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BREXIT AND SCOTS LAW: IMMIGRATION AND CITIZENSHIP

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A. INTRODUCTION

The effects of Brexit on the entry and residence rights of EU citizens in Scotland look set to be the same as those felt across the rest of the UK: they will be integrated into the UK's national immigration system by some future date, which could depend on individual circumstances, could be the end of whatever transitional period may eventually be agreed, or could be as early as Spring 2019 if the UK "crashes out" of the EU without an agreement. And yet, since the Brexit vote, a groundswell of support has arisen for the idea that Scotland should have a differentiated immigration settlement. This article surveys the institutional limitations on Scotland having separate immigration policies, highlights areas where diverging policies have developed, and considers the prospects for difference in Scotland in the Brexit context. While the prospects for developing separate policies depend largely on the emergence of a genuinely inter-governmental approach at UK Government level, there is also scope for the Scottish Government to take the initiative.

B. FREE MOVEMENT RIGHTS AFFECTED BY BREXIT

The EU free movement regime includes rights of residence for longer than three months for economically active EU citizens,¹ family rights, the right to equal treatment, and to permanent residence after five years. These rights are - broadly speaking - drawn from the Citizens Directive,² although other rights are also relevant.³ Both sides of the Brexit talks have repeatedly said that agreement on Free Movement of Persons(FMOP) is their priority, but the UK Government and the EU-27 States have very different starting points. As far as possible, the EU wants to protect the rights of EU citizens to live and work in any EU state (including UK citizens resident in EU-27 States, as well as EU-27 citizens resident in the UK),⁴ and it therefore seeks to maintain the status quo for prior residents. While the UK Government has undertaken to guarantee the rights of EU nationals in the UK, in the expectation that the EU will offer reciprocal treatment for UK nationals in EU-27 states, it also wants to integrate EU citizens into the UK's national immigration system.⁵ Meanwhile, progress on Brexit talks keeps stalling and, according to Ryan, it is "uncertain" whether an Article 50 agreement will cover rights to remain.⁶ A transitional arrangement may be achievable, which could

¹ "Economically active EU citizens" is used as shorthand here to include semi-economically active, the economically independent and work-seekers.

² Directive 2004/38/EC (OJ L 158, 30.4.2004, p. 77–123), implemented in the UK through the Immigration (European Economic Area) Regulations 2016. Although the nationals of Iceland, Liechtenstein, Norway and Switzerland are covered by the EEA Regulations, their position is not discussed here.

³ B Ryan, "Negotiating the Right to Remain after Brexit" JIANL 2017, 31(3), 197-226, at p204.

⁴ Ryan(n3) at p205, citing European Council's negotiating guidelines of 29 April 2017 EUCO XT 20004/17, Annex, para 8 and Council of Ministers document XT 21016/17 ADD 1, para 20.

⁵ Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU (Cm .9464: July 2017).

⁶ Ryan(n3)

give more time for agreement to be reached and, perhaps, an extension of the status quo during that time.

The FMOP regime operates as a quasi-exemption from UK immigration control. EU citizens exercise their free movement rights under EU law and do not have to apply for a visa before travelling to the UK, nor are they required to provide biometric data. Their family reunion rights extend to a slightly broader range of family members, and long-term residents gain other “civic” rights – such as voting rights in local and Scottish Government elections, and access to social rights such as education and healthcare - in line with EU equality principles.

Integrating EU citizens into the UK’s immigration regime involves transferring to a very different system. The UK system grants leave to remain based on compliance with detailed immigration rules,⁷ and a confusing picture is emerging of the transition into that system. The UK and the Commission have issued a Joint Note setting out the issues for EU citizens in the UK and UK citizens in the EU, and while the areas of agreement there provide some reassurance,⁸ a leaked Home Office document seemed to reel back on the rights of EU family members in alarming ways,⁹ before being dismissed by a Government spokesman as a “draft”, with detailed proposals still to be set out.¹⁰

Administration might seem an unlikely area of controversy, but this part of the Joint Note highlights the contrast between each side’s proposals. The EU proposal is that registration documents will continue to be merely declaratory of the exercise of free movement rights after Brexit. This contrasts with the UK’s insistence that every EU citizen in the UK will have to obtain Home Office documents within two years of Brexit (or risk being treated as an illegal immigrant).¹¹ As well as highlighting the difference between the EU’s rights-based system and the UK’s rule-based approach, this issue raises the question whether the Home Office would have the capacity to perform an administrative task of this magnitude. Recent Home Office errors- such as the issuing of removal decisions to EU citizens telling them they are no longer lawfully in the UK- has drawn further attention to this question.¹³

At the time of writing, the possibility that the UK might “crash out” of the EU with no deal at all is being openly discussed.¹⁴ For EU citizens in the UK and UK citizens in the EU, this would mean losing their EU free movement rights overnight and becoming third country nationals, leaving them uncertain about how their transition into domestic immigration systems would be managed, and

⁷ The Immigration Act 1971 s3(2) gives the Secretary of State very broad rule-making powers to which negative resolution procedures apply.

⁸ I Halliday, “EU Nationals In the UK- some reassurance”, 19 September 2017, available at: <http://www.mcqillandco.co.uk/Blog/2017/9/19/eu-nationals-in-the-uk-some-reassurance>.

⁹ “Leaked document reveals UK Brexit plan to deter EU immigrants, The Guardian, 5 September 2017, available at: <https://www.theguardian.com/uk-news/2017/sep/05/leaked-document-reveals-uk-brex-it-plan-to-deter-eu-immigrants>.

¹⁰ “Leaked document suggests UK plan to curb EU migration”, BBC, 5 September 2017, available at: <http://www.bbc.co.uk/news/uk-politics-41168091>.

¹¹ Joint Technical Note on the comparison of EU/UK positions on Citizens’ Rights, Department for Exiting the European Union, 29 September 2017.

¹³ “In error, Britain tells dozens of EU citizens to leave” available at: <https://www.reuters.com/article/us-britain-eu-citizens/in-error-britain-tells-dozens-of-eu-citizens-to-leave-idUSKCN1B315X>

¹⁴ C Morris “What would no deal look like?” BBC 10 October 2017 <http://www.bbc.co.uk/news/uk-politics-39294904>.

whether they and their families would be able to stay. With both sides having made repeated statements aimed at reassuring EU citizens exercising free movement rights,¹⁵ and having also emphasised their desire to conclude a deal that protects their position,¹⁶ the prospects of concluding a deal still seem to outweigh the chances of there being no deal at all. However, the prospects of any deal on EU citizens' rights forming part of an Article 50 agreement have also been called into question,¹⁷ and so a transitional period which is long enough for agreement to be reached on an orderly transition is an outcome that must be hoped for.

C. A DIFFERENTIATED IMMIGRATION SETTLEMENT FOR SCOTLAND?

Differentiation from the rest of the UK on the rights of EU citizens resident in Scotland could emerge from discussions involving the EU, but are more likely to arise within the UK.

1. EU level discussions

The debate may arise in the context of discussions about the future of Northern Ireland and of the 1998 Belfast/Good Friday Agreement, which are the aspects of the UK's devolved nations' future which currently feature most strongly in Brexit negotiations.¹⁸ The implications of the border between Northern Ireland and the Irish Republic becoming the EU border, and of the FMOP regime continuing to apply on one side of that border but not the other, are a feature of these discussions.¹⁹ If the Common Travel Area is expected to operate practically and effectively across the EU/UK border in Ireland, then the task of enabling more limited immigration policy differentiation in another part of the Common Travel Area – at the border between Scotland and England - would seem to pose fewer practical challenges, albeit the political sensitivities involved in drawing such a comparison would be difficult to overcome. However, the EU is unlikely to engage much (if at all) with the possibilities for a differentiated immigration settlement for Scotland: it would prefer not to be involved in debates which it sees as internal to the UK.

2. Options for difference within the UK?

Since the Brexit vote, there has been a groundswell of influential support for the view that Scotland's situation requires a differentiated approach to EU migration.²⁰ Immigration and relations with the EU are both reserved matters and the options for a different approach to EU migration in Scotland therefore depend upon one or more of the following: firstly, the devolution of immigration powers, secondly, inter-governmental cooperation, and thirdly the Scottish Government making full use of its powers to make policy affecting migrants. These options are considered next.

a. Devolution of immigration powers

¹⁵ Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU (n5).

¹⁶ Joint Technical Note (n11).

¹⁷ Ryan(n3).

¹⁸ "Deadlock over UK's Brexit bill" The BBC 12 October 2017, available at: <http://www.bbc.co.uk/news/uk-politics-41585430>.

¹⁹ House of Lords European Union Committee, 4th report of Session 2017-2019, Brexit and Devolution, (HL Paper 9, 19 Jul 2017) ch 3.

²⁰ House of Lords European Union Committee Report (n19).

The Scottish Government has long argued for Scotland to be given greater autonomy to make its own immigration policies,²¹ and devolution of immigration powers would give it most scope to do so. If, as integration into the post-Brexit UK immigration system proceeds, an income threshold is introduced for EU migrants and/or their families, devolved powers would provide the Scottish Government with the opportunity to set a lower income threshold.

The substantial contribution which EU immigration has made to economic growth, Scotland's demographic needs, and the needs of sectors such as higher education and agriculture are among the arguments widely agreed upon for giving the Scottish Government – along with the other devolved administrations- what the House of Lords European Union Committee described as “maximum flexibility in devising a post-Brexit immigration policy”.²² Although the Committee recommended that, in taking forward its forthcoming Immigration Bill, the UK Government should “look for opportunities to enhance the role of the devolved institutions in managing EU migration”,²³ the Committee did not go so far as to recommend changing the devolution settlement in the Brexit context. Other commentators have also stopped short of calling for the devolution of immigration powers.²⁴

b. Inter-governmental cooperation

Giving the devolved administrations maximum flexibility in devising post-Brexit immigration policy requires cooperation, and two examples – firstly, the creation of Scotland-specific immigration rules, and secondly the very broad approach taken by the UK Government in recent Immigration Acts to the reach of immigration as a reserved matter - bring out the salience of inter-governmental cooperation.

Adjustments could be made to the UK Immigration Rules to meet Scotland-specific needs. Such adjustments could re-introduce a Scotland-specific post-study work scheme (bringing back the “Fresh Talent” initiative that allowed graduates of Scottish Universities to work in Scotland for two years), and could allow greater flexibility within the current Tier 2 Immigration provisions, such as by expanding the Scotland-specific parts of the Shortage Occupation lists.

The Scottish Government – and local authorities - have a strong interest in limiting the erosion of the rights of temporary workers – who often do seasonal and low-skilled work - and who have benefited from the social protections which the FMOP regime provides to EU nationals. An enhanced role for the Scottish Government in managing EU migration could enable it to address the problems of exploitation and socio-economic precariousness which impede integration and potentially generate irregular forms of work and movement.²⁵ In an area in which the UK Government is very much in the driving seat, the scope for performance of such an enhanced role would depend on the UK Government recognising that role's potential.

²¹ Scottish Government, Scotland's Place in Europe, December 2016.

²² House of Lords European Union Committee Report (n19) para 239.

²³ House of Lords European Union Committee Report (n19) para 239.

²⁴ Royal Society of Edinburgh, “Brexit: Challenges and Opportunities: Migration, Diversity, Rights and Social Protection”, Advice Paper No 17-13, July 2017, available at: <https://www.rse.org.uk/advice-papers/brexit-challenges-and-opportunities-rights-and-social-protection/>

²⁵ Royal Society of Edinburgh Advice Paper (n24).

c. Legislating for Brexit: legislative consent and immigration: the “hostile environment”

As the European Union (Withdrawal) Bill makes its way through Westminster, the UK Government has accepted that it contains provisions which require the legislative consent of the devolved legislatures. The issue of legislative consent is just one of an array of challenging constitutional questions which the Bill raises,²⁶ and in the immigration context, it is an issue which evokes memories and raises concerns. It evokes memories of the erstwhile Home Secretary refusing to seek legislative consent in relation to those parts of the Immigration Act 2016 which sought to intensify the so-called “hostile environment” (aimed at making the daily lives of illegal migrants so difficult that they would decide to leave the UK).²⁷ The Minister’s stance illustrated the UK Government’s desire to control immigration policy, even when that policy extended into areas normally regarded as devolved, such as housing, licensing, and support for migrant children. As well as raising concerns at the time about whether the Sewel Convention needed reform,²⁸ his stance now raises fears that the UK Government may seek to exert similar control over “retained EU law” which falls into the devolved sphere. Clause 11 of the European Union (Withdrawal) Bill would give the UK Government, not the Scottish Parliament, powers to extend the “hostile environment” to EU migrants in Scotland.³⁰ Of course, having those powers does not necessarily mean that the UK Government would use them but, if giving the devolved administrations maximum flexibility in devising post-Brexit immigration policy is an aim, then Clause 11 would seem to impede that aim.

d. Areas for potential: resisting the hostile environment and human rights.

The above paints a somewhat bleak picture, but there are areas of potential. Firstly, there is potential in human rights. The right to respect for private and family life in the European Convention on Human Rights would still have an impact in the UK’s rule-based immigration system through the Human Rights Act, and in the devolved context the Scotland Act provides a stronger human rights tool. Although its application looks to be complex, “retained EU law” could also enable EU citizens to call on the Charter of Fundamental Rights.³¹

Secondly, the scope for mitigating the effects of the hostile environment can be explored. Although not directed at EU migrants, the hostile environment is a blunt tool, with the potential to affect the rights of lawfully resident migrants – EU migrants included – and to foster discrimination on racial grounds.³² Its purpose contrasts with the strong interests, also mentioned above, which the

²⁶ T Mullen, C McCorkindale and A McHarg “Submission to Finance and Constitution Committee of the Scottish Parliament”, October 2017, available at: http://www.parliament.scot/S5_Finance/General%20Documents/14._Professor_Aileen_McHarg_University_of_Strathclyde.pdf.

²⁷ “Immigration Bill: Theresa May defends plans to create “hostile environment” The Guardian, 10 October 2013, available at: <https://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment>.

²⁸ T Mullen and S Craig “The Immigration Bill, Reserved Matters and the Sewel Convention” Scottish Constitutional Futures Forum 15 April 2016 and 28 May 2016 available at: <http://www.scottishconstitutional futures.org/Home/tabid/1269/Default.aspx>.

³⁰ ILPA Briefing for the House of Commons’ Second Reading of European Union (Withdrawal) Bill (5 September 2017) available at <http://www.ilpa.org.uk/pages/european-union-withdrawal-bill-2017.html>

³¹ M Amos, “Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill”, U.K. Const. L. Blog (4th Oct. 2017), available at: <https://ukconstitutionallaw.org/>.

³² Joint Council for the Welfare of Immigrants “No Passport Equals No Home” An independent evaluation of the “Right to Rent” scheme”, 3 September 2015 <https://www.jcwi.org.uk/>.

Scottish Government and local authorities have in protecting the position of those EU workers who have benefited from the social protections which the FMOP regime extends to them. At the time of writing, not all the hostile environment provisions have been extended to Scotland, and they do not (yet) extend to EU migrants. Providing an alternative to the hostile environment therefore provides both a challenge and an opportunity. There is potential for the Scottish Government to mitigate its effects and to take the initiative in ensuring that service provision is made available on a universal basis in Scotland, without discrimination.