Establishing ordinary residence

24/07/2015

Local Government analysis: How do the courts determine the ordinary residence of a person lacking capacity to make a decision? Peggy Etiebet, barrister at Cornerstone Barristers, examines the method taken by the courts in approaching such a decision.

Original News

R (on the application of Cornwall Council) v Secretary of State for Health and others [2015] UKSC 46, [2015] All ER (D) 91 (Jul)

The Supreme Court allowed the appeals by the Secretary of State for Health and Somerset County Council against the judgment of the Court of Appeal which had decided that, P, a severely disabled person lacking capacity, was ordinarily resident in South Gloucestershire when he reached the age of 18 for the purpose of deciding which local authority was responsible for his accommodation under the relevant provisions of the National Assistance Act 1948 (NAA 1948). The Supreme Court decided that the Court of Appeal's decision ran counter to the policy of NAA 1948 and that on a correct interpretation of NAA 1948, the responsible local authority was Wiltshire Council.

What were the key issues raised in the case?

The case looked at two fundamental issues:

- how the ordinary residence of a person lacking capacity to make a decision on where to live should be determined
- how the ordinary residence of a person, lacking capacity to make a decision on where to live, and who is transitioning from the receipt of accommodation provided under the Children Act 1989 (ChA 1989) to accommodation provided under NAA 1948, should be determined

Why are these issues significant?

The determination of ordinary residence within NAA 1948 determines which local authority is responsible for the provision of accommodation and thus bears the funding burden. This funding burden can be expensive particularly in the current time of financial austerity. In *Cornwall*, the Secretary of State's evidence was that the number of young people who lacked capacity and who were transitioning from ChA 1989 accommodation to NAA 1948 accommodation were small but that, in light of their specialist needs, the cost of maintaining them indefinably is high--for P it was some £80,000 a year. As such, it appears that the underlying motivating force behind the Supreme Court's 4 to 1 majority decision was, as the Secretary of State identified:

'Real concerns that a few local authorities might therefore be motivated to "export" such a minor to the area of another local authority prior to the attainment of his majority...it might nevertheless be motivated to refuse him admission to it for fear of the financial consequences following the attainment of his majority.'

How did the court approach the determination of ordinary residence?

The lead case on the interpretation of ordinary residence for a person with capacity is *R v Barnet LBC ex parte Shah* [1983] 1 All ER 226, [1982] UKHL 14 and Lord Scarman's speech where he stated:

'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 of long duration.'

On the first key issue, when determining the ordinary residence of a person without capacity practitioners had long been applying, in accordance with the Secretary of State's guidance, 'the *Vale* tests one and two' where the former treated the person as a small child unable to choose where to live and used his parents' base as his place of ordinary residence and the latter applied the *Shah* test without the element of voluntary adoption--see *R v Waltham Forest LBC ex parte Vale* (1985) (unreported, 11 February 1985).

The court found that this was wrong. The two approaches should not be treated as separate legal tests--they were complementary commonsense approaches to the application of the *Shah* test to a person who lacked capacity. There was nothing to suggest that the idea of a 'base' was to be separated from the need for physical residence of some kind. When determining the ordinary residence of a person that lacks capacity the essential criterion was the residence of the person and the nature of that residence.

On the second key issue, the court found that the statutory context was critical, the propose of NAA 1948, s 24 was purely administrative and fiscal--it did not affect the rights of the person concerned but only the allocation of responsibility between local authorities. As such, it found that choosing South Gloucestershire as P's place of ordinary residence would fit the language of the statute, and the *Shah*/*Vale* tests. Nonetheless, it would run directly counter to the policy discernable in ChA 1989 and NAA 1948 that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement.

Lord Wilson (dissenting) found the law as it stands clearly compelled the answer to be South Gloucestershire and, in finding otherwise, the court was stepping into the legislative arena and interpreting statute in light of their own view as to policy.

How might this affect social care?

The court's clear aim was that this policy-based approach to determination of ordinary residence would enhance planning and certainty in relation to the provision of accommodation for some of the most vulnerable in society. Allegations of 'dumping' or 'exporting' financial responsibility are not unknown between neighboring local authorities. With the new emphasis on co-operation and integration in the Care Act 2014 (CA 2014), one hopes that this ruling will remove one flashpoint for dispute.

What are the immediate implications of this ruling?

There will no doubt be a flurry of reviews by local authorities to look at the determination of responsibility for existing cases. It does not matter, in this respect, that NAA 1948 is no longer in force. The Secretary of State's guidance on the determination of ordinary residence provides that when an ordinary residence determination is made, the determination will be made in accordance with the law that was in force at the relevant date in respect of which ordinary residence falls to be determined.

Are there any unresolved issues remaining?

One major unresolved issue is whether this interpretation is to apply to CA 2014, ss 18(1), 19(1), (2) and 20(1)--the power and duty to meet needs for care and support. On 1 April 2015, CA 2014 came into force--replacing NAA 1948 in England. As Lord Wilson pointed out:

'Even now Parliament has not chosen to include a requirement to disregard [for the purposes of ordinary residence in CA 2014] a period in which as a minor, the person was provided with accommodation under ChA 1989.'

It is certainly arguable that the statutory context of the ordinary residence provisions in CA 2014 is the same as that of NAA 1948. As such, a court may find that the Supreme Court's 'deeming provision' will be read into the meaning of ordinary residence when assessing the ordinary residence of people lacking capacity who are transitioning from the receipt of accommodation provided under ChA 1989 to accommodation provided under CA 2014.

What should lawyers take from this case?

Litigation is always a risk and sometimes it is difficult to advise clients on a principled legal basis. The 'right' answer, applying the statute and case law, was South Gloucestershire. No party had argued that Wiltshire should be responsible, but the court nevertheless found that this was so.

Are there any further points of interest?

There is debate among practitioners as to the meaning of ordinary residence in the Mental Health Act 1983, s 117 (MeHA 1983) as amended by CA 2014. MeHA 1983, s 117 provides that where a person has been detained in hospital the local authority and health will meet any after care services--related to his mental disorder. The local authority responsible for after care is that in which the person was ordinarily resident immediately before he was detained. The local authority responsible for meeting his needs for care and support pursuant to CA 2014 is determined by CA 2014, s 39(4) where the person is being provided with accommodation pursuant to MeHA 1983, s 117. The upshot is that where MeHA 1983, s 117 accommodation is not being provided there can be a mismatch between the local authorities responsible for different aspects of a person's social care. A purposive policy based interpretation as applied in *Cornwall* may solve this issue.

Peggy Etiebet has a specialist public law practice focusing on local authorities' powers and duties in adult and children services, the Court of Protection, homelessness and allocation, landlord and tenant, as well as strategic issues including those relating to budget setting and savings proposals.

Interviewed by Kate Beaumont.