

## Ordinary residence: case law for fees and student support

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### Ordinary residence: the basics

Many of the provisions of the fees and Student Support regulations require ordinary residence in the UK and Islands, or in the EEA, Switzerland, overseas territories and/or Turkey. In most cases, it is clear whether you have been ordinarily resident in the relevant area. However, in a minority of cases, you might have to persuade an institution or Student Support authority that you meet this requirement. This is most likely to happen when, for some or all of the relevant period, you have lived outside the residence area that applies to you. In such cases, the legislation provides no guidance and those assessing your eligibility for 'home' fees and Student Support have to rely on cases that have been decided in UK courts and tribunals. Each case is decided on its own facts and it might be difficult to derive a general principle from every case. This is why it is possible for institutions and authorities to reach different conclusions in your case, even though you present them with the same facts. UKCISA cannot get involved with any disputes you might have with educational institutions and bodies that administer Student Support. However, you might find the summaries of case law in this Information Sheet helpful in formulating your arguments.

'Ordinary residence' is a concept that appears in many areas of law. Therefore, many of the cases described here are not fees or Student Support cases but come from other areas of law, for example from immigration and nationality cases. However, the courts' interpretations of the term 'ordinary residence' are relevant to fees and Student Support cases.

In some of the immigration and nationality cases, the period of ordinary residence in question was five years. This should not be confused with the requirements of the fees and Student Support regulations. These cases are included because of their interpretation of the term 'ordinary residence' and related issues such as temporary absence.

Some of the cases in this Information Sheet are reported in full on the website of the British and Irish Legal Information Institute at [www.bailii.org](http://www.bailii.org).

### The case of Shah

Extracts from the case of *Shah v London Borough of Barnet* 1983 All ER 226

This is the key case in relation to the meaning of ordinary residence and it is often quoted in other cases. Note: in the extracts below, Lord Scarman uses the term 'settled purpose'. This should not be confused with the requirement in the fees and Student Support regulations that someone should be 'settled' within the meaning of the Immigration Act 1971.

"It is my view that LEAs, when considering an application for a mandatory award, must ask themselves the question:- has the applicant 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 temporary or occasional absences? If an LEA asks this, the correct, question, it is then for it, and it alone, to determine whether as a matter of fact the applicant has shown such residence. An authority is not required to determine his "real home" whatever that means: nor need any attempt be made to discover what his long-term future intention or expectations are. The relevant period is not the future but one which has largely (or wholly) elapsed, namely that between the date of the commencement of his proposed course and the date of his arrival in the United Kingdom. The terms of an immigrant student's leave to enter and remain here may or may not throw light on the question: it will, however, be of little weight when put into the balance against the fact of continued residence over the prescribed period – unless the residence is in itself a breach of the terms of his leave, in which event his residence, being unlawful, could not be ordinary.

"There are two, and no more than two, respects in which the mind of the propositus [the student applicant] is important in determining ordinary residence. The residence must be voluntarily adopted.

Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

"And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. 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.

"The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1982 and recognised by Lord Denning in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to the state of mind. Templeman LJ emphasised in the Court of Appeal the need for a simple test for LEAs to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there is to be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only if it is adopted voluntarily and for a settled purpose.

"An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can be. A man's settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years. There will seldom be any difficulty in determining whether residence is voluntary or for a settled purpose: nor will enquiry into such questions call for any deep examination of the mind of the propositus."

## Temporary absence and ordinary residence in more than one place

Temporary absences from the residence area can be ignored when deciding if you have been ordinarily resident in an area for a specific length of time, usually three years for the fees and Student Support regulations. Neither the case law nor the legislation defines 'temporary', so there is no set period of time which counts as 'temporary', although the longer you are physically absent from the residence area, the harder it will be for you to argue that you were only temporarily absent from that area. Your intentions may also be important. For example, if you emigrate out of the relevant area you may lose your ordinary residence in that area almost instantly. It is, however, possible to be ordinarily resident not only in the area where you spend most of your time, but also in other areas if you visit them regularly and meet some other requirements, as described in the cases which follow.

The following are summaries of cases decided since *Shah v Barnet London Borough Council* [1983] 3 All ER 226. As each case was decided by applying the definition of ordinary residence laid down in *Shah*, they provide illustrations of the application of the concept.

### **Britto v The Secretary of State for the Home Department 1984 Imm AR 93**

This case concerned an application for a certificate of naturalisation. In order to be eligible, Mr and Mrs Britto had to show they were 'settled' (as defined in the Immigration Act 1971) in the UK and had been ordinarily resident for the last five years or more. In the Act 'settled' is defined as being 'ordinarily resident' in the UK 'without being subject under the immigration laws to any restriction' on the period of stay.

As the issue in this case turned entirely on whether Mr and Mrs Britto had been ordinarily resident in the UK for five years, the case depended on the application of the criteria of ordinary residence as laid down by Lord Scarman in the case *Shah v Barnet Borough Council* [1983] 1 All ER 226. Although the case concerned the construction of a phrase in the Education Act, the decision has general application and applies to the Immigration Act 1971 and the Immigration Rules.

In coming to its decision that, in this case, Mr and Mrs Britto were ordinarily resident in two places at once, the Tribunal referred to the case of *Re Norris* 1888 5 Morr 111. In that case, a man who lived in Belgium with his family also maintained a hotel room in England. It was held that he could be ordinarily resident in both countries and that "assuming the definition of ordinary residence to be as set out in *Shah*, it would hardly make sense to restrict ordinary residence to one place only".

Other cases were referred to in which it was held that a person who had an 'establishment', whether home or accommodation, available to him or her in this country but used it for only a relatively short period of a year, was held to be ordinarily resident for that year:

- Cooper v Cadwalader 1904 5 Tax Cas.101 – in this case a citizen of the USA who was the tenant of a house in the Highlands visited it (with his valet) for two months each year during the grouse season. He was held to be ordinarily resident in this country
- Loewenstein v De Salis 1926 10 Tax Cas 424 – a man who had a 'hunting box' that was always available to him and was used regularly but not exceeding four and a half months in the year was ordinarily resident in the UK
- AG v Coote (1817) 4 Price 183 – it was said that if a man 'came here for the purpose of establishing a residence it were enough if he should reside here for only two weeks'.

The Tribunal commented that in all the above cases, the emphasis was not so much on the duration of the presence but on the regularity and purpose. The purpose (in Lord Scarman's words the 'settled purpose') is used to distinguish 'ordinary' from 'occasional' residence, a visit that is not part of the regular order of life.

In coming to its decision, the Tribunal disagreed with the argument that regular habitual mode of life implied a physical presence and commented that "without some physical presence ordinary residence would be difficult to establish, but presence will decrease in importance in the light of a continuous and regular substantive connection such as is evidenced by a home". The Tribunal added that it was a question of fact and degree in each case.

It was decided that Mr and Mrs Britto were ordinarily resident in the UK for the required period because:

- they had a settled purpose, ie to establish a home for the family and eventually to live in it permanently
- there was a regular habitual mode of life as the home was available and used by the family. There was continuity in this mode of life in the form of the visits made by Mr and Mrs Britto whenever leave permitted.

In this case, the family home and the accepted family intention taken together with the regular visits (even though limited in duration) led to the conclusion that Mr and Mrs Britto were ordinarily resident for the required period.

### **R(P) 1/01 [2000] CP/3035/1999 (UK Social Security and Child Support Commissioners' Decisions 12 September 2000)**

This case concerns eligibility for up-ratings of retirement pension, but turns on whether the claimants were ordinarily resident in both New Zealand and Britain. From 1992, the claimants had lived most of the year in New Zealand, for family reasons, but returned every year to Britain for a single period of between two and six months. They stated that they did not travel to other countries and they never left Britain without buying return tickets. One of the claimants had been granted residency rights in New Zealand, but the other had not applied for them. The Commissioners held that they were ordinarily resident in both countries because, amongst other reasons:

- Britain had, until the events in issue, been their long-term home and they still had a home there at all relevant times which was not occupied by anyone else (although they had tried to sell it)
- their strongest economic ties were with Britain which remained the source of their main income (their pension) and was a country where at least one was paying tax
- there was a clear pattern over several years of extended periods spent in both Britain and New Zealand but at no time did a full year go by without an extended visit back to Britain and by 1998 the claimants had established a clear pattern of extended residence in both Britain and New Zealand.

### **R v Immigration Appeal Tribunal Ex parte Siggins 1985 Imm AR 14**

In this case, in order to avoid deportation, the applicant had to show that he had been ordinarily resident in the UK on 1 January 1983 and had been so resident 'for the last five years'. The case went first to the Immigration Appeal Tribunal following the adjudicator's decision that a period of casual work in the United States broke the period of ordinary residence in the UK. Before the High Court it was argued that, applying the principles laid down by Lord Scarman in Shah, those periods of absence had not broken the applicant's period of ordinary residence in the UK.

Mr Siggins' absences from the UK during the five years totalled about 11 months. Eight of the eleven

months were spent working in the States after he had left his job and accommodation in the UK. The Tribunal had noted that there was no evidence that he retained any contact with the UK during that period. He had, however, held a return ticket and when interviewed at the Home Office said that his intention was to return.

The Tribunal had decided, however, that it would be wrong to place too much weight on the return ticket and the implied intention. It had concluded that there was no residual, habitual mode of life in the UK against which Mr Siggins' absence could be set. It had commented that on Mr Siggins' own evidence he was a 'wanderer' and that therefore he was in effect doing in the States what he did here.

The Court of Appeal stressed the importance of asking what Mr Siggins' purpose was when he left the UK, and that "there are times when a court can and must properly make use of hindsight and one of them is in considering whether a man's purpose has been followed up by his subsequent actions". The court could not find any evidence that Mr Siggins had abandoned the UK as his place of ordinary residence.

The court did not agree with the argument that Mr Siggins had no residual, habitual mode of life in the UK. Although Mr Siggins' lifestyle was marked by an absence of regular activity, the quality of his visit to the US was different from that of his stay in the UK, both because of its length and because of his stated intention (in fact carried out) to return to the UK at the end of his visit.

It was held that:

- because the applicant could be ordinarily resident in more than one place at any material time, it was a question of fact whether he had remained ordinarily resident in the UK
- taking into consideration the facts and that the applicant's subsequent conduct showed he had carried out his earlier expressed intention of returning to the UK, he had remained ordinarily resident in the UK throughout the relevant period.

### **The Secretary of State for the Home Department v Rekha Ashok Kumar Jayantilal Haria 1986 Imm AR 165**

This case refers to the cases of both [Shah](#) and [Britto](#).

The case is concerned with section 2(1)(c) of the Immigration Act 1971, whereby a person is entitled to a right of abode if he or she is a citizen of the UK and Colonies who has at any time "been settled in the UK and Islands and had at that time (and while such a citizen) been ordinarily resident in the UK for the last five years or more".

Mrs Haria arrived in the UK in 1973 from Kenya to join her husband. By 1977 (four years and two months later) the family business had failed and they returned to Kenya in order to take advantage of a business opportunity there. In September 1979, she returned to the UK for six months, during which time her daughter was born. She then returned to Kenya in March 1980 and stayed there until November 1982, when she came back to the UK to settle, selling their business and house in Kenya when she and her husband went back for a four-month holiday. The absence from the UK between April 1977 and September 1979 was a critical period for the purposes of this case

The need for continuous contact with the UK in order to establish ordinary residence was stressed. The facts of this case were contrasted with Britto in which there was a continuing contact over a number of years. In this case, it was argued, the only contact was the residence here of the two sets of parents.

The court held that when Mrs Haria left the UK and went to Kenya in 1977, she ceased to be ordinarily resident in this country: "While there was a specific purpose in going and it would appear from the evidence that the move was founded on economic necessity, this did not mean that the move was involuntary. Further ... there was little substantive contact with this country and certainly no evidence that the intention to return at some future date was anything more than an intention".

Although there was a 'family intention' to return, the conclusion as to ordinary residence had to be based on what happened. Although there was a purpose to set up in business in this country again, there was in fact no business here and no money invested for a fresh start here. The court therefore concluded that it was impossible to say on the facts that during her absence from this country Mrs Haria remained in the UK "for settled purposes as part of the regular order of her life for the time being".

### **R v Immigration Appeal Tribunal ex parte Sai Ho Frederick Ng 1986 Imm AR 23 (QBD)**

To qualify for a certificate of patriality on the facts, Ng needed to be ordinarily resident in the UK 'for five

years or more' which meant he still had to be ordinarily resident in the UK on 29 August 1967. On that date, he had ended his employment in the UK and had left for Hong Kong with no intention of returning to the UK. He was still, however, within the period covered by the accrued leave from his UK employment.

It was held that:

- it was an inevitable inference from the facts that when Ng left the UK he intended to reside and be employed in Hong Kong for the foreseeable future
- it followed that he ceased to be ordinarily resident in the UK either on his departure from it or on his arrival in Hong Kong
- it could not be said that Ng was on holiday until he took up employment in Hong Kong. Had he intended nothing more than a short holiday, he would have remained ordinarily resident in the UK.

## Ordinary residence of children

### Re P (GE) (an infant) 1965 Ch 568

Note: this case was decided before 'Shah'

The child had been removed from the UK to Israel by his father without the knowledge of the mother. The father was stateless but had travel documents which entitled him to return to the UK with the child within three months. The question was whether the court had jurisdiction over the father and child and this depended on whether or not they were ordinarily resident in the UK.

It was decided that the father and child were ordinarily resident in the UK because:

- the child's home was with his mother in the UK
- the father and son had left the UK on a travel document which entitled them to return, and which had not been surrendered. This amounted to an admission that the absence was temporary and on a tourist basis
- they had left family and effects in the UK.

In coming to his decision Lord Denning said:

"An infant of tender years is ordinarily resident where he has his home, and that ordinary residence cannot be changed by kidnapping him or by one parent taking him from that home without the consent of the other.

...we are faced with the question: what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of 16? 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. When father and mother are at variance and living separate and apart, and by arrangement the child resides in the house of one of them – then that home is his ordinary residence even though the other parent has access and the child goes to see him from time to time."

### R v Waltham Forest LBC ex parte Vale (25.2.85 The Times)

The applicant was 28 and had been disabled from birth. In 1961 she and her parents had moved to Ireland where she spent most of her time in residential homes. In 1978 her parents returned to England and since then had lived in the London Borough of Waltham Forest. It was not until 1984 that the applicant returned to England and lived in her parents' home for one month before being placed in a home in another local authority's area.

Under the National Assistance Act 1948 Waltham Forest Council had a duty to provide accommodation to the applicant if she were ordinarily resident in the area. The Council had refused to fund her accommodation on the basis that her disability was irrelevant and that until 1984 she had been ordinarily resident in Ireland and that her stay with her parents had been merely temporary prior to her transfer to the home.

The court referred to the case of **Re P (GE)** and applied the case of **Shah**. It decided that the applicant was entitled to assistance under the Act because she was in the same position as that of a small child

and therefore her ordinary residence was that of her parents. Ordinary residence must be voluntarily adopted and it could not be said that the applicant could decide her own ordinary residence. In addition, the court commented that even if her disability were to be left out of account, since the applicant was, on Shah principles, ordinarily resident in her parents' home for the month she was actually there, she would have been entitled to assistance under the Act in any case.

## Temporary employment outside the residence area

Both the fees and the Student Support regulations expressly provide that you are to be treated as ordinarily resident in the relevant residence area if you would have been ordinarily resident there but for the fact that you, or your spouse or civil partner or your parent is or was temporarily employed outside the area in question. If you would be entitled to 'home' fees and Student Support as the dependent parent or grandparent of an EU national or of an EEA/Swiss migrant worker, the temporary employment outside the area in question of your child or of your child's spouse or civil partner is also relevant.

The word 'temporary' is not defined, so you need to be able to provide evidence that the employment is or was outside the relevant area for a limited period and that you would have been ordinarily resident in the relevant area if the temporary employment had not taken you out of it. If you have been **ordinarily resident in more than one place at the same time**, you do not also need to provide evidence of temporary employment abroad.

### **R v Lancashire County Council, ex parte Huddleston 1986 2 All ER 941**

In this case the Court of Appeal had to decide whether a student (Lynne Huddleston), who had been living in Hong Kong for 13 years because her father was employed there, should have been refused an award.

The Huddlestons were British Citizens and had moved from Lancashire to Hong Kong when Mr Huddleston obtained a job there. The family always intended to return to Lancashire where they owned a house but from 1970 when Lynne was five until 1983 she lived in Hong Kong. In 1983, Lynne returned to the UK and applied to Lancashire CC for an award. It was refused on the ground that Lynne had not been ordinarily resident for the relevant three years.

The court upheld the Lancashire CC's decision, holding that it was not unreasonable for the Council to decide that Mr Huddleston's employment abroad by a foreign company for 13 years ceased to be merely temporary and therefore Lynne could not be treated as ordinarily resident in the UK for the purposes of these regulations.

Perhaps unfortunately in this case, the court did not consider whether Lynne might have been ordinarily resident in both Hong Kong and the UK, even though she spent six weeks of every year in the family home in Lancashire, under the annual home leave to which her father was entitled under his contract of employment. This is in contrast to the case of **Britto**, where a family home, the accepted family intention to settle in the UK and regular visits (of a similar length to those in Huddleston) led the court to conclude that they were ordinarily resident in the UK.

## Main purpose for residence being full-time education

For many categories of the fees and Student Support regulations, you have to show not only that you have been ordinarily resident in a particular area, but also that your main reason for being there was not to receive full-time education. You can check this for yourself by asking where you would be ordinarily resident, if you were not in full-time education. If the answer to this is in the same area, full-time education is not your main reason for being there. For example, if you are an EU national and your only reason for being in the UK is to receive full-time education, but when you are not in education in the UK you live in Belgium, you can show that you are not ordinarily resident in the European Economic Area (part of the relevant residence area for EU nationals) mainly for full-time education.

### **R v Hereford and Worcester County Council ex parte Wimbourne CO/174/83 (QBD)**

The student in this case was a British citizen who applied to his local authority for an award for a degree course that started in September 1983. Both his parents were British and he was born in the UK in 1962. His father died when the student was four years old and his mother went to work in Trinidad, where the student went to school. In 1979, he returned to the UK, stayed with an aunt and uncle, and studied for his 'O' and 'A' levels at a technical college.

The local authority refused the award on the grounds that the student's residence in the UK had, during the last three years, been wholly or mainly for the purpose of receiving full-time education. As Mr Justice

Hodgson states in his judgment, "In arriving at this decision, the Authority bore in mind particularly that you undertook a full-time course at Herefordshire Technical College, concerning which you had made enquiries before leaving Trinidad, immediately on your arrival in this country and this was in fulfilment of a prior intention of resolving to continue your Advanced Level education in England, which involved attendance at a full-time GCE A level course aimed at securing consecutive admission to the full-time degree course which is the subject of your present application. Your return to Trinidad during the long vacations is also considered a factor in this connection". In this case, the student did not argue that he was in the UK for any reason other than to receive full-time education.

### **Kent v University College London 1991 TLR 467**

This case involved a student challenging an 'overseas' fee assessment. The case centred around whether Mr Kent's main purpose of residence in the UK had been to receive full-time education during the three years prior to starting the course.

Mr Kent was a British citizen whose parents lived in Singapore. He left Singapore in February 1988 at the age of 17, at least partly in order to avoid military service there at 18. His sister had come to settle in the UK shortly before. Soon after arriving in the UK, he obtained a British passport. He lived with his aunt and did a two-year 'A' level course at grammar school. In August 1990, his father retired and both parents came to settle in England. In September 1990, Mr Kent applied to start a degree course in October 1991, as he would have three years' ordinary residence in the UK by then.

Whilst for two of those three years the student had been in full-time education, the court decided that it did not follow that the full-time course had been the whole or main purpose of his taking up residence in the UK. The evidence in this case pointed instead to the conclusion that his purpose in leaving Singapore and coming to England had been the general purpose of settling in the UK, and not for the specific purpose of receiving full-time education. He was legally entitled to choose and acquire a residence independent of his parents.

University College London appealed the decision but it was upheld, the court in the appeal case noting that the judge had been entitled to take the view that the intention of settling was the dominant intention and that the purpose of receiving full-time education, although important, was 'ancillary'.

### **Wing Kew Leung v Imperial College of Science, Technology and Medicine [2002] EWHC 1358 (Admin) (5 July 2002)**

This is another case in which a student challenged a university's decision that he had been ordinarily resident in the UK wholly or mainly in order to receive full-time education.

The student and his family were granted British citizenship in May 1995. His parents had worked in the UK since 1972 and returned to Hong Kong after having been granted British citizenship. His older brother left Hong Kong in August 1990 and became permanently settled in the UK in May 1995. The student had been at school in Hong Kong but, in August 1995, when he was 14 years old, he came to the UK and enrolled that September in a boarding school. He lived with his aunt and brother in a house bought by his parents that was close to the school, but he continued boarding.

In 1996, his older brother was assessed as a 'home' fee payer, and the student applied for a place at university starting in October 2000. Although the student stated in the university's supplementary questionnaire that his reason for living in the UK was "as country for residence, ie to settle", the university did not accept the student's assertions at face value, and decided that he was in the UK mainly in order to receive full-time education. This was for three reasons:

1. the student's self-assessed residential category on the UCAS form was not the category for 'home' fee payers, although he did enter the fee code which applies to most 'home' fee payers
2. he started at boarding school very soon after having arrived in the UK
3. he was 14 years old when he arrived in the UK and his parents remained in Hong Kong and supported him from there.

As the judge in this case stated, "It is important to stress that my task is to see whether the decision of the college to classify the claimant as an overseas student should be quashed on public law grounds. It is not my function to determine whether I would have reached the same decision as the college, or whether I would have used the same reasoning process as that which was adopted by the college". In fact, a different university did assess this student as a 'home' fee payer. The court's job was to determine whether the college had misdirected itself, and it quoted the following passage from the judgment of the Court of Appeal in [Kent v University College London](#):

"The college or the court, as the case may be, is entitled to evaluate [the claimant's own statements or declarations as to the purpose of his residence and to his intention at any particular time] in the light of the conduct of the person making them and the purpose for which and the circumstances in which they are made. It is entitled to scrutinise with care and to investigate evidence of purpose in order to prevent an abuse of the system under which higher fees may lawfully be charged to overseas students than to home students".

In this case, the college could demonstrate that it had considered the student's arguments, which were not supported by additional information or documents, but had found them to be outweighed by other factors listed above. Therefore, the student's challenge was unsuccessful.

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