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BREXIT AND THE IMPLICATIONS FOR SCOTLAND: A WAY FORWARD?

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Introduction

The vote on British exit from the European Union in June 2016 cast several doubts on a wide range of issues for both the United Kingdom and the European Union; from academic research grants, to defence and from legislations to rights of citizens. The four freedoms, which form the foundation, for free movement are now in question in the United Kingdom.

Within the United Kingdom, there are differences in not only opinions about Brexit strategies but also ideology. Scotland's support for remaining in the European Union fuelled a call for a second independence referendum¹ by the minority-led Scottish government and has heightened the already tense political environment within the executive arm of the UK government. While having to deal with Brexit negotiations with the European Union, the UK government also has to address calls for a second Scottish independence, both problems being a direct consequence of the vote to leave the European Union.

While there is a popular and legal backing for the United Kingdom leaving the European Union, the call for a second Scottish independence referendum does not enjoy the same majority support. This leaves a lot of unanswered questions for Scotland, not only in terms of Scotland remaining in the European Union or joining the European Union, in the event of a successful independence referendum in the future, but also in terms economic sustainability, fiscal realities and several other legal issues.

¹ At the time of drafting the abstract for this paper, the Prime Minister had not called a snap election. However, with the result of the snap election, the First Minister of Scotland has changed the position slightly on a second independence referendum.

This paper looks at the migration implications of Brexit for Scotland. It will seek to address the migration issues in Scotland and proffer options on a way forward for Scotland and the United Kingdom. The paper will examine relevant legislations and recent literature on the subject. Finally, this paper will proffer mechanisms for solving potential issues from the migration implications of Brexit for Scotland.

This paper is divided into four parts. The first part presents an abstract of the work. Part two of the work briefly discusses the origin of the European Union and UK's entry despite refusal by existing members. It then looks at the growing discontent by the UK with some aspects of the EU's core principles. Part three addresses Scotland's immigration needs through the lens of its population numbers. It also considers the migration implications of Brexit for Scotland. The final part of the work considers the immigration options for Scotland.

The European Union

The European Union began as the European Economic Community ("the EEC"). The EEC was one of the three associations² set up to foster economic and political cooperation amongst member countries and using the two world wars as a catalyst, the European Economic Community was formed with the aim of ending *the frequent and bloody wars between neighbours*³ through the **EEC Treaty** or the **Treaty of Rome** in 1957, with mainly economic objectives. Economic interdependence was seen as a means to promote peaceful cooperation⁴. The predecessor to the European Union was the European Coal and Steel Community, which was created through the **Treaty of Paris** in 1951 with the main aim of removing trade barriers to trade in coal and steel and to manage common policies amongst member states⁵. The success of the ECSC in revitalising the economies of member states led to the formation of not just the European Atomic Energy Community in 1957 but also the European Economic Community (EEC).

² Other associations were EURATOM and the ECSC

³ See The History of the European Union. Available at; <https://europa.eu/european-union/about-eu/history_en> (accessed 14 August 2017)

⁴ Gina Clayton, *Textbook on Immigration and Asylum Law* (6th edn, OUP 2014)

⁵ Christian Dadomo, Noelle Quenivet, *European Union Law* (2nd edn, Hall & Scott Publishing 2017)

On 1 January 1973, the United Kingdom became a member of the European Economic Community⁶ and as a result of the UK's membership of the EEC, was a member of other associated organisations in Europe. To legally enable membership of the EEC, the United Kingdom adopted EEC law as part of domestic law through the enactment of the **European Communities Act 1972**. The 1972 Act, provided amongst other things that, rights, duties and rules derived from EU law should apply as part of UK domestic law and for a new constitutional process for making law in the UK⁷. Over the next 40 years, the EEC expanded in membership and in competency. The EEC was renamed the European Community ("the EC") in 1993 through the **Treaty of Maastricht** or the **Treaty on European Union** ("the TEU") 1992. The Treaty contained the four freedoms, which the EU was built, the free movement of goods, persons, services and capital. The TEU established a political union, common citizenship for nationals, a social charter, a monetary union, a central bank and a common currency known as the euro.

The UK was not always in full support of the EU's expansion in membership and competencies. The ratification of the Treaty of Maastricht in 1992 by the UK Parliament almost brought down the UK Government and as a result, the UK negotiated agreements requiring certain issues appended in protocols⁸ or that opt outs were granted specifically. This demonstrated the dissatisfaction by the UK in the changing nature of the European Union, which marked a remarkable difference from the EEC of 1973. It could also be argued that the method allowed for more cooperation amongst EU States and gave other member states the right to opt out of participation in some policies.⁹

There was growing discontent by the United Kingdom for some aspects of the European Union particularly in relation to one of the four freedoms which the EU was founded on. The growing concerns over EU migration and diminishing parliamentary sovereignty by the UK over domestic issues led David Cameron, the then Prime Minister, in 2015, to seek reforms in four areas¹⁰. Immigration was and is still seen as a key concern of many people in the UK and as observed by the UK Government, "*...in the last decade or so, we have seen*

⁶ After two rejected membership applications in 1961 and 1967.

⁷ Scott Blair, ' "Brexit" in the Supreme Court (Part 1)' [2017] S.H.R.J. 3

⁸ See; Protocol No 21 on the Application of Certain Aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and Ireland and; Protocol No 30 on the Application of the Charter of Fundamental Rights of the European to Poland and to the United Kingdom.

⁹ For instance, the Treaty of Amsterdam 1997 incorporated the Schengen Agreements which the United Kingdom is not a part of.

¹⁰ The areas include; economic governance, competitiveness sovereignty and immigration.

record levels of long term net migration in the UK, and that sheer volume has given rise to public concern about pressure on public services, like schools and our infrastructure, especially housing, as well as placing downward pressure on wages for people on the lowest incomes. The public must have confidence in our ability to control immigration. It is simply not possible to control immigration overall when there is unlimited free movement of people to the UK from the EU.”¹¹

The desire to assure concerned voters that immigration will be effectively managed and that other key concerns will be alleviated, led the then Prime Minister; David Cameron, on a diplomatic ‘voyage’ within some EU member states with the aim of seeking support for reforms sought¹². It was hoped that the reforms would be achieved. With the level of concessions made by the EU, the ‘voyage’ was perceived to be fruitful, as proposals for change were agreed across the four areas of concern; immigration, sovereignty, euro governance and competitiveness.¹³ The perceived confidence of the response from the diplomatic ‘voyage’ led to the referendum on the UK’s membership of the EU. Despite the domestic and international support for a remain campaign, the result was a vote by the British population to leave the European Union. The breakdown of results revealed the votes by each of the four nations of the United Kingdom. England and Wales voted to leave the European Union while Scotland and Northern Ireland voted to remain in the European Union.¹⁴ Although Scotland voted overwhelmingly to remain in the EU,¹⁵ the overall national results meant that Scotland, as a part of EU through its being a part of the United Kingdom, has to leave. Irrespective of the differing results across the country, there was one common view; and this was the uncertainty regarding what is now termed

¹¹ HM Government (2017) *The United Kingdom’s exit from and new partnership with the European Union*. Available at: <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>> (accessed 21 August 2017)

¹² EU reform deal: What Cameron wanted and what he got.’ BBC News 20 February 2016. Available at; <<http://www.bbc.co.uk/news/uk-politics-eu-referendum-35622105>> (accessed 21 August 2017). See also, ‘David Cameron steps up European tour as EU negotiations deadline looms’. Independent 6 January 2016. Available at; <<http://www.independent.co.uk/news/uk/politics/david-cameron-steps-up-european-tour-as-eu-negotiation-deadline-looms-a6799861.html>> (accessed 21 August 2017)

¹³ Michael Gordon, ‘Brexit: a challenge for the UK constitution, of the UK constitution?’ [2016] E.C.L. Review 409

¹⁴ See; Results, BBS News. Available at; <http://www.bbc.co.uk/news/politics/eu_referendum/results> (accessed 14 August 2017)

¹⁵ With 62% wanting to remain

'Brexit'.¹⁶ The referendum raised a number of issues; the necessity for the calling the referendum in the first place and whether the result was merely advisory. As observed by Gordon, this stems from the fundamental domestic doctrine of parliamentary sovereignty, which permits the UK legislature not to be absolutely bound by any referendum result as a matter of law.¹⁷ Irrespective of the questions surrounding the call for the referendum or other constitutional issues, one thing was unquestionable; the impact of the referendum result. The implications of the referendum result is believed to have an effect on several aspects of life in Scotland, the UK and indeed the EU; from economic and fiscal concerns,¹⁸ to human rights,¹⁹ to defence, research funding and immigration and this latter impact; the focus of this paper, is a major concern for Scotland.

Following the EU referendum vote, the result prompted the First Minister of Scotland to "take all possible steps and explore all options to give effect to how people in Scotland voted"²⁰. This led to a renewed call for a second Scottish independence referendum. The Scottish parliament passed a motion mandating the Scottish Government to enter into discussions with the UK Government to explore options for protecting Scotland's relationship with the EU and Scotland's place in the single market²¹. However, with the calling of a snap general election by the current Prime Minister; Theresa May, and the result suggesting a large number of Scottish people did not support a second independence referendum, the First Minister of Scotland had to soften her stance slightly on a second independence referendum. This leaves Scotland in the position of trying to negotiate and navigate a favourable approach to the Brexit dilemma it has been forcefully dragged into against its will. Its status as part of the UK means Scotland's hands are tied and although the UK government is not legally obliged to consult the Scottish Parliament, or other devolved legislatures, or obtain their agreement before triggering art. 50,²² it will be politically right for the UK Parliament to consult the devolved legislatures and to

¹⁶ A shorthand way of saying the British exit from the European Union. See; 2 August 2017, *Brexit: All You Need to Know About the UK Leaving the EU*. Available at; <<http://www.bbc.co.uk/news/uk-politics-32810887>> (accessed 14 August 2017)

¹⁷ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 264.

¹⁸ Alicia Hinarejos, 'Brexit and the euro area' [2016] E.L. Rev. 479

¹⁹ Alan Miller, 'Brexit and Human Rights in Scotland' [2016] S.H.R.J. 2

²⁰ See STV News, 24 June 2016, available at; <<https://stv.tv/news/politics/1358534-nicola-sturgeon-speech-in-full-after-eu-referendum-result/>> (accessed 14 August 2017)

²¹ Devolution P.L. 2017, Apr, 296 - 298

²² Alan Page, 'Brexit, the repatriation of competences and the future of the union' [2017] Jur. Rev. 39

address their concerns, in Scotland's case, one of the major concerns is immigration needs.

However, it is the author's contention that a close examination of **s. 2 of the Scotland Act 2016**²³ may suggest the UK Parliament requires the consent of the Scottish Parliament in relation to Brexit. Despite immigration and free movement not being a devolved matter, one can argue that matters associated to immigration, such as education, housing, policing and health, that are devolved matters, impact the lives of migrants and as a result, the consent of Scottish Parliament is required by the UK Parliament in relation to Brexit. The potency of this line of thought is yet to be tested.

Scotland's Immigration Needs

Scotland being a part of the United Kingdom is subject to the laws of the United Kingdom. Currently, there are limitations on the ability of Scotland to act in relation to certain matters. These limitations are as a result of the **Scotland Act 1998** and the most significant provision²⁴ is found in **Section B6 of Schedule 5**.²⁵ It provides for "*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*"²⁶ as reserved matters in which only the Parliament in Westminster can legislate on. As a constituent nation within the United Kingdom, Scotland does not have authority over its borders, as it is the UK Parliament, which has the competence to control the entry of persons into the whole of the country.²⁷ This limitation has seldom caused a divergence of views in relation to how certain aspects of reserved matters are handled. An example can be seen in the approach in handling the EU migrant crisis where the Scottish government was willing to go farther than what the Syrian Vulnerable Persons Resettlement Scheme provided.²⁸

²³ Section 2 provides as follows, "...it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

²⁴ For the purpose of this paper.

²⁵ Scotland Act 1998

²⁶ Section B6, Schedule 5, Scotland Act 1998. See also, s. 29, Scotland Act 1998.

²⁷ Olayinka Lewis and Paul Arnell, 'The Migrant Crisis and Refugee Law in Scotland' [2016] SCOLAG (466, August) 153

²⁸ See; Syrian Vulnerable Persons Resettlement Scheme (VPRS) Guidance for Local Authorities and Partners; Available at; <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631369/170711_Syrian_Resettlement_Updated_Fact_Sheet_final.pdf> (accessed 20 August 2017)

The migration implications of Brexit for Scotland stem from its current population numbers. An analysis of the 2011 Scottish census figures, gives an indication on why immigration is important for Scotland. The figures relating to the 'country of birth and arrival in the UK' section of the census results, reveal that 93% (4.9 million) of the people in Scotland were born within the UK, this is a decrease of three percentage points from 96% (4.8 million) in 2001, the breakdown further shows that 83% were born in Scotland (4,412,000), 9% in England (459,000), 0.7% in Northern Ireland (37,000) and 0.3% in Wales (17,000).²⁹ The results also show a large increase was due to arrivals between 2004 and 2011. Of the 7% (369,000) of people who were not born in the UK in Scotland on census day in 2011, a majority (55%) had arrived in the UK between 2004 and March 2011.³⁰ A large majority of these arrivals in Scotland were of working age. The census results show that the great majority (89%) of the population born outside the UK arrived in the UK aged under 35, although the pattern was generally reflected across all ethnic groups but the proportion of the population of younger working age (25 to 39) was 17% for those born in Scotland, and this proportion was generally higher for people born elsewhere, ranging up to 53% for people born in the EU Accession countries.³¹ The figures also showed that 55,000 people were born in Poland (accounting for 15% of all those born outside the UK) making Poland the third most common country of birth after Scotland and England and ahead of Northern Ireland, the Republic of Ireland and Wales, which accounts for an increase of 14 percentage points compared with the 2001 census, when the number of people born outside the UK who reported their country of birth as Poland was just 1% (2,500).³² The increase of Polish born migrants from 2,500 in 2001 to 55,000 in 2011 demonstrates direct evidence of the increase in population from an EU country and a direct result of Poland's EU accession in 2004. The impact of migration in Scotland, and the rest of the UK, is perceived as being both positive and negative. Language can be perceived as one of the negative aspects of the impact of migration. For instance, the proportion of Scotland's population aged 3 and over who could speak, read and write English was 94% but the proportion was lower when those born in the EU

²⁹ Ethnicity, Identity, Language and Religion, Scotland's Census 2011. Available at; <<http://www.scotlandscensus.gov.uk/ethnicity-identity-language-and-religion>> (accessed 20 August 2017)

³⁰ Op. cit. 29

³¹ Ethnicity, Identity, Language and Religion, Scotland's Census 2011. Available at; <<http://www.scotlandscensus.gov.uk/ethnicity-identity-language-and-religion>> (accessed 20 August 2017)

³² Op. cit. 31

Accession countries (75%) or in the Middle East and Asia (89%)³³ were taken into account. While it is important for new residents in Scotland to speak the national language of the UK (English) or Scots or Gaelic in Scotland and while there is nothing legally restricting a person from speaking their native language or mother tongue, speaking just the national language of the country of origin could be perceived as a lack of willingness by a foreign born migrant to integrate into UK or Scottish society.³⁴ One of the ways of stemming this perceived negative impact is control of immigration. The Centre for Economic Performance researched the effects of Brexit on different aspects of the country and found immigration to be one of the aspects that would be affected. It stated that a key factor for the UK exiting the European Union is that, "Brexit would allow more control over the flow of immigrants to the UK from the rest of the EU."³⁵ It however concluded "*that the empirical evidence reveals that EU immigration has not had a significantly negative effect on average employment, wages, inequality or public services at the local level for the UK-born.*"³⁶ This would suggest its impacts are largely positive and the fact that most migrants from within the EU are of prime working age, would suggest that EU is largely economically beneficial.

The many economic benefits of migration was confirmed in a recent government report.³⁷ The report stated that the evidence indicates skilled migrants can boost innovation, stimulate economic growth and encourage the local labour force to invest in training to take on and specialize in jobs in which the nation or region has a comparative

³³ Op. cit.

³⁴ For an overview of migrant integration policy, see; Eve Hepburn, (2015) 'Immigrant Integration and Policy Divergence in Scotland since Devolution', paper presented at PSA 65th Annual Conference, University of Sheffield, 30 March – 1 April 2015. Available at; <<https://www.psa.ac.uk/sites/default/files/conference/papers/2015/Hepburn%20paper%20PSA%20Sheffield%202015.pdf>> (accessed 20 August 2017)

³⁵ Jonathan Wadsworth, Swati Dhingra, Gianmarco Ottaviano and John Van Reenen 'Brexit and the Impact of Immigration on the UK' (Centre for Economic Performance, May 2016) Available at; <<http://cep.lse.ac.uk/pubs/download/brexit05.pdf>> (accessed 20 August 2017)

³⁶ Op. cit. 35

³⁷ Scottish Government (2016) *The Impacts of migrants and migration into Scotland* Edinburgh. Available at; <<https://beta.gov.scot/publications/impacts-migrants-migration-scotland/>> (accessed 21 August 2017). See also, David N. F. Bell, Allan Findlay, David McCollum, Robert E. Wright; Labour migration policy and constitutional change in Scotland, *Oxford Review of Economic Policy*, Volume 30, Issue 2, 1 July 2014, Pages 310–324 <https://doi.org/10.1093/oxrep/gru019>

advantage.³⁸ Falls in EU immigration are likely to lead to lower living standards for the UK-born citizens³⁹ and this is likely to have a higher effect on Scotland if the figures from the 2011 census are considered. The high number of non-British born nationals helps sustain the UK economy as a whole and a drop in its population will particularly affect Scotland.

A recent report observed the impact of Scotland's decreasing population and it stated that any significant decrease in immigration would particularly impact Scotland's working population, which already suffers a disproportionately high dependency ratio as a result of a number of factors ranging from Scotland's low fertility rates, lower than average levels of net in-migration and an increasingly ageing population.⁴⁰

The UK Parliament could consult Scotland on the terms of Brexit. After all, the wording of the **Scotland Act 2016** provides that the UK Parliament, "will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament"⁴¹ However, immigration is not the sole Brexit issue and for non reserved matters affected by Brexit, the wording of the provision is no guarantee that the consent of the Scottish Parliament will be sought. As the Supreme Court found, despite the new provisions in the **Scotland Act 2016**, it does not mean that the Sewel Convention has been converted into a legally enforceable rule and it remains a political convention⁴². The devolved legislature in Scotland does not have the legal power to block any EU repeal bill nor the Brexit process, however, if the UK government were to bulldoze it through Parliament without the consent of the Scottish Parliament or indeed other devolved Parliaments, it could be

³⁸ Scottish Government (2016) *The Impacts of migrants and migration into Scotland* Edinburgh. Available at: <<https://beta.gov.scot/publications/impacts-migrants-migration-scotland/>> (accessed 17 August 2017) See also: Scottish Government (2016) *Characteristics of migrants in Scotland: analysis of the 2011 census* Edinburgh. Available at: <<https://beta.gov.scot/publications/characteristics-migrants-scotland-analysis-2011-census-first-published-march-2015/>> (accessed 20 August 2017)

³⁹ Jonathan Wadsworth, Swati Dhingra, Gianmarco Ottaviano and John Van Reenen 'Brexit and the Impact of Immigration on the UK' (Centre for Economic Performance, May 2016) Available at: <<http://cep.lse.ac.uk/pubs/download/brexit05.pdf>> (accessed 20 August 2017)

⁴⁰ Eve Hepburn, *Options for Differentiating the UK's Immigration System 24 April 2017*, prepared for the Culture, Tourism, Europe and External Relations Committee of the Scottish Parliament. Available at: <http://www.parliament.scot/S5_European/General%20Documents/CTEER_Dr_Hepburn_report_2017.04.24.pdf> (accessed 18 August 2017)

⁴¹ See **s.2 Scotland Act 2016**

⁴² *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5

politically explosive⁴³. It therefore seems that, the major option for Scotland would be to seek a political solution to the population shortage that Brexit will guarantee, as immigration is highly important for Scotland to grow its population. Where this is the case, then Scotland would need options to prevent or reduce the immigration impact of Brexit on Scotland.

Options for Scotland

More Devolution Powers?

The first obvious option would be to devolve immigration powers to Scotland. Some Members of Parliament are advocating for immigration powers to be devolved to Scotland⁴⁴ but the government has rejected such calls⁴⁵. Currently, the power to legislate on matters pertaining to immigration rests with the UK Parliament.⁴⁶ Although The Sewel Convention⁴⁷ recognises that the UK Parliament “*will not normally*”⁴⁸ legislate on devolved matters, it does not need the permission of the Scottish Parliament or indeed the people of Scotland to legislate on Brexit issues and immigration, which would have an impact on Scotland. Rather than seeking consent of the Scottish Parliament, a better approach will be to grant more powers to the Scottish Parliament by making immigration a devolved matter after Brexit. The UK Parliament, post-Brexit, would not need to concern itself with acts contrary to EU principles as it would no longer fall within the jurisdiction of the EU and its agencies post-Brexit. This would require intense political negotiation but with an acceptable political, economic and legal result. Devolving immigration powers to Scotland will seek to address the immigration impact that Brexit may presumably have on Scotland.

Granting immigration powers to regions or states within a country is not a new practice. Canada is a direct example of a jurisdiction with functional regional immigration policies.

⁴³ See BBC News 14 July 2017, *Reality Check: Can Scotland and Wales block the repeal bill?* Available at; < <http://www.bbc.co.uk/news/uk-politics-40608598>> (accessed 18 August 2017)

⁴⁴ See BBC News 5 January 2017, *MPs call for immigration devolution*. Available at; < <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-38518107>> (accessed 20 August 2017)

⁴⁵ See Evening Telegraph 23 January 2017, *Post-Brexit immigration system for Scotland refused by Home Secretary*. Available at; < <https://www.eveningtelegraph.co.uk/fp/post-brexit-immigration-system-scotland-rejected-home-secretary/>> (accessed 18 August 2017)

⁴⁶ **Section B6, Schedule 5, Scotland Act 1998 and s. 29 of the Scotland Act, 1998.**

⁴⁷ **S. 2 Scotland Act 2016**

⁴⁸ **S. 2, Scotland Act 2016**

Provincial governments in Canada are able to set requirements for immigrants applying to their regions. This system allows the provincial governments address the issue of labour shortages in certain fields and industries within their regions. It enables them enforce place-specific cultural criteria. Although in-country migration is a concern, it is addressed by placing restrictions on immigrants to live within the regions that approves their visa until such a time that the immigrant becomes eligible for Canadian citizenship. There are incentives for immigrants to move to new areas of the country and some regions support welcoming initiatives for immigrants to the region.

The regional policy on immigration are applied through the Provincial Nominee Program⁴⁹ which allows provinces to nominate immigrants for admission through their own regional selection criteria, and the Canada-Quebec Accord⁵⁰ which devolves immigration responsibilities to the province of Quebec. There is also the Atlantic Immigration Pilot,⁵¹ a partnership between the Government of Canada and the Atlantic Provinces. It helps businesses of all sizes attract foreign skilled workers or international student graduates to fill labour gaps in New Brunswick, Prince Edward Island, Nova Scotia or Newfoundland and Labrador. The businesses are given incentives such as exemption from a Labour Market Impact Assessment.⁵² The devolution system in Canada ensures those areas with low population or those experiencing skills shortages are adequately sourced with immigrant labour. However, a distinguishing factor between Canada and the Scotland is the population size, while Canada sits on a very wide land area with a small population across the whole country, Scotland is part of the UK with a large population over a small island and it is easy to why limits would want to be set on immigration to the UK as a country. Also, another criticism against replicating the Canadian approach in Scotland is the perception of the central governments of both countries. Canada's central government is perceived to have a very liberal approach to immigration and openly welcomes immigration to Canada, in-country migration may not necessarily be frowned upon if it occurs as there is positive perception on immigration nationally. The UK central government on the other hand, could be argued to not have the

⁴⁹ For more information on the Provincial Nominee Program, see Citizenship and Immigration Canada. Available at; <<http://www.cic.gc.ca/english/immigrate/provincial/index.asp>> (accessed 19 August 2017)

⁵⁰ Available at; <<http://www.immigration-quebec.gouv.qc.ca/en/index.html>> (accessed 19 August 2017)

⁵¹ Atlantic Immigration Pilot. Available at; <<http://www.cic.gc.ca/english/immigrate/atlantic/index.asp>> (accessed 19 August 2017)

⁵² Atlantic Immigration Pilot. Available at: <<http://www.cic.gc.ca/english/immigrate/atlantic/hire.asp>> (accessed 19 August 2017)

same liberal approach to immigration as Canada. The UK government's policy regarding population numbers and the objective of reducing migration figures to a relatively low level supports this argument. One could argue that granting more devolved powers to Scotland on immigration could be counter-productive to the UK government's policy on reducing net migration as immigrants could be seen as coming to Scotland as a backdoor to coming to the UK and the national immigration policy would be contradicted by devolution of immigration powers to Scotland. However, the counter view is that exiting the EU would repatriate powers back to the UK government and effective systems of controls could be used to address the issue of in-country migration.

Another downside of devolution of immigration powers to Scotland could result in Scotland attracting a "low quality" of migrants generally, both from and outside the EU, since the immigration requirements for entry may be lower when compared to the rest of the UK⁵³ and migrants who would normally not meet requirements for entry to the rest of the UK may 'settle' for Scotland as an alternative option.

One certainty however is that the Canadian devolution system could be a direct method for resolving the immigration impact on Scotland as a result of Brexit despite the criticisms against this approach.

The other system to consider is the Australian immigration system. Under the system, regions have powers to control immigration through the Regional Sponsored Migration Scheme visa.⁵⁴ The permanent residence visa is available to eligible skilled workers migrating to regional Australia. The visa permits work under 3 different streams⁵⁵. The aim of the scheme is to meet the regional needs of participating regions and even applies to specific postcodes⁵⁶. The regional powers also extend to permitting entry to skilled

⁵³ 'Sub-National Immigration Policy: Can it Work in the UK?' The Oxford Observatory at the University of Oxford, 18 September 2013. Available at; <<http://www.migrationobservatory.ox.ac.uk/resources/primers/sub-national-immigration-policy-can-it-work-in-the-uk/>> (accessed 24 August 2017)

⁵⁴ The regional visa system excludes Gold Coast, Brisbane, Newcastle, Sydney, Wollongong and Melbourne. See the Regional Sponsored Migration Scheme Visa. Available at; <<https://www.border.gov.au/Trav/Visa-1/187->> (accessed 25 August 2017)

⁵⁵ The streams are; Temporary Residence Transition Stream, the Direct Entry Stream and the Agreement Stream. The scope of each stream is not covered in this paper. For more information on the streams, please see; the Regional Sponsored Migration Scheme Visa. Available at; <<https://www.border.gov.au/Trav/Visa-1/187->> (accessed 25 August 2017)

⁵⁶ For a list of the inclusive postcodes, please see; Eligible Postcodes in Regional Australia. Available at; <<https://www.border.gov.au/visas/supporting/Pages/187/eligible-postcodes-in-regional-australia.aspx>> (accessed 25 August 2017)

immigrants through the Skilled Regional (Provisional) visa.⁵⁷ The scheme allows skilled workers to live and work in regional or low-population growth metropolitan areas of Australia for up to 4 years.⁵⁸ Although, there may be the issue of further migration outside the regions applicants seek entry into, to more established regions for instance, the scheme caters for areas with low-population growth and allows the regions formulate a system that serves the skills shortage immigration provides.⁵⁹

Although the UK and Australia have different systems of government, the approach to resolving regional immigration issues demonstrates the similarity in relation to skills shortages and low population areas. However, the same criticisms applicable to the Canadian system, would apply to the Australian system as well. However, the immigration implications for Scotland, as a result of Brexit, further show the need for a system that works for Scotland and indeed the UK. The UK could learn from the Australian and Canadian systems by adopting a regional immigration system that could be made possible through devolution of immigration powers to Scotland. A new Scotland Act would need to be enacted to grant Scotland new immigration powers. Ensuring that applicants to the scheme, stay in Scotland for a minimum number of years and with possibly the same employer, would prevent the in-country migration to other parts of the UK, although, it could raise the issue of unnecessary restriction of movements for migrants within the country. Despite the criticisms of both systems, devolving immigration powers to Scotland can give Scotland the flexibility to make policies on immigration according to Scotland's needs.

Revamp the Existing Points-Based System (PBS) Scheme?

An option that will not involve devolving immigration powers to Scotland is a revamping of the PBS Scheme.

The PBS scheme was introduced in 2008 for non-EU nationals coming to the UK for work, study and to conduct business and invest funds in the UK. It was phased in over a number of months after its introduction and it sought to simplify the immigration control system

⁵⁷ See the Skilled Regional (Provisional) visa (subclass 489). Available at; < <https://www.border.gov.au/Trav/Visa-1/489->> (accessed 25 August 2017)

⁵⁸ For details of eligibility for the visa, please see; the Skilled Regional (Provisional) visa (subclass 489). Available at; < <https://www.border.gov.au/Trav/Visa-1/489->> (accessed 25 August 2017)

⁵⁹ For other types of visas, please see; Visa Listing. Available at; < <https://www.border.gov.au/Trav/Visa-1/Visa-listing>> (accessed 24 August 2017)

for non-EU migrants by merging over 80 visa routes into 5 Tiers. The principle of the PBS is based on applicants attaining points to qualify for leave to enter or remain in the UK under the category applied for. The tiers ranged from 1 to 5 with Tier 1⁶⁰ applying to high net-worth individuals, highly skilled migrants and migrants with exceptional talent. Applicants in this category did not require a sponsorship by an employer and could make applications for visas in their own right and without the need to have a job offer in the UK. The second tier⁶¹ requires applicants being sponsored by an employer and additional requirements being met before leave was granted in this category. Tier 3 was originally intended for low skilled workers but never took off since its introduction. The Tier 4⁶² category of the points-based is the only route specific to students and is sub-divided into the Tier 4 (General), for students 16 and over wishing to come to the UK to study from a non-EU country; and the Tier 4 (Child) category for non-EU applicants who wish to attend school at a UK further education institution. The last of the tiers; Tier 5,⁶³ was introduced to cater for young people coming to the UK from specific countries to be able to gain valuable work experience for a very short period of time.⁶⁴

All the Tiers require applicants to meet certain attributes for which points will be awarded before a visa is granted. With the exception of Tier 3, which never really took off, applicants have to go through very tiring processes in order to meet the difficult requirements⁶⁵ of the Immigration Rules for the visa sought and often having to pay huge applications fees with no guarantees of success. The system was originally designed to be flexible and less complicated but the constant changes in the Immigration Rules, makes it difficult to would be applicants to know what requirements will satisfy the visa category they apply for.⁶⁶

⁶⁰ **Paragraphs 245B to 245F of the Immigration Rules.**

⁶¹ **Paragraphs 245G to 245ZL of the Immigration Rules**

⁶² **Paragraphs 245ZT to 245ZZE of the Immigration Rules**

⁶³ **Paragraphs 245ZI to 245ZS of the Immigration Rules**

⁶⁴ For an overview of the different Tiers and a comprehensive list of requirements for each Tier (save for Tier 3), please see **Part 6A of the Immigration Rules**. Available at; <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-6a-the-points-based-system>> (accessed 24 August 2017)

⁶⁵ Payment of an immigration health charge, registration with the police for applicants from certain countries, tuberculosis testing for applicants from certain countries and restriction on types of employment and type of business that an applicant can engage in. See **Part 9 of the Immigration Rules**. Available at; <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal>> (accessed 24 August 2017)

⁶⁶ Since the inception of the PBS, there have been numerous changes to the Immigration Rules, immigration policy and documentation.

One positive feature of the PBS scheme is that the existing legal framework that can be revamped to apply to Scotland without the need for any constitutional changes. The PBS Scheme could incorporate a regional visa scheme that does not require a change to the current devolution arrangements or a change to the provisions of the Scotland Act 1998. This option would provide an alternative to more devolved powers.

One particular area of the PBS that could be revamped is the Tier 3 category and this would cater for not just Scotland, but also other parts of the UK that may be impacted by Brexit's labour shortage. The original intention of the Tier 3⁶⁷ route of the PBS was meant to cater for low-skilled migrants but the 2006 White Paper, *A Points Based System: Making Migration Work for Britain* contemplated the number of workers available from the enlarged EU in 2004 in deciding not to implement the Tier 3 category and instead decided to introduce it based on identifications of temporary shortages in the labour market⁶⁸. Although it was evident that low-skilled migration was essential for businesses in the agricultural and hospitality sectors, which the route was meant to predominantly cater for, a major concern of the sectors, was the low wage that migration in these sectors may cause, in an effort to make it less attractive to UK workers⁶⁹.

It is evident that the original intention of the Tier 3 scheme was to cater for low-skilled workers, which Scotland would also require post Brexit. Revamping the route and applying to EU nationals post Brexit would bring immigration within the legal framework of the existing PBS. Applying national employment and laws effectively and a system of regular audit of companies applying for staff through the scheme would address the issues of wage undercutting. And to ensure that the system works for Scotland, the scheme would need to cater for a restricted age group and standard employment conditions in line with the rest of the UK. Imposing annual limits would help limit net migration and restrictions on in-country migration would ensure that applicants to the

⁶⁷ Prior to the introduction of the PBS, low-skilled migration was governed by the Sectors Based Scheme (SBS) and the Seasonal Agricultural Workers Scheme (SAWS). For discussions on these schemes, see; Gina Clayton, *Textbook on Immigration and Asylum Law* (6th edn, OUP 2014)

⁶⁸ Home Office, *A Points Based System: Making Migration Work for Britain* (White Paper, 2006) 29. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272243/6741.pdf (accessed 27 August 2017)

⁶⁹ Home Office, *A Points Based System: Making Migration Work for Britain* (White Paper, 2006) 29. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272243/6741.pdf (accessed 27 August 2017)

scheme remain in Scotland and not use entry through the scheme as a way of relocating to other parts of the country. A further condition would be to extend the length of time required for settlement through the Tier 3 scheme by granting the visa in the category for a limited period and renewable for same period. A similar grant system that exists for long residence⁷⁰ could apply to the Tier 3 scheme. The complexity⁷¹ of the PBS route however, may deter would be applicants from applying to the scheme. However, maintaining immigration, as a reserved power but revamping the PBS to cater for the needs of Scotland, would cater for Scotland's immigration needs post-Brexit, and it is argued to be a very viable option. The UK has a plethora of immigration legislations⁷² to suit almost every circumstance. The issue to consider will not be one of inadequate legal framework on immigration but for both the Scottish and UK governments to decide on implementation.

Conclusion

Irrespective of the obvious uncertainty Brexit brings, one thing is certain; the status of the UK as a member of the European Union will change. The length of time of the impact of Brexit and the impact of the uncertainties is itself uncertain. While there is currently no easy legal mechanism for Scotland to stop Brexit, political options exist to address the immigration impact of Brexit on Scotland. The options identified in this paper, offer suggestions on ways the Scottish and UK Parliaments can address the immigration needs

⁷⁰ Under the long residence category, an applicant will only qualify for settlement if they can show that they have spent 10 years of continuous lawful residence in the UK and taking other factors into account; age, personal history, strength of connections in the UK, domestic and compassionate circumstances, amongst other things. See **paragraph 276B (i) (a) to (ii) (f) of the Immigration Rules**.

⁷¹ The PBS had 300 instances of changes to either forms, policy, Rules and procedure between 2008 and 2016 alone and this adds to the complexity of the system and applicants not being aware of how it operates. For instances of change, please see; Archive Timeline <http://webarchive.nationalarchives.gov.uk/*/http://www.ukba.homeoffice.gov.uk> (accessed 27 August 2017)

⁷² Some of these legislations include; **Immigration Act 1971**, which regulates, amongst other things, entry into and remaining in the UK; **Nationality Immigration and Asylum Act 2002**, which regulates nationality issues, immigration detention, asylum and appeals; **Immigration Asylum and Nationality Act 2006**, which deals with appeals, employment matters and asylum issues; **Borders Citizenship and Immigration Act 2009**, which deals with acquisition of citizenship amongst other things; **Immigration Act 2014**, covering biometric capture, restrictions on appeal rights, immigration checks for accommodation and bank accounts, imposition of an immigration health surcharge, changes to the provision of immigration advice, amongst others things; **Immigration Act 2016**, which deals with illegal working and offences for illegal working, language requirements for public sector workers, introduction of the immigration skills charge for foreign workers, duties regarding the welfare of a child, amongst other things; **Immigration Rules**, which consists of 14 parts and 28 appendices and deal with practical aspects for making immigration applications.

of Scotland. The implementation of the options however, will be a matter for the politicians to iron out.