraphrased at para 187 of the 2011 guidance.
82 [2011] EWCA Civ 77, (2011) 14 CCLR 224, and see also *R (Sunderland City Council) v South Tyneside Council* [2011] EWHC 2355 (Admin). See para 11.92 for the Law Commission's recommendations.
83 *R (M) v Hammersmith and Fulham LBC and others* (2010) 13 CCLR 217.
84 ie *not* 'deemed' to be resident.

he had been funded by Hammersmith and Fulham because of the deeming provisions under the NAA 1948.)

R (Sunderland City Council) v. South Tyneside Council (2012)[85] concerned an applicant, who while living in a registered residential college in Sunderland attempted suicide. She was taken to Sunderland Royal Hospital, then to the Queen Elizabeth Hospital in Gateshead, and then with her consent to a specialist short-term hospital for patients with a learning disability, in the South Tyneside area (although 'compulsion was never far from the horizon'). Here college placement was then terminated. In December 2009 she was detained under section 3. The Court of Appeal held that – for the purposes of s117 – the *Shah* judgment was not helpful as an authority, preferring instead *Mohamed v Hammersmith and Fulham LBC*[86]. In *Mohamed* Lord Slynn's held that this connoted 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'. On this basis, once the college placement was terminated the applicant had nowhere that could be considered as her residence other than South Tyneside and so it was this authority that was responsible for her aftercare.

The position is explained in the Part 11 Code p.32 which states that under s117 local authorities and LHBs:

> have a duty to provide mental health aftercare services for people … who are in need of such services. These services must have the purposes of "meeting a need arising from or related to the person's mental disorder" and "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." The range of services which can be provided is broad.
>
> The duty on local authorities to commission or provide mental health aftercare rests with the local authority for the area in which the person concerned was ordinarily resident immediately before they were detained under the 1983 Act, even if the person becomes resident in another area where they are detained, or on leaving hospital. The responsible local authority may change, if the person is ordinarily resident in another area immediately before a subsequent period of detention which would require section 117 aftercare services.

The English Statutory Guidance (para 19.65) provides the following guidance:

> Under section 117 of the 1983 Act … 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.

In June 2020 the Department of Health and Social Care in England announced that it no longer considered that the above guidance was correct. This change of approach has been the subject of a briefing note on the 'Rhydian What's New' which can be

[85] [2012] EWCA Civ 1232
[86] [2001] UKHL 57, [2002] 1 A.C. 547 at para 18, which concerned the meaning of 'normally resident' for the purposes of Housing Act 1996, s199.

accessed by clicking here. Until this issue is clarified the above guidance should be treated with caution.

Many individuals entitled to support under MHA 1983 s117 will also have SSWA 2014 support needs – ie support needs that are not related to the mental disorder which resulted in their detention for treatment.[87] Since the two Acts take a slightly different approach to ordinary residence, there is the risk the authority responsible for the support needs under the SSWA 2014 may be different to local authority responsible for the provision of care and support under MHA 1983 s117. This problem is addressed by the SSWA 2014 s194 (4A) which provides that an adult who is being provided with accommodation under MHA 1983 s117 is to be treated for the purposes of the SSWA 2014 'as ordinarily resident in the area of the local authority or the local authority in England, on which the duty to provide the adult with services under that section is imposed'.[88] Although this provision only applies to accommodation, this would appear to all that is needed (due to the deeming rules relating to 'accommodation' under the CA 2014 not being replicated by the MHA 1983.

Section 117 and restricted patents

In the pre-SSWA 2014 judgment of *R (Wiltshire) v Hertfordshire CC*[89] the Court of Appeal suggested that the ordinary residence rule under s117 may be different for patients subject to a hospital order. As the court explained (para 15) where a patient is detained under s 3 'each admission to hospital involves a fresh decision, and generally the patient has been living in the community beforehand without restrictions'. However where a person is (para 19):

> subject to a hospital order with restrictions, then conditionally discharged, then recalled to hospital, and then conditionally discharged for a second time, for the purposes of s 117(3) of the Act he is still to be treated as "resident in the area" of the same local authority as that in which he lived before the original hospital order was made.

Although the Welsh Codes appear silent on this point, the English Statutory Guidance advises (para 17.6) that where:

> prisoners have previously been detained under sections 47 and 48 of the Mental Health Act 1983 and transferred back to prison, their entitlement to section 117 aftercare should be dealt with in the same way as it would be in the community … . Section 117(3), as amended by the Care Act 2014, will apply in determining which local authority is responsible for commissioning or providing the section 117 after-care.

Ordinary residence and the carers' legislation

SSWA 2014, s40(2) stipulates that the local authority that is responsible for meeting a carer's eligible needs is the one in which the adult needing care 'is ordinarily resident in'.[90] The assumption therefore must be that the duty to undertake a carer's assessment is the responsibility of the local authority that is responsible for the person for whom the carer cares.

---

[87] MHA 1983 s117(6).
[88] ie the local authority in whose area the person was ordinarily resident immediately before being detained for treatment under the MHA 1983: Inserted by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 SI 413 (W.131) reg 313.
[89] [2014] EWCA Civ 712 19.
[90] Or is present in its area but of no settled residence

There will be situations where identifying the responsible authority may not be straightforward for example 'where the carer provides care for more than one person in different local authority areas'.[91]

Continuity of care (portability)

The 2014 Act prescribes the way local authorities transfer responsibility for the care and support of people when they move from one authority area to another.

Section 56 contains a number of procedural obligations – which may be fleshed out further by regulations (section 56(6)) - but none appear to have been made). The only guidance provided relates to the process for resolving the inevitable disputes that this provision and is found in the Part 11 Code.

In essence the portability 'right' provides that where a local authority (the 'sending'[92] authority) is providing care and support for an adult or a child in need and another authority (the receiving authority) is notified that he / she intends to move into their area (and it is satisfied that this is likely to happen) then it must (among other things) undertake an assessment of their needs. If the assessment has not been completed by the time the person actually moves, then the receiving authority must meet the needs identified by the sending authority 'in so far as that is reasonably practicable' until its assessment and care plan is put in place.[93]

A problem that has yet to be fully resolved, concerns individuals who move to live in England, Scotland and Northern Ireland. Guidance on this question is found in Annex 2 to the Part 11 Code and in a brief (one page) protocol setting out 'Principles of Cross-Border Continuity of Care within the United Kingdom' which aims:

> to maintain the adult's wellbeing and prevent them from falling into crisis; ensure that the adult is at the centre of the process; and that responsible authorities should work together and share information in a timely manner to ensure needs are being met both on the day of the move and subsequently.

Disputed ordinary residence

Where two or more Welsh social services authorities are in dispute over a person's ordinary residence (either in respect of their responsibilities under the SSWA 2014 or under MHA 1983 s117) s195 of the 2014 Act and 2015 regulations[94] provide that the question is to be determined by the Welsh Ministers.

The Part 11 Code (p.34-35) describes the dispute procedures detailed in the regulations and includes the following salient matters):

- That it is 'critical that the person does not go without the care they need' during the dispute process;
- That one of the authorities involved in the dispute must provisionally accept responsibility for the person at the centre of the dispute and be providing services.
- Where local authorities cannot agree which authority should accept provisional responsibility for the provision of services, the local authority in which the

[91] The English Statutory Guidance 19.7 – which then advises that in such cases the various authorities 'should consider how best to cooperate on and share the provision of support' (para 19.8).
[92] The English Act was amended to remove what was thought to be derogatory language of 'sending and 'receiving' authorities – and speaks instead of 'first' and 'second' authorities.
[93] See also Local Government Ombudsman reports concerning a Complaint against Oxfordshire CC & Barnet LBC 16/8/16 and a Complaint against Isle of Wight Council 9/8/16.
[94] The Care and Support (Disputes about Ordinary Residence, etc.)
(Wales) Regulations 2015..

person is living or is physically present must accept responsibility[95] until the dispute is resolved.

Cross border dispute resolution

Schedule 1 para 5 of the Care Act 2014 provide for regulations that detail the process for resolving cross border ordinary disputes. In consequence, 2014 regulations[96] have been issued supplemented by brief guidance.[97] These make clear that the responsible nation for determining such disputes is the one in which the individual is actually residing.[98]

As with domestic ordinary residence disputes the regulations and guidance require that authorities cooperate and co-ordinate their actions, exchange relevant information and provide appropriate statements to the dispute determining body. Above all the regulations provide that authorities 'must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult'. [99] The 2014 Act makes provision for the recovery of payments made by an authority where it subsequently transpires that the individual is the responsibility of another authority.[100]

Establishing the responsible health body for NHS services

Guidance on this issue if provided in 'Welsh Government *Responsible Body Guidance for the NHS in Wales* (2013)'. This identifies as a 'Fundamental Principle' that:

> The safety and well-being of patients is paramount. The overriding principle is that no treatment should be refused or delayed due to uncertainty or ambiguity as to which body is responsible for funding an individual's healthcare provision.

The guidance states that for the majority of individuals, the LHB that is responsible for their healthcare needs is the one where they consider themselves to be resident (para 1.3). The guidance considers further permutations, for example where people are unable to give an address at which they consider themselves to be resident then the it advises that the relevant address is where they were last resident (para 2.5). It also stresses that parents must not be subjected to undue scrutiny on this question 'or be led into giving an alternative address in order to exploit any perceived financial advantage' (para 2.8).

Additionally a LHB has responsibility for those in need of urgent and emergency care services who are in its area as well as some patients eligible for NHS Continuing Care funding (see below).

Patients who receive fully funded Continuing NHS Healthcare (NHS CHC)

---

[95] The Care and Support (Disputes about Ordinary Residence etc.) (Wales) Regulations 2015 reg 2(3).
[96] The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 SI 2843.
[97] Part 11 Code Annex 2; The English Statutory Guidance Schedule paras 21.58- 21.68; and see also SCIE Legal frameworks for cross-border placements (2016).
[98] The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 SI 2843 reg 2.
[99] The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 SI 2843 reg 5.
[100] SSWA 2014 Schedule 1 para 6.

Slightly different rules apply for people who receive NHS CHC funding. The guidance advises that for such patients who are placed in a care home outside their home area 'the placing LHB will remain responsible for funding the care home placement' (para 6.8).