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Citizenship in Scotland's future

PROFESSOR JO SHAW 2 December 2013

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Last week, the Scottish Government launched its blueprint for an independent Scotland. Here, Jo Shaw outlines what it says, and doesn't say, about citizenship.



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picture/Better Nation

'An independent Scotland will have an inclusive approach to citizenship'. So says the White Paper, and so said other [earlier documents](#). That we already knew. We know more now, in relation to the issues of [descent and residence](#), but there are still many gaps which need to be filled in.

Habitual residence will be the test for existing UK citizens based in Scotland at the time of independence to become automatically Scottish citizens. Likewise, anyone born in Scotland but resident elsewhere will automatically have Scottish citizenship at the date of independence. This will be the initial citizenship settlement.

But since Scotland will tolerate dual and indeed multiple citizenship, being Scottish does not necessarily mean that UK citizens resident in Scotland or anywhere else will need to take on Scottish passports or act in any way as Scottish citizens. Provision will be made for opting out. Assuming that the rUK continues to allow dual citizenship (and of course that was [cast in doubt for the case of Scottish citizens by Theresa May](#) earlier in 2013), even those resident in Scotland could continue to be UK citizens as well as (or instead of) Scottish citizens and indeed might pass UK citizenship to their children depending upon the rUK rules on acquisition by citizenship by descent. We would face the prospect of a very substantial overlap of citizens between Scotland and rUK, because of high cross border mobility in the past and continuing today.

In a table helpfully printed twice in the White Paper (in the area of citizenship as in other aspects there is a good deal of repetition), we can also find out how citizenship will operate after independence. Most of what is envisaged represents a fairly standard mix in relation to birthright citizenship combining birth in the territory to a citizen parent or a parent with indefinite leave to remain (presumably an EU citizen permanent resident as well), with birth outside the territory to a citizen parent provided the birth is registered in Scotland. Further categories of 'registration' are established for births outside the territory with ethnic preferences for children of British citizen parents who *could* qualify for Scottish citizenship (presumably those who become Scottish automatically on independence but don't pursue the offer) and children who have at least one parent or grandparent, irrespective of citizenship, who *could* qualify for Scottish citizenship. Here 'terms and conditions apply' – i.e. certain evidence would have to be forthcoming and perhaps – the White Paper does not say – a fee will be charged. In any event, let us hope that Scotland – if it becomes independent – does not replicate the complex and confusing character of the [UK rules on citizenship by descent](#) and on the registration of children as UK citizens.

Finally, the law will provide for naturalization, but for two different categories. The first is the standard route of naturalization based on a period of residence. The White Paper suggests there will at least be good character as well as residency requirements, and perhaps others as well. Perhaps there will be a Scottish citizenship test along the lines of the [much derided Life in the UK](#) test; one can but hope this is not the case. We therefore don't know answers to the most important questions which would in practice determine whether Scottish citizenship laws match up to [international best practice standards](#) either in relation to the rules or the procedures to be adopted (e.g. how discretionary or rules-based will the process be? will there be appropriate appeal mechanisms?). From the point of view of making an immigration policy stick in terms of integration, then, the White Paper doesn't address the central questions.

The second route to naturalization is curious, and that is the case of 'citizenship by connection'. A person may apply for naturalization as a Scottish citizen on the basis of ten years of prior residency, whenever that might have been and regardless of whether that residency is still subsisting. This possibility obviously operates in addition to ordinary naturalization for non-citizen residents, as ten years would be a longer residence period than is required by the UK at present (in practice six years except for those who are spouses or civil partners of UK citizens), and the White Paper indicates that in general Scottish citizenship rules will replicate or be more liberal than those of UK citizens.

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Despite the reference to requirements of good character and other requirements set out in Scottish immigration law, one has to wonder how broad this preference might be and whether it is normatively defensible. Ten years residence at any point in a person's life without a requirement residence be subsisting at the time of application seems to be a very poor choice for a 'connection' to Scotland. Indeed, a [comprehensive comparison](#) of modes of acquisition of citizenship across 36 European states would suggest it would be a unique provision with no direct equivalent elsewhere, but perhaps closest in character to the [socialization based modes of acquisition](#) that exist in some states.

Is the suggestion that current UK citizenship laws are so restrictive or unwelcoming that there is large group of people who have in the past passed through the territory as children or adults, who have not acquired UK citizenship, but who have acquired a strong sense of 'Scottishness' and who would perhaps have acquired Scottish citizenship if it had existed? And what might be the additional requirements be which could prove that 'connection'? Even if you could prove that you have a Scottish identity or feel Scottish, is this defensible in the context of an independence process that wants to downplay feelings as a basis for decision and aims to highlight instead the economic benefits of self-determination? Or perhaps the applicant might be required to pass certain financial tests (income or savings), in which case we would be looking at a case of [investor citizenship](#) with all the issues that this raises about whether citizenship should be [for sale](#). All in all, this category of citizenship acquisition risks being arbitrary in character and perhaps little used. But if there isn't really a demand for it, why does it feature in the White Paper when so little detail is otherwise provided about important categories of citizenship acquisition such as naturalization of lawfully resident non-citizens? It is also a category which could easily be subject to the deflection effects that are bound to exist in a European Union which protects the free movement and citizenship rights of its citizens. That is, persons may exploit the happenstance of residence earlier in their lives in order to obtain a passport that they intend to use not in order to reside in Scotland (or at least not for more than a minimum of time) but in order to reside and work in another state, most likely rUK.

The White Paper is also thin on detail as to whether and how Scotland would observe international human rights standards in relation to its citizenship policies and practices. There is a reference to the European Convention on Nationality standard in relation to habitual residence in one footnote. And we can also find a brief discussion of statelessness, in the discussion (Q375) of opting out from citizenship for those who hold another citizenship (typically, one might expect, UK citizens who voted no in the referendum and don't want to be forced to become Scottish). So we can take it to be implicit in the White Paper that Scotland would fully recognize its international obligations in relation to statelessness. What we don't find in the White Paper is any discussion of one area where current UK citizenship law is treading a fine line in relation to human rights issues. This is the practice, seen as a weapon in the so-called war on terror, of depriving UK dual citizens of their UK citizenship, usually whilst they are out of the country, in order to prevent them from re-entering, on the grounds that this would be 'conducive to the public good'. Although the courts have

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placed [some limits](#) on the scope of this power of deprivation, [recent reports](#) suggest that the Home Secretary is working on a power to deprive terror suspects of their UK citizenship even if this would make them stateless. Clearly, this is an area where Scotland can establish its credentials as a good global citizen, a title to which the White Paper lays claim. However, the White Paper has nothing to say about the important, but often neglected, question of loss of citizenship, especially involuntary loss.

One last area of uncertainty needs to be highlighted, and this is the relationship between citizenship and voting rights. Question 617 in the White Paper suggests that after independence, there would be few changes to the voting system, except that the Scottish Government proposes bringing votes at 16 into the mainstream for Scottish Parliament elections also. Read at face value this suggests that there will be no external voting in a Scottish Parliament, and the same rules on the rights to vote of non-citizens would apply as do at present in relation to the (devolved) Scottish Parliament once it is a national or state Parliament. Rejecting expatriate votes might be a safe option for a small polity with a large diaspora of actual or potential citizens. External voting might have been easier to contemplate if the offer on external citizenship by descent were not as generous as it is. But as the recent Irish experience in the Constitutional Convention shows, arguments that external citizens – especially those who have recently been forced to leave in order to find work elsewhere – should be allowed to vote in domestic elections (in that case [Presidential elections](#)) will continually be raised by those who feel that their democratic rights are being limited in some way.

The issue of which residents should be allowed to vote is immensely complicated and cannot simply be dealt with via a simple 'no' or 'yes' assurance. For at present, EU and Commonwealth citizens are allowed to vote (and stand for election) in Scottish Parliament elections. While they do not enjoy a privilege there which is not matched in any other EU Member State (and is not mandated by obligations under EU law), for Irish and Commonwealth citizens the right to vote in SP elections is a natural consequence of their having a universal suffrage in the UK – a situation which some regard as a historical anomaly. What is more, of course, UK citizens can vote in elections to the Irish *Dail*. What becomes of these rights is both an interesting question and one which Irish citizens, in particular, might feel especially strongly about. If a new Scotland does not have the same arrangements with the UK and Ireland as currently subsist across these islands, they might feel that they would not want to vote for independence because this would mean fewer rights than they have present, as for now they can also vote in Westminster elections. In earlier documents, as well as in the White Paper, the Scottish Government has focused on the importance of relations across these islands as intrinsic to making the independence settlement work in practice, for all parties. But these are matters that will be subject to negotiation, and the outcomes of as yet hypothetical negotiations can never be clear. But whereas the White Paper makes clear what the Government sees as its main negotiating position on some hypothetical negotiations – specifically on the issue of membership of the European Union – it does not do so for the question of electoral rights.

Perhaps further documents will be forthcoming that will clarify these matters. Certainly, these are issues which the debate should cover between now and 18 September 2014.

For more details on the legal and political implications of citizenship in an independent Scotland, Jo Shaw's extended analysis is available [here](#).

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