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Community Care Update

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1. The focus of this paper is on developments in community care law over the last twelve months[1]. Six areas in particular are covered:
   (1) Section 17 / 20 of the Children Act 1989 ("CA 1989");
   (2) unaccompanied asylum seeking children ("UASCs"), age assessments and the role of Article 6 in social welfare decisions;
   (3) inter-relationship between CA 1989 and special educational needs;
   (4) case law on ordinary residence and the new guidance;
   (5) alternative remedies;
   (6) duty to give reasons.

Section 17 v Section 20 Duties

2. The key relevant statutory provisions considered are ss.17 and 20 of the CA 1989. Sub-section 17(10) of the CA 1989 defines a child as being "in need" if:

> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
> (c) he is disabled.

3. A local authority has a "general duty" under s.17(1) of the CA 1989 to safeguard and promote the welfare of children within their area who are in need and, so far as is consistent with that duty, to promote the upbringing of such children by their families by providing a range and level of services appropriate to those children's needs. The services provided in the exercise of this function may include "providing accommodation" (s.17(6) of the CA 1989).

4. A local authority has a duty to "provide accommodation" under s.20(1) of the CA 1989 for any child in need:

> "...within their area who appears to them to require accommodation as a result of—
> (a) there being no person who has parental responsibility for him;
> (b) his being lost or having been abandoned; or
> (c) the person who has been caring for him being prevented (whether or not permanently,

[1] I am grateful to James Cornwell for allowing me to draw on material from a previous paper in the preparation of this paper.

and for whatever reason) from providing him with suitable accommodation or care".

5. Further, a local authority has a duty to "provide accommodation" under s.20(3) of the CA 1989 for any child in need, "within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation".

6. Section 22(1) CA 1989 defines a "looked after" child as generally to include any child "provided with accommodation" by a local authority in exercise of its social services functions– this is defined to exclude children who are provided with accommodation under s.17 of the CA 1989, but includes those who are accommodated under s.20 of the CA 1989.

7. The local authority has significant additional obligations in relation to a "looked after" child, potentially continuing until the child reaches the age of 21 (under s.23B of the CA 1989) if eligible (under s.19B of the CA 1989). An eligible child is one who has been looked after for a minimum period of 13 weeks since the age of 14 (as prescribed by the Children (Leaving Care) (England) Regulations 2001 (SI 2001/2874).

8. In recent years the vexed issue of homeless 16 and 17 year olds has been particularly fertile ground for the highest appellate court. February 2008 saw the House of Lords' judgment in *R (M) v Hammersmith & Fulham LBC* [2008] UKHL 14, (2008) 1 WLR 535. May 2009 saw the House of Lords deliver judgment in *R (G) v Southwark LBC* [2009] UKHL 26, [2009] 1 WLR 1299. G became homeless at the age of 17 after falling out with his mother. He applied to the local authority (which was both the social services authority and the housing authority) for provision of accommodation under s.20 of the CA 1989. The social services authority assessed G as resourceful and not needing social services support, and therefore decided that he simply required "help with accommodation", which could have been given under s.17(6) of the CA 1989. They concluded that he did not "require accommodation" under s.20(1)(c). The authority referred him to the homeless persons unit, which provided him with accommodation under Pt.VII of the HA 1996. As a result, the authority did not owe G the onerous ongoing duties under the "leaving care" provisions of the CA 1989.

9. The local authority succeeded at first instance and in the Court of Appeal (see [2008] EWCA Civ 877; [2009] 1 WLR 34 – by a majority, Longmore and Pill LJJ, with Rix LJ forcefully dissenting). However, the House of Lords allowed G's appeal. Indeed Baroness

Hale of Richmond (giving the leading speech, as she had done in *M*) considered it "something of a surprise" that the issue reached the House given her observations on what ought to happen in the reverse situation in *M* [5]. At [6] she quoted her own leading speech from *M*:

> "Such a young person has needs over and above the simple need for a roof over her head and these can better be met by social services. Unless the problem is relatively short-term, she will then become an eligible child, and social services accommodation will also bring with it the additional responsibilities to help and support her in the transition to independent adult living. It was not intended that social services should be able to avoid those responsibilities by looking to the housing authority to accommodate the child."

10. The Secretary of State for Children, Schools and Families intervened, largely supporting G's position. Lord Neuberger in his short speech also noted the inconsistency between the Court of Appeal's judgment and the thrust of the reasoning in *M* [38].

11. The issue was what the criteria under s.20(1) meant and how, if at all, they affected an authority's duties under s.17 of the CA 1989 and the HA 1996. Baroness Hale considered that *R (G) v Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208 assisted G by asserting the primacy of the s.20(1) duty and *M* assisted him because it asserted the primacy of the CA 1989 over the HA 1996 [25]. Section 20(1) should not have read into it the words "under this section" [27]. Baroness Hale held that if a child aged 16 or 17 who had applied for accommodation under s.20 of the CA 1989 satisfied all the criteria under s.20(1), the local children's services authority owed the child a duty to provide him with accommodation under that section. The authority could ask other authorities (such as the housing authority pursuant to s.27 of the CA 1989) for help in discharging that duty but it could not avoid its responsibility by referring the child to another authority to use other statutory powers to provide him with accommodation [33]. Baroness Hale set out at [28] the list of questions a children's services authority should ask itself in determining whether the duty under s.20 arises:

> (1) Is the applicant a child? – not an issue in *G*.
>
> (2) Is the applicant a child in need? - A homeless child will generally be a child in need and this was not in dispute in *G*.
>
> (3) Is he within the local authority's area? – Again not in dispute in *G*.
>
> (4) Does he appear to the local authority to require accommodation? – It was "quite obvious" that a child who was "sofa surfing" was a child in need.
>
> (5) Is that the result of: (a) there being no person who has parental responsibility for him; (b) his being lost or having been abandoned; or (c) the person who has been caring for him being prevented from providing him with suitable

accommodation or care? - The latter covers a child who has been excluded from home, even though this is the deliberate decision of a parent.

(6) What are the child's wishes and feelings regarding the provision of accommodation for him? – this is a reference to s.20(6) of the CA 1989. A children's services authority is not allowed to force their services upon older and competent children who do not want them.
(7) What consideration (having regard to his age and understanding) is to be given to those wishes and feelings?

12. If the criteria are met, the children's services authority is under an obligation to accommodate the child under s.20 of the CA 1989. This was so in G's case [28]. In other words: a children's services authority cannot refer a 16/17 year old child who meets the s.20 criteria to a local housing authority to be accommodated under Part VII of the Housing Act 1996, it cannot "side-step" its duties [28]. Baroness Hale considered that s.20 involved an evaluative judgment, not a discretion [31]. Nor can they claim to have been acting under the general duty pursuant to s.17(1) of the CA 1989, if the specific duty in s.20 arises.

Unaccompanied Asylum Seeking Children, Age Assessments and Article 6

13. UASC can cause real problems for local authorities, particularly those close to major ports and airports. The age of a person who claims to be an asylum seeker is very important. If the person is under 18, a local authority will owe him a range of duties under the Children Act 1989. If he is over 18, then the asylum seeker is the responsibility of the Home Office and the UKBA. An Age Assessment Joint Protocol has been drawn up by the UKBA and the Association of Directors of Social Services, under which it is agreed that local authorities, not the Home Office, will make these decisions. However, it is notoriously difficult to make such decisions with any degree of certainty: age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side: see Guidelines for Paediatricians published in November 1999 by the Royal College of Paediatrics and Child Health.

14. In *R(A) v Croydon London Borough Council* [2009] UKSC 8; [2009] 1 WLR 2557, the Supreme Court considered how these decisions are to be made and supervised by the Courts.

15. The claimants arrived in the United Kingdom from Afghanistan and Libya respectively and claimed asylum. Both asserted that they were aged under 18 years, but they were

assessed as over 18 by immigration officers. Social workers from the respective local authorities assessed the claimants and also concluded that they were over the age of 18. The local authorities therefore refused to provide accommodation for them under s.20(1) of the CA 1989, as they were not responsible for adults who would be referred to the National Asylum Support Service ("NASS"). Independent doctors assessed the claimants' ages as 15 years and 17 years respectively. Both claimants sought judicial review of the decision as to their ages. On a trial of preliminary issues, the judge decided that (1) the question whether an individual was a child for the purposes of section 20(1) was not precedent to the local authority's jurisdiction arising, so that the court did not retain the power to review those facts for itself; and (2) that the age determinations by the local authorities were not contrary to the requirement for a determination by an independent and impartial tribunal in Article 6. The Court of Appeal upheld the judge's decision.

16. However, the Supreme Court allowed the claimants' appeals. The lead judgment was again given by Baroness Hale.

17. On the first issue, Baroness Hale drew a distinction between the question whether a person was a "child" for the purposes of the CA 1989 and the question whether a person was a child "in need". The question of whether a child was "in need" for the purposes of s.17 of the CA 1989 required a number of different value judgments. Where the issue was what service should the local authority provide for a particular child, she concluded that Parliament had intended that such evaluative questions were to be determined by the local authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and *Wednesbury* unreasonableness there are no clear cut right or wrong answers [26].

18. Baroness Hale took a different approach to the question of whether a person was "a child". She concluded that in enacting s.20(1) of the CA 1989, Parliament had intended that the question whether a person was or was not a child, which decided entirely on the objective fact of a person's age, would be subject to ultimate determination by the courts. The question which the court has to resolve, as a question of fact, is whether the person is, or is not, under the age of 18. She also concluded that as the CA 1989 was an Act "for and about" children, the question whether a person was a child was a fact precedent to the exercise of a local authority's powers under the Act. On that basis also, the question of whether a person was a "child" was a question for the court.

19. Two crumbs of comfort were given to public authorities. Baroness Hale observed that: (1) the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence; and (2) this conclusion did not mean that all other judgment involved in the decisions whether or not to provide services to children or other client groups must be subject to determination by the courts. They remain governed by conventional principles [29].

Article 6

20. As Lord Hope pointed out, a holding that the local authority's decision as to whether or not to provide accommodation under s.20(1) of the CA 1989 amounted to the determination of a "civil right" for the purposes of Article 6 would have far reaching implications. This is because the right which is guaranteed by Article 6(1) is to a decision by an "independent and impartial tribunal". It cannot plausibly be argued that the social workers – employed by the local authority – who take these decisions on behalf of the authority are independent of it, or are impartial as they are employed by an authority with a direct financial interest in the outcome. If Article 6(1) were engaged by these decisions, issues would arise as to whether control of decisions of local authorities by way of judicial review would be sufficient, or whether a tribunal system to determine the merits of claims to children's services, adult social services etc would have to be established.

21. Lord Hope, giving the other full judgment of the Supreme Court in *R(A) v Croydon LBC*, was prepared to conclude that the duty of the local authority under s.20(1) of the CA 1989 to provide accommodation for any child in need within their area who appeared to them to require accommodation as a result of the factors set out in that subsection did not give rise to a "civil right" within the meaning of Article 6(1) of the Convention. He was of the view that the Article 6 concept of a "civil right" applied only where an individual has an "assertable right" under domestic law to a welfare benefit. Where the award of a social welfare benefit is dependent upon a serious of evaluative judgments as to whether the statutory criteria are satisfied and, if so, how the need for it as assessed ought to be met, no "assertable right" was in issue and no determination of a "civil right" took place. However, Lady Hale (with whom Lord Scott, Walker and Neuberger agreed) did not find it necessary to resolve this point. She held that it followed from her earlier conclusions that as an age determination would, in the event of a dispute, be determined by the courts, an independent and impartial tribunal would be taking the decision. She concluded that even if section 20(1) did give rise to a "civil right", it rested at the periphery of such rights and the present decision making process, coupled with judicial review on conventional grounds, was sufficient to meet the requirements of Article 6.

22. Following the fudge in *R (A) v Croydon LBC,* the Supreme Court handed down judgment in *Tomlinson v Birmingham City Council* [2010] UKSC 8 on 17 February 2010. In *Tomlinson,* the Supreme Court had no choice but to address the Article 6 arguments head on. The question was whether determinations by a local housing authority that it had discharged its duties to homeless persons involved the determination of a "civil right" for the purposes of Article 6 and, if so, whether a Court on appeal must itself be able to determine factual disputes.

23. The local authority claimed that it had successfully discharged its duty to a number of applicants who were homeless and fulfilled the relevant criteria to ensure that suitable accommodation was available for them. The applicants disputed this, claiming that, although written notification of the kind the law requires may have been sent to them by the authority, they never actually received it. The dispute between the parties as to whether the duty had been discharged therefore turned entirely on a pure question of fact. It was therefore of a nature which a County Court Judge on a point of law has no power to determine. The appellant argued that the lack of a fact-finding jurisdiction for a County Court on appeal put that aspect of the system in breach of Article 6(1). Two main issues arose for the Supreme Court's determination: whether an appeal to the County Court involved the determination of a "civil right" for the purposes of Article 6(1); and, if so, whether Article 6(1) required that a Court hearing such an appeal must itself be able to determine issues of fact such as those raised in the present cases.

24. The Supreme Court unanimously dismissed the appeal. It held that a decision that a local housing authority takes under the Housing Act 1996 that it has discharged its duty to an applicant is not a determination of the applicant's "civil rights" for the purposes of Article 6(1). It therefore lies outside the protection of that Article. The Court also holds that, although it is unnecessary to decide the point, the appeal procedure as a whole complies with Article 6(1) in any event.

25. *Tomlinson* is a very helpful judgment for public authorities generally, as it reduces the scope for involving Article 6 in social welfare decisions. The main judgment is that of Lord Hope. His conclusion is at [49], where he says that "where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met" then no "civil right" is in issue and Article 6(1) is not engaged. Lord Collins, whilst agreeing

with Lord Hope's reasoning, placed less emphasis on the evaluative nature of the decision making process. The mere fact that evaluative judgments are required did not take the case out of Article 6(1). The main reason why the decision fell outside the scope of the Article was that the statutory duty lacked precision. There was no right to any particular accommodation; the duty was simply to ensure that accommodation was available. Together with the essentially public nature of the duty, those factors meant that the duty did not give rise to an individual economic right.

26. As to the second issue, although the question whether or not the letters were received was factual, it was just one among a number of interlinked questions that had to be addressed to determine whether the housing authority's duty had been discharged. No case of the European Court of Human Rights was to the effect that an appeal from such a determination on a point of law only would constitute a breach of Article 6(1).

<u>Inter-Authority Disputes and Ordinary Residence</u>

27. A number of inter-authority disputes have come before the Courts in the last 12 months. The first is that of *R (Liverpool City Council) v Hillingdon LBC* [2009] EWCA Civ 43, [2009] LGR 289. In that case, there was a dispute between two local authorities as to which of them was responsible for a failed asylum seeker ("AK") who claimed to be a child. He was assessed by the claimant local authority as being an adult, and referred to NASS.

28. In the course of his unsuccessful asylum appeal, the AIT assessed his age as 15, on the basis of an expert paediatrician's report. He was accommodated by NASS in the Liverpool area, but was then moved to two immigration detention centres, Campsfield, and then Harmondsworth (the latter being in Hillingdon's area). The defendant local authority, having satisfied itself that AK wished to return to Liverpool, took him there, and left him there for the claimant to look after. The claimant and defendant agreed that a re-assessment of the AK's age, pursuant to the Joint Protocol. They could not agree who should be responsible for carrying it out. The claimant applied for judicial review and the Deputy Judge held that the claimant was responsible for AK. The claimant appealed.

29. Dyson LJ considered a number of dicta about the character of the assessment to be carried out by a local authority under s.20 of the CA 1989 [20-34]. He concluded that a local authority should not automatically treat a child's wishes as decisive, since an

authority also had to give proper consideration to a child's welfare, which might conflict with his wishes. His view was that an expression of a wish to be accommodated in a particular place was not a short-cut which enabled an authority to neglect to carry out a proper assessment [34]. He held that the defendant took an over-simplistic view in deciding that AK's own view about where he wanted to live was determinative, instead of taking the nuanced approach dictated by s.20 [35]. In other words, they did not discharge their s.20 duty at all [38]. Wilson LJ simply agreed with Dyson LJ [42].

30. Rix LJ agreed with Dyson LJ. He went on to express a reservation about a concession made by the defendant. He considered that it might, in some cases, be possible (although not on the facts of that appeal) for two authorities to owe concurrent duties to a child [44-45]. He commented on the 'rather disturbing picture' disclosed by the dispute [47], and concluded by noting AK's position that, as he was now settled with a foster mother in Liverpool, that arrangement should not be disturbed, and the defendant, if it accepted the duty to accommodate, should do so with Liverpool's co-operation, in Liverpool [49].

31. Further examples of an inter-authority dispute reaching the higher courts have arisen in relation to a woman known as PE who has a multiple personality disorder. She requires a very high level of care because of this condition – possibly the most expensive care package in the country. PE's case has now reached the Court of Appeal on two occasions, as a number of public bodies have litigated to determine who bears the cost of this care package. The first case was a dispute between a local authority and a PCT, *St Helens BC v Manchester PCT* [2008] EWCA Civ 931. Following multi-disciplinary assessment the PCT concluded that, with a few exceptions, PE's needs were not primarily for health care. It therefore fell on St Helens to fund PE's care. St Helens sought judicial review of the PCT's decision on a number of grounds (failure to apply the eligibility criteria, failure to take account of all relevant material, misapplication of the criteria, misapplication of the PCT's own shared funding criteria, and irrationality). The eligibility criteria themselves were not challenged. Permission was refused by Beatson J.

32. On appeal the issue was whether the court should (as St Helens urged) engage in making a substantive decision on an application for judicial review between two public authorities where each had reached a rational but incompatible decision. May LJ (with whom Scott Baker LJ and Sir Peter Gibson agreed) dismissed the appeal. May LJ's reasoning was essentially that the premise of St Helens' argument was wrong – there was (under the provisions then in force) one primary decision-maker namely, the PCT:

(a) May LJ reviewed the statutory framework under the National Health Service Act 2006 ("the 2006 Act"), the case law (*R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, CA, and *R (Grogan) v Bexley NHS Care Trust* [2006] EWHC 44 (Admin)), and the Secretary of State's guidance and directions in response to those cases (Circular HSC 2001/015; LAC (2001) 18, the Continuing Care (National Health Service Responsibilities) Directions 2004, and the March 2006 Guidance issued following *Grogan*).

(b) There was a highly structured statutory process deriving from ss.1-3 of the 2006 Act in which decisions were taken by and on behalf of the Secretary of State [34].

(c) Social services authorities were involved in the agreement of eligibility criteria, which were not to saddle social services authorities with provision of services outside their competence [34].

(d) Armed with the recommendations of a multi-disciplinary team it was for the PCT to decide whether an individual's needs were primarily for health care [35]. There was no corresponding structured decision-making for the social services authority.

(e) In reaching its decision the PCT had to take account of the statutory competence of the social services [36].

(f) May LJ expressly reserved his position on whether this reasoning applied to the new National Framework for NHS continuing health care and NHS funded nursing care introduced in October 2007 [37].

33. Local authorities might not be filled with confidence that their statutory competence will be satisfactorily assessed by another body and one whose budget will be boosted by giving a generous interpretation to that competence.

34. Concern at public authorities litigating against each other was expressed by both May LJ at [1] and Scott Baker LJ at [39].

35. PE's case returned to the Court of Appeal a second time in November 2009 in a dispute between two local authorities arising out of the Secretary of State's determination that PE had been ordinarily resident in Manchester since April 2000: see *R (Manchester City Council) v St Helens Borough Council and PE* [2009] EWCA Civ 1348.

36. PE's care arrangements had been funded by St Helens, as PE lived in the borough. She moved to Manchester in July 1999 and lived in a property rented in her own name in the

area from April 2000. In January 2000, St Helens carried out an assessment, in which it identified the preferred care package as supported living in Manchester. St Helens provided the funding thereafter. Best interest proceedings were issued in the Family Division in 2005. these proceedings determined that PE should continue to reside in Manchester, and the view was expressed that it was not in PE's best interests to retain an ongoing relationship with St Helens. St Helens then took the view that PE was now ordinarily resident in Manchester. This was disputed by Manchester, and the Secretary of State was asked to make a determination under s.32(3) of the 1948 Act. In April 2008, the Secretary of State determined that PE had been ordinarily resident in the Manchester area since April 2000. That decision was not challenged. IN light of this determination, St Helens took the decision to stop providing and funding any care services for PE. Manchester challenged this decision. Essentially, Manchester argued that St Helens had assumed a duty to provide PE's care package following their assessment in January 20000, at a time when PE was, as the Secretary of State had now determined, ordinarily resident in Manchester; and St Helens were stuck with this unless there had been a relevant change of circumstances, which there had not been.

37. May LJ (with whom Scott Baker and Lloyd LJJ agreed) concluded that the Secretary of State's decision that PE had voluntarily accepted Manchester as her home and was ordinarily resident there meant that St Helens had not placed her there and her residential accommodation was not provided under s.21 of the 1948 Act. Instead, the care package which supported PE was provided under s.29, rather than s.21 of the 1948 Act. The Secretary of State's decision also meant that Manchester had a statutory duty under s.29 to make provision for her care. That duty was not negated because St Helens had taken responsibility for her care for some time after her move to Manchester.

38. As a result of the Secretary of State's determination, Manchester had a statutory duty under s.29 of the 1948 Act or provide PE with the services because

39. The provision of community care services by St Helens in those circumstances was properly to be seen as the exercise of a power, not a duty. The Court concluded that it was an exercise of power from which the local authority could withdraw, subject only to the normal considerations of rationality, abuse of power or legitimate expectation. The Court of Appeal concluded that the Secretary of State's determination provided an entirely rational basis for St Helens decision to stop funding PE's care.

40. May LJ reiterated his concerns about two publicly funded public authorities engaging in expensive litigation to decide which of them should pay for care.

Ordinary Residence: New Guidance in England

41. From 19 April 2010, new statutory guidance on the identification of the ordinary residence of people in need of community care services will be effective in England ("the Guidance"). The guidance is available online here: http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/Ordinaryresidence/index.htm. LAC 93(7) is superseded from this date. A number of new directions also take effect on this date:
    (1) Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010;
    (2) Ordinary Residence Disputes (Community Care (Delayed Discharges etc. Act 2003) Directions 2010;
    (3) Ordinary Residence Disputes (Mental Capacity Act 2005) Directions 2010

42. Overall, the Guidance is a very helpful document. The 9 pages of LAC (93) 7 have been replaced by some 70 pages of detailed guidance. There is a more thorough analysis of the case law in this area, and Part I sets out the general principles surrounding ordinary residence disputes. Part 2 covers particular situations in which a person's ordinary residence may be an issue. It includes a number of scenarios that would not even have been contemplated in 1993 9and so were not covered by LAC 93(7)), such as the shift towards independent living and the demand for services to be delivered in non-traditional ways. Part 3 covers other legislation where an ordinary residence determination can be sought. Part 4 sets out other areas of legislation and guidance, including the provision of after-care services under s.117 of the MHA. Part 5 sets out the procedure for making an application to the Secretary of State for the purpose of seeking an ordinary residence determination.

43. The key principles when two or more local authorities fall into dispute over a person's ordinary residence are that:

    (1) the key priority of local authorities should be the well-being of people who use services;
    (2) the provision of accommodation and/or services must not be delayed or otherwise adversely affected because of uncertainty over which local authority is responsible; and

(3) 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. The local authority which is to provide services is set out in the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 (above):
    (a) if the person is already in receipt of services, the local authority providing them should continue to do so;
    (b) if the person is not in receipt of services, the local authorities in dispute may agree which of them will provide services pending the resolution of the dispute;
    (c) if the local authorities in dispute cannot agree, the local authority in which the person is living must provide the services; and
    (d) if the person is not living anywhere, the local authority in whose area the person is physically present (the 'local authority of the moment') must do so.

44. Also available at the above web address are copies of the "cross-border" arrangements made under s.32(4) of the 1948 Act between the Secretary of State and the Welsh Ministers for determining which questions under Part 3 as to a person's ordinary residence are to be dealt with by the Secretary of State, and which are to be dealt with by the Welsh Ministers. These arrangements will come into force on 19 April 2010, and replaces the interim arrangements put in place in December 2007.

45. In summary:
    (1) if the dispute only involves local authorities in England, it will be dealt with by the Secretary of State;
    (2) if the dispute only involves local authorities in Wales, it will be dealt with by the Welsh Ministers;
    (3) the Secretary of State will determine a cross-border ordinary residence dispute where the person to whom the dispute relates is living in England at the time the dispute is referred; and the Welsh Ministers will determine the dispute if he lives in Wales at the relevant time.

Responsibility for After-Care: Section 117 of the Mental Health Act 1983

46. The recent cases of *R (JM) v London Borough of Hammersmith & Fulham;* and *R (Hertfordshire CC) v London Borough of Hammersmith & Fulham* [2010] EWHC 562 (Admin) considered the question of which local authority is responsible for meeting the

accommodation costs of an individual detained under s.3 of the Mental Health Act 1983 ("the MHA") who is then discharged back into the community.

47. The first case was a "live" case, concerning a 61 year old man known as JM. For 15 years, he lived in a flat in Hammersmith & Fulham and was provided with services by that local authority. On 31 July 2007, he was transferred to a house in Sutton known as Ronau House, living there for 6 months. While there, he signed a notice terminating his tenancy with Hammersmith & Fulham. He was subsequently admitted to Sutton Hospital under s.3 of the MHA for treatment. He was discharged at the end of March 2009, and a dispute broke out between Hammersmith & Fulham and Sutton as to which authority was responsible for providing him with accommodation and services.

48. It was common ground that at the point that JM was first transferred to Ronau House, Hammersmith & Fulham owed him a duty under s.21 of the 1948 Act, as JM was ordinarily resident in their area. This duty continued during JM's placement at Ronau House, by virtue of the deeming provision in s.24(5) of the 1948 Act (which states that, "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.")

49. Mitting J accepted that Hammersmith & Fulham's duty came to an end when JM was admitted to Sutton Hospital under s.3 of the MHA. Section 21 only applies to individuals who by reason of age, illness, disability or other circumstances, are in need of care and attention "which is not otherwise available to them". JM was not in need of care and attention under s.21 at the time he was admitted to Sutton Hospital under s.3 of the MHA.

50. Section 117 of the MHA applied when HM was discharged from Sutton Hospital, which imposes a duty on PCTs and social services authorities to provide after care services. Section 117(3) identifies the local social services authority as:

> "the local social services authority, for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained."

51. Following *R v MHRT ex parte Hall* [1999] 3 All ER 132, it is clear that s.117(3) required first of all to be identified, if possible, the local authority area in which the discharged patient had resided before he was admitted to hospital. Only if that was not possible did

the default option of identifying the place to which he would be sent on discharge have effect.

52. The issue in the present case focused on the apparent difference between the use of the word “resident” in s.117(3) as compared to the words “ordinarily resident” in ss.21 and 24 of the 1948 Act. Mitting J concluded that there was no perceptible difference between the three phrases, “resident”, “ordinarily resident” and “normally resident”. All three connoted settled presence in a particular place other than under compulsion. JM was unquestionably resident at Ronau House (in Sutton) when he was admitted to Sutton Hospital under s.3 of the MHA. He had lived there for about a year. He had abandoned his tenancy in Hammersmith. He had nowhere to live in Hammersmith. The deeming provision in s.24(5) of the 1948 Act did not make any difference to this conclusion. It expressly provided 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. What is deemed to occur for the purpose of the 1948 Act cannot be transposed into the MHA. While there may well be an anomaly between the 1948 Act and s.117, that was for Parliament to correct and not the courts.

53. Mitting J also rejected the claim that the other local authorities had a legitimate expectation that Hammersmith & Fulham would discharge the statutory obligation under s.117. The basis for this argument was the agreement made between the Association of Metropolitan Authorities and the Association of County Councils in 1988, which set out to “resolve certain difficulties over the meaning of ‘ordinarily resident’ for the purpose of determining responsibility for costs of mentally handicapped and mentally ill people in residential care”. Applying those rules, Mitting J found that the responsibility for accommodating JM would have fallen on Hammersmith & Fulham. He accepted that, if there were evidence that local authorities had consistently applied the 1988/89 agreement, and it was established that it was lawful to accept financial responsibility for the costs of accommodation and services, Sutton & Hertfordshire could have established a legitimate expectation that H&F would comply with the agreement. However, the material before the judge did not permit him to reach that conclusion.

<u>Residential Schools and “Looked After Child” status</u>

54. In *R (O) v East Riding of Yorkshire County Council* [2010] EWHC 489 (Admin), the court considered the interface between the Education Act 1996 and the Children Act 1989. The issue was whether a local authority is entitled to bring a child’s “looked after” status to an

end in circumstances where the child has accommodation at a residential school provided under the Education Act 1996 via a statement of special educational needs (“SEN”).

55. A “looked after” child is defined in s.22(1) of the CA 1989 as being a child who is (a) in the local authority’s care; or (b) provided with accommodation by the authority in the exercise of any functions which are social services functions within the meaning of the Local Authority Social Services Act 1970 apart from functions under sections 17, 23B and 24B. Social services functions within the meaning of the Local Authority Social Services Act 1970 are those specified in Schedule 1 of that Act. The only part of the Education Act 1996 specified in schedule 1 is section 322, which imposes a duty on a local authority to assist a local education authority to help the latter, in certain circumstances, to perform its functions, if required to do so.

56. Once a child is a looked after child, various social welfare services accrue, e.g. to safeguard and promote their welfare. There are specific duties to accommodate and maintain looked after children set out in Part III of the CA 1989. Regular looked after child reviews must be held. Older children are entitled to additional services under the leaving care regime. The claimant argued that if local authorities are entitled to bring their duties to “looked after” children to an end by placing them in residential schools, it will have wide and detrimental implications of preventing a significant proportion of vulnerable children from being able to avail themselves of social services assistance under the CA 1989.

57. The claimant was a 14 year old boy who applied for judicial review of the local authority’s decision to end his status as a “looked after” child under the CA 1989. O had ASD and ADHD and his behaviour was very challenging. He had consistently underachieved at school. He had been attending a mainstream school and he had been receiving regular respite care, which made him a looked after child. An SEN statement was produced which named an independent day special school. His parents objected to this, as they felt he needed a residential placement. They refused to send him to the named school, but did not pursue an appeal. At an interlocutory hearing in the judicial review action, the local authority was ordered to accommodate the claimant full-time, which it did. It was common ground that he could not return home in view of his parents’ inability to keep him safe or meet his needs. The claimant then attended the day school named in the statement. He therefore continued to be a looked after child.

58. Expert reports prepared for the judicial review all supported a residential school for the claimant. In November 2008, a new SEN statement was issued, identifying a need for a 52 week residential placement and naming the parents' preferred school. In December 2008, the local authority decided that upon commencement of this placement, the claimant would cease to be a looked after child – because his welfare needs would be met by the educational placement under the Education Act 1996.

59. Cranston J agreed with the local authority and dismissed the claim. He held that the claimant was no longer a looked after child as he did not fall within the statutory definition in s.22(1)(b) of the CA 1989, i.e. he was not a child provided with accommodation by a local authority in the exercise of its social services functions. Social services functions did not cover accommodation provided as a result of SEN under the Education Act 1996. While s.22(3A) of the CA 1989 imposed a duty to safeguard and promote a child's education, it was no substitute for, nor was it paramount over, the detailed provisions of the Education Act, which existed specifically for special needs children. The local authority was not attempting to side step its duties under the CA 1989: it was simply a consequence that followed from how Parliament had couched the legislation. This was particularly so in a case where the parents were happy with the placement and considered that it was meeting the claimant's needs.

60. Cranston J's conclusion was reinforced by s.85 of the CA 1989. As the claimant was accommodated by the local education authority, section 85 placed a duty on the local social services authority to keep under review the question of whether it needs to exercise any of its functions under the CA 1989 with respect to the claimant. The existence of this provision confirmed that Parliament could not have envisaged that children who are in a residential school would automatically be regarded as "looked after" pursuant to s.20 and 22(1)(b) of the CA 1989. had that been the case, there would have been no need for a section requiring the local authority to consider whether it needs to exercise any of its social services functions.

61. The claimant also contended that the local authority acted unlawfully in terminating his looked after status. It was argued that the claimant's educational needs were parallel to his welfare needs; and that one should not trump or terminate the other. Cranston J held that the correct approach in deciding whether a child is "looked after" is to apply the criteria set out in the statute and analysed by Ward LJ in *R (A) v Croydon LBC* [2008] EWCA Civ 1445 (set out above). He concluded that there was no basis for suggesting that the criteria for a child ceasing to be looked after are in any way different from the

criteria which apply to a child becoming looked after. In general, there are three situations where this might happen: (i) where a child's parents are no longer prevented from caring for him; (ii) where a 16-17 year old child no longer wishes to be accommodated; or (iii) where a child ceases to meet the criteria: see *R (G) v Southwark LBC* per Baroness Hale at [32].

Alternative Remedy: Statutory Complaints Procedure

62. In *R (F) v Wirral Borough Council* [2009] EWHC 1626 (Admin) McCombe J highlighted the protection available to local authorities when faced when judicial review claims challenging the adequacy of community care assessments.

63. Essentially, the 25 claimants contended that the assessments carried out by the local authority in respect of each of them did not properly identify their needs and evaluate them against the eligibility criteria for care provision arising under FACS and the Council's own policy. McCombe J accepted the local authority's submissions that the complaints about assessments and care plans were not the proper subject of judicial review. He concluded that while the Administrative Court was astute to correct any illegality of approach on a public authority's part, it was not the proper forum in which to probe into the adequacy of community care assessments. If any of the assessments or care plans were truly inadequate in any of the claims, and such inadequacy was giving rise to a true failure on the part of the local authority to meet an eligible need, there was a full and adequate statutory complaints procedure in which that could be resolved – i.e. the Local Authority Social Services Complaints (England) Regulations 2006. McCombe J emphasised that judicial review will not be granted where there is an alternative remedy.

Duty to Give Reasons

64. In *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWHC 414 (Admin) the claimant was 70 years of age and suffered from ill health. The claim related to the local authority's system for the administration of community care services, whereby those who are assessed to be eligible for support to meet care needs are provided with a personal budget to be spent on meeting their needs in the way that they choose. The claimant challenged the local authority's decision of 21 December 2009 to provide the Claimant with a personal budget of £170.45 per week. No reasons were given for this decision.

65. The judge held that while there was no statutory duty in the applicable legislation to give reasons for the decision, there was a clear policy to provide service users with clear

information about how personal budgets are arrived at. All of the documents produced by the Government Departments and by the Association of Directors of Social Services pointed to transparency, openness and consultation, prior to the drawing up of an agreed care and support plan. The only way that a service user can be satisfied that the personal budget has been correctly assessed by the Panel is by a reasoned decision letter. The service user was left totally in the dark as to whether the monetary value allocated to her was adequate to meet the assessed need. The Judge noted that personal budgets are new and represented a fundamental shift in community care. He stated that:

> "…it must be incumbent on those responsible for this provision, to be transparent, and to explain individual decisions in a precise and clear manner. I fail to see how such an obligation would be unduly burdensome (at [51])."

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