

## ORDINARY RESIDENCE

### 1. General guidance

- 1.1 'Ordinary residence' has not been defined in any Act of Parliament. The leading case in this area is R -v- Barnet LBC ex parte Shah [1983] 1 All ER 226. The concept was held by the House of Lords to imply the following:
  - a. Ordinary residence is established if there is a regular habitual mode of life in a particular place "for the time being", "whether of short or short or long duration", the continuity of which has persisted apart from temporary or occasional absences. The only provisos are that the residence must be voluntary and adopted for "a settled purpose".
  - b. A person can be ordinarily resident in more than one country at the same time. (Lord Scarman described this as "an important factor distinguishing ordinary residence from domicile".)
  - c. Ordinary residence is proven more by evidence of matters capable of objective proof than by evidence as to state of mind.
- 1.2 Although Shah was concerned with the meaning of 'ordinary residence' as used in the Education Acts, the decision is generally recognised as having wider application and should normally be followed when determining status or other matters under the immigration and nationality legislation.
- 1.3 Caution is needed in applying the test at 1.1 c. above. It was held in Siggins [1984] Imm AR 14 that there are times when a court can and must properly make use of hindsight and that one of them is in considering whether a person's purpose has been followed up by his subsequent actions. Therefore, a person's intention or state of mind at the date on which he is seeking to be regarded as ordinarily resident in a particular place needs to be taken into account, as do his subsequent actions where they are relevant to that intention or state of mind. Where there is evidence (dating from the time intention/state of mind was important and/or dating from the time of subsequent actions) which bears out - or alternatively contradicts - a claim to have been ordinarily resident in a particular place, this needs to be balanced against any facts which indicate the opposite conclusion, and a judgement should be reached which will be defensible if challenged, for example at judicial review.

2. **Voluntarily adopted residence**

- 2.1 Unless there is clear evidence that a person is in a country or territory against his or her will, it may be assumed that residence there has been voluntarily adopted. This also applies to minors even though in their case the decision may have been taken on their behalf by a parent or guardian (see paragraph 8).

3. **Residence for a settled purpose**

- 3.1 In assessing whether a settled purpose lies behind the adoption of a particular place of residence, it is necessary to consider whether the residence shows a sufficient degree of continuity. This does not mean that the person must intend to stay in the place indefinitely. He or she may have a settled purpose even though it is for a strictly limited period. The purpose may be general or specific, for example education, business or profession, employment, health, family or merely "love of the place".
- 3.2 'Settled' in this context means 'fixed' or 'predetermined', as opposed to merely casual, and should not be confused with 'settled' as defined in the immigration and nationality legislation. A person may be ordinarily resident in the United Kingdom although liable, under the immigration legislation, to removal or deportation.

4. **What categories of persons can be ordinarily resident?**

- 4.1 Residence in a territory for most of the purposes for which people can enter is capable of constituting ordinary residence, and would do so provided that the conditions outlined above are met. In particular, lawful residence in the following categories is likely to constitute ordinary residence:
- Entry for settlement
  - Employment (with or without permit)
  - Business
  - Self-employment
  - Study
  - Persons of independent means
  - Working holiday-makers
  - Writers and artists
- 4.2 Visitors would not generally be ordinarily resident but are capable of so being, depending on the length and purpose of the visit and an assessment of the other factors described above.

5. **When does a person become ordinarily resident?**

- 5.1 A person may become ordinarily resident immediately on arrival, and probably will if entering the territory for settlement or one of the purposes leading to settlement. It is also possible for a person, initially entering for a temporary purpose not constituting ordinary residence, to become ordinarily resident through a change in the quality and purpose of the residence. Where it is not possible to establish the date on which a person became ordinarily resident, it may be reasonable to treat him or her as having been ordinarily resident from the date of arrival.

6. **What persons cannot be considered ordinarily resident?**

Unlawful residence

- 6.1 In the Shah judgement, Lord Scarman said: "If a man's presence in a particular place or country is unlawful, for example, in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence." This is affirmed for nationality purposes by **s.50(5)** of the British Nationality Act 1981.
- 6.2 A person may be considered to be in breach of the immigration laws if his or her presence contravenes a deportation order or if the person is an overstayer. In the latter case, the Immigration Appeal Tribunal has said that it is irrelevant, for right of abode purposes, that the person's stay was subsequently regularised by the grant of leave to remain (Cheong (4390), Lai (3087)).

Persons in prison

- 6.3 In the Shah judgement, Lord Scarman said that in order to determine whether someone was ordinarily resident it must be asked whether he has "shown that he has habitually and normally resided in the United Kingdom **from choice** and for a settled purpose throughout the prescribed period, apart from occasional or temporary absences."
- 6.4 A person who is in prison is not residing in the UK through choice and so cannot be considered to be ordinarily resident in the UK during their time in prison.

7. **Absences during a period of residence**

- 7.1 Where there have been absences in a period of residence, it must be decided:

- whether they can be regarded as temporary ones, despite which a regular habitual mode of life has continued; or
- whether the absences are such as to destroy the degree of continuity necessary to establish and maintain ordinary residence

- 7.2 The duration of an absence is less important than the purpose that lies behind it, as evidenced by the ascertainable facts. In R -v- Immigration Appeal Tribunal ex p Ng [1986] Imm AR 23, for example, the subject was required to demonstrate that he had been ordinarily resident in the United Kingdom for a period of five years. He travelled to Hong Kong on 24 August 1967, having, by then, been ordinarily resident in the UK for four years and 360 days. His employment in the UK had ceased on 5 August 1967, but he was paid until 31 August, as he was owed leave. The Divisional Court agreed with the Tribunal's view that since he had left the United Kingdom with no discernible intention of returning, Mr Ng ceased to be ordinarily resident in this country either immediately following departure or on arrival in Hong Kong. Had he intended nothing more than a holiday in Hong Kong, his ordinary residence in the UK would have continued.
- 7.3 By contrast, in Stransky -v- Stransky [1954] P 428, a woman was required to demonstrate that she had been ordinarily resident in England for the preceding three years. Despite overseas absences of more than 15 months during that period, it was held that, on the facts, she had remained ordinarily resident here in the natural and ordinary meaning of those words.
- 7.4 The maintenance of a home and family in a particular country during an absence abroad is not conclusive evidence that ordinary residence continued, although it will often be helpful (as it was in Stransky) in assessing whether the absence was a temporary one. Being re-admitted as a returning resident is not to be taken as evidence that ordinary residence in the UK was maintained during the absence.

## 8. Ordinary residence of minors

- 8.1 As a general rule it may be assumed that a child under the age of 16 shares the same place of ordinary residence as his or her parents. This was held to be the position in Re P(GE) (an infant) [1964] 3 All ER 977 even though the minor in question was away at boarding school and later taken abroad by one of the parents without the consent of the other. In Telles (2695) the Immigration Appeal Tribunal held that a minor did not cease to be ordinarily resident in the United Kingdom as long as his parents continued, despite temporary absences, to be ordinarily resident here.

- 8.2 The ordinary residence of older minors, those whose parents are living apart and those who have been left in the care of other relatives may be more difficult to determine. If the minor's age and means are such that he is capable of deciding for himself where he will live, his place of ordinary residence will probably not coincide with that of his parents. Where a parent is no longer living with his or her child on a permanent basis, it will be necessary to consider whether there is nevertheless sufficient contact for them to be considered part of the same household. In such a case it is more likely that the child will be ordinarily resident with the parent (or other relative) having day-to-day responsibility for his or her care and upbringing.

9. **Assessing claims to British citizenship under section 1(1)(b) BNA 1981**

- 9.1 The concept of ordinary residence is of particular relevance to claims to British citizenship under **s.1(1)(b)** where the non-British citizen parent(s) concerned are not subject to immigration control, such as Commonwealth citizens with the right of abode.
- 9.2 In this context unless there is clear evidence to the contrary, a person living here free of immigration restrictions may be assumed to be ordinarily resident in the United Kingdom. Where it appears that neither parent was ordinarily resident at the time of the birth (e.g. because of very short residence or a stated intention of paying only a short visit) we should take care, when declining to accept the claim, to couch the refusal in terms which would allow us to alter our view at a later date if that became appropriate. In addition to the usual qualification that only the courts can determine a person's citizenship authoritatively, the letter might include a statement along the following lines:

"From the information currently available, we are not satisfied that you or the child's father/mother were settled in the United Kingdom at the time of the birth. The Secretary of State is therefore unable to accept that the child has any claim to British citizenship."