

# SURVEYING MIGRATION POLICY AND PRACTICE IN THE INDEPENDENCE REFERENDUM AND BEYOND

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## Introduction

The Scottish Government's approach to immigration issues was portrayed during the independence referendum debate as valuing the contribution of migrants in a way which contrasted with the anti-migrant approach of the UK Government.<sup>1</sup> The question of how much divergence from the immigration policies of the rest of the UK an independent Scotland might have pursued did surface in the context of discussions about EU membership, but it did not feature strongly. But when the Scottish Government's approach is looked at in detail, it reveals pragmatism, and a preparedness to assume constraints on its pursuit of a separate approach to migration, in order to achieve its aspirations to participate in the Common Travel Area and the European Union. In these areas, the emphasis was on agreement, rather than on a separate approach. Reflecting now on the post-referendum landscape, a number of the divergences in migration policy put forward by the Scottish Government can be seen as continuations of divergences with roots which were traceable back to the early years of devolution. Some could be traced back to initiatives which, since immigration is reserved to Westminster, grew from co-operation between the Scottish Executive and the UK Government. This article identifies some of the variations in practice, and contributions in law and policy, which have featured in Scotland since devolution, and draws attention to the connections between the divergences which emerged following devolution, and those which formed part of independence proposals. Its aim is to add to our collective understanding of the kinds of differences in immigration and asylum law, and contributions to policy and practice which have been pursued, and which could still be pursued. It concludes by considering the impacts which UK immigration law continues to have in Scotland, and how these might interact with proposals for constitutional change.

## *Scotland's Future*—the immigration proposals

The approach to managed migration and asylum taken by the Scottish Government's White Paper, *Scotland's Future*, issued in November 2013,

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<sup>1</sup> See Severin Carrell, "Scottish independence: plans to loosen immigration controls 'need debate'" (April 24, 2014), <http://www.theguardian.com/politics/2014/apr/24/scottish-independence-loosen-immigration-debate> [Accessed April 20, 2015].

contrasted with current UK policy in respect of its proposal to set lower minimum salary thresholds for non-EU migrants, better aligned with Scotland's average incomes, rather than the higher UK averages.<sup>2</sup> Secondly, the resurrection of the Fresh Talent Initiative through the introduction of a post-study work visa, would have addressed the needs of Scotland's high number of international students, and of the universities and colleges which benefit from their fees. Its plans to minimise detention and close Dungavel Immigration Removal Centre at the same time as expansion of the immigration detention estate was the order of the day across the UK,<sup>3</sup> and to develop the Scottish Government's existing approach of integrating asylum seekers from the day they arrive also stood in contrast to current UK policy, which is that asylum seekers should not receive "mainstream" social security benefits until refugee status is given.<sup>4</sup> The main regional variation in current UK immigration policy can be found in the separate shortage occupation list for Scotland,<sup>5</sup> but the White Paper proposals would have extended regional approaches by giving incentives to live and work in areas of low population.<sup>6</sup>

Other proposals were broadly similar to UK ones, including the targeted points based system, and the attitude taken to general migration flows between the UK and Ireland and across Europe. Here, although membership of the European Union was a key aim, the Scottish Government also wished to maintain, as far as possible, existing relationships with the rest of the UK and Ireland, including participation in the Common Travel Area.<sup>7</sup> The Common Travel Area is a set of arrangements which permit travel across England, Wales, Scotland and Ireland without passport controls.<sup>8</sup> Like the EU's Schengen system, the Common Travel Area operates as a free travel area, but it is separate from Schengen, and it is not possible to participate in both regimes at the same time.<sup>9</sup> The Scottish Government's desire to be part of the Common Travel Area showed that it was willing to prioritise its existing borderless travel arrangements in the Common Travel Area over those prescribed by Schengen, even though this would have complicated its

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<sup>2</sup> Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (Scottish Government, 2013), pp.267–271.

<sup>3</sup> Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, p.270.

<sup>4</sup> Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, p.426, question 165.

<sup>5</sup> See Migration Advisory Committee, *Call for Evidence: Partial Review of the Shortage Occupation Lists for the UK and for Scotland* (Migration Advisory Committee, 2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/359315/Call\\_for\\_evidence\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/359315/Call_for_evidence_FINAL.pdf) [Accessed April 20, 2015].

<sup>6</sup> Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, p.270.

<sup>7</sup> Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, pp.223–224.

<sup>8</sup> Bernard Ryan, "At the Borders of Sovereignty: Nationality and Immigration Policy in an Independent Scotland" (2014) 28(2) J.I.A.N.L. 146.

<sup>9</sup> HM Government, *Scotland Analysis: Borders and Citizenship* (The Stationery Office, 2014), Cm.8726, paras 2.21–2.24.

EU membership negotiations more than the White Paper acknowledged.<sup>10</sup> Their approach, since it accepted the need for an independent Scotland to get on with its immediate neighbours, was in that sense pragmatic. But it could also be seen as naive since it assumed that, in the event of a Yes vote, the UK Government would have been willing to assist an independent Scotland to negotiate with the EU on achieving similar terms on Schengen to the complex package of Area of Freedom Security and Justice “opt ins” (to measures which control and deter irregular movements) and “opt outs” (of regular migration measures) which successive UK leaders had negotiated.<sup>11</sup> The UK’s assistance would have been extremely helpful to Scotland, but it would also have served the UK’s own interests as a means of preserving the existing Schengen opt-outs package which Ireland, in common with the UK, had achieved,<sup>12</sup> but which could have been more difficult for Scotland to negotiate under the EU’s post-Lisbon Treaty arrangements.<sup>13</sup> Such assistance would have involved the UK Government not only accepting the idea of independence, but also being prepared to collaborate on the practicalities of living alongside an independent Scotland on these islands. In return, we can speculate that Scotland would have adopted immigration policies that did not differ significantly from those pursued by the UK Government. This does not mean that divergence would have been impossible, and there were signs in the White Paper that human rights and equality would have found a more receptive audience.<sup>14</sup> Some of these signs could be traced back to the early years of devolution, and indicate the divergences from UK-wide policy which the future could also bring.

### Divergences in the devolution years

Although asylum and immigration lie outside the legislative competence of the Scottish Parliament<sup>15</sup> some migration related policies and practices which

<sup>10</sup> Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland*, p.224; N. Burrows “Scotland and the EU” in Gerry Hassan and James Mitchell (eds), *After Independence* (Edinburgh: Luath Press, 2013).

<sup>11</sup> The chance to opt in to the European Arrest Warrant, recently taken up by the current Home Secretary, arose from these negotiations: see Steve Peers, “The UK opts back in to the European Arrest Warrant—and other EU criminal law” (December 1, 2014), <http://eulawanalysis.blogspot.co.uk/2014/12/the-uk-opts-back-in-to-european-arrest.html> [Accessed April 20, 2015].

<sup>12</sup> While the UK Government accepted that an independent Scotland would be able to negotiate membership of the CTA, they appeared to rule out diverging immigration policies; HM Government, *Scotland Analysis Borders and Citizenship*, para.2.23 “The CTA, like all borderless travel arrangements, is only effective as long as members do not pursue policies that differ significantly from, or undermine, the policies of other members.”

<sup>13</sup> Burrows, “Scotland and the EU” in *After Independence* (2013).

<sup>14</sup> Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland*, pp.267–271, e.g. criticism of UK Government “Go Home” campaign at p.267.

<sup>15</sup> Scotland Act 1998 s.30 and Sch.5 Head B6: “Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents.”

diverged from those of the rest of the UK were developed during the first decade of devolution, as illustrated by the integration of asylum seekers and by the Fresh Talent Initiative.

### **Asylum dispersal and integration**

The Immigration and Asylum Act 1999 introduced dispersal; this was a controversial policy because it latched on to concerns about migration expressed in the south east of England in a way which foreshadowed the dog whistle approach now characterising UK migration and asylum policy. Dispersal involved accommodating asylum seekers on a “no choice” basis while their claims were being processed.<sup>16</sup> In Glasgow, the City Council contracted with the Home Office to implement the policy of providing dispersal accommodation, and Glasgow housed the largest concentration of asylum seekers in the UK.<sup>17</sup> Dispersal showed firstly that, where the provision of housing arose from asylum policy, the Home Office could control its provision in Scotland, notwithstanding the devolution of responsibility for housing policy to the Scottish Parliament.<sup>18</sup> Secondly, it revealed that the context of devolution could provide a useful starting point for diverging policies for migrants, as long as they were consistent with Home Office policy. Policy on the integration of asylum seekers is a case in point. The initial experience of dispersal had tended to reinforce stereotypes about unwanted migrants and disaffected locals in hard to let areas.<sup>19</sup> At the same time, a less well publicised, but precarious solidarity was emerging between some in the host communities, who were all too familiar with stigmatisation, and their new neighbours. Effort was needed to turn the common experience of exclusion, which contributed to the daily grind of both groups, into a mutual recognition of their common resilience, and support in the form of good local services was essential.<sup>20</sup> It came as no surprise when the Scottish Executive and Parliament were called on to respond to the needs of these communities, since housing, education and other aspects of support (such as child protection) were devolved responsibilities. Creating the circumstances which would encourage refugees who had been dispersed to Glasgow to stay there was also consistent with Home Office policy. So while the divergences from the UK-wide approach, such as on medical and homelessness provision, came incrementally and cautiously, and generally amounted to attempts to “hold the line” of service

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<sup>16</sup> Immigration and Asylum Act 1999 Pt VI.

<sup>17</sup> See Emma Stewart, “UK Dispersal Policy and Onward Migration: Mapping the Current State of Knowledge” (2011) 25(1) *Journal of Refugee Studies* 25, 33.

<sup>18</sup> Immigration and Asylum Act 1999 Pt VI.

<sup>19</sup> Stewart, “UK Dispersal Policy and Onward Migration: Mapping the Current State of Knowledge” (2011) 25(1) *Journal of Refugee Studies* 25.

<sup>20</sup> Stewart, “UK Dispersal Policy and Onward Migration: Mapping the Current State of Knowledge” (2011) 25(1) *Journal of Refugee Studies* 25.

provision where it was being curtailed south of the border,<sup>21</sup> these measures contributed to the establishment of an important principle: the Scottish Executive's policy of integrating asylum seekers from arrival diverged from the UK policy of integration following the later grant of refugee status, and the policy could also be claimed as evidence of adherence to equality and human rights principles.<sup>22</sup>

### **The Fresh Talent Initiative**

The Fresh Talent Initiative involved the Scottish Executive gaining the agreement of the Home Office to a variation in immigration law. Immigration law in the UK relies heavily on delegated legislation, in the form of immigration rules issued under the authority of the Home Secretary, for its content.<sup>23</sup> Here, the Home Secretary was persuaded to vary the immigration rules and allow international students to stay on for two years after their university or college studies had ended to live and work in Scotland. The initiative was short lived because, as Sarah Kyambi observed, the introduction of the points based system removed most of its comparative advantages for Scotland. Consequently, its effectiveness as a tool for addressing Scotland's different demographic needs, and the extent to which other levers might be required to encourage people to stay in Scotland, were not fully explored.<sup>24</sup> But, as with asylum integration policy, the Fresh Talent Initiative demonstrated that devolution could be a means of implementing aspects of a separate Scottish approach to migration policy.

Where differences emerged between practices in Scotland and those south of the border on detention, and on appeals, the need to be aware of the gaps that can emerge alongside such divergences became clear, as discussed next.

### **The detention of migrant children: Not in my back yard?**

At the hard edges of migration policy (detention and removal), the Scottish Executive could do little more than lobby Westminster. The issue of detaining families illustrates this. Dungavel House is currently operated by the GEO Group UK Ltd on behalf of the Home Office, and it remains the only immigration removal centre in Scotland. When it opened in 2001, it expanded considerably the Home Office's scope for using its detention powers.<sup>25</sup>

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<sup>21</sup> Stewart, "UK Dispersal Policy and Onward Migration: Mapping the Current State of Knowledge" (2011) 25(1) *Journal of Refugee Studies* 25, 34.

<sup>22</sup> Minister for Social Justice, *Scottish Refugee Integration Forum Action Plan* (The Stationery Office, 2003).

<sup>23</sup> Immigration Act 1971 s.3.

<sup>24</sup> See discussion in Sarah Kyambi, *Room for Manoeuvre? The options for addressing immigration-policy divergence between Holyrood and Westminster* (Glasgow: Equality and Human Rights Commission Scotland, 2009).

<sup>25</sup> Immigration Act 1971 Sch.2

Following the prolonged detention there of some families, calls were made for an end to the detention of migrant children in Scotland. Notwithstanding its reservation to Westminster, the impact of immigration and asylum law, policy and practice upon the welfare of children and young people was a matter of concern for devolved bodies.<sup>26</sup> The eventual acceptance that Dungavel was not a suitable place for children was a welcome development,<sup>27</sup> but those families in Scotland facing detention now are likely also to face transfer to a centre in England, separating them from their support network and deepening their vulnerability and isolation.<sup>28</sup> And this works vice versa too: the increased capacity in Dungavel opened up the possibility of relocating detainees there from the south, with the corresponding loss of their local support network in England.<sup>29</sup>

### **UK-wide tribunals and the Scottish legal system: Top level divergences?**

The First and Upper tiers of the Tribunals Service Immigration and Asylum Chamber make up the sector of the administrative tribunal system which determines appeals against Home Office refusals of asylum and human rights claims. The Immigration and Asylum Chamber operates in the same way across the UK, but onward appeals, beyond the Upper Tribunal, go to the Court of Session.<sup>30</sup> This provides an appeals structure which aims to produce a common approach, while also recognising the Court of Session's supervisory role in the Scottish legal system.<sup>31</sup> The extent of divergence at onward appeal should not be overstated: legal certainty provides a strong imperative towards a common approach,<sup>32</sup> as does the potential benefit for migrants in Scotland when an important human rights or EU law case succeeds in the UK-wide jurisdiction.<sup>33</sup>

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<sup>26</sup> Commissioner for Children and Young People, *Memorandum by Scotland's Commissioner for Children and Young People to the House of Commons Select Committee on Home Affairs, Fifth Report 2005–06* (The Stationery Office, 2005), <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/775we01.htm> [Accessed May 11, 2015].

<sup>27</sup> Scottish Government, *Cabinet Memo on Asylum Issues* (Scottish Government, 2007), <http://www.scotland.gov.uk/News/News-Extras/asylum-issues> [Accessed April 20, 2015].

<sup>28</sup> Children are still being detained under the UK's immigration powers, four years after undertakings were given to end the practice; see Jonathan Owen, "Immigrant children still being detained, figures show" (January 8, 2015), <http://www.independent.co.uk/news/uk/politics/immigrant-children-still-being-detained-figures-show-9966155.html> [Accessed April 20, 2015].

<sup>29</sup> See <https://www.opendemocracy.net/5050/kate-alexander/like-chicken-surrounded-by-dogs> [Accessed April 20, 2015].

<sup>30</sup> Tribunals Courts and Enforcement Act 2007 s.13.

<sup>31</sup> There is also a final avenue of appeal to the UK's Supreme Court.

<sup>32</sup> The importance of consistency also led to the establishment of a system of country guidance cases, providing factual precedent on country of origin matters in asylum cases. For a full discussion of the issues see Robert Thomas, *Administrative Justice and Asylum Appeals* (Oxford: Hart, 2011), Ch.7, the country guidance concept.

<sup>33</sup> *Re MF (Article 8: New rules: Nigeria)* [2012] UKUT 393 (IAC); *Re Izuazu (Article 8: New rules: Nigeria)* [2013] UKUT 45 (IAC).

However an approach which drew more from traditional principles of procedural fairness was discerned in empirical research in the Court of Session,<sup>34</sup> and in the context of uncertainty about the extent to which the Upper Tribunal's judicial review functions remained subject to the control of the higher courts, the Court of Session was prepared to weigh in behind the retention of their supervisory role.<sup>35</sup> The Inner House also criticised the standard of linguistic analysis evidence presented by the Home Office in asylum appeals, on the grounds of its potential for bias, insisting that the usual procedural standards expected of expert evidence be met.<sup>36</sup> In both cases, the Court of Session's approach was preferred by the Supreme Court<sup>37</sup> to that taken by the Court of Appeal.<sup>38</sup> At other times, it has been necessary to smooth out procedural anomalies which have arisen as a consequence of tribunal reform.<sup>39</sup>

### Divergences and gaps

The time and cost involved in pursuing challenges makes the appeals mechanism a popular target for governmental reform, notwithstanding (or perhaps because of) its importance as a means of protecting human rights.<sup>40</sup> The result is that the story of the tribunals system is one of almost continual reform.<sup>41</sup> Legal aid cutbacks have also targeted this area, but since Scotland has a separate legal aid system,<sup>42</sup> reforms (and their impacts) have varied here.<sup>43</sup>

<sup>34</sup> Sarah Craig, Maria Fletcher and Kay Goodall, *Challenging Asylum and Immigration Tribunal decisions in Scotland: an evaluation of Onward Appeals and Reconsiderations* (Glasgow: University of Glasgow; University of Stirling, 2008), research into onward appeals and reconsideration in immigration cases between 2005 and 2007.

<sup>35</sup> *Eba v Advocate General for Scotland* [2011] UKSC 29; 2012 S.C. (U.K.S.C.) 1; 2011 S.L.T. 768; *R. (on the application of Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 A.C. 663.

<sup>36</sup> *N v Advocate General for Scotland* [2013] CSIH 68; 2013 S.L.T. 1143.

<sup>37</sup> *Eba v Advocate General for Scotland* [2011] UKSC 29; 2012 S.C. (U.K.S.C.) 1; 2011 S.L.T. 768; *N v Advocate General for Scotland* [2014] UKSC 30; 2014 S.C. (U.K.S.C.) 183; 2014 S.L.T. 669.

<sup>38</sup> *R. (on the application of Cart) v Upper Tribunal* [2010] EWCA Civ 859; [2011] Q.B. 120 and *RB (Somalia) v Secretary of State for the Home Department* [2012] EWCA Civ 277.

<sup>39</sup> The "second appeals" test for onward appeals from the Upper Tribunal to the Court of Appeal was introduced in England and Wales by the Tribunals Courts and Enforcement Act 2007 s.13(6). The same test was introduced in Scotland by Rule of the Court of Session 41.57, as amended by Act of Sederunt (Rules of the Court of Session Amendment No.5) (Causes in the Inner House) 2011 (SSI 2011/303).

<sup>40</sup> Thirty per cent of asylum appeals to the First-tier tribunal (Immigration and Asylum Chamber) succeeded in April–June 2014; see Ministry of Justice, *Tribunal statistics quarterly: April to June 2014* (The Stationery Office, 2014), <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2014> [Accessed April 20, 2015].

<sup>41</sup> For an account of this see S. Craig and M. Fletcher "The Supervision of Immigration and Asylum Appeals in the UK—taking stock" (2012) 24(1) I.J.R.L. 60.

<sup>42</sup> See Scottish Legal Aid Board, <http://www.slab.org.uk/about-us/> [Accessed April 20, 2015].

<sup>43</sup> The restrictions on legal aid introduced in England and Wales by the Crime and Courts Act 2013 do not apply in Scotland, but representatives still report that they face difficulties getting paid, particularly where "cross border" issues arise (see evidence submitted to the Smith Commission below).

Where different practices are pursued in Scotland and England, gaps can arise which create particular difficulties as regards access to justice, of which the movement of detained migrants (outlined above) is an example. The gaps in provision and procedural anomalies outlined here are likely to remain a feature of the relationship between the UK-wide and Scottish institutions. While the divergences are not in themselves problematic, their existence means that migrants, and those supporting them, have to remain mindful of the complex institutional landscape affecting them, and aware of the potential for gaps to emerge. These gaps also illustrate the ongoing co-operation which is required between UK-wide and Scottish institutions.<sup>44</sup>

### **The future: The Smith Commission, the Immigration Act 2014 and human rights**

So far, this article has reflected on how the external constraints which the Scottish Government was willing to take on as a result of its participation in the Common Travel Area and the EU would have limited its scope for developing a separate migration policy in an independent Scotland. Looking at the period since devolution, it has considered the impacts felt in Scotland of UK-wide initiatives which have dominated the post-devolution experience. It has also considered how the Scottish legal system interacts with the UK-wide immigration appeals structure. Scotland has experienced some limited divergences in migration law, policy and practice, notwithstanding that immigration is a reserved matter. Where divergence was achieved, it was often in response to the impacts of UK-wide policy, for example in relation to the integration of dispersed asylum seekers, and detention.<sup>45</sup> The Fresh Talent Initiative, by contrast, was a separate initiative rather than a reaction to UK-wide policy. All exemplify a different approach to migration in Scotland. These initiatives, along with the evidence that Scots regard immigration as less of a concern than people in England and Wales do,<sup>46</sup> and that a regional approach to migration would be possible<sup>47</sup> provide a context from which future divergences could draw, whatever the constitutional arrangements might be.

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<sup>44</sup> See Nicola McEwen, "The Problem of Interdependence in the New Devolution Agreement" (Scottish Constitutional Futures Forum, 2014), <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4803/Nicola-McEwen-The-Problem-of-Interdependence-in-the-New-Devolution-Agreement.aspx> [Accessed April 20, 2015].

<sup>45</sup> See also Scottish Commissioner for Young People's evidence to Home Affairs Committee on the impacts of asylum policy on children's rights in Scotland, Commissioner for Children and Young People, *Memorandum by Scotland's Commissioner for Children and Young People to the House of Commons Select Committee on Home Affairs, Fifth Report 2005–06*.

<sup>46</sup> The Migration Observatory, *Report: Immigration and Independence: Public Opinion on Immigration in Scotland in the context of the Referendum Debate* (Oxford: The Migration Observatory at the University of Oxford, 2014).

<sup>47</sup> Robert E. Wright, *Sub-National Immigration Policy: Can it Work in the UK?* (Oxford: The Migration Observatory at the University of Oxford, 2013).



### Smith, Sewel motions and intergovernmental machinery

The impact felt in Scotland of UK-wide immigration laws looks set to be the dominant experience. An obvious early area of concern will be the overlaps between reserved and devolved responsibilities in the Immigration Act 2014. Its provisions requiring landlords to check the immigration status of prospective tenants<sup>48</sup> and limiting the availability of free NHS services to British citizens and settled residents<sup>49</sup> both impact on devolved responsibilities and should have given rise to Sewel motions seeking the legislative consent of the Scottish Parliament.<sup>50</sup> The use of Sewel motions, and the extent to which Westminster continues to legislate in devolved areas, has been a matter of concern since the early years of devolution.<sup>51</sup> The Smith's Commission's proposal that the Sewel convention be given statutory force<sup>52</sup> should help to strengthen it, and address some of these concerns. Improved intergovernmental machinery and formal processes for the Parliaments to hold Government to account, proposed by Smith,<sup>53</sup> could also help. But these mechanisms cannot work in isolation and Smith's recommendations regarding increased public awareness of Scotland's constitutional settlement,<sup>54</sup> must also be a priority, if calls for greater engagement on measures such as those in the Immigration Act are to be effective. Otherwise it will remain an elite conversation.

### Decisions, appeals and human rights

In the area of rights, the issues that have arisen as the Scottish legal system works alongside the UK-wide tribunals system are relevant. If, as the Smith Commission proposes, powers over the management and operation of all reserved tribunals are devolved to the Scottish Parliament,<sup>55</sup> it should be easier

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<sup>48</sup> The sanction is a fine of up to £3,000 (Immigration Act 2014 (c.22) Pt 3, Ch.1, ss.22 and 23). The provisions are not expected to be implemented ahead of the 2015 general election.

<sup>49</sup> Home Office, Immigration Bill: Factsheet: National Health Service (c11.33–34) (The Stationery Office, 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/249315/Factsheet\\_08\\_-\\_Health.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249315/Factsheet_08_-_Health.pdf) [Accessed April 20, 2015].

<sup>50</sup> See Scottish Refugee Council, *Statement of Concern on the impact of Immigration Bill on Scotland's Communities* (Glasgow: Scottish Refugee Council, 2014), [http://www.scottishrefugeecouncil.org.uk/policy\\_and\\_research/responding\\_to\\_policy/policy\\_and\\_research\\_2014](http://www.scottishrefugeecouncil.org.uk/policy_and_research/responding_to_policy/policy_and_research_2014) [Accessed May 11, 2015].

<sup>51</sup> Andrea Page and Alan Batey, "Scotland's Other Parliament: Westminster Legislation about Devolved Matters in Scotland since Devolution", 2002 P.L. 501.

<sup>52</sup> The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Smith Commission, 2014), Heads of Agreement Pillar 1, para.22.

<sup>53</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, Heads of Agreement Pillar 1, paras 28–29.

<sup>54</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, foreword, p.6.

<sup>55</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, Heads of Agreement Pillar 2, paras 63–64; the Special Immigration Appeals Commission (which deals with national security cases) and the Proscribed Organisations Appeals Commission are excepted from this proposal.

in future to manage divergences and anticipate gaps in access to justice that might emerge.

### **Article 8 and Scotland's Future**

One final point on the impact of the Immigration Act 2014 needs to be made. It attempts to constrain how the courts treat the limitation of the state's power to interfere with the right to private and family life in art.8 of the European Convention on Human Rights.<sup>56</sup> The previous attempt to constrain judges' flexibility by specifying the content of art.8 in immigration rules having failed, since the Human Rights Act 1998 still gave them that flexibility,<sup>57</sup> the provision is now to be found in primary legislation. In immigration cases, when considering whether an interference with someone's private life is in pursuit of a legitimate aim, necessary and proportionate, s.19 of the 2014 Act specifies matters to which courts and tribunals must "have regard". These include that it is in the public interest that those seeking immigration status in the UK speak English and are financially independent, and that little weight should be given to family life established while unlawfully resident or when immigration status is "precarious".<sup>58</sup> While these factors are already taken into account by courts, it is not yet clear what impact they will have now that they have become mandatory requirements. The European Court of Human Rights, as the final arbiter of art.8, may be called on to decide, or the courts may take these factors into account, but decide against giving them much weight. The provision is new and such things remain unclear. But s.19, in its desire to limit human rights, stands in clear contrast to the proposals in *Scotland's Future*, which were that human rights should be given greater protection than they currently have.<sup>59</sup> This would not have changed the Immigration Act 2014, and would have raised all sorts of cross-border difficulties, and transitional complications. But such an approach would have given greater flexibility to judges in individual cases, as well as greater clarity that Strasbourg jurisprudence applies. So despite all its difficulties, in this imagined future, giving judges some clarity and flexibility on the application of human rights might still have been a good thing.

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<sup>56</sup> Immigration Act 2014 s.19.

<sup>57</sup> *Re MF (Article 8: New rules: Nigeria)* [2012] UKUT 393 (IAC).

<sup>58</sup> For a fuller discussion see Immigration Law Practitioners Association, *Information Sheet Immigration Act: Article 8* (London: Immigration Law Practitioners Association, 2014), <http://www.ilpa.org.uk> [Accessed April 20, 2015].

<sup>59</sup> The proposal was to give the same level of protection as they have under the Scotland Act 1998, in the reserved areas as well as in the devolved: Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, p.568, question 608.