At the Borders of Sovereignty: Nationality and Immigration Policy in an Independent Scotland

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At a glance
This article assesses the probable implications of Scottish independence for nationality and immigration law and policy, in the event of a ‘yes’ vote in the September 2014 referendum. It will firstly show that the Scottish Government plans to limit the implications of independence in the nationality field, but that some new Scottish citizens might lose British citizenship. In the immigration field, it will argue that intra-EU migration is one reason why, in the event of a successful referendum, a treaty should be put in place to ensure continuity of Scotland’s membership of the EU. In relation to immigration control, it will argue that the most likely outcome is that an independent Scotland would be part of the common travel area, rather than the Schengen zone. In relation to immigration policy, it will show that Scotland’s greater freedom of action after independence might be constrained by participation in EU immigration and asylum legislation.

Introduction
On 18 September 2014, there will be a referendum in Scotland on the question ‘Should Scotland be an independent country?’, the outcome of which the United Kingdom Government has committed to respect.1 If the result of the vote is a ‘yes’, the Scottish Government’s intention is that Scotland would become independent on 24 March 2016.2 Given that sovereignty over each of nationality and immigration is thought to be characteristic of an independent state, it is unsurprising that these policy areas have featured prominently in the referendum debate. In particular, the Scottish Government’s plans in these fields were outlined in the white paper Scotland’s Future, published in November 2013, and were the subject of a response in the

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1 Paragraph 30 of the Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, signed at Edinburgh on 15 October 2012, includes the statement that the two governments ‘look forward to a referendum that is legal and fair producing a decisive and respected outcome.’ That formulation does not entirely preclude the United Kingdom Government from later questioning a ‘yes’ vote in the referendum, as based on an illegal or unfair process, or as insufficiently decisive. The Secretary of State for Scotland at the time, Michael Moore, did however interpret paragraph 30 to imply such a commitment, in oral evidence to the House of Commons Scottish Affairs Select Committee on 13 February 2013 (‘What we have committed to … is that each Government will respect the outcome of the vote and act constructively to reflect it’: answer to Q2534). More recently, the Prime Minister has declared that ‘If people vote yes in September, then Scotland will become an independent country. There will be no going back’: David Cameron, speech at Lee Valley VeloPark, 7 February 2014.

2 The United Kingdom Government has not committed to a timetable for independence: see HM Government, Scotland Analysis: Devolution and the Implications of Scottish Independence (Cm 8554, February 2013), para 2.41.
United Kingdom Government’s *Scotland Analysis: Borders and Citizenship*, published in January 2014.\(^3\) This article will consider the implications of independence for nationality and immigration law and policy relating to Scotland. It will begin by addressing the field of nationality law, where the principal questions have concerned the rules for acquisition of Scottish citizenship, and the possibility that Scottish citizens might lose British citizenship. The article will then consider the debate over the route by which Scotland would obtain EU membership, and the implications of that debate for both EEA and non-EEA migration.\(^4\) That discussion will provide the context for a discussion of implications of independence for immigration control, where the effective alternatives are membership of the Schengen zone and of the common travel area, and for admissions policy, where the central question is whether independence would lead to different outcomes for Scotland. The aim of the article will be to identify the main points on which a reasonable degree of clarity is possible as to the post-independence position, and those where significant uncertainty remains.\(^5\)

**Nationality law**

If Scotland became independent, it would have its own legal nationality, for which it would be necessary to define the rules governing acquisition and loss. In the *Scotland’s Future* white paper, the Scottish Government played down the implications of independence in this field, by seeking to build upon British citizenship, rather than proceeding from a definition of the Scottish people. Its cautious approach will be seen here through an examination of the planned rules concerning the acquisition of a future Scottish citizenship, and of the implications of acquisition of Scottish citizenship for the retention of British citizenship.

**Acquisition of Scottish citizenship**

The Scottish Government’s intended scheme for a new Scottish citizenship has two stages. The first is that citizenship would be acquired automatically on the date of independence by two categories of British citizen: those habitually resident in Scotland on that date, irrespective of place of birth; and, persons alive on that date who were born in Scotland, irrespective of their place of residence.\(^6\) Automatic Scottish citizenship would therefore be available only to a subset of British citizens with a connection to Scotland. That approach may be contrasted in particular with the previous Scottish National Party policy, articulated in *A Constitution for a Free Scotland* in 2002, under which Scottish citizenship was to be defined *de novo.*\(^7\) That document provided that citizenship would have been automatic for *any* person, irrespective of nationality, whose ‘principal place of residence’ was in Scotland on the date of independence, and for persons who had been born there before that date, or one of whose parents had been so. The key practical difference is that, by making possession of British citizenship a precondition,

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\(^4\) For simplicity, and in line with United Kingdom immigration law, the term ‘EEA’ is used here to refer to all of the EU member states, Norway, Iceland and Liechtenstein (which together make up the European Economic Area, properly so-called), and also Switzerland, with which there are parallel agreements on the free movement of persons. Uncertainty must be considered endemic in the Scottish independence debate. For a discussion, see Stephen Tierney, ‘Why is Scottish Independence Unclear?’ UK Constitutional Law Blog (February 2014), available at: http://ukconstitutionallaw.org/ (accessed 17 March 2014).

\(^5\) Scotland’s Future, p 272. The phrase used is that these two categories would ‘be considered Scottish citizens’.

the current proposals would not impose Scottish citizenship upon other Scottish residents, or other persons born in Scotland.

The second stage in *Scotland’s Future* provides for the acquisition of Scottish citizenship after independence. Here, the scheme follows much of current British nationality law. Children born in Scotland would acquire citizenship automatically if, but only if, one of their parents was a Scottish citizen or settled in Scotland. It would be possible for migrants to naturalise after a period of residence in Scotland, subject to meeting a ‘good character’ test and ‘any other requirements set out under Scottish immigration law’. While many details remain undefined, there is no apparent intention to deviate from the United Kingdom approach on these points.

The main differences to current British nationality law arise from the goal of opening post-independence citizenship to a broad category of persons with Scottish connections. That can firstly be seen in the proposed provision for acquisition of citizenship by descent. *Scotland’s Future* contains two statements on that subject:

(a) a child ‘born outside Scotland to at least one parent who has Scottish citizenship’ would acquire citizenship automatically, though the birth would have to be ‘registered in Scotland’;  
(b) any person who had ‘a parent or grandparent who qualifies for Scottish citizenship’ would be eligible for citizenship through registration.

A significant gap in these statements is that they do not make clear how many generations born outside Scotland would have access to Scottish citizenship. The minimum position would be that the reference to ‘parent’ in statement (a) implicitly excluded those whose connection to Scotland was itself one of descent. In that case, Scottish citizenship would be available to two generations born outside Scotland. That would go further than current British nationality law, which permits only the first generation born outside the United Kingdom to acquire citizenship as of right (unless qualifying conditions as to residence are satisfied). It is possible, however, that statements (a) and (b) imply something broader, with a route to citizenship after the second generation, provided a parent or grandparent had actually acquired Scottish citizenship by the time of the birth of the person in question.

Secondly, *Scotland’s Future* broadens access to Scottish citizenship through a route to naturalisation for all persons who have ‘spent at least ten years living in Scotland at any time’, if they have ‘an ongoing connection with Scotland’, and subject to meeting good character and ‘other’ requirements. This provision is without direct parallel in current British nationality law. It would presumably provide for periods of residence ending prior to independence, for which conventional naturalisation would be unavailable. Depending on how it was applied, it could also provide a route to citizenship for persons whose residence had not always been consistent with immigration law.

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8 *Scotland’s Future*, Table at p 273.  
9 Ibid.  
10 Ibid.  
11 Ibid, pp 271–272 and Table at p 273.  
12 British Nationality Act 1981, ss 2 and 3.  
13 That would be similar to the current Irish model. The Irish Nationality and Citizenship Act 1956, s 7, confers Irish citizenship automatically on the first generation born outside the island of Ireland, and permits subsequent generations to acquire citizenship by registration if a parent was actually a citizen on the date of the child’s birth.  
14 *Scotland’s Future*, Table at p 273.
Dual nationality

Probably the most politically charged aspect of nationality law in the referendum debate is the possibility that some British citizens might lose that status at the time of independence, because they became Scottish citizens. In Scotland’s Future, the Scottish Government sought to play down the implications of sovereignty in this regard. Firstly, it addressed the fear of loss of British citizenship by itself endorsing the principle of dual British and Scottish nationality. Secondly, it argued in relation to post-independence British nationality law that, ‘if Westminster decided that Scottish citizens could not also be UK citizens it would be inconsistent with its approach to every other country.’

The Scottish Government’s general position concerning post-independence British nationality law must however be considered unpersuasive. Put simply, dual nationality consequent upon the independence of part of a state is logically distinct from that arising from an individual’s own connection to two states. On this point, the United Kingdom Government has taken the more realistic view that there can be no guarantee that British citizenship would be retained by all Scottish citizens. That much was made clear by the Home Secretary in the House of Commons in June 2013:

‘Decisions on UK citizenship are for the UK Government. Any decisions on the retention of UK citizenship by Scottish citizens after independence would be affected by future Scottish Government policy decisions’.

At least some new Scottish citizens would therefore be at risk of losing their British citizenship, at or soon after independence.

Withdrawal of British citizenship from some of those who acquired Scottish citizenship automatically would be in line with the position in international law concerning nationality in the event of state succession. The leading recent sources on that subject are the International Law Commission’s Draft Articles on Nationality of Natural Persons in relation to the Succession of States of 1999, and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession of 2006. These instruments each provide that a successor state’s nationality should be acquired automatically by the nationals of the predecessor state in three cases:

– the person is habitually resident in the successor state’s territory on the date of succession
– the person was born on the territory of the successor state
– the person’s last habitual residence in the pre-separation state was within the territory of the successor state.

15 For examples of coverage of the subject, see ‘May threat that Scots might not keep UK passports’, Scotsman, 11 June 2013; ‘Scots warned over citizenship’, Herald, 26 September 2013; and, ‘Opponents and experts on the white paper’s details’ Scotsman, 27 November 2013, where one of the nine questions covered was ‘Can I have both Scottish and British citizenship?’
16 Scotland’s Future, p 272.
17 Scotland’s Future, p 497 (Question 376).
18 Theresa May, House of Commons Debates, 10 June 2013, col 16.
19 The ILC Draft Articles were endorsed by the UN General Assembly in its Resolution 55/153 of 12 December 2000.
20 While the first of these is a non-binding instrument, and the United Kingdom is not a party to the second, they may be relied upon as evidence of current thinking in the field. For a similar approach, see Laura van Waas Nationality Matters: Statelessness under International Law (Intersentia, 2008) p 136.
21 ILC Draft Articles, art 24 and Council of Europe Convention on the Avoidance of Statelessness, art 5.
Article 25 of the ILC Draft Articles also provides a default position of automatic withdrawal of the predecessor state’s nationality from persons who actually acquire the successor state’s nationality. That default position is, however, subject to three exceptions:

– the person is habitually resident in the predecessor state’s continuing territory
– the person has ‘an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State’ (art 25(2)(b))
– the person is habitually resident in a third State, and was born in the predecessor state’s continuing territory, or had their last habitual residence there, or has ‘any other appropriate connection’ to that territory.

In contrast, the Council of Europe Convention does not describe the contexts in which withdrawal of nationality is – or is not – usually permitted, other than to provide that statelessness should not be the result.\(^{23}\)

In the event of a positive referendum, questions might arise in particular concerning British citizens whose connection to Scotland was such that they were to acquire Scottish citizenship automatically. This line of argument has already been seen in *Scotland Analysis: Borders and Citizenship*:

‘The government of the continuing UK would … need to consider whether all British citizens living in Scotland could retain their British citizenship upon independence. This cannot be guaranteed and could be dependent on any residency requirements or proof of affinity to the continuing UK.’\(^{24}\)

The first sentence of this passage raises the possibility that British citizenship might be withdrawn *only* from new Scottish citizens ‘living in Scotland’. By implication, that opens the door to protection of the British citizenship of new Scottish citizens who were born in Scotland, but who were not resident there at independence. In the second sentence, the circumstances which would permit new Scottish citizens to retain British citizenship are left open. We may speculate that, if British citizenship was to be withdrawn from some new Scottish citizens, the leading candidates for exceptions would be persons with connections of birth, parental birth or residence to another part of the United Kingdom, or who had served in the United Kingdom armed forces.\(^{25}\)

A further question is whether automatic Scottish citizenship might be declined by a British citizen. That possibility too has been accepted by the Scottish Government, in line with its minimisation of the implications of sovereignty in the field of nationality law. *Scotland’s Future* states that ‘Should [a person] qualify for British citizenship under the rest of the UK’s rules post-independence then [he or she] will be able to opt out of Scottish...

\(^{22}\) In the Scottish case, this is potentially applicable to British citizens with a connection to the Channel Islands, the Isle of Man or an overseas territory.

\(^{23}\) Council of Europe Convention on the Avoidance of Statelessness, art 6.


\(^{25}\) The provisions of British nationality law concerning Irish citizens might serve as a model in this regard. Both the British Nationality Act 1948, s 3 and now the British Nationality Act 1981, s 31, have provided for Irish citizens who were British subjects on 1 January 1949 to give notice to retain that status on the grounds of Crown service or ‘associations by way of descent, residence or otherwise’ with the United Kingdom or with any other British territory. These provisions have not however provided a route to citizenship of the United Kingdom and colonies (1948 Act) or British citizenship (1981 Act).
citizenship or hold dual citizenship.\textsuperscript{26} One issue of detail concerns the timing of any option. The alternatives appear to be that Scottish citizenship could be acquired automatically, and then given up by those retaining British citizenship, or that a mechanism could be put in place for some British citizens to avoid automatic Scottish citizenship altogether. A second issue of detail concerns the scope of any option. The narrower approach would be to include only those whom the United Kingdom intended could retain British citizenship in any event. Alternatively, assuming that the United Kingdom was set on withdrawing British citizenship from some Scottish citizens, a broader approach would be to extend a right of option to some or all of them too. In practice, the details of any individual option would depend upon the interaction of Scottish and British law at and just after independence, and there would therefore be pressure for an agreement between the Governments on the subject between a referendum and independence. It is presumably for these reasons that the discussion in \textit{Scotland's Future} ends with the rather weak statement that ‘Information on how to opt out will be made available before independence.’\textsuperscript{27}

It may be added that an individual option is contemplated by the ILC Draft Articles referred to above. Firstly, art 26 of the Draft Articles provides that a ‘right of option’ should be granted to ‘all persons’ who are to acquire the successor state’s nationality automatically under art 24, but from whom the predecessor state’s nationality ought not to be withdrawn under art 25(2) (above). Secondly, outside of those cases, art 11 of the Draft Articles provides that states affected by a succession ‘shall give consideration to’ the wishes of any person eligible for the nationality of more than one of those states.\textsuperscript{28}

Where the Scottish Government’s position concerning retention of British citizenship appears more persuasive is in relation to those who acquired Scottish citizenship at or after independence through a voluntary act. If the scheme set out in \textit{Scotland's Future} was followed, that category would include persons who were not Scottish-born or habitually resident, but who exercised a right to register arising by descent, as well as those who naturalised on the basis of pre- or post-independence residence. These voluntary situations would be akin to the conventional cases of multiple nationality arising out of an individual’s personal connection to more than one state. Crucially, the United Kingdom has long accepted multiple nationality as a general principle, and indeed the United Kingdom Government re-iterated that position in \textit{Scotland Analysis: Borders and Citizenship}.\textsuperscript{29} It must therefore be considered unlikely that those who acquired Scottish citizenship through a voluntary act would be denied British citizenship.\textsuperscript{30} That raises the intriguing possibility that it might turn out to be politically expedient for the Scottish Government to narrow the category of British citizens who acquired Scottish citizenship automatically at independence, precisely in order to preserve their opportunity to retain British citizenship. This is a further reason why, in the event of a ‘yes’ vote, post-referendum negotiations concerning dual nationality appear desirable.

\textsuperscript{26} \textit{Scotland's Future}, p 497 (Question 375).
\textsuperscript{27} Ibid.
\textsuperscript{28} The only provision for choice in the Council of Europe Convention on the Avoidance of Statelessness is not relevant here. It provides that the \textit{successor} state may not refuse its nationality to persons who held the predecessor state’s nationality, and who would otherwise become stateless, if they were born on the successor state’s territory, and acquisition of that nationality is their ‘expressed will’ (art 7).
\textsuperscript{29} \textit{Scotland Analysis: Borders and Citizenship}, p 60.
\textsuperscript{30} A general re-consideration of Britain’s historic acceptance of multiple nationality cannot of course be ruled out. One argument for the historic position is that it permits diverse identities and connections to be reconciled with British citizenship, and that argument would presumably be strengthened by Scottish independence.
Scotland and European Union membership

One of the most vexed questions to have arisen in the wider debate over Scottish independence is whether Scotland would have to apply to accede to the European Union. This section considers the dispute over that question in general terms, and shows why it has particular implications in the field of immigration law.

The EU itself has not previously faced the situation that would arise in the event of a positive vote in the Scottish referendum, with an independent state set to emerge from within the territory of an existing member state, and wishing to be an EU member.\(^{31}\) The Scottish Government’s position is that the starting-point should be recognition that Scotland has been within the EU for more than forty years (since 1 January 1973). In the event of a ‘yes’ vote, it would therefore seek ‘a transition process’ to membership, with the aim of ensuring continuity of membership on the date of independence. Its strong preference is for an amendment treaty adopted under the ordinary revision procedure provided for in art 48 of the Treaty on European Union (TEU).\(^{32}\) Such a treaty would ultimately require the unanimous agreement of the member states at the time, and ratification in accordance with their constitutional requirements. A similar approach has been advocated by David Edward, a former judge at the Court of Justice. In his view, in the event of a ‘yes’ vote, EU law ‘obligations of good faith, sincere cooperation and solidarity’ would require the EU institutions and member states ‘to enter into negotiations … to determine the future relationship within the EU of the separate parts of the former UK and the other Member States.’\(^{33}\)

The alternative position is that, at independence, Scotland would be a new state, which would have to become a candidate for accession to the European Union under art 49 TEU. Accession would then have to be the subject of an agreement between it and the current Member States, and would be subject to ratification by all the parties in accordance with their constitutional requirements. This analysis of the route to EU membership for an independent Scotland has been advanced by the United Kingdom Government.\(^{34}\) It has also been put forward by the President of the European Commission, who has stated that ‘If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory,’ so that accession via art 49 would be necessary.\(^{35}\)

If Scotland was on course for independence after a ‘yes’ vote, the choice between arts 48 and 49 routes would probably be strongly influenced by political considerations. In that context, the EU institutions and member states would find it difficult to resist the argument that Scottish independence should be facilitated, as it was the product of a democratic process, and was compatible with the United Kingdom’s constitutional order. As David Edward has

\(^{31}\) The closest precedent is Algeria’s independence from France in 1962, as it had previously been considered part of France’s metropolitan territory. As a wholly non-European state, Algeria could not however have become a member of the European Economic Community.


\(^{34}\) HM Government, Scotland Analysis: Devolution and the Implications of Scottish Independence (Cm 8554, February 2013), pp 49–52. Its analysis is supported by a legal opinion as to the position in international law: see James Crawford and Alan Boyle, ‘Opinion: Referendum on the Independence of Scotland – International Law Aspects’, published as Annex A to Cm 8554.

\(^{35}\) Letter from José Manuel Barroso to Lord Tugendhat, chair of the House of Lords Economic Affairs Committee, 10 December 2012.
argued, insisting on accession under art 49, would mean that ‘EU law [did] not recognise the democratic right of the inhabitants of one part of a Member State to dissolve their constitutional union with those of the other part(s) other than at the cost of automatic loss of their acquired rights as citizens of the EU.’ In rejecting that possibility, he has noted in particular the recognition given to ‘democracy’ among the founding values of the EU listed in art 2 TEU, and the principle of respect for the ‘national identities’ of member states, ‘inherent in their fundamental structures, political and constitutional’, set out in art 4 TEU.

For our purposes, it is significant that the art 48 and 49 routes have different implications, which would potentially matter in the field of immigration law. One difference between the two routes is chronological. Reliance upon the art 48 revision mechanism would enable negotiations to take place between the existing member states in the period between a referendum and independence, in order to permit Scotland to be a member state from the date of independence. Even if those negotiations could not formally involve Scotland (which would not yet exist), the post-referendum Scottish Government could presumably be a de facto party. In contrast, if the accession route were followed, that would appear to require an agreement with an independent Scotland. Negotiations with the post-referendum Scottish Government could occur in advance of independence, but the formal process could not. Predicting the timescale for such an accession is impossible, as previous enlargement negotiations do not offer a guide for the case of a candidate state which in principle would already be complaint with the EU law acquis. The ratification process might therefore take months or even years to complete.

A second difference between arts 48 and 49 concerns the implications of a failure to agree, whether to the principle of Scottish membership, or to its terms. That this is a genuine question was made clear by the President of the European Commission in February 2014, when he speculated that member state governments concerned about separatist movements of their own might block Scotland’s accession. If art 48 was utilised, and the premise was one of continuing membership, then the default position in the event of non-agreement would arguably be the retention in force of as much of the status quo as was technically possible. Conversely, if the premise was one of accession, then non-agreement would result in Scotland’s exclusion from the EU.

In the field of immigration law, these possibilities of delay in membership, and non-accession, would be of particular relevance to EEA nationals with a connection to Scotland who had exercised rights of free movement. In a post-referendum scenario, that category would include (a) Scottish residents who were nationals of EEA states, including British citizens who expected to retain that status after independence, and (b) presumptive Scottish citizens who were resident in the rest of the United Kingdom or in other EEA states. If Scotland had to apply to join the EU using art 49, the pre-independence rights of all of these persons would be put at risk. David Edward has argued more generally that the self-evident undesirability of such a hiatus is itself reason to favour art 48. Otherwise, ‘Scotland, its citizens and its land and

37 Scotland’s Future, p 221.
39 The judgment in Case C434/09, McCarthy [2011] ECR I-3375 is a complicating factor in defining these categories. The CJEU held there that a dual British-Irish national could not claim the protection of the Citizens Directive (Directive 2004/38, OJ 2004 L 158/77) vis-à-vis the United Kingdom, unless they had exercised rights of free movement. If that ruling were applied by analogy, dual British-Scottish citizens could not claim the full protection of EU free movement law unless, at some point in their lives, they had moved between Scotland and the rest of the United Kingdom, or had moved to or from another EEA state.
sea area would find themselves in some form of legal limbo *vis-à-vis* the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated’, which is an outcome the drafters of the Treaties cannot have intended.\(^40\)

A third difference in the implications of arts 48 and 49 concerns Scotland’s rights and obligations. If art 48 were relied upon, it is more likely that the starting-point in the negotiations would be that Scotland could continue with any special arrangements currently applicable to the United Kingdom. In contrast, under art 49, there is a general political expectation, articulated in the conclusions to the Copenhagen European Council in 1993, that a candidate state will accept all of the European Union’s *acquis* – ie the existing body of EU law. Full acceptance of the EU *acquis* is not however a legal requirement: art 49 provides only that ‘the conditions of eligibility agreed upon by the European Council shall be taken into account’, and applies that requirement only to the Council decision to authorise negotiations, and not to the accession negotiations as such. There would therefore be scope for parts of the *acquis* not to apply, in the event of Scottish independence. That said, the art 49 route would probably make it less likely that the EU member states would accept that Scotland could retain the special arrangements currently applicable to the United Kingdom.

This difference of starting-point would potentially affect outcomes in the immigration field, because of the special arrangements applicable to the United Kingdom – together with Ireland\(^41\) – in relation to immigration and asylum matters under the EU treaties. Those arrangements are now reflected in Protocols 19, 20 and 21 to the TEU and the Treaty on the Functioning of the European Union (TFEU).\(^42\) Protocols 19 and 20 each concern immigration control. Protocol 19 makes provision for the Schengen *acquis* and measures building upon it, including the absence of border controls on persons and related measures. Under its terms, neither Ireland nor the United Kingdom participates in the Schengen *acquis* unless they request to do so, and the other member states agree. Protocol 20 then recognises the existence of a separate immigration system as between Ireland and the United Kingdom, and permits the two states to ‘continue to make arrangements between themselves relating to the movement of persons between their territories (‘the Common Travel Area’).’

Protocol 21 is distinct, and concerns the legislation on freedom, security and justice matters – including immigration and asylum – which is adopted, post-Lisbon, under Title V of Pt Three of the TFEU and its predecessors. Under Protocol 21, the starting-point is that Ireland and the United Kingdom do not participate in such legislation. Each of these states has the right to opt in at the negotiation stage, subject to the proviso that, if they do so, and the negotiations do not bear fruit ‘after a reasonable period of time’, the other member states may proceed without them.\(^43\) In addition, each of Ireland and the United Kingdom may opt in to a measure after it has been adopted. Provision is also made in Protocol 21 for the situation where Ireland or the United Kingdom is bound by an existing measure, which has been the subject of revision negotiations, and that state does not opt in.\(^44\) In that scenario, if the Council of Ministers determines that that state’s non-participation in the revision makes the earlier measure ‘inoperable for other Member States or the Union’, then it may give the state in question two months to opt in, failing which that state ceases to be covered by the earlier measure.

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40 Edward, 2012 (above, fn 32) paras 11 and 21.
41 The term ‘Ireland’ is used here to refer to that state, as that is its official name.
42 The Protocols are to be found at OJ 2012 C 326/290 *et seq*.
43 The proviso appears in art 3(2) of Protocol 21, and was introduced by the Treaty of Lisbon, with effect from 1 December 2009.
Since the initial version of these arrangements came into effect in 1999, the United Kingdom has used its right to opt in to negotiations on immigration and asylum measures in a strategic way. In the 1997–2010 period of Labour Government, the United Kingdom participated in all measures concerned with asylum, including the Directive on reception conditions for asylum applicants, the ‘Dublin II’ Regulation on the allocation of responsibility for asylum claims, the Refugee Qualification Directive, and the Asylum Procedures Directive.\(^{45}\) In that period, the United Kingdom also opted in to some measures concerned with irregular migration.\(^{46}\) It declined however to participate in EU measures concerned with immigration policy, such as the Family Reunification Directive, which lays down minimum standards for family reunification involving a third country sponsor; the Long-term Residents Directive, which provides for an EU status of long-term resident, and guarantees limited rights of mobility between member states; and, the Blue Card Directive, which provides a framework concerning highly skilled labour migration, and additional rights of mobility between member states.\(^{47}\) Since the Coalition Government came to power in 2010, it has participated in only one measure, the ‘Dublin III’ Regulation on the allocation of responsibility for asylum claims, where the United Kingdom’s non-participation would have implied a confusing variation in regimes.\(^{48}\) It has meanwhile declined to participate in revisions of the other measures on asylum which the Labour Government had previously accepted.\(^{49}\)

The Scottish Government’s general position is that, in post-referendum negotiations with EU member states, it would seek to preserve ‘continuity of effect’, so that any special arrangements applicable to the United Kingdom would also apply to Scotland.\(^{50}\) Protocols 19, 20 and 21 are covered by the statement in *Scotland’s Future* that:

‘specific provisions will need to be included in the EU Treaties as part of the amendment process to ensure the principle of continuity of effect … including detailed considerations around current opt-outs, in particular the rebate, Eurozone, Justice and Home Affairs and the Schengen travel area.’\(^{51}\)

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\(^{45}\) Directive 2003/9 on the minimum standards for the reception of asylum seekers (OJ 2003 L 31/18); Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States (OJ 2003 L 50/1, known as ‘Dublin II’); Directive 2004/83 on qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection (OJ 2004 L 304/12); and, Directive 2005/85 on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326/13).


\(^{48}\) Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ 2013 L 180/31).


\(^{50}\) *Scotland’s Future*, pp 221–222 and *Scotland in the European Union*, para 3.11.

\(^{51}\) *Scotland’s Future*, p 222.
In practice, irrespective of the formal route taken towards Scottish membership of the EU, the opt-outs relevant to immigration and asylum would presumably be a matter for negotiation. Nevertheless, recourse to the art 49 accession route would probably change the starting-point of negotiations, in ways which would potentially affect Scotland’s freedom of action in relation to immigration control and policy. The precise implications for Protocols 19, 20 and 21 are considered further below.

Immigration control

In the immigration field, probably the most sensitive issue within the independence debate is the possibility of border control on travel between Scotland and England. The background reason is the high volume of traffic between Scotland and the rest of the United Kingdom. Scotland Analysis: Borders and Citizenship shows that an estimated 23 million vehicles cross the England-Scotland border each year, which may be equated to roughly 36 million person crossings a year. In addition, each year there are an estimated 10 million air passenger journeys, 7 million rail passenger journeys, and 1.8 million journeys by ferry. We may therefore estimate that a total of 54.8 million personal journeys a year take place between Scotland and the rest of the United Kingdom.

In order to assess the likelihood of post-independence immigration control as between Scotland and the United Kingdom, the discussion here will consider first the possibility of Scotland’s membership of the Schengen zone, and then its potential inclusion within the common travel area.

Membership of Schengen?

One potential threat to the openness of borders between an independent Scotland and the post-independence United Kingdom is that Scotland might be obliged to join the Schengen zone, as a condition of EU membership. If Scotland did join the Schengen zone, then border controls on entry from and exit to the post-independence United Kingdom would become obligatory, at least on the assumption that the United Kingdom would continue to stay outside of that zone. One reason that Scottish membership of Schengen is a genuine possibility is the political expectation (noted above) that new EU member states participate fully in the EU acquis. In addition, art 7 of Protocol 19 states in terms that:

‘For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.’

The apparent implication of this provision is that there is a legal requirement upon new EU states to become Schengen members.

53 The 23 million figure for vehicle crossings is in Scotland Analysis: Borders and Citizenship, para 1.49. The estimate of persons crossing the border is the author’s, based upon the most recent Great Britain average of car occupancy (1.56) in Department for Transport, National Travel Survey, Table NTS0905, available at https://www.gov.uk/government/statistical-data-sets/nts09-vehicle-mileage-and-occupancy#table-nts0905 (accessed 17 March 2014).
54 Figures in Scotland Analysis: Borders and Citizenship, paras 1.49 and 1.53.
The prospect of obligatory Schengen membership for Scotland has been highlighted by the United Kingdom Government. Its position is that ‘it is by no means certain that an independent Scottish state would be able to negotiate similar opt-outs from Schengen membership to those enjoyed by the UK and […] Ireland.’ It has also noted that, since the Schengen system was incorporated into the EU in 1997 (when the Treaty of Amsterdam was agreed), all new member states have been obliged to join Schengen.

While the logic of the argument that Scotland would be obliged to join Schengen is clear, it is far from certain that that is how negotiations would actually play out. The Scottish Government’s clear position is that it ‘will not seek membership of the Schengen area’, and that ‘there are absolutely no grounds to believe that the EU would challenge Scotland remaining part of the [common travel area] rather than joining Schengen.’ While these statements stop short of a legal argument concerning non-membership of Schengen, they give a plausible account of the probable direction of negotiations on the subject. In the event of independence, Scotland’s only land border would be with the post-independence United Kingdom, and most international journeys to or from Scotland would be from or to the United Kingdom. Faced with that context on the ground, it would be highly artificial for the other member states to insist upon Scotland’s membership of Schengen, at the expense of free movement overall. Nor are the terms of art 7 of Protocol 19 decisive: given that a Treaty revision would be required in any event, it too could be amended, or simply ignored.

The common travel area

If we assume that Scotland would be able to negotiate an opt-out from Schengen, the question then would be whether it could participate in common travel area-type arrangements with the United Kingdom. By extension, questions would arise as to Scotland’s relationship with the other common travel area jurisdictions, ie Ireland and the crown dependencies (Guernsey and Jersey in the Channel Islands, and the Isle of Man). In its commentary on the implications of Scottish independence, the United Kingdom Government has argued that common travel area membership cannot be guaranteed. One argument it has advanced is that immigration control would be more feasible at the English-Scottish border than it is at the Irish land border, because of the ‘unique political circumstances’ as between Ireland and Northern Ireland, and because of geography. In relation to the latter, it has noted that:

‘The [Irish] border, some 448 kilometres long, cutting across some 180 roads and not delineated by natural boundaries contrasts with the 154 kilometres land border between England and Scotland crossed by 21 roads and which is marked by the river Tweed in the east and the river Esk in the west.’

The United Kingdom Government has also observed that Scotland’s membership of the common travel area would have to be agreed to by the existing members, and that that would require the Scottish Government’s agreement ‘to co-operate with other members … on certain aspects of visa and immigration policies’.

55 Ibid, para 2.12.
56 Scotland Analysis: Devolution and the Implications of Scottish Independence, paras 3.45 and 3.46.
57 Scotland’s Future, pp 223, 224.
58 Ibid, para 2.77.
59 Scotland Analysis: Borders and Citizenship, para 2.23.
The position of the Scottish Government in relation to the common travel area is radically different. In its words:

‘an independent Scotland will remain an integral part of the broader social union of close economic, social and cultural ties across the nations of the UK (including the Isle of Man and the Channel Islands) and Ireland. An essential part of this social union, and one that will be fully maintained with independence, is the free movement of nationals between Scotland and the rest of the UK and Ireland. There are no circumstances in which the Scottish Government would countenance any measure being taken that jeopardized the ability of citizens across the rest of the UK and Ireland to move freely across our borders as they are presently able to do.’

The high volume of cross-border journeys discussed above, which are presumably of interest not just to Scotland, but also to the other parts of the current United Kingdom, point to the plausibility of the Scottish Government’s approach. In the event of Scottish independence, the post-independence United Kingdom too would have a strong interest in maintaining the status quo, rather than putting itself in the position of having to introduce forms of immigration control towards Scotland. That is the case even if one accepts that there are relevant political and geographical differences between the current Irish land border and that between England and Scotland after independence. By extension, Scotland could also enter arrangements with the other common travel area jurisdictions.

In order to show the potential content of those arrangements, for Scotland and the other jurisdictions, it is necessary to give a brief outline of the organisation of the current common travel area. Legally, the term ‘common travel area’ is used in the United Kingdom’s Immigration Act 1971 to refer to two very distinct sets of arrangements. The first relates to the relationship between United Kingdom on the one hand, and the Channel Islands and Isle of Man on the other. Journeys along these routes are not subject to immigration control, and there is mutual recognition of immigration permissions granted by each jurisdiction in the others. These arrangements reflect the close constitutional relationship between the United Kingdom and these dependent territories, and do not therefore offer a direct precedent for the case of an independent Scotland.

The second dimension to the ‘common travel area’ is the relationship between the United Kingdom and Ireland. Arrangements based on freedom of movement and co-operation have been in place between these two states since the establishment of the Irish Free State in 1922,

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60 Scotland’s Future, p 223.
61 The ‘political’ distinction drawn by the United Kingdom Government appears misplaced. If Scotland were to become independent, there would presumably be a large minority in Scotland who supported the prospect of Scotland’s return to the United Kingdom. That political context would be structurally not dissimilar to that arising out of the presence of a nationalist minority in Northern Ireland.
62 At the time of writing (March 2014), there are direct flights between these Irish and Scottish airports: Cork and Edinburgh and Glasgow International; Dublin and Aberdeen, Edinburgh, Glasgow International and Prestwick; Knock and Prestwick; and, Shannon and Edinburgh. There are direct flights between Jersey and Glasgow, with further services to Aberdeen, Edinburgh and Inverness planned for the summer 2014. There are no current direct flights between the Isle of Man and Scotland, with a Douglas-Glasgow International service planned from March 2014.
63 For the provisions applicable to entry to the United Kingdom, see Immigration Act 1971, Sch 4. Orders in Council adopted by the United Kingdom Government extend much of the 1971 Act to the Isle of Man, Jersey and Guernsey, including an adjustment to Schedule 4 to ensure recognition of immigration permission granted in the United Kingdom or the other two island jurisdictions: see Immigration (Guernsey) Order 1993 (SI 1993/1796), Immigration (Jersey) Order 1993 (SI 1993/1797) and Immigration (Isle of Man) Order 2008 (SI 2008/680).
with the exception of a period during and after World War Two (1939–1952). At present, the United Kingdom does not apply immigration control to any arrivals from Ireland. In contrast, since 1997, Ireland has applied immigration control to some arrivals from the United Kingdom, and currently requires permission to land to be obtained by those who are not Irish or British citizens and who arrive from the United Kingdom by sea or air. Historically, the two states have co-operated in relation to immigration control, both in order to ensure that persons considered undesirable in one state are not admitted to the other, and to ensure that British visa policy is applied by Ireland.

A key gap in the British-Irish arrangements – and the crucial difference to the position with respect to the island jurisdictions – is the absence of general provision for mutual recognition of immigration permission. A non-EEA national holding a visa or residence permit issued by one state may not generally rely upon that to travel to the other state, even for a short period of time. In this regard, a significant development – dating from 1 July 2011 – is that, in the interests of tourism, the Irish Government permits the nationals of selected states to rely upon United Kingdom visitor visas to enter Ireland, provided their intended period of stay is for 90 days or less, and does not exceed the remaining period of the visa. In a statement in December 2011, the two Governments also indicated that they were prepared to consider forms of mutual recognition of immigration permission more generally.

If travel between an independent Scotland and the post-independence United Kingdom were wholly or partly free of immigration control, the arrangements with Ireland offer the most obvious precedent. There would probably not be immigration control on journeys across the land border, but there would be scope for it to be applied to those travelling by air or sea between Scotland and other parts of the common travel area. There would be co-operation in relation to individuals considered undesirable, and potentially in relation to visa policy (discussed further in the following section). Mutual recognition of immigration permission would be an option, but might not be routine, and would not have to be reciprocal.

Nor can it be ruled out that, were an independent Scotland to join the common travel area, there would be evolution in the arrangements relating to that area. One issue concerns formalisation of the terms of co-operation over immigration control through a public agreement. In the British-Irish case, it was long considered too politically sensitive for the governments to admit that they co-operated on immigration matters. Greater openness about the fact of arrangements between the two states can be dated back to the recognition given to those arrangements in the Treaty of Amsterdam in 1997 (see now Protocol 20, discussed above).

65 Immigration Act 1971, s 1(3).
66 Immigration Act 2004 [Ireland], s 4.
67 Discussed in Ryan (above, fn 63), pp 864–868.
68 In the case of the United Kingdom, this is the consequence of the Immigration Act 1971, s 9(2) and the Immigration (Control of Entry through the Republic of Ireland) Order 1972 (SI 1972/1610), art 3. In the case of Ireland, it is the consequence of the requirement on non-nationals arriving by sea and air to obtain permission to land (above, fn 65), of the rule that non-nationals may not be present in the state without permission (Immigration Act 2004 [Ireland], s 5), and of the absence of any general provision for persons who have immigration permission in the United Kingdom.
69 See now Immigration Act 2004 (Visas) Order 2012 (SI 2012/417) [Ireland], art 3(d) and Sch 2. The states in question are Bahrain, Belarus, Bosnia and Herzegovina, China, India, Kazakhstan, Kuwait, Montenegro, Oman, Qatar, Russia, Saudi Arabia, Serbia, Turkey, Ukraine, United Arab Emirates and Uzbekistan.
70 See ‘Joint Statement by Damian Green, Minister of State for Immigration and Alan Shatter, Minister for Justice and Equality, regarding Co-operation on Measures to Secure the External Common Travel Area Border’ [21 December 2011], para 3.
71 See Ryan (above, fn 63).
Discussion of the terms of the common travel area has been more frequent since 2008–2009, when the Labour Government sought to introduce partial controls on entry from Ireland, as part of its e-border programme. Further details concerning the operation of the common travel area then emerged from the joint statement of Government ministers in December 2011, and the summary given in *Scotland Analysis: Borders and Citizenship*. In a three-state scenario, there would be pressure both to formalise and to reform the inter-state common travel area arrangements. In particular, such a reform could address the following matters: the modes of travel which would and would not be exempt from control; the possibility of relying upon an immigration permission to travel to another participating state; and the mechanisms for co-ordination of visa policy.

**Admissions policy**

Whereas the Scottish Government has emphasised continuity in relation to both nationality and immigration control in the event of independence, it has offered a more positive case in relation to the admission of migrants from outside the EEA. To quote from *Scotland’s Future*:

‘One of the major gains from independence for Scotland will be responsibility for our own immigration policy. Currently immigration is a reserved matter, and the Westminster Government’s policy for the whole of the UK is heavily influenced by conditions in the south east of England … With independence … policy choices [would be] made on the basis of Scotland’s needs and priorities.’

Underlying these claims are the assumptions that ‘Scotland has a different need for immigration than other parts of the UK’, because ‘historically Scotland’s population has grown at a lower rate compared to the rest of the UK.’ These assumptions admittedly appear somewhat less compelling in the light of the 2011 census, which found that the population of Scotland was at its highest ever level (5.3 million), and that it had grown by 5% in the previous decade, largely as a result of migration. Nevertheless, there is a consensus that Scotland will have particular underlying needs for migration in the future, due to emigration and an ageing population.

In analysing admissions policy after independence, two questions are distinguished here: the implications of Scotland not being bound by United Kingdom policy on the admission of non-EEA migrants, and the possibility of other constraints upon Scotland’s policy.

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72 In *Strengthening the Common Travel Area* (July 2008), the Home Office proposed to introduce immigration control on air and sea arrivals from Ireland, and selective control on travel across the Irish land border. These proposals depended upon the success of a clause in the Borders, Citizenship and Immigration Bill 2009 (House of Lords Bills 2008–2009 No 15, cl 46), which would have removed the statement in the Immigration Act 1971 that arrivals to the United Kingdom from Ireland and the islands are not subject to control. That clause was rejected in the House of Lords on 1 April 2009, and the Government abandoned its attempt to re-introduce it on 14 July 2009.


74 *Scotland’s Future*, pp 267–268.

75 Ibid.

76 National Records for Scotland, *2011 Census: Key results on Population, Ethnicity, Identity, Language, Religion, Health, Housing and Accommodation in Scotland – Release 2A* (September 2013), pp 7 and 17–18. Between the 2001 and 2011 censuses, the population of Scotland increased by 233,400. Over the same period, the number of foreign-born persons increased by 177,000 to 369,000, and therefore accounted for 76% of the population increase.

Scotland and the United Kingdom’s admissions policy

Over the past decade, the presumed needs of Scotland in relation to non-EEA migration have influenced United Kingdom admissions policy in two respects, each of which dates from the period when Labour was in power at Westminster, and the Scottish Executive was composed of a Labour-Liberal Democrat coalition (1999–2007). The first was the introduction in June 2005 of the *Fresh Talent: Working in Scotland Scheme* (FTWISS). That scheme permitted non-EEA nationals who graduated with degrees or Higher National Diplomas (HNDs) from Scottish universities and colleges, and who intended to work in Scotland, to stay and work for a two-year period. From 1 May 2007, a more general principle of post-study work was introduced for the United Kingdom as a whole, under the International Graduates Scheme (IGS). The IGS applied to degrees, postgraduate certificates and postgraduate diplomas, but did not apply to HNDs, and permitted a stay of only one year. From 30 June 2008, the FTWISS and IGS were merged as Tier 1 (post-study work) of the points-based system. Eligibility remained much as before – i.e. degrees, postgraduate certificates and postgraduate diplomas obtained in any part of the United Kingdom, and HNDs obtained in Scotland – but the possibility to stay for two years was extended to all those eligible. These arrangements – including the special provision for Scotland – were removed by the Coalition Government, with the abolition of the Tier 1 (post-study work) category in April 2012.

The second – ongoing – case is the additional shortage occupation list for Scotland, which was introduced under Tier 2 (General) of the points based system, when that replaced work permits in November 2008. Separate provision for Scotland under the points based system had first been mooted by the Labour Government in July 2005, when it suggested that points could be varied by region, or for Scotland, in order to address ‘particular skill shortages’. By March 2006, that suggestion had crystallised into a proposal for a Scottish shortage occupation list, additional to the United Kingdom wide one. The idea was then taken forward through the recommendations on shortage occupations of the Migration Advisory Committee (MAC). In September 2008, the MAC proposed the first additional list for Scotland, to which it has subsequently recommended changes on four occasions. All of these recommendations concerning Scotland have been adopted by the Government of the day. The additional shortage occupation list for Scotland has though been limited in scope throughout its existence, and at the time of writing covers only a narrow range of medical occupations.

In its *Scotland Analysis: Borders and Citizenship*, the United Kingdom Government argued that the current arrangements concerning shortage occupations offer Scotland ‘the best of both worlds’, as ‘businesses and employers in Scotland can influence the UK-wide list of shortage occupations, and the system provides for a Scotland specific list.’ The evidence of Scottish influence in relation to the United Kingdom-wide list must however be considered limited. The only example of such influence offered in *Scotland Analysis: Borders and Citizenship* concerned secondary teaching of maths, physics and chemistry, which occupation was said to have been retained on the United Kingdom list in 2013 partly as a result of representations by

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78 Prior to the IGS, the only UK-wide arrangement was the Science and Engineering Graduates Scheme, which had been introduced in June 2004. It applied to degree graduates only, and permitted a stay of only one year.


81 See the discussion of Scotland in the Migration Advisory Committee’s reports on shortage occupation lists of September 2008, April 2009, October 2009, September 2011 and February 2013.

82 The occupations in question are in diagnostics radiology, paediatrics, anesthetics, and obstetrics and gynaecology: see the Tier 2 Shortage Occupation List in effect from 6 April 2013.

the Convention of Scottish Local Authorities. There is though nothing in the corresponding MAC report to suggest that those representations made any difference to the outcome. Conversely, there is at least one clear example in the MAC reports of specific Scottish representations not making a difference, when the MAC declined to follow the Scottish Government’s request in 2010 that registered pharmacists not appear on the United Kingdom list. This indicates a limitation to the current arrangements, at least from a Scottish perspective, that occupations may be added to the United Kingdom list in Scotland, but cannot be subtracted from the United Kingdom list in Scotland when they are not considered to be in shortage there.

If the long-term demographic argument is accepted, it is anyway difficult to see how a focus on immediate shortages in the supply of skilled labour could be sufficient to meet it. For that reason, the Scottish Government sees the issues in broader terms. It expects that independence would mean a less restrictive policy on non-EEA admissions overall, as the ‘current Westminster approach is strongly focused on reducing the overall number of migrants’. The more specific criticisms in Scotland’s Future mainly concern changes introduced by the Coalition Government since May 2010: the introduction of caps on skilled workers, the withdrawal of the post-study work visa (noted above), and the setting of financial maintenance thresholds at a standard level for the United Kingdom. After independence, the following are among the changes contemplated by the Scottish Government:

- ‘a points-based approach targeted at particular Scottish requirements’
- ‘incentives to migrants who move to live and work in more remote geographical areas’
- a lowering of ‘the current financial maintenance thresholds and minimum salary levels for entry, to better align them with Scottish average wages and cost of living’
- reintroduction of the post-study work visa.

Modified arrangements are also contemplated in relation to asylum claims, including ‘a new model of asylum services separate from immigration’, and a re-consideration of ‘asylum seekers’ access to employment, education and accommodation.’

Other constraints?

There would therefore be far greater possibility for an admissions policy suited to Scotland’s circumstances to be fashioned if Scotland became independent. Nevertheless, the role of other constraints upon an independent Scotland’s policy must also be considered. Three possible sources of constraint are considered here: membership of the common travel area, EU immigration and asylum legislation, and public opinion.

84 Ibid, para 2.51.
85 See Migration Advisory Committee, Full review of the recommended shortage occupation lists for the UK and Scotland, a sunset clause and the creative occupations (2013) pp 150–153.
86 See Migration Advisory Committee, Third review of the recommended shortage occupation lists for the UK and Scotland (March 2010) pp 14–19.
87 This appears to arise from the mandate of the MAC, which is to produce a United Kingdom list and a Scottish one: see Migration Advisory Committee, The recommended shortage occupation lists for the UK and Scotland (February 2008) p 15.
88 Scotland’s Future, p 268.
89 Ibid.
90 Ibid, p 270.
91 Ibid, p 271. In relation to the latter category, what is stated is that ‘Independence will … afford the opportunity to address’ those matters.
In the case of the common travel area, the question is whether an independent Scotland would have to make concessions in relation to its immigration policy in order to secure its participation. The United Kingdom Government has argued that ‘a significant divergence of Scottish policy on short-term visas or immigration policies could strain the current cooperative arrangements of the [common travel area].’ If one looks to the current arrangements between Ireland and the United Kingdom, however, this claim must be considered too sweeping. As between those states, the historic practice has been for co-ordination only of those parts of immigration policy which impact directly upon entry to each state’s territory. Even in the case of visa requirements for short-term stay, significant differences have emerged in recent years: at the time of writing, nine states are subject to a visa requirement in the United Kingdom, but not Ireland, while seven are subject to a requirement in Ireland, but not the United Kingdom. There is moreover no practice of co-ordination by the two states of the substance of immigration policy concerning family reunion, work, study or long-term residence. It can be expected that, even if there were a largely open immigration frontier, these matters would not be the subject of co-ordination between an independent Scotland and the United Kingdom, unless there were clear mutual benefits to so doing.

A second question is whether an independent Scotland would face constraints on its immigration policy deriving from EU legislation on immigration and asylum. Could the Scottish Government succeed in retaining the opt-out concerning legislation on freedom, security and justice? This is a point on which it could make a crucial difference whether Scotland was considered to be continuing within the EU, or was instead classed as a candidate state. In the former case, it would presumably have at least some opportunity to refuse to give up the United Kingdom’s opt-out. In the latter case, however – irrespective of the position in relation to Schengen membership – there would be a presumption of full participation in EU legislation on immigration and asylum. That would mean Scotland’s full acceptance of existing and future legislation concerning, inter alia, the admission of skilled workers, students and family members, the position EU long-term residents, and asylum. It is not clear on what objective basis Scotland could argue against such a conclusion, as it would not have a greater need to remain free of the legislation than other actual or potential member states. There is a real possibility that, while continuing to have an autonomous immigration policy, an independent Scotland would nevertheless be obliged to respect the limits given by EU legislation.

A final point which may be made concerns the role of Scottish public opinion in a post-independence context. A survey of attitudes to immigration in Scotland, conducted by YouGov in October 2013, showed that the majority opinion in Scotland was that immigration should be reduced, albeit that the extent of support for such positions (58%) was less than in England and Wales (75%). This finding suggests a certain tension between the two elements of the Scottish Government’s case for independence, referred to above, that it would enable Scotland’s ‘needs and priorities’ in relation to immigration to be met. Faced with public opinion, there can be

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92 Scotland Analysis: Borders and Citizenship para 2.29.
93 This conclusion is based upon a comparison of Ireland’s list of visa-exempt states and territories, set out in Sch 1 to the Immigration Act 2004 (Visas) Order 2012 (SI 2012/417), and the United Kingdom’s list of states and other territories subject to a visa requirement, set out in para 1 of Appendix 1 to the Immigration Rules. Among UN member states, the Ireland-only visa states are the Marshall Islands, Mauritius, Micronesia, Namibia, Palau, Papua New Guinea and Timor Leste. The United Kingdom-only visa states are Bolivia, Fiji, Guyana, Lesotho, Malawi, South Africa, Swaziland, Taiwan (not a UN member) and Venezuela. The nationals of 101 UN member states are subject to a visa requirement in both Ireland and the United Kingdom.
no guarantees that actual post-independence Scottish admissions policy would be less restrictive than the policy of the day in the United Kingdom.  

**Conclusion**

The analysis in this article has shown that the implications of Scottish independence for nationality and immigration law and policy are clear only in part. In the case of nationality law, while the Scottish Government has made matters simpler by choosing a model based on continuity with current British citizenship, it cannot yet be known to what extent British citizenship would be retained by future Scottish citizens. In the case of immigration law and policy, the main area of uncertainty concerns whether Scotland would be treated as continuing in EU membership, or as a candidate for accession. That choice would potentially affect EEA nationals who had moved into Scotland and presumptive Scottish citizens who had moved elsewhere in the EEA, as an accession process would put their distinct legal status in jeopardy. The approach taken to Scotland’s EU membership would also be relevant to immigration control, where the Scottish Government’s intention that Scotland would be part of the common travel area, rather than Schengen, appears the most likely outcome, yet cannot be guaranteed. Finally, independence would give Scotland far greater freedom in relation to admissions policy, although its freedom of action might end up being constrained by obligatory participation in EU immigration and asylum legislation.

At the time of writing (March 2014), the most likely result in the referendum is a ‘No’ vote, but with sizeable support for independence. If that is the outcome, a question which may then emerge is whether there is scope for the devolved Scottish Government and Parliament to have a greater role in immigration policy than at present. In that regard, it may be significant that, in addition to broad agreement that Scotland has distinctive migration needs, there is now evidence of a high degree of public support in Scotland for decisions concerning immigration policy being taken by the Scottish Government.  

It is quite possible that in future the Scottish devolved institutions might have some flexibility to vary United Kingdom immigration policy for those working, studying or residing in Scotland.  

Even if the outcome of the referendum is negative, at least some of the questions it throws up may therefore live on, in renewed debates over the terms of the devolution settlement.

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96 The YouGov survey in October 2013 found 60% support for the Scottish Government taking ‘the most important decisions’ about immigration, and 58% support for the same position with respect to asylum and refugees: Migration Observatory (above, fn 93), pp 17–18.

97 For a discussion of this possibilities, see Robert Wright *Sub-National Immigration Policy: Can it work in the UK?* Migration Observatory, September 2013.