Case No: C1/2013/0279/QBACF

Neutral Citation Number: [2014] EWCA Civ 12
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**ADMINISTRATIVE COURT**
**MR JUSTICE BEATSON**
**CO/6708/2012**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2014

**Before :**

**LORD JUSTICE ELIAS**
**LORD JUSTICE LEWISON**
and
**LORD JUSTICE FLOYD**

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**Between :**

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| **THE QUEEN ON THE APPLICATION OF CORNWALL COUNCIL** | **Appellant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR HEALTH & ORS** | **Respondent** |
| **- and -** | |
| **(1) WILTSHIRE COUNCIL**<br>**(2) SOUTH GLOUCESTERSHIRE COUNCIL**<br>**(3) SOMERSET COUNTY COUNCIL** | **Interested Parties** |

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**Mr David Lock QC** and **Mr Hashi Mohamed** (instructed by **Cornwall Council Legal Department**) for the **Appellant**
**Miss Deok-Joo Rhee** (instructed by **The Treasury Solicitor**) for the **Respondent**
**Mr Hilton Harrop-Griffiths** for the **First Interested Party** (instructed by **Wiltshire Council Legal Department)**
**Ms Sarah Hannett** for the **Second Interested Party** (instructed by **South Gloucestershire Legal Department)**
**Mr David H Fletcher** for the **Third Interested Party** (instructed by **Somerset County Council Legal Department)**

Hearing dates : 21, 22 January 2014

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# Judgment

**Lord Justice Elias :**

1. Local authorities have a wide range of duties, imposed under a variety of statutes, to secure the provision of care and other types of assistance for certain children and vulnerable adults. Criteria have to be identified to determine which authority has the obligation. In a general sense it will be the authority with which the individual has the closest connection. Some test has to be adopted to reflect that general notion, and typically this is to ask where the person is ordinarily resident, although sometimes the alternative formulae of normal or habitual residence are used. Usually the application of that test is straightforward and provides a clear answer, but not always. Human beings have the inconvenient habit of conducting their lives without regard to legal categories, and the application of the relevant test is sometimes highly problematic. The difficulties of applying the test are compounded where, as in this case, the vulnerable adult does not have the capacity to make a voluntary choice about where to live. Given the potential financial implications for whichever authority bears the burden, it is not surprising that there should from time to time be disputes between authorities, essentially about who pays. There is a stream of cases in different statutory contexts testifying to the difficulties of applying the test in atypical circumstances, and this is yet another. In this case the Secretary of State was (subject to an argument in this appeal) statutorily empowered to resolve the dispute. The issue he had to decide was where Philip, a severely disabled person lacking capacity, was ordinarily resident when he turned 18. He concluded that it was in Cornwall which, if he is correct, will therefore have to foot the not inconsiderable bill - currently estimated at some £80k a year - for providing the necessary care for Philip throughout his life. Cornwall challenged that determination by way of judicial review before Beatson J, as he then was, but were unsuccessful. They now appeal against his decision. Three other local authorities who consider that they potentially have an interest in the outcome were given permission to intervene and they made both written and oral submissions. The court is grateful for the assistance given by all counsel.

*The facts*

2. There was an agreed statement of facts before the Secretary of State. I gratefully adopt the summary derived from that statement set out in the decision of the Secretary of State. This was the basis on which he made his decision, and it has not been suggested that it is an inaccurate or incomplete statement of the material facts:

> "2. The following information has been obtained from the agreed statement of facts and copy documents supplied. Philip was born on 27th December 1986 and has complex disabilities including cerebral palsy, epilepsy, autism, right-sided hemiplegia together with a significant visual impairment. He has severe learning disabilities and is without speech.
>
> 3. In 1991, Philip's parents asked Wiltshire, in whose area they lived, to provide accommodation for him. Wiltshire placed

Philip with foster parents, pursuant to section 20 of the Children Act 1989. The referral form entitled "Particulars of Child needing long-term family placement" dated 7th June 1991 noted that Philip required a great deal of physical care. Mr and Mrs B resided in the area of South Gloucestershire. Mrs B held an appointeeship with regard to Philip's finances. The notes of the planning meeting held on 5th November 1991 state that: "Since Philip left their household, it is clear that contact for both the family and for Philip is very important. Not only is contact important for the immediate family, but also for the grandparents who live in Dursley and Malmesbury respectively. In an ideal world any placement would be nearer Cornwall than either the present placement or anywhere in Wiltshire".

4. In November 1991, Philip's parents and siblings moved to Cornwall's area and have lived there ever since save for a period of less than a year (December 2002 to 2003) when Philip's father resided in Hong Kong for work. The Agreed Statement of Facts records at paragraph 11 that Philip's parents have been involved in decisions affecting Philip and have had regular contact with him.

5. Philip turned 18 on 27th December 2004. In 2001, Wiltshire began corresponding with Cornwall given the anticipation that Philip would require accommodation pursuant to section 21 of the 1948 Act but no agreement regarding the responsible authority was reached.

6. On the 15th April 2004, Wiltshire assessed Philip. It was recorded that Philip would need accommodation other than with Mr and Mrs B or the foster placement would need to be re-registered as an adult placement. It was noted that Philip's parents visited him four or five times a year with occasional visits to the family home usually over Christmas and in the summer. If Philip were to move away, his parents wanted to maintain at least the current level of contact. The Bs wished to help Philip settle into a new place and to visit him as regularly as possible. Continuing contact with his parents and foster parents was noted to be vitally important and a placement within the M4/M5 corridor was therefore thought to be best for ease of travel.

7. A care review took place on 27th April 2004 attended by both Philip's parents and Mr and Mrs B. Although Philip was noted to be happy and settled with the Bs and that they would be happy for Philip to stay post his 18th birthday, it seemed

likely that suitable residential accommodation would become available within 6-12 months. A suitable care home, Blackberry Hill in the area of Somerset County Council, was identified and as of 4th October 2004, it was anticipated that Philip would be able to move in by the end of December 2004. By 25th November 2004, this date had changed to mid to late January 2005.

8. The agreed statement of facts records the belief that Philip went to Cornwall to stay with his parents for a period over Christmas 2004 including the day before his 18th birthday. He returned to live with Mr and Mrs B until the 24th January 2005 when he moved into Blackberry Hill. This placement was funded by Wiltshire on a provisional basis. A care plan dated 18th January 2005 recorded as an objective that Philip should live in sufficiently close proximity to his natural family and foster parents to allow regular contact to be made. The placement at Blackberry Hill did not appear to meet Philip's needs and he was unsettled. On 6th June 2005, Philip moved to Langley House in Somerset where he remains to date. His natural parents were involved in the decision to move him. Mrs Harris has taken over appointeeship for Philip's benefits following a request by Voyage which runs Langley House. Regular telephone contact is had with Philip's family and Philip stays with his natural family over Christmas and perhaps for a week in the summer and the Bs keep in regular contact, it now seems mainly via letters and cards.

9. Philip lacks capacity to decide where to live. This is the view of both Wiltshire and South Gloucestershire. Wiltshire carried out a capacity assessment on 15th April 2008 which concluded that overall and at that time, it was not considered that Philip had the capacity to make an informed choice about where he would want to live nor does he have the communication skills for this to be expressed. The assessor also commented that whilst it was hard to judge capacity three to four years prior to this assessment, there was no evidence that there had been any change in Philip's intellectual abilities since this time."

3. A feature of these facts, heavily relied upon by the appellant in this case, is that Philip has never lived in Cornwall, he has rarely visited it save for the occasional holiday, he has no property there, and his only link with the area is that his parents lived there at the relevant time.

*The relevant legislation*

4. The statutory provisions with which we are concerned are contained principally in the National Assistance Act 1948 ("the NAA") and the Children Act 1989 ("the CA"). The former imposes duties on local authorities to provide care for vulnerable adults; the latter imposes duties with respect to children and those described as "former relevant children" who are between the ages of 18 and 21. The appeal in part raises issues concerning the relationship between the NAA and the CA with respect to former relevant children who are in transition from childhood to mature adulthood.

5. Section 21 of the NAA provides as follows:

> "A local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing ...
>
> (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or other circumstance are in need of care and attention *which is not otherwise available to them.*" (emphasis added.)

The italicised words suggest that this is a backstop provision designed to operate only when other avenues for providing the requisite accommodation have failed. Section 21(8) reinforces the point. It provides that:

> "Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made...by or under any enactment not contained in this Part of this Act..."

6. Subsection (5) indicates that the concept of accommodation is a very broad one and is not limited to the provision of physical premises:

> "References in this Act to accommodation provided under this part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections, and as including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary."

7. Section 24(1) is the origin of the ordinary residence test. It imposes the section 21 duty on the authority "in whose area the person is ordinarily resident" save where that principle is qualified by other provisions in the Act.

8. Section 24(3) empowers a local authority to provide accommodation to someone urgently in need of it even though not ordinarily resident in the area. But in that case section 32(1) provides that the cost may be recovered from the authority where the person is ordinarily resident.

9. Section 24(4) provides that local authority A may agree with another local authority B to provide section 21 residential accommodation to someone ordinarily resident in the area of authority B.

10. Section 24(5) sets out an important "deeming provision" whose effect is that a person may be deemed to be ordinarily resident in place A even though in fact he is not ordinarily resident there:

> "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."

The significance of this is that where a local authority provides accommodation outside its area, as it sometimes does, it cannot assert that the ordinary residence has changed to the new area, thereby sloughing off its responsibilities. In effect the place of ordinary residence is crystallised at the point when the duty first arises.

11. Section 26 provides that accommodation may be provided in premises maintained in the voluntary sector. However, by section 26(1)(a) where arrangements are made for the provision of accommodation together with nursing or personal care as mentioned in section 3(2) of the Care Standards Act 2000, the accommodation is to be provided in a care home which must be registered under the Health and Social Care Act 2008. The purpose is to ensure that the premises, and those managing them, are properly regulated and fit for purpose. (There was an exception at the relevant time by virtue of the Care Home Regulations 2001 where a foster parent who has looked after the child for at least five years continues to do so after he has reached 18. That, for a short period, was the situation with Philip before he moved to Somerset.)

12. Section 29 empowers a local authority to make arrangements for promoting the welfare of relevant persons aged 18 or over ordinarily resident in the area to such an extent as the Secretary of State may direct. The Secretary of State's direction requires local authorities to provide "such support as may be needed for people in their own home". Section 29 must be read together with section 2 of the Chronically Sick and Disabled Persons Act 1970 which converts the power into a duty where the needs of the person require it. The effect, therefore, is that under the NAA a local authority must provide to vulnerable persons who remain in their own accommodation equivalent care as section 21 requires the authority to give to those similarly vulnerable adults for whom it provides accommodation.

13. Section 32(3) provides that "any question arising under this Part of the Act as to a person's ordinary residence shall be determined by the Secretary of State". The relevant Part is Part III and it includes the provision in section 32(1) under which local authority A may recover the cost from authority B of providing accommodation for someone ordinarily resident in area B. That is what Wiltshire is seeking to do here. It was pursuant to section 32(3) that the Secretary of State made his ruling that Cornwall was Philip's ordinary residence at the material time, following a joint request to make the determination from Wiltshire, South Gloucestershire and Cornwall.

14. The provisions of the CA requiring local authorities to provide support for children and their families are found in Part III. A child is defined as a person under 18.

15. Section 17 is a general duty requiring local authorities to safeguard and promote the welfare of children who are in need and are in their area by providing a range and level of services appropriate to their needs. (The obligation with respect to "children in their area" contrasts with the case where a care order is made when the duty falls on the authority where the child is ordinarily resident: section 31(8)).

16. More specifically, section 20 requires a local authority to provide accommodation for any child in need who requires it. Subsection 20(1)(c) provides that this will include the situation where the person who has been caring for the child is prevented from providing him with suitable accommodation. It is under that subsection that Wiltshire secured a residential placement for Philip with the foster parents in South Gloucestershire. By virtue of being accommodated, Philip was what the CA describes as a "looked after child": section 22(1).

17. Section 22B requires an authority to maintain a looked after child. One of the ways in which the requisite accommodation and maintenance can be achieved is by placing the child in foster care: section 22C. So the powers under the CA enable children to be protected in the same way as vulnerable adults are protected by the NAA. Moreover, the welfare powers conferred on local authorities under section 29 of the NAA to assist adults are replicated in the CA in relation to children. They were inserted into that Act by section 28A of the Chronically Sick and Disabled Persons Act 1970.

18. Once a duty arises towards a child in need, the local authority which discharges the duty by placing a child out of its area cannot claim that he is no longer in its area and thereby avoid continuing responsibility. There is a deeming provision in section 105(6)(c) which, whilst differently framed to the deeming provision in section 24(5) of the NAA, achieves essentially the same result.

19. Of particular relevance to the submissions in this case are those provisions in the CA which impose powers and duties with respect to the transitional period between the child reaching 18 and becoming an adult. These duties apply, *inter alia*, to children like Philip who were in care immediately before their eighteenth birthday. They are referred to in the legislation as "former relevant children": section 23C(1). Certain

duties continue notwithstanding that they have reached the age of majority. So far as is relevant, section 23C provides as follows:

> "… (4) It is the duty of the local authority to give a former relevant child: ...
>
> (c) other assistance, to the extent that his welfare requires it ...
>
> (6) Subject to sub-section (7), the duties set out in sub-sections 2, 3 and 4 subsist until the former relevant child reaches the age of 21."

20. Another obligation, imposed by section 23E, is to prepare a pathway plan which will set out the ways in which the local authority will provide advice, assistance and support to a child in their care even after it ceases to look after him. The plan is produced when the child is 16 or 17 but it is kept under review. Its aim, in broad terms, is to set out the child's needs and to provide an explicit operational plan spelling out "who does what, where, and when" (per Munby J in *R (J) v Caerphilly County Borough Council* [2005] EWHC 586 (Admin); [2005] 2 FLR 860.) Prior to producing the plan, an assessment of the child's needs must be undertaken. It is expressly provided that the assessment under the CA may be conducted at the same time as assessments under other legislation such as the Chronically Sick and Disabled Persons Act 1970 and the Disabled Persons Act 2006.

21. Section 30 deals with the relationship between these duties under the CA and those imposed by other statutes:

> "Nothing in this Part shall affect any duty imposed on a local authority by or under any other enactment."

*The authorities*

22. The traditional starting point for the definition of ordinary residence for adults with full capacity is the judgment of Lord Scarman in *R v Barnet LBC ex parte Shah* [1983] A.C.309, a case concerned with the concept of ordinary residence in the context of making education grants. He emphasised that the courts should give the words their ordinary and natural meaning unless the particular statutory framework dictated otherwise (344):

> "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 long duration."

He then added this:

> "There are two, but 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."

23. This concept, therefore, presupposes that the person is capable of forming an intention about where to live so as to make the choice of residence a voluntary act. But that is not the case with persons suffering from a mental incapacity which deprives them of ability to exercise free choice in any meaningful way. This was recognised by Taylor J, as he then was, in *R v Waltham Forest ex p.Vale* (unreported, 11 February 1985), in a judgment delivered some two months after the *Shah* decision. The case concerned an English woman, Judith, who had been in residential care in Ireland for over twenty years. When her parents returned to England, leaving her in the home in Ireland, she became disturbed and it was thought to be in her best interests to return to live near them. On her return she stayed with her parents at their house in Waltham Forest for a few weeks pending a suitable residential home being found. She was then placed in a home in Stoke Poges, Buckinghamshire. The DHSS agreed to bear most of the cost and the shortfall was sought from Waltham Forest. They claimed not to be liable for her on the grounds that she was not ordinarily resident in the borough.

24. Taylor J recognised that *Shah's* case does not provide a useful test for someone so dependent upon a parent or other guardian. Counsel for Judith proposed two tests to determine her ordinary residence. First, he submitted that in the case of someone so mentally incapacitated and lacking independence, her ordinary residence must be that of her parents or guardians. Alternatively, he contended that she should be treated as if she had normal mental capacity and her ordinary residence should then be determined in the usual way.

25. Taylor J adopted the first test. He said this:

> "Where the propositus ... is so mentally handicapped as to be totally dependent upon a parent or guardian, the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise. She is in the same position as a small child. Her ordinary residence is that of her parents because that

> is her "base", to use the word adopted by Lord Denning in the infant case cited."

26. The judgment of Lord Denning, to which the judge there made reference, and which adopted the concept of base, was *Re P (GE) an infant* [1965] Ch 568. In that case the court held that a child was ordinarily resident at the matrimonial home where his or her parents lived even if he might spend lengthy periods living elsewhere. As Lord Denning observed:

> ".. it is still his ordinary residence even while he is away at boarding school. It is his base, from whence he goes out and to which he returns."

Applying this test, Taylor J held that Judith's ordinary residence was Waltham Forest.

27. Taylor J went on to find that even on the alternative test, Judith's place of ordinary residence was still Waltham Forest. Essentially his reasoning was that it had not been suggested that there was no place of ordinary residence; Lord Scarman in *Shah's* case had stated that future intentions should be left out of account and therefore it could not be Buckinghamshire; and the residence with her parents was capable of amounting to ordinary residence, notwithstanding its short duration. In truth, it seems to me that there was no other place which could have been identified, whichever test was adopted, once it was accepted that there had to be a place of ordinary residence.

28. The Supreme Court has recently had to consider the concept of the habitual residence of a child in *Re A* [2013] UKSC 60. The case was concerned with the question whether the court in England had jurisdiction to order the return to the United Kingdom of a child who had never lived here. The child's mother and three other children had visited Pakistan for what was intended to be a short visit. The wife unwillingly remained there for almost two years as a result of emotional and psychological pressure. She became pregnant. It was accepted that her own place of habitual residence was still the UK, but the question was whether that was also the place of habitual residence of the new-born child, notwithstanding that he had never even been present in the UK.

29. The Supreme Court considered the appropriate test for determining the habitual residence of a child for the purpose of applying the jurisdictional rules in the Brussels 2 Regulations and the Hague Convention. Lady Hale who gave a judgment with which Lords Wilson, Reed, Hughes and Toulson agreed, held that the test was now the same under both sets of rules and that following decisions of the CJEU it was as follows (para. 55): the place which reflects some degree of integration by the child into the social and family environment. The purposes and intentions of the parents were merely one of the relevant factors. Lady Hale said that the *Shah* test should now be abandoned when deciding the habitual residence of the child.

30. Lady Hale also held, albeit rather tentatively, that physical presence was a necessary precursor to residence and hence habitual residence, although Lord Hughes disagreed on this point. Accordingly the young baby was not habitually resident in the UK.

*The guidance*

31. Sensibly, the Department has issued guidance designed to assist authorities to resolve potential disputes between themselves and to indicate how the Secretary of State will approach his statutory determinations. The guidance in force at the relevant time was issued in 1993 but it was replaced by fresh guidance in 2010. It emphasises that the interests of the individuals in need of services should not be prejudiced because of uncertainty about which authority is responsible; and one local authority must take responsibility until the dispute is resolved.

32. The guidance seeks to encapsulate the principles derived from the case law. The Secretary of State relied on the guidance when reaching his decision. The guidance emphasises that the term "ordinary residence" should be given its ordinary and natural meaning; that it involves questions of fact and degree; that there is no minimum period for which a person must be living somewhere before acquiring ordinary residence; and that for the purposes of the Act there can be only one place of ordinary residence. It also suggests that there is a rebuttable presumption that the young person remains ordinarily resident in the local authority which had responsibility for him under the CA.

33. The provisions giving guidance relating to those lacking capacity to decide where to live are found in paragraphs 27-34. The guidance provides that a determination of capacity should be made with reference to the Mental Capacity Act 2005 and that the *Vale* tests should only apply where the requisite lack of capacity is established. The critical paragraphs are as follows:

> "31. In the Vale case, Taylor J held that a young person with severe learning disabilities was ordinarily resident at her parents' house where she was temporarily living at the time. He stated that she was in the same position as a small child who was unable to choose where to live. He set out that where a person's learning disabilities were so severe as to render them totally dependent on a parent or guardian then '*the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise'*. The judge rejected the possibility of the young person having an ordinary residence in a place that she had left or in a place where she may go in the future.
>
> …

> 33. However, the approach set out in test one of Vale may not always be appropriate and should be used with caution: its relevance will vary according to the ability of the person to make their own choices and the extent to which they rely on their parents or carers. This Vale test should only be applied when making decisions about ordinary residence cases with similar material facts to those in Vale."*(emphasis in the original)*

34. The test adopted appears to be that for someone incapable of making their own choices, their place of ordinary residence will be that of the parents provided their child is sufficiently reliant upon them.

*The determination of the Secretary of State*

35. The following features of this case are not disputed and set the context for the Secretary of State's determination. Philip was provided with accommodation by Wiltshire because he was in its area at the material time: section 20 CA. Although Wiltshire secured his residential accommodation with foster parents in South Gloucestershire, the period when he was in South Gloucestershire had to be ignored when considering his ordinary residence under the CA: section 105(6). So until aged 18 the effect of that deeming provision was that his place of ordinary residence was at all times Wiltshire. But as section 105 makes clear, the deeming provision applies only "for the purposes of this Act" and has no application with respect to any other statute: see *R (Ota Hertfordshire County Council) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77; [2011] PTSR 1623 para. 32 per Carnwath LJ (dealing in that case with the deeming provision in the NAA). Accordingly, once Wiltshire's obligations under the CA came to an end and the requisite care had to be provided under the NAA by the authority where he was ordinarily resident, the deeming provision ceased to apply and the fact that he had for a long time lived with foster parents in South Gloucestershire was a relevant factor to consider when assessing his ordinary residence at that time.

36. After setting out the facts and summarising the authorities and the relevant guidance, the Secretary of State analysed the issue in the following way. First, he confirmed the undisputed fact that Wiltshire was Philip's place of ordinary residence until the age of 18. He then held that in accordance with the guidance, there was a presumption that his place of ordinary residence would not change, but that this may be rebutted on the facts. He went on to find that it had been rebutted in the particular circumstances of this case.

37. First, he held that Philip was not ordinarily resident in Wiltshire because he no longer had any links at all with that area. The child did not live there; the parents and siblings had moved away from the area, as had the maternal grandparents; and the only link was the fact that Wiltshire had been the authority with responsibility for him under the 1989 Act.

38. Second, the facts were very similar to *Vale*, and whilst it was recognised in the guidance that the principles enunciated in the first test in that case should be adopted with caution, the Secretary of State was satisfied that it could appropriately be applied here.

39. Applying that test, he concluded that Cornwall should be treated as the place of ordinary residence, notwithstanding the relatively infrequency of Philip's visits. The grounds for reaching this conclusion were expressed as follows (paras. 24 and 25):

> "24. Philip has severe learning difficulties and lacks mental capacity to decide where to live. He lived with, and was cared for by, his parents in the very early years of his life. The family home in Cornwall is a place to which Philip returns for holidays and his parents are in regular contact by telephone. In 2004 it was the case that Philip's parents visited him four or five times a year. Philip's parents have also been closely involved in decisions made in relation to his care. Philip's father's letter dated 6th January 2001 provides an example of this. From that letter (see page G36 onwards of the bundle), it is apparent that the family view the quantity of contact with Philip in terms of what is in Philip's best interests. It is clear from the social services papers that proximity to the family home and ease of travel to and from Cornwall has been a consideration in planning the care and support needs of Philip. I consider that Philip's base is with his parents.
>
> 25. I note that Cornwall question whether the family home in Cornwall can properly be described as a "base" for Philip given the infrequency of his visits there. It is not merely the number or frequency of visits that are determinative. The entirety of the relationship between Philip and his parents is to be taken into account and when regard is had to that it is clear that Philip's base remained with his parents."

40. Finally, the Secretary of State then explained why he did not think that South Gloucestershire was the place of ordinary residence notwithstanding that Philip had lived there for a long period. The foster parents could not be treated by analogy as a parent, notwithstanding their years spent caring for him; and it was Philip's natural parents who were involved in decisions regarding his care and well being. Moreover, by the date of his eighteenth birthday it was anticipated that he would shortly leave the foster parents and move to residential accommodation in Somerset so at that point his period of residence with the foster parents could properly be described as temporary.

41. A point of potential significance is what the Secretary of State meant when commenting in paragraph 25 that "the entirety of the relationship between Philip and his parents is to be taken into account." I do not read this as meaning that he took

into account all material factors as he would do if applying the second test in *Vale*. Rather, I think he was focusing on the requirement in the guidance that before concluding that the first *Vale* test is appropriate, it is necessary to have regard to the degree of Philip's incapacity and the extent to which he relied upon his parents. Having found that he was attached to the parents and saw them regularly, the application of the *Vale* test, at least as understood by the Secretary of State, led him to conclude that Cornwall was his base.

*The grounds of challenge*

42. It is trite law that the court is exercising a supervisory jurisdiction and does not determine the issue of ordinary residence for itself. Accordingly, in order successfully to sustain that challenge, Cornwall had to show that the Secretary of state erred in law in a material way, either misdirecting himself or reaching a perverse conclusion.

43. Cornwall challenged the Secretary of State's decision on two broad grounds. First, it alleged that the Secretary of State did not in fact have the power to determine the dispute at all - a somewhat unattractive submission given that it had been a party to the application requesting him to decide the point. Second, it contended that even if he did have the power, he had misdirected himself in law in wrongly applying the first test in *Vale*, and had reached a perverse conclusion not properly available to him on the facts. The judge, in a careful and full analysis of each of these arguments, rejected them both. Cornwall has renewed these grounds before us. I will address them in turn.

*Was the Secretary of State empowered to hear the dispute?*

44. This raises the issue whether the Secretary of State had the power to make a determination under section 32 of the 1948 Act at all. The submission is that he did not because there never was any live issue concerning the meaning of ordinary residence when Philip was 18, contrary to the mistaken understanding of the parties, although it was conceded that the issue would arise when he was 21. Accordingly, the request to the Secretary of State was premature.

45. The argument rests on the following propositions:

    i) The Secretary of State can only determine a dispute over a person's ordinary residence where a question arises under Part 3 of the NAA.

    ii) Although when they made the reference, the relevant local authorities assumed that section 21 of that Act (which falls within Part 3) was engaged, they were in error. The effect of section 21(1)(a) and section 21(8) is that it is a backstop provision which cannot be used if the necessary community care can be provided under any other statutory power.

    iii) In this case care and attention was otherwise available to Philip: Wiltshire was required to provide it pursuant to section 23C(4)(c) of the CA. Although it is accepted that Wiltshire did not purport to provide the accommodation

pursuant to that power, it was able to do so and that was sufficient to ensure that section 21 was not engaged. That section could not provide the source of the power to provide the necessary community care.

iv) Accordingly, there could be no dispute about who was responsible to provide care and assistance under the NAA because nobody was. Hence no question of ordinary residence under part 3 arose for determination and the exercise was wholly otiose.

46. Mr Lock QC, counsel for Cornwall, accepts that the question of ordinary residence would necessarily be engaged when Philip reached 21 because the powers under the CA would cease and section 21 of the NAA would then come into play. But there was no purpose in the Secretary of State giving a ruling as to Philip's ordinary residence at the age of 18 when nothing turned on the point; and it could not be assumed that his answer would hold good with respect to a point in time three years later when the question would need an answer.

47. A preliminary issue raised by Mr Fletcher, counsel for Somerset, was whether the point was properly arguable at all. It was not one of the original grounds of judicial review. He submitted that in substance Cornwall was seeking to set aside the reference on jurisdictional grounds and thereby render the decision a nullity. But the reference had been made and the Secretary of State had given a ruling which he was requested to give. Even if Cornwall were right to say that it served no useful purpose, that did not render it a nullity or justify the court setting it aside.

48. I see the force of the submission and indeed Beatson J observed in his judgment that the Secretary of State was entitled to take the request. Nonetheless Beatson J did consider the point and in my view so should we. If the argument is correct, it means that a fresh determination of the ordinary residence question will have to be conducted with reference to the situation as at Philip's twenty first birthday. If that is the legal position, the parties ought to be told now. In any event, if Cornwall were to maintain its position that the ruling of the Secretary of State had no relevance to them for the period when Philip was between the ages of 18 and 21 (irrespective of their liability for Philip once he had reached 21) the issue would still have to be determined. Accordingly, in my view there is clear merit in addressing the point.

49. Beatson J dismissed the argument relatively summarily (see paras 57-62). But the argument now addressed to us appears to be materially different to the way it was put before the judge. He determined the case on the assumption that the submission being advanced was that since accommodation could be provided under section 23C of the CA, it was not necessary to have recourse to section 21 of the NAA. That was not surprisingly given short shrift essentially on the basis that section 21 is not just concerned with physical accommodation but with care and attention.

50. But Mr Lock says that was never his submission. Whether that is so or not, the argument now advanced is that Wiltshire could indeed provide under section 23C(4)(c ) the full care and attention which would be provided under section 21 of

the NAA. Mr Lock submitted that the words in the section are very broad and will include all assistance which the welfare of the child requires. He relied on the decision of the Court of Appeal in *R(O) v Barking and Dagenham LBC* [2011] 1 WLR 1283 where it was held that the duty to provide assistance to a former relevant child would include a duty to provide accommodation where his welfare required it. That duty was not limited to situations where the power was expressly conferred. The welfare needs could readily include the kind of care and attention which Philip required and which, if not otherwise available, would be provided under section 21.

51. Mr Lock also sought succour from the general principle, adopted in a variety of cases, that duties owed under the CA should take precedence over duties imposed by other legislation: see e.g. *R(G) v London Borough of Southwark* [2009] UKHL 26; [2009] 1 WLR 1299 and *R(RO) v East Riding of Yorkshire* [2011] EWCA Civ.196;[2011] 2 FLR 207. As Baroness Hale put it in *R(M) v Hammersmith and Fulham LBC* [2008] UKHL 14; [2008] 1 WLR 535 (para. 42) if a duty under the CA arises, the local authority can not side step it by claiming to be acting under a different power. She was concerned with section 20 but Mr Lock submits that the same principle would apply here.

52. Notwithstanding the attractive way in which the argument was put, in my view it fails. The necessary premise is false. In my judgment, the scope of the power under section 21 (where accommodation is given a wide meaning) is in fact wider than the power conferred by section 23C(4)(c) of the CA. Wiltshire could not have provided the same package of services under the latter as under the former. The *Barking and Dagenham* case does not support such a very broad construction. Tomlinson LJ, with whose judgment Leveson and Jacob LJJ agreed, reached the conclusion that accommodation could be provided by a detailed textual analysis of the statutory provisions and the fact that similarly worded provisions in similar contexts had been construed by the courts to confer this power. The power to provide accommodation is a far cry from a power to provide the full range of community care services (including personal care services), and section 23C(4)(c) is an extremely slender thread on which to hang such extensive and burdensome duties. In my judgment, if Parliament had intended to confer a power of this scope, it would have done so expressly.

53. In my judgment, section 23C (and the other provisions applicable to those described as "former relevant children") should be construed in the light of its purpose. Baroness Hale, with immense experience in this field, described that purpose as follows in the *Hammersmith and Fulham LBC* case, para. 21:

> "Particularly relevant in this case are the duties towards older children inserted by the Children (Leaving Care) Act 2000. The aim was to supply for those older children the same sort of continuing support and guidance which children can normally expect from their own families as they move from childhood to adulthood."

To similar effect are her observations in *R (G) v Southwark LBC* [2009] UKHL 26; [2009] 1 WLR 1299 para. 8.

54. This analysis of the purpose is supported by the fact that this section and others dealing with obligations during the transitional period were inserted into the CA by the Children (Leaving Care) Act 2000. The title of that Act provides the clue to its purpose, namely to provide support for those who are leaving care. The provisions are not designed to provide the full range of community support for those who will never, or at least not for the foreseeable future, be leaving care.

55. That is not to say that there will be no benefits available to such persons under section 23C(4) or related sections. As the Secretary of State accepted, it may be in a particular case that a local authority can properly exercise powers under this section in order to supplement the care and support provided to a young adult pursuant to the NAA powers. To that extent the powers under the two Acts are not mutually exclusive and may be complementary. That does not, however, mean that they are coterminous.

56. There are a number of other considerations which in my view also strongly suggest that section 23C(4)(c) cannot be interpreted in the open ended way which Mr Lock suggests:

a) The language of the section 23C(4)(c) - "to give the former relevant child other assistance, to the extent that his welfare requires it" - suggests that the true purpose is to provide practical help to enable the young adult to become independent and look after himself or herself. The concept of giving the child assistance is inappropriate if the authority is actually having to look after the young adult itself.

b) If Mr Lock's submission is right, the incorporation into the CA of the sections dealing with former relevant children by the Children (Leaving Care) Act 2000 has had the effect that section 21 of the NAA, which says it applies to persons over the age of 18 is false since it no longer applies to persons under the age of 21. The welfare needs of those between the ages of 18 and 21, very broadly defined so as to include community care services, can be met under the CA. If the argument is correct, it is surprising that the 2000 Act did not, when incorporating these powers into the CA, at the same time amend the NAA to make it clear that section 21 only applied to persons over the age of 21.

c) The local authority responsible for the care of the child has a duty to provide a pathway plan for a looked after child once he or she has reached the age of 16. This sets out a detailed plan to assist the child to move into adulthood. (Some play was made of the fact that Wiltshire did not in fact comply with that duty in this case, but in my view that fact has no bearing on the issues we have to determine.) Before the

plan is made there needs to be an assessment of the child. Section 23E assumes that there may need to be assessments made under a variety of Acts, and not just the CA itself. However, there would seem to be no purpose in an assessment under any act other than the CA itself if all the necessary powers are contained in that Act had to be given priority.

d) Any accommodation provided under section 21 of the NAA for those who need looking after has to be registered under the Health and Social Care Act 2008 so as to ensure that it complies with certain standards: see section 26. This is an important safeguard for vulnerable young adults (and indeed older ones too.) However, the same safeguards do not apply where the accommodation is provided pursuant to section 23C(4)(c) This suggests that Parliament did not anticipate that the latter power would be exercised for the purpose of providing residential accommodation for someone in Philip's position.

57. On the assumption that the NAA powers are not fully replicated in the CA, the supporting argument that CA duties should take precedence falls away.

58. Mr Lock sought to counter this analysis that the duties are intended to assist children to independence by asserting that it was based on a distinction which is simply not reflected in the legislation. He says that there are no grounds for seeking to distinguish between those young adults capable of moving into adulthood and those who are not. The duties with respect to former relevant children are imposed with respect to all who fall into that category; and the regulations which supplement the Act and specify the kind of assistance which may be required are of an entirely general nature.

59. I do not accept that this undermines the analysis. As I have said, there may be some aspects of the range of duties which can in an appropriate case be engaged even with respect to a seriously incapacitated person like Philip. It is not surprising that where there is a spectrum from those highly capable to those incapable of helping themselves, Parliament has provided a common set of powers so that any appropriate power can be utilised if and when the child's welfare requires it. The opportunity for using these powers for the significantly disadvantaged may be very truncated given that they are not leaving care, but it is not surprising that Parliament should have adopted a common range of potential powers to be exercised as appropriate.

60. Accordingly, in my judgment, this submission fails. The Secretary of State was in fact determining a live issue which was necessary to establish which authority had to provide the section 21 care once Philip reached 18.

61. There was a further and related ground advanced by the appellant. We allowed the point to be argued, without objection from the Secretary of State, notwithstanding that formally permission to run it had not been granted.

62. The point is one singularly without merit but Mr Lock submitted that it was nonetheless correct as a matter of statutory construction. The argument rests upon a textual analysis of section 24 of the NAA, which sets out the circumstances when a local authority is empowered to provide accommodation. He submits that Wiltshire could not possibly be considered to have responsibility for Philip once he had reached the age of 18 and had no power to accommodate him under that section at all. He was not ordinarily resident in the area; nor was he even in the area so as to trigger the power provided by section 24(3) to provide accommodation for someone in urgent need of it; nor had the authorities where he was ordinarily resident consented to Wiltshire housing him under section 24(4). Mr Lock submitted that Wiltshire had acted unlawfully in placing him as it had and could not recover the cost of having done so.

63. On policy grounds this would be a deeply unsatisfactory conclusion for the court to reach. It would be contrary to the statutory purpose and inimical to the interests of the vulnerable young adult if the law were that as a result of voluntarily taking the responsibility to accommodate the young adult as an interim measure, the local authority might deprive itself of the right to recover compensation from the authority properly responsible. It would inevitably discourage the authority from acting in a responsible and sensible way. This would be contrary to the guidance which stipulates that care for the young adult should not be withheld pending the resolution of a dispute over responsibility.

64. I do not accept that the court is driven to such an unhappy conclusion. In my view, there are a number of answers to the argument. First, the whole point about the procedure is that it allows the Secretary of State to determine the allocation of responsibility where, until that matter is resolved, there is some uncertainty about it. The argument pre-supposes that it was plain that Wiltshire could not be responsible. But that begs the very question in issue. The procedure is to determine that question; and it must not be forgotten that under the guidance Wiltshire were at least presumptively liable as the authority which had been responsible for Philip as a child.

65. Second, I would be willing to conclude that there had been implicit consent within the meaning of section 24(4) to Wiltshire's actions from the other local authorities potentially responsible. They were parties to the reference and at no stage have they ever complained at Wiltshire's action. It is not as if Wiltshire was a meddling authority; it was acting responsibly; it acted responsibly in a way which would undoubtedly attract the support of all potentially interested authorities.

66. Finally, even if Wiltshire had no power to act as it did, I do not see why that should affect the powers of the Secretary of State to give a ruling when plainly interested parties had asked him to do so. This determined their obligations for the future irrespective of whether Wiltshire had acted lawfully in finding Philip interim residential accommodation.

67. Accordingly, I reject the submission that the Secretary of State was never properly seized of the issue of ordinary residence.

*The second ground of appeal; the meaning of ordinary residence*

68. Cornwall submits that the Secretary of State erred in law in applying the ordinary residence test in the way he did and reached a conclusion which was simply perverse on the evidence.

69. Mr Lock's basic submission is that the phrase "ordinary residence" should be given its ordinary meaning. If and to the extent that the first test in *Vale* required the Secretary of State virtually to ignore the element of physical presence, it was wrong in law and ought not to have been followed. He does not quibble with the decision in *Vale* but submits that the first test cannot properly be applied as though the actual place of residence was of no real significance. He relies on two authorities in particular which have emphasised the relevance of the actual place of residence. In *Mohammed v Hammersmith and Fulham LBC* [2002] 1 AC 547 para. 18 Lord Slynn said this:

> "It is clear that words like "ordinary residence" and "normal residence" may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides…So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent the place from being his normal residence. He may not like it, he may prefer some other place, but that is the place is for the relevant time the place where he normally resides."

70. He also placed some weight upon *Re A* which, as I have indicated, abandoned the *Shah* test for children and treated physical presence as an essential element in the test of normal residence. Here, submits Mr Lock, Philip's actual place of residence was South Gloucestershire; it was his place of ordinary residence which had to be determined, not that of his parents.

71. Mr Lock also argued that even if it was legitimate to apply the first test in *Vale*, it was inappropriately applied in this case. It was not correct to say that the parents were the decision makers on behalf of Philip. The local authority had to make the decisions, albeit that the parents were fully consulted.

72. Beatson J considered and rejected these submissions, and the other parties essentially support his analysis. He noted that *Vale* had been followed on a number of occasions, for example by Potts J in *R v Redbridge LBC ex p. East Sussex CC* [1993] COD 256 and had been considered without disapproval by Charles J in *R (Greenwich LBC) v Secretary of State* [2006] EWHC (Admin) 2576; and moreover it had been relied upon in formulating guidance. He concluded that there was no good reason why he should depart from it. The issue had been conscientiously considered in a fact sensitive way; it was not simply a mechanical application of the *Vale* test. There was a proper evidential basis for the conclusion and it was not for the court to interfere.

The judge noted that the concept of ordinary residence could not be equated with physical presence otherwise the test would be simple residence. In so far as some physical presence was required, Philip had periodically visited Cornwall. The judge conceded that there was a degree of artificiality in saying that Cornwall was the place of ordinary residence, but he considered that this would have been the case whichever authority had been selected.

73. The Secretary of State added that neither the observations of Lord Slynn in *Mohammed* nor the approach of the Supreme Court in *Re A* undermine the judge's analysis. Those cases were concerned with different statutory contexts. Residence is simply one factor, but no more than that. The test is one of fact and degree, and the conclusion cannot be said to be perverse.

*Discussion*

74. Since the place of ordinary residence is a question of fact, it is perhaps misleading to describe *Shah* as laying down a test as such at all. Rather, Lord Scarman has identified the paradigm case where an adult will typically be found ordinarily resident - where he has a settled abode as part of the regular order of life, voluntarily chosen. As such it helps to inform cases which depart in various ways from that paradigm. But whatever the merits of that approach for adults, as the Supreme Court held in *Re A*, *Shah* should be abandoned as the appropriate test to apply when considering the ordinary residence of young children, because they cannot sensibly be said voluntarily to choose where they live nor to have a subjective settled purpose with respect to it. Precisely the same difficulties arise with respect to those who are severely mentally disabled as *Vale* itself recognised. *Shah* provides no real assistance in those cases either.

75. However, in my judgment the first test in *Vale* establishes something akin to a rule of law. The actual test adopted by Taylor J (set out in para. 25 above) was that where the adult so lacks capacity that he is totally dependent on his parents, then at least in cases where the parents are living together, their place of ordinary residence must be taken to be that of their child. On the facts of that case, the decision is no doubt correct; and it may be that the judge meant the test to be read in that context. Indeed, the test will almost inevitably provide the right answer when the parents are actually caring for their child, because in those circumstances the child will in fact reside with the parents. That was indeed the situation in *Vale*, albeit for a short period only. Taylor J himself recognised that the position is more complicated when the parents delegate the care of the incapacitated child to others. He said that their child may then acquire what he described as a second ordinary residence. But for the purposes of attributing liability, there can only be one place of ordinary residence since only one authority is ultimately responsible for providing the relevant care and attention; and the Secretary of State must identify which area most satisfies the ordinary residence test.

76. In my judgment, the Secretary of State did apply the *Vale* test without proper consideration of Philip's actual place of residence and as if it were a rule of law. I

accept that he did carefully consider the facts but that was in the context of determining whether the conditions for the application of the test were met. Once he was satisfied that the facts were sufficiently similar to the circumstances in *Vale*, he necessarily concluded that Philip's ordinary residence was determined by the ordinary residence of the parents, which at the material time was Cornwall. He described this as Philip's base. Even if that is a helpful concept, I do not accept that Cornwall could properly be so described. It was not a place where Philip had any settled residence at all; it was simply a place which he occasionally visited for holidays. His parents visited him in South Gloucestershire more frequently than he visited them in Cornwall. Philip's parents' house was not, to use Lord Denning's phrase, "a place where he goes out and to which he returns." Indeed, in so far as it is helpful to adopt the concept of his base at all, this was surely South Gloucestershire. It was there where he lived day by day; it was from there that he left on his very occasional visits to Cornwall and to which he returned; and it was there that he received the visits from his parents.

77. In my judgment, the first test in *Vale* ought not to be followed. The words "ordinary residence" should, unless the context indicates otherwise, be given their ordinary and natural meaning. The effect of applying the *Vale* test without any real regard to the actual place of residence is that Philip is found to be ordinarily resident in a house which has never been his residence and indeed is not a suitable place for him to reside (hence the reason why he was accommodated under section 20). The occasional visit to his parents for holidays does not begin to justify a conclusion that he resides with them, let alone that it is his place of ordinary residence.

78. The observations of Lord Slynn in *Mohammed* and the judgment of the Supreme Court in *Re A* recognise the significance of the place of actual residence. I appreciate that these cases were concerned with different statutory contexts but they cannot simply be ignored on that ground. The courts in those cases were equally concerned to identify a place of residence with which the individual had a close connection. In my view, where the vulnerable adult like Philip 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, in my view, 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.

79. I do not say that the link with the parents is irrelevant; in some contexts it might carry real weight. Moreover, contrary to the submission of Mr Lock, I accept that the Secretary of State was entitled on the evidence to conclude that the parents in practice made the relevant decisions on Philip's behalf. But even having regard to that factor, it could not in my view justify treating Cornwall as Philip's place of ordinary residence.

80. Although we did not hear argument specifically on the point, there is in my view much to be said for the court adopting in the context of severely incapacitated adults a test of ordinary residence similar to the test of habitual residence adopted for dependent children in *Re A*, namely where he is integrated into a social and family

environment. I recognise that both the context and indeed the precise test in *Re A* was different - habitual rather than ordinary residence - but in my judgment those considerations should not lead to a materially different approach There is this difference, however: in the jurisdictional context a court might properly conclude that a person - adult or child - is not habitually resident anywhere whereas for the purposes of fixing responsibility for providing care, the child must be ordinarily resident somewhere.

81. In this context, by analogy with the test for children adopted in *Re A*, the ordinary residence would be the place which can properly be described as the centre or focus of the child's social and family environment. That may not always be easy to determine where he is subjected to two sets of relationships, with both his parents and the carers who foster him, and spends time with both. No doubt the place of ordinary residence may sometimes be with the parents even though he may spend more time with carers. The greater emotional pull of the parents may justify the conclusion that the parents' residence can properly be considered the place where his emotional and social life is most focused (he might perceive it as his real base) even though he spends more time with the carers. But it seems to me that he would at least have to have a pattern of regular living with the parents before it would be possible to describe this as his own place of ordinary residence. The fact that Philip's placement has been deliberately chosen so that he is in close proximity to the family home, a factor relied upon by the Secretary of State, does not make it in any sense his residence or justify treating the parents' home as his base. It facilitates visits both ways. Applying the *Re A* test, in my view, the place where he has the closest social and family environment also points ineluctably to South Gloucestershire. That is where he is integrated socially and emotionally with his foster parents; and that is where he frequently sees his own parents.

82. In this case the Secretary of State sought to diminish the significance of South Gloucestershire by saying that at the point when the assessment was made, Philip's residence there was only temporary because it was appreciated that he would soon be transferred to accommodation in Somerset. But I do not accept that this fact justifies the Secretary of State describing his residence in South Gloucestershire as temporary. It was the place where he had resided virtually all of the time for some thirteen years. That period of residence was coming to an end, but that did not justify describing it as "temporary". It was irrelevant how things might change in the future. It remained his place of ordinary residence at least until he went to live in Somerset.

83. There were two further arguments advanced by Mr Lock. First, he said that the Secretary of State erred in taking as his starting point a presumption in favour of Wiltshire being the place of ordinary residence because Wiltshire had had the responsibility for Philip as a child. In so doing, the Secretary of State was in fact simply acting in accordance with the guidance. I agree, however, that it is not helpful to adopt this as a presumption, at least in cases where the child has been placed out of the borough. But nothing turns on the point since the presumption was in any event rebutted, and it had no bearing on the finding that Cornwall was the place of ordinary residence.

84. Second, Mr Lock suggested that insufficient focus had been directed to considering the wishes of Philip. This point had not been advanced below and it would not be right to consider it now, quite apart from the fact that given Philip's very severe handicap, he is not capable of communicating his wishes. Nor do I see how his wishes as such can be relevant to a consideration of his ordinary residence. No doubt in an appropriate case and for a less severely handicapped individual it will be necessary to have regard to the state of mind (rather than the wishes) of the child in relation to his perception of the nature and quality of his residence. That could be relevant to a consideration of ordinary residence in much the same way as the Supreme Court has recently held the state of mind of an adolescent child is relevant in determining his habitual residence: *Re LC (Children)* [2014] UKSC 1. But that is not this case.

*Disposal*

85. In my judgment, therefore, the Secretary of State did misdirect himself in law and his decision cannot stand. Usually in such circumstances the appropriate remedy would be to remit the case to the Secretary of State for a fresh determination. But I do not think that would be justified in this case. Looking at the facts as at Philip's eighteenth birthday, there was in my judgment only one conclusion properly open to the Secretary of State. Philip's place of ordinary residence was South Gloucestershire. It could not be Wiltshire, because he ceased to have any connection with it at all. At that stage he had never lived in Somerset and had no connection with it. And for reasons I have given, the mere fact that his parents' place of ordinary residence was in Cornwall could not justify finding that to be Philip's place of ordinary residence.

86. Accordingly, I would declare that the place of ordinary residence at the relevant time was South Gloucestershire. It follows that the appeal succeeds.

**Lord Justice Lewison:**

87. I agree. The fundamental proposition on which Lord Scarman based his speech in *Shah* was that the words "ordinary residence" were words "bearing their natural and ordinary meaning as words of common usage in the English language". Although he proceeded to offer a definition of his own, which Elias LJ has quoted, those are not the statutory words. It is often dangerous to treat the explanatory words of a judge, however eminent, as replacing the statutory language that decision makers have to apply. I agree with Elias LJ, for the reasons that he gives, that in no ordinary sense of the words could Philip's residence be said to have been in Cornwall.

**Lord Justice Floyd.**

88. I agree with both judgments.