Neutral Citation Number: [2021] EWHC 682 (Admin)

Case No: CO/1935/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2021

Before:

MR JUSTICE LINDEN

- -

Between:

THE QUEEN **on the application of** **WORCESTERSHIRE COUNTY COUNCIL**	**Claimant**
- and –	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
-and-	
SWINDON BOROUGH COUNCIL	**Interested Party**

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- -

Mr Lee Parkhill (instructed by Heather Griffiths, Solicitor, Worcestershire County Council for the **Claimant)**
Mr Tim Buley QC (instructed by the Government Legal Department) for the **Defendant**
Ms Peggy Etiebet (instructed by Daryl Bigwood, Solicitor, Swindon Borough Council) for the **Interested Party**

Hearing dates: 17 and 18 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00pm on 22nd March 20

MR JUSTICE LINDEN:

INTRODUCTION

1. The hearing of this claim for judicial review was conducted in public via Microsoft Teams.

2. Mr Lee Parkhill appeared for the Claimant, Mr Tim Buley QC for the Defendant and Ms Peggy Etiebet for the Interested Party. Their written and oral submissions were very helpful and clear, and I am grateful to all of them.

THE ISSUES

3. JG has a diagnosis of treatment resistant schizoaffective disorder, as a consequence of which she was detained in hospital pursuant to section 3 of the Mental Health Act 1983 from March to July 2014, and then from May to November 2015. Between these two periods of detention she was provided with after-care services, pursuant to section 117 of the 1983 Act, which were funded by the Claimant ("Worcestershire"). These services included the provision of accommodation in Swindon.

4. The main issue in this case is: which local authority should pay for the after-care services which have been provided to JG following her discharge from her second period of detention on 12 November 2015 and, subsequently, from hospital? Mr Parkhill, on behalf of Worcestershire, argues that it is Swindon Borough Council ("Swindon") whereas Mr Buley, on behalf of the Defendant, and Ms Etiebet on behalf of Swindon, argue that it is Worcestershire. The resolution of this issue depends on where JG was "*ordinarily resident" … "immediately before being detained"* for the purposes of section 117(3)(a) of the 1983 Act. There is also an issue as to the circumstances in which a duty to provide after-care services under section 117 comes to an end and, in particular, whether it is automatically brought to an end if the person is detained again under section 3 of the 1983 Act.

THE FACTUAL BACKGROUND

5. The factual basis on which the decision of the Defendant which is challenged in this case was taken, can be briefly stated.

6. In 2011/2012 JG became known to Worcestershire for the first time, when she was living in Evesham in a local authority property. At this stage she required a short-term care package because of her mental and physical health.

7. On 30 July 2012, JG was informally admitted to Athelon Ward in Newtown Hospital in Worcester where it was found that she was experiencing auditory hallucinations which suggested that her neighbours were a threat to her family. In October 2012, December 2012, and March 2013, JG had periods of leave from hospital but during these periods of leave she quickly became paranoid and agitated about the intentions of her neighbours.

8. On 12 August 2013, alternative accommodation in Worcester was found for JG on the basis that this would take her away from her neighbours in Evesham. This move was unsuccessful, and JG was readmitted to Athelon Ward on 21 November 2013, as an

informal patient, and then detained under section 3 of the 1983 Act on 20 March 2014. I will refer to this as the first period of detention.

9. On 30 April 2014, Worcestershire assessed JG as lacking the capacity to decide where to live. Following consultation with JG's daughter and others involved in JG's care, it was decided that it was in JG's best interests for her to move to a residential placement closer to her daughter, in Swindon.

10. On 12 July 2014, Worcestershire therefore moved JG to a care home in Swindon pursuant to section 117 of the 1983 Act. This was the end of the first period of detention.

11. On 7 February 2015, Worcestershire then moved JG to a second care home in Swindon because there were reports that the first care home could no longer adequately meet her needs. Worcestershire consulted JG's daughter as part of the decision-making process which led to this move, and the placement at the second care home was also funded by Worcestershire pursuant to section 117.

12. On 27 May 2015, JG was detained in a hospital in Swindon under section 2 of the 1983 Act, i.e. for assessment, as a result of her deteriorating mental health and challenging behaviour. On 23 June 2015, she was detained under section 3 of the 1983 Act i.e. for treatment, also in Swindon. I will refer to this as the second period of detention.

13. On 4 August 2015, Worcestershire issued a termination notice to the care home in Swindon which had been accommodating JG. I will return to the contents and effect of this notice below.

14. On 12 November 2015, JG was discharged from detention under section 3 of the 1983 Act. However, she remained an in-patient and was subject to a standard authorisation, made pursuant to Schedule A1 to the Mental Capacity Act 2005, because she lacks decision making capacity, including the capacity to make decisions about where she lives. She was discharged from hospital on 9 August 2017.

15. A dispute then arose as to where JG was ordinarily resident immediately before she was detained under section 3, and which authority should therefore pay for JG's care from 9 August 2017, when she left hospital. The Defendant was asked to determine this dispute under the mechanism provided for by section 40(1) Care Act 2014 and, on 11 May 2017, he held that she was ordinarily resident in Swindon, essentially on the basis that this was where she was living immediately before the second period of detention. This conclusion was also in accordance with the Defendant's statutory guidance *"Care and support statutory guidance"* issued pursuant to section 78 Care Act 2014, at paragraphs 19.62-19.68 in particular.

16. Swindon then sought a review of the 11 May 2017 decision pursuant to section 40(2) of the 2014 Act. On 28 February 2020 the Defendant reversed that decision and decided that JG was in fact ordinarily resident in Worcestershire for the relevant purposes. In coming to this conclusion, at paragraph 35 the Defendant acknowledged that:

> *"The approach which I have taken is clearly at odds with parts of the Secretary of State's Care Act Guidance, and in particular with paragraph 19.64 of that guidance. I have had regard to that guidance, but it cannot override what I regard as the correct interpretation of the relevant primary legislation and the*

case law. The Secretary of State is in the process of considering how the Care Act Guidance should be amended, on this and other related points, in light of the approach taken to this and a number of other similar cases."

17. The correctness or otherwise of the Defendant's decision of 28 February 2020, and in particular the analysis of the law on which it is based, is what is in issue in the Claim.

THE RELEVANT PROVISIONS OF THE MENTAL HEALTH ACT 1983.

18. For present purposes, the key powers of detention under the Mental Health Act 1983 are set out in sections 2 and 3. Section 2 of the 1983 Act provides for the admission to hospital and detention of a person for assessment on the grounds that they are suffering from a relevant mental disorder and it is in their interests or the interests of others that this step be taken. Section 3 then provides for a patient to be *"admitted to a hospital and detained there"* for treatment on the grounds that:

> *"(2) ….*
>
> *(a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and*
>
> *……..*
>
> *(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and*
>
> *(d) appropriate medical treatment is available for him."*

19. Sections 117(1) of the 1983 Act provides:

> *"**117 - After Care***
>
> *(1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a hospital direction made under section 45A above or a transfer direction made under section 47 or 48 above, and then cease to be detained and (whether or not immediately after so ceasing) leave hospital."* (emphasis added)

20. Section 117(1) therefore identifies a class of individuals, namely those who have been detained in hospital for the purposes of treatment (see sections 37(2)(a)(i), 45A(2)(b), 47(1)(b) and 48(1(a)) and who then cease to be detained and leave hospital. In the light of the arguments in the case, I note that the words in brackets at the end of section 117(1) tend to emphasise that those who fall within this class must also have left hospital.

21. Section 117(2) of the 1983 Act then states the duty which is owed to this class of individuals and by which bodies:

> *(2) It shall be the duty of the clinical commissioning group or Local Health Board and of the local social services authority to provide or arrange for the provision*

> *of, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the clinical commissioning group or Local Health Board and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a community patient while he remains such a patient."* (emphasis added)

22. As to which clinical commissioning group/Local Health Board and local services authority owed the duty to the particular person, until 1 April 2015, section 117(3) answered this question as follows:

> *"(3) In this section "the clinical commissioning group or Local Health Board" means the clinical commissioning group or Local Health Board, and "the local social services authority" means the local social services authority, for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained."* (emphasis added)

23. So, until 1 April 2015, the issue turned on *"residence"* rather than *"ordinary residence"* or where the person was sent upon discharge from hospital. In **R v Mental Health Tribunal ex parte Hall** [2000] 1 WLR 1323, however, it was held by Scott Baker J (as he then was) that responsibility fell on the authority for the area in which the person was resident immediately before being detained: the period in detention was to be disregarded in deciding place of residence and, therefore, responsibility for the provision of after-care services. This was the case even if the patient had not actually been resident in that place for a number of years and might never be permitted to return there, for example because of an order of the Mental Health Tribunal on their release from detention. However, if no place of residence could be established the duty fell on the area to which the patient was discharged. The correctness of this analysis was not questioned by the Court of Appeal in **R (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council** [2011] PTSR 1623 at [21] ("the **Hertfordshire** case").

24. This was the law which applied when JG was released from her first period of detention in July 2014. As she had been resident in Worcestershire immediately before this period of detention, the duty to provide or arrange after care for JG remained with Worcestershire despite the fact that she was discharged from hospital to a care home in Swindon.

25. With effect from 1 April 2015, however, section 75 of the Care Act 2014 made a series of amendments to section 117, the detail of which will be considered below. However, section 117(3) of the 1983 Act was amended by section 75(3) of the 2014 Act so that it now provides as follows:

> *"(3) In this section "the clinical commissioning group or Local Health Board" means the clinical commissioning group or Local Health Board, and "the local social services authority" means the local social services authority—*
>
> *(a) if, immediately before being detained, the person concerned was ordinarily resident in England, for the area in England in which he was ordinarily resident;*

> *(b) if, immediately before being detained, the person concerned was ordinarily resident in Wales, for the area in Wales in which he was ordinarily resident; or*
>
> *(c) in any other case for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained."* (emphasis added)

26. So, section 117(3) now requires consideration of whether the person was *"ordinarily resident"* in an area in England or Wales immediately before being detained. If she was, then responsibility lies with the clinical commissioning group/Local Health Board and the local services authority for that area. The section fixes the point in time by reference to which the question of ordinary residence is to be addressed – it is to be assessed at the point immediately before the person is detained – and thereby ensures that a period of detention under section, or any of the other provisions referred to in section 117(1), does not affect their ordinary place of residence. Nor, therefore, does the fact that they are discharged into an area other than the one in which they were ordinarily resident immediately before being detained. If the person was not ordinarily resident in England or Wales at the relevant point, subsection 117(3)(c) also preserves the test which applied before the amendments effected by the 2014 Act and it appears to have been intended that the **Hall** approach would continue to apply to the application of this subsection.

27. But section 117(3) does not provide any further guidance as to how the ordinary residence question is to be determined. In particular, it does not deal with the effect on a person's ordinary residence of the provision of accommodation as part of social care pursuant to what are now the Care Act 2014, in the case of an adult, and the Children Act 1989 in the case of a child. Nor, which is the issue in the present case, does the 1983 Act deal with the effect on a person's ordinary residence of the provision of accommodation as part of "after-care services" pursuant to section 117.

28. As will have been appreciated, these were the terms of section 117(3) of the 1983 Act when JG was discharged from her second period of detention.

THE DECISION OF THE DEFENDANT DATED 28 FEBRUARY 2020.

29. The impugned decision of the Defendant was based on three propositions, each of which is individually capable of sustaining that decision if it is correct. The parties agree that all three propositions must therefore be wrong in law if the claim for judicial review is to be allowed. These propositions are:

    i) First: *"That, applying the approach of the Supreme Court in **R (Cornwall CC) v Secretary of State for Health** [2016] AC 137, JG should be regarded as being ordinarily resident in the area of Worcestershire as at 23 June 2015 (immediately before the second period of detention), on the basis that Worcestershire had itself placed her in Swindon pursuant to its obligations to provide her with after-care under section 117 of the Mental Health Act 1983 following the first period. Though physically present and resident in Swindon at this date, she remained ordinarily resident in Worcestershire "for fiscal and administrative purposes" in the sense discussed by Lord Carnwath in paragraph 60 of the **Cornwall** judgment."* ("**Proposition 1**", emphasis added)

ii) Second, that where there has been a period of detention, immediately followed by a period of after-care services, immediately followed by a second period of detention, the words "*immediately before being detained"* in section 117(3) of the 1983 Act require a decision as to the ordinary residence of the person immediately before they were first detained, rather than immediately before their most recent period of detention. Since JG was ordinarily resident in Worcestershire immediately before her first period of detention under section 3 of the 1983 Act, this was the place where she was ordinarily resident at all material times. ("**Proposition 2**")

iii) Third, that the effect of section 117(2) of the 1983 Act is that the duty to provide after care arising from a period of detention continues until a decision is made by *"the clinical commissioning group or Local Health Board and the local social services authority [that they are] are satisfied that the person concerned is no longer in need of such services"*. On the facts, no such decision was taken by Worcestershire in this case and the duty arising out of JG being released from her first period of detention continued notwithstanding her second period of detention. The second period of detention did not bring Worcestershire's duty under section 117 to an end. ("**Proposition 3**")

30. Mr Buley made clear that the Defendant's preferred route to the conclusion that JG was ordinarily resident in Worcestershire at all material times, as between Propositions 1 and 2, is Proposition 1. Proposition 3 raises an issue of principle as to the circumstances in which the section 117 duty comes to an end, but it also turns on the facts of this particular case. He accepts that the Defendant's decision departed from his statutory guidance, but he contends that the decision was right in law and in accordance with the decision of the Supreme Court in the **Cornwall** case and the true construction of the relevant provisions.

PROPOSITION 1

Introduction

31. I will examine each of the Defendant's three propositions in turn but the first requires the most detailed consideration. Here Mr Buley and Ms Etiebet's argument is essentially that in the **Cornwall** case it was decided that where a child who is living in accommodation pursuant to the Children Act 1989 becomes an adult, with an entitlement to accommodation under the then National Assistance Act 1948, their placement under the 1989 Act does not affect their place of ordinary residence. Although the **Cornwall** case did not concern the 1983 Act, the logic of, and rationale for, the decision of the Supreme Court should be applied under the 1983 Act with the result that accommodation provided pursuant to section 117 as part of JG's after-care services following her first period of detention should be left out of account in deciding where she was ordinarily resident immediately before her second period of detention. On this approach, the fact that JG was accommodated in Swindon from the end of her first period of detention until immediately before her second period of detention did not affect her ordinary place of residence. This remained Worcestershire at all material times.

32. In order to assess this argument, first it is important to consider the general understanding of *"ordinarily resident"* where it appears in a statute, before briefly

considering the approach to this phrase under the Children Act 1989 and the National Assistance Act 1948. I will then consider the decision of the Court of Appeal in the **Hertfordshire** case, which considered and rejected an argument that the approach to deciding where a person is ordinarily resident under the 1948 Act should be read across to the 1983 Act. Against this background, I will then analyse the **Cornwall** case and the competing arguments as to what it decided, and its effect is on the issues in the present case. The 1948 Act has for present purposes been superseded by the Care Act 2014 which, as noted above, made amendments to section 117 of the 1983 Act. I will, therefore, then consider the effect of relevant provisions of the 2014 Act on the present case.

33. For the reasons given below, however, I reject Proposition 1.

The general approach to the term "ordinarily resident"

34. Although there are various authorities on this topic, the parties relied on the speech of Lord Scarman in **R v London Borough of Barnet ex parte Shah** [1983] 2 AC 309 as providing the classic explanation of how the term *"ordinarily resident"* should be approached where it appears in legislation. The question in the **Shah** case was whether four foreign students qualified for educational grants on the basis that they had been ordinarily resident in the United Kingdom throughout the three years which preceded the first year of their courses. The education authorities argued that their ordinary residence during this period, in the sense of their real home, was elsewhere. The House of Lords disagreed.

35. Lord Scarman pointed out that *"ordinary residence is not a term of art in English law."*. He placed particular emphasis on two tax cases – **Levene v Inland Revenue Commissioner** [1928] AC 217 and **Inland Revenue Commissioners v Lysaght** [1928] AC 234 in which the House of Lords said that *"ordinarily resident"* had no technical or special meaning. At page 341 he said of these cases that:

> *"The true reading of the speeches delivered is that the House decided to construe the words in their tax context as bearing their natural and ordinary meaning as words of common usage in the English language…"*

36. At page 343G-H Lord Scarman famously said:

> *"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that ordinarily resident refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."*

37. He then added, at page 344B-D:

> *"There are two, and no more than two, respects in which the mind of the propositus is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is. And there*

> *must be a degree of settled purpose . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.*"

38. Mr Buley helpfully confirmed that he was not advancing any argument that I should hold that JG was not ordinarily resident in Swindon because she did not have sufficient mental capacity to decide to live there voluntarily or to have a settled purpose. Nor was he submitting that her presence in the accommodation provided to her in Swindon should be discounted on the basis that it was not *"voluntarily adopted"* in the sense intended by Lord Scarman. The issue of the effect of mental incapacity on Lord Scarman's formulation is discussed in the **Cornwall** case, which I will come to, but suffice it to say that in the light of the case law I agree with Mr Buley's concessions in this regard.

39. At page 349 Lord Scarman held that:

> *"An authority is not required to determine his "real home," whatever that means nor need any attempt be made to discover what his long-term future intentions or expectations are."*

40. I also note, given the arguments in this case, that at page 340 Lord Scarman referred to the possibility that there may be a different meaning given to the term *"ordinarily resident"* where it determines which authority has the obligation to arrange and pay for provision of a benefit, as opposed to the question whether there is an entitlement that benefit in the first place. He said:

> *"If, as to which I offer no firm opinion, ordinary residence in an area of the local education authority has a special meaning when the distribution of the fiscal burden between local education authorities is being considered as a matter for the exercise of executive decision by the Secretary of State, it does not follow that such special meaning, whatever it be, is to be attributed to the term "ordinary residence in the United Kingdom (British Islands)" when used as a criterion of an applicant's eligibility for an award."*

The Children Act 1989.

41. As is well known, the 1989 Act deals with the provision of accommodation in cases concerning children. Section 20(1) places a duty on local authorities to provide accommodation for any child in need *"within their area who appears to require accommodation as a result of"* in three types of situation. These are where there is no person with parental responsibility for the child, or they have been lost or abandoned, or the person caring for them has been prevented from providing them with accommodation: see section 20(1)(a)-(c).

42. As is apparent from the text of section 20(1), a local authority may therefore provide accommodation for a child who is within its area but is ordinarily resident in another area. However, section 20(2) provides that: *"(2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within"* three months of being notified that this is occurring or such longer period as may be prescribed. Section 29(7) of the 1989 Act

also entitles the provider of accommodation under section 20(1) to *"recover from that other authority any reasonable expenses incurred by them in providing the accommodation and maintaining him"*. The financial liability to provide accommodation under section 20(1) therefore falls on the local authority in which the child is *"ordinarily resident"* and there is a mechanism for that authority to provide the accommodation itself by taking over its provision.

43. Section 105 is the interpretation section of the 1989 Act. Section 105(6) provides:

> *"(6) In determining the "ordinary residence" of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place—*
>
> *(a) which is a school or other institution;*
>
> *(b) in accordance with the requirements of a supervision order under this Act; or*
>
> *(ba) in accordance with the requirements of a youth rehabilitation order under Chapter 1 of Part 9 of the Sentencing Code;*
>
> *(c) while he is being provided with accommodation by or on behalf of a local authority"* (emphasis added)

44. The effect of these provisions is that living in certain types of accommodation cannot affect where a child is ordinarily resident for the purposes of deciding who is to fund the services to which they are entitled. This is achieved by providing that the relevant periods in statutory accommodation are to be *"disregarded"*, but I agree with Mr Buley that nothing turns on the drafting technique. The result is that the question posed is as to the ordinary residence of the child immediately before the accommodation was provided. This question, in turn, is not answered by section 105 itself. However, the policy objectives which this approach aims to achieve are continuity of care and ensuring that decisions are taken in the best interests of the child. The responsible authority will take its decisions knowing that an out of area placement in accommodation will not affect its obligations, and the authority for the receiving area will know that it will not be penalised for accommodating the child by becoming financially responsible for them.

The National Assistance Act 1948.

45. Section 21(1) of the 1948 Act enacted a power on the part of local authorities to provide residential accommodation to various categories of person, including *"(a) persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them"*. In 1993 the power to provide accommodation under section 21 was converted into a duty by direction of the Secretary of State.

46. Section 24 of the 1948 Act then dealt with the question which local authority was empowered or obliged to provide residential accommodation in a given case as follows:

> *"**24. — Authority liable for provision of accommodation**.*
>
> *(1) The local authority empowered under this Part of this Act to provide residential accommodation for any person shall subject to the following provisions of this Part*

> *of this Act be the authority in whose area the person is ordinarily resident."* (emphasis added)

47. Section 24(3) conferred a power to provide accommodation to a person who was in the area of the local authority, to a person with no settled residence, or to those who were in urgent need of residential accommodation who were not ordinarily resident in the area *"as if he were ordinarily resident in the area"*. There was also a power under section 24(4) to provide accommodation, with the consent of another authority, to persons who were ordinarily resident in the area of that other authority. Section 32 provided for an authority to recover the costs of the provision of accommodation to a person who was not ordinarily resident in its area from the authority in whose area they were ordinarily resident.

48. Importantly, section 24(5) provided as follows:

> *"Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him."* (emphasis added)

49. This subsection ensured that the provision of accommodation pursuant to this Part of the 1948 Act did not affect who had the underlying power or obligation to provide it. This meant that where a person was placed in residential accommodation other than in the area, which was responsible for them, this would not affect that responsibility. The aims of this approach were essentially the same as the aims which lie behind the similar approach under the Children Act 1989, summarised above. Again, the result was achieved by requiring a decision as to where the adult was ordinarily resident immediately before the accommodation was provided, in relation to which question the statute provided no further guidance.

50. Similarly, to section 24(5), section 24(6) provided:

> *"(6) For the purposes of the provision of residential accommodation under this Part, a patient ("P") for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area."*

The Hertfordshire Case.

51. Although **R (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council** (supra) was decided before the amendments to section 117 of the 1983 Act enacted by the Care Act 2014, it very usefully illustrates the stance which the law had taken in relation to arguments that the approach to the duties on authorities under the 1948 Act and the 1983 Act should be the same. In short, this suggestion, which is at the heart of Mr Buley and Ms Etiebet's case, was rejected despite the anomalies which resulted from adopting different approaches under each Act. The reasons why this stance was taken are also highly relevant to the present case, in my view. The decision in the **Hertfordshire** case also formed part of the context in which the Care Act 2014 amendments to the 1983 Act, which I discuss further below, were introduced and it therefore informs the assessment of their effect.

52. The individual in the **Hertfordshire** case, "JM", who had a history of Korsakoff's syndrome, had lived in Hammersmith and Fulham for 15 years. Following a serious road traffic accident, he was admitted to hospital. Upon his discharge from hospital, JM was placed by Hammersmith and Fulham in a hostel in Sutton, Roanu House, pursuant to section 21 of the 1948 Act. The effect of section 24(5) of that Act was that Hammersmith and Fulham nevertheless retained funding responsibility. However, after nine months JM's mental health deteriorated, and he was detained under section 3 of the 1983 Act in a hospital in Sutton for 11 months before being discharged to a residential placement in Ealing.

53. Hertfordshire sought:

> *"A declaration that "is resident" in section 117(3) of the Mental Health Act 1983 has the same (or substantially the same) meaning as "is ordinarily resident" under section 24 of the National Assistance Act 1948, so that a person placed by a local authority under section 21 [of the1948 Act] in the area of another local authority remains ordinarily resident in the area of the placing authority for the purposes of Part III of the [1948 Act] and section 117(3) [of the 1983 Act]."*

54. On this basis, the responsible authority in respect of JM's after-care services on his release from hospital in Sutton would be Hammersmith and Fulham because his stay in Roanu House in Sutton immediately before his detention did not "count".

55. This application was refused by Mitting J and his decision was upheld by the Court of Appeal. It was held that JM had become subject to section 117 by virtue of his detention under section 3 of the 1983 Act and had ceased to be subject to the 1948 Act at that point. The period spent living in accommodation in Sutton prior to his hospital admission therefore did "count" and was sufficient to satisfy the residence test under the then section 117(3). The court therefore found that there was a duty on Sutton to provide and fund his aftercare.

56. At paragraph 25, Mitting J held that:

> *"There seems to me to be no perceptible difference between the three phrases, 'resident', 'ordinarily resident' and 'normally resident'. All three connote settled presence in a particular place other than under compulsion. Applying those tests to JM's circumstances and leaving aside the deeming provision in section 24(5) of the 1948 Act, JM was unquestionably resident at Roanu House when he was admitted to Sutton Hospital under section 3 of the 1983 Act. He had lived there for about a year…He had nowhere to live in Hammersmith. If anyone had asked him the question, and he had been capable of giving a rational answer to it, 'where do you now reside?' on 9 April 2008, his answer could only have been 'in Roanu House'. If he had been asked 'do you reside in Hammersmith and Fulham?' he might have said 'I wish I did', but he could not sensibly have said 'I do'."* (emphasis added)

57. As to whether section 24(5) of the 1948 Act made any difference to the result suggested by the ordinary meaning of the word *"resident"* where it appeared in section 117, at paragraph 26 Mitting J pointed out that section 24(5) of the 1948 Act unequivocally applied *"for the purposes of this Act"* i.e. the 1948 Act and said:

> *"What is deemed to occur for the purpose of the 1948 Act cannot be transposed into the 1983 Act".*

58. Mitting J also accepted that his interpretation posed practical problems but said that:

> *"27. ... the fact that it does cannot lead to a construction of primary legislation which the wording of the legislation does not bear. It should also be remembered that section 117 does not only apply to those who are supported by a local authority under section 21 of the 1948 Act. It applies also to those discharged from mental hospitals who were admitted there as a result of a criminal process or of a transfer from a prison. It applies also to many people who do not require accommodation to be provided for them by a local authority but who have homes of their own and who are afflicted by mental illness.*
>
> *"28. It cannot therefore be said that as a matter of construction Parliament must have intended, when it enacted section 117...that the duties owed under the 1948 Act and section 117 should be congruent. If there is an anomaly it is for Parliament to correct" ..."*

59. Carnwath LJ (as he then was) gave the leading judgment in the Court of Appeal. He specifically noted, at paragraph 17, that section 117 contained no deeming provision corresponding to section 24(5) of the 1948 Act and nor did it contain any provision for the resolution of disputes as to ordinary residence.

60. At paragraph 18, Carnwath LJ also noted the decision of the House of Lords in **R v Richmond Upon Thames London Borough Council ex parte Watson** [2002] 2 AC 1127, where the House rejected an argument that section 117 was a "gateway" section which enabled the use of the powers under the 1948 Act to provide accommodation and other services to a person who fell withing section 117(1). The House held that section 117 was a freestanding provision which both imposed the duty and conferred the power to provide after-care services, independently of the 1948 Act. It followed that although section 22 of the 1948 Act gave an authority the power to charge for accommodation provided pursuant to section 21, as there was no corresponding provision in relation to section 117 accommodation or other after care services provided under that section, after-care services could not be charged for.

61. Carnwath LJ also noted that in **ex parte Watson** the House of Lords had been unimpressed with arguments based in anomalies, and that Lord Steyn had cited with approval the following passage from the judgment of Buxton LJ in the Court of Appeal in the **Watson** case:

> *"the statutory provision is not at all anomalous, and not at all surprising. The persons referred to in section 117(1) are an identifiable and exceptionally vulnerable class. To their inherent vulnerability they add the burden, and the responsibility for the medical and social service authorities, of having been compulsorily detained. It is entirely proper that special provision should be made for them to receive after-care, and it would be surprising, rather than the reverse, if they were required to pay for what is essentially a health-related form of care and treatment."*

62. At paragraph 36, Carnwath LJ noted a summary of some of the practical problems resulting from Mitting J's decision as set out in the skeleton argument of counsel for JM:

> *"(a) responsibility for the social care of a mentally ill person will shift between local authorities, without any planning or any therapeutic purpose, on the day an individual is detained under section 3 [of the 1983 Act]; this is precisely the time when consistent, coherent care is most needed to increase the chances of early discharge and to maintain existing community links; (b) prior to discharge and subsequently, the social care of a mentally ill person will be provided by a new social work team unfamiliar with the individual's history and family background; (c) after-care is more likely to be provided out of the 'home' borough, and away from the friends, family and support networks that are vital to re-integration and recovery; (d) there will be a strong financial incentive on local social services authorities to place people such as JM, who are likely at some point to be admitted under the [1983 Act], outside their borough boundaries."*

63. Carnwath LJ saw no reason to question these concerns but he said that the problem was *"how to address them in within the constraints of apparently very clear statutory language"*:

> *"44. I have considerable sympathy for Hertfordshire's arguments. It is not easy to see why Parliament did not simply follow the precedent of the 1948 Act when enacting the duty under section 117.*
>
> *45. However, the 1948 Act precedent must have been well known to those involved in drafting the new Bill. …. We have to proceed on the basis that Parliament deliberately chose a different formula; and that, by implication, it accepted the possibility of responsibility changing over the period of detention, including the potential impact on continuity of patient care. Furthermore, we are bound by **ex parte Watson** to accept that section 117 was intended to be a free-standing provision, not dependent on the 1948 Act.*
>
> *46. Those considerations are sufficient in my view to require us to reject Mr Green's proposed form of declaration. That invites us to hold that "is resident" in section 117(3) of the 1983 Act has "the same (or substantially the same) meaning" as "is ordinarily resident" in section 24 of the 1948 Act. That is inviting us to rewrite the language of the statute to the form which Parliament could have adopted but did not. It also glosses over the status of the deeming provision. This view is reinforced by the contrast with the case where accommodation is provided under section by a primary care trust or local health board; there Parliament has amended section 24 so as to apply a deeming provision (see subsection (6) and (6A)…."*

64. From paragraph 47 onwards, Carnwath LJ considered an argument that if the period of detention under section 3 of the 1983 Act was required to be excluded in order to achieve the statutory purpose, section 117(3) should equally exclude a period of accommodation, for reasons outside the patient's control, in a home such as Roanu House. It was also argued that it was anomalous that the same period of residence, which is ignored for the purpose of the 1948 Act, should become the foundation of responsibility under the 1983 Act. Carnwath LJ's answer was that on the authorities,

including the passages from the **Shah** case cited at paragraphs 36 and 37 above, a period of detention did not affect where a person's residence was given that it is not *"voluntarily adopted"*, to use Lord Scarman's phrase, whereas a period of accommodation, even under the 1948 Act, clearly did:

> *"52. Although there are policy reasons for excluding a period of placement under section of the 1948 Act, neither counsel was able to offer a legitimate interpretative technique to achieve that result. Placement under that section is not compulsory, even though the patient may in practice have little choice. Nor, in the light of* ***ex parte Watson****, can one find in section 117 of the 1983 Act any express or implicit link to section of the 1948 Act, on which one could found such an exclusion.*" (emphasis added)

65. Mitting J and the Court of Appeal do not appear to have considered that there was any discernible difference between *"residence"* and *"ordinary residence"*, a point which tends to undermine Mr Buley and Ms Etiebet's argument that the amendments made to section 117(3) by the Care Act 2014 had a material impact on the issues in the present case. The courts in the **Hertfordshire** case also apparently accepted that residence in accommodation provided pursuant to the 1948 Act would affect a person's ordinary residence were it not for section 24(5). They regarded the absence of any similar provision in the 1983 Act as highly significant given that the decision of Parliament not to include an equivalent to section 24(5) in the 1983 Act must have been taken advisedly. With the support of House of Lords authority in the shape of **ex parte Watson**, the Court of Appeal rejected arguments based on anomalies and policy considerations, on the grounds that section 117 is a freestanding provision which has its own statutory aims, context and rationale. Moreover, the Court of Appeal held that it did not follow from the fact that the 1983 Act did not permit a period of detention to affect a person's place of residence that the position under the 1983 Act was the same in relation to a period of residence in accommodation, pursuant to a placement under the 1948 Act at least.

66. On the face of it, then, the decision in the **Hertfordshire** case is flatly against any argument that the approach to the question of ordinary residence under the 1948 Act and, by extension, the Care Act 2014 or the Children Act 1989, can be transposed to the Mental Health Act 1983. Indeed, the present case is, if anything, *a fortiori* given that in the **Hertfordshire** case there was, at least, a placement in accommodation under the 1948 Act which section 24(5) deemed to be irrelevant to the question of ordinary residence, albeit for the purposes of that Act. Here, the only placement was under the 1983 Act which contains no equivalent deeming provision, as I have pointed out.

67. The question therefore becomes whether, in the light of the **Cornwall** case and/or the provisions of the 2014 Act relating to section 117, the law is not, or is no longer, as stated in the **Hertfordshire** case and is as contended by Mr Buley and Ms Etiebet. I will consider the **Cornwall** case first, as it was decided under the law as it was before the Care Act 2014 came into force, albeit the Supreme Court was aware of that the 2014 Act was to come into force shortly after the hearing of the appeal, and it came into force shortly before the Supreme Court handed down its decision. It is also of note that Mr Buley and Ms Etiebet put their proposed analysis of the **Cornwall** case at the forefront of their argument, rather than the changes effected by the 2014, albeit they relied on the latter as enabling them to argue that the **Hertfordshire** case is not binding on me, and

to meet Mr Parkhill's point that the Defendant's decision in the present case altered the established understanding of the law.

The Cornwall case

Overview.

68. PH was born in 1986, with multiple disabilities, and he lacked mental capacity to make informed choices about where he lived. He was cared for in Wiltshire by his parents until 1991 when, pursuant to section 20 of the Children Act 1989, Wiltshire Council placed him with long-term foster carers in South Gloucestershire. PH's parents moved to Cornwall later that year, but PH continued to live with his carers in South Gloucestershire until he reached the age of 18. During that period P's parents were closely involved in decisions affecting him. They visited him several times a year, and he would occasionally visit them. After PH had reached the age of 18 a placement was found for him in a care home in Somerset.

69. The issue was where PH was ordinarily resident for the purposes of section 24(1) National Assistance Act 1948 as this would determine which local authority was responsible for providing support and accommodation for him as an adult pursuant to section 21(1)(a) of that Act. The Secretary of State held that it was Cornwall on the basis that, although there was a presumption that PH was ordinarily resident in the place indicated by the 1989 Act, this presumption had been rebutted by his ties with his parents, who were in Cornwall. PH had no connections with Wiltshire and his base was his parents. In a judgment which was handed down on 21 December 2012 the High Court agreed. On 19 February 2014, and therefore 3 months before the Care Act 2014 was enacted, the Court of Appeal held that it was South Gloucestershire. The Supreme Court disagreed, holding by a majority, in a judgment which was promulgated on 8 July 2015, that PH was ordinarily resident in Wiltshire.

The decision of the Court of Appeal in the **Cornwall** case.

70. Elias LJ gave the leading judgment in the Court of Appeal. His conclusion was reached on the basis of essentially the same reasoning as had been applied in the **Hertfordshire** case:

    i) The accommodation provided to PH up to the time when he turned 18 was provided under the Children Act 1989. Section 105(6)(c) of the 1989 Act prevented the period of time spent in that accommodation from being taken into account in relation to the question of ordinary residence *"for the purposes of"* the 1989 Act but only for the purposes of that Act. It therefore could be taken into account for the purposes of the 1948 Act. Accordingly, once Wiltshire's obligations under the 1989 Act came to an end, and the requisite care had to be provided under the 1948 Act, the deeming provision in the 1989 Act ceased to apply and the fact that PH had, for a long time, lived with foster parents in South Gloucestershire was a relevant factor when assessing his ordinary residence at that time (paragraph 35).

    ii) The words *"ordinarily resident"* should, unless the context indicates otherwise, be given their ordinary and natural meaning (paragraph 77). In **Shah**, Lord Scarman identified the paradigm case where an adult will be found to be

ordinarily resident – i.e. the place *"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"* etc - but he was not laying down a test as such (paragraph 74). (Lewison LJ also emphasised that this was the effect of **Shah** (paragraph 87)).

iii) ". *…where the vulnerable adult like PH has as a matter of fact been living in one place and only one place for many years, that will almost inevitably compel the conclusion that it is his ordinary place of residence. It is not…legitimate to avoid that common sense conclusion by the application of an artificial rule which effectively gives no weight to the fact of residence at all*." (emphasis added, paragraph 78).

iv) In this case the only possible answer was that PH was ordinarily resident in South Gloucestershire (paragraph 85).

The decision of the Supreme Court in the **Cornwall** case

71. In the Supreme Court, Lord Carnwath JSC gave a judgment with which Baroness Hale and Lords Hughes and Toulson agreed. Lord Wilson dissented and agreed with the Court of Appeal.

72. The precise basis on which the majority decided that PH was ordinarily resident in Wiltshire is, with great respect, not sufficiently clear to be incapable of being debated and in this regard I also note that, at paragraph 63, Lord Wilson expressed concern about the fact that the answer given by the majority was not contended for by any of the parties. This is an unpromising starting point for Mr Buley and Ms Etiebet's argument that, nevertheless, the reasoning in that case should be applied in a different statutory context and in a way which runs contrary to the decision of the Court of Appeal in the **Hertfordshire** case.

73. Be that as it may, they submit that the decision of the majority in the Supreme Court was that where the question of ordinary residence requires to be answered, not in order to decide whether a person is entitled to a given benefit but in order to decide who is fiscally and administratively responsible for its provision, *"ordinarily resident"* has a special meaning, such that residence in accommodation provided by an authority pursuant to statutory duties or powers does not affect their ordinary residence. The person continues to be ordinarily resident in the area of the authority which funds and arranges the accommodation, wherever they in fact live and for however long they live there. It follows from this, they submit, that accommodation pursuant to what they say are the analogous or *"parallel"* provisions of the 1983 Act is of the same inherent nature and should be regarded as not affecting a person's ordinary place of residence.

74. On the other hand, Mr Parkhill submits that **Cornwall** was decided in its particular statutory context and on the basis that both the 1948 Act and the 1989 Act expressly state that accommodation provided pursuant to the relevant powers or duties under those Acts is not relevant to the question of a person's ordinary place of residence. It is only in that specific context that such accommodation does not "count" in determining ordinary residence. Accommodation provided as part of after-care services, pursuant to section 117 of the 1983 Act, is provided in a different statutory context and, in particular, one in which there is no provision which states that such accommodation is

irrelevant to the question where a person is ordinarily resident. **Cornwall** therefore does not compel any answer to the question in the present case, let alone one which is inconsistent with earlier case law and the Defendant's own statutory guidance.

75. In order to assess these competing analyses, it is necessary to consider Lord Carnwath's judgment in detail. At paragraph 35, he said that section 24(5) *"left open"* the question whether residence in accommodation provided pursuant to the 1948 Act would otherwise have been regarded as ordinary residence for the purposes of the 1948 Act, and said that he would return to this question. He pointed out that:

> *"In policy terms [section 24(5)] ensured that decisions on placements, inside or outside an authority's area, were made solely with reference to the interests of the client, without affecting the placing authority's continuing responsibility for his care."*

76. At paragraphs 39-48, Lord Carnwath then considered the authorities on the meaning of *"ordinarily resident"*, including **Shah**. These also included **R v Waltham Forest LBC ex parte Vale** The Times 25 February 1985 where Taylor J considered the application of the ordinary residence test under the 1948 Act to a person who was mentally incapable of forming a settled intention where to live. That person had been in residential care in Ireland, where her parents lived, for over 20 years. When her parents returned to England, it was decided that she should return to live near them. She stayed with them at their house in Waltham Forest for a few weeks while a suitable residential home was found, and she was then placed in a home in Buckinghamshire. Taylor J held that she was ordinarily resident in Waltham Forest at the time of her placement. Lord Carnwath agreed with the result. On the basis of a common sense application of the **Shah** approach, her actual residence with her parents was sufficiently settled to amount to ordinary residence, notwithstanding her lack of mental capacity to decide where to live and for what purposes. Mr Buley's concession, noted at paragraph 38 above, is consistent with this aspect of Lord Carnwath's judgment.

77. At paragraph 51, Lord Carnwath then said that under the statute *"it is the residence of the subject, and the nature of that residence, which provide the essential criterion"*. He went on to say, at paragraph 52, that (emphasis added) *"Applying the **Shah** tests without qualification is easy to understand why the Court of Appeal"* reached the conclusion which it reached:

> *"52……. If one asks where was PH's ordinary residence in the period immediately before his move to Somerset, an obvious answer for many purposes would be his home with his carers. That is where he had lived happily for some fourteen years. On an objective view it might be thought sufficiently "settled" to meet Lord Scarman's test, regardless of whether PH himself took any part in the decision-making.*
>
> *53. However, although the choice of South Gloucestershire may fit the language of the statute, it runs directly counter to its policy. The present residence in Somerset is ignored because there is no connection with that county other than a placement under the 1948 Act. By the same policy reasoning, South Gloucestershire's case for exclusion would seem even stronger. There is no present connection of any kind with that county, the only connection being a historic*

> *placement under a statute which specifically excluded it from consideration as the place of ordinary residence for the purposes of that Act."* (emphasis added)

78. Lord Carnwath then considered the possibility that responsibility for PH transferred from Wiltshire to South Gloucestershire as a result of him turning 18, on the basis that there was a *"hiatus"* in the legislation at this point in time:

> *"55. It is highly undesirable that this should be so. It would run counter to the policy discernible in both Acts 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. It would also have potentially adverse consequences. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority, and the people who are cared for in some specialist settings may come from all over the country. It would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long-term financial burden which would potentially follow."* (emphasis added)

79. At paragraph 56, he then noted that the reasoning of the Court of Appeal in the **Cornwall** case had been based on the reasoning in the **Hertfordshire** case and said:

> *"56……..However, the court was there faced with a rather different argument, which depended on reading the Mental Health Act 1983 section 117 (in which responsibility was based on "residence" without any deeming provision) as though it had the same meaning as ordinary residence under section 24. The court (para 45) rejected that argument, not only because it was inconsistent with the statute, but also because it was constrained by higher authority to hold that section 117 was a free-standing provision not dependent on the 1948 Act."* (emphasis added)

80. He therefore did not question the correctness of the decision in the **Hertfordshire** case. Rather, he appeared to say that that decision was accounted for, at least in part, by the fact that the issue in that case arose in a different statutory context and was subject to authority applicable to that particular statute. He also specifically referred to the lack of an equivalent deeming provision in the 1983 Act as a distinguishing feature of that Act. The **Hertfordshire** case therefore was not inconsistent with the conclusion which he had reached in the context of the particular legislation under which the issue arose in the **Cornwall** case.

81. At paragraph 57, Lord Carnwath noted that the issue arose for administrative purposes rather than in order to determine rights, and he referred to the passage in the speech of Lord Scarman in **Shah**, mentioned above, where the possibility that such a context may justify a different approach was recognised. He concluded as follows:

> *"58. Section 24(5) poses the question: in which authority's area was PH ordinarily resident immediately before his placement in Somerset under the 1948 Act? In a case where the person concerned was at the relevant time living in accommodation in which he had been placed by a local authority under the 1989 Act, it would be artificial to ignore the nature of such a placement in that parallel statutory context.*

> *He was living for the time being in a place determined, not by his own settled intention, but by the responsible local authority solely for the purpose of fulfilling its statutory duties.*
>
> *59. In other words, it would be wrong to interpret section 24 of the 1948 Act so as to regard PH as having been ordinarily resident in South Gloucestershire by reason of a form of residence whose legal characteristics are to be found in the provisions of the 1989 Act. Since one of the characteristics of that placement is that it did not affect his ordinary residence under the statutory scheme, it would create an unnecessary and avoidable mismatch to treat the placement as having had that effect when it came to the transition in his care arrangements on his eighteenth birthday.*
>
> *60. On this analysis it follows that PH's placement in South Gloucestershire by Wiltshire is not to be regarded as bringing about a change in his ordinary residence. Throughout the period until he reached 18, he remained continuously where he was placed by Wiltshire, under an arrangement made and paid for by them. For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live…."* (emphasis added)

82. I do not accept the submission that Lord Carnwath was, here, deciding that the concept of ordinary residence under the 1989 Act has a special or inherent meaning, regardless of the disregard provision under section 105(6)(c), such that accommodation provided pursuant to that Act was inherently incapable of affecting a person's ordinary place of residence even if it was not required by the statute to be disregarded. He was not holding that the statutory disregard was otiose. Rather, in my view it is tolerably clear that his conclusion was based on the particular legal characteristics of the period of residence under the 1989 Act which included that it was to be left out of account in determining PH's ordinary place of residence and therefore responsibility for his care.

83. Mr Buley and Ms Etiebet placed particular emphasis on the last sentence of paragraph 58 (highlighted above) as encapsulating the key point in Lord Carnwath's reasoning and, consistently with the Defendant's decision of 28 February 2020, they emphasised paragraph 60 as part of that reasoning. But in my view the words in the penultimate sentence of paragraph 58 "*it would be artificial to ignore the nature of such a placement in that parallel statutory context"* draw attention to the terms of the particular statute in which the words *"ordinarily resident"* appeared. The words *"in other words"* at the beginning of paragraph 59 also show that paragraphs 58 and 59 have to be read as a whole, and that the statutory disregard under section 105(6)(c) of the 1989 Act was a key indicator of a special legal characteristic of PH's residence in South Gloucestershire pursuant to that Act. Paragraphs 58 and 59 also have to be read in the context of paragraphs 35 and 53, in particular, which emphasise the policy of the 1989 and the 1948 Acts on the basis that it is evidenced by sections 105(6)(c) and 24(5) of those Acts respectively. It also seems to me that section 105(6)(c) of the 1989 was precisely the *"qualification"* referred to by Lord Carnwath at paragraph 52, without which the application of the **Shah** test would have led to the conclusion that PH was ordinarily resident in South Gloucestershire, as the Court of Appeal held in the **Cornwall** case and the Court of Appeal in the **Hertfordshire** case would no doubt also have held on the application of the natural meaning of *"ordinarily resident"*.

84. As for reliance on paragraph 60, I also consider that the words *"On this analysis it follows that"* at the beginning of this paragraph indicate that what follows is Lord Carnwath's conclusion rather than further reasoning from which the result for which Mr Buley and Ms Etiebet contend can be extrapolated. In particular, I do not accept that the sentence *"For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live."* supports an argument that the only question is whether an authority has accepted statutory responsibility for a person at some point, in which case the person will remain ordinarily resident in the area of the authority for the relevant purposes for as long as that is the case and regardless of where they actually live. The liability of an authority to fund care and support under the 1989 Act, and now the 2014 Act, will continue to depend on the place of ordinary residence, albeit the statutes provide that the provision of accommodation by the authority will not affect that question.

85. I appreciate that this analysis of Lord Carnwath's judgment involves some loosening of the words *"for the purpose of this Act"* in section 105(6) of the 1989 Act, so that on one view the disregard was in effect being applied for the purposes of the 1948 Act as well. Indeed, this was Lord Wilson's principal criticism of his fellow Justices – that they were acting as legislators by extending the reach of section 105(6)(c), rather than interpreting the legislation – see paragraphs 66 and 70 (although at paragraph 71, consistently with Mr Buley and Ms Etiebet's argument, he appears to have considered that the majority took a view about the inherent nature of ordinary residence which rendered the deeming/disregard provisions otiose). But, in my view, Mr Parkhill's interpretation of Lord Carnwath's judgment is less problematic from the point of view of established approaches to statutory construction than adopting an interpretation of Lord Carnwath's judgment which renders sections 24(5) and 105(6) redundant.

86. I recognise that there is also a tension between Mr Parkhill's interpretation and aspects of the approach of the Court of Appeal in the **Hertfordshire** case. But it seems to me that the essential point which Lord Carnwath was making was that if, for strong policy reasons which were clear from the terms of both statutes, and equally applicable under both, time living in accommodation provided pursuant to a statutory placement did not affect a person's ordinary residence, it would be odd if Parliament intended the same period of residence to change its character and effect simply because the individual reached his 18th birthday. Both statutes were *"parallel"* pieces of legislation in the sense that they addressed essentially the same social care issues in relation to different stages in the development of a person. Essentially the same duties were now owed to PH under the legislation applicable to adults, and for essentially the same reasons as applied when he was a child. There was no rational reason why the authority which owed him these duties should change, and good reasons why it should not.

87. But to my mind there is a second, critical, reason why Proposition 1 is wrong insofar as it depends on the decision in the **Cornwall** case. Whatever may or may not have been the reasoning of the majority in the **Cornwall** case, that reasoning was in relation to the 1989 Act and the 1948 Act. Whilst one can immediately see that it would apply to the 2014 Act and, indeed, Lord Carnwath referred to section 39 of the 2014 Act at paragraph 38 of his judgment, the Supreme Court in the **Cornwall** case did not consider the nature of ordinary residence under the Mental Health Act 1983 other than in its references to the **Hertfordshire** case. As noted above, these references did not suggest that the **Hertfordshire** case was wrongly decided: on the contrary, they indicated that,

as **ex parte Watson** also shows, the position under the 1948 Act and the 1989 Act should not necessarily be "read across" to the 1983 Act, or vice versa. This was not only because the relevant terms of the 1983 Act were different, including the lack of an equivalent disregard or deeming provision in respect of accommodation. It was also because section 117 is free standing and it serves a different category of person, with different needs, to those who are served by the care and support legislation. In short, I reject Mr Buley's submission that the 1983 Act is a *"parallel"* statutory context in the sense in which this phrase was used by Lord Carnwath to describe the 1948 and the 1989 Acts, and that therefore the term *"ordinarily resident"* should, "logically" have the same meaning in all three Acts.

88. Given that there was, and indeed is, an absence from the 1983 Act of any equivalent to sections 105(6) and 24(5), nor was or is there a solid evidential or statutory basis for concluding that the policy in relation to this issue underpinning section 117 was or is the same as that which underpins the relevant parts of the 1989 Act and the 1948 Act. Whilst there is an element of circularity in this point given that it requires one to have decided that **Cornwall** turned on the presence of the deeming/disregard provisions in the relevant legislation, there does seem to me to be a gap in the 1983 Act where evidence of statutory policy should be if it is to form the basis for a purposive construction.

89. I therefore conclude that the **Cornwall** case does not in fact support Proposition 1. The question then becomes whether the Care Act 2014 materially altered the law so as undermine the reasoning and/or reverse the result in the **Hertfordshire** case.

The Care Act 2014.

90. The Care Act 2014 Act provides, in respect of England, a single statutory scheme for the provision of adult social care. Prior to the 2014 Act, the assessment for, and provision of, adult social care was governed by various pieces of legislation, including the National Assistance Act 1948, the Chronically Sick and Disabled Persons Act 1970 and the National Health Service and Community Care Act 1990. The preamble to the 2014 Act describes its subject matter as follows:

> *"An Act to make provision to reform the law relating to care and support for adults and the law relating to support for carers; to make provision about safeguarding adults from abuse or neglect; to make provision about care standards; to establish and make provision about Health Education England; to establish and make provision about the Health Research Authority; to make provision about integrating care and support with health services; and for connected purposes."*

91. The 2014 Act came into force on 1 April 2015. However, it did not immediately apply to individuals who were in receipt of services on that date. For those individuals, the earlier legislation continued to apply until such time as the relevant local authority reviewed the person's care. In the event that no review was undertaken, the 2014 Act applied to such individuals from 1 April 2016. Subject to savings provisions which mirrored these transitional provisions, section 21 of the 1948 Act ceased to apply, in England, from 1 April 2015.

92. Part 1 of the 2014 Act deals with care and support. Paragraph 5 of the Explanatory Notes to the 2014 Act identified the aims of Part 1 as follows:

> *"5. Part 1 of the Act is intended to give effect to the policies requiring primary legislation that were set out in the White Paper Caring for our future: reforming care and support (Cm 8378, July 2012), to implement the changes put forward by the Commission on the Funding of Care and Support, chaired by Andrew Dilnot, and to meet the recommendations of the Law Commission in its report on Adult Social Care (Law Com 326, HC 941, May 2011) to consolidate and modernise existing care and support law"* (emphasis added)

93. Part 1 extends to England and Wales, but it applies to local authorities in England only, as social care is a devolved matter. However, there are provisions for cross border placements in section 39(8) and Schedule 1. Wales has also replaced the pre-existing range of social care provisions with one statute: the Social Services and Well-being (Wales) Act 2014.

94. In broad terms, section 13 of the 2014 Act provides for an assessment of the need for care and support of an adult or their carer, taking into account certain eligibility criteria. Sections 18 and 19, respectively, set out a duty and a power of local authorities to meet needs for care and support. Subject to various conditions the duty is owed to an adult if *"the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,"* (section 18 (1)(a)). The power arises where there is no requirement to meet the adult's needs under section 18 and the *"the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,"* (section 19(1)). There is also a power to meet the needs of an adult who is ordinarily resident in the area of another local authority (section 19(2)) and where the adult's needs appear to be urgent. Section 8(1)(a) lists *"accommodation in a care home or in premises of some other type"* as an example of what may be provided to meet needs under sections 18-20.

95. Where an authority has been meeting the needs of a person who is ordinarily resident in the area of another authority, section 41 then makes provision for the former to recover from the latter the costs of doing so. So, liability under the 2014 Act attaches to a single body and on the basis of ordinary place of residence. As noted above, the position under section 117(3) of the 1983 Act in terms of who owes the relevant financial obligation is therefore different in these respects: the duty is owed by two bodies and the amended section 117(3) retains the pre existing residence/place of discharge test as a residual category.

96. Under the heading *"Establishing where a person lives etc"*, section 39(1) of the 2014 Act provides, so far as material as follows:

> "**39 Where a person's ordinary residence is**
>
> *(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 England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident—*
>
> > *(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or*

> *(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.* (emphasis added)

97. It will be seen that this provision is similar in nature to section 24(5) of the 1948 Act in that it deems the ordinary residence of the person to be the one which applied at the beginning of the period of accommodation. It is from this that one can also discern the same policy of continuity of responsibility whether or not the accommodation is provided "out of area".

98. Section 39(4) of the 2014 Act is an important provision. It states, so far as material, as follows:

> *"(4) An adult who is being provided with accommodation under section 117 of the Mental Health Act 1983 (after-care) is to be treated for the purposes of this Part as ordinarily resident in the area of the local authority in England or the local authority in Wales on which the duty to provide the adult with services under that section is imposed; …"* (emphasis added)

99. As paragraph 259 of the Explanatory Notes confirms, the effect of this provision is that *"an adult who is being provided with accommodation under section 117 of the Mental Health Act 1983 will be treated as ordinarily resident in the area of the local authority in England or Wales which is under a duty to provide the adult with services by virtue of that section"*.

100. Section 39(5) then provides as follows:

> *"(5) An adult who is being provided with NHS accommodation is to be treated for the purposes of this Part as ordinarily resident— (a) in the area in which the adult was ordinarily resident immediately before the accommodation was provided, or (b) if the adult was of no settled residence immediately before the accommodation was provided, in the area in which the adult was present at that time."*

101. Section 39(8) then gives effect to Schedule 1 to the 2014 Act which deals with cross border placements out of England. As the Explanatory Notes state at paragraph 260:

> *"Schedule 1 makes provision to ensure that where a person in England, who has care and support needs and requires residential accommodation to meet those needs, is provided with that accommodation in another part of the UK by a local authority, generally this does not result in a transfer of that authority's responsibility for that person. Paragraphs 2 to 4 make similar provision in respect of placements in England of people from Wales, Scotland or Northern Ireland which are arranged under the relevant Welsh, Scottish or Northern Irish legislation. These paragraphs also make similar provision in respect of cross-border placements not involving England i.e. Wales-Scotland, Scotland-Northern Ireland and Northern Ireland-Wales."*

102. Pausing there, apart from section 39(4), the clear intention of section 39 was therefore that the fact that, pursuant to the duties or powers under the 2014 Act, an adult was placed in accommodation in an area other than the one in which they were ordinarily resident would not affect their ordinary place of residence for the purposes of

determining which authority was responsible for the provision of care and support under the 2014 Act. Section 39 adopts a consistent approach in that the question of ordinary residence for the purposes of Part 1 is required to be addressed immediately before the accommodation is provided. The provisions do not answer the question where they were ordinarily resident at that point, but sections 39(1) and (5) ensure that the provision of accommodation will not affect a person's ordinary residence for the relevant purposes.

103. However, Counsel agreed that the effect of section 39(4) is that where a person has been provided with accommodation pursuant to section 117 of the 1983 Act and the question arises, for the purposes of Part 1 of the 2014 Act, as to where they are ordinarily resident, they will be deemed to be ordinarily resident in the area of whichever authority has the duty under section 117. So, in a case where an adult is entitled to care and support under the 2014 Act, and is receiving accommodation under the 1983 Act, the aim is for one authority to be responsible for provision of all services and for that authority to be the one identified as having responsibility under the 1983 Act.

104. Mr Parkhill submits that the implication of section 39(4) is that the person's ordinary place of residence under the 1983 Act would not necessarily be the same as their ordinary place of residence under the 2014 Act. If the concept of ordinary residence was identical under both Acts, section 39(4) would be otiose. However, I disagree with this particular argument. Section 39(4) does not simply state that the place of ordinary residence under the 1983 Act is deemed to be the ordinary place of residence for the purposes of the 2014 Act. It states that the person is to be treated, for these purposes, as ordinarily resident in the area of the authority which owes the section 117 duty. Of course, the person may <u>not</u> actually be ordinarily resident in the area of that authority given that the section 117 duty may be owed to a person who is merely resident in an area or, more importantly, if they are not resident in any particular area, in the area of the authority into which they are discharged. The consequence of this point is that where a person is provided with accommodation, pursuant to a duty under section 117, by an authority for an area in which they are merely resident or to which they are discharged, that person will acquire a place of ordinary residence for the purposes of the 2014 Act. There is a similar approach in section 39(5)(b) where a person has no settled residence.

105. Nevertheless, it may be significant that the matter was approached in this way by Parliament, rather than the 2014 Act deeming the position as to ordinary residence under the 2014 Act to apply under the 1983 Act. Nor is there a mirror provision in the 1983 Act which states that where the question of ordinary residence arises under that Act, and the person is in receipt of accommodation under the 2014 Act, they are to be deemed to be ordinarily resident in the area of the local authority which has the duty to provide that accommodation under the 2014 Act. As Mr Parkhill suggested, this may be because the duty under the 1983 Act is jointly owed by the local authority and the clinical commissioning group/Local Health Board. If the 2014 Act position as to ordinary residence were deemed to govern the position under the 1983 Act, the deeming provision would also have to deem the responsible clinical commissioning group etc to be the body for the area identified under the section 39 of the 2014 Act, lest there was then a mismatch between the co holders of the section 117 duty to provide after care services. This, in turn, would mean that the bodies responsible for after care services would potentially be remote from the patient because they were ordinarily resident in a

different area. That may well have been regarded by Parliament as undesirable given that there are advantages to the decision makers being located close to the person who is the subject of their decisions and to those who are providing the relevant care.

106. I also note that section 39(4) applies to adults. There is no equivalent provision in the Children Act 1989. This tends to support the view that anomalies will arise if the amendments made to the 1983 Act by the 2014 Act create a particular approach to adults under the 1983 Act but not to children.

107. Section 40 of the 2014 Act then provides as follows:

> "**S40 Disputes about ordinary residence or continuity of care**
>
> *(1) Any dispute about where an adult is ordinarily resident for the purposes of this Part, or any dispute between local authorities under section 37 about the application of that section, is to be determined by— (a) the Secretary of State, or (b) where the Secretary of State appoints a person for that purpose (the "appointed person"), that person.* (emphasis added)
>
> *(2) The Secretary of State or appointed person may review a determination under subsection (1), provided that the review begins within 3 months of the date of the determination.*
>
> *(3) Having carried out a review under subsection (2), the Secretary of State or appointed person must— (a) confirm the original determination, or (b) substitute a different determination."*

The amendments to the Mental Health Act 1983 effected by the 2014 Act

108. Under the heading *"After care under the Mental Health Act 1983"* section 75, which also forms part of Part 1 to the 2014 Act, made various amendments to 117 of the 1983 Act. As has been noted above, section 75(3) amended section 117 so that it provided that the financial liability for a person who was released from detention fell on the authority in which they were ordinarily resident immediately before being detained and, in any case where they were not ordinarily resident or resident anywhere, the authority into whose area they were discharged.

109. Section 75(4) of the 2014 Act made provision for the resolution of disputes about where a person was ordinarily resident for the purposes of section 117(3) by inserting a new section 117(4) of the 1983 Act, which is in the following terms:

> *'(4) Where there is a dispute about where a person was ordinarily resident for the purposes of subsection (3) above—*
>
> *(a) if the dispute is between local social services authorities in England, section 40 of the Care Act 2014 applies to the dispute as it applies to a dispute about where a person was ordinarily resident for the purposes of Part 1 of that Act; …* (emphasis added)

110. In relation to the amendments to section 117 of the 1983 Act effected by sections 75(3) and (4) paragraphs 446 and 448 of the Explanatory Notes state that:

> *"446. Section 75 clarifies the meaning of after-care and makes minor amendments to section 117 of the Mental Health Act 1983 (the 1983 Act). The changes remove anomalies in determining the responsible local authority in relation to the provision of after-care services under the 1983 Act to people who have been detained in hospital for treatment of mental disorder and the provision of care and support services to which the [2014] Act applies.*
>
> …
>
> *448. Subsections (3) and (4) apply the ordinary residence rules to section 117 in order to avoid anomalies which can currently arise where one local authority is responsible for commissioning section 117 services whilst another commissions any other services a person may need. They apply consistent after-care ordinary residence rules in England and Wales, in particular, in relation to which health body and local authority are responsible for commissioning after-care services. One benefit of this will be to empower the Secretary of State to resolve disputes as to which authority is liable to commission section 117 services, which can currently only be resolved through the courts. The Secretary of State and the Welsh Ministers will publish arrangements for determining cross-border disputes."* (emphasis added)

111. Mr Buley relied on these passages as indicating that the intention which lay behind the 2014 Act amendments to section 117(3) was to remove anomalies. Clearly that is so, but these passages deal with the possibility of a mismatch between the 2014 Act and the 1983 Act where services are being provided to the same person under both. That is not the issue in the present case, which concerns the effect of accommodation provided under the 1983 Act on ordinary residence for the purposes of that Act. Moreover, these passages deal with services under both Acts generally, rather than with the specific issue of the effect of the provision of accommodation on a person's ordinary residence. As all parties agreed, the category of persons who are entitled to services under the two Acts are not co-extensive, although they may overlap. Furthermore, as was emphasised in **ex parte Watson** and the **Hertfordshire** cases, the recipients of after-care services under section 117 are a particular group of people with particular needs who may never be, or have been, in receipt of services under the Care Act 2014 and will not necessarily be, or have been, provided with accommodation under either Act.

112. As I have noted, the aim of reducing anomalies in cases where accommodation is provided, at least pursuant to the 1983 Act, is achieved by section 39(4) of the 2014 Act which provides that the authority which owes duties under the 1983 Act will owe any duties under the 2014 Act. But the very enactment of the subsection implicitly recognises that, because the test under the two statutes is different, the responsible body under the 2014 Act would otherwise not necessarily be the same as under the 1983 Act. Moreover, section 39 concerns itself only with the position under the 2014 Act and, other than the amendments to section 117(3) which I have explained, it did not make any other relevant changes to the position under the 1983 Act. As noted above, these changes are described in paragraph 446 as "minor", which is an accurate description of the move to make ordinary residence, rather than residence, the core concept. This description would not be apt if the intention was effectively to overturn the reasoning and the result in the **Hertfordshire** case.

113. As I have noted, the changes brought about by the 2014 Act did not include any provision to the effect that the concept of ordinary residence would always have the same meaning under both Acts, still less that accommodation provided under the 1983 Act, as opposed to detention under section 3, should not affect the ordinary place of residence or the duty to provide after care services under that Act. In the light of the reasoning in the **Hertfordshire** case, which emphasised the importance to the analysis of the deeming provision in section 24(5), this seems to me to be a glaring omission if the legislative aim was to ensure that the provision of accommodation under the 1983 Act should be disregarded in the same way as it is under the 2014 Act, and to ensure that a person's place of ordinary residence could never differ as between the two Acts. The view in the **Hertfordshire** case that there was no discernible difference between a person's *"residence"* and their *"ordinary residence"* also supports the conclusion that the introduction of the latter term into section 117(3) would not be sufficient to achieve the result contended for by Mr Buley and Ms Etiebet.

114. But there were various other amendments made by section 75 which tend to reinforce the argument that what Parliament did not do when it amended the 1983 Act is instructive in the context of the present case. Section 75(1) amended section 117(2) so that it now provided that it was the duty of the *"authority to provide or arrange for the provision of,"* after-care services. The drafters of the 2014 Act therefore had well in mind the point that after-care services under the 1983 Act might be provided "out of area" and must be taken to have understood the implications, given the reasoning in the **Hertfordshire** case, if this was not directly addressed.

115. Section 75(5) inserted the following definition of *"after care services"* at section 117(6):

> *"(6) In this section, "after-care services", in relation to a person, means services which have both of the following purposes—*
>
> *(a) meeting a need arising from or related to the person's mental disorder; and*
>
> *(b) 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)."* (emphasis added)

116. The Explanatory Notes explain, at paragraphs 449 and 450, that new section 117(6):

> *"449…. makes clear that section 117 services must meet a need arising from or related to the person's mental disorder. Additionally, the purpose of these services must be to reduce the risk of deterioration in the person's mental condition and, accordingly, to reduce the risk of the person's re-admission to hospital for treatment for mental disorder.*
>
> *450.The definition of after-care services is nevertheless broad. For example, after-care can encompass health, social care and employment services, supported accommodation and services to meet the person's wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient's mental disorder, and help to reduce the risk of a deterioration in the patient's mental condition."* (emphasis added)

117. These paragraphs indicate the breadth of the services which may be provided under section 117 but they also emphasise that, as is apparent from the terms of section 117(6), the services are provided for a specific purpose. This purpose is not the same as the purpose for which services are provided under the 2014 Act which, as noted above, is the broader one of meeting the support and care needs of adults. New section 117(6) therefore tends to reinforce the delineation of the roles of the 2014 Act and the 1983 Act and to undermine arguments that they should necessarily be read consistently with each other.

118. Section 75(6) then inserted a new section 117A which enabled the introduction of regulations which would provide for the individual to express a preference for particular accommodation and for them to be charged for any additional costs incurred as a result of the provision of such accommodation pursuant to their preference. Subsections 75(7)-(13) then made various detailed consequential or equivalent amendments to the Social Services and Well-being (Wales) Act 2014 and to the 1983 Act itself. Whilst these amendments are not directly relevant for present purposes, they are further evidence that section 117 received thorough and detailed consideration by Parliament, which makes the omission of any equivalent disregard to sections 24(5), 105(6) and 39(1) and (5) the more striking. As Mr Parkhill submitted, it is one thing for the Supreme Court to reach a policy driven interpretation where there is clear evidence of the statutory purpose. It is quite another to do so where there is no such evidence, despite the fact that Parliament has carried out a detailed overhaul of the relevant aspects of the legislation and has made various changes, but not the one which would achieve the policy objectives contended for.

The position of the Law Commission, and the White Paper

119. I was helpfully shown passages from Law Commission Consultation Paper No 192 dated February 2010, Law Commission Report No 326, HC 941, *"Adult Social Care"* dated 11 May 2011, and the White Paper government response *"Reforming the law for adult care and support"* Cm 8379, dated July 2012. The second and third of these documents were referred to at paragraph 5 of the Explanatory Notes to the 2014 Act, as noted above. Neither side ultimately claimed that these materials pointed to a clear answer to the issues before me or added a great deal to the Explanatory Notes, although Mr Buley emphasised the apparent aim to remove anomalies. For completeness I note the following points.

120. Consideration was apparently given to bringing the provision of after care services under section 117 into the scope the new single adult care statute but it was decided that this would remain as *"a standalone community care provision in the Mental Health Act 1983"*. Paragraph 11.57 of the Consultation Paper explained that:

> *"The main reason for this is that section 117 applies to a specific group of former mental health patients whose needs are linked directly to the 1983 Act, since services are required in order to reduce their chance of being readmitted to hospital. Furthermore, section 117 cannot be described as a pure social care enactment, since it establishes a joint duty on social services and the NHS and would not fit easily into our proposed statute. However, we consider below whether section 117 could or should be more fully integrated within the legal framework for the provision of adult social care services."*

121. The 2011 Law Commission Report noted, at paragraph 11.85, that: *"The majority of responses…agreed that in principle the concept of ordinary residence should be extended to section 117 services and that the current effect of section 117 should be retained. However, there was disagreement about the best way to achieve this."* The **Hertfordshire** case was then specifically considered in the May 2011 Report at paragraphs 11.86-11.88. The result in that case was a matter of concern to some local authorities but was supported by others. Paragraph 11.88 of the Report explained that:

> *"Several local authorities expressed concern about the implications of this judgment and argued that under our scheme, responsibility for funding section 21 accommodation should remain with the placing authority as it would do under the ordinary residence rules. However, some consultees argued that the effect of this judgment should be retained since it means that service users will receive support from social workers who work in the local area and are aware of locally available services. Others argued that the specific and cyclical nature of mental illness meant that the last authority in which the patient was living should only have section 117 responsibility until any further detention occurred."* (emphasis added)

122. Paragraph 11.91 of the Report stated that the view of the Law Commission was that *"there may be legal advantages to changing current policy and applying the same rules to section 117 service users that currently apply under the 1948 Act."* This would give greater clarity and consistency and in principle there was no reason why section 117 service users should be treated differently in this respect. But this specific issue had not been consulted on and changing the current rules would alter existing funding responsibilities, although it would not appear to have overall resource implications.

123. At paragraph 11.92, the Law Commission noted that the Government had suggested in its response that *"it might be better to take the opportunity of a new statutory framework to review, as a matter of policy, whether and to what extent, the distribution of local authority responsibilities under section 117 should be brought in line with those under the main ordinary residence rules"*. Its recommendation, number 63, was therefore that:

> *"The concept of ordinary residence should be extended to apply to after-care services provided under section 117 of the Mental Health Act 1983. The issue of how the ordinary residence rules should be applied to section 117 should be taken forward as a general review of the policy of the Government and Welsh Assembly Government."* (emphasis added)

124. In the White Paper, Recommendation 63 was then accepted in these terms:

> *"We similarly support the Law Commission's recommendation 63 that the concept of ordinary residence should be extended to apply to people receiving services under section 117. This would address the problem in some cases of a person's mental health needs being catered for by one authority and their other needs by another and help reduce some of the anomalies associated with this type of care and support."*

125. Unfortunately, this paragraph did not directly address the proposal, in the second part of Recommendation 63, that there be a review of how the ordinary residence rules should be applied to section 117. But it appears, from the legislation which emerged,

that the decision was to go no further than was stated i.e. to make ordinary residence, rather than residence, the primary criterion but to retain the approach in **Hall** in cases where there was no ordinary residence in England and Wales.

126. Paragraph 11.31 of the White Paper also stated:

> *"Section 117 is a freestanding duty because some of the specific characteristics of these services do not apply to mainstream care and support. The most significant of these is that after-care services cannot be charged for and must be provided free of charge. Whilst we wish to remove some of the anomalies of section 117 by specifically applying certain provisions to after-care services (as per recommendations 61-63), we do not intend to change its status. In our view, it would be more straightforward to retain section 117 as a freestanding provision, albeit amended as proposed in other recommendations."*

127. If anything, the Law Commission materials and the White Paper therefore tend to be against Mr Buley and Ms Etiebet's argument, in my view. They are right to say that the intention which lay behind the amendments to section 117 which were made by section 75 of the 2014 Act was to remove or reduce anomalies but this much is also clear from the Explanatory Notes and section 39(4), which I have considered above. The fact that the **Hertfordshire** case was specifically considered, and that there were policy arguments put forward as to why its outcome was desirable, demonstrates that it cannot be assumed that the aims and approach of the social care legislation are the same as those of section 117, even after it was amended. So does the fact that the view was clearly taken that the latter could not be assimilated into the former, albeit some of the provisions of the 2014 Act, including the amendments, would bring the two regimes closer to each other.

128. The fact that the **Hertfordshire** case was specifically considered also lends support to the view that if the intention had been to achieve a fundamentally different position or outcome to the one in that case, this would have been made clear by the provisions of the 2014 Act. Some of the discussions in the Law Commission documents, and the way in which Recommendation 63 was accepted in the White Paper are a little opaque, and Counsel were not able to shed much light on the meaning of certain passages, but the overall impression which one is left with is that the idea of applying the 1948 Act approach to the 1983 Act was left for further consideration, rather than adopted, and that ultimately more minor changes were made to the existing arrangements, as the Explanatory Notes indicate.

The Defendant's statutory guidance

129. Also as part of the context for the 2014 Act I note that the *"Guidance on the identification of the ordinary residence of people in need of community care services, England"* published by the Department of Health in July 2011 and then October 2013 clearly stated in bold, at paragraph 184 of the former and 185 of the latter, that:

> **"The term "resident" in the 1983 Act is not the same as "ordinarily resident" in the 1948 Act and therefore the deeming provisions (and other rules about ordinary residence explained in this guidance do not apply)."**

130. This tends to reinforce the view that the contrast in the approaches under the 1983 Act and the other social care legislation was well understood and that references to rules about ordinary residence in the Law Commission documents and the White Paper were to the deeming provisions of the 1948 Act.

131. I also note, although not as an aid to construction, that paragraphs 19.63 -19.66 of the Defendant's *"Care and support statutory guidance"*, which was published on 10 March 2016 and was last updated on 24 June 2020, explain the amended section 117(3) and its relationship with the Care Act 2014 as a result of section 39(4). Paragraph 19.67 then states:

> *"There are several provisions in the Care Act (section 39(1)-(3) and (5)-(7) and paragraph 2 of Schedule 1) which deem a person to be ordinarily resident in a particular local authority's area in specified circumstances for the purposes of Part 1 of the Act. These deeming provisions do not apply to section 117 of the 1983 Act, nor have they been incorporated into section 117 of the 1983 Act."* (emphasis added)

132. This was the position of the Defendant even after the **Cornwall** decision and, indeed, at the time of the decision which is the subject of this case, despite the fact that, on 26 October 2018, amendments were made to Chapter 19 of the Guidance in the light of the **Cornwall** case. Clearly, the Guidance could have been wrong and/or could have gone on to say that accommodation provided under the 1983 Act should nevertheless be disregarded. Ultimately it is for the court to decide the position in law. But the fact that this was the Defendant's position cannot be without significance given that the Guidance was issued pursuant to section 78 of the 2014 Act, the effect of which is that local authorities were obliged to comply with it in the exercise of their functions. At the very least it tends to reinforce the impression that the difference in the approaches under the 2014 Act and the 1983 Act was both well understood and widely accepted before the Defendant's decision of 28 February 2020.

Conclusion on Proposition 1

133. For all of these reasons, then, I consider that Proposition 1 is wrong in law. As the Defendant held in his initial decision in 2017, immediately before her second period of detention JG was ordinarily resident in Swindon.

PROPOSITION 2

134. As noted above, Proposition 2 is advanced by the Defendant in the alternative. It is that where there has been a period of detention, immediately followed by a period of after-care, immediately followed by a second period of detention, section 117(3) of the 1983 Act requires a decision as to the ordinary residence of the person immediately before they were first detained, rather than immediately before their most recent period of detention.

135. The reasoning which is said to support this proposition is at paragraphs 56-68 of the decision of 28 February 2020 and it was supported and supplemented by Mr Buley in argument. Essentially it is that section 117(3) is ambiguous or unclear as to the position where a person is subject to more than one period of detention. Whilst there are competing policy arguments as to what is desirable in the context of the 1983 Act –

essentially, continuity of responsibility versus the desirability of responsibility lying with the area in which the professionals who are assisting the person are based – the policy aims recognised in the **Cornwall** case should govern the interpretation of section 117 and these are best achieved by the Defendant's construction. He adds that the Worcestershire's interpretation creates the potential for undesirable results where a person was subject to a series of short detentions with after care placements out of area on each occasion.

136. I reject Proposition 2. It seems to me that section 117 contemplates that on each occasion that a person is to cease to be detained under section 3, or any of the orders or directions referred to in section 117(1) of the 1983 Act, and is to leave hospital, the question as to appropriate after-care services will arise and will be addressed by whichever bodies owe the section 117(2) duty at that time. Consistently with this, the responsibility for the services to be provided after that period of detention will fall on the area in which they were ordinarily resident etc when the decision to detain them was made i.e. immediately before that period of detention. I do not consider that the words of the provision are ambiguous or unclear.

137. Even if I did consider that the words of section 117(3) are unclear, the case that the policy considerations which underpin the Children Act 1989 and the Care Act 2014 apply equally to the Mental Health Act 1983 is not made out for the reasons I have given in analysing Proposition 1 and the **Cornwall** case. Section 117 is a free standing provision which serves related but different objectives and the 1983 Act does not contain a provision equivalent to section 105(6) of the 1989 Act or section 39(1) of the 2014 Act which would support the argument that the policy objectives of all three Acts are identical in terms of who should owe the relevant duties. As the Defendant also acknowledges, there are policy arguments in favour of Worcestershire's construction although neither solution is necessarily perfect.

138. In my view there are also considerable potential difficulties with the Defendant's proposed construction in that it attributes different meanings to the phrase *"immediately before being detained"* according to the facts of the case to which they are being applied. On Mr Buley's argument, if there is a single period of detention, then the issue as to responsibility for the provision of after-care services is to be addressed immediately before that period of detention. If there is a period of detention followed by a period of after-care services which then comes to an end, and there is subsequently a second period of detention, then responsibility for the after-care services in relation to that, second, period of detention depends on the place of ordinary residence immediately before the second period of detention. It is only if the provision of after-care continues throughout the interregnum between the two periods of detention that the position before the first period of detention is decisive. One could multiply the potential complications if there were a series of more than two periods of detentions with periods of after-care services in between but is it not necessary to spell these out. In my view, these considerations mean that Mr Parkhill is right to submit that the court is effectively being asked by the Defendant to write words into the statute but with no legitimate basis for doing so.

139. Again, although I accept that ultimately it is for me to decide the correct interpretation of the legislation, I note that the conclusion which I have reached on Proposition 2 is consistent with paragraph 188 of the *"Guidance on the identification of the ordinary residence of people in need of community care services, England"* which was published

by the Department of Health in July 2011 and with paragraph 189 of the October 2013 version. Similarly, paragraph 19.64 of the Defendant's *"Care and support statutory guidance"*, issued after the **Cornwall** decision, states:

> *"Although any change in the patient's ordinary residence after discharge will affect the local authority responsible for their social care services, it will not affect the local authority responsible for commissioning the patient's section 117 after-care. Under section 117 of the 1983 Act, as amended by the Care Act 2014, 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."* (emphasis added)

PROPOSITION 3

The competing arguments

140. Here, the proposition of law is that the effect of section 117(2) of the 1983 Act is that the duty to provide after-care arising from a period of detention continues until *"the clinical commissioning group or Local Health Board and the local social services authority [that they are] are satisfied that the person concerned is no longer in need of such services"*. There therefore has to be a decision by these bodies as to the needs of the person. That is so even if there is a second period of detention. On the facts, no such decision was taken by Worcestershire in the present case and the duty triggered by JG being released from her first period of detention therefore continued notwithstanding her second period of detention. Swindon therefore never owed any duty under section 117 even if JG was ordinarily resident there immediately before her second period of detention.

141. The reasoning relied on to support this proposition is set out at paragraphs 17 and 69-77 of the Defendant's decision. Essentially, the argument is that section 117(2) states that the duty to provide the after-care services continues until there is a joint decision of the clinical commissioning group and the social services authority that the person no longer needs them. In a case where the person was detained again it might be decided that they were no longer in need of the after-care services referrable to the previous period of detention, say because their stay in hospital was going to be a lengthy one. But a decision would still be needed and that would not be the decision in every case: it would depend on the circumstances, including the nature of the services being provided, the continuing needs of the person and the likely length of the period in hospital.

142. The Defendant argues that it cannot be the case, as Worcestershire submits, that the duty under section 117(2) ceases when a person is detained under section 3 for a second time simply because section 117(1) only applies to people who have ceased to be detained under section 3. The logic of this argument would require that the duty came to an end when the person was admitted to hospital, whether or not they were detained

for a second time, given that the duty is only owed to those who *"cease to be detained and (whether or not immediately after so ceasing) leave hospital"*. The Defendant supports this argument by reference to paragraph 33.21 of the Mental Health Code of Practice which was issued by the Defendant pursuant to section 118 of the 1983 Act on 15 January 2015 and updated 31 October 2017. This states that section 117 services should not be withdrawn solely on the grounds that the patient has returned to hospital *"informally or under section 2 of the 1983 Act"*. This passage is said to be inconsistent with the idea that the mere fact that a person is detained for the time being shows that their need for services has lapsed. Although paragraph 33.21 is concerned with detention under section 2, rather than section 3, this is said to make no difference to the analysis.

143. Mr Parkhill, on the other hand submits that section 117(1) describes the person to whom section 117 applies and section 117(2) states in terms that the duty to provide after-care services is owed to persons to whom section 117 applies. Since it applies to persons who have ceased to be detained under section 3, the duty cannot be owed to people who are in fact currently detained under section 3, even if they ceased to be so detained on a previous occasion. He argues, by analogy with **R(G) v London Borough of Southwark** [2009] 1 WLR 1299 HL [32], that the duty cannot be owed to a person who does not fit the description in section 117(1) and that satisfying this description is a condition precedent to the duty arising and then continuing. Since section 117(1) is concerned with people who were detained for treatment under the specified provisions, detention under section 2 is irrelevant. Any other construction would lead to potentially absurd results as, if Mr Buley is right, there is the potential for a second and parallel duty to provide after-care services to be triggered at the end of a second period of detention. Mr Parkhill also submits, correctly, that recourse to the Mental Health Code of Practice for the purposes of construing section 117 is impermissible: see **R(CXF) v Central Bedfordshire Council & another** [2019] 1 WLR 1862 CA [22]-[25].

144. Mr Parkhill argues that the central point of section 117(1) is that it identifies a class of individuals, namely those who have been detained in hospital for the purposes of treatment and requires that they be provided with after-care services when they cease to be detained for this purpose. By definition, after-care services are services which are provided in circumstances where the patient has not been admitted to hospital for treatment pursuant to section 3. This is why they are defined by section 117(6) as services which "*(b) [reduce] the risk of a deterioration of the person's mental condition (and, accordingly, [reduce] the risk of the person requiring admission to a hospital again for treatment for mental disorder"* (emphasis added). In this connection, Mr Parkhill places particular reliance on paragraph 38 of the decision in **CXF** where Leggatt LJ said:

> *"The clear purpose of section 117 is to arrange for the provision of services to a person who has been, but is not currently being, provided with treatment and care as a hospital patient. That purpose is implicit in the very expression "after-care", which is used not only in the heading but throughout the body of section 117 in the phrase "after-care services". It is further articulated by the definition of "after-care services" in section 117(6). As specified in section 117(6)(b), to constitute after-care services, the services must have the purpose of "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)". That purpose is only capable of being fulfilled if the person concerned is not currently admitted to a hospital at which he or she is receiving treatment for mental disorder."

Conclusion on Proposition 3

145. I reject Proposition 3, although for slightly different reasons to those suggested by Mr Parkhill. It is plainly right that, as Mr Buley submits, absent a second period of detention, section 117(2) requires a decision to be taken by both of the bodies which owe the patient the duty under section 117. That decision has to be about the needs of the patient and, if provision is to be brought to an end, it has to be to the effect that the after-care services are no longer needed.

146. I also agree with Mr Buley that section 117(1) identifies the circumstances in which the duty will arise and section 117(2) identifies when and how it comes to an end, rather than section 117(1) identifying qualifying conditions for the continuation of the duty. The problem with Mr Parkhill's condition precedent argument is that it proves too much: the person described in section 117(1) has to have ceased to have been detained under section 3 and then left hospital. Logically, Mr Parkhill's argument therefore has the consequence that any readmission to hospital, whether voluntary or otherwise, would mean that the duty came to an end. Indeed, this is also the implication of Mr Parkhill's argument based on section 117(6).

147. I do not accept that section 117(6) should be read as indicating that, once the duty to provide after-care services has arisen, they cannot even in principle be made available to a person after any readmission to hospital. Nor does the text of this provision support Mr Parkhill's attempt to meet this point by arguing that section 117(6)(b) it is intended to refer to readmission under one of the provisions specified in section 117(1). If this were its intention the section would have said so. As paragraphs 449 and 450 of the Explanatory Notes indicate, after care services are a broad concept and the fact that they may include healthcare renders arguments which have the consequence that any admission to hospital will automatically bring the section 117 duty to an end, unattractive. In this connection see, also, paragraph 33.2 of the Code of Practice.

148. In my view the answer to Proposition 3 is that, as a matter of construction, sections 117(2) and (3) contemplate that one clinical commissioning group and one local services authority will owe the person described in section 117(1) the section 117(2) duty, and that they will become subject to that duty when it is triggered under section 117(1). The duty will be triggered by the discharge of the person from section 3 detention and their release from hospital, and there is therefore a need to identify which bodies owe the duty at this stage and on each occasion that this occurs. Absent the intervention of any further detention, the clinical commissioning group and local services authority for the area identified under section 117(3) will then continue to owe the duty until such time as there is a section 117(2) decision.

149. In a case where there is then a second period of detention under section 3, the question of after-care services will arise again when the person is due to be released and leave hospital. As I have held in rejecting Proposition 2, the clinical commissioning group and the local services authority identified by section 117(3) in respect of the second section 3 detention will owe the duty to provide after-care services arising out of that period of detention. If, at that point, the answer to the section 117(3) question has

changed, for example because, immediately before the second period of detention, the person was no longer ordinarily resident in the area of the clinical commissioning group and the local services authority which previously provided after-care services, these bodies will not owe the section 117 duty which arises out of the second period of detention.

150. That is what happened in this case. Immediately before JG's second period of detention she was ordinarily resident in Swindon. When the issue arose as to after-care services in the context of her release from her second period of detention the effect of section 117(3) was that the duty was owed by Swindon, rather than Worcestershire. On this basis, the Defendant was wrong to find that Worcestershire had any duty to provide after-care services after the duty to provide such services was triggered in respect of the second period of detention. The notion that the duty which had been triggered by the end of the first period of detention continued in parallel with the duty owed by Swindon in respect of the second period of detention, or instead of that duty, seems to me to highly artificial and contrary to the intention of Parliament that the section 117(2) duty will be owed by the bodies identified under section 117(3) by reference to the relevant, here the second, period of detention.

151. It follows that, whether or not there is a need for a decision under section 117(2), I reject the conclusion in Proposition 3 that Worcestershire continued to owe a duty to provide after-care services to JG after the point at which Swindon's duty under section 117 was triggered by the ending of JG's second period of detention and her release from hospital. No decision by Worcestershire under section 117(2) was required to achieve the result that Swindon was responsible for the provision of after-care services to JG at that point. That was simply the effect of section 117(1) being satisfied in respect of the second period of detention, and the application of section 117(3) to the facts.

Did Worcestershire need to make a decision under section 117(2) to bring its section 117 duty to an end notwithstanding JG's second period of detention?

152. This leaves the question whether a decision was nevertheless needed to bring Worcestershire's section 117 duty, which arose at the end of the first period of detention, to an end if it was to end before the duty on the part of Swindon arose. Here, for the reasons I have given I agree with Mr Buley that, even where there is a subsequent detention under section 3, a decision as to the discontinuation of after-care services whilst the person is in hospital is needed on the basis required by section 117(2). The decision may well be that the needs of the patient are being met by the hospital in the course of their treatment and that they therefore do not need after-care services, at least for the time being, given that a further decision as to their needs will be taken when they are due to leave hospital. This may well almost invariably be the position, but I have not been shown evidence which would enable me to say what sorts of situations typically arise and so I express no firm view.

153. What I do not accept is that Parliament intended that this would automatically be the position as soon as there was a further period of detention given the terms of section 117(2), and given that it is conceivable that there may be circumstances in which it is necessary to continue certain after-care services whilst the person is detained in hospital or at least for an initial period after admission. I consider that Mr Parkhill's condition

precedent argument is wrong as a matter of statutory construction, as I have explained. But it also introduces a lack of flexibility into a situation where the needs of the patient are required to be uppermost in the minds of the decision makers. The Defendant's analysis, on the other hand, ensures that the professionals are in control and make decisions by reference to the person's needs. I also consider that an analysis which maximises flexibility and prioritises the person's needs, as well as continuity of care, is consistent with the pragmatic approach in **R(B) v London Borough of Camden** [2005] EWHC 1366 [57]-[60] which, at the very least, encourages responsible bodies to plan ahead even where the section 117 duty has not yet arisen.

154. Paragraph 57 of the **Camden** case and paragraph 38 of the **CXF** case, cited above, on which Mr Parkhill understandably relies, were concerned with identifying when the section 117 duty is triggered rather than when it comes to an end. These passages are not inconsistent with the position that, once the duty has arisen, a needs based decision to withdraw after-care services is required under section 117(2), albeit that decision may well be that after-care services are no longer needed by the person whilst they are detained under section 3.

Did the Defendant err in finding that Worcestershire had not made a valid decision to bring its section 117 duty to an end?

155. Turning, for completeness, to the factual question whether any decision was made under section 117(2) in the present case, the Defendant found as a fact that there had not been. This is unsurprising given that this is what he was told by Worcestershire. Very briefly, the history is that:

i) As noted above, the initial decision of the Defendant was that Swindon was liable. This did not involve any finding as to whether a decision had been made under section 117(2) as the arguments essentially revolved around the decision in the **Cornwall** case.

ii) In the context of the review of the initial decision, the Defendant then wrote to the parties on 19 September 2018 seeking clarification on two issues. The letter said this:

> *"WCC placed [JG] in Swindon's area, pursuant to section 117. She remained entitled to and in receipt of section 117 support until her re-detention under section 3 of the 1983 Act on 23 June 2015.*
>
> *The first issue on which the Secretary of State seeks clarification, and comments or legal submissions you may wish to make, is whether [JG] was ever discharged from the provision of section 117 support by WCC. In particular, is there any information or contemporaneous documentation (or any other reason or argument) to suggest that [JG] was formally discharged from the provision of aftercare support under section 117(2), on the basis that such support was no longer necessary to meet her needs?*
>
> *In the event that no such formal discharge took place, and in any event, the Secretary of State would welcome your submissions on whether WCC's pre-*

existing duty under section 117 continued, or ceased, whether by operation of law or otherwise, during the period that [JG] has been detained under section 3 of the 1983 Act. In the event that WCC's original section 117 duty continued during the detention it would appear to do so on any further discharge from detention, in which case it is not necessary to consider whether any new duty arose or who would be responsible under section 117(3) as it now stands." (emphasis added)

iii) The Claimant responded to this request by written submissions dated 10 October 2018 and signed by Mr Parkhill. This document dealt with both of the issues raised by Defendant. In relation to the first issue it included the following:

*"**Was JG discharged from s. 117 provision, before being re-detained?***

6. The first issue on which the Secretary of State seeks clarification, is whether JG was ever discharged from the provision of s. 117 support by Worcestershire. The answer is no; there was no decision to discharge JG from s. 117 services, and JG remained in receipt of s. 117 support up to the date on which she was again detained under s. 3 of the 1983 Act, in June 2015.

Did Worcestershire's s. 117 duty persist during JG's second period of detention?

7. If, as was the case, JG was not discharged from s. 117, the Secretary of State seeks submissions on whether Worcestershire's duty under s. 117 continued, or ceased, during when JG was detained under s. 3 of the 1983 Act, between June and November 2015." (emphasis added)

iv) Worcestershire's submissions went on to argue that a further detention automatically brings the duty to and end as a matter of law.

156. Mr Parkhill now seeks to argue that in fact a section 117(2) compliant decision was in fact taken by Worcestershire. The evidence on which he relies is contained in the witness statement of Heather Griffiths, the solicitor with conduct of the proceedings on behalf of Worcestershire, dated 26 May 2020. At paragraph 8 she says: *"As a result of JG's re-admission to hospital, the Claimant issued a 'termination notice' to the care home which had been accommodating JG in Swindon"*. That notice, which is dated 4 August 2015, i.e. approximately 6 weeks after JG was detained for the second time under section 3, is exhibited. It appears to be a standard form notice addressed to the residential care home in which JG had been resident, simply instructing it, in a single line and with no explanation, to cease to supply services to her. No other evidence is submitted in relation to the claim that a section 117(2) decision was made by Worcestershire.

157. Given that the Defendant was told that JG was never discharged from the provision of section 117 support, it cannot be said that he erred in law in proceeding on this basis. His error of law was the more fundamental one which I have identified above. Mr Parkhill argues that it would be unfair to Worcestershire for it to be prevented from relying on the evidence of the 4 August 2015 termination notice. He says that the words *"WCC placed [JG] in Swindon's area, pursuant to section 117. She remained entitled*

to and in receipt of section 117 support until her re-detention under section 3 of the 1983 Act on 23 June 2015." before the Defendant set out the first issue in his letter of 19 September 2018 led Worcestershire to understand that the question was whether JG had been discharged before she was re detained. Whether or not that was the Worcestershire's understanding, the real question is whether they were given a fair opportunity to put forward this aspect of their case to the Defendant. In my judgement they were. As noted above, the question was very clearly put with reference to section 117(2) and its scope was not time limited. The response stated the question as being whether JG was *"ever discharged"* and said that *"the answer was no"* albeit I accept that it then went on to say that JG remained in receipt of s117 services until she was re detained.

158. In any event, the answer which Worcestershire gave to the Defendant was correct on the evidence. As I have held, the discharge of the section 117 duty requires a joint decision by both of the bodies which owe the duty that they are *"satisfied that the person concerned is no longer in need of such services"* i.e. a joint decision about the needs of JG. The termination notice appears to be no more than the result of an administrative decision by one of the parties which owed the duty to JG to terminate one aspect of the services provided to her. It makes no reference to her needs, nor to any services other than accommodation. That there was no section 117(2) decision is also unsurprising given that at all material times Worcestershire's position, apparently reflecting its understanding, was that no such decision was required given that the effect of a further period of detention was automatically to bring the section 117 duty to an end.

159. Having said all of this, it appears that the reality is that Worcestershire ceased to fund the provision of accommodation to JG. Whether it did so in breach of section 117(2) also appears to be academic. As far as I am aware, there are no other after-care services which are relevant to the present inquiry but insofar as there were, and the costs of these were incurred before the section 117 duty was triggered in respect of the second period of detention, it seems to me that the loss should lie where it fell. The important point is that I disagree with the Defendant's view that because there was no section 117(2) compliant decision it follows that Worcestershire, and not Swindon, owed the duty to provide after-care services in respect of JG's release from her second period of detention.

CONCLUSION

160. For all of these reasons, then, I propose to quash that decision of the Defendant dated 28 February 2020, on the grounds that it was erroneous in law.