Landmark ruling on funding for the disabled

David Fletcher, Barrister, St John's Chambers

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David Fletcher, member of St John's Chambers' Administrative Law team successfully acted on behalf of Somerset County Council in the recent Supreme Court test case on funding for the disabled: R (*Cornwall County Council) v Secretary of State for Health and Others* [2015] UKSC 46.

This landmark ruling by the Supreme Court decides important issues concerning where financial responsibility lies as between local authorities for the substantial costs of providing long-term care and accommodation for a disabled adult who lacks mental capacity. The Court of Appeal and the Supreme Court reached different conclusions as to the proper interpretation of 'ordinary residence' and as to where the disabled adult had been ordinarily resident at the relevant time. The case has important implications for local authorities funding care for the disabled. David Fletcher acted throughout for Somerset Council, and his arguments on the interpretation of the legislation were accepted by the Supreme Court in overruling the Court of Appeal.

The case concerned PH, an adult with severe physical and learning disabilities, who lacked the capacity to decide where he should live. Since the age of 4 he had been accommodated at public expense. As a child he had been placed by Wiltshire with

long-term foster carers in South Gloucestershire under the provisions of the Children Act 1989. Since his majority in December 2004 he had been placed in two care homes in the Somerset area. Throughout, Wiltshire had paid for his accommodation but eventually a dispute arose as to which of several authorities was responsible for these costs. The National Assistance Act 1949 s24(1) (now replaced by s39(1)(a) of the Care Act 2014) fixes financial responsibility on the local authority of the area where the disabled person is 'ordinarily resident' immediately before his placement. The issue which the Secretary of State had to determine under his powers to resolve such disputes, and on which the courts reached differing conclusions, was whether, at the date immediately prior to his adult placement in December 2004, PH was ordinarily resident (a) in Wiltshire, the authority which accepted responsibility for him throughout his childhood and placed him pursuant to the NAA, (b) in Cornwall, where his parents were resident, on the basis that they made decisions for him and that their home was his base, (c) in South Gloucestershire where he had lived with foster parents from the age of 4 until his placement in Somerset, or (d) in Somerset where he had been placed from the age of 18.

The Secretary of State, in determining the dispute, applied the first test propounded in the case of ***R v Waltham Forest London LBC ex parte Vale*** [1985] ('the ***Vale*** test'), which in broad terms states that where an individual is so mentally incapacitated as to be incapable of making a decision as to his own residence, and totally dependent on his parents, his ordinary residence should be regarded as that of his parents because their home is his base. The ***Vale*** test had been applied by the courts for thirty years and was enshrined in guidance issued by the Secretary of State.

Both the Court of Appeal and the Supreme Court took the view that the Secretary of State's reasoning could not be supported and in effect regarded the ***Vale*** test as substituting an alternative test of ordinary residence, namely the 'seat of decision-making' or parental base, from the test set out in the Act, which requires a determination of the ordinary residence of the individual in accordance with the principles set out in case law the 'locus classicus' being ***Shah v Barnet LBC*** (1983).

In making the difficult determination as to which of the three local authorities bore responsibility, the Court of Appeal decided that PH had been ordinarily resident in South Gloucestershire, this being the area with which he had established the closest connection prior to his 18th birthday by virtue of his placement with foster carers. In so doing, the Court of Appeal suggested that the interpretation of 'habitual residence' for the purposes of the Brussels 2 Regulations and the Hague Convention by the Supreme Court in ***Re A*** [2013] should be applied, the test in ***Re A*** being the place which reflects a degree of integration by the child in his social and family environment.

The Supreme Court disagreed with the Court of Appeal determination that PH had been ordinarily resident in South Gloucestershire on the basis that although the residence in South Gloucester might fit the language of the statute, such a ruling ran directly counter to its policy since PH had been resident in South Gloucestershire (and later in Somerset) as a result of placements there under the 1989 and 1948 Acts. The policy of the NAA (and of the Children Act) was that an individual's ordinary residence should not be affected by placement pursuant to statutory powers or duties under either Act. There would be potential adverse consequences of a ruling that PH was ordinarily resident in South Gloucestershire. It was undesirable if decisions on

placement for those whose disabilities required specialist settings were constrained by a reluctance on the part of local authorities to receive children from another area by considerations of the financial burden which would potentially follow.

The Supreme Court therefore reached the conclusion that in a case where at the relevant time a person was living in accommodation where he had been placed by a local authority, it would be wrong to regard him as ordinarily resident in a location where he had been placed pursuant to statutory powers. In these circumstances it inevitably followed that PH had at the date of his majority continued to be ordinarily resident in Wiltshire.

This important decision by the Supreme Court is both consistent with the policy of the legislation and at the same time overrules the principle which the courts had been applying for thirty years to mentally incapacitated adults.

David Fletcher
St John's Chambers

David.fletcher@stjohnschambers.co.uk

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