Trinity Term
[2015] UKSC 46
On appeal from: [2014] EWCA Civ 12

JUDGMENT

R (on the application of Cornwall Council) (Respondent) *v* Secretary of State for Health (Appellant)

R (on the application of Cornwall Council) (Respondent) v Somerset County Council (Appellant)

before

Lady Hale, Deputy President
Lord Wilson
Lord Carnwath
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

8 July 2015

Heard on 18 and 19 March 2015

Appellant (Secretary of State for Health)
Clive Sheldon QC
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(Instructed by Government Legal Department)

Respondent (Cornwall Council)
David Lock QC
Charles Banner
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Appellant /Intervener (Somerset County Council)
David Fletcher

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Intervener (South Gloucestershire Council)
Helen Mountfield QC
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LORD CARNWATH: (with whom Lady Hale, Lord Hughes and Lord Toulson agree)

Introduction

1. PH has severe physical and learning disabilities and is without speech. He lacks capacity to decide for himself where to live. Since the age of four he has received accommodation and support at public expense. Until his majority in December 2004, he was living with foster parents in South Gloucestershire. Since then he has lived in two care homes in the Somerset area. There is no dispute about his entitlement to that support, initially under the Children Act 1989, and since his majority under the National Assistance Act 1948. The issue is: which authority should be responsible?

2. This depends, under sections 24(1) and (5) of the 1948 Act, on, where immediately before his placement in Somerset, he was "ordinarily resident". There are three possible contenders: Wiltshire, as the authority for the area where he was living with his family when he first went into care, and which remained responsible for him under the 1948 Act; Cornwall, where his family have lived since 1991; or South Gloucestershire, where he lived with his foster parents from the age of four until his move to Somerset. The Secretary of State, acting under section 32 of the 1948 Act, decided that Cornwall were responsible. In doing so, he followed the approach of his own published guidance on the determination of ordinary residence, which drew on two principal authorities *R v Barnet LBC, Ex p Shah* [1983] AC 309, and *R v Waltham Forest, Ex p Vale* (unreported, 11 February 1985). The latter is the source of what have become known as "*Vale* tests 1 and 2" (described at paras 45-46 below), the correctness of which is in issue in this appeal.

3. In judicial review proceedings brought by Cornwall, the Secretary of State's decision was upheld in the High Court (Beatson J), but set aside by the Court of Appeal, who held that South Gloucestershire were responsible. The Secretary of State and Somerset have appeals with the permission of this court. The appeals are supported by South Gloucestershire and Wiltshire, but opposed by Cornwall. Cornwall also disputes the Secretary of State's jurisdiction to make the determination. Although none of the other authorities has argued that Wiltshire should be responsible, the court indicated at the beginning of the hearing that this possibility should not be excluded from consideration.

4. It is regrettable that in this way so much public expenditure has been incurred on legal proceedings. However, the amounts involved in caring for PH and others

like him are substantial (some £80,000 per year, we were told). The legal issues are of general importance, and far from straightforward.

The legislation

The Children Act 1989 Part III

5. Part III of the 1989 Act imposes duties on local authorities to provide support for children and their families. By section 30(1), nothing in this Part of the 1989 Act "shall affect any duty imposed on a local authority by or under any other enactment". Section 17 is a general duty of authorities to safeguard and promote the welfare of children in need who are in their area. Section 20 deals with provision of accommodation. By section 20(1), every local authority is required to provide accommodation "for any child in need within their area" who appears to them to require accommodation as a result (inter alia) of -

> "(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

By section 22 the local authority have a duty to promote and safeguard the welfare of a child who is provided with accommodation under section 20 (and is thus "looked after" by them). One of the ways in which the necessary accommodation and maintenance can be provided is by placing the child in foster care (section 22C).

6. Although under the 1989 Act the primary duty lies with the authority in whose area the child happens to be, "ordinary residence" also has a part to play. By section 20(2), where a local authority provides accommodation under subsection (1) for a child who is "ordinarily resident" in the area of another local authority, that other local authority may following notification "take over" the provision of accommodation for the child. Section 29 provides for recoupment of costs. By section 29(7), where a local authority provide accommodation under section 20(1) for a child who, immediately before they began to look after him, was "ordinarily resident" within the area of another local authority, they may recover from that other authority the reasonable expenses of accommodation and maintenance. By section 30(2) any question arising under these provisions as to the ordinary residence of a child is to be determined by agreement between the local authorities or, in default of agreement, by the Secretary of State. By section 105(6):

> "In determining the 'ordinary residence' of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place -
>
> …
>
> > (c) while he is being provided with accommodation by or on behalf of a local authority."

7. Under section 23C the authority's duties to children maintained under the 1989 Act (referred to as "former relevant children") continue to a limited extent after majority, generally until the age of 21 (section 23C(6)). The authority have a continuing duty to provide for such a child various specific forms of support (not relevant in this case) and (by section 23C(4)(c)) "other assistance, to the extent that his welfare requires it ...". They should also have prepared a "pathway plan" indicating the support to be provided (sections 22B, 22E).

National Assistance Act 1948

8. Section 21 of the NAA provides:

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

By subsection (5) references to accommodation are references to accommodation provided under this and the five next following sections, and include references to board and other services, amenities and requisites provided in connection with the accommodation. By subsection (8):

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

9. By section 24(1) the duty falls generally on the authority in whose area the person is "ordinarily resident". Section 24(3) enables an authority to provide accommodation to someone urgently in need of it even though not ordinarily resident in the area. By section 24(5):

> "Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him."

By section 29(1) a local authority may, and shall if directed, make arrangements for promoting the welfare of certain categories of persons "ordinarily resident" in their area, including those who "suffer from mental disorder of any description". Certain specific forms of assistance are described in the section, but without prejudice to the generality of the power. The Secretary of State has made directions (under circular LAC (93)10) which have the general effect of turning these powers into duties, and also sets out in some detail the nature of the arrangements which have to be made.

10. By section 32(3) -

> "any question arising under this Part as to a person's ordinary residence shall be determined by the Secretary of State ..."

The procedure for such a determination is governed by the Ordinary Residence Disputes (National Assistance Act 1948) Directions 2010 (made under sections 21(1) and 29(1) of the 1948 Act). Article 2 deals with provision of services under Part III pending determination. The dispute must not be allowed to "prevent, delay or otherwise adversely affect" the provision of services; one of the authorities in dispute must provisionally accept responsibility pending determination; and, if they are unable to agree, the local authority in whose area the subject is living must do so. The authority providing provisional service is the "lead local authority" and as such must "identify all the local authorities in dispute and co-ordinate discussions between those authorities in an attempt to resolve the dispute" (article 3(2)).

The Secretary of State's guidance

11. Before turning to the determination in the present case, it is convenient to refer to the relevant parts of the Secretary of State's guidance, which address the problem of defining ordinary residence of a person who is unable to make decisions for himself. As already noted, this is done by reference in part to the "*Vale* tests 1

and 2" (paras 31-34). Of the first, which treats a mentally disabled person in the same way as "a small child who was unable to choose where to live", the guidance says:

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

12. Of test 2, it says:

> "34. The alternative approach involves considering a person's ordinary residence as if they had capacity. All the facts of the person's case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in *Shah*, but without requiring the person themselves to have adopted the residence voluntarily …"

13. Later paragraphs go into more detail in relation to "young people in transition from children's services to adult services":

> "147. Although the provisions of the 1989 Act no longer apply once a young person reaches 18 (other than the leaving care provisions, if the young person is eligible for such services), local authorities could reasonably have regard to the 1989 Act and start from a presumption that the young person remains ordinarily resident in the local authority that had responsibility for them under the 1989 Act. Section 105(6) of the 1989 Act provides that, in determining the ordinary residence of a child for any purposes of that Act, any period in which a child lives in the following places should be disregarded:
>
> …
>
> while he is being provided with accommodation by or on behalf of a local authority.
>
> 148. Therefore, where a local authority has placed a child in accommodation out of area under the 1989 Act, that local authority

> remains the child's place of ordinary residence for the purposes of the 1989 Act. In such a case, there would be a starting presumption that the young person's place of ordinary residence remains the same for the purposes of the 1948 Act when they turn 18.
>
> 149. However, this starting presumption may be rebutted by the circumstances of the individual's case and the application of the *Shah* or *Vale* tests (see Part 1 of this guidance). Under these tests, a number of factors should be taken into account when considering a person's ordinary residence for the purposes of the 1948 Act. These include: the remaining ties the young person has with the authority that was responsible for their care as a child, ties with the authority in which they are currently living, the length and nature of residence in this area and the young person's views in respect of where he/she wants to live (if he/she has the mental capacity to make this decision). If the young person is being provided with residential accommodation under Part 3 of the 1948 Act at the time ordinary residence falls to be assessed, the deeming provision in section 24(5) applies and it would be necessary to assess their place of ordinary residence immediately before such accommodation was provided.
>
> 150. In many cases, establishing a young person's local authority of ordinary residence will be a straightforward matter. However, difficulties may arise where a young person has been placed in residential accommodation out of area as a child under the 1989 Act. In this situation, the young person may be found to be ordinarily resident in the local authority that had responsibility for them under the 1989 Act, or they may be found to have acquired a new ordinary residence in the area in which they are living, depending on the facts of their case …."

Facts

14. PH was born on 27 December 1986. In 1991, PH's parents asked Wiltshire, in whose area they were then living, to provide accommodation for him. Acting under section 20 of the 1989 Act, they placed him with foster parents, Mr and Mrs B, who lived in South Gloucestershire. In November 1991, PH's family moved to Cornwall's area. The parents have continued to be involved in decisions affecting PH and he has regular contact with them.

15. In May 2001, anticipating his 18th birthday on 27 December 2004, Wiltshire wrote to Cornwall regarding the planning of his "transition to adulthood". They

suggested that his ordinary residence should be taken as that of his parents, in Cornwall. Cornwall maintained that the responsibility for managing the transition rested, under the 1989 Act, with Wiltshire. Inconclusive correspondence on this issue continued for more than a year. It seems to have culminated, on the legal side, with an exchange in June 2002 in which Wiltshire were proposing a reference to the Secretary of State to enable the matter to be resolved before his 18th birthday; Cornwall were taking the position that a reference would be premature until a decision had been made whether he was able to express his own wishes and a suitable placement on that basis had been determined. Meanwhile, on the basis of the residence of his parents in the county, Cornwall's social services department (in a letter of 25 July 2002) was asserting its own interest in assisting his "transition to adult living". It seems that Wiltshire did not again take up the issue of legal responsibility with Cornwall until October 2005.

16. In April 2004 Wiltshire conducted an assessment and a care review. It appeared that PH was happy and settled with his foster parents, and that they would have been content for PH to stay with them after his 18th birthday. However, it would not be possible for him to stay there, unless the foster placement were to be re-registered as an adult placement. It was noted that PH's parents visited him four or five times a year with occasional visits to the family home usually over Christmas and in the summer. They wanted to maintain at least the current level of contact. The foster parents also wished to help him settle into a new place and to visit him as regularly as possible. Continuing contact with his parents and foster parents was regarded as vitally important. A placement within the M4/M5 corridor was therefore thought to be best for ease of travel.

17. A care home was identified, Blackberry Hill in Somerset, where he would be able to move around the end of the year. At the end of 2004, PH went to Cornwall to stay with his parents for Christmas (including the day before his 18th birthday). He returned to stay with Mr and Mrs B until 24 January 2005, when he moved to Blackberry Hill. This placement was funded by Wiltshire on a provisional basis. Unfortunately, the placement at Blackberry Hill did not work well for him. On 6 June 2005, he moved to Langley House, also in Somerset, where he has remained ever since. His parents were involved in that decision. They have continued to maintain regular telephone contact with him, and he stays with them over Christmas and occasionally in the summer. Mr and Mrs B also keep in regular contact, now mainly by letters and cards.

18. Wiltshire carried out a capacity assessment on 15 April 2008 which concluded that overall and at that time, it was not considered that PH had the capacity to make an informed choice about where he would want to live nor did he have the communication skills for this to be expressed. There appeared to be no evidence of any change in his intellectual abilities since 2004.

The Dispute and the Secretary of State's determination

19. The question of responsibility as between the three possible authorities (Wiltshire, Cornwall and South Gloucestershire) remained unresolved for a number of years. In August 2011, they jointly referred the dispute to the Secretary of State for determination under section 32(3). On 22 March 2012 he issued a determination that PH had been on 26 December 2004, treated as the relevant date, ordinarily resident in Cornwall.

20. On the basis that the need for accommodation under section 21 of the 1948 Act arose on his 18th birthday, it was considered right to consider the question of ordinary residence at that date.

21. The determination continued:

> "19. As stated in paragraph 147 of the guidance issued by the Department, local authorities in determining ordinary residence could reasonably have regard to the 1989 Act and start from a presumption that the young person remains ordinarily resident in the local authority that had responsibility for them under the 1989 Act. …
>
> 20. … I consider that, for the purposes of the 1989 Act, [PH] was ordinarily resident in Wiltshire. Residence while accommodation was being provided by or on behalf of a local authority, in this case with foster carers, would be disregarded in accordance with section 105(6)(c) of the 1989 Act.
>
> 21. The starting presumption is that [PH] remained ordinarily resident in the area of the local authority which had responsibility for him under the 1989 Act, namely Wiltshire. However, as para 149 of the guidance points out, this starting point may be rebutted by the circumstances of the case and the application of the *Shah* and *Vale* tests. That paragraph refers to various factors that should be taken into account in applying those tests.
>
> 22. First, I do not consider that [PH] was ordinarily resident in Wiltshire. He had no links to the area. [PH's] parents and siblings left Wiltshire in November 1991, and [by December 2004] there were no … remaining ties with Wiltshire. … The mere fact that Wiltshire was the responsible authority for [PH] under the 1989 Act is not enough to

affirm the presumption that he is ordinarily resident in Wiltshire from 27 December 2004.

…

24. [PH] has severe learning difficulties and lacks mental capacity to decide where to live. … The family home in Cornwall is a place to which [he] returns for holidays and his parents are in regular contact by telephone. In 2004 it was the case that [his] parents visited him four or five times a year. [His] parents have also been closely involved in decisions made in relation to his care. … It is clear from the social services papers that proximity to the family home and ease of travel to and from Cornwall has been a consideration in planning the care and support needs of [PH]. I consider that [PH's] base is with [h]is parents.

25. I note that Cornwall question whether the family home in Cornwall can properly be described as a 'base' for [PH] given the infrequency of his visits there. It is not merely the number or frequency of visits that are determinative. The entirety of the relationship between [PH] and his parents is to be taken into account, and when regard is had to that, it is clear that [PH's] base remained with his parents.

26. Nor do I consider that [PH's foster parents] can, despite the years spent caring for [PH], be treated, by analogy, as a parent, such that, in accordance with test 1 in *Vale*, [PH] could be considered to have been ordinarily resident in South Gloucestershire on 26 December 2004. [PH's] natural parents remained his base throughout [PH's] placement with [his foster parents]. His parents visited him, he stayed with them, and they were involved with decisions regarding his care and well-being. I do not consider [his foster parents] to have so far replaced the role of [PH's] parents to be treated by analogy as [his] parents.

27. … [I]t was clear that [PH's] remaining in South Gloucestershire was at 26 December a temporary matter. [PH] was to remain with [his foster parents] in South Gloucestershire only until his section 21 accommodation became available. It is clear from the papers that continuing contact with his foster carers was considered to be important and [they] have kept in regular contact, but this is now mainly by letters and cards. His school, respite care and church life were associated with this foster care placement, and ceased once he

removed to the accommodation provided under section 21 of the 1948 Act."

22. For these reasons the Secretary of State determined that as at the relevant date, taken as 26 December 2004, PH was ordinarily resident in the area of Cornwall.

The court proceedings

23. The decision was upheld by Beatson J who, after a careful review of the authorities, held that the Secretary of State's reasoning disclosed no error of law. In summary, he concluded:

> "The Secretary of State examined … whether there was a real relationship between PH and his natural parents and whether they were in fact making relevant decisions. He was entitled to take account of that and … of the 'entirety of the relationship between [PH] and his parents'. As part of that, he was also entitled to take account of the time spent by PH with them in Cornwall. …
>
> The process of determining that PH was ordinarily resident in Cornwall may appear artificial. There would, however, have been a similar artificiality in determining that he was ordinarily resident in any of the other counties under consideration …" (paras 87-89)

24. The Court of Appeal disagreed. Elias LJ (with whom the rest of the court agreed) gave the leading judgment. He took account of authorities since *Shah*, including *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57; [2002] 1 AC 547 and *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] AC 1. In the former (at para 18) Lord Slynn had said of "words like 'ordinary residence' and 'normal residence'" that, while they may take their precise meaning from the legislative context, the starting point is where at the relevant time the person "in fact resides", in the sense of the place where (voluntarily) he "eats and sleeps", regardless of the reason. In the latter the Supreme Court held that, in determining the "habitual residence" of a child for the purpose of the Brussels II Regulation revised and the Hague Convention, the *Shah* test should not be followed, the search being rather for the place which reflects "some degree of integration by the child into the social and family environment", the intentions of the parents being no more than one relevant factor; in the majority's view (Lord Hughes disagreeing on this point) physical presence was a necessary element.

25. Against this background, Elias LJ held that, although the Secretary of State had carefully considered the facts, he had wrongly applied the *Vale* test "as if it were a rule of law". He proceeded on the basis that section 105(6), which required the placement in South Gloucestershire to be disregarded for the purposes of the 1989 Act, applied only for the purposes of that Act, not the 1948 Act (citing by way of analogy *R (Hertfordshire County Council) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77; [2011] PTSR 1623, 32). Accordingly, the fact that he had for a long time lived with foster parents in South Gloucestershire was a relevant factor to consider when assessing his ordinary residence at that time (para 35).

26. He criticised the decision-maker's use of the term "base" (following Lord Denning MR in *In re P (GE) (An infant)* [1965] Ch 568) to describe PH's relationship to his parents' home:

> "… Even if that is a helpful concept, I do not accept that Cornwall could properly be so described. It was not a place where PH had any settled residence at all; it was simply a place which he occasionally visited for holidays. His parents visited him in South Gloucestershire more frequently than he visited them in Cornwall. PH's parents' house was not, to use Lord Denning's phrase, 'a place from whence he goes out and to which he returns.' Indeed, in so far as it is helpful to adopt the concept of his base at all, this was surely South Gloucestershire. It was there where he lived day by day; it was from there that he left on his very occasional visits to Cornwall and to which he returned; and it was there that he received the visits from his parents." (para 76)

27. He held further that it was unnecessary to remit the matter for redetermination by the Secretary of State:

> "Looking at the facts as at PH's 18th birthday, there was in my judgment only one conclusion properly open to the Secretary of State. PH's place of ordinary residence was South Gloucestershire. It could not be Wiltshire, because he ceased to have any connection with it at all. At that stage he had never lived in Somerset and had no connection with it. And for reasons I have given, the mere fact that his parents' place of ordinary residence was in Cornwall could not justify finding that to be PH's place of ordinary residence." (para 85)

Preliminary issues

28. Before turning to the main substantive issue, it is necessary to consider two preliminary issues raised by Mr Lock QC on behalf of Cornwall, for the first time in the court proceedings. Although no objection has been taken to this course, I would wish to reserve my position as to its appropriateness in the context of a statutory power intended to encourage co-operation and lack of technicality.

29. He submits, first, that under section 21 there is power to make provision of residential care services only if it is "not otherwise available" (section 21(1)(a)), and if it is not "authorised or required to be made ... by or under any enactment not contained in this Part of this Act". In the three years following PH's 18th birthday, so it is said, Wiltshire's powers to provide "assistance" under section 23C of the 1989 Act were wide enough to cover all the services in fact provided for him during that period. There was therefore no place for section 21. It follows that there was at that date no question as to his ordinary residence under the Act requiring determination by the Secretary of State, and his decision was made without jurisdiction. Secondly, for good measure, he submits that Wiltshire itself had no power at all to incur expenditure under the 1948 Act, and no right to seek to recoup it from any other authority. At the time of PH's majority, he was not within their area, and there was no basis for treating him as ordinarily resident there, his only practical connection with the county through his parents having been severed some 14 years before.

30. These arguments were rejected by Beatson J and by the Court of Appeal. Without disrespect to the persistent arguments of Mr Lock QC in this court, I have no doubt that they were right to do so. I would have been content to adopt their reasoning. But there are, in my view, two short answers. The first concerns the nature of the powers, the second timing. The argument only works if there is identity between the two sets of powers. In my view there is not. Part III of the 1948 Act provides the exclusive statutory basis for securing the long term care and accommodation which PH needs and has needed since his majority. That is not displaced by the relevant provisions of the 1989 Act, which are transitional in character. I would not wish to place artificial restrictions of the types of assistance which may be provided if necessary under section 23C. However, their purpose is, not to supplant the substantive regime, but to ease the transition (usually) to adult independence. There may of course be some overlap in some of the specific provision made from day to day, but they are serving different ultimate purposes, one temporary, the other long term. That potential overlap is not such in my view as to exclude section 21(1)(a), under its own terms or by reference to section 21(8).

31. Secondly, and in any event, section 32 should in my view be read broadly in respect of timing. Even if the need for 1948 Act provision did not arise immediately

on PH's 18th birthday, the nature of the dispute was already apparent, and needed to be resolved in the immediate future to ensure a smooth transition to the new regime. That dispute was willingly referred to the Secretary of State by the three authorities concerned. It was obviously desirable for all parties, most particularly PH, that it should be resolved without delay. I see no reason to read section 32 as confined to those disputes arising in the period after the duties under the 1948 Act have come into effect. On the contrary a purposive construction would extend it to disputes which need to be resolved in advance, so as to enable the duties under the Act to be exercised by the correct authority from the outset.

32. As to whether Wiltshire itself should have been excluded as a potential party to the dispute, Mr Lock's argument is ingenious but unrealistic. As has been seen from the decision-determination, the Secretary of State's starting point was a presumption that Wiltshire, as the authority responsible under the 1989 Act, should be treated as responsible also under the 1948 Act, unless and until displaced by another authority under the *Shah* or *Vale* tests. Thus Wiltshire was (and still is) in the firing-line for potential liability, and it would have been irresponsible to proceed on any other basis. No amount of retrospective legal theorising by Cornwall can alter that position.

Ordinary residence – the law

Background

33. The 1948 Act was designed, in the words of its long title, to "terminate the existing poor law", and to replace it with a new scheme for the "assistance of persons in need" by the new National Assistance Board and by local authorities. Miss Mountfield QC (for South Gloucestershire) has helpfully drawn our attention to the approach under the Poor Law Act 1930 to the allocation of responsibility for the old or infirm or those otherwise unable to work. The duty to "relieve and maintain" such persons was placed on their "father, grandfather, mother, grandmother husband or child …" (1930 Act section 14). They were supported by the duty of the council of every county or county borough to "provide such relief as may be necessary" for the same group of people (section 15(1)), that duty applying generally to "all persons within (their area)" (section 15(2)).

34. The adoption by the 1948 Act of "ordinary residence" in this context, as the basis for allocation of responsibility between local authorities, was a new departure. As will be seen, a similar approach was adopted at about the same time in relation to allocation of responsibilities between education authorities. It is noteworthy that there was no repetition of the pre-1948 statutory duty of parents or family members for maintenance of incapacitated adults, and no recognition even of their practical

role in making decisions on behalf of those unable to do so for themselves. The common law could not fill the gap (see *re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, confirming that the parent of a mentally-disabled adult had no power at common law to consent to a medical operation on her behalf). Even in such cases the criterion was to be the ordinary residence of the individual, not of his parent or family, or anyone else.

35. However, it was recognised from the outset that some modification was required in the case of those whose current residence was the result of care decisions, rather than their personal connections with the area in question. Thus section 24(5) provides where a person is being provided with residential accommodation under the Act, he is 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. This formulation left open the question whether residence in such accommodation would otherwise have been regarded as "ordinary residence" for the purpose of section 24 – a question to which I shall return. In policy terms it ensured that decisions on placements, inside or outside an authority's area, were made solely with reference to the interests of the client, without affecting the placing authority's continuing responsibility for his care.

36. It is common ground that in the present context, unlike others considered in the authorities, the subject can be "ordinarily resident" in the area of only one local authority. Otherwise that test would not be an effective tool for allocating responsibility for services or their cost. As Beatson J observed (para 55) this factor, combined with what he called the "deeming" provision in section 24(5), may sometimes lead to "artificial and arbitrary" results.

37. The ordinary residence test has proved resilient. In its 2010 Consultation Paper on Adult Social Care (CP 192), para 8.12, the Law Commission noted that it had been adopted in a number of care statutes but not all, and that the resulting picture was "complex and inconsistent". However, it was not part of their remit to consider the meaning of the expression, nor whether it was the most effective way of determining which local authority is responsible for the provision of services. In their final report (Law Commission Report: *Adult Social Care* (2011) Law Com 326), they declined invitations from consultees to extend their remit to these issues, regarding them as "matters for political policy and not law reform" (para 10.11).

38. Nonetheless, in their proposals for a single adult care statute they recommended that ordinary residence should continue to be the primary criterion of responsibility for all community care services (para 10.9). The Care Act 2014, which generally gives effect to their proposals, adopts the criterion of ordinary residence. The basic definition may be made subject to exceptions, to be defined by regulations, for placements in specified types of care accommodation, the effect of which is to

substitute reference to the area of ordinary residence before the placement began, or the beginning of the period of consecutive placements of specified types (section 39).

The authorities on "ordinary residence"

39. At the time of the 1948 Act, most prior case-law on the meaning of the expression "ordinary residence" related to income tax. Liability depended on whether a person was resident or ordinarily resident in the United Kingdom for a particular tax year. In that context it had long been established that a person could be ordinarily resident in two places. This approach was affirmed by the House of Lords in two well-known cases reported in 1928: *Levene v Inland Revenue Comrs* [1928] AC 217 and *Inland Revenue Comrs v Lysaght* [1928] AC 234. In an earlier case, *Cooper v Cadwalader* (1904) 5 Tax Cases 101, an American resident in New York, who had taken a house in Scotland which he visited for two months each year, was held to be resident and ordinarily resident in the United Kingdom for tax purposes for each such year. It mattered not that for other purposes he might be treated as ordinarily resident in New York. As Viscount Sumner later observed "Who in New York would have said of Mr Cadwalader 'his home's in the Highlands; his home is not here'?" (*Lysaght* at p 244).

40. The House of Lords confirmed that approach and reached the same conclusions on the facts of the two cases in the 1928 Reports. Mr Levene lived abroad, but returned each year for about five months for the purpose of obtaining medical advice, visiting relatives and other matters. Mr Lysaght lived in Ireland, but returned to England each month for business purposes, remaining for about a week and usually staying in a hotel. In both cases the Special Commissioners had been entitled to hold that they were resident and ordinarily resident in this country.

41. Those authorities were followed in the leading modern authority on the meaning of the expression in a statutory context. That is the speech of Lord Scarman in *R v Barnet LBC, Ex p Shah* [1983] AC 309. The question was whether four foreign students qualified for an education grant on the basis that they had been "ordinarily resident" in the United Kingdom "throughout" the three years preceding the first year of their course. The authorities had argued that their ordinary residence, in the sense of their "real home", was elsewhere. The House disagreed. Lord Scarman, in the leading speech, treated the tax cases as authority for the "natural and ordinary meaning" of the expression. In particular he cited Viscount Sumner's reference to "ordinary" residence as "that part of the regular order of a man's life, adopted voluntarily and for settled purposes …" (*Lysaght* p 243). Lord Scarman echoed those words in his own statement of the natural and ordinary meaning of the term:

> "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." (p 343G-H)

The "mind" of the subject was relevant in two respects. First the residence must be "voluntarily adopted", rather than for example "enforced presence by reason of kidnapping or imprisonment". Secondly, there must be "a degree of settled purpose":

> "This is not to say that the (subject) intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. … All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." (p 344D)

A "settled" purpose did not need to be indefinite. "Education, business or profession … or merely love of a place" could be enough. There was no justification for substituting a "real home test", as the councils had argued (p 345B).

42. Although understandably this passage has been often quoted and relied on in later cases, the weight given to the concept of a "settled purpose" needs to be seen in context. The focus of the passage was to explain why the undoubted residence of the claimants in this country for the necessary period, albeit for the temporary purpose of education, was sufficiently settled to qualify as "ordinary" under the accepted meaning. It was relevant therefore to show that it was no less settled than, for example, the residence of Mr Cadwalader during his annual visit to Scotland, or that of Mr Levene on his five-month visit for medical and other reasons. Nor did it matter, it seems, that they might have had other "ordinary" residences in their countries of origin.

43. As Mr Sheldon QC (for the Secretary of State) points out, Lord Scarman made reference, albeit by way of contrast, to provisions in the same legislation for allocating financial responsibility between education authorities, which are not dissimilar to those now in issue. Lord Scarman referred to provisions for allocation as between authorities in Education (Miscellaneous Provisions) Act 1953 section 7, Education Act 1962 section 1(7), and section 31 of the Education Act 1980 section 31 (see *Shah* pp 338F, 340B)). They had contained a formula, for recoupment of costs as between education authorities, based in part on "ordinary residence", and

under which disputes were to be determined by the Minister or Secretary of State. (Similar provisions can be traced back to the same time as the 1948 Act: see Education (Miscellaneous Provisions) Act 1948 section 6.) The parallel is not necessarily exact. For example, the 1962 Act contained a schedule dealing with "ordinary residence" (applied by 1962 Act section 1(7)), in which the primary test was linked with a discretionary power in certain circumstances for the Secretary of State to impose a different result by direction. Lord Scarman described such provisions as "administrative and fiscal ..." in character, by contrast with the "justiciable" issue before the House. He noted, without expressing an opinion, the possibility that in that context "ordinary residence" might have -

> "… a special meaning when the distribution of the fiscal burden between local education authorities is being considered as a matter for the exercise of executive decision by the Secretary of State" (p 340B-G).

This is helpful as illustrating that the meaning of the term ordinary residence may be strongly influenced by the particular statutory context. However, it is common ground as I understand it that in the present context, once properly construed, the issue for the Secretary of State was one of factual judgement rather than executive discretion, and that his decision is "justiciable", in the sense that it is reviewable by the courts on ordinary *Wednesbury* principles.

44. Another authority relied on by the Secretary of State, again from a very different area of the law, is *In re P (GE) (An infant)* [1965] Ch 568. The Court of Appeal (applying the analogy of the law of treason) decided that the wardship jurisdiction of the Court of Chancery extended to any child "ordinarily resident" in this country. Lord Denning MR spoke of the ordinary residence of "a child of tender years who cannot decide for himself where to live":

> "So long as the father and mother are living together in the matrimonial home, the child's ordinary residence is the home - and it is still his ordinary residence, even while he is away at boarding school. It is his base, from whence he goes out and to which he returns …" (p 585)

This is the source of the word "base", used in *Vale* and in the Secretary of State's guidance, as indicative of ordinary residence. However, it is important again to see it in context. There is nothing to suggest that Lord Denning MR was intending to separate the idea of a "base" from the need for physical residence of some kind. The underlying assumption seems to have been that the child would be living at his

parent's home for the parts of the year when he was not at school, and would remain "ordinarily" so resident throughout.

45. Shortly after the *Shah* judgment, in *R v Waltham Forest London Borough Council, Ex p Vale* (unreported, 11 February 1985), Taylor J had to consider a case much closer to the present, involving the application of the ordinary residence test under the 1948 Act to someone mentally incapable of forming a settled intention where to live. Judith, an English woman, had been in residential care in Ireland for over 20 years where her parents had been living. When her parents returned to England, it was decided that she should return to live near them. She stayed with them at their house in Waltham Forest for a few weeks while a suitable residential home was being found, and she was then placed in a home in Buckinghamshire. The shortfall in costs (so far as not borne by the Department of Health and Social Security) was sought from Waltham Forest on the grounds that she was "ordinarily resident" in the borough.

46. The case was argued and decided by reference to the *Shah* test of ordinary residence, adapted for the case of someone lacking the power to form for herself a settled intention where to live. Taylor J adopted a two-part approach suggested by counsel, but on either approach he considered that her residence with her parents could be treated as sufficiently settled to satisfy the *Shah* test. The result is unremarkable, but in view of the weight later given (particularly in the Secretary of State's guidance) to "*Vale* tests 1 and 2", it is right to quote the judge's own words. For the first approach he made reference to Lord Denning MR's concept of a child's "base":

> "Where the (subject) ... is so mentally handicapped as to be totally dependent upon a parent or guardian, the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise. She is in the same position as a small child. *Her ordinary residence is that of her parents because that is her 'base'*, to use the word applied by Lord Denning in the infant case cited." (emphasis added)

The alternative approach, considering her as if she were a person of normal mental capacity, led to the same result:

> "I cannot accept that during the relevant month Judith should be regarded as a squatter in her parents' home. Her residence there had, in my judgment, all the attributes necessary to constitute ordinary residence within Lord Scarman's test, albeit for a short duration."

47. There is no reason to quarrel with Taylor J's conclusion on the unusual facts of the case. In circumstances where her only previous residence had been in Ireland, there was obvious sense in treating her few weeks living with her parents as sufficiently settled to meet the *Shah* test, whether by reference to the intentions of those making decisions on her behalf, or to the "attributes" of the residence objectively viewed. With hindsight, it was perhaps unhelpful to elide the *Shah* test with the idea of a "base", used by Lord Denning MR in a different context and for a different purpose. The italicised words in the first passage quoted above cannot be read as supporting any more general proposition than that Judith's ordinary residence was to be equated with that of her parents, without reference to the period of her own actual residence with them. Nor in my view should Taylor J's two approaches be treated as separate legal tests. Rather they were complementary, common-sense approaches to the application of the *Shah* test to a person unable to make decisions for herself; that is, to the single question whether her period of actual residence with her parents was sufficiently "settled" to amount to ordinary residence.

48. Most subsequent authorities on the issue of ordinary residence in the context of social services have relied on these authorities, without detailed discussion. The Court of Appeal also referred to authorities on other comparable expressions ("normal residence", "habitual residence") in other statutes. Without disrespect to the high authority of the statements quoted, their interpretation is a doubtful guide to the different language used in the provisions before us, and cannot in any event be considered without regard to the different statutory contexts in which they appear. As was pointed out by Lady Hale in *A v A (*above, at para 24) the phrase "habitual residence" was adopted in family legislation partly to distinguish it from ordinary residence as used in the taxation and immigration context.

Ordinary residence in the present case

49. I agree with the Court of Appeal that the decision-maker's reasons for selecting Cornwall cannot be supported. The writer started, not from an assessment of the duration and quality of PH's actual residence in any of the competing areas, but from an attempt to ascertain his "base", by reference to his relationships with those concerned. Thus in deciding that the family home in Cornwall could properly be described "as a 'base' for [PH]" notwithstanding the infrequency of his visits, the determination stated that it was necessary to consider "not merely the number or frequency of visits [but] … the entirety of the relationship between [PH] and his parents …". There is no suggestion that his brief periods of staying with his parents at holiday times could in themselves amount to ordinary residence.

50. Mr Sheldon seeks to support this approach by reference to the guidance and the authorities there relied on. He submits that, in the case of a person who is unable to make decisions for himself, it is necessary to determine -

> "the place which most appropriately represents at the material time, the seat of the person's decision-making power given his lack of capacity to make decisions where to live, the coming to an end of a placement under the 1989 Act, and the extent to which his parents (or those in loco parentis) can and will make the relevant decisions on his behalf."

Miss Mountfield QC is even more explicit, submitting that it is right in principle to look "to the ordinary residence of the decision-maker in deciding the ordinary residence of a person who lacks capacity".

51. There might be force in these approaches from a policy point of view, since they would reflect the importance of the link between the responsible authority and those in practice representing the interests of the individual concerned. They are however impossible to reconcile with the language of the statute, under which it is the residence of the subject, and the nature of that residence, which provide the essential criterion. In so far as *Vale* is relied on to substitute an alternative test, based on "the seat of (his) decision-making", or otherwise on his relationship with his parents and their home, it depends on a misunderstanding of that judgment. The seat of the decision-making power in relation to a mentally disabled adult is the authority making the placement (subject to any contrary determination by the Court of Protection), not the parents. For the same reason, the weight put by the decision-maker on the so-called *Vale* tests 1 and 2, both in the guidance and in the decision-determination, was in my view misplaced.

52. The more difficult issue is to make a principled choice between the two alternatives - South Gloucestershire or Wiltshire. Applying the *Shah* tests without qualification it is easy to understand why the Court of Appeal chose the former. If one asks where was PH's ordinary residence in the period immediately before his move to Somerset, an obvious answer for many purposes would be his home with his carers. That is where he had lived happily for some fourteen years. On an objective view it might be thought sufficiently "settled" to meet Lord Scarman's test, regardless of whether PH himself took any part in the decision-making. The Secretary of State rejected this alternative solely because he did not think that the foster parents had "so far replaced the role of [PH's] parents to be treated by analogy as [his] parents" under the *Vale* tests. For the reasons I have given this involved a misunderstanding of the reasoning in *Vale*. If the question is whether the residence of PH himself was sufficiently settled to satisfy the *Shah* test, the precise status of

his foster-parents was irrelevant. On this point the intentions and perceptions of his parents and his foster-parents were identical.

53. However, although the choice of South Gloucestershire may fit the language of the statute, it runs directly counter to its policy. The present residence in Somerset is ignored because there is no connection with that county other than a placement under the 1948 Act. By the same policy reasoning, South Gloucestershire's case for exclusion would seem even stronger. There is no present connection of any kind with that county, the only connection being a historic placement under a statute which specifically excluded it from consideration as the place of ordinary residence for the purposes of that Act.

54. The question therefore arises whether, despite the broad similarity and obvious underlying purpose of these provisions (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), there is a hiatus in the legislation such that a person who was placed by X in the area of Y under the 1989 Act, and remained until his 18th 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.

55. It is highly undesirable that this should be so. It would run counter to the policy discernable 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. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority, and the people who are cared for in some specialist settings may come from all over the country. 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.

56. The Court of Appeal (para 35), apparently without argument to the contrary, proceeded on the basis that the "deeming" provision under each statute applied only for the purposes of its own Act. Elias LJ cited *R (Hertfordshire County Council) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77; [2011] PTSR 1623, in which the court held that section 24(5) was a self-contained provision. 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" without any deeming provision) 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.

57. In construing the relevant words in section 24 of the 1948 Act, the statutory context is critical. The purpose of the provision is purely "administrative and fiscal", to borrow Lord Scarman's phrase in *R v Barnet London Borough Council, Ex p Shah* (see para 43 above). It does not affect the rights of the person concerned, but only the allocation of responsibility as between local authorities. Lord Scarman recognised the possibility that such a context might justify a different approach as compared to one directed to a person's entitlement to a benefit. In this respect the function of the relevant provisions in each Act is the same.

58. Section 24(5) poses the question: in which authority's area was PH ordinarily resident immediately before his placement in Somerset under the 1948 Act? In a case where the person concerned was at the relevant time living in accommodation in which he had been placed by a local authority under the 1989 Act, it would be artificial to ignore the nature of such a placement in that parallel statutory context. 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.

59. In other words, 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 18th birthday.

60. On this analysis it follows that PH's placement in South Gloucestershire by Wiltshire is not to be regarded as bringing about a change in his ordinary residence. 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. It may seem harsh to Wiltshire to have to retain indefinite responsibility for a person who left the area many years ago. But against that there are advantages for the subject in continuity of planning and financial responsibility. As between different authorities, an element of arbitrariness and "swings and roundabouts" may be unavoidable.

61. For these reasons, I would allow the appeals and in the declaration made by the Court of Appeal for references to South Gloucestershire I would substitute references to Wiltshire.

LORD WILSON: (dissenting)

62. My colleagues consider that, in making his determination under section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the place of PH's ordinary residence on 26 December 2004 for the purpose of section 24(1) of the same Act, the Secretary of State could lawfully have reached only one conclusion. It is, according to them, that on that date, which was the day prior to his 18th birthday, PH was ordinarily resident in a county (Wiltshire):

a) in which in May 1991, ie about 13 years earlier, he had ceased to live upon his removal to live with the foster parents in South Gloucestershire;

b) to which, during the following 13 years, he never returned, not even just to stay overnight;

c) in which in November 1991, ie also about 13 years earlier, his parents had ceased to live upon their removal to live in Cornwall;

d) in which by 1997, ie about seven years earlier, both sets of his grandparents had, in one case because of relocation and in the other because of death, ceased to live; and

e) in which, from 1997 onwards until many years after 26 December 2004, no home remained available, even in principle, for his occupation.

63. Such is a conclusion to which, with great respect to my colleagues, I do not subscribe. It is a conclusion for which no party has contended at any stage of these proceedings. A court should tread cautiously before favouring a solution devised only by itself, particularly where, as here, it has been addressed by an array of excellent counsel instructed by public authorities widely experienced in this area of the law.

64. I agree that there was only one conclusion which the Secretary of State could lawfully have reached. But, so I consider, his conclusion should have been that on 26 December 2004 PH was ordinarily resident in South Gloucestershire. So I believe that the order of the Court of Appeal was correct.

65. I must squarely confront the problem. There appear to be strong reasons of public policy which militate in favour of imposing upon Wiltshire, rather than upon South Gloucestershire, the obligation of making decisions about a suitable placement of PH following his 18th birthday and of funding whatever placement may thereafter be suitable for him from time to time. It would be a heavy financial burden for Wiltshire but its burden in the case of PH would be borne to the same extent by some other local authority in a reverse situation: in other words the burdens should even out. Public policy suggests:

a) that it is desirable that a local authority which has exercised the decision-making power (and has borne the funding burden) in relation to the placement of a mentally incapacitated minor should, in the light of its knowledge of his needs, continue to exercise that power (and bear that burden) following the attainment of his majority; and

b) that it is undesirable that a local authority which is exercising the decision-making power (and bearing the funding burden) in relation to the placement of an incapacitated minor should, while he remains a minor, be able to place him in a suitable facility in the area of another local authority (indeed, in the case of a private placement, without the consent of that local authority), with the result that, following the attainment of his majority, the decision-making power and, in particular, the financial burden should fall upon that other local authority. In the present case, for example, the evidence suggests that Wiltshire's placement of PH in 1991 with his excellent specialist foster parents did not in any way involve the local authority of South Gloucestershire, which for the following 13 years appears to have played no part in directing or securing his care. Yet, on my analysis, it is South Gloucestershire which should thereafter have begun to exercise the decision-making power and, in particular, to bear the financial burden. The Secretary of State accepts that, of the young people who move from being looked after by local authorities as minors to being provided with accommodation by them as adults, those lacking capacity are only a small proportion. But he explains convincingly that, in the light of their specialised needs, the cost of maintaining them indefinitely is very high. He proceeds to identify real concerns that a few local authorities might therefore be motivated (to use the crude shorthand which, only for convenience, has been deployed in the hearing before this court) to "export" such a minor to the area of another local authority prior to the attainment of his majority; and equally that, were that other local authority to be the administrator of a specialist resource entirely

suitable to the needs of a minor, it might nevertheless be motivated to refuse him admission to it for fear of the financial consequences following the attainment of his majority.

66. But such is the result which in my view the law, as it stands, clearly compels. I am not a legislator. Nor, with respect, are my colleagues.

67. When, by section 24(1) of the 1948 Act, it decided to identify the local authority responsible for making the provision specified by the Act by reference to a person's "ordinary residence" in its area, Parliament deployed a well-known phrase. The courts confidently assume that, in deploying a phrase, Parliament understands the meaning which the courts have ascribed to it: *Regina v G* [2003] UKHL 50, [2004] 1 AC 1034, at p 1059 (Lord Steyn). No doubt Parliament understands that in the future the courts may refine and develop their interpretation of a phrase. Subject to that, however, Parliament in 1948 intended that the courts should construe the phrase in section 24(1) by reference to its established meaning. Furthermore, insofar as the courts might encounter any difficulty in applying every aspect of its established meaning to any person entitled to provision under the Act, for example to a mentally incapacitated person, Parliament no doubt intended that the courts should, albeit only to the necessary extent, adapt their interpretation of the phrase. To that extent the framework in which Parliament set the phrase might require the courts to ascribe to it a somewhat different meaning.

68. In 1948 the established meaning of the phrase "ordinary residence" was that which the House of Lords had ascribed to it in the *Levene* and *Lysaght* cases cited by Lord Carnwath at para 39 above. In the former Viscount Cave LC had stated at p 225 that it meant "residence in a place with some degree of continuity and apart from accidental and temporary absences". In the latter Viscount Sumner had stated at p 243 that "the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'".

69. In the *Shah* case, cited by Lord Carnwath at para 41 above, Lord Scarman, at p 341, quoted both these statements; and it can be seen that his classic definition of the phrase "ordinary residence", set out by Lord Carnwath, was in effect no more than an amalgamation of what Viscount Cave and Viscount Sumner had said. By applying his definition, Lord Scarman and the other members of the committee decided that the four foreign students, who had pursued a course of study in the UK for the previous three years with leave to remain in the UK limited thereto, and who aspired, with the aid of grants, to pursue courses of further education, had been ordinarily resident in the UK throughout those three years and were therefore entitled to the grants under the Education Act 1962. Lord Scarman noted at pp 346 and 347 that each of the lower courts had attached importance to their belief that in

1962 Parliament would not have intended that foreign students with only limited leave to remain in the UK should be entitled to grants by which to further their education. He continued, at pp 347 and 348:

> "My Lords, the basic error of law in the judgments below was the failure … to appreciate the authoritative guidance given by this House in *Levene* … and … *Lysaght* as to the natural and ordinary meaning of the words "ordinarily resident". They attached too much importance to the particular purpose of the residence; and too little to the evidence of a regular mode of life for a *settled* purpose, whatever it be, whether study, business, work or pleasure. In so doing, they were influenced by their own views of policy and by the immigration status of the students.
>
> The way in which they used policy was, in my judgment, an impermissible approach to the interpretation of statutory language. **Judges may not interpret statutes in the light of their own views as to policy**." [Bold type supplied]

70. In 1948 the jurisdiction to commit a child to the care of a local authority was contained in section 62(1)(b) of the Children and Young Persons Act 1933 ("the 1933 Act"). No doubt Parliament could have extended the disregard in section 24(5) of the 1948 Act so as to encompass any period in which, immediately prior to the provision of residential accommodation to a person under Part III of that Act, he had been in the care of a local authority under section 62(1)(b) of the 1933 Act. But it did not do so. Equally, following the rationalisation of the provisions for taking children into care achieved by the Children Act 1989 ("the 1989 Act"), Parliament could have extended the disregard in section 24(5) of the 1948 Act so as to encompass any period in which, immediately prior to the provision of such accommodation, the person had been looked after by a local authority within the meaning of section 22(1) of the 1989 Act. But it did not do so. By paragraph 9 of the Schedule to the Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015, (SI 2015/914), made pursuant to section 123(2) of the Care Act 2014 ("the 2014 Act"), the application of the 1948 Act has now been restricted to Wales. In England accommodation for adults in need of it is now provided under the 2014 Act which, by section 39, has replaced the disregards formerly contained in section 24 of the 1948 Act with wider disregards. But, even now, Parliament has not chosen to include a requirement to disregard a period in which, as a minor, the person has been looked after by a local authority within the meaning of section 22(1) of the 1989 Act. It is instead my colleagues who have chosen to do so.

71. Indeed the statutory disregards, limited though they are, present another difficulty. In para 59 above Lord Carnwath suggests that the "legal characteristics" of the residence of a minor provided with accommodation under the 1989 Act are such as to make it irrelevant to the determination of his ordinary residence for the purposes of section 24(1) of the 1948 Act. But, if so, they must make it equally irrelevant to the determination of his ordinary residence for the purposes of the 1989 Act itself, including for those of section 31(8)(a) which requires the recipient of a care order to be the local authority within whose area he is ordinarily resident. So then the question arises: why should Parliament, by section 105(6)(c) of the 1989 Act, have troubled to require that the period of provision of such accommodation be disregarded? Lord Carnwath's analysis renders the subsection redundant. More broadly the same charge can, in my view, be levelled in relation to the disregards provided by section 24(5) of the 1948 Act and now by section 39 of the 2014 Act, which provide for the disregard of periods of accommodation which has legal characteristics analogous to those of accommodation provided under the 1989 Act.

72. The Secretary of State determined that on 26 December 2004 PH was ordinarily resident in Cornwall. I agree that his determination was unlawful. Although clearly PH had links with Cornwall which he lacked with Wiltshire, it was artificial to describe him as having had a "base" with his parents there; and it was unrealistic to regard them as having continued to be the decision-makers in relation to him. Having summarised approaches to the issue which, so counsel suggested, favoured the identification of Cornwall as the responsible local authority under the 1948 Act, Lord Carnwath states at para 51 above:

> "There might be force in these approaches from a policy point of view. … They are however impossible to reconcile with the language of the statute, under which it is the residence of the subject, and the nature of that residence, which provide the essential criterion."

I agree with Lord Carnwath's statement which, by coincidence, encapsulates the reasons for my own rejection of his conclusion that on 26 December 2004 PH was ordinarily resident in Wiltshire.

73. But it is not only by a process of elimination that I conclude that PH was then ordinarily resident in South Gloucestershire.

74. In *A v A (Children: Habitual Residence)*, [2013] UKSC 60, [2014] AC 1, this court determined the proper approach to an inquiry into a child's *habitual* residence for the purposes of article 8 of Council Regulation (EC) 2201/2003, namely the Brussels II Revised Regulation. It ruled that, in the light of the identity of article 8 as a European regulation, the inquiry into a child's habitual residence was required

to be conducted by reference to the interpretation of the phrase favoured by the Court of Justice of the European Union, namely to identify "the place which reflects some degree of integration by the child in a social and family environment" and that, for the purposes of article 8, such an inquiry was preferable to one determined by reference to Lord Scarman's classic definition of *ordinary* residence in the *Shah* case: see para 54(iii) and (v) of the judgment of Lady Hale. The European approach is plainly tailored so as to allow for the inability of most children to make decisions for themselves and, as such, it seems well suited to an inquiry into the ordinary residence of a mentally incapacitated person such as PH. I agree with the observation of Elias LJ in his judgment in the present case that there is much to be said in favour of a determination of PH's ordinary residence by reference to a similar approach. Were the inquiry indeed to be into the place of PH's integration in a social and family environment, that place would plainly be South Gloucestershire. But application of Lord Scarman's definition, subject to the alteration of one word required by PH's incapacity, yields the same conclusion. For on 26 December 2004 South Gloucestershire represented the abode which he had adopted for settled purposes as part of the regular order of his life for the time being. The word which requires alteration is "voluntarily". PH did not adopt his abode in the foster home "voluntarily". But, as the Secretary of State recorded in his determination, PH was very happy and settled in the foster home and had to leave it only because it was not possible for the foster parents to accommodate an adult under the 1948 Act while continuing to foster children under the 1989 Act. One may confidently infer that, had he had capacity, PH would have adopted his abode in the foster home voluntarily. In the light of his incapacity, however, the context requires a modest replacement of the word "voluntarily" with the word "contentedly" and, on that basis, his ordinary residence in South Gloucestershire is again plainly established.

75. I therefore take the view that both of these appeals should be dismissed.