

Two (or three?) referenda and a general election: Brexit and devolved social security in Scotland

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Abstract

The impact of EU membership on national social security systems has been limited: member states have been required to open up some benefits to immigrants from other member states, but there has been relatively little pressure for harmonisation. Ironically, the UK's withdrawal occurs just as proposals for a new 'pillar of social rights' suggest the Union may take a closer interest in this field of policy. Nonetheless, Brexit could have a significant (if largely indirect) impact on social security in Scotland. The recent EU and independence referenda have allowed devolved elites to portray Scotland as more concerned with social justice and more internationalist than the UK as a whole. This social justice narrative underpins commitments to build a Scottish social security system based on respect for the dignity of individuals and the potential raising of the profile of social and economic rights at devolved level. Maintaining or enhancing EU citizens' social rights would be in keeping with this self-image. The Scottish Government's argument that Scotland has a greater need for immigration than other parts of the UK provides a further, pragmatic argument for enhancing its attractiveness as a destination by allowing migrants to access family benefits in particular. The limited extent of devolved social security competences means this is not currently an option. However, the push for a second independence referendum that has followed the Brexit vote points to the possibility of further renegotiation of the constitutional settlement after the general election. Social security is an obvious field for further devolution. The door could hence be opened to divergence from DWP on the entitlements of EU migrants, and potentially in other aspects of policy.

Introduction

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

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

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

³ G McKeever and M Simpson, 'Worlds of welfare collide: implementing a European unemployment benefit scheme in the UK' (2017) 19(1) *European Journal of Social Security* 21

interest in social protection⁴ and when there is a live proposal for a common European unemployment benefit.⁵

This paper argues that while Brexit will clearly have particular impacts on Scotland, in social security the big questions are political as much as legal. Withdrawal from the EU, the contrasting referendum results in Scotland and in the UK as whole and the ongoing political fall-out form part of a wider process that, depending on one's point of view, either reveals Scotland to be a very different polity to the rest of the UK or allows the current Scottish Government to construct a vision of Scotland as different to the rest of the UK. Following hot on the heels of the 2014 referendum on independence, the Brexit debate as a whole can be viewed as a continuation of the independence campaign by other means, with the debate on Scotland's future place in the UK resuming in earnest following the result of the EU referendum. This occurs at a time when freshly devolved social security powers provide another opportunity to demonstrate Scotland's otherness through the development of (the Scottish Government promises) a fairer, more compassionate model. The independence referendum was followed by the major UK parties agreeing to an enhanced devolution settlement and a similar response to the EU referendum is not without advocates. With further social security powers among the most obvious candidates for devolution, the potential is clear for Brexit to have a profound, though indirect, impact on the still-emerging Scottish welfare state.

EU membership, Brexit and social security

There is no EU welfare state, no single "solidaristic communit[y]," only a set of rules on the "interchangeability of solidaristic communities in the Union that allows Union citizens to be affiliated with the one of their residence." Recent CJEU judgments have "narrowed down" even this access to host state welfare systems from something approaching a right of citizenship to an entitlement to be earned through "economic contribution in a host Member State."⁶ The other key impacts of EU membership on social security in the UK concern the portability of benefits for people *leaving* for another member state and curbs on gender based discrimination.

The latter two points can be dealt with relatively briefly. The key judgment against the UK in respect of gender based discrimination in social security concerned occupational pension schemes rather than any state benefit. The finding that accrued pension rights constituted pay and that discrimination between male and female employees – for example in age criteria – was consequently prohibited did not directly apply to public provision.⁷ Nonetheless, Wikeley and Ogus argue that the enforced equalisation of pensionable age in occupational schemes made similar changes to the state pension "inevitable."⁸ An incremental process of equalisation of state pensionable age has now been completed.⁹ Given that this is now being followed by a further increase in pensionable age for both men and women, lowering the age for females following Brexit appears unthinkable. It should also be noted that while this example of direct discrimination against men has been dismantled, EU membership has done less to prevent indirect discrimination against

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

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

⁶ R Bebayev, 'Re-shaping the paradigm of social solidarity in the EU: on the UK's welfare reforms and pre- and post-EU referendum developments' (2016) 18(4) *European Journal of Social Security* 356, 365

⁷ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] 2 CMLR 513

⁸ NJ Wikeley and AI Ogus, *The law of social security* (London: Butterworths, 2002)

⁹ Pensions Act 1995 c26 sch 5; Pensions Act 2011 c19 s1

women. On one hand, the Supreme Court's finding that Directive 97/81/EC prohibits discrimination against part-time workers in their pension rights might be expected to primarily benefit female employees.¹⁰ On the other, women continue to face disadvantage in their ability to meet contribution requirements for insurance-based benefits¹¹ and the Supreme Court has found that the Secretary of State is entitled to make regulations implementing cuts to social assistance benefits that impact primarily on women, as long as this is in pursuit of a legitimate objective such as controlling public spending.¹²

Brexit may have a greater impact on the portability of UK benefits. Certainly, if the UK leaves the EEA as well as the EU the state will no longer be subject to any obligation to allow EU migrants to export child benefit to their children in another member state or to export other benefits to its own citizens living in other member states. That is not to say the practice would definitely cease, at least for continuing claimants: it is not uncommon for transitional protection to be given to those who would otherwise lose income due to social security reforms. As Harris notes, the salience of this question will in any case depend to a large extent on the impact of Brexit on the ability of UK citizens to live in other European countries.¹³

The greatest impact of EU membership – and therefore, potentially, of Brexit – has been on the ability of citizens exercising free movement rights to access their host state's social security system. Although "welfare state walls" have been more fiercely defended than "geographical boundaries," legislation and case law have gradually expanded the social rights gained as an EU citizens.¹⁴ Initially, social security rights were closely linked with the free movement of *workers* rather than citizens. As at national level, for a period it seemed that social rights for workers would act as precursors to social rights for all.¹⁵ This process was initially driven by the CJEU stretching the definition of 'worker' so as to confer entitlements upon progressively greater numbers of people¹⁶ – part time employees,¹⁷ students on placement,¹⁸ jobseekers¹⁹ and workers' dependents.²⁰ Ultimately, the court would declare that "Union citizenship is destined to be the fundamental status of nationals of the Member States," with the implication that, in most cases, "those who find themselves in the same situation... enjoy the same treatment in law irrespective of their nationality." This implies the

¹⁰ *Ministry of Justice v O'Brien* [2013] UKSC 6 [2013] 1 WLR 522

¹¹ N Duvvury, A Ní Léime, A Callan, L Price and M Simpson, *Older women workers' access to pensions: vulnerabilities, perspectives and strategies* (Galway: ICSG, 2012)

¹² *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449

¹³ N Harris, 'Brexit and social security' (2016) 23(3) *Journal of Social Security Law* 113

¹⁴ C O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity' (2008) 33(5) *European Law Review* 643, 645

¹⁵ I Bleijenberg, J de Bruijn and J Bussemaker, 'European social citizenship and gender: the part-time work directive' (2004) 10(3) *European Journal of Industrial Relations* 309, 310

¹⁶ K Sieveking, 'Der Europäischen Gerichtshof als Motor der sozialen Integration der Gemeinschaft' (1997) 43(3) *Zeitschrift für Sozialreform* 187; see also L Conant, 'When courts decide: foreigners' rights and social citizenship in Europe and the US' (2008) 7 *European Political Science* 43, 43; M Wind, 'Post-national citizenship in Europe: the EU as a welfare rights generator?' (2009) 15 *Columbia Journal of European Law* 239

¹⁷ *DM Levin v Staatssecretaris van Justitie* (C-53/81) [1982]; see also *RH Kempf v Staatssecretaris van Justitie* (C-139/85) [1986]

¹⁸ *Françoise Gravier v City of Liège* (C-293/83) [1985]; *Deborah Lawrie-Blum v Land Baden-Württemberg* (C-66/85) [1986]

¹⁹ *R v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* (C-292/89) [1991]

²⁰ *Giovani Bronzino v Kindergeldkasse Nürnberg* (C-228/88) [1990]

emergence of a new sharing community based on a “certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States.”²¹

Directive 2004/38/EC largely placed these developments on a legislative footing, further expanding the definition of ‘worker’ to include jobseekers who have previously worked for one year in the host state, individuals who leave employment for vocational training and individuals temporarily unable to work due to illness. Member states are also prevented from expelling social assistance claimants unless they have become an “unreasonable burden” or jobseekers under most circumstances. The distinction between workers and non-workers is clearest during the first three months of residence, when migrants other than workers and their families have no automatic right to social assistance.²² In recent years the EU institutions have envisaged more significant convergence in social rights. The Parliament has advocated a European minimum income guarantee²³ – implying a common floor for social assistance benefits – and the inclusion of social security in the proposed new pillar of social rights.²⁴ Meanwhile, the Commission has supported a feasibility study into a common European unemployment insurance benefit, albeit that formidable political and operational challenges stand in the way of such a development.²⁵

This vision contrasts sharply with the reality of a partial *reversal* of the progress made in access to host states’ social security systems in the aftermath of the 21st century enlargements of the Union. Rules on EU migrants’ access to social security in the UK were reformed in 2013.²⁶ Additional questions have been added to the habitual residence test used to assess whether individuals of *any* nationality seeking income-related benefits or local authority housing after less than two years’ residence in the common travel area (UK, Ireland, Channel Islands and Isle of Man) are legally present, “habitually resident” and have “sufficient ties” to the UK.”²⁷ Those of less than three months’ residence are now ineligible for jobseeker’s allowance.²⁸ Future reform targeting “new” EEA claimants will prevent JSA claims longer than six months’ duration “unless they can demonstrate they are actively seeking work and have a genuine prospect of work” and remove eligibility for

²¹ *Grzelczyk v Centre Public d’Aide Sociale d’Ottignies Louvain la Neuve* (C-184/99) [2002]

²² See *Collins v Secretary of State for Work and Pensions* (C-138/02) [2004], in which having worked in the UK 17 years previously was not deemed a sufficiently close connection with the state to confer eligibility to unemployment benefits

²³ European Parliament resolution of 20 October 2010 on the role of minimum income in combating poverty and promoting an inclusive society in Europe (2010/2039(INI))

²⁴ Motion for a European Parliament resolution on a European pillar of social rights (2016/2095(INI))

²⁵ G McKeever and M Simpson, ‘Worlds of welfare collide: implementing a European unemployment benefit scheme in the UK’ (2017) 19(1) *European Journal of Social Security* 21

²⁶ See, for example, P Wintour, ‘EU migrants: David Cameron sets out more benefit restrictions’ (*Guardian*, 27 November 2013) <<http://www.theguardian.com/politics/2013/nov/27/david-cameron-benefit-restrictions-eu-migrants>> accessed 24 January 2014; R Mason and P Wintour, ‘Benefits delay is obstacle for jobless immigrants, says Iain Duncan Smith’ (*Guardian*, 18 December 2013) <<http://www.theguardian.com/uk-news/2013/dec/18/benefits-delay-immigrants-iain-duncan-smith>> accessed 24 January 2014; P Dominiczak, ‘We will block benefits to new EU migrants, says Cameron’ (*Daily Telegraph*, 18 December 2013) <<http://www.telegraph.co.uk/news/uknews/immigration/10524285/We-will-block-benefits-to-new-EU-migrants-says-Cameron.html>> accessed 24 January 2014

²⁷ Department for Work and Pensions, ‘Improved benefit test for migrants launched’ (DWP, 2013) <<https://www.gov.uk/government/news/improved-benefit-test-for-migrants-launched>> accessed 24 January 2014

²⁸ Department for Work and Pensions, ‘JSA(IB) – three months residence requirement’ (Memo DMG 28/13, DWP, 2013)

housing benefit.²⁹ These changes appear compatible with EU requirements. Directive 2004/38/EC confers no right to social protection during the first three months of residence and an automatic right to benefits for only six months for those who employed for less than a year in the host state. In *Dano*, the CJEU confirmed that an EU national with no connection to the labour market of the host state and no independent resources has no right of residence and consequently no right to social protection.³⁰ In subsequent cases it was held that even would-be claimants who had previously been employed and were actively seeking work in the host state could be denied benefits.³¹

Consequently, while a ‘soft’ Brexit involving continuing EEA/EFTA membership or a similar level of access to the internal market would probably mean EU citizens’ social rights being largely maintained, it is far from clear what those rights are likely to be in the future. As noted above, the UK has been able to curtail EU migrants’ access to social security even in advance of Brexit.³² Shortly before the referendum the Council indicated that it was prepared to authorise further rollback by allowing member states to temporarily exclude workers exercising free movement rights from in-work benefits due to pressures resulting from an “inflow... of an exceptional magnitude.”³³ For Bebayev, this “compromise” further legitimises member states’ “narrow and exclusionary interpretation of Union workers’ and job-seekers’ rights.”³⁴ In any case, remaining in the EEA currently seems an improbable outcome if the June general election returns a Conservative government – the party’s manifesto promises withdrawal not only from the EU, but from the “customs union.”³⁵ A ‘hard’ Brexit, involving outright withdrawal from the single market, would probably put EU citizens in the UK on the same footing as third country nationals; and the UK is “notoriously stingy about allowing third-country nationals access to social benefits and exporting social benefits (including state pensions) to British citizens who live in other countries.”³⁶ Although the European Social Charter will remain an alternative basis on which to advocate social rights for migrants, its requirement that contracting state nationals should be able to access social and medical assistance on the same basis as host state nationals has proved impotent to date and can be expected to remain so.

The largely common approach to social security across the state means that the policy impact of Brexit would essentially be the same UK-wide, but the *impact* would not necessarily be the same in all parts of the UK. The Scottish Government argues that Scotland has a particular need for immigration due to demographics and skills shortages³⁷ and IFS economic projections for an independent Scotland suggest that public borrowing would be lower in a “high-migration scenario,”

²⁹ Department for Work and Pensions, ‘Improved benefit test for migrants launched’ (DWP, 2013) <<https://www.gov.uk/government/news/improved-benefit-test-for-migrants-launched>> accessed 24 January 2014

³⁰ *Dano v Jobcenter Leipzig* (C-333/13) [2015] 1 CMLR 48

³¹ *Jobcentre Berlin Neukölln v Alimanovic* (C-67/14) [2016] 1 CMLR 29; *Vestische Arbeit Jobcenter Kreis Recklinghausen v García Nieto* (C-299/14) [2016] 3 CMLR 5

³² N Harris, ‘Demagnetisation of social security and healthcare for migrants to the UK’ (2016) 18(2) *European Journal of Social Security* 130

³³ European Council, European Council meeting (18 and 19 February 2016) – conclusions (EUCO 1/16, Brussels: European Council, 2016) section D, 2(b)

³⁴ R Bebayev, ‘Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU referendum developments’ (2016) 18(4) *European Journal of Social Security* 356, 358

³⁵ Conservative Party, *Forward together: our plan for a stronger Britain and a prosperous future* (London: Conservative Party, 2017) 36

³⁶ E Guild, ‘Brexit and social security in the EU’ (Brussels: CEPS, 2017)

³⁷ Scottish Government, ‘Home Affairs Committee inquiry into immigration: Scottish Government written submission’ (Edinburgh: Scottish Government, 2017) <<http://www.gov.scot/Publications/2017/02/9947/1>>

largely because the average age of the population would be lower.³⁸ Public opinion appears to be less strongly in favour of significant reductions in immigration compared to England and Wales and significantly more likely to view immigration as having a positive or neutral effect, but with only a minority (10 per cent) in favour of increased immigration.³⁹

The extent to which (prospective) social security entitlements influence decisions on migration is controversial. The *perception* that people might migrate in search of a more generous welfare state, is an often-occurring political concern and has formed part of the UK debate on both EU and wider immigration in recent years. This reflects a Europe-wide concern about ‘benefit tourism’ that has intensified since the accession of Romania and Bulgaria⁴⁰ and is acknowledged in the Council’s pre-referendum statement, even though the same document highlights that economically inactive and even jobseeking migrants have no right to social security or social assistance under EU law.⁴¹ Academic research suggests that, on the whole, anticipated social security rights play a minor role in decisions to migrate compared to labour market conditions. However, family- and child-related benefits have been found to act to some extent as a ‘pull’ factor.⁴² While these are not currently devolved, future control of child tax credits (and the child element of universal credit) is likely to appeal to the Scottish Government given its focus on child poverty reduction.⁴³ Devolution would present an opportunity not only to adjust the level of benefits, but to ease migrants’ access if this were deemed a suitable means of stimulating immigration and encouraging immigrants to remain in Scotland rather than move on to other parts of the UK.⁴⁴ For example, prior to the referendum the Council agreed that the UK could phase in EU migrants’ access to in-work benefits over a longer period, suspend access if high immigration numbers create a temporary “exceptional situation” and reduce child benefit payments in respect of dependent children living elsewhere in the EU.⁴⁵ It can be anticipated that equivalent measures (at least) will be put in place following withdrawal; a future Scottish Parliament with devolved competence for the relevant benefits could take a different path.

Brexit, human rights, citizenship and social security

It is perhaps an exaggeration to claim that “Brexit undermines and imperils the... human rights framework of Scotland.”⁴⁶ However, it is clear that withdrawal from the European Union forms part

³⁸ M Amior, R Crawford and G Tetlow, *Fiscal sustainability of an independent Scotland* (London: Institute for Fiscal Studies, 2013) 27

³⁹ S Blinder, *Immigration and independence: public opinion on immigration in Scotland in the context of the referendum debate* (Oxford: Migration Observatory, 2014)

⁴⁰ GC Rentea, ‘Mobility within the European Union and the access to social benefits: challenges of social policies’ (2015) 3 *Revista de asisenta sociala* 99; P Larkin, ‘A policy of inconsistency and hypocrisy: United Kingdom social security policy and European citizenship’ (2009) 31(1) *Journal of Social Welfare and Family Law* 33

⁴¹ European Council, European Council meeting (18 and 19 February 2016) – conclusions (EUCO 1/16, Brussels: European Council, 2016) section D

⁴² C Enache and C Pânzaru, ‘Romanian migration flows in European countries: does social security matter?’ (2012) 14(2) *Annales Universitatis Apulensis: Series Oeconomica* 485

⁴³ Child Poverty (Scotland) SP Bill (2017) [6]

⁴⁴ See RE Wright, ‘Sub-national immigration policy: can it work in the UK?’ (Migration Observatory, 18 September 2013) <<http://www.migrationobservatory.ox.ac.uk/resources/primers/sub-national-immigration-policy-can-it-work-in-the-uk/>> accessed 1 June 2017

⁴⁵ For a summary, see M Sumption and S Altorjai, *EU migration, welfare benefits and EU membership* (Oxford: Migration Observatory, 2016)

⁴⁶ A Miller, ‘Brexit and human rights in Scotland’ (2016) 74 *Scottish Human Rights Journal* 2, 2

of a wider political “climate of hostility to human rights” in the UK.⁴⁷ Although the ECHR and Human Rights Act 1998 are separate issues from the EU and Brexit, the two are frequently conflated in critiques of interference in domestic affairs and erosion of the UK’s sovereignty by ‘Europe’.⁴⁸ While migrants’ political, social and residence rights are clearly vulnerable following Brexit, the surrounding political climate has itself been recognised as a potential threat to human rights more widely.⁴⁹ In the face of a potential roll-back of rights, Harvey argues that the time is ripe for reinvigoration of Northern Ireland’s long-dormant debate on a regional Bill of Rights.⁵⁰ Scotland’s First Minister has already expressed desire to incorporate more of the international human rights framework into Scottish law⁵¹ and a debate is underway as to the best means of enhancing the protection of social rights in areas of devolved competence.⁵² The Scottish Human Rights Commission argued that progress on this front would represent an appropriate devolved-level response to Brexit.⁵³

The European Convention on Human Rights is the most important international human rights agreement in the UK, being uniquely incorporated into domestic law by the Human Rights Act 1998. The same Conservative party manifesto that promised a referendum on continued membership of the EU included a commitment to repeal the Human Rights Act to make way for a British Bill of Rights.⁵⁴ This project now appears to be on hold until after Brexit has been completed,⁵⁵ and would in any case be likely to have a limited impact on social security. The ECHR is more concerned with civil and political than social rights and those provisions that can most readily be deployed in defence of social security entitlements are the non-absolute article 8 (the right to family life) and article 1, protocol 1 (the right to peaceful enjoyment of one’s possessions). Interference with these rights can normally be justified on the basis of a competing public policy objective.⁵⁶ Nonetheless, there have been recent signs that the courts are becoming more willing to question the ECHR-compliance of social security policy, normally because of its impact on children,⁵⁷ and therefore repeal of the Human Rights Act might – depending on the content of the successor Bill of Rights –

⁴⁷ C Harvey, ‘Reflections on human rights and citizenship in a changing constitutional context’ (Brexiting and Rights conference, Belfast, September 2016)

<http://www.caj.org.uk/files/2016/10/11/3_Brexiting_and_Rights_-_Colin_Harvey_CAJ-TJI_2016.pdf>

⁴⁸ A Wagner, ‘The Sun gets regulator reprimand and publishes correction for misleading on human rights’ (UK Human Rights Blog, 26 June 2013) <<https://ukhumanrightsblog.com/2013/06/26/the-sun-gets-regulator-reprimand-and-apologises-for-misleading-on-european-human-rights/>> accessed 1 June 2017; K King, ‘Daily Express forced to make huge correction to human rights story, again’ (Legal Cheek, 23 March 2017)

<<https://www.legalcheek.com/2017/03/daily-express-forced-to-make-huge-correction-to-human-rights-story-again/>> accessed 1 June 2017

⁴⁹ N Muižnieks, *Annual activity report 2016* (Strasbourg, Council of Europe: 2017)

⁵⁰ For discussion, see A Smith, M McWilliams and P Yarnell, *Political capacity building: advancing a Bill of Rights for Northern Ireland* (Newtownabbey: Transitional Justice Institute, 2014)

⁵¹ Scottish Human Rights Commission, ‘Commission welcomes key human rights pledge from First Minister’ (SHRC news release, 10 December 2015)

⁵² M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: Equality and Human Rights Commission, 2017 – forthcoming)

⁵³ Scottish Human Rights Commission, ‘Brexit: protecting human rights in Scotland in a changing relationship with Europe’ (Edinburgh: SHRC, 2016)

⁵⁴ Conservative Party, *Strong leadership, a clear economic plan, a brighter, more secure future: the Conservative party manifesto 2015* (London: Conservative Party, 2015)

⁵⁵ J Collins, ‘Liz Truss confirms British Bill of Rights on hold until after Brexit’ (Rights Info, 23 February 2017) <<https://rightsinfo.org/liz-truss-confirms-british-bill-rights-will-hold-brexit/>>

⁵⁶ *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449

⁵⁷ *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449; *McLaughlin’s application for judicial review, Re* [2016] NIQB 11

stymie the evolution of a new, human rights based protection of social security rights at UK level. Although the Conservatives endorse “the commitments made when we signed the Convention,”⁵⁸ the party rejects the subsequent claimed “mission creep” of the ECtHR – which could imply reversal of the relatively recent application of P1-1 to non-contributory benefits.⁵⁹ The Scotland Act 1998 is an alternative, stronger source of protection for the ECHR rights in Scotland, prohibiting the Scottish Parliament from legislating contrary to the Convention – mirroring provisions in the Northern Irish and Welsh devolution settlements. In a post-Brexit, post-Human Rights Act era, then, any “human rights legal deficit”⁶⁰ at UK level would not be reflected at devolved level. Devolved benefits in Scotland would still have to comply with the ECHR rights while reserved benefits might not. Although Parliament could, in principle, legislate to remove reference to the ECHR from the devolution legislation, this seems unlikely given its centrality to Northern Ireland’s peace agreement, to which the devolution project is inextricably linked.⁶¹

Raising the profile of social rights in Scottish law, especially if the European Social Charter were the chosen vehicle for doing so, would have even greater potential to push aspects of social security in a different direction to UK policy and even recent CJEU judgments. In particular, an enforceable right to social assistance (protected by article 13) could push the evolution of certain benefits in the opposite direction to their current trajectory under DWP stewardship. In 2013 the UK was found to comply with article 13.⁶² Since then, real-terms and cash cuts to the main income replacement benefits, including a freeze on uprating, the household benefit cap, a two-child limit on tax credits and various reforms to housing benefit mean the conclusion is becoming increasingly questionable. Most of these benefits are not devolved, but can be topped up in Scotland – the Scottish Government’s continued commitment to child poverty reduction points to the possible use of the top-up power to increase child-related benefits and incorporation of the ESC could lead to further pressures in this direction.⁶³ Article 13 also requires equal access to social assistance for lawful migrants from other contracting states. The UK’s provisions on universal credit for EEA migrants⁶⁴ are explicitly contrary to this requirement, although (as discussed above) in conformity with recent CJEU judgments shifting the focus from citizenship to contribution in determining access to social security in the host state.⁶⁵ Article 16, which protects the right of the family to social, legal and economic protection, may also be relevant. While the European Committee of Social Rights has generally used this article to assess the adequacy of child benefits or family allowances,⁶⁶ its requirement that contracting states ensure “the necessary conditions for the full development of

⁵⁸ Conservative Party, ‘Protecting human rights in the UK: the Conservatives’ proposals for changing Britain’s human rights laws’ (London: Conservative Party, 2014) 8

⁵⁹ *Stec v United Kingdom* (app 65731/01) [2006] 43 EHRR 1017

⁶⁰ K Boyle, ‘The legitimacy of the EU referendum requires that citizens are informed of the implications of their decision’ (Democratic Audit, 22 April 2016) <<http://www.democraticaudit.com/2016/04/22/the-legitimacy-of-the-eu-referendum-requires-that-citizens-are-informed-of-the-implications-of-their-decision/>>

⁶¹ Northern Ireland Office, *Agreement reached in the multi-party negotiations* (Cmnd 3883, Belfast: NIO, 1998)

⁶² European Committee of Social Rights, *Conclusions XX-2 – article 13 (United Kingdom)* (Strasbourg: Council of Europe, 2013)

⁶³ Child Poverty (Scotland) SP Bill (2017) [6]; for discussion, see M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: Equality and Human Rights Commission, 2017 – forthcoming)

⁶⁴ Universal Credit (EEA Jobseekers) Amendment Regulations 2015 no 546

⁶⁵ R Bebayev, ‘Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU referendum developments’ (2016) 18(4) *European Journal of Social Security* 356, 365

⁶⁶ European Committee of Social Rights, *Conclusions XX-4 – article 16* (Strasbourg: Council of Europe, 2013)

the family” is potentially of wider application in ensuring that claimants have sufficient income to support the development of their children.

The extent to which the ESC or any other social rights agreement might shape the development of Scottish benefits would, of course, depend on two things. The future extent of devolved social security competences – which forms the focus of the next section below – will be crucial as the Scottish Parliament is currently able to determine the level and form (including any rules on migrants’ access) of a minority of benefits. Meanwhile, the weight that would have to be afforded to social rights in the development of devolved social security would depend on the legislative vehicle chosen for their protection in Scottish law. Possible models range from Scottish Ministers’ rather vague duty to take whatever steps they deem appropriate to give effect to the rights contained in the UNCRC,⁶⁷ to Welsh Ministers’ somewhat “more robust” obligation to have due regard to the UNCRC⁶⁸ or the stronger model of the Human Rights Act.⁶⁹ While none of these approaches could prevent the Scottish Parliament legislating against a given set of rights if it wished to do so, the latter in particular would create a fairly strong presumption in favour of compliance. Consequently, there would be a potential driver of divergence in respect of benefits under devolved control as policy development would be guided by a different set of human rights obligations to that applicable to the UK Government.

Brexit, independence, devolution and social security

Discussing Brexit from a Northern Irish perspective, Harvey writes: “The appropriate response to what we are facing is not passive acceptance.”⁷⁰ Whether “passive acceptance” is a fair summary of the response in Northern Ireland’s fragmented political landscape varies dramatically depending on which party’s position one considers. Early opinion polls pointed to a resounding victory in the June 2017 general election for a Conservative party that has enthusiastically embraced withdrawal since the referendum result, albeit under an electoral system that heavily skews the result in favour of a party with a plurality, rather than a majority, of votes (although the gap has subsequently narrowed).⁷¹ It might therefore be argued that the response from a large section of the English electorate, and the likely next UK governing party, is not passive acceptance, but enthusiasm. There are few signs of passive acceptance in Scotland, or at least from the electorally dominant party of government at Holyrood, the Scottish National Party.

For a former chair of the Scottish Human Rights Commission, through the two recent referenda “Scotland has presented its credentials internationally and it’s now understood as to what its outlook is and what kind of country it wants to become.”⁷² That is, a more egalitarian country, more concerned with human rights – including social rights – and social justice, more internationalist too

⁶⁷ Children and Young People (Scotland) Act 2014

⁶⁸ Rights of Children and Young People (Wales) Measure 2011; SM McCall, ‘Putting the justice into social justice: how international human rights can deliver progressive social change for Scotland’ (2016) 72 Scottish Human Rights Journal 3

⁶⁹ For discussion of the options, see K Boyle, ‘Economic, social and cultural rights in Scotland’ (Edinburgh: Scottish Human Rights Commission, 2015); M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect* (Glasgow: Equality and Human Rights Commission, 2017 – forthcoming)

⁷⁰ C Harvey, ‘Reflections on human rights and citizenship in a changing constitutional context’ (Brexiting and Rights conference, Belfast, September 2016)

<http://www.caj.org.uk/files/2016/10/11/3_Brexiting_and_Rights_-_Colin_Harvey_CAJ-TJI_2016.pdf>

⁷¹ A Kirk and P Scott, ‘General election 2017: latest polls and odds tracker’ (Daily Telegraph, rolling updates) <<http://www.telegraph.co.uk/news/0/who-will-win-general-election-2017-latest-polls-odds-tracker/>> accessed 1 June 2017

⁷² R Johnston and A Miller, ‘Interview with Professor Alan Miller’ (2016) 75 Scottish Human Rights Journal 2, 3

than the rest of the UK/England/the Westminster elite. The independence referendum was to a large extent a debate about whether social justice could best be served within or outside the UK⁷³ and as the UK government moved towards a referendum on and then withdrawal from the EU, continued enthusiasm for European integration has also become increasingly central to the “Scottish brand.”⁷⁴

Much literature tries to put its finger on “the distinctive identity, values and policy preferences of the Scottish people.”⁷⁵ Even prior to legislative devolution aspects of Scottish social policy were claimed to be “fairer,” more caring than south of the border, although the reserved status of social security meant that “the scope for a transformative approach” has until now remained limited.⁷⁶ Recent research by the author finds nationalist politicians are heavily invested in the notion of a “fairer Scotland,”⁷⁷ advancing explanations from the theological (non-conformist churches’ concern for poverty) to the literary (Burns).⁷⁸ However, unionist politicians – in line with much of the literature⁷⁹ – tend to suggest that while Scotland’s political elite is significantly to the left of the UK’s, the gap in public opinion is much narrower. Digging deeper into the findings, nationalists themselves acknowledge that egalitarianism has not historically been an *exclusively* Scottish perspective, but a “defining feature of Britishness,” one that has been progressively abandoned by the Conservatives and other unionist parties, but to which Scotland remains committed.⁸⁰ From this perspective, it is Westminster that is undermining the post-World War 2 welfare settlement, therefore more devolution or even independence might be necessary (in part) to save the UK welfare state from the UK government.

Keating suggests that a distinctly Scottish attitude to European integration, too, is an elite rather than a popular phenomenon. Elected representatives overwhelmingly favoured remain prior to the referendum. Both Labour and the SNP had shaken off their previous Euro-scepticism during the 1980s and the Scottish Conservative leadership was much more united around continued membership than their Westminster counterparts. On the eve of the referendum, the SNP and the consistently pro-EU Liberal Democrats officially backed ‘remain’; Labour, Conservative and Green Party representatives were at liberty to vote as they wished, but the party leaderships and most of their MSPs were solidly pro-remain.⁸¹ Among the population as a whole, the picture is more “ambivalent,” with social research suggesting “less Euroscepticism but not a lot of Europhilia”

⁷³ G Mooney and G Scott, ‘The 2014 Scottish independence debate: questions of social welfare and social justice’ (2015) 23(1) *Journal of Poverty and Social Justice* 5; J Hearn, ‘Nationalism and normality: a comment on the Scottish independence referendum’ (2014) 38(4) *Dialectical Anthropology* 505

⁷⁴ G Mooney and C Williams, ‘Forging new “ways of life”? Social policy and nation building in devolved Scotland and Wales’ (2006) 26(3) *Critical Social Policy* 608

⁷⁵ N McEwen, ‘The territorial politics of social policy development in multilevel states’ (2005) 15(4) *Regional and Federal Studies* 537, 543

⁷⁶ K Rummery and C McAngus, ‘The future of social policy in Scotland: will further devolved powers lead to better social policies for disabled people?’ (2015) 86(2) *Political Quarterly* 234, 234

⁷⁷ Scottish Government, *Fairer Scotland action plan* (Edinburgh: Scottish Government, 2016)

⁷⁸ M Simpson, ‘The social citizenship of lone parents, 2010-2015: evolution and devolution’ (PhD thesis, Ulster University, 2016); M Simpson, ‘Renegotiating social citizenship in the age of devolution’ (under review, *Journal of Law and Society*)

⁷⁹ J Curtice and R Ormston, ‘Is Scotland more left-wing than England?’ (Edinburgh: ScotCen Social Research, 2011); J Mitchell, *The Scottish question* (Oxford: Oxford University Press, 2014)

⁸⁰ N McEwen, ‘Independence and the territorial politics of welfare’ (ESRC conversation 2: delivering social security: options in Scotland’s constitutional debate, Edinburgh, 2013) 3

⁸¹ C McCall, ‘EU referendum: where do Scotland’s political parties stand?’ (Scotsman, 26 February 2016) <<http://www.scotsman.com/news/politics/eu-referendum-where-do-scotland-s-political-parties-stand-1-4038649>>

compared to England.⁸² In common with the ‘social democratic Scotland’ thesis, nationalists have an opportunity to argue that the UK elite is abandoning formerly British values in a way that is unacceptable to the Scottish people. As the UK government stands accused of dismantling the welfare state, a Conservative party under whose leadership the UK *entered* the EU is now taking the state *out* of the EU, in the process becoming a cheerleader for an outcome that most of the leadership opposed during the referendum.⁸³

The ultimate impact of Brexit on Scottish social security, then, is intimately linked to this wider clash of values between the Scottish and UK elites that manifested in both the independence and EU referenda. The 2017 general election may be as important as the EU referendum in determining what happens next. The SNP has seized on UK withdrawal from the EU, against the wishes of 62% of Scottish voters in the referendum, as a development of sufficient magnitude to justify a second poll on independence.⁸⁴ In recent Scottish history, signs of enthusiasm for independence have been followed by attempts to placate the electorate with more devolved powers. The election of the first SNP government in 2007 was followed swiftly by the appointment of the Calman Commission,⁸⁵ whose recommendations for additional devolution shaped the Scotland Act 2012. The 45% vote in favour of independence in 2014 resulted in the convening of the Smith Commission, which again advocated new devolved powers including, for the first time, significant social security competences.⁸⁶ The Scotland Act 2016 put the Smith recommendations into action. The First Minister’s speech on a second referendum prompted an immediate call from Gordon Brown, the former Prime Minister and an influential voice in favour of further devolution at the time of the independence referendum,⁸⁷ for federalisation of the UK, implying more powers to Scotland.⁸⁸ Whether this “constitutional chain reaction”⁸⁹ in fact continues remains in the realms of speculation, but may depend to a great extent on the general election result, which will be known by 13 June. One scenario could see an SNP success of similar magnitude to 2015, when the party won all but three of Scotland’s 59 seats in the House of Commons, forcing the UK Government’s hand, with more powers devolved in an effort to curb enthusiasm for a new independence referendum. Alternatively, a resurgent Conservative vote in Scotland – where the party has gone from having no MPs in 1997 to becoming the main opposition party at Holyrood in 2016 – and clear victory at UK

⁸² M Keating, ‘The European dimension to Scottish constitutional change’ (2015) 86(2) *Political Quarterly* 201, 202

⁸³ A Learmouth, ‘Ruth Davidson accused of “enormous U-turn” on Europe’ (The National, 13 September 2016) <http://www.thenational.scot/politics/14894562.Ruth_Davidson_accused_of_enormous_U_Turn_on_Europe/>

⁸⁴ N Sturgeon, ‘Nicola Sturgeon’s speech on Scottish independence: full text’ (New Statesman, 13 March 2017) <<http://www.newstatesman.com/politics/staggers/2017/03/nicola-sturgeons-speech-scottish-independence-full-text>>

⁸⁵ Commission on Scottish Devolution, *Serving Scotland better: Scotland and the United Kingdom in the 21st century* (Edinburgh: Commission on Scottish Devolution, 2009)

⁸⁶ Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh: Smith Commission, 2014)

⁸⁷ R Syal, ‘Scottish independence: Brown to push for more devolution in event of no vote’ (Guardian, 5 September 2014) <<https://www.theguardian.com/politics/2014/sep/05/gordon-brown-scottish-independence-devolution>>; G Mooney and G Scott, ‘The 2014 Scottish independence debate: questions of social welfare and social justice’ (2015) 23(1) *Journal of Poverty and Social Justice* 5

⁸⁸ S Carrell, ‘Gordon Brown pushes “patriotic” third option for Scotland after Brexit’ (Guardian, 18 March 2017) <<https://www.theguardian.com/politics/2017/mar/18/gordon-brown-to-push-patriotic-third-option-for-more-powerful-scotland-after-brexit>>

⁸⁹ C Jeffery, ‘Constitutional change – without end?’ (2015) 86(2) *Political Quarterly* 275, 275

level might be seen as an opportunity to make concessions from a position of strength, cementing its electoral comeback and the decline of Scottish Labour since 2007.

Social security would be an obvious candidate for further devolution. The Scottish Government has a vision for a devolved system based on respect for the dignity of individuals and putting the user experience first (amongst other principles),⁹⁰ but only a limited set of competences to enable it to put the vision into practice. Policy announcements to date indicate that the devolved system will, to a limited but real extent, be more generous than the equivalent benefits provided by DWP for England and Wales. For example, the level of carer's allowance is to be raised to the same rate as jobseeker's allowance and the introduction of a dedicated young carer's benefit is proposed. There are no current proposals for significant changes to disability benefits – the largest part of the devolved system in terms of expenditure. However, a Scotland anxious to burnish its European credentials could in principle refrain from implementing any new restrictions on migrants' eligibility for or the portability of personal independence payment resulting from the future disapplication of Council Regulation (EC) no 1408/71 and Regulation (EC) no 883/2004.

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

Outright devolution of social security seems unlikely to take place in the near future; following the Smith report, Scottish civil servants told the author that retirement pensions in particular would be a "big financial risk" to any devolved government and are too fundamental a part of the glue "that keeps the country together" for any UK government to contemplate devolution.⁹¹ State-wide risk pooling in unemployment benefits is also the norm in decentralised states.⁹² Even in the context of wholesale devolution, the experience of Northern Ireland, where full devolved competence since 1921 has produced little significant policy divergence, shows that powerful forces in favour of a common UK approach to key benefits might remain.⁹³ Scotland is subject to less intense fiscal pressures than its near neighbour, as the Barnett formula preserves a higher block grant than a needs-based formula would allow,⁹⁴ enabling it to have higher levels of public spending than other

⁹⁰ Scottish Government, *A new future for social security: consultation on social security in Scotland*' (Edinburgh: Scottish Government, 2016)

⁹¹ M Simpson, 'The social citizenship of lone parents, 2010-2016: evolution and devolution' (PhD thesis, Ulster University, 2016) 254, 259

⁹² PE Peterson, *The price of federalism* (Washington DC: Brookings Institution, 1995); T Iversen, 'Democracy and capitalism' in FG Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford handbook of the welfare state* (Oxford: Oxford University Press, 2010)

⁹³ M Simpson, 'Developing constitutional principles through firefighting: social security parity in Northern Ireland' (2015) 22(1) *Journal of Social Security Law* 31

⁹⁴ The Barnett Formula is based on three main elements: population, planned spending changes in UK Government departments and equivalence of function between UK and devolved departments – see HM

UK regions without raising the taxes under devolved control. If fiscal autonomy continues to increase, the Barnett bonus may well diminish.⁹⁵ In any case, after a certain point benefit levels are “likely to be constrained by existing funding limits unless Scottish politicians can persuade the electorate to pay... higher income tax,” while the operational challenge of “dismantling” systems inherited from DWP should not be underestimated.⁹⁶

In the context of continued shared competence between the UK and Scottish Governments, the future oversight of the interaction of reserved and devolved benefits as well as the impact of any divergence that occurs on social rights within and freedom of movement between different parts of the UK – identified as problematic by McKeever⁹⁷ – will become an issue of increasing urgency. McEwen and Petersohn argue that the politics of devolution in the UK have been characterised by an excessive focus on *self*-rule to the exclusion of *shared* rule. Both governments have contributed to this position. If Scottish Governments since 2007 have consistently sought to “maximise self-rule,” the UK Government is accused of being more interested in using the Scotland Office to advance its own interests in Scotland than in allowing it to “act as a voice for Scotland in national decision making.”⁹⁸ With competence for key policy areas including personal taxation as well as social security now split between Holyrood and Westminster, this issue can be ignored no longer. Initial signs are mixed. The UK Government’s refusal to allow the Social Security Advisory Committee any remit in respect of devolved Scottish benefits seems explicable only by willingness to place intergovernmental (or unionist-nationalist) competition ahead of the best interests of the UK. Joint sessions of the Scottish Parliament Social Security Committee and House of Commons Scottish Affairs Committee are a positive step, but meetings have been blighted by squabbling over the appropriate way of referring to the social sector size criteria (‘bedroom tax’) and apparent unwillingness on the part of the UK government to facilitate the Scottish Government’s totemic policy of disapplying the criteria in Scotland.⁹⁹ Ministerial-level communication may or may not be more constructive, but takes place out of public view.

Conclusion

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

Treasury, *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: statement of funding policy* (HM Treasury, 2010) 13 and 39; notably, it is the *change* in rather than the overall level of per capita spending which is determined by Barnett, so higher levels of per capita expenditure in some areas were not initiated by the formula, but are maintained by it – see J McConnell, ‘Funding devolution: why Barnett remains better than the alternatives’ (2000) 7(2) *New Economy* 65

⁹⁵ A Midwinter, ‘The Barnett formula: why replacing it would be a mistake’ (2000) 7(2) *New Economy* 69, 74

⁹⁶ DNF Bell, ‘Territorial finance and the future of Barnett’ (2015) 86(2) *Political Quarterly* 209, 215

⁹⁷ G McKeever, ‘Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution’ (2016) 23(3) *Journal of Social Security Law* 126

⁹⁸ N McEwen and B Petersohn, ‘Between autonomy and interdependence: the challenges of shared rule after the Scottish referendum’ (2015) 86(2) *Political Quarterly* 192, 196

⁹⁹ Scottish Affairs Committee, ‘Oral evidence: Inter-governmental co-operation on social security, 20 March 2017’ (HC 1095, London: House of Commons, 2017)

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

While the Scottish Government and Scottish parliamentarians have been vocal critics of UK Government social security policy since 2011,¹⁰⁰ prior to the Scotland Act 2016 Holyrood had little scope to set a distinctive course. Even the implementation of the Smith recommendations devolves only a rather limited set of social security competences, although the significance of control of disability benefits and the opportunity to top up reserved benefits should not be underestimated. Arguably, then, the biggest question to be answered in respect of devolved social security is whether Brexit and the related calls for a new independence referendum will result in a wider revision of the devolution settlement with potential to hand control of additional benefits to the Scottish Parliament.

Such a development could open the door to divergence in income replacement and family benefits, which are currently reserved, many of which are becoming less generous to claimants and where the UK government has already moved to curtail EU migrants' rights even ahead of Brexit. A distinctive Scottish approach could be driven in part by legal requirements, particularly if the Human Rights Act 1998 were repealed but the obligation of compliance with the ECHR in the Scotland Act 1998 retained. However, at present the more important considerations are political, notably whether (and how) the Scottish Government might elect to enhance the protection of social rights in Scottish law, put into practice its pledge to base its social security system on respect for the dignity of individuals and seek to attract immigration to an economy claimed to need it more than other parts of the UK. Collectively, these considerations could underpin greater generosity in and easier access for migrants to certain benefits. To get to this point, a great number of 'what ifs' must be addressed, not least those relating to the outcome of the 2017 general election and the potential for a second independence referendum.

¹⁰⁰ Scot Parl deb 22 December 2011 session 4 col 4941; N Sturgeon, 'Foreword from the Deputy First Minister' in Scottish Government, *Child poverty strategy for Scotland: our approach 2014-2017* (Edinburgh: Scottish Government, 2014); Welfare Reform Committee, *The cumulative impact of welfare reform on households in Scotland* (SP657, Edinburgh: Scottish Parliament, 2015)