



THE UNIVERSITY of EDINBURGH  
Edinburgh Law School



## Scottish Universities Legal Network on Europe

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### Free Movement, Immigration and Political Rights

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**1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

**For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.**

**Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).**

**EU free movement of people law<sup>1</sup>**

The right of free movement is enjoyed by all nationals of countries which participate in the single market, therefore including all EU Member States, the European Economic Area (EEA) states and Switzerland. With the coming into force of the Maastricht Treaty in 1993, all nationals of EU Member States have also become European Citizens (now Article 20 TFEU) possessing the rights of free movement and residence in the EU (subject to the limitations of EU secondary law). 'For those who are not economically active, this new status appeared to offer them greater opportunity under EU law than they had enjoyed previously, although recent case law of the Court of Justice of the EU (CJEU) has cast doubt upon this'<sup>2</sup>. EU citizenship remains an evolving concept upon which future developments in free movement rights may still be founded.

The secondary legislation on free movement is Directive 2004/38/EC, known as the 'Citizen's Rights Directive' of 'Free Movement Directive'. It sets out that all EU citizens (and EEA nationals) can enjoy free movement and residence unconditionally across the EEA for a period of up to 3 months. To enjoy residence in another Member State beyond three months, the individual must be:

1. a national of a Member State (nationality is a matter for Member State's own law), and,
2. be either:
  - a worker,
  - a self-employed person,
  - an economically self-sufficient person (and have health insurance cover) (eg retired people),

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<sup>1</sup> Part of the research for this paper has been drawn from papers that were commissioned and published prior to the EU referendum by the Immigration Law Practitioners Association on legal issues relating to the EU referendum. In particular, Sarah Craig, Maria Fletcher and Nina Miller Westoby (2016) 'EU Referendum position paper 12: The implications for Scotland of a vote in the EU referendum for the UK to leave the EU', available at <http://www.ilpa.org.uk/resources.php/32192/eu-referendum-position-paper-12-the-implications-for-scotland-of-a-vote-in-the-eu-referendum-for-the> and Catherine Barnard (2016) 'EU Referendum Position Paper 2 - Free movement of persons and the single market' available at <http://www.ilpa.org.uk/resources.php/32123/eu-referendum-position-paper-2-free-movement-of-persons-and-the-single-market>. As well as evidence submitted by Sarah Craig, Maria Fletcher and Nina Miller Westoby to the Scottish Parliament call for evidence 'European and External Relations Committee. Written Call for Evidence – Scotland's relationship with the EU: [http://www.parliament.scot/Inquiries/Written\\_Call\\_for\\_Evidence\\_-\\_FINAL\\_VERSION.pdf](http://www.parliament.scot/Inquiries/Written_Call_for_Evidence_-_FINAL_VERSION.pdf) on file with the authors.

<sup>2</sup> Catherine Barnard (2016) 'EU Referendum Position Paper 2 - Free movement of persons and the single market', available at <http://www.ilpa.org.uk/resources.php/32123/eu-referendum-position-paper-2-free-movement-of-persons-and-the-single-market> p 4

- a student (with health insurance cover and sufficient resources to support themselves. This status has some limits to equal treatment in terms of access to financial support for studies), or
- a jobseeker who has a genuine chance of being engaged (with some limits to equal treatment in terms of access to social assistance until they become employed).

It is clear, in sum, that the rights of free movement and residence are focused primarily on those who are economically active or self-sufficient.

### **5 key rights can then be enjoyed by the EU citizen in the host Member State<sup>3</sup>:**

#### **1. Right to enter, reside and leave including procedural protection from expulsion**

All EU citizens have the right leave one Member State and enter and reside in another. They do not need a visa; they need only present travel documents such as a passport or identity card. Provided they satisfy the criteria above on economic activity or self-sufficiency, they or their family members (family members - see below) may not be excluded from a Member State unless on grounds of public policy, public health or national security. In which case the Member State must meet the procedural legal framework set out in Directive 2004/38/EC including carrying out an individual assessment which takes into account the proportionality of the exclusion.

#### **2. Right to work**

The origin of the free movement of people is the idea of a mobile workforce that flows towards demand. This reflects the economic origins of the internal market. The ambition to facilitate a mobile workforce is also reflected in other Treaty rights including, most prominently, Title IV of the TFEU on the free movement of persons, services and capital.

To ensure that it would not be to a person's disadvantage to exercise the right to work in another Member State Regulation (EC) 883/2004 coordinates social security across the EU. This coordination of social security preserves the right of the Member States to determine the types of benefits and the rules governing them whilst ensuring that payments into one national system is acknowledged and that different national systems are coordinated so as not disadvantage persons who exercise their right to free movement; protecting social security entitlements as if they had been accrued in the same Member State for the course of their working lives.

Research into EU citizen's motivations for moving to the UK suggests that the overriding motivation to migrate is to work.<sup>4</sup> The media often presents EU migrants as low skilled workers but the EU free

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<sup>3</sup> Catherine Barnard identifies four main rights in her paper Catherine Barnard (2016) 'EU Referendum Position Paper 2 - Free movement of persons and the single market', available at <http://www.ilpa.org.uk/resources.php/32123/eu-referendum-position-paper-2-free-movement-of-persons-and-the-single-market> pp 4- 6. In this paper a fifth right is added to these; the right to accrue periods of lawful residence towards achieving the status of permanent residence.

<sup>4</sup> For further information see for example: The Migration Observatory, University of Oxford, 'Pulling power: Why are EU citizens migrating to the UK?' available at <http://www.migrationobservatory.ox.ac.uk/resources/commentaries/pulling-power-eu-citizens-migrating-uk/> and Swati Dhingra, Gianmarco Ottaviano, John Van Reenen and Jonathan Wadsworth, The Centre for

movement rules facilitate all skill levels including the migration and employment of high skilled EU migrants in, for example, the NHS, universities or services sector.

### **3. Right to bring family**

The right of free movement includes the right to be accompanied by your family (as defined by Directive 2004/38/EC). This ensures that the right of free movement is meaningful and accessible and operates in support of a worker's broader human rights. It also encourages successful integration within host Member States. The right to be joined by family is irrespective of the nationality of those family members or the level of family income. Family members also have the right to work, this, in turn is 'an important way of bringing talent to the UK'<sup>5</sup>.

To complement the right to free movement, the Union has also introduced a suite of private international law instruments governing cross-border litigation in family law and civil matters. These are intended to facilitate the free movement of persons by removing judicial or procedural barriers to free movement. These harmonisation and unification measures are discussed in the SULNE International Private Law paper<sup>6</sup>.

### **4. Right to equal treatment**

The right to equal treatment or the freedom from discrimination on the grounds of nationality underpins the free movement system (Article 24, Directive 2004/38/EC). It means that EU citizens and their family members living in another member state must enjoy the same treatment as nationals of the host member state. This encompasses a range of circumstances including job recruitment, conditions of employment and social assistance and tax advantages. This is limited, in the case of access to social assistance, with regard to the need to protect public finances, and EU citizens and their family must not become a 'burden' on the social assistance system of the host Member State. Recently this has played out in the case law of the CJEU to mean that workers may have access to social assistance on the basis of equal treatment but EU citizens who are not economically active may not (C-333/13 Dano v Job Centre Leipzig, 11 November 2014).

The right to equal treatment and any other of the rights conferred by the free movement provisions may also be limited, withdrawn or refused (within procedural safeguards) in the case of an abuse of EU law, for example through marriages of convenience (Article 35, Directive 2004/38/EC).

The right to non-discrimination on the basis of nationality encompasses both direct and indirect discrimination. Direct discrimination covers cases where a rule which results in less favourable treatment purely on the basis of nationality. This is prohibited unless there are grounds of public policy, public security or public health. Indirect discrimination is where the rule does not mention nationality but it disadvantages EU migrants in practice. An example would be the requirement to be resident for a certain period before an advantage can be claimed. This would be unlawful on the

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Economic Performance, London School of Economics, 'Brexit and the Impact of immigration in the UK'  
<http://cep.lse.ac.uk/BREXIT/abstract.asp?index=5053>

<sup>5</sup> Catherine Barnard (2016) 'EU Referendum Position Paper 2 - Free movement of persons and the single market', available at <http://www.ilpa.org.uk/resources.php/32123/eu-referendum-position-paper-2-free-movement-of-persons-and-the-single-market> p 6

<sup>6</sup> Janeen Carruthers, Elizabeth Crawford (2016) SULNE position paper 'International Private Law: Family Law' available at <https://sulne.files.wordpress.com/2016/11/ipl-and-family-law-sulne-roundtable-oct-2016.pdf>

grounds of indirect discrimination because it would be more difficult for an EU migrant to meet this kind of requirement than it would be for nationals. However, the Member State may objectively justify the rule and demonstrate that it is proportionate. In the case law, it has been established that a Member State may have such a residence requirement before there is entitlement to certain benefits as a way of protecting the Member States finances from claims from newly arrived EU citizens. However the period of residence required must be proportionate<sup>7</sup>.

## **5. Right to accrue permanent residence**

An important right for EU citizens and their family members is the right to permanent residence. The status of permanent residence follows five years of lawful residence in the host Member State. This means that the EU citizen or family member who achieves permanent residence is integrated fully as a member of the host Member State. They benefit from continued protection under the equal treatment principle and from enhanced procedural safe guards against expulsion. An EU citizen with permanent residence status cannot lose these rights or the right of residence if his or her economic status changes.

The free movement of EU citizens was central to the Leave campaign during the referendum and it remains a very controversial element of the UK government's vision for UK withdrawal from the EU. Free movement of people is a core and indivisible element of the single market but regardless of whether the UK intends to stay within the single market, it appears that attempts will be made to limit, suspend or end the free movement of people between the EU and the UK. This will be a tough bargaining position for the UK government to seek to implement in negotiations with the EU and the other Member States.

**The impact** of this will affect:

- i) The freedom with which UK nationals are currently able to travel to, reside in and work in another Member State of the EU. UK nationals will become 'third country nationals' and unless there is a substitute arrangement involving, for example, the UK remaining in the EEA as a member of EFTA, then UK nationals may be subject to immigration law when they seek to travel or work in the EU. UK nationals will no longer benefit from the right to equal treatment with host state nationals whilst living there, for example, when applying for jobs, housing, schooling or other social or tax advantages. Nor will UK nationals benefit from the coordination of social security guarantee on Regulation (EC) 883/2004 which protects their contributions when working in the EU.
- ii) The reverse is true for EU citizens migrating to Scotland and rUK. In the absence of a substitute agreement on free movement they will become third country nationals and will become subject to UK immigration law which is more onerous, expensive, restrictive and difficult to meet and may act as a disincentive to migrating to the UK because, for example, in practical terms, moving to the UK with a partner or spouse will be considerably more complicated and difficult under domestic immigration law. It is worth noting that the UK did not opt into EU immigration law under the TFEU's Justice and Home Affairs provisions. Consequently, measures such as the long term residence directive or the family reunion directive do not apply, and thus would not be part of the process of

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<sup>7</sup> For further explanation and examples see Catherine Barnard (2016) 'EU Referendum Position Paper 2 - Free movement of persons and the single market', available at <http://www.ilpa.org.uk/resources.php/32123/eu-referendum-position-paper-2-free-movement-of-persons-and-the-single-market> pp 6 -7.

incorporating EU law *pro tem* into national law under the proposed legislation repealing the European Communities Act 1972, although the existing EU measures on free movement will be.

iii) In the immediate aftermath of a UK withdrawal from the EU, unless otherwise planned for, the status of EU citizens and their families living in Scotland will be uncertain, although these matters are likely to be regulated by both the withdrawal agreement under Article 50 TEU and the repeal measures referred to above. Uncertainty would extend to EU citizens who are working in Scotland on the basis of EU law (along with their family members) as well as families who comprise a combination of UK nationals and EU citizens, who have lived together, worked and attended school on the basis of EU law. Parents (especially mothers) in particular may find themselves in a precarious legal status if they have not always satisfied the economic activity threshold implicit in EU free movement law due to child care responsibilities although they have hitherto been able to reside on the basis of being an EU citizen or the family member of an EU citizen. They may suffer a detriment if, post withdrawal, assessments are done on an individual basis.

iv) In more abstract terms the loss of membership of the EU will mean the automatic loss of EU citizenship status for people in Scotland who are UK nationals. This brings with it a sense of social belonging and identity which many people have come to recognise.

**The relevant EU legislation** is the Treaty on the Functioning of the Europe Union, Directive 2004/38/EC (the 'Citizens' Rights Directive' or Free Movement Directive), Regulation 883/2004 on the coordination of social security (and Implementing Regulation 987/2009 implementing provisions of the coordination rule. The equivalent provisions before 1 May 2010 were Regulation 1408/71 and Regulation 574/72). In addition, there is Regulation (EU) 492/2011 on the free movement of workers and the case law of the Court of Justice of the EU. The European Convention on Human Rights is also important as it can provide a 'floor' of EU fundamental rights which has applied in family life cases for example and effective judicial protection, and may become increasingly significant after Brexit.

The matter of immigration and therefore EU free movement **is a reserved area**. The relevant UK legislation is the Immigration (European Economic Area) Regulations 2004.

**Other legal sources?** The system of free movement and residence for EU citizens is unique to the EU/EEA. However, some have argued that the right to free movement is an international human right. For example, in 'the UN International Covenant on Civil and Political Rights (ICCPR), free movement is provided for in Article 12, which concerns free movement within states and also between them (within limits of public policy). The United Kingdom has ratified the ICCPR and is bound on the plane of international law, yet has not sought to transpose it into domestic law so the provisions do not currently have direct effect and are not justiciable before domestic courts. There are analogous provisions in the ECHR; the 4<sup>th</sup> and (Article 1 of the) 7<sup>th</sup> Protocols of the European Convention on Human Rights although the UK is not bound by either)<sup>8</sup>.

### **EU political rights**

One area where the right to equal treatment has been given specific effect by the treaties concerns the rights of EU citizens resident in the UK to enjoy certain political rights under EU law. These

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<sup>8</sup> Adrian Berry (2016) 'Free Movement as a Human Right: the forgotten context in the EU debate' available at <http://nationality-migration-blog.tumblr.com/post/149718942907/free-movement-as-a-human-right-the-forgotten>

include the rights to vote and to stand for election in local elections and European Parliament elections, under the same conditions as nationals. While it can be anticipated that the right to participate in European Parliament elections will fall after withdrawal of the UK (although EU citizens resident in the UK will still be able to vote in EP elections if their national law allows for out of country voting and in particular voting when a person resides outside the EU), more complexities arise in relation to local electoral rights.

It may reasonably be anticipated that these rights, under the Local Elections Directive,<sup>9</sup> will be conserved pro tem after withdrawal, while Parliament contemplates whether they should be retained. The matter is complicated by the fact that in the 1990s the UK chose to 'upgrade' the EU law rights by giving EU citizens the right to vote in the elections to the devolved assemblies and parliaments, as well as most of the referendums that underpinned the creation of these bodies. This upgrade process to continued by the Scottish Parliament when it chose to incorporate EU citizens into the franchise for the Scottish Independence Referendum of 2014. Notably, of course, EU citizens were not included in the franchise for the EU Referendum of 2016, and this has given rise to a considerable level of unhappiness about the anti-integration effects of such a decision.

This is an area where, if the Westminster Parliament chooses to withdraw the electoral rights of EU citizens no longer protected by EU law in either Scottish local elections or Scottish Parliament elections, there may be considerable friction between the Westminster and Holyrood political authorities. While these matters are currently regulated via reserved powers and a s.30 order was needed to allow the Scottish Parliament to legislate for the franchise for the independence referendum and to lower the voting age in SP elections to 16,<sup>10</sup> franchise matters are now being devolved to Holyrood under s.3 of the Scotland Act 2016.

Ensuring that the rights of EU citizens to vote in Scottish Parliament elections could be one way in which Scotland could clearly distinguish itself from the rest of the UK in terms of indicating a positive welcome to EU citizens after withdrawal.

### **EU immigration law and policy**

The EU has the competence to lay down conditions governing entry into and legal residence in Member States for third country nationals although Member States retain the right to determine admission rates for people coming from third countries to seek work. The UK has opted out of all of these measures, with the exception of certain measures relating to control of those who enter without leave, and so the rights which have developed under EU law have no impact in the UK. Withdrawal of the UK will not affect this position. However, EU immigration law could become applicable to UK citizens living in the EU if no other free movement arrangement is arrived at between the UK and the EU. For this reason and limits of space and focus, EU immigration law is mentioned here but it is not discussed further in this paper.

The package of EU immigration legislation is presented as an Annex to this paper, the UK's opt out means they do not have effect in Scotland or rUK.

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<sup>9</sup> Directive 94/80, OJ L 368, 31.12.1994, p. 38–47.

<sup>10</sup> Considerations related to the balance of powers between the Scottish Parliament and the Westminster Parliament in relation to franchise matters are well covered in a SPICE briefing note related to the lowering of the voting age to 16: [http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB\\_15-21\\_Scottish\\_Elections\\_Reduction\\_of\\_Voting\\_Age\\_Bill.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-21_Scottish_Elections_Reduction_of_Voting_Age_Bill.pdf).

**2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.**

The public benefit of EU free movement law is illustrated through the following case studies<sup>11</sup>.

EU free movement law case study 1

A family in Aberdeen have been considering the different ways their lives would be affected when the UK withdraws from the EU. The grandparents are concerned about the trips they make to Lanzarote twice a year. They wonder if they will have to get visas or visa waivers, whether it will become more expensive and whether, in their old age, it will become more risky to go if they are no longer free to access emergency Spanish health care whilst they are there.

In Aberdeen the mother and father own a medium sized fish processing factory. They say that they pay around £1.5 million for labour costs annually. At the present time, this comes 'from the continent' and all of the permanent staff are Polish. They do not see how they will find the workforce that they need without recruiting from abroad.

After completing her degree at Aberdeen University, inspired by her ERASMUS exchange to Germany and keen to be reunited with her German boyfriend, the daughter has applied for a job at a Frankfurt bank. She has progressed to the third round of interviews but she is concerned that without guaranteed EU citizenship it may be more complicated for the bank to hire her.

EU free movement law case study 2

A small business set up to advise and facilitate other small business opening up in Scotland is owned and run by a Dutch woman and her American husband. They live and work in Scotland on the basis of their EU free movement rights to reside and work, including to bring family with you irrespective of whether they are EU citizens.

Since starting their business they have helped over 300 small businesses start up in Scotland. They have had a son, who is now in primary school. As well as running the company, the American husband has taken a job with a Scottish business consultancy supporting small businesses in Scotland who want to expand to the EU and North America. He has been able to take up this employment simply and without delay as the spouse of an EU citizen on the basis of EU free movement law.

After the withdrawal of the UK from the EU they are unsure about whether they will be able to live, work and run their business in Scotland and whether their son will have the same access to school, university and opportunities in the future that he currently does under EU free movement law.

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<sup>11</sup> Catherine Barnard has a number of further case studies that illustrate free movement in Catherine Barnard (2016) 'EU Referendum Position Paper 2 - Free movement of persons and the single market', available at <http://www.ilpa.org.uk/resources.php/32123/eu-referendum-position-paper-2-free-movement-of-persons-and-the-single-market> p3, p 5 and p 6.

#### EU free movement case study 3

A Glaswegian family comprises a Scottish father and German mother. They have lived in Glasgow for 13 years. Together they have one son, who is a dual UK and German national and one daughter from the father's previous marriage, who is a UK national. The German mother had been residing here on the basis of her EU citizenship right to reside and work in Scotland.

They are now concerned as a family about what her immigration status will be when the UK withdraws from the EU and whether she will be able to apply for new jobs or social and tax benefits on an equal basis any longer. They are considering moving the family to Austria where they can continue to enjoy EU free movement rights into the future however, the daughter has only UK nationality and will lose her EU citizenship after the UK withdrawal from the EU and so they are unsure about the best option for their family remaining as one unit.

#### EU free movement law case study 4

A world renowned scientist who has for the last 10 years been on a research funded stay at an American university has recently re-considered her proposed plans to return to Scotland to continue her research. She cites the UK's withdrawal from the EU as the reason for not re-locating to Scotland.

She explains that success in world class scientific research and innovation is the combination of the access to EU research grants and the ability to recruit her research team from as wide a field as possible, bringing the best talent into her team and thereby raising the overall standards of the work. She is concerned that without the benefit of EU free movement rights to reside and work in Scotland, the delay, difficulty and expense presented in gathering the right people is a barrier and disincentive to carrying out world leading science research in Scotland.

### **3. What are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).**

**How might this be found out and explored further (contacts in Brussels/Strasbourg?)**

#### EU free movement law

The future development of EU free movement law appears, at the moment, to have two sides. On the one hand, there have been some restrictive approaches to non-economically active EU citizens' access to social assistance in host Member States and David Cameron's 'deal' negotiated at the Council before the EU referendum result suggested that there was some political sympathy with this and other aspects that are politically sensitive for Member States such as the deportation of EU

citizens who have committed a criminal offence and the combatting of so-called 'sham marriages'. It is therefore possible that continuing Member States may pursue some of these issues and that the free movement provisions may in the future become more specific and perhaps restrictive on these points. Changes would nevertheless need to be in compliance with the EU law rule of non-discrimination on grounds of nationality and legal safeguards, including proportionality.

On the other side, Directive 2004/38/EC, the Citizens Rights Directive, sets out that the direction of travel for free movement rights is towards enhancement. Currently the right to equality is on the grounds of nationality only but other areas of EU law such as employment law and the Charter of Fundamental Rights prohibit discrimination on the grounds beyond nationality including for example gender and sexual orientation amongst others. The future may see the free movement provisions evolving to come into in line with these protections. For example, at the time of drafting the Citizen's Rights Directive, the recognition of same sex spouses as family members and therefore beneficiaries of rights, where the host Member State recognises same sex partnerships, was felt to be a progressive inclusion. However in light of the Charter of Fundamental Rights prohibition on discrimination on the grounds of sexual orientation and case law at the European Court of Human Rights (*Oliari v Italy* (Application Nos 18766/11 and 36030/11))<sup>12</sup> the requirement of home state regulation would appear outdated and the legal obligation to replicate rights of opposite sex marriages appears to be developing, however the CJEU has not yet applied the Charter in this manner and the political context currently is unlikely to progress this in the short term<sup>13</sup>. Furthermore, recent case law at the CJEU has highlighted the difficulty that the operation of some of the provisions present to women, given that there is no mention in the Directive of how maternity leave affects worker status and therefore women's ability to maintain their right of residence and right to equal treatment during the period of pregnancy and maternity leave (*C-507/12 Jessy Saint Prix v Secretary of State for Work and Pensions*, 19 June 2014). This seems quite out of step with the advances in gender equality that have been made in EU employment law and it seems prudent to consider the development of the free movement provisions in this light.

**4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?) Do you have suggestions?**

**You may wish to consider: a) current devolved position;**

EU free movement law

'In terms of the current devolution settlement immigration control is a matter reserved to Westminster. This means that input from the Scottish Government and Parliament into negotiations

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<sup>12</sup> The judgment of the European Court of Human Rights in *Oliari* suggests that States may have a 'positive obligation to ensure...a specific legal framework providing for the recognition and protection of...same-sex unions.' Para 185, *Oliari v Italy* (Application Nos 18766/11 and 36030/11) cited in Justin Borg Barthet, 'Jurisdiction in matrimonial matters - Reflections for the review of the Brussels IIa Regulation' p36 available at [https://pure.abdn.ac.uk:8443/ws/files/68850287/IPOL\\_STU\\_2016\\_571361\\_EN.pdf](https://pure.abdn.ac.uk:8443/ws/files/68850287/IPOL_STU_2016_571361_EN.pdf)

<sup>13</sup> For further discussion see Justin Borg Barthet, 'Jurisdiction in matrimonial matters - Reflections for the review of the Brussels IIa Regulation', pp36-37 available at [https://pure.abdn.ac.uk:8443/ws/files/68850287/IPOL\\_STU\\_2016\\_571361\\_EN.pdf](https://pure.abdn.ac.uk:8443/ws/files/68850287/IPOL_STU_2016_571361_EN.pdf)

on EU citizenship between the UK and the EU, and internally within the UK, is ultimately at the gift of the UK Government.

The UK Government's recent interpretations of the reserved purpose of immigration control have been very broad: e.g. the Immigration Act 2016 saw incursions into areas of law usually regarded as devolved (such as housing) which were not deemed to require the Scottish Parliament's legislative consent, on the grounds that the main purpose of the legislation was reserved.

The scope for a differential settlement in Scotland to enable, for instance, a more generous or protective position for EU citizens and EEA nationals in Scotland post withdrawal for the UK is therefore limited. However, there are historical examples of political cooperation leading to Westminster-approved differential immigration policy in Scotland, taking account of devolved matters that overlap with immigration issues (eg health and education provision for asylum seekers and refugees) and different economic/job market conditions (eg post study work visas and shortage occupation lists)(cf Sarah Kyambi paper and Scottish govt inquiry into post study work)<sup>14</sup>.

It may be possible to maintain some rights for EU citizens in Scotland under the current devolution settlement where they are within the competence of the Scottish Parliament. For example, EU citizens have the right to vote in Scottish Parliament and Local Government elections, both of which are now matters within devolved competence. Accordingly, the Scottish Parliament could choose to maintain the voting rights of resident EU citizens. Secondly, EU citizens' access to services in Scotland could be protected by ensuring that legislation in this area is clearly understood to be either within the powers of the Scottish Parliament or, if introduced at Westminster, to require the legislative consent of the Scottish Parliament prior to enactment. The Equality Act 2010 and protection from discrimination on the grounds of nationality may offer a relevant backstop that might protect people's vested rights. Ongoing political and inter-governmental cooperation between Holyrood and Westminster would be needed to achieve this.

The UK government has explained that Parliament will be asked to enact legislation to repeal the European Communities Act 1972 and to replace it with a new piece of primary legislation which will keep all EU law in force until a decision is taken on when and how to amend or repeal it. This will temporarily protect the status of EU citizens living in the UK, however if Scotland wishes to continue to protect the residence rights of EU citizens living in Scotland following future changes made at Westminster it will require express legal change and the further devolution of powers to Scotland to manage it.

**b) with further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader);**

EU free movement law

'Further devolution of power, so that immigration control for EU free movement comes within the legislative competence of the Scottish Parliament, could address Scotland's demographic and economic needs, as well as clarifying in law the scope for the Scottish Parliament and Government to

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<sup>14</sup> These comments were originally made as part of evidence submitted by Sarah Craig, Maria Fletcher and Nina Miller Westoby to the Scottish Parliament call for evidence 'European and External Relations Committee. Written Call for Evidence – Scotland's relationship with the EU: [http://www.parliament.scot/Inquiries/Written\\_Call\\_for\\_Evidence\\_-\\_FINAL\\_VERSION.pdf](http://www.parliament.scot/Inquiries/Written_Call_for_Evidence_-_FINAL_VERSION.pdf) on file with the authors.

continue to protect the accrued rights of EU citizens and EU nationals in Scotland. This would require amendment to the Scotland Acts (including the Scotland Act 1998 reservation on immigration control), as well as political commitment and reciprocity from both sides of the border'<sup>15</sup>. A practical solution to the challenge of having continued EU free movement in only Scotland and not the rest of the UK may be more plausible than at first blush. Increasingly immigration control is taking place within the UK, in situ, for example by landlords obliged to confirm residence status before renting property, rather than traditional immigration control at the border, and this may be a means in which a differentiated immigration approach is developed. An example that has been mooted by commentators<sup>16</sup> proposes that the Scottish Parliament become responsible for the issue of National Insurance numbers and thereby develop a system where National Insurance numbers are granted to EU and EEA citizens which are only valid in Scotland. Further, 'citizens on the electoral roll in Scotland could be granted documents additional to their passports which could serve to secure them free movement in the rest of the European Union'<sup>17</sup>.

### **c) as an independent nation.**

#### EU free movement law

'Full independence would allow Scotland to explore a range of options which would enable the retention of free movement rights. Firstly, Scotland could seek full EU membership which would mean retaining EU citizenship and all of the free movement rights as well as being included in any future developments and the ability (as part of the legislative process) to influence such developments. Border-related issues with the rest of the UK (non –EU state) would require addressing. Alternatively, Scotland could seek membership of the EEA. The EEA adopts EU legislation on free movement but EEA states do not have a vote in the legislative process. Lastly, a unique bi-lateral relationship between Scotland and the EU could perhaps be developed which could be designed so as to incorporate EU free movement rights. Both of these latter two options may also be open to the UK as a whole'<sup>18</sup>.

Should independence occur after the UK has left the EU, and thus the question of a transitional period for Scotland before full membership arises, then provisions of the ECHR on non-discrimination and family life might be useful for maintaining the vested rights of EU citizens

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<sup>15</sup>These comments were originally made as part of evidence submitted by Sarah Craig, Maria Fletcher and Nina Miller Westoby to the Scottish Parliament call for evidence 'European and External Relations Committee. Written Call for Evidence – Scotland's relationship with the EU: [http://www.parliament.scot/Inquiries/Written\\_Call\\_for\\_Evidence\\_-\\_FINAL\\_VERSION.pdf](http://www.parliament.scot/Inquiries/Written_Call_for_Evidence_-_FINAL_VERSION.pdf) on file with the authors.

<sup>16</sup> D. Chalmers and A. Mahon (2016) 'Getting out quick and playing the long game: a three-step plan for a rapid Brexit' available at: <http://blogs.lse.ac.uk/brexit/2016/07/26/getting-out-quick-and-playing-the-long-game-a-three-step-plan-for-a-rapid-brexit/>

<sup>17</sup> D. Chalmers and A. Mahon (2016) 'Getting out quick and playing the long game: a three-step plan for a rapid Brexit', available at: <http://blogs.lse.ac.uk/brexit/2016/07/26/getting-out-quick-and-playing-the-long-game-a-three-step-plan-for-a-rapid-brexit/>

<sup>18</sup> These comments were originally made as part of evidence submitted by Sarah Craig, Maria Fletcher and Nina Miller Westoby to the Scottish Parliament call for evidence 'European and External Relations Committee. Written Call for Evidence – Scotland's relationship with the EU: [http://www.parliament.scot/Inquiries/Written\\_Call\\_for\\_Evidence\\_-\\_FINAL\\_VERSION.pdf](http://www.parliament.scot/Inquiries/Written_Call_for_Evidence_-_FINAL_VERSION.pdf) on file with the authors.

resident in Scotland. This would seem to follow from the *Kuric* case of the European Court of Human Rights, on the rights of the so-called Erased in Slovenia.<sup>19</sup>

### EU political rights

One big question for an independent Scotland will be whether or not it would continue to permit EU citizens to vote in Scottish (national) parliament elections. This would seem to be consistent with the pre-independence position, but would require Scotland to adopt a position in relation to immigrants' political rights that would be distinctly progressive compared to the general approach in most European states. Only New Zealand and Uruguay, internationally, currently permit widespread voting for non-nationals in national elections, and a proposition to this effect in Luxembourg was recently heavily defeated in a national referendum (of the existing electors). However, it is worth considering the relationship between the right to vote and any possible 'citizenship offer' that an independent Scotland might make to resident EU citizens (or other non-nationals) in the event of independence, so far it is might respect their long term residence rights as equivalent to citizenship.

### EU immigration law and policy

If an independent Scotland became a Member State of the EU, Scotland could potentially, depending on the terms of its membership, decide whether to opt-in to EU immigration law.

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<sup>19</sup> *Kuric and others v. Slovenia*, Application no. 26828/06, Council of Europe: European Court of Human Rights, 26 June 2012, available at: <http://www.refworld.org/docid/4fe9c88c2.html> .

## Annex

### EU Immigration law – legislative package. They do not have effect in the UK.

Directive number and name	Description
<i>Directive 2009/50/EC the 'Blue Card Directive'</i>	Sets out the conditions of entry and residence of highly qualified third country nationals for the purpose of employment and creates the 'EU blue card', a fast track procedure for issuing special residence and work permits to such third country nationals.
<i>Directive 2011/98/EU the 'Single Permit Directive'</i>	Sets out a common, simplified procedure for third country nationals applying for a residence and work permit in a Member State, as well as a common set of rights to be granted to regular immigrants.
<i>Directive 2014/36/EU, the 'Seasonal Workers Directive'</i>	Sets out the conditions of entry and residence of third-country nationals for the purpose of employment as seasonal workers.
<i>Directive 2014/66/EU the 'Intra-corporate Transfer Directive' (in force 29 November 2016)</i>	On conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer making it easier for businesses and multinational corporations to temporarily relocate their managers, specialists and trainee employees to their branches or subsidiaries located in the European Union.
<i>Directive 2016/801/EU the 'Directive on intra EU mobility rights for scientists and students,'</i>	Consolidates minimum standards on the conditions of entry and residence of third country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.
<i>Directive 2003/109/EC the 'Long Term Residents Directive'</i>	Concerns the status of third country nationals who are long-term residents.
<i>Directive 2003/86/EC the 'Family Reunification Directive'</i>	Sets out provisions on the right of third country nationals resident in the EU to family reunification.
<i>Directive 2008/115/EC the 'Return Directive'</i>	Sets out common EU standards and procedures for returning irregularly residence third country nationals.
<i>Directive 2009/52/EC the 'Employers Sanctions Directive'</i>	Specifies sanctions and measures to be applied in Member States against employers who infringe the ban on employing illegally resident third-country nationals.