

Scottish Government submission of 27 March 2024

PE2085/A: Introduce a statutory definition of residency for Fatal Accident Inquiries into the deaths of Scots abroad

We write in respect of Petition PE2085 entitled “Introduce a statutory definition of residency for Fatal Accident Inquiries into the deaths of Scots abroad”.

The Scottish Government recognises that each death abroad is a tragedy, with additional heartache for families when their loved one dies far from home.

The law on Fatal Accident Inquiries is contained in the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (“the 2016 Act”).

The law governing fatal accident inquiries was comprehensively reviewed by Lord Cullen and the findings of that review were reflected in the 2016 Act. Lord Cullen dealt specifically with the question of fatal accident inquiries concerning a death abroad, and considered that the deceased should be defined as a person normally resident in Scotland. This was ultimately the test that was reflected in the Act.

Section 6 of the 2016 Act allows the Lord Advocate to hold a fatal accident inquiry into a death of a person “ordinarily resident” in Scotland, if the death occurs outwith the United Kingdom. On the matter of ordinary residence, the terms “ordinarily resident” and “habitually resident” (and other similar terms) are not defined in legislation, and their meanings have been established through case law. The leading case on this matter is *R. v Barnet LBC Ex p. Shah* [1983] 2 A.C. 309 per Lord Scarman at p349 who asked ‘...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?’

These are the types of factors the Lord Advocate and Crown Office and Procurator Fiscal Service (COPFS), (acting independently of

Government and all other agencies) will take into account when assessing whether a person who has died outwith the UK is ordinarily resident in Scotland - based on the information available. Where a person is considered to be ordinarily resident in Scotland, the Lord Advocate/COPFS will go on to consider whether the death was either sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern. The Lord Advocate must also consider whether the circumstances of the death have already been established in the course of an investigation by the appropriate authorities in the country where the death occurred, and whether there is a real prospect that the circumstances would be sufficiently established in an inquiry. An inquiry will only be held if the Lord Advocate decides that it is in the public interest to investigate the circumstances of the death .

At present, we do not intend to define ordinarily resident in legislation. The term is a flexible one, and it has been subject to sufficient judicial comment to assist the Lord Advocate in taking into account the deceased's individual circumstances. It seems flexible enough to exclude a temporary or transitory relationship by the person with Scotland, but be generous enough to permit a FAI into the death of a person who is here on a semi-permanent basis. In most cases, whether the deceased was ordinarily resident will be clear from the outset. In others, further information can be sought by the Procurator Fiscal and a decision taken based on all the facts and circumstances.

The background information contained in the petition states that no FAIs have taken place in relation to deaths abroad. That statement is correct, however, although no FAIs have taken place into deaths abroad, it is important to note that COPFS are able to conduct enquiries short of an FAI in relation to deaths abroad, such as the instruction of a post mortem examination, which has allowed further information to be provided to the family and given them reassurance and closure about the circumstances. There are various reasons why the Lord Advocate may decide not to hold a FAI depending on the individual circumstances of the case as considered against the criteria in section 6.

The Petition states that Scotland should afford as a minimum similar protection and support as England and Wales when an individual who lives or works abroad is repatriated. The systems for investigating deaths abroad in Scotland and England and Wales are different (as they are for the investigation of deaths generally). All UK nations, irrespective of their legislation, will encounter the same problems in trying to establish the truth in relation to a death abroad

when faced with an unfamiliar legal system. It is considered that it is a reasonable minimum requirement before an investigation can take place for the deceased person to have been ordinarily resident in Scotland.

The petition also suggests that 'most families would choose to repatriate to England or Wales'. We understand that in the vast majority of cases where there is a death abroad, the primary concern of the family is having the body of their loved one released as soon as possible so that funeral arrangements can be finalised. It is a matter for the relevant Coroner in England or Wales to determine whether they have jurisdiction to investigate a death occurring abroad and, if so, whether an inquest should be held into that death. It would not be appropriate for the Scottish Government to offer advice in that regard.

Justice Directorate