Neutral Citation Number: [2012] EWHC 3739 (Admin)

Case No: CO/6708/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES
(BRISTOL HEARING CENTRE)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 3ST

Date: 21/12/2012

Before :

THE HONOURABLE MR JUSTICE BEATSON

- -

Between :

The Queen on the application of Cornwall Council	**Claimant**
- and -	
Secretary of State for Health	**Defendant**
- and -	
(1) Wiltshire Council	Interested Parties
(2) South Gloucestershire Council	
(3) Somerset County Council	

- -
- -

David Lock QC (instructed by **Cornwall Council Legal Department**) for the **Claimant**
Deok-Joo Rhee (instructed by **Department of Health Litigation and Employment Division**) for the **Defendant**
Hilton Harrop-Griffiths (instructed by **Wiltshire Council Legal Department**) for the **First Interested Party**
Sarah Hannett (instructed by **South Gloucestershire Council Legal Department**) for the **Second Interested Party**
David Fletcher (instructed by **Somerset County Council Legal Department**) for the **Third Interested Party**

Hearing date: 9 November 2012

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Judgment

Mr Justice Beatson:

1. This judicial review, lodged on 27 June 2012 with an application for urgent consideration, concerns PH, a young man born with significant learning and physical disabilities. His eighteenth birthday was on 27 December 2004. It is a case about an important part of the mechanism under the National Assistance Act 1948 ("the 1948 Act") for determining which local authority has to pay for the care which PH undoubtedly needs. It is common ground that: (a) PH lacks capacity to decide where to live, (b) he is in need of care and attention for the purposes of Part III of the 1948 Act, and (c) the local authority in whose area he was "ordinarily resident" at the material time is under a duty to provide that care. It is important to state at the outset that PH has been and is being well cared for and neither he nor his natural parents, who lived in Cornwall at the material time, are parties to these proceedings.

2. Where, as in this case, there is disagreement between local authorities about the "ordinary residence" of a person in need of care, section 32(3) of the 1948 Act provides that the matter "shall be determined by the Secretary of State". On 22 March 2012 the Secretary of State determined that, as at 26 December 2004, PH was ordinarily resident in the area of Cornwall Council. In these proceedings Cornwall challenges that determination. Permission was granted on the papers by Miss McGowan QC on 15 August 2012. On 9 October 2012 these proceedings were transferred to the Administrative Court in Wales for hearing in Bristol.

3. While PH was a child Wiltshire Council provided him with accommodation under section 20 of the Children Act 1989 ("the 1989 Act"). It placed him with foster carers who live in South Gloucestershire. The arrangements for his care since his eighteenth birthday on 27 December 2004 have also been made by Wiltshire Council, first with the same foster carers, and then in two residential homes in Somerset. As a result of those circumstances, Wiltshire Council, South Gloucestershire Council, and Somerset County Council are interested parties in these proceedings. Although it does not directly fall for decision in these proceedings, the underlying and perhaps the ultimate issue is which of the four local authorities has, for the purposes of the 1948 Act, been responsible for PH's care since his eighteenth birthday.

4. The combined effect of sections 21 and 24 of the 1948 Act is that, subject to certain exceptions, the local authority "in whose area the person is ordinarily resident" may make arrangements for providing "residential accommodation for persons who, by reason of age, illness, disability or any other circumstances, are in need of care and attention which is not otherwise available to them". The exceptions are (see section 24(3) and (4) set out at [11]) cases of urgent need or where the authority in which the person is ordinarily resident consents. Section 32(1) makes provision for adjustments between the authority providing the accommodation and the authority in which the person receiving the accommodation is ordinarily resident.

5. "Ordinary residence" is not defined in the 1948 Act. The words are simple but the caselaw in this and other contexts shows the meaning of the concept is not and that the determination of ordinary residence is an intensely fact-sensitive process.

It will be necessary to consider the approach of the courts and, in particular the decision of the House of Lords in *Barnet LBC v Shah* [1983] AC 309 and that of Taylor J in *R v Waltham Forest LBC, ex p. Vale*, 25 February 1985. *Shah's* case is notable for Lord Scarman's definition (at 343) that ordinary residence refers to a person'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". It has been described by one commentator (Bradley, (2007) Solicitors Journal 1146) as "canonical" but it did not consider how the "ordinary residence" of a person who lacks the mental capacity to decide where to live is to be determined.

6. The determination of the "ordinary residence" of a person who lacks the mental capacity to decide where to live was considered in *Vale's* case. That case has been relied on in two later decisions and has influenced the formulation of the Department of Health's guidance (as to which see [24]) on determining "ordinary residence". Taylor J set out two approaches, which are referred to as "test 1" and "test 2" in the Departmental Guidance. "Test 1" applies where the person is so severely handicapped as to be totally dependent upon a parent or guardian. Taylor J stated that such a person (in that case it was a 28 year old woman) is in the same position as a small child and her ordinary residence is that of her parents or guardian "because that is her base". The second approach, "test 2" considers the question as if the person is of normal mental capacity, taking account of all the facts of the person's case, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Shah,* but without requiring the person himself or herself to have adopted the residence voluntarily.

7. Disagreement, primarily between Wiltshire Council and Cornwall Council, both before and since PH's eighteenth birthday, led them and South Gloucestershire Council to invoke the procedure under section 32(3) of the 1948 Act. The result is the determination by the Secretary of State which Cornwall Council challenges in these proceedings. Its case is that, although PH's parents lived in Cornwall on the relevant date, PH has never done so. He does not own a property in Cornwall. Nor was there, at the relevant time, any property in Cornwall at which he was able to live other than on a temporary and occasional basis. He visits his natural parents only two or three times a year. For these reasons, Mr Lock QC, on behalf of Cornwall Council, submitted that the Secretary of State erred in finding that PH has been "ordinarily resident in Cornwall since attaining his majority". He also submitted that the Secretary of State erred in concluding that Wiltshire Council had a duty to provide accommodation for PH under the 1948 Act on the day of his eighteenth birthday.

8. The evidence on behalf of the claimant consists of two statements, both dated 1 June 2012, of Karen Jackson, the Group Manager for Cornwall Council's social care, litigation, planning and highways teams, and formerly head of the Council's social services legal team.

9. The remainder of this judgment is arranged as follow. Part II summarises the relevant legislation and the Departmental Directions and Guidance. Part III summarises the facts. Part IV sets out the material parts of the decision, Part V summarises the grounds of Cornwall's challenge, and Part VI contains my

analysis and decision. An appendix contains further material from the Departmental Guidance.

II. *The legal and regulatory context*

(i) The National Assistance Act 1948:

10. I have referred to sections 21, 24 and 32 of the 1948 Act. Section 21 (as amended) provides:

> "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 who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them."

11. Section 24 provides:

> "(1) The local authority empowered under this part of the 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
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> …
>
> (3) Where a person in the area of a local authority –
>
> …
>
> (b) not being ordinarily resident in the area of the local authority, is in urgent need of residential accommodation under this part of the Act,
>
> the authority shall have the like power to provide residential accommodation for him as if he were ordinarily resident in their area.
>
> (4) Subject to and in accordance with the arrangements under section 21 of this Act, a local authority shall have power, as respects a person ordinarily resident in the area of another local authority, with the consent of that other authority, to provide residential accommodation for him in any case where the authority would have a duty to provide such accommodation if he were ordinarily resident in their area.
>
> (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.
>
> …"

12. Section 32 provides:

> "(1) Any expenditure which apart from this section would fall to be borne by a local authority –
>
> (a) in the provision under this Part of this Act of accommodation for a person ordinarily resident in the area of another local authority;
>
> …

shall be recoverable from the said other local authority.

…

(3) Any question arising under this Part as to a person's ordinary residence shall be determined by the Secretary of State…"

(ii) The Children Act 1989:

13. Section 3(1) of the 1989 Act defines "parental responsibility" as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

14. By section 17 of the 1989 Act a local authority is under a duty to safeguard and promote the welfare of children within its area who are in need and, by subsection (6), the services provided may include providing accommodation. By section 20 a local authority may accommodate a child if it considers this would safeguard or promote his welfare.

15. Section 22 of the 1989 Act provides:

22.- General duty of local authority in relation to children looked after by them.

(1) In this Act any reference to a child who is looked after by a local authority is a reference to a child who is –

…

(b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970…

…

(3) It shall be the duty of a local authority looking after any child -

(a) to safeguard and promote his welfare…

…

(4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of –

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and

(d) any other person whose wishes and feelings the authority consider to be relevant regarding the matter to be decided.

(5) In making any such decision, a local authority shall give due consideration –

> (a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;
>
> (b) to such wishes and feelings as any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain…"

16. Section 23(1) of the 1989 Act, which section was in force at the material time, provided that it is the duty of a local authority to maintain a child they are looking after in other respects other than the provision of accommodation. By section 23(2) the ways in which "looked after" children are to be accommodated and maintained included making arrangements for them to live with a local authority foster parent. By section 23(7) and (8) the local authority had to secure, so far as it was practicable and consistent with the child's welfare, that the accommodation was near his home and that, in the case of a disabled child, it was not unsuitable to his particular needs. The equivalents of these provisions are now to be found in sections 22B and 22C of the 1989 Act, which came into effect on 1 April 2011.

17. Section 23C deals with an authority's continuing functions in respect of former relevant children. Its material parts provide:

> "(1) Each local authority shall have the duties provided for in this section towards –
>
> (a) a person who has been a relevant child for the purposes of section 23A (and would be one if he were under 18), and in relation to which they were the last responsible authority; and
>
> (b) a person who was being looked after by them when he attained the age of 18, and immediately before ceasing to be looked after was an eligible child,
>
> and in this section such a person is referred to as a 'former relevant child'.
>
> …
>
> (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 subsection (7) [which is not relevant in these proceedings] the duties set out in subsections (2), (3) and (4) subsist until the former relevant reaches the age of 21;
>
> …"

By section 30(1) of the 1989 Act "nothing in this Part shall affect any duty imposed on a local authority by or under any other enactment".

18. Section 105(6) of the 1989 Act provides that, in determining the "ordinary residence" of a child for any purpose of the Act, any period in which he lives in any place *inter alia* "while he is being provided with accommodation by or on behalf of a local authority" shall be disregarded. This is similar to the deeming

provision in section 24(5) of the 1948 Act. It has generated much litigation: see the discussion in Thorpe LJ's judgment in *Northampton CC v Islington LBC* [2001] Fam. 364 and *Re D (a child) (care order: designated local authority)* [2012] EWCA Civ. 627, albeit in relation to the requirements of section 31(8) of the 1989 Act in relation to the designation of a local authority in a care order.

(iii) The Mental Capacity Act 2005:

19. Section 4 of the 2005 Act provides that in determining what is in a person's best interests, the person making the determination must (section 4(2)) consider all the relevant circumstances and (section 4(4)), so far as reasonably practicable, permit and encourage the person to participate, or improve his ability to participate, as fully as possible in any decision affecting him. By section 4(6) the person making the decision must consider, so far as is reasonably ascertainable, the person's past and present wishes and feelings, and by subsection (7) he must take into account, if it is practical, the views of anyone named by the person as someone to be consulted, and anyone engaged in caring for the person or interested in his welfare.

(iv) Departmental Guidance and Directions:

20. In 1993, the Department of Health issued circular LAC(93)(7) which provided guidance on the identification of the "ordinary residence" of people who require assistance under the 1948 Act and the procedure for making references to the Secretary of State for determination of disputes that cannot be resolved by the local authorities concerned. The purpose of the circular was to clarify, where possible, where responsibility lies between different authorities, so that the scope for disputes is reduced. It remained in force until April 2010 when it was replaced by *Ordinary Residence: guidance on the identification of the ordinary residence of people in need of community care services* ("the Departmental Guidance"). The current version of the Departmental Guidance is stated to have been published on 15 April 2011, but was in fact updated in July and November 2011.

21. Three key principles underpinned the guidance in circular LAC(93)(7). Two are relevant in these proceedings. One was that "the provision of services for individuals should not be delayed or otherwise adversely affected because of uncertainty about which authority is responsible". Another was that "one local authority must accept responsibility, in accordance with the directions issued by the Secretary of State, for the provision of social care services until the dispute is resolved". These remain features of the Departmental Guidance: see paragraph 5.

22. The directions making provision for responsibility for the provision of services pending the determination of a dispute are now contained in the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 ("the 2010 Directions"). Direction 2(2) provides that one of the local authorities in dispute must provisionally accept responsibility for the provision of services for that period. Direction 2(3) provides that, if no local authority is providing services to the person on the date on which the dispute arises, the local authorities in dispute must agree without delay which of them will do so. The Directions do not, either in Direction 2 or elsewhere, expressly state which authority is to be provisionally

responsible where the person is already in receipt of services. It does, however, seem legitimate to infer from the structure of Direction 2 that it is the authority which is in fact providing the services. This is, moreover, expressly stated in paragraph 5 of the Departmental Guidance.

23. Direction 2(4) provides that, if the authorities are unable to agree, the local authority in whose area the person is living or, in the case of a homeless person, the local authority in whose area the person is physically present must do so. This direction is similar to the statement in circular LAC(93)7 that the "local authority of the moment" has the responsibility to provide any care required to meet such a person's needs. The Departmental Guidance also uses the term "local authority of the moment" to refer to a local authority in which a person in need of services is physically present: see e.g. paragraph 45.

24. The relevant provisions of the Departmental Guidance on the term "ordinary residence" can be summarised as follows:

    (1) As there is no definition of "ordinary residence" in the 1948 Act, the term should be given its ordinary and natural meaning subject to any interpretation by the courts: paragraph 18.

    (2) The concept of "ordinary residence" "involves questions of fact and degree" and that "factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account": paragraph 19.

    (3) For the purposes of the 1948 Act it is not possible for a person to have more than one ordinary residence. This is because, if (as is possible in other contexts) a person could have more than one ordinary residence, the purpose of the ordinary residence test in the 1948 Act to determine which single local authority has responsibility for meeting a person's eligible social care needs would be defeated: paragraph 26.

    (4) "Ordinary residence can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes, irrespective of whether they own, or have an interest in, a property in another local authority area. **There is no minimum period for which a person has to be living in a particular place for them to be considered ordinarily resident there**, because it depends on the nature and quality of the connection with a new place.": paragraph 22, emphasis in original.

    (5) In the case of a young person who reaches the age of 18 years, if the young person is eligible for services, local authorities could reasonably have regard to the definition of "ordinary residence" in the 1989 Act in determining where responsibility for the future delivery of services might most appropriately lie: see paragraph 147 and [25(1)] below.

(6) Issues relating to mental capacity should be decided with reference to the 2005 Act; and the test for capacity is specific to each decision at the time it needs to be made and that a person may be capable of making some decisions but not others: paragraphs 27 – 30, which also refer to the checklist of factors in section 4 of the 2005 Act for working out the best interests of a person who lacks capacity.

(7) In the case of a person who has been placed in accommodation and who does not have capacity to decide where to live and cannot be regarded as having adopted a place of residence voluntarily, uncertainty about that person's place of "ordinary residence" should be resolved by applying one of the alternative tests in the *Vale* case: paragraph 30.

(8) Taylor J's statement that, where a person's learning difficulties were so severe as to render them totally dependent on 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" is set out in paragraph 31. It is stated that Taylor J "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". It is also stated that he held "that a young person with severe learning disabilities was ordinarily resident at her parents' house where she was temporarily living at the time" and that "she was in the same position as a small child who was unable to choose where to live".

(9) As to the first of the *Vale* tests, that a young person with severe learning disabilities will be treated as having the ordinary residence of his or her parents, the guidance states (paragraph 33) that the test:-

(a) "may not always be appropriate and should be used with caution" because "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"; and

(b) should "only be applied when making decisions about ordinary residence cases with similar material facts to those in *Vale*" (ibid).

(10) The guidance states that "the alternative approach [the second of the *Vale* tests] involves considering a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Shah*, but without requiring the person themselves to have adopted the residence voluntarily": paragraph 34.

25. The position of young people in transition from childrens' services to adult services is dealt with in paragraphs 138-158 of the Departmental Guidance. It is stated (paragraph 145) that, when a young person reaches 18 and is eligible for accommodation or services under the 1948 Act, their ordinary residence should be assessed to determine which local authority is responsible for the provision of

services under the 1948 Act. It is also stated that the authority that had responsibility for the young person under the 1989 Act is not necessarily the young person's local authority of ordinary residence once they become eligible for services under the 1948 Act. The relevant paragraphs of this part of the guidance can be summarised as follows:-

(1) Although the provisions of the 1989 Act no longer apply once a young person reaches the age of 18, local authorities could reasonably have regard to the 1989 Act and start from a "presumption that the young person remains ordinarily resident in the local authority that had responsibility under the 1989 Act": paragraph 147.

(2) Where a local authority has placed a child in accommodation on out of its area under the 1989 Act, as a result of section 105(6) of the Act, that local authority remains the child's place of ordinary residence for the purpose of the 1989 Act: paragraph 148.

(3) In such a case, "there would be a starting presumption that the young person's place of ordinary residence remains the same for the purposes of the 1948 Act when they turn 18": paragraph 148.

(4) "[The] starting presumption may be rebutted by the circumstances of the individual's case, and the application of the *Shah* or *Vale* tests": paragraph 149. "[T]he young person may be found to be ordinarily resident in the local authority that had responsibility for them under the 1989 Act, or they may be found to have acquired a new residence in the area in which they are living, depending on the facts of their case": paragraph 150.

(5) The factors that should be taken into account when considering ordinary residence for the purposes of the 1948 Act include:-

(a) "the remaining ties the young person has with the authority that was responsible for their care as a child,
(b) ties with the authority in which the young person is currently living,
(c) the length and nature of residence in the area in which the young person is currently living, and
(d) If he/she has the mental capacity to make this decision, the young person's views in respect of where he/she wants to live. The position of those with physical and learning disabilities and who may lack capacity is dealt with in the discussion of a number of scenarios in paragraph 158. These show the intention of the Departmental Guidance that the questions are ones of fact and degree. The scenarios are summarised in the Appendix to this judgment.

III The facts

26. The facts below are summarised from the agreed statement of facts the three Councils put before the Secretary of State and the "facts" section of the Secretary of State's determination.

27. PH was born with multiple complex disabilities including cerebral palsy, epilepsy, autism, right-sided hemiplegia, together with a significant visual impairment. He has severe learning disabilities and no speech. In 1988, PH, his parents and two siblings moved to Wiltshire. He lived with, and was cared for by, his parents until 1991. His parents then asked Wiltshire to provide accommodation for him.

28. In May 1991, pursuant to its powers under section 20 of the Children Act 1989, Wiltshire placed PH with specialist long-term foster carers. Wiltshire was the relevant local authority under the 1989 Act, but PH's parents retained parental rights. PH's foster parents lived within the area of South Gloucestershire. Six months later, PH's parents moved to Cornwall because of his father's job. PH remained with his foster parents until January 2005. His foster mother held an appointeeship with respect to his finances. In January 2005, PH left his foster parents and moved to a care home in Somerset funded by Wiltshire Council. He was later moved to a different care home, also located in Somerset.

29. Although PH's parents moved to Cornwall in November 1991 and have, save for a seven month period, lived there since, they have been closely involved in decisions affecting him and have had regular contact with him. They have visited him four or five times a year, and he occasionally visits his parents' home, usually over Christmas and in the summer. Those with responsibility for him considered that continuing contact with both his parents and his foster parents was important to PH. His maternal grandparents moved to Cornwall in 1996. In 1997 his paternal grandparents, who had lived in Wiltshire, died. The position after that was that he had no remaining close family ties with Wiltshire.

30. In 2001 Wiltshire, anticipating that after his eighteenth birthday PH would require support and accommodation pursuant to section 21 of the 1948 Act, began a correspondence with Cornwall: see the references to the 1948 Act in a letter dated 5 July 2001 from Wiltshire to Cornwall, and see also the letters dated 3 May 2001 and 21 January 2002. However, no agreement as to which authority was to be responsible for him after he turned 18 was reached.

31. On the 15th April 2004 Wiltshire carried out an assessment of PH's needs for community care services and having regard to this decided he needed to be provided with accommodation following his 18th birthday. The record of the assessment contains the following entries:-

    (1) The preferred persons to contact were recorded as his parents at their address in Cornwall.

    (2) At the time PH lived with his foster-parents. It was recorded that on reaching 18 he would need either to move elsewhere, or the foster placement would need re-registering as an adult placement.

(3) PH had lived with his foster parents for over 12 years and was included in their family activities. His parents were recorded as visiting four or five times a year, with occasional visits to their home by PH, usually over the Christmas period (which included his birthday) and in the summer.

(4) It was recorded that, if PH was to be moved away, his parents would wish to maintain at least the current level of contact. His foster parents also expressed a wish to be involved in helping him settle into a new placement and intended to visit as regularly as possible.

(5) Continuing contact with PH's natural and foster families was noted to be vitally important. For that reason it was considered desirable for him to live within the M4/M5 corridor for ease of travelling.

32. On 27 April 2004 there was a care review, attended by both PH's natural and foster parents. It was noted that PH was happy and settled with his foster parents and that although they would be happy for him to stay with them after his eighteenth birthday it seemed likely a suitable residential option would become available within the following 6 – 12 months. It was agreed at the meeting that this option would be pursued. There are references in Wiltshire's documents dated May and September 2004 to a "CCA", that is a "community care assessment", a process concerning adult rather than "leaving care" services.

33. On 4 October 2004 there was a further care review, again attended by both PH's natural and foster parents. Blackberry Hill in Castle Cary, Somerset, a residential care home run by Voyage, had been identified as a suitable home for PH. It is in Somerset County Council's area. Its manager thought it likely that PH would be able to move in by the end of December 2004. PH's foster parents felt that South Gloucestershire would be flexible about registration if PH needed to stay with them a while after his eighteenth birthday. The natural and foster parents had visited Blackberry Hill and both were very positive about it. Funding from Adult Services for the placement had been agreed for PH's move there.

34. At the review on 4 October, it was noted that PH's foster parents would take him to visit Blackberry Hill and his natural parents would arrange to be present to reassure him that they were involved. His adult social worker at Wiltshire was to liaise with those in South Gloucestershire responsible for registration issues to ensure that he could remain with his foster parents whilst the placement was arranged, as it was likely that PH would remain with them for a short period after his eighteenth birthday.

35. The agreed statement of facts stated that it was believed PH stayed with his parents in Cornwall over Christmas and was with them on 26 December 2004, the day before his 18th birthday. He then returned to his foster parents.

36. It was not necessary for the Secretary of State to take account of events after 27 December 2004. I shall, however, summarise them to provide a fuller picture. It was also not necessary for the Secretary of State to consider the basis upon which Wiltshire Council provided PH with accommodation after his eighteenth birthday.

Accordingly, although that may be relevant to Wiltshire Council's ability to recover the cost from another authority, it does not fall for decision in these proceedings.

37. On 11 January 2005 the manager of Blackberry Hill informed Wiltshire that the home could admit PH on 24 January 2005, and it was agreed with his natural and foster parents that he would move on that date. A care plan dated 18 January 2005 set out as one of its objectives that PH should live sufficiently close to both his natural family and his foster-parents to allow regular contact. It also provided for Blackberry Hill as an appropriate placement.

38. PH moved to Blackberry Hill on 24 January. Due to his unsettled behaviour and the fact that the home did not in fact appear to meet his needs, on 6 June 2005 he moved to Langley House, Wiveliscombe, Somerset, which is where he remains. This home, also run by Voyage, is also in Somerset's area. His parents were closely involved in the decision to move him, as evidenced by entries in Wiltshire's diary sheets.

39. On 19 July 2005, there was a care review, attended by PH's natural parents but not by his foster parents. It was noted that PH's parents had visited him several times at Langley House, and that his father had also called in when passing nearby on business. It was further noted that his parents had been closely involved in the move, staying locally on the weekend that it took place. They hoped to have PH come to visit them in their home in Cornwall for a few days later in the summer once he had settled in fully. It was also recorded in the care review notes that PH's foster parents had also been keeping in regular contact with PH and a visit by them was proposed. PH's natural mother had taken over appointeeship for his benefits from his foster mother at the request of Voyage.

40. On 11 October 2005 there was a further care review, again attended by PH's natural parents, but not his foster parents. It was noted that PH had been to stay with his parents for 5 days in late August. It was also recorded that his natural parents telephoned him on a weekly basis and were thinking of setting up a webcam link so that he could see them when they telephoned. PH had on occasions asked to telephone them. He had received cards and letters from his foster parents. The Care Manager reported that his natural parents were very pleased with his progress and described his key-worker's input as "brilliant".

41. Since PH moved to Langley House, his natural parents have no input into his day to day care, except on home visits. A care plan report dated the 27th October 2005 noted that they and PH's older brother maintained regular contact by phone and visited two or three times a year. It was recorded that he usually stayed with them over Christmas, which included his birthday.

42. In summary, PH's parents were involved in the decision to move him to both care homes and his mother has taken over the appointeeship for his benefits following a request by the company which runs the care home he is now in. Regular telephone contact is maintained. The pattern where he stays with his natural family over Christmas and perhaps for a week in the summer, and they keep in regular contact, continues.

43. Since Wiltshire first provided accommodation, the position has been as follows. Between May and November 1991, care was provided by Wiltshire and PH's parents resided in Wiltshire, but his foster parents lived in South Gloucestershire. Between November 1991 and 26 December 2004, care was provided by Wiltshire with the same foster parents, who lived in South Gloucestershire, but PH's parents lived in Cornwall. Between PH's eighteenth birthday on 27 December 2004 and 24 January 2005, Wiltshire provided PH with accommodation with his foster parents in South Gloucestershire. His parents continued to live in Cornwall. Between 24 January and 6 June 2005 Wiltshire provided PH with accommodation at Blackberry Hill in Somerset. His parents continued to reside in Cornwall. Since 6 June 2005, Wiltshire has provided PH with accommodation at Langley House which is also in Somerset's area. At the beginning of this period his parents were living in Cornwall, but on 31 May 2012 they moved back to Wiltshire's area.

44. It would thus appear that, for over 21 years, although PH's parents lived in Cornwall, Wiltshire has made provision for his accommodation. It did so pursuant to powers under the 1989 Act for some 13 years. It has done so for a further eight years since his eighteenth birthday. It is only the position at the time of his eighteenth birthday that is at issue in these proceedings. It is common ground that PH's parents' recent move does not affect the legal issues in these proceedings.

45. The last paragraph of "Agreed statement of facts" document submitted with the reference to the Secretary of State sets out the lack of agreement as to funding and the different positions of Wiltshire, Cornwall, and South Gloucestershire. It states:

> "27.1 [Wiltshire] considers that it accepted responsibility for [PH] until he reached the age of 18 but has not at any time accepted responsibility for him as an adult. Nonetheless it has provided services for him as an adult on a provisional basis pending this determination, formerly in keeping with LAC(93)7 and now with paragraph 2(2) of the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010.
>
> 27.2 [Cornwall] considers that [Wiltshire] has accepted responsibility for [PH] and demonstrated this by their actions. It has continued to provide services for him as an adult and has at no time stated that this was on a provisional or without prejudice basis.
>
> 27.3 [South Gloucestershire] considers that [Wiltshire] accepted responsibility for [PH] until he reached the age of 18 but has not at any time accepted that it ought to be responsible for providing him with adult services when he became an adult. Nonetheless, after the he left [his foster parents'] home on 24th January 2005 it has provided services for him as an adult on a provisional basis pending this determination, formerly in keeping with LAC(93) and now with the paragraph 2(2) of the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010."

It is clear that the word "it" in the fourth line of 27.3 refers to Wiltshire.

IV The decision

46. The Secretary of State's determination first sets out (in paragraphs 2 – 9) the facts, and then sets out (in paragraphs 10 – 15) the law. The application of the law to this case is contained in paragraphs 16 – 27. The material parts of this are:

"17. The legal basis for the provision of [PH's] placement between his 18th birthday and his move to Blackberry Hill is unclear. Given [PH's] personal care needs this period cannot have been in accommodation provided pursuant to section 21 of the 1948 Act, as it would not have met the requirements of section 26(1A). It may have been provided pursuant to continuing duties under the 1989 Act, but the Secretary of State's jurisdiction under section 32(3) of the 1948 Act does not extend to determining this. …

18. On [PH's] 18th birthday, his need for accommodation under section 21 of the 1948 Act arose. I will determine [PH's] place of original residence as of his 18th birthday, despite the fact that the section 21 accommodation was not in fact provided on his date, on the basis of the approach taken in the case of Greenwich. In Greenwich, the court looked at what the position would have been had arrangements been made under section 26 of the 1948 Act, and noted that the deeming provisions should be applied and interpreted on the basis that they had actually been put in place by the appropriate authority (paragraph 55 of the judgment).

19. As stated in paragraph 147 of the guidance issued by the Department, local authorities, in determining ordinary residence, can reasonably have regard to the 1989 Act and start from a presumption that the young person remains ordinarily resident in the local authority that had responsibility for them under the 1989 Act. …

[Section 105(6) of the 1989 Act was set out and the decision in *Northampton County Council v Islington Borough Council* [1999] All ER (D) 832 was cited.]

20. …I consider that, for the purposes of the 1989 Act, [PH] was ordinarily resident in Wiltshire. Residence while accommodation was being provided by or on behalf of a local authority, in this case with foster carers, would be disregarded in accordance with section 105(6)(c) of the 1989 Act.

21. The starting presumption is that [PH] remained ordinarily resident in the area of the local authority which had responsibility for him under the 1989 Act, namely Wiltshire. However, as paragraph 149 of the guidance points out, this starting point may be rebutted by the circumstances of the case and the application of the Shah and Vale tests. That paragraph refers to various factors that should be taken into account in applying those tests.

22. First, I do not consider that [PH] was ordinarily resident in Wiltshire. He had no links to the area. [PH's] parents and siblings left Wiltshire in November 1991, and [by December 2004] there were no…remaining ties with Wiltshire. …The mere fact that Wiltshire was the responsible authority for [PH] under the 1989 Act is not enough to affirm the presumption that he is ordinarily resident in Wiltshire from 27 December 2004.

…

24. [PH] has severe learning difficulties and lacks mental capacity to decide where to live…The family home in Cornwall is a place to which [he] returns for holidays and his parents are in regular contact by telephone. In 2004 it was the case that [his] parents visited him four or five times a year. [His] parents have also been closely involved in decisions made in relation to his care. [His] father's letter dated 6 January 2001 provides an example of this. From that letter…it is apparent that the family view the quantity of contact with [PH] in terms of what is in [his] 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 [PH]. I consider that [PH's] base is with [h]is parents.

25. I note that Cornwall question whether the family home in Cornwall can properly be described as a "base" for [PH] 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 [PH] and his parents is to be taken into account, and when regard is had to that, it is clear that [PH's] base remained with his parents.

> 26. Nor do I consider that [PH's foster parents] can, despite the years spent caring for [PH], be treated, by analogy, as a parent, such that, in accordance with test 1 in Vale, [PH] could be considered to have been ordinarily resident in South Gloucestershire on 26 December 2004. [PH's] natural parents remained his base throughout [PH's] placement with [his foster parents]. His parents visited him, he stayed with them, and they were involved with decisions regarding his care and well-being. I do not consider [his foster parents] to have so far replaced the role of [PH's] parents to be treated by analogy as [his] parents.
>
> 27. …[I]t was clear that [PH's] remaining in South Gloucestershire was at 26 December a temporary matter. [PH] was to remain with [his foster parents] in South Gloucestershire only until his section 21 accommodation became available. It is clear from the papers that continuing with his foster carers was considered to be important and [they] have kept in regular contact, but this is now mainly by letters and cards. His school, respite care and church life were associated with this foster care placement, and ceased once he removed to the accommodation provided under section 21 of the 1948 Act.
>
> 28. For the reasons given above, I determine that [PH] was ordinarily resident in the area of Cornwall as of 26 December 2004."

V The grounds of Cornwall's challenge

47. Mr Lock's skeleton argument set out four matters which he submitted fall to be determined in these proceedings. At the outset of the hearing he handed up six different or differently formulated issues which he addressed in his oral submissions. In my judgment, the fundamental questions are whether the Secretary of State (a) applied the correct legal test for ordinary residence in reaching his decision that PH was ordinarily resident in Cornwall, (b) applied the *Vale* case's test 1 in a *Wednesbury* unreasonable way, and (c) fell into a reviewable error in concluding that the relevant date on which to determine this was 27 December 2004.

48. The last of the matters identified in Mr Lock's skeleton argument and his oral submissions is whether Wiltshire's actions should be deemed to be the actions of the council of the area in which PH was ordinarily resident, and whether Wiltshire had the right to seek recoupment from that council pursuant to section 32 of the 1948 Act. In the list handed up the question asked is whether Cornwall can be deemed to have placed PH through the actions of Wiltshire. As I have stated, this may be the underlying and perhaps the ultimate issue of dispute, but it does not directly arise or fall for decision in these proceedings because this is only a challenge to the Secretary of State's decision as to PH's ordinary residence. The Secretary of State's decision does not purport to (nor could it) deal with the issues that might arise as a consequence of the determination of PH's ordinary residence on the relevant date.

49. Although, it appears as "ground 4", the principal ground upon which Mr Lock based his challenge was that the Secretary of State's approach erred by wrongly applying the first of the approaches set out in *Vale's* case, and that his decision on the application of *Vale's* case to the facts of the present case was irrational. He contended that the Secretary of State has been motivated by a concern that parents of an adult who lacks capacity should retain a responsibility for their "child" and that funding responsibility should therefore attach to the local authority serving

the area in which the parents live, even if that is not where the relevant adult lives or has ever lived. That, he submitted, is an approach which is not consistent with any proper view of the meaning of "ordinary residence" of an adult.

50. Mr Lock submitted that the Secretary of State had erred in not recognising that there is a conflict between the tests in *Vale*'s case and those in *Barnet LBC v Shah* and *Mohammed v Hammersmith and Fulham LBC* [2001] UKHL 57 . He maintained that the approach taken by Taylor J was wrong at the time and is in any event outdated. It was wrong at the time because it was inappropriate to use the decision in *Re P (GE) (an infant)* [1965] 1 Ch 568 at 585 that a child's ordinary residence is that of the parents as the child's "base". The court in *Re P (GE)'s* case was concerned with situations where the child's primary place of residence in fact was the parental home from which the child spent limited periods of time away, for instance at boarding school. Its reasoning did not apply to the situation in which the child's primary place of residence is not at the parent's home but the child occasionally visits them there, for instance, at Christmas or for a holiday. He also submitted that the approach in *Re P (GE)'s* case has been overtaken by the new approach to mental capacity in the Mental Capacity Act 2005.

51. Cornwall's case is that as a result of this error the Secretary of State made an inappropriate and unlawful link between the role of PH's parents at a time when he was being voluntarily cared for by Wiltshire and when his parents were under no legal duty to provide accommodation for him, and did not do so other than for temporary visits. Mr Lock argued that the position was *a fortiori* once PH became an adult. He submitted that the Secretary of State erred in not asking and giving appropriate weight to where PH was in fact living, and to reaching a conclusion which was inconsistent with the decision in *Shah*'s case, and the approach to "voluntariness" as a component of ordinary residence in *R (Hertfordshire CC) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77 (in the context of section 117 of the Mental Health Act 1983).

52. I turn to the other grounds. Ground 1 contended that a duty under section 21 of the 1948 Act did not arise on PH's eighteenth birthday because, while Wiltshire exercised its power to accommodate PH under the Children Act 1989, PH did not have a "need" for accommodation. Ground 2 is contingent on ground 1. It is (grounds, paragraph 52) that the Secretary of State erred in his approach to the decision in *R (Greenwich LBC) v Secretary of State for Health* [2006] EWHC 2576 (Admin) because it was not appropriate to "revert back to 27 December 2004 because, at that date, no duty under the [1948 Act] has (sic) arisen on any local authority to provide accommodation to PH".

53. Ground 3 is that the Secretary of State applied an incorrect starting presumption that PH was ordinarily resident in Wiltshire when he reached the age of 18. This, Mr Lock submitted, was an error of law because there is no presumption within the scheme in the 1948 Act that a person who has been provided with accommodation under the 1989 Act continues to be ordinarily resident in the same authority in which he was deemed to be ordinarily resident for the purposes of the 1989 Act. The deeming provision in section 105(6) of the 1989 Act operates solely for the purposes of that Act, and cannot be read over to apply to any other

Act. Relying on *Mohammed v Hammersmith and Fulham LBC*, Mr Lock maintained that the correct starting point in determining ordinary residence is the place where the person in fact resides at the relevant time. He contended this was South Gloucestershire, where PH was actually living on a long-term basis. He submitted that this was seen from paragraph 145 of the Departmental Guidance, and that the reference to a starting presumption in paragraph 147, if treated as a legal presumption, is erroneous in law.

VI Analysis and conclusions

(i) Introduction

54. When considering a challenge to a determination by the Secretary of State under section 32 of the 1948 Act of a person's ordinary residence the court exercises its classic supervisory jurisdiction: see Charles J in *R (Greenwich LBC) v Secretary of State for Health* at [20] and [21]. In language that is very familiar, it is to consider whether the Secretary of State applied the right criteria, had regard to relevant factors, disregarded irrelevant factors, and did not come to a conclusion which is *Wednesbury* unreasonable. Charles J also stated (*ibid.* at [77]) that the determination of the Secretary of State has to be read generously and referred to the range of decisions open to a decision-maker properly directing himself on the question of ordinary residence. As Lord Scarman stated in the very different context of *Shah*'s case ([1983] 2 AC 309 at 341), if the local authority gets the law right, the question of fact, whether the individual has established the prescribed residence, is for the authority, not the court, to decide. At that stage, determining ordinary residence is a question of fact and degree.

55. One of the difficulties in complex cases is that, unlike other contexts, under the 1948 Act (and the Children Act 1989), a person can only have "ordinary residence" in one place. This, and the deeming provisions in sections 24(5) of the 1948 Act and 105(6) of the Children Act 1989, can lead to results which appear artificial or arbitrary: see, in the context of the Children Act 1989, *North Yorkshire CC v Wiltshire CC* [1999] Fam. 323 at 333 – 334 *per* Holman J, *Northamptonshire CC v Islington LBC* [2001] Fam. 364 *per* Thorpe LJ and *Re D (a child) (care order: designated local authority)* [2012] EWCA Civ. 627.

56. The summary of the legislation and the Departmental Guidance set out earlier in this judgment suggests that two policies underlie the approach to be taken in difficult cases. The first is that there should be no incentive for local authorities to seek to be rid of the financial burden of responsibility for caring for a person by placing him or her in the area of another local authority. That was alleged to have happened in *R(Greenwich LBC) v Secretary of State for Health* where Bexley LBC facilitated the move of an elderly and mentally disabled woman to a care home in the area of Greenwich LBC shortly before her capital fell to the point at which responsibility for her fell on the local authority in whose are she was ordinarily resident. Charles J (at [45] – [51]) rejected the suggestion that there had been conscious or unconscious "dumping" or culpable failures of communication. The second policy to be found in both the 2010 Directions and in the Departmental Guidance is that there should be a strong disincentive to

withholding care pending the resolution of a dispute between local authorities or penalising an authority which does provide care pending its resolution.

(ii) Grounds 1 and 2

57. Although the challenge to the tests enunciated in *Vale*'s case is at the heart of this judicial review, I shall first deal with grounds 1 and 2. I start by observing that the Secretary of State was entitled to take the request made by the three local authorities at face value. That request was to determine PH's ordinary residence as at 26 December 2004. Moreover, for the reasons I shall give, the argument that on and after that date Wiltshire was providing accommodation pursuant to its powers under section 23C(4)(c) of the Children Act 1989 is unsustainable either in law or on the facts.

58. As to the law, section 30(1) of the 1989 Act provides that nothing in Part III of the Act "shall affect any duty imposed on a local authority by or under any other enactment". Section 23C is in Part III of the 1989 Act, so that if the duty under section 21 of the 1948 Act is otherwise engaged, it is not affected by the powers under section 23C. The crucial question therefore is whether the duty under section 21 of the 1948 Act was engaged on PH's eighteenth birthday.

59. PH's needs were assessed before his eighteenth birthday and (see [32] – [34]) it was decided that he needed to be provided with accommodation after that birthday. The contention that on his eighteenth birthday PH did not have a need for accommodation under the 1948 Act because Wiltshire had provided him with accommodation under section 23C(4)(c) of the 1989 Act is simply wrong. It proceeds on the assumption that the criterion for eligibility under section 21 of the 1948 Act was the need for accommodation as such rather than the reason why such accommodation was needed. As Baroness Hale stated in *R (M) v Slough BC* [2008] UKHL 52 at [16] to make the words "which is not otherwise available to them" govern the words "residential accommodation" would be to defeat the main purpose of section 21, which is to make special provision for those with special needs, including those who could afford to pay for the provision. See also Lord Brown of Eaton-Under-Heywood at [40].

60. As to the facts, there is no indication in the agreed facts that Cornwall believed Wiltshire's provision was made under section 23C. Cornwall's position, in paragraph 27.2 (set out at [45]), states only that it believed Wiltshire "accepted responsibility for PH and demonstrated this by their actions" and by continuing "to provide services for him as an adult". The agreed facts clearly show that Wiltshire was purporting to act under the 1948 Act: see the correspondence referred to at [30] and Wiltshire's actions referred to at [32] – [34].

61. By the time PH's eighteenth birthday was approaching it was apparent that there was a dispute between Cornwall and Wiltshire. In the light of the terms of the Departmental Guidance summarised at [22] – [23] and [25], in particular since Wiltshire was already providing PH with services, albeit under the 1989 Act, it was appropriate for it to make the arrangements. Although, for the reasons I have given, the 2010 Directions (issued after the relevant date) do not squarely point to

Wiltshire because they refer to the authority in whose area the person is living or where the person is physically present, they are consistent with the Guidance. Direction 2(3) suggests that the Directions apply where no authority is providing services. Paragraph 3 of the Departmental Guidance, however, expressly states that, where an authority is already providing services, it is the authority that is to be provisionally responsible.

62. For these reasons, I have concluded that the Secretary of State did not fall into error in concluding that PH's need for accommodation under section 21 of the 1948 Act arose on his eighteenth birthday. That disposes of grounds 1 and 2.

(iii) Ground 3:

63. Ground 3 is that the Secretary of State applied an incorrect starting presumption in paragraphs 19 and 21 of the determination that PH remained ordinarily resident in Wiltshire when he reached the age of 18. Since the determination concluded that PH was not ordinarily resident in Wiltshire at the material time, it is difficult to understand how, even if the starting point was wrong, that in itself helps Cornwall's case.

64. The determination made it clear (at paragraph 22) that: (a) the "presumption" can "be rebutted by the circumstances of the case taking account of the factors in paragraph 149 of the Departmental Guidance" (as to which see paragraph 39); and (b) the mere fact that Wiltshire was the responsible authority under the 1989 Act, was "not enough to affirm the presumption" so that the presumption was rebutted. It may be that the word 'presumption' is not an ideal word because it can be understood as indicating a legal presumption as opposed to a factual starting point. But there is nothing wrong with it being a factual starting point. It reflects the position in cases, and there must be many of them, where the placement is in the area of the local authority which makes it and the family of the person placed also live in that area. That was how it was used in this case.

65. Mr Lock submitted that the starting point should have been that PH's ordinary residence was in South Gloucestershire because (in the language of Lord Slynn in *Mohammed v Hammersmith and Fulham LBC* at [18]) he in fact resided there on 26 December 2004. Although, on that date PH was in fact physically present at his parents' home in Cornwall visiting for his birthday and Christmas, Mr Lock argued that did not count because of its temporary nature: see the *Greenwich* case at [72] ("ordinary residence not broken by temporary or occasional absences of long or short duration"), *Barnet LBC v Shah* at 341A (citing Viscount Cave LC in *Levene v IRC* [1928] AC 217, 225), and *R (Hertfordshire CC) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77 at [41].

66. Even if Mr Lock is right about the starting point, what is relevant is the finishing point. It does not follow that the application of the test in *Shah's* case would have led to the conclusion that PH was ordinarily resident in South Gloucester on 26 December 2004. For the purposes of the Children Act 1989 he remained ordinarily resident in Wiltshire. In October 2004 Blackberry Hill in Somerset had been identified as the place for him. After October, he continued to reside with his foster parents in South Gloucestershire, but it was clear he was there on a very

temporary basis, with his natural parents in Cornwall rather than his foster parents primarily involved in helping with the arrangements for the move to Somerset. In October it was (see [33]) anticipated that PH would be able to move into Blackberry Hill by the end of December; that is at most five days after his eighteenth birthday. I accept Miss Rhee's submission that in the circumstances that obtained in the two months preceding PH's eighteenth birthday one cannot impute a settled intention and voluntariness resulting in a finding that on 26 December he was ordinarily resident in South Gloucestershire.

(iv) Ground 4:

67. I turn to ground 4, the challenge to the approach in *Vale's* case based on the submissions that there is a conflict between the tests in that case and those set out by the House of Lords in *Shah's* case and in *Mohammed v Hammersmith and Fulham LBC* and that the approach has been overtaken by the approach to mental incapacity in the Mental Health Act 2005. In his reply, Mr Lock also submitted that *Vale's* case is not authority for the proposition that, after thirteen years first with foster parents and then in two care homes, PH's "ordinary residence" at the relevant time was that of his parents and follows their ordinary residence because they continue to take an interest in his welfare.

68. The starting point in considering Mr Lock's submissions is the acknowledgment by Lord Scarman in *Shah's* case (see [1983] 2 AC at 343G-H) that the statutory framework or the legal context in which the words "ordinary residence" are used may require a different meaning to that in his "canonical definition". The context before the court in that case was entitlement to a mandatory grant for fees and maintenance for students pursuing a course of study leading to a first degree or comparable course of further education. To be so entitled, they had to be "ordinarily resident" in the United Kingdom throughout the three years preceding the first year of the course. The key concepts in Lord Scarman's definition (set out at [6]) are that the residence must be "voluntarily" adopted and that it must be for "settled purposes". Lord Scarman stated that these are the two ways in which the mind of the individual concerned is important in determining ordinary residence: see [1983] AC at 344. As Mr Harrop-Griffiths observed, in the light of the facts of *Shah's* case, it was hardly surprising that Lord Scarman did not seek to explain how the test he stated could, if necessary, be adapted in the case of an incapacitated person. What is clear, however, is that a test which accords a central role to the intention of the person whose "ordinary residence" is to be determined cannot be applied without adaptation when considering the position of a person who does not have the capacity to decide where to live.

69. The other case on which Mr Lock relied, *Mohammed v Hammersmith and Fulham LBC* was also not concerned with a person who lacked capacity. Moreover, it was not concerned with the term "ordinary residence" but with the term "normal residence" in sections 198, 199 and 202 of the Housing Act 1996. M was a homeless person who had lived as the guest of a friend in Hammersmith for two and a half months. After being reunited with his wife, the couple applied to the Hammersmith and Fulham Council for assistance with accommodation. In July 1998 the Council determined that neither the applicant nor his wife had any local connection with Hammersmith but, as the wife had a local connection with

Ealing by reason of her several years of residence there, their application was referred to the local housing authority for Ealing.

70. The question for the court was whether the Hammersmith and Fulham Council had erred in not taking into account the period spent by M when living in its area as the guest of his friend. It was held that it had. Interim accommodation within the area of the Council could constitute "normal residence" for the purpose of section 199(1)(a) and thus be evidence of a local connection. Lord Slynn of Hadley stated (at [17]) that where a person in fact has no "normal residence" at a particular time, the term is to be given the same meaning as "ordinarily resident" in *Shah's* case, and (see ibid at [18]) that "the *prima facie* meaning of normal residence is a place where, at the relevant time, the person in fact resides". He continued:

> "That therefore is the question to be asked, and it is not appropriate to consider whether, in a general or abstract sense, such a place would be considered an ordinary or normal residence. 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 must not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is, for the relevant time, the place where he normally resides."

71. Mr Lock gains some support from Lord Slynn's statement that the term "normal residence" is to be given the same meaning as "ordinarily residence". But it is limited support. Apart from the differences of statutory context and terminology, Lord Slynn stated the term "normal residence" is only to be given the same meaning as "ordinarily residence" where, at the relevant time, the person in fact has no "normal residence". The test is thus a surrogate because the person in fact had no "normal residence". It is, indeed, a surrogate which accorded an important role to intention. Lord Slynn's reference to the need for the person to "voluntarily accept" the place where he eats and sleeps, suggests that physical presence was used as an indication of what the person voluntarily wanted and it was that which could constitute a local link. Moreover, the factual circumstances included a number of features pointing to a strong attraction to the borough in which M was physically present. They included the presence of relatives in the borough and the need for medical treatment which was being provided by a hospital in the borough. It would appear that physical presence is insufficient in itself and that what is required is an underlying attachment.

72. Mr Lock also relied on *R (Hertfordshire CC) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77 and *R (Sunderland CC) v South Tyneside C* [2012] EWCA Civ 1232, two cases about the meaning of the term "resident" in section 117 of the Mental Health Act 1983. The *Hertfordshire* case is of limited assistance because there was no evidence that JM lacked capacity: see [2010] EWHC 562 (Admin) *per* Mitting J at [5] and [8] and [2011] EWCA Civ 77 *per* Carnwath LJ at [8]. In the *Sunderland* case Lloyd LJ stated (at [26]) that, in understanding the meaning of the term "resident" in the 1983 Act, he did not find it helpful to consider cases in which "ordinary residence" in other legislation has been construed. Similarly, I do not find the cases on the term "resident" of assistance in construing the term "ordinary residence" in the 1948 Act.

73. I therefore turn to *Vale*'s case. It was the first case in which the determination of the "ordinary residence" of an incapacitated person fell for decision. For the reasons I have given, I do not consider that the approaches set out by Taylor J in it are "inconsistent" with the approach in either *Shah*'s case or *Mohammed v Hammersmith and Fulham LBC*. Is it, however, outdated or flawed in some other way?

74. On examination, the facts and the judgment of Taylor J show that what are referred to as "Test 1" and "Test 2" in the Departmental Guidance are not rules of law but two approaches to the circumstances of a particular case. Both involve questions of fact and degree, although Test 2 may be thought to do so to a greater degree.

75. *Vale*'s case concerned Judith, a 28 year old woman who lacked the mental capacity to decide where to live. She was born in London but her parents moved to Dublin in 1961, when she was five. She was placed in residential care in the Republic of Ireland. In 1978, when she was 22, her parents moved back to England with their other children to an address in the area of Waltham Forest. Judith remained at a home for the mentally handicapped in Ireland, but visited her parents two or three times a year. In May 1984, she returned to England to her parents' address. In anticipation of her return her parents, who wanted to place Judith in a suitable home, sought assistance from Waltham Forest LBC. After her arrival, a placement was found at a home in Stoke Poges, in Buckinghamshire. The DHSS agreed to meet the major part of the cost. Waltham Forest refused to make up the shortfall on the ground that Judith had not been a resident in the borough, but had transferred from a residential placement in Ireland where her need for residential accommodation arose.

76. After considering *Shah*'s case, Taylor J stated that, where a person's learning difficulties were so severe as to render them totally dependent on 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". He identified two alternative approaches to the determination of where such a person is ordinarily resident. Where a person is so severely handicapped as to be totally dependent upon a parent or guardian, he stated that she is in the same position as a small child and her ordinary residence is that of her parents or guardian "because that is her base". This (see [24(8) – (9)] is referred to as Test 1 in the Departmental Guidance.

77. Taylor J stated that the alternative approach (which the Departmental Guidance refers to as Test 2) is to consider the question as if the person is of normal mental capacity. He considered where the person was in fact residing and the purpose of such residence. He stated that Judith was residing "with her parents for the settled purpose of being looked after and having her affairs managed as part of the regular order of her life for the time being" and "until it was possible to obtain funding for her to go" to the home in Stoke Poges. He stated that there was no other address at which she could have been ordinarily resident, that *Shah's* case required future intent to be left out of account, and that Judith could not be regarded as a squatter in her parents' home. The Departmental Guidance (paragraph 34, summarised at [24(10)]) rationalised what he had said about this

second alternative thus:- "all the facts of a person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Shah*, but without requiring the person themselves to have adopted the residence voluntarily".

78. *Vale*'s case was decided two months after the decision of the House of Lords in *Shah*'s case. It was the first case in which the approach to the determination of the "ordinary residence" of an incapacitated person fell for decision. It was applied by Potts J in *R v Redbridge LBC, ex p. East Sussex CC* [1993] COD 256, and considered without disapproval by Charles J in *R (Greenwich LBC) v Secretary of State* [2006] EWHC 2576 (Admin) and the Court of Appeal in *R (Hertfordshire CC) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77 at [41] (Carnwath LJ). Central government and local authorities have placed significant reliance on it in formulating guidance.

79. In these circumstances there needs to be a good reason to replace it and a satisfactory alternative approach. Cornwall's case is that primacy should be given to physical presence. It is, however, important not to accord insufficient weight to the fact that Parliament chose the concept of "ordinary residence" as opposed to "residence", to the difference between those concepts, and to the other factors which are of relevance in determining "ordinary residence".

80. It is clear from the cases, including *Shah's* case and *Mohammed v Hammersmith and Fulham LBC*, that physical presence is not sufficient to constitute "ordinary residence" but the implication of Mr Lock's submissions is that it is a necessary requirement. He relied on Holman J's statement in *North Yorkshire CC v Wiltshire CC* [1999] Fam. 323 at 333 that it is "wholly artificial to regard a child as continuing to be ordinarily resident in an area in which neither he nor his family continues actually to reside and to which neither expects to return". In PH's case that has been the position since May 2012, but it was not the position in December 2004. At that time PH's parents lived in Cornwall, there was a physical presence by him in the county during his visits. Indeed, as it happened, PH was physically present in Cornwall on the day before his eighteenth birthday, although I disregard that fortuitous circumstance as of no significance to the determination of the question before me. However, his parents were much involved in the arrangements for his care and took an active and continuing interest in him, and that is a relevant factor.

81. At this stage it is instructive to consider the two first instance cases in which *Vale's* case has been considered. The first is *R v Redbridge LBC, ex p. East Sussex CC* , 21 December 1992, of which I only have the summary of the judgment in the Crown Office Digest: [1993] COD 168. The father of handicapped autistic twins, who lived in Haringey, placed them at a residential school in East Sussex. Four years later in 1986 the twins' parents moved to the area of Redbridge LBC and sought assistance from the council. In 1987 Redbridge informed the father that, pending a statutory assessment, it would accept responsibility for the education of the twins, then aged fifteen. In January 1989 the residential school informed Redbridge that it would be closing on 17 March 1989.On 2 March Redbridge learned that the twins' parents had sold their house in Redbridge and left this country to live in Nigeria in December 1988, and, on 10 March, Redbridge

informed East Sussex of the impending closure of the school, the parents' return to Nigeria, and that it considered that the statutory responsibility for the twins lay on East Sussex. As the twins were in urgent need of assistance and were in its area, East Sussex provided emergency respite care under the National Health Act 1977, but instituted judicial review proceedings contending that the duty to provide for the twins under the 1948 Act lay on Redbridge.

82. Potts J held that the duty under the 1948 Act fell on East Sussex. The summary in the Crown Office Digest states that he held that the twins were ordinarily resident in Redbridge until December 1988 because they were so mentally handicapped as to be totally dependent on their parents, and because Redbridge was their base. However, after their parents left and the family house was sold, they had no settled residence, were physically present in East Sussex, and were in urgent need of care. East Sussex was (see [23]) the "local authority of the moment" and, as such, the duty fell on it. The summary does not state whether the twins had ever visited their parents in Redbridge before the parents returned to Nigeria. It refers to Redbridge seeking to contact the parents in December 1988 about funding a holiday placement, and to the fact that the parents left for Nigeria without informing Redbridge. These factors suggest that there may have been only little contact between the parents and the twins, even in the school holidays, before that time. Nevertheless, their parents' house in Redbridge was stated to be their base.

83. The second case is *R (Greenwich LBC) v Secretary of State* [2006] EWHC 2576 (Admin). D, an elderly woman who lived in the area of Bexley LBC moved into a care home in Bexley. Her means were such that she and her family were responsible for the costs of her care, and her home was sold to provide funding for this. After about a year, it was decided that it was no longer appropriate for D to remain at that home because she needed to be in a EMI nursing home or in NHS care. She was placed in a nursing home in the area of Greenwich LBC. Four weeks and five days later, on 29 June 2002 her capital had fallen to the point that responsibility for her care fell on the appropriate local authority. There was a dispute between Greenwich and Bexley and they referred the matter to the Secretary of State. He determined that, although the move to the home in Greenwich was facilitated by Bexley, it was D's family and not Bexley who placed her there. The question was where she was ordinarily resident on the date when her available capital fell below the relevant financial cap. The Secretary of State decided that it was Greenwich. After considering the authorities, including *Vale*'s case, Charles J stated (at [72]):

> "Habitual or ordinary residence is in each case a question of fact. The temptation to turn it into an abstract proposition should be resisted. Habitual or ordinary residence is not equivalent to physical presence. There can be ordinary or habitual residence without continuous presence, while physical presence is not necessarily equivalent to residence. Residence means living somewhere. The significance of ordinary or habitually is that it connotes residence adopted voluntarily and for settled purposes. That was the point emphasised before me and appears clearly from *Shah*. Although ordinary in one place can be lost immediately, acquisition of a new ordinary residence requires an appreciable period of time. The length of the appreciable period of time is not fixed, since it depends on the nature and quality of the connection with the new place. However, it may only be a few weeks, perhaps, in some circumstances, even days. In order to establish ordinary residence over a period of time a person must spend more than a token part of that period in the place in

> question. Ordinary residence is not broken by temporary or occasional absences of long or short duration. …"

84. Charles J thus regarded "ordinary residence" as involving questions of fact and degree, and factors such as time, intention and continuity, each of which were to be given a different weight according to the context: see [73]. He also stated (see [74]) that the fact that the individual in that case did not have an existing right to reside at a place in Bexley on the relevant date is a significant factor to be taken into account, but "is not determinative of the issue". Mr Lock's submissions in effect suggested that PH could not be ordinarily resident in Cornwall because he did not have the "right" to reside at his natural parents' home. Although certain passages in the Secretary of State's determination in the *Greenwich* case might be understood to suggest that the Secretary of State regarded the absence of a place available in Bexley as determinative, Charles J stated (see [85]) that, on its true interpretation, the determination stated that, given all the factors that had to be taken into account, the key factor was that the individual did not in fact have anywhere to live in Bexley any longer, and was actually living in Greenwich, and that the factors that fell for consideration did not outweigh the force to be given to those points in determining her ordinary residence.

85. Drawing the threads together, "ordinary residence" is a question of fact and degree, and if the Secretary of State gets the law right, the determination of a person's ordinary residence is for the Secretary of State, subject only to *Wednesbury* unreasonableness. In the present case PH's connections with Cornwall differed from Judith's connections with Waltham Forest in *Vale's* case. In one sense PH's connections were more transitory because Judith had come to stay with her parents in Waltham Forest until appropriate arrangements were made for her whereas by December 2004 arrangements had been made for PH to be placed in a home in Somerset. But, in *North Yorkshire CC v Wiltshire CC* [1999] Fam. 323 at 334 Holman J stated that "the court is entitled to take into account matters other than where [the person himself or] herself was living during the specified period, and Potts J in *R v Redbridge LBC, ex p. East Sussex CC* .did not appear to have placed any weight on whether there was a physical presence by the twins in Redbridge during the period in which the court found they were ordinarily resident there.

86. In deciding whether PH's base was at the home of his natural parents, the Secretary of State applied the *Vale* Test 1 in a fact-sensitive way. Although not determinative of the legality of his decision, he did so in a similar way to that presented in "scenario 2" in paragraph 158 of the Departmental Guidance: which is summarised in the Appendix to this judgment.

87. The Secretary of State examined (see determination, paragraphs 23-24, set out at [46]) whether there was a real relationship between PH and his natural parents and whether they were in fact making relevant decisions. He was entitled to take account of that and (see determination, paragraph 25) of the "entirety of the relationship between [PH] and his parents". As part of that, he was also entitled to take account of the time spent by PH with them in Cornwall.

88. It is also clear that the Secretary of State took account of the approach in section 4 of the Mental Capacity Act 2005. In considering the approach of PH's family, he

concluded that they viewed contact with PH in terms of what was in his best interests.

89. The process of determining that PH was ordinarily resident in Cornwall may appear artificial. There would, however, have been a similar artificiality in determining that he was ordinarily resident in any of the other counties under consideration. The Secretary of State gave reasons for concluding that PH could not be considered ordinarily resident in Wiltshire at the relevant time: see paragraph 22 of the determination, which is set out at [46] above. Those reasons and that approach are in line and consistent with the decision of the Court of Appeal in *Re D (a child) (care order: designated local authority)* [2012] EWCA Civ 627.

90. In *D*'s case it was held that the "disregard" principle in section 105(6) of the 1989 Act did not apply when the ordinary residence of a sixteen year old mother had to be determined for the purpose of determining the ordinary residence of her baby. Elias LJ stated:

> "[the mother] is treated as though she has two hats; she is a mother whose ordinary residence must be determined by common law principles when that concept is relevant for the purpose of determining her child's ordinary residence for any purpose under the 1989 Act; but she is a child whose ordinary residence is modified by section 105(6) when it comes to determining her own place of ordinary residence for any purpose under that Act". (at [45]).

The reasoning summarised in paragraph 22 of the Secretary of State's determination represents the application of those common law principles.

91. As to South Gloucestershire, for the reasons I have given in [66], by the relevant date it was clear that PH was only in South Gloucestershire on a very temporary basis and the settled intention required to establish "ordinary residence" could not be imputed to him. Finally, as to Somerset, although it was planned that he would move there shortly afterwards, at the relevant date he had never lived in that county. *Shah*'s case required future intent to be left out of account.

92. For these reasons, I have concluded that the Secretary of State's determination that PH had, as his "base" his parents' home as at the date of his eighteenth birthday, and hence was ordinarily resident in Cornwall was one that was properly open to him. Accordingly this application is dismissed.

Appendix:

Scenarios in the Department of Health's Guidance concerning those with physical and learning disabilities in transition between childrens' services and adult services who may lack capacity (see Guidance, paragraph 158)

Scenario 1: A disabled person is accommodated by local authority A under section 20 of the 1989 Act in a specialist residential school in the area of local authority B. The individual has capacity to make some decisions for himself, and has expressed a desire to remain living in local authority B near his friends. The guidance states that the starting presumption is that the individual is ordinarily resident in local authority A. However, since he or she has expressed a wish to remain in local authority B, and since the family home in local authority A is not a base to which he or she returns other than for short spells over Christmas and other occasional events, it is stated that, in line with the settled purpose test in the *Shah* case, "it seems that [the person] has adopted local authority B voluntarily and for settled purposes". The presumption that he remains ordinarily resident in local authority A is stated to be rebutted so that, for the purposes of the 1948 Act, he is ordinarily resident in local authority B.

Scenario 2: A person with severe learning disabilities has been accommodated under the 1989 Act by local authority A in a residential facility in the area of local authority B, but spends weekends and holidays with his parents at their home in the area of local authority A. The assumption is that the individual does not have capacity to decide where to live, and that a "best interests" assessment concluded that it would be in his best interests to remain in the residential facility in which he is currently living during the week, because it caters for young people up to the age of 21. It is stated that, while the presumption is that the individual remains ordinarily resident in the local authority that had responsibility for him under the 1989 Act, because he maintained a close relationship with his parents and returned to their home each weekend and for holidays, and was dependent on them for much of his support, their home could be considered his "base". The guidance states that his circumstances are similar to those in the *Vale* case, where it was decided that a 28 year old woman who lived in residential care remained ordinarily resident with her parents. The guidance contrasts this scenario with the first scenario because of the close relationship between the individual, his parents, and their home, and the absence of established links "within his host local authority".

Scenario 3: A person with Downs Syndrome has been looked after by local authority A and placed with foster carers in the area of local authority B. The scenario assumed that she has expressed the wish to live independently, that her support workers and foster carers helped her to find a flat share, and that she signed her own tenancy agreement. The guidance states that, although the starting presumption is that her place of ordinary residence is local authority A which had responsibility for her under the 1989 Act, since she has lived within the area of local authority B for five years, has no contact with her birth parents, and has no links with anyone in local authority A other than her social workers, whereas she has a well-established support network in the local authority B, she has acquired an ordinary residence in local authority B.