

*This is a pre-copy edited, author-produced version of an article accepted for publication in the Journal of Social Security Law following peer-review. The definitive published version (M Simpson, 'Brexit and devolved social security in Scotland: a tale of two referenda' (2018) 25(1) Journal of Social Security Law 56-73) is available online through [Westlaw UK](#) or from [Thomson Reuters DocDel](#) service.*

## **Brexit and devolved social security in Scotland: a tale of two referenda**

**Mark Simpson\***

**Lecturer in Law, Ulster University, Derry-Londonderry**

### Abstract

*This article discusses the possible impact of withdrawal from the EU on social security in Scotland. Despite the relatively limited role of EU membership in shaping the UK social security system, the effects of Brexit could be significant, even if largely indirect. The recent EU and independence referenda have allowed devolved elites to portray Scotland as more concerned with social justice and more internationalist than the UK as a whole. Maintaining or enhancing EU citizens' social rights would be in keeping with this self-image. The Scottish Government's view that Scotland has a greater need for immigration than other parts of the UK provides a further, pragmatic argument for enhancing its attractiveness as a destination by allowing migrants to access family benefits in particular. The limited extent of devolved social security competences means this is not currently an option. Even if the push for a second independence referendum following the Brexit vote has been put on hold for now, the possibility remains that the Scottish Government will seek renegotiation of the constitutional settlement. Social security is an obvious field for further devolution. The door could hence be opened to divergence from DWP on the entitlements of EU migrants.*

### Introduction

The impact of EU membership varies dramatically depending on the field of law; consequently, the impact of Brexit will vary dramatically. At one end of the spectrum, it is scarcely an exaggeration to say that UK environmental law largely is EU environmental law. Directives in this field exert a strong centripetal force between member states and between autonomous regions within them, so that where divergence occurs this is as likely to be due to lax or delayed transposition as to differences of policy objective.<sup>1</sup> Since the environment is a devolved matter in Scotland, Wales and Northern Ireland, removal of this force for convergence raises the prospect of more significant differences of approach emerging.<sup>2</sup> Social security is closer to the other end of the spectrum – not untouched by EU law, certainly on the radar of European policymakers, but subject to much less Union influence.<sup>3</sup> The influence of the EU is largely limited to three key aspects of social security policy: the elimination of gender based discrimination from national systems, rules on when citizens of other member states can access a host state's system and on the portability of entitlements on emigration. Otherwise, each member state retains a largely free hand regarding what it offers,

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\* m.simpson@ulster.ac.uk | <http://ulster.academia.edu/marksimpson>. This article was sent for publication on 18 January 2018; the reader should note that, given the ongoing negotiations on the UK's withdrawal from the European Union, some parts may be overtaken by events. An early version was presented (as 'Two (or three?) referenda and a general election: Brexit and devolved social security in Scotland') at the MANREG conference on Brexit, Regulation and Society, Manchester, June 2017. The author would like to thank Neville Harris for the invitation to present at the conference and to participate in this special issue, and the journal's anonymous reviewers for their useful comments.

<sup>1</sup> K Yates, A Payo and S Shoeman, 'International, regional and national commitments meet local implementation: a case study of marine conservation in Northern Ireland' (2013) 38 *Marine Policy* 140

<sup>2</sup> D Baldock, A Buckwell, A Colsa-Perez, A Farmer, M Nesbit and M Pantzar, *The potential policy and environmental consequences for the UK of a departure from the European Union* (Institute for European Environmental Policy: London, 2016)

<sup>3</sup> J Saari and J Kvist, 'European Union developments and national social protection' in J Kvist and J Saari (eds), *The europeanisation of social protection* (Bristol: Policy Press, 2007)

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although it is somewhat ironic that Brexit occurs just as moves to establish a social rights pillar suggest the EU may take a closer interest in social protection<sup>4</sup> and when there is a live proposal for a common European unemployment benefit.<sup>5</sup> The impact of withdrawal from the EU on social security, then, is likely to be smaller overall because of the limited extent of supranational influence. It is also likely to be less regional in character because constitutional law and practice have left less space for divergence, with control of only a small part of the system (in expenditure terms) devolved to Scotland and Northern Ireland traditionally reluctant to depart dramatically from Westminster policy.

Brexit will nonetheless have particular impacts on Scottish social security, but this article argues that the big questions are political as much as legal. Withdrawal from the EU, the contrasting referendum results in Scotland and in the UK as whole and the ongoing political fall-out form part of a wider process; whether or not one accepts the proposition that Scotland is a very different polity to the rest of the UK, the resounding remain vote is a further tool that the Scottish Government can use to construct a vision of Scotland as different to the rest of the UK.<sup>6</sup> Following hot on the heels of the 2014 referendum on independence, the Brexit debate as a whole can be portrayed as a continuation of the independence campaign by other means, albeit that the renewed uncertainty around Scotland's immediate future within the UK that followed the vote for withdrawal appears to have abated for now.<sup>7</sup> Still, that tensions remain between the two tiers of government was evident following the emergence of a leaked position paper on post-withdrawal migration policy.<sup>8</sup> This occurs at a time when freshly devolved social security powers provide another opportunity to demonstrate Scotland's otherness through the development of (the Scottish Government promises) a fairer, more compassionate model. The independence referendum was followed by the major UK parties agreeing to an enhanced devolution settlement and there have been calls for a similar response to the EU referendum.<sup>9</sup> With further social security powers among the most obvious candidates for devolution, the potential is clear for Brexit to have a profound, though indirect, impact on the still-emerging Scottish welfare state.

## EU membership, Brexit and social security

There is no EU welfare state, no single "solidaristic communit[y]," only a set of rules on the "interchangeability of solidaristic communities in the Union that allows Union citizens to be affiliated

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<sup>4</sup> European Parliament Resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0010+0+DOC+XML+V0//EN>>

<sup>5</sup> G McKeever and M Simpson, 'Worlds of welfare collide: implementing a European unemployment benefit scheme in the UK' (2017) 19(1) European Journal of Social Security 21

<sup>6</sup> M Simpson, 'The social union after the coalition: devolution, divergence and convergence' (2017) 46(2) Journal of Social Policy 251; G Mooney and L Poole, "'A land of milk and honey'? Social policy in Scotland after devolution' (2004) 24(4) Critical Social Policy 458

<sup>7</sup> M Simpson, 'More devolution rather than independence: time for the SNP to rediscover the "middle way"' (LSE British Politics and Policy, 10 July 2017) <<http://blogs.lse.ac.uk/politicsandpolicy/time-for-the-snp-to-rediscover-the-middle-way/>>

<sup>8</sup> Home Office, draft position paper on immigration policy following withdrawal from the EU (leaked document, 2017) <<https://www.theguardian.com/uk-news/2017/sep/05/the-draft-home-office-post-brexit-immigration-policy-document-in-full>>; I Blackford, HC deb 6 September 2017 vol 628 col 151

<sup>9</sup> S Carrell, 'Gordon Brown pushes "patriotic" third option for Scotland after Brexit' (Guardian, 18 March 2017) <<https://www.theguardian.com/politics/2017/mar/18/gordon-brown-to-push-patriotic-third-option-for-more-powerful-scotland-after-brexit>>

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with the one of their residence.” As Harris explains elsewhere in this issue,<sup>10</sup> recent CJEU judgments have “narrowed down” even this access to host state welfare systems from something approaching a right of citizenship to an entitlement to be earned through “economic contribution in a host Member State.”<sup>11</sup> The other key impacts of EU membership on social security in the UK concern the portability of benefits for people *leaving* for another member state and curbs on gender based discrimination.

The latter two points can be dealt with relatively briefly. The key judgment against the UK in respect of gender based discrimination in social security concerned occupational pension schemes rather than any state benefit. The finding that accrued pension rights constituted pay and that discrimination between male and female employees – for example in age criteria – was consequently prohibited did not directly apply to public provision.<sup>12</sup> Nonetheless, Wikeley and Ogus argue that the enforced equalisation of pensionable age in occupational schemes made equivalent changes to the state pension “inevitable,”<sup>13</sup> a process that has now been completed.<sup>14</sup> Given that this is now being followed by a further increase in pensionable age for both men and women, lowering the age for women following Brexit appears unthinkable. It should also be noted that while this example of direct discrimination against men has been dismantled, EU membership has done less to prevent indirect discrimination against women. On one hand, the Supreme Court’s finding that Directive 97/81/EC prohibits discrimination against part-time workers in their pension rights might be expected to primarily benefit female employees.<sup>15</sup> On the other, women continue to face disadvantage in their ability to meet the contribution requirements for insurance-based benefits<sup>16</sup> and the Supreme Court has found that the Secretary of State is entitled to make regulations implementing cuts to social assistance benefits that impact primarily on women, as long as this is in pursuit of a legitimate objective such as controlling public spending.<sup>17</sup>

Brexit may have a greater impact on the portability of UK benefits. Certainly, if the UK leaves the EEA as well as the EU the state will no longer be subject to any obligation to allow EU migrants to export child benefit to their children in another member state or to export other benefits to its own citizens living in other member states. That is not to say the practice would definitely cease, at least for continuing claimants: it is not uncommon for transitional protection to be given to those who would otherwise lose income due to social security reforms. Media reports indicate that the position of British retirees in other member states will be unchanged after 2019<sup>18</sup> and the UK and EU’s joint progress report of December 2017 reinforces this with its commitment to “reciprocal protection... to

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<sup>10</sup> N Harris, ‘Welfare rights, austerity and the decision to leave the EU: influences on UK social security law’ (2018) 25(X) Journal of Social Security Law XX

<sup>11</sup> R Bebayev, ‘Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU referendum developments’ (2016) 18(4) European Journal of Social Security 356, 365

<sup>12</sup> Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] 2 CMLR 513

<sup>13</sup> NJ Wikeley and AI Ogus, *The law of social security* (London: Butterworths, 2002)

<sup>14</sup> Pensions Act 1995 c26 sch 5; Pensions Act 2011 c19 s1

<sup>15</sup> *Ministry of Justice v O’Brien* [2013] UKSC 6 [2013] 1 WLR 522

<sup>16</sup> N Duvvury, A Ní Léime, A Callan, L Price and M Simpson, *Older women workers’ access to pensions: vulnerabilities, perspectives and strategies* (Galway: ICSG, 2012)

<sup>17</sup> *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449; for discussion of a possible softening of this position, see M Simpson, ‘The benefit cap fails human rights test’ (2017) 24(3) Journal of Social Security Law 148

<sup>18</sup> S Brodbeck, ‘Britain and EU reach agreement over expats’ state pension after Brexit’ (Daily Telegraph, 13 September 2017) <<http://www.telegraph.co.uk/pensions-retirement/news/britain-eu-reach-agreement-expats-state-pension-brexit/>>

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enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights” before the withdrawal date.<sup>19</sup> As Harris notes, the salience of this question to *future* claimants will to some extent depend on the impact of Brexit on the ability of UK citizens to live in other European countries.<sup>20</sup>

The greatest impact of EU membership – and therefore, potentially, of Brexit – has been on the ability of citizens exercising free movement rights to access their host state’s social security system. Although “welfare state walls” have been more fiercely defended than “geographical boundaries,” legislation and case law have gradually expanded the social rights gained as an EU citizen.<sup>21</sup> Initially, social security rights were closely linked with the free movement of *workers* rather than citizens. As at national level, for a period it seemed that social rights for workers would act as precursors to social rights for all.<sup>22</sup> This process was initially driven by the CJEU stretching the definition of ‘worker’ so as to confer entitlements upon progressively greater numbers of people<sup>23</sup> – part time employees,<sup>24</sup> students on placement,<sup>25</sup> jobseekers<sup>26</sup> and workers’ dependents.<sup>27</sup> At its most ambitious, the court would declare that “Union citizenship is destined to be the fundamental status of nationals of the Member States,” with the implication that, in most cases, “those who find themselves in the same situation... enjoy the same treatment in law irrespective of their nationality.” This implies the emergence of a new sharing community based on a “certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States.”<sup>28</sup>

Directive 2004/38/EC<sup>29</sup> largely placed these developments on a legislative footing, further expanding the definition of ‘worker’ to include jobseekers who have previously worked for one year in the host state, individuals who leave employment for vocational training and individuals temporarily unable to work due to illness. Member states are also prevented from expelling social assistance claimants unless they have become an “unreasonable burden” or jobseekers under most circumstances. The distinction between workers and non-workers is clearest during the first three months of residence, when migrants other than workers and their families have no automatic right to access the host

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<sup>19</sup> Department for Exiting the European Union, ‘Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 negotiations under article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union’ (London: DExEU, 2017) at [6]

<sup>20</sup> N Harris, ‘Brexit and social security’ (2016) 23(3) *Journal of Social Security Law* 113

<sup>21</sup> C O’Brien, ‘Real links, abstract rights and false alarms: the relationship between the ECJ’s “real link” case law and national solidarity’ (2008) 33(5) *European Law Review* 643, 645

<sup>22</sup> I Bleijenbergh, J de Bruijn and J Bussemaker, ‘European social citizenship and gender: the part-time work directive’ (2004) 10(3) *European Journal of Industrial Relations* 309, 310

<sup>23</sup> K Sieveking, ‘Der Europäischen Gerichtshof als Motor der sozialen Integration der Gemeinschaft’ (1997) 43(3) *Zeitschrift für Sozialreform* 187; see also L Conant, ‘When courts decide: foreigners’ rights and social citizenship in Europe and the US’ (2008) 7 *European Political Science* 43, 43; M Wind, ‘Post-national citizenship in Europe: the EU as a welfare rights generator?’ (2009) 15 *Columbia Journal of European Law* 239

<sup>24</sup> *DM Levin v Staatssecretaris van Justitie* (C-53/81) [1982] 2 CMLR 454; see also *RH Kempf v Staatssecretaris van Justitie* (C-139/85) [1987] 1 CMLR 764

<sup>25</sup> *Françoise Gravier v City of Liège* (C-293/83) [1985] 3 CMLR 1; *Deborah Lawrie-Blum v Land Baden-Württemberg* (C-66/85) [1987] 3 CMLR 389

<sup>26</sup> *R v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* (C-292/89) [1991] 2 CMLR 373

<sup>27</sup> *Giovani Bronzino v Kindergeldkasse Nürnberg* (C-228/88) [1990] ECR I-531

<sup>28</sup> *Grzelczyk v Centre Public d’Aide Sociale d’Ottignies Louvain la Neuve* (C-184/99) [2002] 1 CMLR 19

<sup>29</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158/77)

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state's social assistance systems.<sup>30</sup> In recent years the EU institutions have envisaged more significant convergence in social rights. The European Parliament has advocated a European minimum income guarantee<sup>31</sup> – implying a common floor for social assistance benefits – and the inclusion of social security in the proposed new pillar of social rights.<sup>32</sup> Meanwhile, the Commission has supported a feasibility study into a common European unemployment insurance benefit, albeit that formidable political and operational challenges stand in the way of such a development.<sup>33</sup>

The partial *reversal* of the progress made in access to host states' social security systems in the aftermath of the 21<sup>st</sup> century enlargements of the Union contrasts sharply with this vision, but is in keeping with the EU's fluctuating interest in social policy matters generally.<sup>34</sup> Rules on EU migrants' access to social security in the UK were reformed in 2013.<sup>35</sup> Additional questions have been added to the habitual residence test used to assess whether individuals of *any* nationality seeking income-related benefits or social housing after less than two years' residence in the common travel area (UK, Ireland, Channel Islands and Isle of Man) are legally present, "habitually resident" and have "sufficient ties" to the UK."<sup>36</sup> Those of less than three months' residence are now ineligible for jobseeker's allowance.<sup>37</sup> Future reform targeting "new" EEA claimants will prevent JSA claims longer than six months' duration "unless [the claimant] can demonstrate they are actively seeking work and have a genuine prospect of work" and remove eligibility for housing benefit.<sup>38</sup> These changes appear compatible with EU requirements. Directive 2004/38/EC confers no right to social protection during the first three months of residence; those who are employed for less than a year in the host state retain the status of 'worker' (and the associate access to social protection) for only six months, while non-workers forfeit their right to reside after three months' residence unless they have sufficient

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<sup>30</sup> See *Collins v Secretary of State for Work and Pensions* (C-138/02) [2004] 2 CMLR 8, in which having worked in the UK 17 years previously was not deemed a sufficiently close connection with the state to confer eligibility to unemployment benefits

<sup>31</sup> European Parliament resolution of 20 October 2010 on the role of minimum income in combating poverty and promoting an inclusive society in Europe (2010/2039(INI))

<sup>32</sup> Motion for a European Parliament resolution on a European pillar of social rights (2016/2095(INI))

<sup>33</sup> G McKeever and M Simpson, 'Worlds of welfare collide: implementing a European unemployment benefit scheme in the UK' (2017) 19(1) *European Journal of Social Security* 21

<sup>34</sup> M Daly, 'Whither EU social policy? An account and assessment of developments in the Lisbon Social Inclusion Process' (2007) 31(1) *Journal of Social Policy* 1; D Birrell and AM Gray, 'Devolution: the social, political and policy implications of Brexit for Scotland, Wales and Northern Ireland' (2017) 46(4) *Journal of Social Policy* 765

<sup>35</sup> See, for example, P Wintour, 'EU migrants: David Cameron sets out more benefit restrictions' (*Guardian*, 27 November 2013) <<http://www.theguardian.com/politics/2013/nov/27/david-cameron-benefit-restrictions-eu-migrants>> accessed 24 January 2014; R Mason and P Wintour, 'Benefits delay is obstacle for jobless immigrants, says Iain Duncan Smith' (*Guardian*, 18 December 2013) <<http://www.theguardian.com/uk-news/2013/dec/18/benefits-delay-immigrants-iain-duncan-smith>> accessed 24 January 2014; P Dominiczak, 'We will block benefits to new EU migrants, says Cameron' (*Daily Telegraph*, 18 December 2013) <<http://www.telegraph.co.uk/news/uknews/immigration/10524285/We-will-block-benefits-to-new-EU-migrants-says-Cameron.html>> accessed 24 January 2014

<sup>36</sup> Department for Work and Pensions, 'Improved benefit test for migrants launched' (DWP, 2013) <<https://www.gov.uk/government/news/improved-benefit-test-for-migrants-launched>> accessed 24 January 2014

<sup>37</sup> Department for Work and Pensions, 'JSA(IB) – three months residence requirement' (Memo DMG 28/13, DWP, 2013)

<sup>38</sup> Department for Work and Pensions, 'Improved benefit test for migrants launched' (DWP, 2013) <<https://www.gov.uk/government/news/improved-benefit-test-for-migrants-launched>> accessed 24 January 2014

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resources to avoid becoming a “burden” on host state welfare systems.<sup>39</sup> In *Dano*, the CJEU confirmed that an EU national with no connection to the labour market of the host state and no independent resources has no right of residence and consequently no right to social protection.<sup>40</sup> In subsequent cases it was held that even would-be claimants who had previously been employed and were actively seeking work in the host state could be denied benefits.<sup>41</sup>

Consequently, while a ‘soft’ Brexit involving continuing EEA/EFTA membership or a similar level of access to the internal market would probably mean EU citizens’ social rights in the UK remaining largely in line with what they would be when migrating between member states, it is far from clear what those rights are likely to be in the future. As noted above, the UK has been able to curtail EU migrants’ access to social security even in advance of Brexit.<sup>42</sup> Shortly before the referendum the Council indicated that it was prepared to authorise further rollback by allowing member states to temporarily exclude workers exercising free movement rights from in-work benefits due to pressures resulting from an “inflow... of an exceptional magnitude.”<sup>43</sup> For Bebayev, this “compromise” further legitimises member states’ “narrow and exclusionary interpretation of Union workers’ and job-seekers’ rights.”<sup>44</sup> In any case, remaining in the EEA currently seems an improbable outcome after the June general election returned a Conservative government whose manifesto promised withdrawal not only from the EU, but from the “customs union”<sup>45</sup> (albeit that continued EFTA membership has not been entirely ruled out).<sup>46</sup> A ‘hard’ Brexit, involving outright withdrawal from the single market, would probably put EU citizens in the UK on the same footing as third country nationals; and the UK is “notoriously stingy about allowing third-country nationals access to social benefits and exporting social benefits (including state pensions) to British citizens who live in other countries.”<sup>47</sup> Although the European Social Charter will remain an alternative basis on which to advocate social rights for migrants, its prohibition of ‘duration of residence’ requirements for nationals of other contracting state seeking to access social and medical assistance on the same basis as host state nationals did not prevent the recent reforms and can be expected to remain relatively impotent.

The largely common approach to social security across the UK means that the legal and policy impact of Brexit would essentially be the same UK-wide, but the social and economic impact would not necessarily be uniform. The Scottish Government argues that Scotland has a particular need for immigration due to demographic challenges and skills shortages<sup>48</sup> and IFS economic projections for

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<sup>39</sup> Directive 2004/38/EC article 7

<sup>40</sup> *Dano v Jobcenter Leipzig* (C-333/13) [2015] 1 CMLR 48

<sup>41</sup> *Jobcentre Berlin Neukölln v Alimanovic* (C-67/14) [2016] 1 CMLR 29; *Vestische Arbeit Jobcenter Kreis Recklinghausen v García Nieto* (C-299/14) [2016] 3 CMLR 5

<sup>42</sup> N Harris, ‘Demagnetisation of social security and healthcare for migrants to the UK’ (2016) 18(2) *European Journal of Social Security* 130

<sup>43</sup> European Council, European Council meeting (18 and 19 February 2016) – conclusions (EUCO 1/16, Brussels: European Council, 2016) section D, 2(b)

<sup>44</sup> R Bebayev, ‘Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU referendum developments’ (2016) 18(4) *European Journal of Social Security* 356, 358

<sup>45</sup> Conservative Party, *Forward together: our plan for a stronger Britain and a prosperous future* (London: Conservative Party, 2017) 36

<sup>46</sup> C Kroet and K O’Donnell, ‘David Davis: Norway model is one option for UK after Brexit’ (Politico, 1 September 2017) <<http://www.politico.eu/article/david-davis-norway-model-is-one-option-for-uk-after-brexit/>>

<sup>47</sup> E Guild, ‘Brexit and social security in the EU’ (Brussels: CEPS, 2017)

<sup>48</sup> Scottish Government, ‘Home Affairs Committee inquiry into immigration: Scottish Government written submission’ (Edinburgh: Scottish Government, 2017) <<http://www.gov.scot/Publications/2017/02/9947/1>>

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an independent Scotland suggest that public borrowing would be lower in a “high-migration scenario,” largely because the average age of the population would be lower.<sup>49</sup> Consequently, claims by the Home Office that it is seeking to develop “an approach for the whole of the UK” in post-Brexit migration policy have generated some scepticism in Edinburgh,<sup>50</sup> where the Scottish Government has for various reasons emphasised its commitment to “retaining membership of the European Single Market.”<sup>51</sup> Proposals for tighter controls on EU migrants’ access to the UK labour market, social security entitlements, right to enter the state as jobseekers and ability to bring family members with them are particularly likely to be seen as impediments to the Scottish Government’s objective of attracting people to Scotland and as having the “potential to seriously harm Scotland’s economy.”<sup>52</sup> Public opinion appears to be less strongly in favour of significant reductions in immigration compared to England and Wales and significantly more likely to view immigration as having a positive or neutral effect, but with only a minority (10 per cent) in favour of increased immigration.<sup>53</sup>

The extent to which (prospective) social security entitlements influence decisions on migration is controversial. The *perception* that people might migrate in search of a more generous welfare state, is a recurring political concern and has formed part of the UK debate on both EU and wider immigration in recent years. This reflects a Europe-wide concern about ‘benefit tourism’ that has intensified since the accession of Romania and Bulgaria<sup>54</sup> and is acknowledged in the Council’s pre-referendum statement, even though the same document highlights the fact that economically inactive and even jobseeking migrants have no specific right to social security or social assistance under EU law.<sup>55</sup> Academic and government research suggests that, on the whole, anticipated social security rights play a minor role in decisions to migrate compared to labour market conditions.<sup>56</sup> However, family- and child-related benefits have been found to act to some extent as a ‘pull’ factor.<sup>57</sup> While these are not currently devolved, future control of child tax credits and the child element of universal credit is likely to appeal to the Scottish Government given its focus on child poverty reduction.<sup>58</sup> Devolution would present an opportunity not only to adjust the level of benefits, but to ease migrants’ access if this were deemed a suitable means of stimulating

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<sup>49</sup> M Amior, R Crawford and G Tetlow, *Fiscal sustainability of an independent Scotland* (London: Institute for Fiscal Studies, 2013) 27

<sup>50</sup> Home Office, draft position paper on immigration policy following withdrawal from the EU (leaked document, 2017) 60 <<https://www.theguardian.com/uk-news/2017/sep/05/the-draft-home-office-post-brexit-immigration-policy-document-in-full>>; P Gourtsoyannis, ‘Nicola Sturgeon : UK immigration plans are “morally bankrupt”’ (The Scotsman, 6 September 2017) <<http://www.scotsman.com/news/politics/nicola-sturgeon-uk-immigration-plans-are-morally-bankrupt-1-4552680>>

<sup>51</sup> Scottish Government, ‘Scotland’s place in Europe’ (Edinburgh: Scottish Government, 2016) 2

<sup>52</sup> Scottish Government, ‘Scotland’s place in Europe’ (Edinburgh: Scottish Government, 2016) 18

<sup>53</sup> S Blinder, *Immigration and independence: public opinion on immigration in Scotland in the context of the referendum debate* (Oxford: Migration Observatory, 2014)

<sup>54</sup> GC Rentea, ‘Mobility within the European Union and the access to social benefits: challenges of social policies’ (2015) 3 *Revista de asisenta sociala* 99; P Larkin, ‘A policy of inconsistency and hypocrisy: United Kingdom social security policy and European citizenship’ (2009) 31(1) *Journal of Social Welfare and Family Law* 33

<sup>55</sup> European Council, European Council meeting (18 and 19 February 2016) – conclusions (EUCO 1/16, Brussels: European Council, 2016) section D

<sup>56</sup> HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union. Single Market: Free Movement of Persons* (London: Cabinet Office, 2014)

<sup>57</sup> C Enache and C Pânzaru, ‘Romanian migration flows in European countries: does social security matter?’ (2012) 14(2) *Annales Universitatis Apulensis: Series Oeconomica* 485

<sup>58</sup> Child Poverty (Scotland) SP Bill (2017) [6]

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immigration and encouraging immigrants to remain in Scotland rather than move on to other parts of the UK.<sup>59</sup> For example, prior to the referendum the Council agreed that the UK could phase in EU migrants' access to in-work benefits over a longer period, suspend access if high immigration numbers create a temporary "exceptional situation" and reduce child benefit payments in respect of dependent children living elsewhere in the EU.<sup>60</sup> It can be anticipated that equivalent measures (at least) will be put in place following withdrawal; a future Scottish Parliament with devolved competence for the relevant benefits might prefer to take a different path.

## Brexit, human rights, citizenship and social security

It is arguably an exaggeration to claim that "Brexit undermines and imperils the... human rights framework of Scotland."<sup>61</sup> However, it is clear that withdrawal from the European Union forms part of a wider political "climate of hostility to human rights" in the UK.<sup>62</sup> Although the ECHR and Human Rights Act 1998 are legally separate issues from the EU and Brexit, the two are frequently conflated in popular media critiques of interference in domestic affairs and erosion of the UK's sovereignty by 'Europe'.<sup>63</sup> While migrants' political, social and residence rights are clearly vulnerable following Brexit, the surrounding political climate has itself been recognised as a potential threat to human rights more widely.<sup>64</sup> In the face of a potential roll-back of rights, Harvey argues that the time is ripe for reinvigoration of Northern Ireland's dormant debate on a regional Bill of Rights.<sup>65</sup> Scotland's First Minister has already expressed her desire to incorporate more of the international human rights framework into Scottish law<sup>66</sup> and a debate is underway as to the best means of enhancing the protection of social rights in areas of devolved competence, including the newly devolved parts of the social security system.<sup>67</sup> The Scottish Human Rights Commission argues that progress on this front would represent an appropriate devolved-level response to Brexit.<sup>68</sup>

The European Convention on Human Rights is the most important international human rights agreement in the UK, being uniquely incorporated into domestic law by the Human Rights Act 1998.

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<sup>59</sup> See RE Wright, 'Sub-national immigration policy: can it work in the UK?' (Migration Observatory, 18 September 2013) <<http://www.migrationobservatory.ox.ac.uk/resources/primers/sub-national-immigration-policy-can-it-work-in-the-uk/>> accessed 1 June 2017

<sup>60</sup> For a summary, see M Sumption and S Altorjai, *EU migration, welfare benefits and EU membership* (Oxford: Migration Observatory, 2016)

<sup>61</sup> A Miller, 'Brexit and human rights in Scotland' (2016) 74 *Scottish Human Rights Journal* 2, 2

<sup>62</sup> C Harvey, 'Reflections on human rights and citizenship in a changing constitutional context' (Brexit and Rights conference, Belfast, September 2016)

<[http://www.caj.org.uk/files/2016/10/11/3\\_Brexit\\_and\\_Rights\\_-\\_Colin\\_Harvey\\_CAJ-TJI\\_2016.pdf](http://www.caj.org.uk/files/2016/10/11/3_Brexit_and_Rights_-_Colin_Harvey_CAJ-TJI_2016.pdf)>

<sup>63</sup> A Wagner, 'The Sun gets regulator reprimand and publishes correction for misleading on human rights' (UK Human Rights Blog, 26 June 2013) <<https://ukhumanrightsblog.com/2013/06/26/the-sun-gets-regulator-reprimand-and-apologises-for-misleading-on-european-human-rights/>> accessed 1 June 2017; K King, 'Daily Express forced to make huge correction to human rights story, again' (Legal Cheek, 23 March 2017) <<https://www.legalcheek.com/2017/03/daily-express-forced-to-make-huge-correction-to-human-rights-story-again/>> accessed 1 June 2017

<sup>64</sup> N Muižnieks, *Annual activity report 2016* (Strasbourg, Council of Europe: 2017)

<sup>65</sup> For discussion, see A Smith, M McWilliams and P Yarnell, *Political capacity building: advancing a Bill of Rights for Northern Ireland* (Newtownabbey: Transitional Justice Institute, 2014)

<sup>66</sup> Scottish Human Rights Commission, 'Commission welcomes key human rights pledge from First Minister' (SHRC news release, 10 December 2015)

<sup>67</sup> M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: Equality and Human Rights Commission, 2017)

<sup>68</sup> Scottish Human Rights Commission, 'Brexit: protecting human rights in Scotland in a changing relationship with Europe' (Edinburgh: SHRC, 2016)

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The same Conservative party manifesto that promised a referendum on continued membership of the EU included a commitment to repeal the Human Rights Act to make way for a British Bill of Rights.<sup>69</sup> This project now appears to be on hold until after Brexit has been completed,<sup>70</sup> with denunciation of the ECHR itself apparently off the agenda for now,<sup>71</sup> and would in any case be likely to have a limited impact on social security. The ECHR is more concerned with civil and political than social rights and those provisions that can most readily be deployed in defence of social security entitlements are the non-absolute article 8 (the right to family life) and article 1, protocol 1 (P1-1, the right to peaceful enjoyment of one's possessions). Interference with these rights can normally be justified on the basis of a competing public policy objective.<sup>72</sup> Nonetheless, there have been recent signs that the courts are becoming more willing to question the ECHR-compliance of social security policy, normally because of its impact on children.<sup>73</sup> Repeal of the Human Rights Act – depending on the content of the successor Bill of Rights – might therefore stymie the evolution of a new, human rights based protection of social security entitlements at UK level. Although the Conservatives endorse “the commitments made when we signed the Convention,”<sup>74</sup> the party rejects the alleged subsequent “mission creep” of the ECtHR – which could imply reversal of the relatively recent application of P1-1 to non-contributory benefits.<sup>75</sup> The Scotland Act 1998 is an alternative, stronger source of protection for the ECHR rights in Scotland, prohibiting the Scottish Parliament from legislating contrary to the Convention – mirroring provisions in the Northern Irish and Welsh devolution settlements. In a post-Brexit, post-Human Rights Act era, then, any “human rights legal deficit”<sup>76</sup> at UK level would not necessarily be reflected at devolved level. Devolved benefits in Scotland would still have to comply with the ECHR rights while reserved benefits might not. Although Parliament could, in principle, legislate to remove reference to the ECHR from the devolution legislation, this seems unlikely given its central place in Northern Ireland's peace agreement, to which the devolution project is inextricably linked.<sup>77</sup>

Raising the profile of social rights in Scottish law, especially if the European Social Charter were the chosen vehicle for doing so, would have still greater potential to push aspects of social security in a different direction to UK policy and even recent CJEU judgments. In particular, an enforceable right to social assistance (protected by article 13) could push the evolution of certain benefits in the opposite direction to their current trajectory under DWP stewardship. In 2013 the level of benefits in the UK was found to comply with article 13, which requires social assistance to guarantee an income

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<sup>69</sup> Conservative Party, *Strong leadership, a clear economic plan, a brighter, more secure future: the Conservative party manifesto 2015* (London: Conservative Party, 2015)

<sup>70</sup> J Collins, 'Liz Truss confirms British Bill of Rights on hold until after Brexit' (Rights Info, 23 February 2017) <<https://rightsinfo.org/liz-truss-confirms-british-bill-rights-will-hold-brexite/>>

<sup>71</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (London: DExEU, 2017) para 2.22

<sup>72</sup> *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449

<sup>73</sup> *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449 (see Lady Hale and Lord Kerr's dissenting judgments); *McLaughlin's application for judicial review, Re* [2016] NIQB 11; *R (on the application of DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (admin)

<sup>74</sup> Conservative Party, 'Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws' (London: Conservative Party, 2014) 8

<sup>75</sup> *Stec v United Kingdom* (app 65731/01) [2006] 43 EHRR 1017

<sup>76</sup> K Boyle, 'The legitimacy of the EU referendum requires that citizens are informed of the implications of their decision' (Democratic Audit, 22 April 2016) <<http://www.democraticaudit.com/2016/04/22/the-legitimacy-of-the-eu-referendum-requires-that-citizens-are-informed-of-the-implications-of-their-decision/>>

<sup>77</sup> Northern Ireland Office, *Agreement reached in the multi-party negotiations* (Cmnd 3883, Belfast: NIO, 1998)

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not manifestly below 50% of the equivalised median.<sup>78</sup> Since then, real-terms and cash cuts to the main income replacement benefits, including a freeze on uprating, the household benefit cap, a two-child limit on tax credits and various reforms to housing benefit mean the conclusion is becoming increasingly questionable.<sup>79</sup> Most of these benefits are not devolved, but can be topped up in Scotland – the Scottish Government's continued commitment to child poverty reduction points to the possible use of the top-up power to increase child-related benefits and incorporation of the ESC could lead to further pressures in this direction.<sup>80</sup> Article 13 also limits the extent to which the UK may restrict access to social assistance for lawful migrants from other contracting states. The recent provisions on universal credit for EEA migrants<sup>81</sup> are explicitly contrary to this requirement, although (as discussed above) in conformity with recent CJEU judgments shifting the focus from citizenship to contribution in determining access to social security in the host state.<sup>82</sup> Article 16, which protects the right of the family to social, legal and economic protection, may also be relevant. While the European Committee of Social Rights has generally used this article to assess the adequacy of child benefits or family allowances,<sup>83</sup> its requirement that contracting states ensure "the necessary conditions for the full development of the family" is potentially of wider application in ensuring that claimants have sufficient income to support the development of their children.

The extent to which the ESC or any other social rights agreement might shape the development of Scottish benefits would, of course, depend on two things. The future extent of devolved social security competences – which forms the focus of the section below – will be crucial as the Scottish Parliament is currently able to determine the level and form (including any rules on migrants' access) of a minority of benefits. Meanwhile, the weight that would have to be afforded to social rights in the development of devolved social security would depend on the legislative vehicle chosen for their protection in Scottish law. Possible models range from Scottish Ministers' rather vague duty to take whatever steps they deem appropriate to give effect to the rights contained in the UNCRC,<sup>84</sup> to Welsh Ministers' somewhat "more robust" obligation to have due regard to the UNCRC<sup>85</sup> or the stronger model of the Human Rights Act.<sup>86</sup> While none of these approaches could prevent the Scottish Parliament legislating in defiance of a given set of rights if it wished to do so, the latter model in particular would create a fairly strong presumption in favour of compliance. Consequently, there would be a potential driver of divergence in respect of benefits under devolved control as

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<sup>78</sup> European Committee of Social Rights, *Conclusions XX-2 – article 13 (United Kingdom)* (Strasbourg: Council of Europe, 2013)

<sup>79</sup> See M Simpson, 'Assessing the compliance of the UK social security system with the state's obligations under the European Social Charter' (forthcoming, 2018) *Human Rights Law Review*

<sup>80</sup> Child Poverty (Scotland) SP Bill (2017) [6]; for discussion, see M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: Equality and Human Rights Commission, 2017)

<sup>81</sup> Universal Credit (EEA Jobseekers) Amendment Regulations 2015 no 546

<sup>82</sup> R Bebayev, 'Re-shaping the paradigm of social solidarity in the EU: on the UK's welfare reforms and pre- and post-EU referendum developments' (2016) 18(4) *European Journal of Social Security* 356, 365

<sup>83</sup> European Committee of Social Rights, *Conclusions XX-4 – article 16* (Strasbourg: Council of Europe, 2013)

<sup>84</sup> Children and Young People (Scotland) Act 2014

<sup>85</sup> Rights of Children and Young People (Wales) Measure 2011; SM McCall, 'Putting the justice into social justice: how international human rights can deliver progressive social change for Scotland' (2016) 72 *Scottish Human Rights Journal* 3

<sup>86</sup> For discussion of the options, see K Boyle, 'Economic, social and cultural rights in Scotland' (Edinburgh: Scottish Human Rights Commission, 2015); M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: Equality and Human Rights Commission, 2017)

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policy development would be guided by a different set of human rights obligations to that applicable to the UK Government.

## Brexit, independence, devolution and social security

Discussing Brexit from a Northern Irish perspective, Harvey writes: "The appropriate response to what we are facing is not passive acceptance."<sup>87</sup> Whether "passive acceptance" is a fair summary of the response in Northern Ireland's fragmented political landscape varies dramatically depending on which party's position one considers. Early opinion polls pointing to a resounding victory in the June 2017 general election for a Conservative party that has eagerly embraced withdrawal since the referendum result<sup>88</sup> were not reflected in the ultimate outcome, but the Conservatives nonetheless emerged as the largest party in the House of Commons and have been able to form a minority government. It might therefore be argued that the response from a large section of the electorate, and the current UK governing party, is not passive acceptance, but enthusiasm. There are few signs of passive acceptance in Scotland, at least from the electorally dominant party of government at Holyrood, the Scottish National Party.

Harris notes in this issue that "modern welfare states share a broad mission to fulfil normative social expectations about the basic requirements of human organisation and personal welfare and development."<sup>89</sup> Those normative expectations do not necessarily take the same form in every part of the UK.<sup>90</sup> In the words of a former chair of the Scottish Human Rights Commission, through the two recent referenda "Scotland has presented its credentials internationally and it's now understood as to what its outlook is and what kind of country it wants to become."<sup>91</sup> That is, a more egalitarian country, more concerned with human rights – including social rights – and social justice, more internationalist too than the rest of the UK/England/the Westminster elite. The independence referendum was to a large extent a debate about whether social justice could best be served within or outside the UK<sup>92</sup> and as the UK government moved towards a referendum on and then withdrawal from the EU, continued enthusiasm for European integration has also become increasingly central to the "Scottish brand."<sup>93</sup>

Much literature tries to put its finger on "the distinctive identity, values and policy preferences of the Scottish people."<sup>94</sup> Even prior to legislative devolution aspects of Scottish social policy were

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<sup>87</sup> C Harvey, 'Reflections on human rights and citizenship in a changing constitutional context' (Brexiting and Rights conference, Belfast, September 2016)

<[http://www.caj.org.uk/files/2016/10/11/3\\_Brexiting\\_and\\_Rights\\_-\\_Colin\\_Harvey\\_CAJ-TJI\\_2016.pdf](http://www.caj.org.uk/files/2016/10/11/3_Brexiting_and_Rights_-_Colin_Harvey_CAJ-TJI_2016.pdf)>

<sup>88</sup> A Kirk and P Scott, 'General election 2017: latest polls and odds tracker' (Daily Telegraph, rolling updates) <<http://www.telegraph.co.uk/news/0/who-will-win-general-election-2017-latest-polls-odds-tracker/>> accessed 1 June 2017

<sup>89</sup> N Harris, 'Welfare rights, austerity and the decision to leave the EU: influences on UK social security law' (2018) 25(X) Journal of Social Security Law XX

<sup>90</sup> M Simpson, 'Renegotiating social citizenship in the age of devolution' (2017) 44(4) Journal of Law and Society 646

<sup>91</sup> R Johnston and A Miller, 'Interview with Professor Alan Miller' (2016) 75 Scottish Human Rights Journal 2, 3

<sup>92</sup> G Mooney and G Scott, 'The 2014 Scottish independence debate: questions of social welfare and social justice' (2015) 23(1) Journal of Poverty and Social Justice 5; J Hearn, 'Nationalism and normality: a comment on the Scottish independence referendum' (2014) 38(4) Dialectical Anthropology 505

<sup>93</sup> G Mooney and C Williams, 'Forging new "ways of life"? Social policy and nation building in devolved Scotland and Wales' (2006) 26(3) Critical Social Policy 608

<sup>94</sup> N McEwen, 'The territorial politics of social policy development in multilevel states' (2005) 15(4) Regional and Federal Studies 537, 543

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claimed to be “fairer,” more caring than south of the border, although the reserved status of social security meant that “the scope for a transformative approach” has until now remained limited.<sup>95</sup> Recent research finds nationalist politicians are heavily invested in the notion of a “fairer Scotland,”<sup>96</sup> advancing explanations from the theological (non-conformist churches’ concern for poverty) to the literary (Burns).<sup>97</sup> However, unionist politicians – in line with much of the literature<sup>98</sup> – tend to suggest that while Scotland’s political elite is significantly to the left of the UK’s, the gap in public opinion is much narrower. Digging deeper into the findings, nationalists themselves acknowledge that egalitarianism has not historically been an *exclusively* Scottish perspective, but a “defining feature of Britishness,” one that (they claim) has been progressively abandoned by the Conservatives and other unionist parties, but to which Scotland remains committed.<sup>99</sup> From this perspective, it is Westminster that is undermining the post-World War 2 welfare settlement, therefore more devolution or even independence might be necessary (in part) to save the UK welfare state from the UK government.

Keating suggests that a distinctly Scottish attitude to European integration, too, is an elite rather than a popular phenomenon. Elected representatives overwhelmingly favoured remain prior to the referendum. Both Labour and the SNP had shaken off their previous Euro-scepticism during the 1980s and the Scottish Conservative leadership was much more united around continued membership than their Westminster counterparts. On the eve of the referendum, the SNP and the consistently pro-EU Liberal Democrats officially backed ‘remain’; Labour, Conservative and Green Party representatives were at liberty to vote as they wished, but the party leaderships and most of their MSPs were solidly pro-remain.<sup>100</sup> Despite a resounding vote in favour of ‘remain’, the picture among the population as a whole is presented as more “ambivalent,” with social research suggesting “less Euroscepticism but not a lot of Europhilia” compared to England.<sup>101</sup> In common with the ‘social democratic Scotland’ thesis, nationalists have an opportunity to argue that the UK elite is abandoning formerly British values in a way that is unacceptable to the Scottish people. As the UK government stands accused of dismantling the welfare state, a Conservative party under whose leadership the UK *entered* the EU is now taking the state *out* of the EU, in the process becoming a cheerleader for an outcome that most of its own leadership opposed during the referendum.<sup>102</sup>

The ultimate impact of Brexit on Scottish social security is intimately linked to this wider clash of values between Scottish and UK elites that manifested itself in both the independence and EU

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<sup>95</sup> K Rummery and C McAngus, ‘The future of social policy in Scotland: will further devolved powers lead to better social policies for disabled people?’ (2015) 86(2) *Political Quarterly* 234, 234

<sup>96</sup> Scottish Government, *Fairer Scotland action plan* (Edinburgh: Scottish Government, 2016)

<sup>97</sup> M Simpson, ‘The social citizenship of lone parents, 2010-2015: evolution and devolution’ (PhD thesis, Ulster University, 2016); M Simpson, ‘Renegotiating social citizenship in the age of devolution’ (2017) 44(4) *Journal of Law and Society* 646

<sup>98</sup> J Curtice and R Ormston, ‘Is Scotland more left-wing than England?’ (Edinburgh: ScotCen Social Research, 2011); J Mitchell, *The Scottish question* (Oxford: Oxford University Press, 2014)

<sup>99</sup> N McEwen, ‘Independence and the territorial politics of welfare’ (ESRC conversation 2: delivering social security: options in Scotland’s constitutional debate, Edinburgh, 2013) 3

<sup>100</sup> C McCall, ‘EU referendum: where do Scotland’s political parties stand?’ (*Scotsman*, 26 February 2016) <<http://www.scotsman.com/news/politics/eu-referendum-where-do-scotland-s-political-parties-stand-1-4038649>>

<sup>101</sup> M Keating, ‘The European dimension to Scottish constitutional change’ (2015) 86(2) *Political Quarterly* 201, 202

<sup>102</sup> A Learmouth, ‘Ruth Davidson accused of “enormous U-turn” on Europe’ (*The National*, 13 September 2016) <[http://www.thenational.scot/politics/14894562.Ruth\\_Davidson\\_accused\\_of\\_enormous\\_U\\_Turn\\_on\\_Europe/](http://www.thenational.scot/politics/14894562.Ruth_Davidson_accused_of_enormous_U_Turn_on_Europe/)>

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referenda. The 2017 general election may be as important as either referendum in determining what happens next. The SNP had initially seized on UK withdrawal from the EU, against the wishes of 62% of Scottish voters in the referendum, as a development of sufficient magnitude to justify a second poll on independence.<sup>103</sup> If independence *had* been the ultimate outcome of Brexit, and Scotland had remained within or gone on to rejoin the EU, then many of the issues identified by McKeever in this issue<sup>104</sup> as potentially affecting workers who commute across the Irish border would also have become relevant to cross-border workers in Great Britain: up to 110,000 people are thought to live in England and work in Scotland or vice versa.<sup>105</sup> This outcome, though, seems very unlikely at present: the fall in support and significant loss of parliamentary representation for the SNP on 8 June clearly dealt a blow to secessionist ambitions, prompting a swift retreat from calls for another vote on independence,<sup>106</sup> albeit that the message of the subsequent party conference was that “campaigning for independence” remains high on the agenda.<sup>107</sup> More pertinently, in recent Scottish history, signs of enthusiasm for independence have typically been followed by attempts to placate the electorate with more devolved powers. The election of the first SNP government in 2007 was followed swiftly by the appointment of the Calman Commission,<sup>108</sup> whose recommendations for additional devolution shaped the Scotland Act 2012. The 45% vote in favour of independence in 2014 resulted in the convening of the Smith Commission, which again advocated new devolved powers including, for the first time, significant social security competences.<sup>109</sup> The Scotland Act 2016 put the Smith recommendations into action. The First Minister’s speech on a second referendum prompted an immediate call from Gordon Brown, the former Prime Minister and an influential voice in favour of further devolution at the time of the independence referendum,<sup>110</sup> for federalisation of the UK, implying more powers to Scotland.<sup>111</sup>

Whether this “constitutional chain reaction”<sup>112</sup> in fact continues remains in the realms of speculation. Had the recent general election delivered an SNP success of similar magnitude to 2015, when the party won all but three of Scotland’s 59 seats in the House of Commons, the UK Government’s hand could effectively have been forced, with more powers devolved in an effort to

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<sup>103</sup> N Sturgeon, ‘Nicola Sturgeon’s speech on Scottish independence: full text’ (New Statesman, 13 March 2017) <<http://www.newstatesman.com/politics/staggers/2017/03/nicola-sturgeons-speech-scottish-independence-full-text>>

<sup>104</sup> G McKeever, ‘Brexit, the border and social security rights’ (2018) 25(X) *Journal of Social Security Law* XX

<sup>105</sup> P Collinson, ‘What price Scottish independence for an army of cross-border workers?’ (Guardian, 19 April 2014) <<https://www.theguardian.com/money/2014/apr/19/scotland-vote-independence-yes-no-tax-pensions-workers>>

<sup>106</sup> M Simpson, ‘More devolution rather than independence: time for the SNP to rediscover the “middle way”’ (LSE British Politics and Policy, 10 July 2017) <<http://blogs.lse.ac.uk/politicsandpolicy/time-for-the-snp-to-rediscover-the-middle-way/>>

<sup>107</sup> N Sturgeon, Leader’s speech (Scottish National Party conference, October 2017)

<sup>108</sup> Commission on Scottish Devolution, *Serving Scotland better: Scotland and the United Kingdom in the 21<sup>st</sup> century* (Edinburgh: Commission on Scottish Devolution, 2009)

<sup>109</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh: Smith Commission, 2014)

<sup>110</sup> R Syal, ‘Scottish independence: Brown to push for more devolution in event of no vote’ (Guardian, 5 September 2014) <<https://www.theguardian.com/politics/2014/sep/05/gordon-brown-scottish-independence-devolution>>; G Mooney and G Scott, ‘The 2014 Scottish independence debate: questions of social welfare and social justice’ (2015) 23(1) *Journal of Poverty and Social Justice* 5

<sup>111</sup> S Carrell, ‘Gordon Brown pushes “patriotic” third option for Scotland after Brexit’ (Guardian, 18 March 2017) <<https://www.theguardian.com/politics/2017/mar/18/gordon-brown-to-push-patriotic-third-option-for-more-powerful-scotland-after-brexit>>

<sup>112</sup> C Jeffery, ‘Constitutional change – without end?’ (2015) 86(2) *Political Quarterly* 275, 275

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curb enthusiasm for a new independence referendum. Although this did not happen, the resurgent Conservative vote in Scotland – where the party has gone from having no MPs in 1997 to becoming the main opposition party at Holyrood in 2016 and was arguably the main ‘winner’ in June 2017, with 13 Westminster seats gained – might yet come to be seen as an opportunity to make concessions from a position of strength, cementing the party’s electoral comeback and the decline of Scottish Labour since 2007.<sup>113</sup> Alternatively, a successor to the Calman and Smith Commissions could be the price of SNP support for a future Labour minority government.

Social security would be an obvious candidate for further devolution, indeed it is among the areas in which the Scottish Government advocates further devolution as it seeks to “protect Scotland’s interests” post-Brexit.<sup>114</sup> The Scottish Government has a vision for a devolved system based on respect for the dignity of individuals and putting the user experience first (amongst other principles),<sup>115</sup> but only a limited set of competences to enable it to put the vision into practice. The Scotland Act 2016 devolved competence for disability, carers’ and industrial injuries benefits, maternity, funeral and heating payments that previously fell within the regulated social fund, discretionary benefits including discretionary housing payments, food aid and the housing element of universal credit. Collectively these accounted for 14.6% of social security expenditure in Scotland in 2016.<sup>116</sup> The Scottish Parliament also gained a power to top up reserved benefits, make certain changes to the payment arrangements for universal credit and control of employment support schemes.<sup>117</sup> Policy announcements to date have been limited,<sup>118</sup> but indicate that the devolved system will, to a limited but real extent, be more generous than the equivalent benefits provided by DWP for England and Wales. For example, the level of carer’s allowance is to be raised to the same rate as jobseeker’s allowance and the introduction of a dedicated young carer’s benefit is proposed. There are no current proposals for significant changes to the level of or eligibility criteria for disability benefits,<sup>119</sup> which are the largest part of the devolved system in terms of expenditure but will not come under Holyrood’s control until at least 2020.<sup>120</sup> However, a Scotland anxious to burnish

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<sup>113</sup> See BBC News, ‘Conservatives and Labour make gains’ (BBC News, 9 June 2017)

<<http://www.bbc.co.uk/news/election/2017/results/scotland>>

<sup>114</sup> Scottish Government, ‘Scotland’s place in Europe’ (Edinburgh: Scottish Government, 2016) 10, 17-18, 42-43

<sup>115</sup> Scottish Government, *A new future for social security: consultation on social security in Scotland* (Edinburgh: Scottish Government, 2016)

<sup>116</sup> Scottish Government, *A new future for social security in Scotland* (Edinburgh: Scottish Government, 2016)

<sup>117</sup> Social Security (Scotland) Act 2017 c11 part 3; for discussion, see T Mullen, ‘Devolution of social security’ (2016) 20 *Edinburgh Law Journal* 382

<sup>118</sup> The Scottish Government acknowledges, but largely rejects, calls for the inclusion of greater detail regarding the workings of devolved benefits in the current Social Security (Scotland) Bill – Scottish Government, *Stage 1 report on the Social Security (Scotland) Bill: Scottish Government response* (Edinburgh: Scottish Government, 2016)

<sup>119</sup> Change in the short-term is more likely in the fields of assessment practice, notably avoidance of the use of private companies and an increase in the use of lifetime awards, and administration of the benefit, with the potential for greater use to be made of direct payment for goods or services if the claimant desires – see Social Security Directorate, ‘Policy position paper: disability assistance and employment injury assistance’ (Edinburgh: Scottish Government, 2017)

[http://www.parliament.scot/S5\\_Social\\_Security/Inquiries/Social\\_Security\\_-\\_Position\\_Paper\\_-\\_Disability\\_Assistance\\_and\\_Employment\\_Injury\\_Assistance\\_-\\_28\\_September\\_2017.pdf](http://www.parliament.scot/S5_Social_Security/Inquiries/Social_Security_-_Position_Paper_-_Disability_Assistance_and_Employment_Injury_Assistance_-_28_September_2017.pdf)

<sup>120</sup> Citizen’s Advice Scotland, ‘Details and timescales for the first wave of devolved Scottish benefits announced’ (CAS, 30 May 2017) <http://www.cas.org.uk/news/details-and-timescales-first-wave-devolved-scottish-benefits-announced>; as of December 2017, the exact implementation schedule for some of the devolved benefits remained unconfirmed – see Scottish Government, *Stage 1 report on the Social Security (Scotland) Bill: Scottish Government response* (Edinburgh: Scottish Government, 2017)

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its European credentials could in principle refrain from implementing any new restrictions on migrants' eligibility for or the portability of personal independence payment resulting from the future disapplication of Regulations 1408/71 and 883/2004.<sup>121</sup>

Since the main income replacement and family benefits remain largely reserved, there is currently no possibility of changing the eligibility rules as they apply in Scotland to ease immigrants' access to the social security system, whether this were to mean rolling back some of the pre-Brexit restrictions on EU citizens' entitlement to support or the non-implementation of any future changes. Even the devolution of the housing element of universal credit will be of limited impact as would-be claimants would have to be eligible for universal credit in the first place in order to benefit from any changes the Scottish Parliament might choose to make. While reserved benefits can be topped up, this power (similarly) can only be used to benefit those who are already eligible for the benefit according to the DWP criteria. Consequently, any aspiration to entice migrant workers to Scotland through easier access to the social security system in comparison to the rest of the UK could currently only be put into practice in respect of disability benefits. If new competences in respect of working age benefits were devolved, the Scottish Parliament would have the option of expanding (or at least resisting any dismantling of) EU citizens' entitlements as one aspect of a pitch to would-be migrants and a manifestation of the 'fairer', more solidaristic society to which Scotland is claimed to aspire.

Outright devolution of social security seems unlikely to take place in the near future; following the Smith report, Scottish civil servants observed that retirement pensions in particular would be a "big financial risk" to any devolved government and are too fundamental a part of the glue "that keeps the country together" for any UK government to contemplate devolution.<sup>122</sup> State-wide risk pooling in unemployment benefits is also the norm in decentralised states.<sup>123</sup> Even in the context of wholesale devolution, the experience of Northern Ireland, where full devolved competence since 1921 has produced little significant policy divergence, shows that powerful forces in favour of a common UK approach to key benefits might remain.<sup>124</sup> Scotland is subject to less intense fiscal pressures than its near neighbour, as the Barnett formula preserves a higher block grant than a needs-based formula would allow,<sup>125</sup> enabling it to have higher levels of public spending than other

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<sup>121</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 149/2); Regulation (EC) no 883/2004 of the European Parliament and of the Council of 20 April 2004 on the coordination of social security systems (OJ L 166/1); following withdrawal, the Regulations will continue to apply to individuals who were within their scope prior to withdrawal – Department for Exiting the European Union, 'Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 negotiations under article 50 TEU on the United Kingdom's orderly withdrawal from the European Union' (London: DExEU, 2017) at [28]

<sup>122</sup> M Simpson, 'The social citizenship of lone parents, 2010-2016: evolution and devolution' (PhD thesis, Ulster University, 2016) 254, 259

<sup>123</sup> PE Peterson, *The price of federalism* (Washington DC: Brookings Institution, 1995); T Iversen, 'Democracy and capitalism' in FG Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford handbook of the welfare state* (Oxford: Oxford University Press, 2010)

<sup>124</sup> M Simpson, 'Developing constitutional principles through firefighting: social security parity in Northern Ireland' (2015) 22(1) *Journal of Social Security Law* 31

<sup>125</sup> The Barnett Formula is based on three main elements: population, planned spending changes in UK Government departments and equivalence of function between UK and devolved departments – see HM Treasury, *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: statement of funding policy* (HM Treasury, 2010) 13 and 39; notably, it is the *change* in rather than the overall level of per capita spending which is determined by Barnett, so higher levels of per capita expenditure in some

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UK regions without raising the taxes under devolved control. If fiscal autonomy continues to increase, the Barnett bonus may well diminish.<sup>126</sup> In any case, after a certain point benefit levels are “likely to be constrained by existing funding limits unless Scottish politicians can persuade the electorate to pay... higher income tax,” while the operational challenge of “dismantling” systems inherited from DWP should not be underestimated.<sup>127</sup>

In the context of continued shared competence between the UK and Scottish Governments, the future oversight of the interaction of reserved and devolved benefits as well as the impact of any divergence that occurs on social rights within and freedom of movement between different parts of the UK – identified as problematic by McKeever<sup>128</sup> – will become an issue of increasing urgency. McEwen and Petersohn argue that the politics of devolution in the UK have been characterised by an excessive focus on *self*-rule to the exclusion of *shared* rule. Both governments have contributed to this position. If Scottish Governments since 2007 have consistently sought to “maximise self-rule,” the UK Government is accused of being more interested in using the Scotland Office to advance its own interests in Scotland than in allowing it to “act as a voice for Scotland in national decision making.”<sup>129</sup> With competence for key policy areas including personal taxation as well as social security now split between Holyrood and Westminster, this issue can be ignored no longer. Initial signs are mixed. The UK Government’s refusal to allow the Social Security Advisory Committee any remit in respect of devolved Scottish benefits seems explicable only by willingness to place intergovernmental (or unionist-nationalist) competition ahead of the best interests of the UK. Joint sessions of the Scottish Parliament Social Security Committee and House of Commons Scottish Affairs Committee are a positive step, but meetings have been blighted by squabbling over the appropriate way of referring to the social sector size criteria in housing benefit (imposition of a ‘bedroom tax’ or removal of a ‘spare room subsidy’?) and apparent unwillingness on the part of the UK government to facilitate the Scottish Government’s totemic policy of disapplying the criteria in Scotland.<sup>130</sup> Ministerial-level communication may or may not be more constructive, but takes place out of public view.

## Conclusion

In common with other areas of policy, the impact of Brexit on social security in the UK will only become apparent over time. When the focus falls on *Scottish* social security specifically, any discussion of the likely implications inevitably strays even further into the realm of speculation. The relatively low-key role of the EU in shaping national social security systems means direct impacts, other than the rules on migrants’ access to host state benefits, are likely to be limited. Even in this area the EU has itself been willing to allow some diminution of the social rights of citizens exercising their right to freedom of movement, and to countenance further curbs. Indirect impacts may be more widespread. The political connections between critiques of the EU and of the ECHR (even

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areas were not initiated by the formula, but are maintained by it – see J McConnell, ‘Funding devolution: why Barnett remains better than the alternatives’ (2000) 7(2) *New Economy* 65

<sup>126</sup> A Midwinter, ‘The Barnett formula: why replacing it would be a mistake’ (2000) 7(2) *New Economy* 69, 74

<sup>127</sup> DNF Bell, ‘Territorial finance and the future of Barnett’ (2015) 86(2) *Political Quarterly* 209, 215

<sup>128</sup> G McKeever, ‘Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution’ (2016) 23(3) *Journal of Social Security Law* 126

<sup>129</sup> N McEwen and B Petersohn, ‘Between autonomy and interdependence: the challenges of shared rule after the Scottish referendum’ (2015) 86(2) *Political Quarterly* 192, 196

<sup>130</sup> Scottish Affairs Committee, ‘Oral evidence: Inter-governmental co-operation on social security, 20 March 2017’ (HC 1095, London: House of Commons, 2017)

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though the two issues are legally separate) and between Brexit and the future constitutional position of Scotland within the UK will be crucial here.

While the Scottish Government and Scottish parliamentarians have been vocal critics of UK Government social security policy since 2011,<sup>131</sup> prior to the Scotland Act 2016 Holyrood had little scope to set a distinctive course. Even the implementation of the Smith recommendations devolves only a rather limited set of social security competences, although the significance of control of disability benefits and the opportunity to top up reserved benefits should not be underestimated. Arguably, then, the biggest question to be answered in respect of devolved social security is whether Brexit will result in a wider revision of the devolution settlement with potential to hand control of additional benefits to the Scottish Parliament.

Such a development could open the door to divergence in income replacement and family benefits, which are currently reserved, many of which are becoming less generous to claimants and where the UK government has already moved to curtail EU migrants' rights even ahead of Brexit. A distinctive Scottish approach could be driven in part by legal requirements, particularly if the Human Rights Act 1998 were repealed but the obligation of compliance with the ECHR in the Scotland Act 1998 retained. However, at present the more important considerations are political, notably whether (and how) the Scottish Government might elect to enhance the protection of social rights in Scottish law, put into practice its pledge to base its social security system on respect for the dignity of individuals and seek to attract immigration to an economy claimed to need it more than other parts of the UK. Collectively, these considerations could underpin greater generosity in and easier access for migrants to certain benefits. To get to this point, though, a great number of 'what ifs' must be addressed.

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<sup>131</sup> Scot Parl deb 22 December 2011 session 4 col 4941; N Sturgeon, 'Foreword from the Deputy First Minister' in Scottish Government, *Child poverty strategy for Scotland: our approach 2014-2017* (Edinburgh: Scottish Government, 2014); Welfare Reform Committee, *The cumulative impact of welfare reform on households in Scotland* (SP657, Edinburgh: Scottish Parliament, 2015)