**Section 117 After-care and Ordinary Residence**

In ***R (Worcestershire County Council) v Secretary of State for Health and Social Care*** [2021] EWHC 682 (Admin) the court considered ordinary residence under s. 117 of the Mental Health Act 1983. The Secretary of State had advanced a new interpretation of s. 117, which differed significantly from his own guidance. The court held that the new approach was wrong. Subject to one point of clarification, the court has effectively endorsed the well-understood meaning of s. 117, which is reflected in the Care and Support guidance.

The statutory guidance explains that the bodies responsible for s. 117 after-care provision retain responsibility even if they place a person out of area. However, if a person living in out of area s. 117 accommodation is re-detained under s. 3[[1]](#footnote-1), the guidance explains that a fresh s. 117 duty arises, and that new duty falls on the authorities where the person was ordinarily resident before their second detention. A person placed out of area, pursuant to s. 117, could acquire ordinary residence in the place of their s. 117 accommodation.

However, in determining a dispute between Worcestershire and Swindon, the Secretary of State decided that his guidance was wrong. The Secretary of State adopted a new interpretation of s. 117, which – he said – gave three reasons why the person in question, ‘JG’, was ordinarily resident in Worcestershire. Worcestershire judicially reviewed the determination.

The three propositions, adopted by the Secretary of State, were:

1. That where local authority A places a person in accommodation, pursuant to s. 117, in area B, the person remains ordinarily resident in area A for as long as they live in accommodation commissioned by local authority A. This, the Secretary of State argued, was the position given the decision of the Supreme Court in ***R (Cornwall CC) v Secretary of State for Health*** [2016] AC 137;
2. that where there has been a period of s. 3 detention immediately followed by a period of after-care, then immediately followed by a second period of detention, the s. 117 duty falls on the authorities for the area where the patient was ordinarily resident immediately before their first period of detention (rather than falling on the authorities for the area where the patient was ordinarily resident immediately before their most recent period of detention); and
3. That the s. 117 duty continues unless and until the responsible bodies take a conscious decision to discharge the patient, and that a second period of detention under s. 3 does not, itself, terminate the prior s. 117 duty - such that the original duty can continue during, and then beyond, a second period of s. 3 detention.

The court rejected all three of the Secretary of State’s propositions.

*Proposition 1*

In ***Cornwall***, the court’s task was to determine where a young man was ordinarily resident, for the purposes of the National Assistance Act 1948, when he turned 18. The man had been in receipt of services under the Children Act 1989, until his 18th birthday. The Supreme Court held that the man remained ordinarily resident in the area of the local authority which had owed him duties under the 1989 Act, despite him not having lived in that authority’s area for many years. The result of ***Cornwall***, so the Secretary of State argued, is that individuals are to be treated as ordinarily resident in the area of whichever local authority is responsible for providing their accommodation and care. In the case of s. 117, local authority A remains responsible for providing s. 117 services even if it places a person in a care home in area B. The Secretary of State said that it must follow, per ***Cornwall***, the patient should be regarded as remaining ordinarily resident in area A – because area A retained financial responsibility for the placement.

However, properly analysed, the Supreme Court only interpreted *ordinary residence* under the 1984 Act by reference to the 1989 Act, because both Acts included deeming provisions, i.e. provisions which said that the provision of accommodation, under the Act, did not alter the person’s ordinary residence. The court held that s. 117 is materially different to the provision considered in ***Cornwall***, and so the approach in ***Cornwall*** had no application to s. 117.

*Proposition 2*

Section 117(3) provides that the responsible bodies will be those:

*if, immediately before being detained, the person concerned was ordinarily resident in England, for the area in England in which he was ordinarily resident;*

The Secretary of State argued that where a person was in receipt of s. 117 after-care, and then re-detained, and then discharged, s. 117(3) should be interpreted as asking where the person was ordinarily resident before they were *‘first’* detained. However, the court held that there was no basis for reading words into s. 117. Furthermore, the Secretary of State’s analysis meant that s. 117(3) should be given different meanings according to the facts, i.e. if the patient had only ever been detained once, s. 117(3) would, on the Secretary of State’s analysis, ask where the patient was ordinarily resident before that detention, whereas if the patient had been detained more than once, s. 117 would ask where was the patient ordinarily resident before being first detained.

The court held that whenever a patient is detained under s. 3, and then discharged, the s. 117 duty arises, and the duty falls on the authorities for where the patient was ordinarily resident immediately before the detention which they are being discharged from, i.e. their most recent detention.

*Proposition 3*

The final proposition relied on by the Secretary of State was that where a person is in receipt of s. 117 after-care up to the date on which they are re-detained, the s. 117 duty survives the period of re-admission. On JG’s case, the Secretary of State said that because Worcestershire had not decided to discharge JG from s. 117 before her re-admission under s. 3, the s. 117 duty on Worcestershire continued, and Worcestershire continued to owe the duty when JG was discharged from her second admission.

The court rejected the Secretary of State’s submission that the s. 117 duty, from the first admission, survives beyond a second period of qualifying detention. Worcestershire had argued that the duty it owed to JG terminated at the point of her re-admission under s. 3. However, the court held that that it is the *discharge* from a second admission which automatically terminates the prior s. 117. At the point of discharge from a second period of detention, a fresh s. 117 duty arises and, at that point, the prior s. 117 duty automatically ends. Of course, it is possible for the after-care bodies to decide to terminate the duty at any time, and the bodies might conclude that they should terminate the duty where the individual has been re-detained; the s. 117 bodies are likely to conclude that they duty should not be maintained while the patient is receiving in-patient care. However, even if a decision to discharge the s. 117 duty is not made during the period of re-admission, the first duty will end at the time the patient is discharged from the second period of detention. When the duty arises afresh, the duty will fall on the bodies for the area where the patient was ordinarily resident immediately before their most recent period of detention.

The court’s conclusions on issues 1 and 2 confirm that s. 117 operates as it had been described in the statutory guidance. The judgment on issue 3 also reflects the terms of the guidance, which stated that the ordinary residence rules need to be applied, afresh, following any subsequent s. 3 detention. However, the judgment helpfully clarifies the mechanism by which the duty ends, automatically, by reason of subsequent admissions.

Lee Parkhill of Cornerstone Barristers represented Worcestershire County Council.

1. Or other qualifying provision of the Act [↑](#footnote-ref-1)