Neutral Citation Number: [2021] EWCA Civ 1957

Case No: C1/2021/0681

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Mr Justice Linden
[2021] EWHC 682 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2021

Before :

LORD JUSTICE COULSON
LADY JUSTICE CARR
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

The Queen on the application of Worcestershire County Council	**Respondent**
- and -	
Secretary of State for Health and Social Care	**Appellant**
- and –	
Swindon Borough Council	**Interested Party**

- -
- -

Tim Buley QC (instructed by **Government Legal Department**) for the **Appellant**
Lee Parkhill (instructed by **Worcestershire County Council**) for the **Respondent**

Hearing Date : 2 December 2021

- -

Approved Judgment

LORD JUSTICE COULSON :

1 INTRODUCTION

1. This is another dispute about which of two local authorities should pay for care services, in this case after-care services pursuant to s.117(3) of the Mental Health Act 1983 ("the 1983 Act"). The service user, JG, was detained, released and then, sometime later, detained again under the 1983 Act. The primary issue, as presented both below and on appeal, was where she was "ordinarily resident…immediately before being detained" for the second time, for the purposes of s.117(3)(a) of the 1983 Act. Linden J ("the judge") concluded, in a painstaking judgment, that the answer was Swindon Borough Council ("Swindon") because that is where she was living at the time of her second detention. The appellant maintains on appeal that the answer was Worcestershire County Council ("Worcestershire"), the respondent to the appeal, because they had originally placed her in a care home in Swindon. It was accepted that she was ordinarily resident in Worcestershire prior to her first detention.

2. The argument as to the proper interpretation of "ordinarily resident" was the first of three different ways in which the appellant (with the support of Swindon, the interested party) sought to make Worcestershire liable for JG's care costs under s.117(3). All three had at their root the argument that Worcestershire owed the original duty to pay for the cost of JG's care, and could not seek to export that liability to another local authority by moving her to their area. As explained in greater detail below, the second way in which the appellant put that argument before the judge is not pursued on appeal.

3. However the third way in which liability was said to rest with Worcestershire gives rise to the second ground of appeal. That involved a consideration of when the (agreed) duty owed by Worcestershire at the time of JG's first detention came to an end (if at all). Worcestershire argued that their duty ceased when JG was detained for the second time. The judge disagreed with that but found, on a basis that had not been argued before him, that Worcestershire's duty ceased when JG was released from that second period of detention. The appellant appeals against that conclusion.

4. As became apparent during the hearing of the appeal itself, it seems to me that this second ground of appeal properly arises for consideration first. That is because, if the judge was wrong, then there may be no answer to the appellant's proposition that the original (agreed) duty owed to JG by Worcestershire never came to an end, no matter what the result of the argument about where JG was "ordinarily resident" at the time of her second detention.

5. I set out the facts in Section 2 below. I identify (without, I hope, excessive repetition), the salient part of the judge's judgment in Section 3. I summarise the relevant parts of the legislation and the authorities in Section 4. Thereafter, I deal with the second ground of appeal (the continuing duty issue) in Section 5, and the first ground of appeal (the 'ordinarily resident' issue) in Section 6. There is a short summary of my conclusions in Section 7. I am very grateful to both counsel for their clear and fair submissions.

2 THE RELEVANT FACTS

6. The patient, JG, has a diagnosis of treatment resistant schizoaffective disorder. She became known to Worcestershire in about 2011/2012 when she was living in Evesham in a local authority property. There were issues with both her mental and physical health. She spent time in Newtown Hospital in Worcester. There is no dispute that, in March 2014, she was ordinarily resident in Worcestershire.

7. On 20 March 2014, JG was detained at Newtown Hospital under s.3 of the 1983 Act. In April 2014, 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.

8. On 12 July 2014, JG's first period of detention came to an end and she was released to a care home in Swindon pursuant to s.117 of the 1983 Act. At this point she was still funded by Worcestershire. On 7 February 2015, following concerns that the first care home could no longer adequately meet JG's needs, Worcestershire moved JG to a second home in Swindon. JG's daughter was again part of the decision-making process. The placement in the second care home was again funded by Worcestershire.

9. On 27 May 2015, JG was detained in a hospital in Swindon under s.2 of the 1983 Act, for assessment. On 23 June 2015 she was detained for treatment under s.3 on the 1983 Act, again in Swindon. That was the start of her second period of detention.

10. On 4 August 2015, during her second period of detention, Worcestershire issued a termination notice to the care home in Swindon which had been accommodating JG. The judge found at [156] that it was a standard form notice addressed to the residential care home in which JG had been resident, simply instructing it in a single line with no explanation, to cease to supply services to her. Importantly, he found that this was not a decision by Worcestershire under s.117(2) of the 1983 Act that JG was no longer in need of after-care services.

11. On 12 November 2015, JG was discharged from detention under s.3 of the 1983 Act. She remained an in-patient. She was finally discharged from hospital on 9 August 2017. She was then in need of and received after-care services.

12. A dispute arose as to where JG was "ordinarily resident" immediately before she was detained under s.3 for the second time in June 2015, and which authority should pay for JG's after-care services from 9 August 2017, when she left hospital. The appellant was asked to determine this dispute under the mechanism provided for by s.40 (1) of the Care Act 2014 ("the 2014 Act"). On 11 May 2017, the appellant held that JG was ordinarily resident in Swindon, because that was where she was living immediately before her second period of detention. That conclusion was in accordance with the appellant's own statutory guidance issued pursuant to s.78 of the 2014 Act.

13. Swindon sought a review of that decision. On 28 February 2020, the appellant reversed his decision and decided that JG was in fact ordinarily resident in Worcestershire for "fiscal and administrative purposes". That was a phrase taken from the judgment of Lord Carnwath in *R (Cornwall CC) v Secretary of State for Health* [2016] AC 137 ("*Cornwall*"). In coming to that conclusion, the appellant acknowledged that it was at odds with his own guidance, but said that his change of

mind was based on both the legislation and the case law. He indicated that he was in the process of considering how that guidance should be amended. Counsel informed us that, as a result of this litigation, that guidance has not been amended.

3 THE JUDGMENT BELOW AND THE TWO GROUNDS OF APPEAL

14. The judge's judgment at [2021] EWHC 682 (Admin) extends over 160 full paragraphs. It addresses in detail every point raised by each party.

15. At centre stage was the appellant's decision of 28 February 2020, in which he had quashed his original determination (to the effect that Swindon was the relevant local authority) and replaced it with a determination that the relevant local authority was Worcestershire. The judge said that Worcestershire's claim for judicial review of that decision required them to show that each of the three propositions on which it was based was wrong in law. Those three propositions were set out by the judge at [29] as follows:

> "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**")"

16. The judge then went on to demonstrate how and why he considered that each of those three propositions was indeed wrong. The bulk of the judgment, from [31] to [133], was focused on Proposition 1 (the "ordinarily resident" issue). The judge found that JG was ordinarily resident in Swindon, not Worcestershire. He based this on:

    i) The general approach in the authorities to the words "ordinarily resident";

    ii) The interpretation of s.117 of the 1983 Act (prior to amendment) in *R (Hertfordshire County Council)* v *Hammersmith and Fulham London Borough Council* [2011] PTSR 1623 ("*Hertfordshire*");

    iii) His conclusion that the Supreme Court decision in *Cornwall* was concerned with different statutes, with different provisions, which required a different approach; and

    iv) His conclusion that the provisions of the 2014 Act, and the amendments that it made to the 1983 Act, were of minor significance and did not form a basis for departing from the decision in *Hertfordshire.*

17. For those reasons, he said that "ordinarily resident" was to be given its ordinary meaning, and not to be overlaid with concepts of "fiscal and administrative convenience"; on this basis, he found that JG was ordinarily resident in Swindon immediately before her second period of detention.

18. As to Proposition 2 (which, as I have said, no longer features directly in this appeal) the judge rejected the appellant's argument that, where there has been a period of detention, immediately followed be a period of after-care, immediately followed by a second period of detention, s.117(3) of the 1983 Act required 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. His views are set out in short order at [134]-[139].

19. As part of his reasoning on Proposition 2, the judge said at [136] that s.117 contemplated that, on each occasion that a person was to cease to be detained under s.3, the question of appropriate after-care service will arise and will be addressed by whichever bodies owe the s.117(2) duty at the time. The responsibility for the services to be provided after that period of detention will fall on the area in which they were ordinarily resident when the decision to detain them was made (in other words, immediately before what was, in this case, the second period of detention).

20. The judge considered that this conclusion had some bearing on Proposition 3, which he dealt with at [140]-[151]. The result was not one that either party had advocated. The appellant had argued that an existing duty to provide after-care services arising from a period of detention continued until the clinical commissioning group or local health board and the local social services authority were satisfied that the person concerned was no longer in need of such services, under s.117(2). He argued that, in the absence of such a decision, this duty continued even if there was a second period of detention. The appellant said that, because no such decision had been taken by Worcestershire, their original duty continued, notwithstanding the second period of detention. Thus it was said that Swindon never owed any duty under s.117, even if JG was ordinarily resident there immediately before her second period of detention.

Worcestershire argued that their continuing duty ceased when JG was detained for a second time.

21. The judge did not accept either party's case: see in particular [145]-[151]. Instead, building on his answer to Proposition 2, he concluded that Worcestershire's duty ceased by operation of law at the moment JG was released from her second period of detention.

4 THE LAW

4.1 The Relevant Legislation: The 1983 Act and the 2014 Act

22. 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 a relevant mental disorder and that it is in their interests, or the interests of others, that this step be taken. Section 3 provides for a patient to be "admitted to a hospital and detained there" for treatment on a number of grounds.

23. The relevant section of the 1983 Act for present purposes is s.117. In its *unamended* form, s.117 provided as follows:

> "**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.
>
> (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.
>
> (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."

24. As from 1 April 2015, s.75 of the Care Act 2014 made a series of amendments to the 1983 Act. Section 117(3) was amended 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"

25. Although the 2014 Act contained duties and requirements in respect of the provision of care services generally, in the present appeal the parties only referred to one section of the Act itself. That was s.39, which provided 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.

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

(3) The regulations may make provision for determining for the purposes of subsection (1) whether 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 the regulations…

(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; and for that purpose—

(a)"local authority in England" means a local authority for the purposes of this Part, and

(b)"local authority in Wales" means a local authority for the purposes of the Social Services and Well-being (Wales) Act 2014."

26. One of the arguments advanced by Mr Parkhill on behalf of Worcestershire was that, if Mr Buley was right about the interpretation to be given to "ordinarily resident" in s.117(3), this section, and in particular section 39(4), would be otiose. I return to that point in Section 6 (paragraphs 80 to 81) below.

4.2 Other Relevant Legislation

27. As explained in greater detail below, *Cornwall* (which is central to the appellant's case about the "ordinarily resident" test) is not a case under the 1983 Act at all. Instead it arises under particular provisions of the National Assistance Act 1948 ("the 1948 Act") and the Children Act 1989 ("the 1989 Act"):

i) Section 24 of the 1948 Act provides:

> "**24 Authority liable for provision of accommodation**
>
> (1)The local authority liable 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
>
> …
>
> (5)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."

ii) Section 20 of the 1989 Act provides:

> "(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—
>
> (a)three months of being notified in writing that the child is being provided with accommodation; or
>
> (b)such other longer period as may be prescribed."

iii) The reason why "that other local authority" may want to take over the provision of care is given in Section 29(7), which provides:

> "(7) Where a local authority provide any accommodation under section 20(1) for a child who was (immediately before they began to look after him) ordinarily resident within the area of another local authority, they may recover from that other authority any reasonable expenses incurred by them in providing the accommodation and maintaining him."

iv) Section 105(6) of the 1989 Act 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 an order under section 7(7)(b) of the Children and Young Persons Act 1969; or
>
> (c)while he is being provided with accommodation by or on behalf of a local authority."

28. For convenience I shall refer to these provisions of the 1948 and 1989 Acts as "the deeming provisions", although I am conscious that s.105(6) is more aptly described as a 'disregarding' provision. They are provisions which, for perfectly sensible reasons, maintain a fiction, and require the court to depart from what would otherwise be a clear answer as to residence, based simply on where the service user lived at the relevant time.

4.3 The Authorities

29. The leading case on the general approach to be taken to the words "ordinarily resident" is *R v London Borough of Barnet Ex parte Shah* [1983] 2AC 309, where Lord Scarman said at 343 G-H:

> "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".

Unsurprisingly, perhaps, this general approach has nothing expressly to do with concepts of fiscal or administrative convenience.

30. *Hertfordshire* is a decision of this Court relating to s.117 of the 1983 Act and the meaning of the words "is resident". It was decided prior to the amendments effected by the 2014 Act, and the addition of the word "ordinarily" in s.117(3). The case was also procedurally a bit of a mess, for the reasons explained by Carnwath LJ (as he then was) at [1]-[4]. The court was being asked to consider the facts of a different case, involving a service user called JM, to illustrate the problem that had arisen. Hertfordshire hoped that the court's consideration of this example would lead to the grant of a declaration, to the effect that the words "is resident" under the 1983 Act had the same or substantially the same meaning as the words "is ordinarily resident" in s.24 of the 1948 Act. It is necessary to understand the facts first, in order to see how the relief sought by Hertfordshire was ambitious, to say the least.

31. JM lived in Hammersmith and Fulham in a one bedroom council flat. He suffered from significant cognitive impairment. Following a serious road traffic accident he was provided with accommodation in a residential care home, still in the area of Hammersmith and Fulham. Eventually, it was decided that his needs could no longer be sustained in a community setting, and in July 2007 he was transferred to Roanu

House in Sutton. He was never happy there and sometimes returned to Hammersmith to sleep rough. Following a return to Roanu House he was admitted to Sutton Hospital, a psychiatric hospital, and eventually was compulsorily detained there under s.3 of the 1983 Act.

32. Sutton argued that "is resident" meant the same as "is ordinarily resident" under the 1948 Act, and that therefore the period in which JM was living in Roanu House should be disregarded (and that Hammersmith & Fulham were therefore the responsible authority). That was the same argument that Hertfordshire had advanced in their own case against Hammersmith & Fulham. At first instance, ([2010] EWHC 562 (Admin); [2010] LGR 678) Mitting J rejected that submission. He said:

> "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'."

33. Mitting J explained that one of the difficulties of using provisions in other legislation to define the term in the 1983 Act was that the other legislation contained different provisions. So, for example, he said, s.24(5) of the National Assistance Act 1948 expressly dealt with someone who was provided with residential accommodation, and provided that that person would be "deemed" for the purposes of the 1948 Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided. Mitting J said that what was deemed to occur for the purposes of the 1948 Act could not be transposed into the 1983 Act, which contained no similar provision.

34. The decision of Mitting J was upheld by the Court of Appeal. Carnwath LJ expressly noted at [17] that s.117 contained no deeming provision corresponding to s.24(5) of the 1948 Act. In addition, at [18], he referred to the decision of the House of Lords in *R v Richmond upon Thames London Borough Council Ex parte Watson* [2002] 2AC 1127, where the House held that s.117 was a freestanding provision which both imposed the duty and conferred the power to provide after-care services independently of the 1948 Act.

35. Carnwath LJ therefore concluded that Mitting J had been right to conclude that Sutton was responsible for the after-care services. He said:

> "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)…."

36. The *Cornwall* case, decided in 2015, was at the heart of Mr Buley's submissions to the judge and on appeal. The patient, PH, was cared for in Wiltshire by his parents until 1991 when, pursuant to s.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. Once that happened a placement was found for him in a care home in Somerset.

37. The issue was where PH was ordinarily resident for the purposes of s.24(1) of the 1948 Act. The Secretary of State decided 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 (which was South Gloucestershire), this presumption had been rebutted by his ties with his parents who were in Cornwall. The High Court agreed. The Court of Appeal reversed that ruling and concluded that the responsible authority was South Gloucestershire (the equivalent of Swindon in the present appeal). The Supreme Court disagreed, holding by a majority that PH was ordinarily resident in Wiltshire (the equivalent of Worcestershire in the present appeal) because of their original funding obligations.

38. The decision has attracted a certain amount of criticism, not least from Lord Wilson, who dissented and agreed with the Court of Appeal that the answer was where PH actually lived, namely South Gloucestershire. He pointed out that the answer given by the majority – Wiltshire - had not been contended for by any of the parties. He expressly warned at [66] that, although the majority's view was said to be based on the policy behind the statutes, judges were not legislators.

39. It might also be respectfully noted that the precise basis on which the majority reached their conclusion is not as clear as it might be (and was therefore the subject of extensive debate in the present appeal). However what can be said with confidence is that the decision was reached on policy grounds. Lord Carnwath said:

"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.

54. The question therefore arises whether, despite the broad similarity and obvious underlying purpose of these provisions (namely that an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it), there is a hiatus in the legislation such that a person who was placed by X in the area of Y under the 1989 Act, and remained until his 18th birthday ordinarily resident in the area of X under the 1989 Act, is to be regarded on reaching that age as ordinarily resident in the area of Y for the purposes of the 1948 Act, with the result that responsibility for his care as an adult is then transferred to Y as a result of X having arranged for his accommodation as a child in the area of Y.

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…

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 18th 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. It may seem harsh to Wiltshire to have to retain indefinite responsibility for a person who left the area many years ago. But against that there are advantages for the subject in continuity of planning and financial responsibility. As between different authorities, an element of arbitrariness and "swings and roundabouts" may be unavoidable**"**

40. In arriving at these conclusions, Lord Carnwath distinguished *Hertfordshire* on the basis it was decided under a different Act. He said at [56]:

> "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."

41. In his judgment below, the judge considered these paragraphs carefully. His conclusion was that, not only had Lord Carnwath not questioned the correctness of the decision in *Hertfordshire*, but he had explained its result on the basis that the issue in that case arose under a different statute and was therefore subject to different considerations, specifically the lack of an equivalent deeming provision in the 1983 Act. The judge below therefore held that *Hertfordshire* was not inconsistent with the conclusion which Lord Carnwath had reached in *Cornwall*.

5 GROUND 2: WORCESTERSHIRE'S CONTINUING DUTY

5.1 The Factual Context and The Competing Arguments

42. It is important, first, to identify the factual context for the dispute about Proposition 3 and the second ground of appeal (which I am taking first, for the reasons that I have explained). I would summarise that context in these terms:

    a) It is common ground that Worcestershire owed JG a duty to provide after-care services following her release from her first period of detention in 2014. That was because she was resident in Worcestershire when she was detained for the first time.

b) Worcestershire argued before the judge that – by sending the termination notice described in paragraph 10 above - they had made a decision which terminated their duty under s.117(2). The judge rejected that submission, and found as a fact at [155]-[159] that Worcestershire had never made a valid decision to bring their s.117 duty to an end. That finding of fact is not challenged on appeal.

c) As a result, Worcestershire had to say that their duty somehow came to an end by operation of law. Their original argument was that the duty came to an end when JG was detained for a second time. The judge rejected that submission too. Again, there is no appeal against that rejection.

d) So if the duty was still extant when JG was detained a second time, and if it was not terminated as a matter of fact, how and when – if ever – did it come to an end? The judge found that the duty came to an end by operation of law at the point when JG was released at the end of her second period of detention. As I have said, that was not a point that had been argued before him.

43. The essence of the judge's reasoning on this point is at [148] and [149]:

> "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."

44. On behalf of the appellant, Mr Buley argued that the judge's unheralded conclusion was plainly wrong. He said that the judge had been right to conclude that the duty subsisted during the second period of detention because of the need for care planning once JG was released from that further period of detention. But in the absence of a

clearly communicated decision bringing the duty to an end, it was irrational to say that the duty came to an end as a matter of law at the point of release, to be replaced by a new duty owed by a different local authority. Mr Buley submitted that there was nothing in the 1983 Act that supported that proposition. Further, he said, it was contrary to logic and common sense for Worcestershire's duty to expire just at the point when it was needed most.

45. Accordingly he said that Worcestershire were under the relevant duty at the time of the first detention, and that it was common ground or decided by the judge that that duty continued both after the first release and at the time of the second detention. There being no relevant decision to terminate under s.117(2), the duty continued on release following the second period of detention, irrespective of where the patient was ordinarily resident immediately prior to that second period of detention.

46. Mr Parkhill submitted that, although it had not been his argument below[1], the judge had been correct. First, he said that this complaint was really answered by the judge's rejection of the appellant's case on Proposition 2, which is not the subject of any appeal. The judge had said:

> "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."

In particular, Mr Parkhill relied on the penultimate sentence of [136] which suggested that the judge considered that responsibility was linked back to where the person was "ordinarily resident" at the time of the second period of detention. In this way, he said that, where a service user was discharged, irrespective of a pre-existing s.117 duty, a new duty would arise.

47. Secondly, before the judge, Mr Parkhill suggested that, once JG was re-detained, she was no longer caught by the words of s.117(1) of the 1983 Act, and therefore the duty under s.117(2) ceased to be owed to her.

5.2 Analysis

48. I have a number of concerns about the judge's conclusion on Proposition 3. They have led me to conclude that his solution was incorrect. That is principally because it cannot be rooted in the words of the 1983 Act. My analysis is as follows.

[1] Mr Parkhill did not seek to resurrect his submission below by way of cross-appeal. In consequence, I have assumed that the judge was right to conclude that the duty did not come to an end when JG was detained for a second time.

49. The starting point is that the words of s.117(2) could not be clearer. It provides that the duty continues "until such time as" a decision is taken by the relevant medical/social care staff at the authority that they are satisfied that the person concerned is no longer in need of after-care services. As the judge found, there was no such decision here. So this whole debate really boils down to trying to find a way round the express provisions of s.117(2), and to alight upon some other way in which it might be said that the duty came to an end. No matter how ingenious such an answer might be, it will always be met with the response: that is not what the Act says.

50. There was much debate about whether the original duty owed by Worcestershire at the start of the first period of detention could be trumped by a new duty owed by Swindon, based on the fact that JG was "ordinarily resident" in Swindon at the start of the second period of detention. Assuming for the purpose of this argument that JG was ordinarily resident in Swindon at that point, I do not consider that there was any competition between rival duties. As the judge said, there could only be one duty at any one time. That duty rested with Worcestershire until it came to an end either on the facts or as a matter of law. There is nothing in s.117 that could permit this court to conclude that, absent any decision by Worcestershire under s.117(2), the fact that JG had become ordinarily resident in Swindon immediately prior to the second period of detention somehow gave rise to a competition, and switched the relevant duty from Worcestershire to Swindon. Mr Parkhill's submission – that this was the neatest and least artificial solution to the problem of competing duties – was based on a false premise. There was only ever one duty and, as long as the original duty subsisted, the question of competing duties did not arise.

51. For that reason, the judge's conclusion on Proposition 2 was nothing to the point. It assumed that the original duty could be superseded in a way that was not envisaged by the 1983 Act.

52. The only other counter-argument to this straightforward analysis was Mr Parkhill's submission made below, that the duty ceased under s.117(1) because, on the point of re-admission, s.117(1) no longer applied to JG: she was no longer a person who had ceased to be detained in hospital, so the duty came to an end. But there are two complete answers to that submission.

53. The first is that, as the judge himself said at [146], the submission proves too much. It would mean that any readmission to hospital, voluntary or otherwise, would bring the duty to an end. It would also mean that the provisions at s.117(2) about the need for an express decision that the relevant medical and care staff were satisfied that the services were no longer required would be rendered otiose if the duty automatically ceased when the service user left hospital.

54. The second answer is that the submission does not follow the structure or the words of s.117. JG was somebody to whom the section applied because she fell within s.117(1). She met that gateway provision. Under s.117(2) she was therefore owed the duty. According to s.117(2), that duty continued until such time as there was a decision that the after-care services were no longer to be provided. There was no such decision in this case. Thus, once JG was a person who met the gateway provision of s.117(1), she was owed that duty until there was a decision which terminated the after-care arrangements in accordance with s.117(2).

55. There are other practical difficulties with the judge's solution. Indeed, the whole notion of an automatic change in the identity of the authority with the duty to provide after-care services, triggered by law rather than by a decision made by those actually involved in the care of the service user, seems to me to be unrealistic. It would be woefully uncertain. How would that change come about? How would it be effected? How would it be communicated? Who is responsible for identifying that it had happened? There were no answers to these questions.

56. In addition, from a purely common sense perspective, the judge's conclusion seems to me to be a most unsatisfactory outcome. Someone like JG is particularly vulnerable. When/if she is detained, everyone must be trying to work to a plan which sees her release from detention as soon as possible. All through the period of her detention, there would be extensive planning by the responsible authority which, on the judge's findings in this case, was Worcestershire. It would be curious to find that, at the very moment those plans come to fruition, and JG is released, Worcestershire suddenly became irrelevant, and a new duty was owed by a new local authority. That would not make for continuity of care, and would be very unsatisfactory for the service user. Unless I was compelled to conclude that was the effect of s.117, I would be very reluctant to reach a decision on that basis.

57. For the reasons that I have given, I do not need to reach such a decision. S.117 is clear. The duty subsists until it comes to an end by the communication of a decision by Worcestershire pursuant to s.117(2). There has been no such decision. The duty therefore continued throughout both the second period of detention and beyond.

5.3 Summary

58. For these reasons, if my Lord and my Lady agree, I would allow the second ground of this appeal. That is, on its own, sufficient to overturn the judge's conclusions and to find that Worcestershire was the relevant local authority with the duty to provide after-care services to JG. That makes it strictly unnecessary to go on and deal with the arguments about where JG was ordinarily resident at the time of her second detention. However, as advertised during the hearing, it would be inappropriate for this court to duck that much more difficult question. Accordingly, I go on to consider the first ground of appeal in any event. I assume for that purpose only that my conclusion on the second ground of appeal is wrong, and that it matters where JG was ordinarily resident in June 2015.

6 GROUND 1: WHERE WAS JG "ORDINARILY RESIDENT" IMMEDIATELY BEFORE HER SECOND PERIOD OF DETENTION?

59. This ought to be a very straightforward question: where was JG ordinarily resident immediately before her second period of detention? For a variety of reasons, it is not. However, I have concluded that, on balance, the judge was right to conclude that the answer to the question was Swindon. I have not found the decision easy and I can see the force of the competing arguments. But my reasons for deciding this issue in favour of Worcestershire are set out below.

6.1 The Ordinary Meaning of the Words

60. The starting point must be the ordinary meaning of the words "ordinarily resident". Where was JG ordinarily resident immediately before her second period of detention? Where did she live? In my judgment, the answer was Swindon. If JG or her daughter had been asked in 2015, 'where does JG live?', they would have answered 'Swindon'.

61. That is the answer without having regard to any of the authorities. But it is also the answer to the general formulation of the question posed by Lord Scarman in *Shah* (paragraph 29 above). Swindon was the particular place of residence which had been adopted on behalf of JG, primarily because it was close to her daughter. It was part of the regular order of her life. Moving JG to Swindon was expressly for the purpose of placing her in as settled a location as possible.

62. If that is the answer on the ordinary words used, and the answer by reference to the leading general authority on the point, the question then becomes whether there is any statutory provision or any authority which would oblige this court to come to a different conclusion. Mr Buley fairly accepted that, without the decision in *Cornwall*, the ordinary meaning of the words "ordinarily resident" lead to the conclusion that Swindon owed the duty at the start of JG's second period of detention.

6.2 *Hertfordshire*

63. I consider that this authority confirms that conclusion. As to the outcome, speaking for myself, it seems to me entirely unsurprising that the Court of Appeal refused to grant the declaration sought, and to say that "is resident" means the same as "is ordinarily resident". To have done so would have been, as Carnwath LJ said, to rewrite the language of the statute. That is not what the court is there to do.

64. This court construed s.117 (in its unamended form) as fixing liability on the local authority where the service user was resident, regardless of any previous placing or funding arrangements. In other words, they concluded that the local authority where the service user actually lived was liable for the after-care services.

65. So, if we followed the approach taken by the Court of Appeal in *Hertfordshire*, the answer in the present case would be that Swindon owed the duty. Mr Buley accepted that too. The decision in *Hertfordshire* is binding on this court unless it can be shown that it was decided *per incuriam*, or that the subsequent amendments to s.117, or the provisions of the 2014 Act generally, should lead to a different conclusion.

66. The decision in *Hertfordshire* is plainly not *per incuriam*. On the contrary, it was expressly considered by the Supreme Court in *Cornwall*, and approved on the basis that it was a particular answer to a question arising under a particular statute. Accordingly, *Hertfordshire* is not even arguably wrong; on the contrary, in relation to the words "is resident" in the 1983 Act, it has been approved by the Supreme Court in *Cornwall*.

67. There is one further point to be made about the decision in *Hertfordshire*. I am in no doubt that, as part of the comparison exercise between the 1983 Act and the 1948 Act which the Court undertook in that case, the presence in the latter of the deeming provision was regarded as important. That was expressly noted at [17], and featured in

the Court's conclusions, in particular at [46]. Carnwath LJ expressly said that the attempt to align the test under the under the two statutes "glosses over the status of the deeming provision".

68. In my view, subject always to *Cornwall*, that leaves the appellant with the subsequent amendments to the 1983 Act, or the 2014 Act itself, as the only way round the binding effect, in the present appeal, of the decision in *Hertfordshire*.

5.3 The Amendments and the 2014 Act Generally

69. I deal first with the amendments to s.117 effected by s.75(3) and 75(4) of the 2014 Act. The principal change relied on is, of course, the change from "resident" to "ordinarily resident".

70. The first point to make is that the term "ordinarily resident" was considered in *Hertfordshire* (because it arose under the statutes being used as comparators). Mitting J did not think there was any discernible difference between 'resident' and 'ordinarily resident'. And whilst the Court of Appeal did not grant a declaration to that effect, that seemed more to do with reasons of principle than matters of language.

71. Absent the particular meaning ascribed to the words "ordinarily resident" in other statutes, and just looking at the words themselves, there is no significant difference between the two concepts of where X "is resident" and where X "is ordinarily resident". Or to put the point the other way round, the addition of the word "ordinarily" does not bring with it, as a matter of language, some sort of deeming provision whereby questions of actual residence are to be superseded by considerations of who might be fiscally or administratively responsible for the provision of the care services in question. The addition of the single word "ordinarily" cannot bear that weight.

72. It is at the heart of the appellant's case that the change from "resident" to "ordinarily resident" in s.117(3) had a seismic affect, not because of the language used, but because the expression "ordinarily resident" has a particular meaning in care statutes which ensures that actual residence is trumped by considerations of fiscal and administrative responsibility. So it is said that, by that one simple amendment to s.117, the whole meaning of the provision was changed and *Hertfordshire* is no longer good law.

73. There are a number of difficulties with that submission. The first is that, as Mr Buley candidly accepted, this seismic change was not apparent to the appellant at the time that he piloted the Care Act through Parliament in 2013/2014. The seismic change was not reflected in the appellant's own post-2014 guidance (paragraph 12 above) which continued to promote the unadorned approach to 'ordinarily resident' (and led here to the appellant's original decision that Swindon was responsible). Mr Buley also accepted that the appellant only became aware of this potential change in about 2020, and only as a result of his (belated) consideration of the Supreme Court's judgment in *Cornwall*. In other words, if it was a seismic change, it was not a change known to the person responsible for the legislation that brought it about.

74. Secondly, one of the factors that has given rise to the particular meaning to be ascribed to "ordinarily resident" under the both the 1948 and the 1989 Acts are, of

course, the deeming provisions. That much is plain from *Hertfordshire*. There are no such provisions in the amendments to s.117 effected by the 2014 Act. It must have been apparent to the promoters of the Bill that the deeming provisions were an integral part of the machinery in the other statutes by which actual residence is trumped by the local authority with fiscal/administrative responsibility for the service user. The absence of equivalent amendments here must therefore be considered to be deliberate.

75. On this point, Mr Buley argued that there was no need for a deeming provision because the amendments fixed the point in time when the test of "ordinarily resident" was to be applied. I do not accept that submission. The whole point about the deeming provisions is that they propagate a fiction by asking the Court to treat something as true which is not, or to disregard something which is otherwise true and relevant to the issue being determined. There is no equivalent to the deeming provisions in the amendments to s.117.

76. Thirdly, I note that the 2011 Law Commission report, which gave rise to the 2014 Act, expressly considered the decision in the *Hertfordshire* case. The report explained that whilst some local authorities were concerned about the implications of that judgment, other consultees argued that the effect of it should be retained, and explained why. It is not at all apparent from the Law Commission report, nor any of the other background materials to which we were taken, that one of the purposes of the 2014 Act (and its amendments to the 1983 Act) was to do away with *Hertfordshire* and bring responsibility back to the original provider, wherever the service user was now resident. It would not be appropriate for this court somehow to infer that this was what was intended when the background materials are ambivalent at best, and in some places suggest that that was not the intention.

77. On this point the judge's summary was as follows:

> "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."

78. I agree with this part of the judgment. These are powerful reasons why, in my view, the amendments effected by the 2014 Act do not entitle this court to depart from the judgment in *Hertfordshire*.

79. None of the other amendments to the 1983 Act affect this question at all. The judge rightly noted at [110] that the Explanatory Notes refer to the "minor amendments to s.117" and he explained how and why that was an apt description. Accordingly, I conclude, as the judge did, that there is nothing in the amendments to s.117 that has any significant effect on the question before this court, and nothing which would indicate that the decision in *Hertfordshire* was not still applicable and binding.

80. Do the provisions of the 2014 Act themselves make any difference? Particular emphasis was placed on s.39(4) of the 2014 Act. It was submitted that these provisions were generally designed to reduce anomalies in cases where accommodation is provided. I am prepared to accept that submission. But that does not mean that, on its own, that produces a different answer to the question of where JG was ordinarily resident than was provided in *Hertfordshire*. In my view, the judge dealt with this point correctly at [112] of the judgment below, where he said:

> "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."

81. In at least one way, s.39(4) of the 2014 Act is contrary to Mr Buley's principal submission. If he was right as to the change effected by the amendment to "ordinarily resident", then it followed that this and other provisions of the Care Act 2014 would be otiose. There would be no need for this provision because, on Mr Buley's case, this is what is meant by "ordinarily resident" anyway. Of course one has to recognise that there are times when, out of an abundance of caution, or plain error, the parliamentary draughtsman includes redundant provisions. But it is not a promising feature of the

appellant's interpretation of the amendments, that they render otiose other simultaneous legislative provisions.

82. No other parts of the 2014 Act were identified which made any difference to the issue raised by Ground 1 of the appeal. But the more that we looked at the background to the 2014 Act, the more certain I became that – absent a consideration of *Cornwall* - it would be quite wrong for this court to depart from the decision in *Hertfordshire*. That ended up being consistent with Mr Buley's submission too: he expressly accepted that, if he did not get home on *Cornwall*, he could not argue his case on the basis of either the 2014 Act or the amendments to the 1983 Act.

5.4 *Cornwall*

83. So the last but most important point on the first ground of appeal is whether the judge was wrong to conclude that the decision of the Supreme Court in the *Cornwall* case did not affect the approach to what was meant by "ordinarily resident". It is said that it is absurd for there to be these sorts of anomalies between different parts of the care system, and that the sort of policy-driven result in *Cornwall* should now be applied to the 1983 Act.

84. Nobody is suggesting that anomalies are a good idea, or that the most appropriate solution would not be to have one overall series of rules relating to the determination of where someone is "ordinarily resident", that holds good for all care legislation. But ensuring such a solution is traditionally the role of legislators, not judges. Moreover, it might be said that the Law Commission report gave the Government the perfect opportunity to do just that through the provisions of the 2014 Act, and they chose not to do so (or at least not in a way that they themselves realised that that is what they had done). So the only question is whether the result in *Cornwall* should be read across to the present case.

85. Although the judge called this the second reason why he did not accept that proposition, at [87] he provides his answer. He said:

> "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".

86. Again, I find myself in respectful agreement with the judge.

87. Mr Buley submitted that, whilst *Cornwall* is itself a problematic case, the *ratio* of the decision is that, for all care statutes which use the expression "ordinarily resident", that means the local authority with fiscal/administrative responsibility, not where the service user lives at the relevant time. He fairly accepted that he was asking the Court to read across from one set of statutory provisions to another, different set of statutory provisions, and that he was asking us to extend the effect of *Cornwall*.

88. I start with the simple observation that, although *Cornwall* is a controversial decision, and although the dissenting judgment of Lord Wilson has found plenty of support amongst commentators since the judgments were handed down, this court is not in a position to pick and choose which Supreme Court cases are binding upon it and which are not. In simple terms, all Supreme Court cases are binding on the Court of Appeal.

89. Accordingly, it is necessary to identify the *ratio* of *Cornwall* in order to see what precisely it is (if anything) that is binding on us. In this context, [58]-[60] of the judgment of Lord Carnwath (set out in paragraph 39 above) were the subject of a deconstructionist analysis, by both counsel, that would not have been out of place in the English Department of Cambridge University in the 1980s.

90. Mr Buley's original submission was that the *ratio* could be found in the last part of [58] and the conclusion that it would be "artificial to ignore the nature of such a placement in that parallel statutory context". I have to say that I do not regard that or the subsequent sentence as being any sort of *ratio*. It is an observation of fact, although it is not irrelevant that one of the points that Lord Carnwath stressed is that PH was living somewhere "not by his own settled intentions". And the "parallel statutory context" was a reference to the 1989 Act which, like the 1948 Act but unlike the 1983 Act, had specific deeming provisions.

91. Mr Parkhill suggested that the *ratio* could be found in [59] where, in summary, Lord Carnwath suggested that what mattered was the deeming provision in the 1948 Act. It seems to me that that was a relevant consideration, but it might be hard to say that this alone was the *ratio* of the case. [59] is also problematic, because although its introduction uses the expression "in other words", its content does not re-state [58] in another way, but is instead dealing with something that has not been addressed in the preceding paragraphs.

92. That leaves [60] and its reference to "for fiscal and administrative purposes his ordinary residence continued to be in [Wiltshire], regardless of where they determined that he should live." That was the result in the case, and it seems to me to have been informed by the entirety of paragraphs [57]-[60].

93. Mr Buley's alternative argument was that the *ratio* of *Cornwall* was that, when considering "ordinarily resident", the court should disregard placements which were made by a local authority solely for the purposes of carrying out their statutory duty in

a parallel statutory context. That broad interpretation explains why he said that the result in *Cornwall* could be translated to the present case, although he fairly said that that "was not an unproblematic reading of the judgment".

94. Mr Parkhill argued that all that *Cornwall* was doing was saying that the deeming provision in s.24 of the 1948 Act had this effect on a dispute as to "ordinarily resident" under that statue, in circumstances where the 1989 Act was also in play.

95. In my view, both of those interpretations are too extreme. The answer, as so often, lies somewhere in the middle. There is no doubt that Lord Carnwath wanted to see a greater consistency arising out of the use of the term "ordinarily resident". But by the same token, he could not and did not ignore the role that the deeming provision played in that analysis. He expressly addressed it at [59].

96. In order for Mr Buley to succeed in his argument on this appeal, he needs to persuade this court that the deeming provision in the 1948 Act had no part to play in the *ratio* of *Cornwall* and that Lord Carnwath was intending to make the sort of generalised policy statement about all care statutes, which Mr Buley urged to us, and which I have summarised at paragraph 93 above. On a proper reading of [58]-[60], I simply cannot accept that that is the effect of the judgment. The reason why, in Mr Buley's own words, that is a "not unproblematic" reading of the judgment is that, in my view, it is not what Lord Carnwath said.

97. It is of course very tempting to strive to remove anomalies and to arrive at results which might be consistent with other related statutory provisions. In the course of his fair and candid submissions, Mr Buley came close to persuading me that that is what we should do in this case. But in the end, I have concluded that that would be a misstep. Whilst a policy-driven approach was justified in the statutory context under review *in Cornwall*, it is not justified here where, on the appellant's own case, the 2014 Act and its amendments expressly failed to implement the sort of policy now being urged on this Court.

98. *Cornwall* is a decision on a different statute which is expressly based, at least in part, on statutory provisions which are missing here. In my view, there is no basis on which the decision in *Cornwall* can be read across to the different provisions of the 1983 Act, so as to overrule *Hertfordshire* and give effect to a policy of which the appellant was unaware until 5 years after the 2014 Act had come into force.

5.5 Summary

99. For all these reasons, I would dismiss the first ground of the appeal. Of course, because of my conclusions on the second ground of appeal, if my Lady and my Lord agree, the appeal itself will be allowed.

LADY JUSTICE CARR

100. I agree.

LORD JUSTICE WILLIAM DAVIS

101. I also agree.