[2023] UKSC 31
On appeal from: [2021] EWCA Civ 1957

JUDGMENT

R (on the application of Worcestershire County Council) (Appellant) *v* Secretary of State for Health and Social Care (Respondent)

before

Lord Reed, President
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
10 August 2023

Heard on 27 April 2023

Appellant
Andrew Sharland KC
Lee Parkhill
Oliver Jackson
(Instructed by Head of Legal and Democratic Services, Worcestershire County Council)

Respondent
Tim Buley KC
Natasha Jackson
(Instructed by the Government Legal Department)

Intervener - Mind (written submissions only)
Alex Ruck Keene KC (Hon)
Nyasha Weinberg
(Instructed by Mind Legal Unit)

LORD HAMBLEN AND LORD LEGGATT (with whom Lord Reed, Lord Burrows and Lord Richards agree):

1 Introduction

1. The issue in this appeal is which of two local authorities is responsible for providing and paying for "after-care services" under section 117 of the Mental Health Act 1983 (the "1983 Act") for a particular individual.

2. Section 117 places a duty on health authorities and local social services authorities to provide after-care services for persons who have left hospital following compulsory detention for treatment for mental disorder under the 1983 Act. The duty is placed on the authorities in whose area the person concerned was "ordinarily resident" immediately before being detained (see section 117(3)(a)). The complication in this case is that, after being discharged from hospital, the person concerned moved from the area of one local authority where she was ordinarily resident to the area of a second local authority, where (in accordance with section 117) she was provided with after-care services by the first local authority. She was then compulsorily detained in hospital for a second time. The question is which of the two local authorities is responsible for providing after-care services for her when she left hospital after this second period of detention. Is it the first authority – the appellant, Worcestershire County Council ("Worcestershire"), which was responsible for providing such services immediately before the second detention? Or is it the second authority – the interested party, Swindon Borough Council ("Swindon"), in whose area she was living at that time?

3. At first instance the judge, Linden J, decided that the second authority, Swindon, is responsible: [2021] EWHC 682 (Admin). The Court of Appeal reached the opposite conclusion and held that it is the first authority, Worcestershire: [2021] EWCA Civ 1957, [2022] PTSR 833. Worcestershire appeals against that decision. Swindon has not taken part in the appeal, but the appeal is opposed by the Secretary of State for Health and Social Care. The Secretary of State has also cross-appealed seeking to uphold the decision of the Court of Appeal that Worcestershire is responsible for providing after-care services under section 117 on a ground rejected by both courts below.

2 The duty to provide after-care services

4. The key statutory provisions which are in issue in this case are subsections (1), (2), (3) and (6) of section 117 of the 1983 Act. These provide:

> "**117 After Care**
>
> (1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a hospital direction made under section 45A above or a transfer direction made under section 47 or 48 above, and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
>
> (2) It shall be the duty of the clinical commissioning group or Local Health Board and of the local social services authority to provide or arrange for the provision of, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the clinical commissioning group or Local Health Board and the local social services authority are satisfied that the person concerned is no longer in need of such services; …
>
> …
>
> (3) In this section 'the clinical commissioning group or Local Health Board' means the clinical commissioning group or Local Health Board, and 'the local social services authority' means the local social services authority —
>
> (a) if, immediately before being detained, the person concerned was ordinarily resident in England, for the area in England in which he was ordinarily resident;

(b) if, immediately before being detained, the person concerned was ordinarily resident in Wales, for the area in Wales in which he was ordinarily resident; or

(c) in any other case for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained.

…

(6) In this section, 'after-care services', in relation to a person, means services which have both of the following purposes —

(a) meeting a need arising from or related to the person's mental disorder; and

(b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)."

5. Section 117(3)(a) and (b) were added by section 75(3) of the Care Act 2014 ("the 2014 Act"). Before that amendment the relevant authorities were defined in every case as those for the area specified in what is now section 117(3)(c): that is, the area in which the person concerned "is resident or to which he is sent on discharge by the hospital in which he was detained".

6. The definition of "after-care services" in subsection (6) was also added by section 75 of the 2014 Act. Previously there was no statutory definition of the term. In *R (Mwanza) v Greenwich London Borough Council* [2010] EWHC 1462 (Admin), [2011] PTSR 965, paras 63-67, Hickinbottom J approved the interpretation suggested in a respected commentary on the 1983 Act by Richard Jones (*Mental Health Act Manual*, 12th ed (2009), para 1-1053) that an after-care service is "a service which is (1) provided in order to meet an assessed need that arises from a person's mental disorder; and (2) aimed at reducing that person's chance of being re-admitted to hospital for treatment for that disorder". It can be seen that section 117(6) broadly adopts this test.

7. As reflected in the statutory definition, the provision of after-care services under section 117 is intrinsically linked to the medical treatment which a person compulsorily detained for treatment for mental disorder under the 1983 Act has been receiving in hospital: see *DM v Doncaster Metropolitan Borough Council* [2011] EWHC 3652 (Admin), para 64. As explained by Lord Steyn in *R v Manchester City Council, Ex p Stennett* [2002] UKHL 34, [2002] AC 1127, para 5, it is part of a regime introduced to further a policy of shifting people with mental health conditions from institutional care to care in the community and which "bridged the gap between the institution and unsupported return to the community" (*DM* para 64). It is important to note that section 117 applies only to an "exceptionally vulnerable" class of persons (see *Stennett* at paras 8 and 15) who have been compulsorily detained for treatment under section 3 (or certain other specified provisions) of the 1983 Act. It does not extend to persons who have been informally or voluntarily admitted to hospital under section 131 of the 1983 Act or who have been admitted for assessment under section 2 (which allows for detention for a maximum of 28 days).

8. In practice, the services provided as "after-care" largely comprise healthcare and social care, including the provision of specialised accommodation. Although these services could be provided under other statutory regimes, section 117 is not a "gateway" to other regimes but imposes a free-standing duty which has the important feature that the services must be provided free of charge: see *Stennett*, paras 7, 10.

9. The House of Lords held in *Stennett* that the duty imposed by section 117 necessarily imports a concomitant power to carry out the duty: see para 11. It also gives rise to an implied power to make plans and take preparatory steps before the duty to provide after-care arises on release from hospital: see *W v Doncaster Metropolitan Borough Council* [2004] EWCA Civ 378, [2004] LGR 743, paras 49-51. That power is discretionary, but failure to use reasonable endeavours without strong reasons may amount to an unlawful exercise of the discretion: see *R (B) v Camden London Borough Council* [2005] EWHC 1366 (Admin), [2006] LGR 19, paras 58-61.

3 The facts

10. This case concerns a particular individual who, to preserve her anonymity, has been referred to as "JG". However, the court has been told that the circumstances giving rise to this appeal are common and can be expected to arise many times every year.

11. JG lives with a schizoaffective disorder that is resistant to treatment. It is common ground that before the relevant events she was ordinarily resident in

Worcestershire. In March 2014 she was detained under section 3 of the 1983 Act for treatment in hospital in Worcester ("the first detention").

12. While she was in hospital, JG was assessed as lacking capacity to decide where to live when discharged. Following consultation with her daughter and others involved in JG's case, a decision was made that it would be in JG's best interests for her to reside in a care home close to where her daughter lives, in Swindon.

13. Accordingly, when JG ceased to be detained under section 3 of the 1983 Act and left hospital in July 2014 ("the first discharge"), she was placed by Worcestershire in a residential care home in Swindon. (Worcestershire subsequently moved JG to a second care home in Swindon because the first care home could no longer adequately meet her needs.) The provision of this accommodation and care constituted the provision of after-care services arranged and funded by Worcestershire under section 117.

14. In May 2015, as a result of deteriorating mental health and challenging behaviour, JG was admitted to a hospital in Swindon and detained there, initially for assessment under section 2 of the 1983 Act. On 23 June 2015 she was detained under section 3 for treatment ("the second detention").

15. On 4 August 2015 Worcestershire issued a notice to the care home in Swindon in which JG had been living terminating the provision of this accommodation and associated services for her.

16. In November 2015 JG ceased to be detained under section 3. She remained as a patient in the Swindon hospital because she lacked decision-making capacity until 9 August 2017, when she finally left hospital ("the second discharge").

4 The procedural history

17. A dispute arose between Worcestershire and Swindon as to where JG was ordinarily resident immediately before the second detention and which of them was responsible under section 117 for providing after-care services for JG following the second discharge. Under section 117(4)(a), where there is a dispute between local social services authorities in England about where a person was ordinarily resident for the purposes of section 117(3), section 40(1) of the Care Act 2014 applies, which provides for the dispute to be determined by the Secretary of State. On this basis the dispute was referred to the Secretary of State.

18. The Secretary of State decided that JG was ordinarily resident in Swindon immediately before the second detention and that, in these circumstances, Swindon was responsible under section 117 for her after-care following the second discharge. This decision reflected guidance issued by the Secretary of State under section 78 of the 2014 Act. Paragraph 19.64 of the current version of this care and support statutory guidance, issued in 2016, states:

> "Under section 117 of the 1983 Act, as amended by the Care Act 2014, if a person is ordinarily resident in local authority area (A) immediately before detention under the 1983 Act, and moves on discharge to local authority area (B) …, local authority (A) will remain responsible for providing or commissioning their after-care. However, if the patient, having become ordinarily resident after discharge in local authority area (B) or (C), is subsequently detained in hospital for treatment again, the local authority in whose area the person was ordinarily resident immediately before their subsequent admission (local authority (B) or (C)) will be responsible for their after-care when they are discharged from hospital."

Earlier versions of this guidance issued in 2011 and 2013 were in materially the same terms.

19. Swindon requested a review of the Secretary of State's decision under section 40(2) of the 2014 Act. Having carried out such a review, the Secretary of State reversed his earlier decision and substituted a decision that Worcestershire was responsible for providing JG with after-care services under section 117. The Secretary of State acknowledged that this decision was at odds with his own guidance but stated that his change of mind was based on the legislation and the case law.

20. Worcestershire brought proceedings in the High Court for judicial review of the substituted decision. The challenge was successful. In summary, the judge ([2021] EWHC 682 (Admin)) reasoned that JG was ordinarily resident in Swindon immediately before the second detention so that the second discharge triggered a duty on Swindon to provide after-care services for her; that it could not have been intended that Worcestershire's duty to provide after-care services consequent on the first discharge should continue in parallel once Swindon's duty had been triggered; and that section 117 should therefore be construed as imposing the duty to provide after-care services on Swindon alone from that point.

21. The Secretary of State appealed against this decision to the Court of Appeal. (Swindon was not represented and did not appear in the Court of Appeal, nor on the appeal to this court.) As mentioned earlier, the appeal was allowed. The sole reasoned judgment was given by Coulson LJ, with which Carr and William Davis LJJ agreed ([2022] PTSR 833). In summary, the Court of Appeal held that the judge was correct to find that JG was ordinarily resident in the area of Swindon immediately before her second detention and rejected the Secretary of State's argument to the contrary. But the Court of Appeal held that the duty owed by Worcestershire to provide after-care services following the first discharge was still continuing. Under section 117(2) the duty subsists until such time as a decision is taken by the relevant authorities that they are satisfied that the person concerned is no longer in need of after-care services, and on the judge's findings no such decision had been taken in relation to JG. The Court of Appeal held that there can only be one duty at any one time and, for as long as Worcestershire's duty subsists, there can be no duty owed by Swindon: see paras 50 and 57 of the judgment.

5 The appeal and cross-appeal

22. Worcestershire appeals against the decision of the Court of Appeal on two grounds which are put forward as alternatives. Worcestershire's primary case is that its duty to provide after-care services for JG under section 117 ended upon the second discharge. Its alternative case is that the duty ended at the start of the second detention. If either argument is correct, it follows that Swindon, and not Worcestershire, had a duty to provide after-care services for JG after the second discharge on the premise that, as the courts below held, JG was ordinarily resident in the area of Swindon immediately before her second detention.

23. The Secretary State disputes that premise. He submits that, applying the reasoning of the Supreme Court's decision in *R (Cornwall County Council) v Secretary of State for Health* [2015] UKSC 46, [2016] AC 137 ("*Cornwall*"), Worcestershire's placement of JG in a care home in Swindon did not change where she was ordinarily resident, which as a matter of law continued to be in Worcestershire. In applying section 117(3), the area in England in which JG was ordinarily resident immediately before the second detention was therefore Worcestershire. By a cross-appeal the Secretary State invites this court to uphold the Court of Appeal's conclusion that the duty to provide after-care services for JG under section 117 is owed by Worcestershire, and not Swindon, on this further or alternative basis.

24. In a helpful written intervention the national mental health charity, Mind, has emphasised the need for clarity in being able to identify which public body is

responsible for providing after-care services, so as to minimise the potential for disagreements between, and delays by, public bodies.

25. We will first consider Worcestershire's appeal, assuming for this purpose that immediately before the second detention JG was ordinarily resident in Swindon. We will then consider the Secretary State's cross-appeal which challenges the correctness of that assumption.

6 The conundrum

26. The problem of interpretation raised by the appeal arises in this way. It is agreed that, following the first discharge, the duty to provide after-care services for JG was owed by Worcestershire (alone). That is because, when she ceased to be detained and left hospital in July 2014, JG became a person to whom section 117 applies and for whom there was therefore a duty to provide after-care services under section 117(2). Applying section 117(3)(a), the local authority on whom this duty lay was the local authority for the area in England in which JG was ordinarily resident immediately before being detained, ie Worcestershire.

27. Section 117(2) says that this duty shall exist "until such time as" the relevant authorities "are satisfied that the person concerned is no longer in need of such services". The judge found and it is agreed on this appeal that Worcestershire did not at any point take a decision that JG was no longer in need of after-care services.

28. The judge also held, however, and it is agreed on this appeal that, in applying section 117(3) in a situation where there has been more than one period of detention, the words "immediately before being detained" must be understood to refer to the most recent period of detention. It follows that, upon JG's second discharge in August 2017, the local authority designated by section 117(3)(a) was the local authority for the area in England in which JG was ordinarily resident immediately before the second detention. On the assumption that this was Swindon, this implies that it was the duty of Swindon to provide after-care services for her.

29. Prima facie, therefore, upon the second discharge both Worcestershire and Swindon owed a duty to provide after-care services for JG.

30. It has, however, been common ground throughout these proceedings that Parliament cannot have contemplated that two parallel duties, owed by two different local authorities, to provide after-care services for the same individual should exist at

the same time. This would be a recipe for disputes between local authorities and risk logistical chaos. No party to this litigation, and no judge, has suggested that section 117 should be interpreted as having this result. The question that arises, therefore, is how (if at all) section 117 can properly be interpreted in a way that avoids such an unacceptable outcome and identifies only one of the two local authorities which are prima facie responsible as having a duty to provide after-care services for JG under section 117(2) following the second discharge.

31. On this appeal three potential answers to this question have been put forward. We will examine them in turn.

7 Worcestershire's primary case

32. We take first Worcestershire's primary case that its duty to provide after-care services for JG under section 117(2) ended upon the second discharge. This was the view taken by Linden J.

33. Worcestershire acknowledges that, to reach this result, it is necessary to read an implied qualification into the second part of section 117(2). On Worcestershire's case section 117(2) places a duty on the local authority to provide after-care services for the individual concerned "until such time as" they are satisfied that the individual is no longer in need of such services or until such time as a duty to provide after-care services for the individual is owed by another authority. The stumbling-block for Worcestershire's argument is the inability to provide any justification in terms of the statutory language and purpose for reading section 117(2) as if it included these additional words.

34. The judge's reasoning on this point ([2021] EWHC 682 (Admin), at para 150 of his judgment) was as follows:

> "The notion that the duty which had been triggered by the end of the first period of detention continued in parallel with the duty owed by Swindon in respect of the second period of detention, or instead of that duty, seems to me to [be] highly artificial and contrary to the intention of Parliament that the section 117(2) duty will be owed by the bodies identified under section 117(3) by reference to the relevant, here the second, period of detention."

The problem with this reasoning is that it does not explain why the intention of Parliament that a section 117(2) duty should be owed by the bodies identified under section 117(3) by reference to the second period of detention should prevail over the duty already owed by the first authority, Worcestershire, by reference to the first period of detention. It is, as mentioned, common ground that Parliament cannot sensibly be taken to have intended that parallel duties owed by two different local authorities should co-exist. But no reason has been given by Worcestershire (or the judge) to explain why the second duty should oust the first, rather than the other way round.

8 The Secretary of State's case

35. The Secretary of State's case is the converse of Worcestershire's primary case and, as such, is open to exactly the same objection in reverse. The Secretary of State contends that, once a duty to provide after-care services was imposed on Worcestershire upon the first discharge, on the express wording of section 117(2) the duty subsists until such time as a decision is taken by Worcestershire that JG is no longer in need of after-care services. As Worcestershire had not taken such a decision, its duty continued during the second period of detention and after the second discharge. As there could only be one duty at any one time, for as long as the original duty subsisted, no new duty owed by another local authority could arise. This was, in essence, the Court of Appeal's reasoning: see [2022] PTSR 833, paras 49-57.

36. Just as Worcestershire and the judge, however, have failed to explain how, consistently with the terms of the statute, Worcestershire's duty under section 117(2) came to an end upon the second discharge, so equally have the Secretary of State and the Court of Appeal failed to explain why, upon the second discharge, Swindon did not owe a duty under section 117(2). Applying section 117(2) and (3)(a) in accordance with their terms, upon an individual leaving hospital after ceasing to be detained a duty is imposed on the local authority for the area in which the individual was ordinarily resident immediately before that period of detention. There is nothing in section 117 which says that such a duty will not arise if there is a pre-existing duty resting on another local authority.

37. The only reason given by the Court of Appeal for the assertion that no new duty arose was that there can only be one duty owed at any one time and that the original duty still existed. Accepting the premise, however, that there can only be one duty owed at any one time, this begs the question of why the first duty should oust the second rather than the second duty ousting the first (or both duties co-existing). The judgment of the Court of Appeal did not engage with this question.

38. On this appeal counsel for the Secretary of State seek to answer it by making the following argument. All that section 117(1) does, they submit, is to provide that the section "applies" to persons who fall within subsection (1). Where a duty under section 117(2) is owed by reason of a first period of detention, the question whether section 117 applies to the person concerned has already been answered in the affirmative: the section does apply to her. The fact that, in a case where the duty has not ceased, the criteria in section 117(1) are then met for a second time as a result of the person again being detained and later discharged does not make it necessary to say that section 117 applies to her again, or that it applies to her twice. The section either applies to a person or it does not. In a case where the section already applies to a person, a further detention and subsequent discharge do not alter the person's status under section 117 and therefore do not trigger a new and separate duty.

39. On analysis, however, this argument is just as question-begging as the reasoning adopted by the Court of Appeal. The fact that section 117 already applies to a person at the time of her detention does not explain why upon that person's subsequent discharge no duty should be owed by a local authority which falls within the description in section 117(3). To say that the section cannot apply to a person by reason of her leaving hospital after ceasing to be detained if it already applied to that person by reason of a previous discharge is simply a more elaborate way of saying that, if a duty is already owed under section 117, no new duty can arise. The reasoning is purely conclusory and does not explain why not.

40. Thus, in our view, the approach put forward by Worcestershire as its primary case and the approach put forward by the Secretary of State and accepted by the Court of Appeal both suffer from the same flaw. Both approaches fail to explain why, assuming it is not possible to have two concurrent duties under section 117, one duty ousts or prevails over the other. Each approach rests on nothing more than assertion that its preferred duty trumps the other without identifying any basis in the language and purpose of the statute for reaching this conclusion.

9 Practical considerations

41. Each party has attempted to support its case by arguing that it has practical advantages over the other party's approach. Thus, Worcestershire has suggested that it is likely to be more efficient and to facilitate co-operation with other relevant authorities and agencies if the responsibility for providing after-care services lies with the local authority for the area in which the person concerned is living rather than with one that may be many miles away. For his part, the Secretary of State submits that his preferred approach has the benefit of preserving continuity of care and responsibility

and avoids practical difficulties likely to result if the duty is shifted from one authority to another.

42. Neither of these arguments, however, is supported by evidence and, without appropriate supporting evidence, we are not prepared to give weight to either argument. Worcestershire's argument might seem plausible if Worcestershire had been actively managing the provision of after-care services for JG in Swindon before the second detention. But there is no evidence that it was and in his oral argument leading counsel for Worcestershire, Andrew Sharland KC, realistically accepted that in practice people in Swindon will be organising the provision of services for JG whichever local authority owes the duty. The dispute is really one about who must pay for the services. This point equally undermines the Secretary of State's argument. Mr Sharland KC also pointed out that if applying the Secretary of State's guidance (which indicates that responsibility lies with the second local authority, Swindon) had given rise to any practical difficulties, it is reasonable to assume that the Secretary of State would have adduced evidence to this effect; but none has been adduced.

43. We are therefore not persuaded that speculation about possible practical difficulties or benefits of either approach is of assistance in interpreting the relevant statutory provisions.

10 Worcestershire's alternative case

44. Worcestershire's alternative case is that the duty under section 117(2) to provide after-care services for an individual ends if the individual is compulsorily detained in hospital for treatment. That individual is no longer a person who has ceased to be detained and has left hospital but rather a person who is detained and is in hospital. The criteria set out in section 117(1) are therefore not met. When that period of detention ends and the individual leaves hospital, a new duty under section 117(2) will arise. On this interpretation, therefore, there is never any possibility of concurrent or competing duties. So there is no need to try to explain why one duty should oust or prevail over another.

45. Unlike the other two suggested approaches, this interpretation is grounded in the language and purpose of section 117. It is implicit in the wording of section 117(1), and in the very concept of "after-care", that the section does not apply to persons who are (currently) detained under section 3 for the purpose of receiving medical treatment in hospital, but only to persons who have ceased to be and therefore are not now so detained (although they previously were). As one of us (Leggatt LJ) put it in

giving the lead judgment of the Court of Appeal in *R (CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852, [2019] 1 WLR 1862, para 38:

> "The clear purpose of section 117 is to arrange for the provision of services to a person who has been, but is not currently being, provided with treatment and care as a hospital patient."

46. Furthermore, as specified in section 117(6)(b), to constitute "after-care services", the services must have the purpose of "reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)". That purpose is only capable of being fulfilled if the person concerned is not currently detained in a hospital for treatment for mental disorder. It makes no sense to speak of reducing the risk of the person requiring readmission to a hospital for treatment after the person has been readmitted.

47. In *CXF* counsel for the claimant attempted to avoid that conclusion by arguing that services provided to an individual who had been detained under section 3 and had not been discharged could still constitute "after-care services" on the footing that one of their purposes was to reduce the risk that, when the individual became in future well enough to live in the community, his condition would then deteriorate so as to require his admission to hospital again for further treatment. This contrived argument was rejected. As stated at para 43 of Leggatt LJ's judgment :

> "That suggestion seems to me completely unreal. The purpose of the treatment which the claimant is currently receiving from the hospital is to bring about an improvement in his condition which will enable him to leave hospital and live in the community. It is not to reduce the risk of a deterioration from a state of health which has not yet been achieved."

48. In the present case Worcestershire did not advance in the Court of Appeal its alternative case in this court that its duty came to an end when JG was detained for a second time (see [2022] PTSR 833, para 46, footnote 1, of the judgment), although this had been its position before the judge and this court gave permission for this case to be argued on appeal. What led the judge to reject this approach was the wording of section 117(2). He accepted the argument made by Tim Buley KC for the Secretary of State that section 117(2) has the meaning and effect that the duty to provide after-

care services will come to end only when the bodies referred to in that subsection take a joint decision that the person concerned is no longer in need of after-care services, and not until then: see [2021] EWHC 682 (Admin), paras 140-141 and 145-146 of the judgment. Mr Buley KC makes the same argument for the Secretary of State on this appeal. He submits that it is inconsistent with the language of section 117(2) to assert that the duty to provide after-care services will cease at a time when no decision has been taken by the relevant bodies that the services are no longer needed.

49. As a matter of linguistic analysis, the answer to this argument, in our view, is that the duty under section 117(2) is to provide after-care services "for any person to whom this section applies". The duty will therefore cease not only if and when a decision is taken that the person concerned is no longer in need of after-care services but, alternatively, if the person receiving the services ceases to be a person to whom section 117 applies. As Mr Sharland KC pointed out, that would be the case if, for example, the person concerned were to die or was deported or imprisoned. Although there is nothing in section 117(2) which says that the duty will cease in that event, there would then be no person to whom section 117 could apply. That is also true if the person concerned ceases to fall within the class of persons specified in section 117(1). For the reasons given, interpreted in the context of section 117 as a whole and its purpose, the class of persons specified in section 117(1) does not include persons who are currently detained in a hospital under section 3 for treatment. Upon such detention an individual therefore ceases to be a "person to whom this section applies".

50. Looking at the matter more broadly, where a person who has been receiving after-care services is admitted to a hospital for treatment under section 3 (or one of the other provisions mentioned in section 117(1)), it is inherent in the person's situation that she has no need for, and is incapable of being provided with, after-care services. It is therefore unnecessary for the relevant authorities to take any decision that they are satisfied that the person concerned is no longer in need of such services. Such a decision is only necessary, and it is only necessary for section 117(2) to require such a decision, if the situation of the person concerned is one in which a present need for such services could possibly exist.

51. On behalf of the Secretary of State, Mr Buley KC disputed the proposition that a person who is compulsorily detained in a hospital for treatment cannot be in need of after-care services. He submitted that during a short period of such detention the need for after-care services would not necessarily cease, as steps might be required to plan ahead and prepare for care to be provided in the community for the person upon her anticipated discharge. It is wrong, however, to characterise such planning or preparation as the provision of after-care services. Planning or preparing to provide a service is not the same as providing the service. The fact that the local authority has a

power, but not a duty, to engage in such planning and preparation before a person is discharged (see para 9 above) does not show that a duty to provide after-care services does or may exist before the person's discharge. On the contrary, it is inconsistent with that suggestion.

52. Another objection raised by the Secretary of State, which seems to have been accepted by the courts below, is that this interpretation of section 117 proves too much. It is said that logically, if correct, it would have the consequence that any readmission to hospital, voluntary or otherwise, would bring the duty to an end. Since a voluntary admission to hospital, or detention under section 2 of the 1983 Act for the purpose of assessment (rather than treatment), does not give rise to any right to receive after-care services upon discharge, this would mean that a person would permanently lose the right to receive after-care services merely by reason of a short voluntary admission to hospital or admission for assessment.

53. We do not agree, however, that this consequence follows. What takes a person outside the class of persons specified in section 117(1) to whom section 117 applies, and thereby terminates the duty under section 117(2), is not admission to hospital or detention simpliciter but detention under section 3 of the 1983 Act (or one of the other provisions mentioned in section 117(1)) for treatment for mental disorder. Further, under section 117(6) after-care services are directed at reducing the risk of admission to hospital for "treatment" and to admission to hospital "again" for such treatment. This is clearly referring to further treatment under section 3 of the 1983 Act (or the other provisions referred to in section 117(1)). Where after-care services have not avoided that risk eventuating and there has been readmission for such treatment, there is no room for the continued provision of services which are aimed at reducing that specific risk. The same does not apply in relation to other admissions to hospital. It is wrong to suppose, therefore, that a voluntary admission to hospital or admission for assessment could lead to permanent loss of the right to receive after-care services.

11 Conclusion on where the duty lies

54. We conclude that, on the best interpretation of section 117 of the 1983 Act, the duty under section 117(2) to provide after-care services automatically ceases if and when the person concerned is detained under section 3 (or another provision specified in section 117(1)). In this case, therefore, Worcestershire's duty to provide after-care services for JG ended upon her second detention. Upon the second discharge a new duty to provide such services arose. Which local authority owed that duty is determined by section 117(3) and depends on where JG was ordinarily resident immediately before the second detention.

12 Ordinary residence

55. So far we have assumed that, as both courts below held, the area in England in which JG was ordinarily resident immediately before the second detention was Swindon, where she was living at the time. By his cross-appeal the Secretary of State disputes this. He contends that, in determining where a person is ordinarily resident for the purposes of section 117(3), a person remains ordinarily resident in the area of a local authority which is providing her with accommodation in performing its statutory duty under section 117 even if the accommodation is situated, and the individual is therefore living, in the area of another local authority. So, as immediately before the second detention JG was living in accommodation provided by Worcestershire, she remained ordinarily resident in Worcestershire for the purposes of section 117(3).

56. The classic statement of what is meant by the term "ordinarily resident" is that of Lord Scarman in *R v Barnet London Borough Council, Ex p Shah* [1983] 2 AC 309, 343. After reviewing earlier authorities, he concluded:

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

Lord Scarman went on to say, at p 344, that there are two respects in which the mind of the person concerned is relevant in determining ordinary residence. First, residence must be voluntarily adopted, so that enforced presence by reason of kidnapping or imprisonment, for example, would not generally give rise to ordinary residence. And second, there must be a degree of settled purpose: this requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".

57. We think it clear in principle and from the examples given by Lord Scarman that the circumstances in which a person will not be regarded as ordinarily resident in a place because the person's presence there is involuntary are narrow and are limited to situations where the person is forcibly detained. Along with kidnapping and imprisonment, compulsory detention under the 1983 Act would fall into this category. On the other hand, the fact that someone has no other accommodation (or suitable accommodation) available to her in which to live does not prevent it from being said

that she is ordinarily resident where she is living. The occupation of that accommodation is still adopted voluntarily in the requisite sense and the absence of any practical alternative only tends to confirm that her situation has the necessary degree of settled purpose to amount to ordinary residence. This situation may arise where, for example, a person dependent on a local authority for accommodation is only offered accommodation by the local authority in one particular place, as happened here on the first discharge.

58. The test articulated in *Shah* requires adaptation where the person concerned is someone such as JG who lacks the mental capacity to decide where to live for herself. It seems to us that in principle in such a case the mental aspects of the test must be supplied by considering the state of mind of whoever has the power to make relevant decisions on behalf of the person concerned. Under the Mental Capacity Act 2005 that power will lie with any person who has a lasting power of attorney or with a deputy appointed by the Court of Protection or with the court itself. Applying this approach, JG's residence in the area of Swindon was adopted voluntarily in the relevant sense, as it was the result of a choice made on her behalf to live in the accommodation that Worcestershire provided for her following the first discharge. Manifestly, her residence in that place was also adopted for settled purposes as part of the regular order of her life for the time being. Thus, if the term "ordinarily resident" is given its usual meaning, it is clear that immediately before the second detention JG was ordinarily resident in the area of Swindon. Indeed in these proceedings the Secretary of State has not sought to argue otherwise.

59. His argument is that, in the context of section 117 of the 1983 Act, the words "ordinarily resident" do not simply bear their usual meaning but are subject to a special rule of law. This rule is said to be that, if the accommodation in which the person concerned is living is provided by a local authority for the purpose of performing its statutory duty under section 117, then residence in that place should be disregarded in determining where the person is "ordinarily resident" for the purpose of section 117(3). There is no such rule to be found in the language of the 1983 Act (or any other legislative provision). But the Secretary of State submits that it follows from what the Supreme Court decided in *Cornwall*.

13 *Cornwall* and deeming provisions

60. *Cornwall* concerned the interface between certain provisions of the National Assistance Act 1948 (the "NAA 1948") and the Children Act 1989 (the "CA 1989"). Under these Acts local authorities were obliged to provide accommodation to qualifying adults (under the NAA 1948) and children (under the CA 1989) based in each case on whether they were "ordinarily resident" in that local authority's area. Both

Acts also contained provisions designed to preserve the liability of a local authority to provide accommodation in circumstances where it arranged accommodation for the person concerned in the area of another local authority.

61. Under the NAA 1948 this was done by a "deeming provision". Section 24(5) stated that, where a person was provided with residential accommodation under that Part of the 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".

62. Under the CA 1989 such liability is preserved by a "disregarding provision". Section 105(6) states that, in determining the "ordinary residence" of a child for any purpose of the Act, "there shall be disregarded any period in which he lives in any place … while he is being provided with accommodation by or on behalf of a local authority". This provision has the substantially the same effect as the deeming provision in section 24(5) of the NAA 1948.

63. The NAA 1948 has now been largely replaced by the Care Act 2014. Sections 18 and 19 of the 2014 Act set out a power and a duty for local authorities to meet needs for care and support of adults. Subject to various conditions, both arise in respect of an individual who is "ordinarily resident in the authority's area": see sections 18(1)(a), 19(1) and 19(2). Section 39(1) contains a similar deeming provision to section 24(5) of the NAA 1948. It provides that an individual living in accommodation provided under the 2014 Act is to be treated "for the purposes of this Part" (that is, Part 1 of the 2014 Act) "as ordinarily resident in the area in which the adult was ordinarily resident immediately before the adult began to live in" that accommodation.

64. *Cornwall* concerned an individual referred to as "PH" who was born with multiple disabilities and who lacked mental capacity. As a child, PH was placed by Wiltshire Council with long term carers in South Gloucestershire. By reason of section 105(6) of the CA 1989, Wiltshire remained responsible for his accommodation. When PH reached the age of 18, a placement was found for him in a care home in Somerset. The issue which arose was, given "the parallel statutory context" (see para 58) of section 105(6) of the CA 1989 and section 24(5) of the NAA 1948 and the ordinary residence provisions of those Acts, in which authority's area was PH to be regarded as ordinarily resident. It was not Somerset because pursuant to section 24(5) of the NAA 1948 PH was deemed "to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him". That pointed to South Gloucestershire, where PH had lived for some 14 years. However, that period of residence had been disregarded for the purpose of

deciding where he was ordinarily resident under the CA 1989, so that Wiltshire had remained responsible for him until his 18th birthday.

65. In giving the lead judgment of the Supreme Court, Lord Carnwath recognised that South Gloucestershire "may fit the language of the statute" (para 53), which was the decisive consideration in the view of the Court of Appeal ([2014] EWCA Civ 12, [2014] 1 WLR 3408) and Lord Wilson in his dissenting judgment. However, he said that "it runs directly counter to its policy". The same policy reasoning which required the present residence of PH in Somerset to be ignored because he had been placed there also implied that his residence in South Gloucestershire should be ignored because the only connection with that county was "a historic placement under a statute which specifically excluded it from consideration as the place of ordinary residence for the purposes of that Act" (para 53).

66. Lord Carnwath observed that the deeming and disregarding provisions of the NAA 1948 and the CA 1989 shared the same "underlying purpose", namely that "an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it". Given that common purpose, Lord Carnwath considered that it would create "a hiatus in the legislation" if "a person who was placed by X in the area of Y under the 1989 Act, and remained until his eighteenth birthday ordinarily resident in the area of X under the 1989 Act, is to be regarded on reaching that age as ordinarily resident in the area of Y for the purposes of the 1948 Act, with the result that responsibility for his care as an adult is then transferred to Y as a result of X having arranged for his accommodation as a child in the area of Y" (para 54). He stated that this would be "highly undesirable" and that it "would run counter to the policy discernible in both Acts that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement". It would also have "potentially adverse consequences": in particular "it would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long-term financial burden which would potentially follow" (para 55).

67. In the light of these policy considerations, Lord Carnwath concluded, at para 59, that:

> "… it would be wrong to interpret section 24 of the 1948 Act so as to regard PH as having been ordinarily resident in South Gloucestershire by reason of a form of residence whose legal characteristics are to be found in the provisions of the 1989

> Act. Since one of the characteristics of that placement is that it did not affect his ordinary residence under the statutory scheme, it would create an unnecessary and avoidable mismatch to treat the placement as having had that effect when it came to the transition in his care arrangements on his eighteenth birthday."

68. The precise legal basis of the majority decision in *Cornwall* is a matter of some controversy and has been addressed in considerable detail in the judgments below and in the parties' submissions to this court.

69. The Secretary of State's case is that *Cornwall* decides that "ordinary residence" for the purpose of care statutes such as the NAA 1948, the CA 1989, the 2014 Act and the 1983 Act depends on fiscal and administrative considerations and that under all of those statutes responsibility remains with the local authority which arranges accommodation for the person concerned for the purpose of fulfilling its statutory duties. Although the 1983 Act contains no deeming provision, section 117 achieves substantially the same result as, once a local authority is fixed with responsibility for providing care, a move out of that local authority's area will not generally affect that responsibility (as when JG moved to Swindon). Particular emphasis is placed on the following passages in Lord Carnwath's judgment:

> "He was living for the time being in a place determined, not by his own settled intention, but by the responsible local authority solely for the purpose of fulfilling its statutory duties." (para 58)

> "Throughout the period until he reached 18 he remained continuously where he was placed by Wiltshire, under an arrangement made and paid for by them. For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live." (para 60)

70. In agreement with the courts below, we would reject this attempt to extend the *Cornwall* decision beyond the specific context of the statutes under consideration in that case and their "parallel statutory context" (per Lord Carnwath at para 58). Both those statutes contained provisions which shared the same "underlying purpose" (para 54) and the particular problem which arose was what was to happen on the transition of care responsibility from one statutory regime to the other when PH turned 18. The

1983 Act does not contain a deeming provision or other similar provision; nor does it sit in a "parallel statutory context" to those statutes. As the judge observed [2021] EWHC 682 (Admin), at para 87, "it serves a different category of person, with different needs, to those who are served by the care and support legislation."

71. We do not accept that section 117(3) of the 1983 Act is functionally equivalent to the deeming or disregarding provisions in the other statutes. Unlike those provisions, section 117(3) does not manifest any intention that the term "ordinarily resident" should be given anything other than its usual meaning. Section 117(3) does not state or imply that providing residential accommodation for an individual in the area of another local authority will not, or is not to be taken to, change the individual's place of ordinary residence. All it does is to specify the time at which the person's ordinary residence is to be determined for the purpose of allocating responsibility to provide and pay for their care. This carries no implication that, at the point in time at which the person's ordinary residence is required to be determined for the purpose of section 117, any special rule or test of ordinary residence different from the normal test should be applied.

14 *Hertfordshire*

72. The independence of section 117 from other care legislation is borne out by the decision of the Court of Appeal in *R (Hertfordshire County Council) v Hammersmith and Fulham London Borough Council* ("*Hertfordshire*") [2011] EWCA Civ 77, [2011] PTSR 1623. That case concerned an individual, JM, who had lived in the area of Hammersmith and Fulham for 15 years and was then placed by that local authority in a hostel in Sutton under section 21 of the NAA 1948. After nine months, his mental health deteriorated and he was detained under section 3 of the 1983 Act in a hospital in Sutton, before being discharged to a residential placement in Ealing. It was argued that "is resident" in section 117(3) (as it then provided) meant the same as "is ordinarily resident" in section 21 of the NAA 1948 and that, in identifying where JM was resident for the purposes of section 117(3), the period when he was living in Sutton in accommodation provided by Hammersmith and Fulham should be disregarded just as it would be under the NAA 1948.

73. This argument was rejected by the High Court: [2010] EWHC 562 (Admin), [2010] LGR 678. Having observed that there was no perceptible difference between the phrases "resident" and "ordinarily resident", Mitting J held that JM was unquestionably resident in Sutton prior to his detention in hospital there and that the deeming provision in section 24(5) of the NAA 1948 made no difference. As he stated at para 26:

> "Section 24(5) expressly provides that a person provided with residential accommodation is only to 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 accommodation was provided for him. Those words are unequivocal. What is deemed to occur for the purpose of the 1948 Act cannot be transposed into the 1983 Act."

74. Mitting J further observed at paras 27-28:

> "27 … It should also be remembered that s 117 does not only apply to those who are supported by a local authority under s 21 of the 1948 Act. It applies also to those discharged from mental hospitals who were admitted there as a result of a criminal process or of a transfer from a prison. It applies also to many people who do not require accommodation to be provided for them by a local authority but who have homes of their own and who are afflicted by mental illness.
>
> 28 It cannot therefore be said that as a matter of construction Parliament must have intended, when it enacted s 117 or its predecessor in 1982, that the duties owed under the 1948 Act and s 117 should be congruent. ..."

75. An appeal from this decision was dismissed by the Court of Appeal, with Carnwath LJ giving the lead judgment. Carnwath LJ noted that in enacting the 1983 Act Parliament had not followed the precedent of the NAA 1948 and stated, [2011] PTSR 1623, at para 45:

> "We have to proceed on the basis that Parliament deliberately chose a different formula; and that, by implication, it accepted the possibility of responsibility changing over the period of detention, including the potential impact on continuity of patient care. Furthermore, we are bound by [*Stennett*] to accept that section 117 of the 1983 Act was intended to be a free-standing provision, not dependent on the 1948 Act."

76. Carnwath LJ referred to *R v Mental Health Review Tribunal, Ex p Hall* [2000] 1 WLR 1323, where Scott Baker J had interpreted the words "is resident" in section 117(3) as referring to the area in which the patient was resident immediately before being detained in hospital, and not to the area where the hospital was located. Carnwath LJ justified excluding the period of compulsory detention in hospital when determining the person's residence on the basis that it is analogous to periods of imprisonment which do not affect a person's residence because they are involuntary (see paras 56-57 above). That did not apply to a placement under section 21 of the NAA 1948 which "is not compulsory, even though the patient may in practice have little choice": see paras 51-52.

77. *Hertfordshire* is clear Court of Appeal authority that section 117(3), before it was amended by the 2014 Act, fixed responsibility for after-care services on the local authority where the person concerned was resident immediately prior to detention, even if his residence came about because he was living in accommodation provided or paid for by another local authority. Section 117(3) did not contain a deeming provision equivalent to section 24(5) of the NAA 1948, nor did that provision apply to the free-standing regime under section 117.

78. Nothing said in *Cornwall* cast any doubt on the correctness of the decision in *Hertfordshire.* In his judgment Lord Carnwath cited *Hertfordshire* without apparent disapproval and distinguished it, including on the ground that section 117 had no deeming provision. He said, at para 56:

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

(The reference to "higher authority" was evidently a reference to *Stennett*.)

15 The effect of amending section 117(3)

79. The Secretary of State is therefore driven to argue that everything changed when in 2014 Parliament amended the wording of section 117(3). Like the courts below, we would unhesitatingly reject that argument.

80. The amendment had its origins in a recommendation of the Law Commission that the concept of ordinary residence should be extended to apply to after-care services provided under section 117. The reasoning was that this "would bring greater clarity and consistency" and "would also ensure that section 117 service users would benefit from having access to the dispute resolution procedures that apply to ordinary residence": see Law Commission Report No 326, HC 941, *Adult Social Care* (11 May 2011), paras 11.89 – 11.92 and recommendation 63. The Law Commission expressly left open, however, the question whether the rules that determine which local authority is responsible for funding services provided under section 117, as interpreted in *Hertfordshire*, should be changed so as to bring them into line with the ordinary residence rules applicable to the provision of other care services. Conflicting views had been expressed on this issue in response to consultation and the Law Commission recommended that the issue should be taken forward as a part of a joint review of policy by the Government and the Welsh Assembly Government.

81. In its response to the report, the Government accepted the recommendation to extend the concept of ordinary residence to people receiving services under section 117: see *Reforming the law for adult social care and support: The Government's response to Law Commission report 326 on adult social care*, CM 8379 (July 2012), para 11.29. However, nothing was said on the issue of whether the effect of the existing rules under section 117(3) as interpreted in *Hertfordshire* should be retained or changed.

82. We think it clear that the amendments subsequently made to section 117(3) did no more than (i) replace the concept of residence with that of ordinary residence and (ii) make clear on the face of the legislation that the time at which ordinary residence is to be determined for the purpose of section 117(3) is the point immediately before the person is detained (reflecting how the original wording had anyway been interpreted: see para 76 above). The amended wording cannot properly be interpreted as going further and as applying the same rules which govern where a person is ordinarily resident for the purpose of the 2014 Act to the determination of ordinary residence under section 117(3).

83. In particular:

(i) There was an established drafting technique in care legislation for ensuring that responsibility remained with a local authority which placed a person in another local authority area, namely a deeming provision such as that in section 24(5) of the NAA 1948 or its equivalent in the CA 1989. No such deeming provision was inserted in section 117.

(ii) The Court of Appeal had held in *Hertfordshire* that the courts had to proceed on the basis that in enacting section 117 Parliament had deliberately chosen a different formula to that in the NAA 1948 and that this meant that section 117 operated differently and did not ensure the continuing responsibility of the placing authority.

(iii) Section 117(3) had already been interpreted as requiring residence to be determined at the time immediately before the person is detained and Mitting J in *Hertfordshire* had stated in terms that in this context there was no difference in meaning between "resident" and "ordinarily resident".

(iv) It could not in these circumstances have been contemplated that the amendments made to the wording of section 117(3) would change the existing rules for determining which local authority is responsible for providing after-care services under section 117.

84. There is a further point. Section 39 of the Care Act 2014, which deals with "where a person's ordinary residence is", states in subsection (4):

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

85. The purpose of this provision is evidently to ensure that where a person who is being provided with accommodation under section 117 of the 1983 Act has social care needs not falling within the scope of after-care which require care services under Part 1 of the 2014 Act, the same local authority will be responsible for providing both services. The enactment of section 39(4) shows explicit recognition by Parliament that the area in which a person is ordinarily resident for the purposes of section 117 does not always coincide with the area in which he or she is treated as ordinarily resident

for the purposes of the 2014 Act. Put another way, as Coulson LJ pointed out in the Court of Appeal at para 81, if the Secretary of State's argument about what is meant by "ordinarily resident" in section 117 were correct there would be no need for this provision.

86. In a supplemental written submission made with the court's permission after the hearing the Secretary of State sought to answer this point. He did so, not by denying that on his approach section 39(4) of the 2014 Act is otiose, but by arguing that it is otiose anyway because the effect of *Cornwall* is on any view to extend the effect of a deeming provision, such as that in section 39(1) of the 2014 Act, beyond the scope of the legislative regime in which it is included, thereby rendering the specific deeming provisions in that regime and the parallel statutory regime redundant. We do not find this an adequate response. It was clearly essential to the conclusion reached in *Cornwall* that the two relevant statutory regimes each contained a deeming (or disregarding) provision intended to achieve exactly the same effect. Far from being otiose, their existence was therefore critical. The significance of section 39(4) is in confirming that, unlike the rules in the adult social care legislation and the CA 1989, the ordinary residence rules in the 2014 Act and section 117 of the 1983 Act are <u>not</u> congruent with each other, so that a specific provision is needed to align them where they interact.

87. We conclude that the courts below were right to decide that, in circumstances where Parliament has deliberately chosen not to apply a deeming (or equivalent) provision to the determination of ordinary residence under section 117 of the 1983 Act, the words "is ordinarily resident" must be given their usual meaning, so that JG was ordinarily resident in Swindon immediately before the second detention.

16 Disposal

88. For these reasons, we would allow Worcestershire's appeal, reject the Secretary of State's cross-appeal and declare that, following the second discharge, Swindon, and not Worcestershire, had a duty to provide after-care services for JG under section 117 of the 1983 Act.