# BREXIT: CHALLENGES AND OPPORTUNITIES

## MIGRATION, DIVERSITY, RIGHTS AND SOCIAL PROTECTION

## Summary

> The UK's decision to leave the EU will have profound consequences for UK policies on migration, as well as for the dynamics of immigration and integration in Scotland and the UK. Brexit will influence these policies and dynamics through two main channels. First, it will imply withdrawal from specific EU policies and cooperation on immigration and asylum; and second, it is expected to signify an end to the rights to free movement of workers. The Royal Society of Edinburgh (RSE) analyse the effects of these changes on the UK, and especially Scotland, focusing on four areas of policy: immigration, the rights and status of EU/EEA nationals in the UK, integration and diversity, and asylum and refugees. For each of these areas, we consider the challenges and opportunities created by Brexit, and examine scenarios relating to how the UK and Scotland may respond.

> We would encourage both the UK and Scottish Governments to consider the various options that exist in developing an immigration policy post-Brexit. Such deliberation should take into account not just immediate labour market needs, but also longer-term economic and demographic impacts, including the distinct needs of the devolved administrations and other regions and cities in the UK. It should also place central weight on the rights, status and well-being of long-term foreign-born residents.

> Of the various approaches available, a differentiated points-based system would be the most effective in responding to Scotland's demographic, economic and socio-cultural goals. However, such a model is likely to face political resistance from the UK Government, and may also be controversial given public attitudes towards immigration in Scotland.

> There is more scope in the short-term to leverage UK support for making adjustments within the existing immigration system under Tier 2 (skilled workers), for example through lowering salary and skills thresholds for Scottish employers and/or expanding the Scotland occupational short-list. There is also scope for putting post-study work schemes back on the agenda, either in the form of a differentiated Scottish programme, or a UK-wide scheme.

› Given that a significant proportion of EEA immigration is clustered in lower-skilled jobs, it is vital to explore how labour shortages in such areas would be addressed post-Brexit. Short-term responses in the form of seasonal worker and temporary labour programmes should build in appropriate rights and protection for immigrant workers, and need to take account of the impacts on those who have 'made a life' in the UK, albeit on the basis of such forms of employment.

› An early priority of the negotiations is agreement on the rights of EU nationals and their dependents, in terms of: their right to remain in the UK; access to public services; and participation in democratic processes. This is essential not just for clear ethical reasons, but also to avoid an outflow of EEA nationals who are making a vital contribution to the Scottish economy and society. The RSE notes that the Prime Minister, on behalf of the UK, made an initial offer with regard to this issue, but that the response from the EU was that it fell short of their desired outcome in terms of the rights of EU citizens. Ultimately, an agreement will need to be reached between the EU and the UK on this issue and the parallel rights of UK nationals living elsewhere in the EU.

› The complexity and bureaucracy of systems governing the rights and status of EU nationals is likely to increase; this will put additional pressure on services and systems and may widen the gap between rights on paper and their delivery in practice (which is already often an issue in relation for example to welfare rights).

› Research into the impacts of the referendum on EU membership suggests increasing levels of anxiety (among EU nationals) and a lowering of longer-term attachment and commitment to the UK/Scotland as a place of residence.[1] Brexit may thus lead to a worsening of community relations, to a lessening of incentives to learn English, and/or to integrate with other communities and cultures, as well as a sense of not being accepted or belonging.

› The cessation of free movement rights may have particular repercussions for young EEA nationals living in the UK/Scotland who were born in the UK/Scotland, or lived here from an early age, and identify primarily as Scottish/British. Recent research suggests more than half of these feel anxious about their future in the UK and have reported an increase in racism post-Brexit, including racism experienced in schools. It is crucial that measures are taken to ensure the ongoing inclusion of these young people into wider communities and UK/Scottish society.[2]

› EU common policies on integration and diversity are still nascent, and Brexit is unlikely to have a direct impact on policy in this area. Indeed, Brexit could result in greater (or more equal) opportunities for migration from beyond the EU to fill labour shortages and gaps. However, if people come to fractured and/or unwelcoming communities, and are treated as 'guest workers' and expected to leave after a certain period, this is likely to have negative repercussions on integration and diversity.

› Approaches to integration therefore need to span local and national policy and administration; and there is a need for a wide-ranging debate at Scottish and UK levels about identity, belonging and community formation. The continuing challenge for Scotland and the UK is both to come to terms with its existing diversity as well as to fashion ways of being Scottish and/or British that are open to renewal.

› In light of Brexit and the anticipated permanent settlement of a significant number of EU nationals currently living in the UK, particular emphasis should be given to integration into core sectors such as: labour market participation (for example through the creation of targeted training and recruitment practices); educational engagement through supplementary support at tertiary levels and funded classes beyond compulsory education; and means to deal with residential clustering where this limits opportunities for wider social participation.

› The impact of Brexit on asylum and refugee policy offers a similarly complex picture. Current EU asylum policies pursue contradictory aims, on the one hand seeking to exclude refugees and asylum seekers through measures on migration control; while simultaneously encouraging the protection of refugees' human rights through a number of provisions on refugee protection and asylum procedures.

> The UK is not currently bound to adopt EU common measures on asylum. The UK (along with Ireland) enjoys the prerogative to opt into individual measures on asylum; in this sense, Brexit would not significantly affect the UK's autonomy over asylum policy. However, following Brexit, the UK would be unable to influence the shaping of EU policy towards refugees, in both its exclusionary and its protection-oriented aspects. On the protection side, following Brexit, the UK Government would be unable to cooperate in the development of policies aimed at improving the situation for refugees arriving in the EU, including the adoption of 'humanitarian visas'.[3]

> On the exclusion side, Brexit could generate unintended consequences: if the UK became unable to participate in the Dublin regime following Brexit, it would not be possible for 'Dublin transfers' back to EU entry points to take place. This could lead to more people arriving in the UK without having to be concerned about being sent back to EU entry points.

> As with other areas of immigration policy, Brexit presents an opportunity to consider further devolution of policies regarding refugee and asylum issues to Scotland from the UK Government. Since devolution, the Scottish Government has been able to implement policies on matters such as health and homelessness which diverge from UK-wide policies. From the Scottish Government's perspective, such divergences help to promote their view of Scotland as a welcoming place for refugees. Devolving further powers could enable the Scottish Government to pursue a more protection-oriented approach to the rights of asylum seekers and refugees following Brexit. Further devolution could also imply Scottish participation in EU responsibility-sharing measures developed in response to the humanitarian crisis facing large numbers of refugees arriving in Europe.

## Introduction

1  The RSE has established an overall EU Strategy Group to inform and advise the UK Government, the Scottish Government and our current EU partners on issues that they will face and potential solutions in the negotiations for the UK leaving the EU. The overall Strategy Group is chaired by Sir John Elvidge. The work of the RSE draws on contributions from members of its Fellowship, the Young Academy of Scotland and others in Scotland with relevant expertise.

2  To carry out the detailed work on each of the major areas of policy four working groups have been established. As well as this group covering Migration, Diversity, Rights and Social Protection the others deal with: Law & Governance; Economy & Public Finance; and Research, Innovation & Tertiary Education.

3  Those contributing to the work of the Migration, Diversity, Rights and Social Protection Group were: Professor Christina Boswell (Chair); Professor Graeme Caie; Dr Daniel Clegg; Ms Sarah Craig; Professor Allan Findlay; Professor Rebecca Kay; Ms Debora Kayembe; Dr Tobias Lock; Professor Nasar Meer; Dr Ingela Naumann; Professor Charles Raab; and Dr Daniela Sime.

4  This paper has been approved on behalf of the RSE Council by the chair of the EU Strategy Group, Sir John Elvidge, and the General Secretary, Professor Alan Alexander.

### *Migration, Diversity and EU Membership: Introduction*

5  EU membership affects UK policies and approaches to immigration, integration and asylum in two main ways. First, EU member states have adopted a range of policy measures in the area of immigration and asylum policy since the 1990s. These cover rights, policies and procedures on asylum and temporary protection, conditions for the entry and residence of third country nationals, issuing of long-term visas, action against illegal immigration, and the rights of legally resident third-country nationals. There is also a growing body of guidelines and shared approaches on the integration of third-country nationals resident in EU states, although the legal framework in this area is less developed.

6   As with many other areas of EU integration, the UK has negotiated a special status governing its participation: its default position is not to participate in measures on immigration and asylum, but it can opt into policies on a case-by-case basis. In addition, the UK does not participate in the Schengen Area, meaning that it retains border controls (although again, it may opt into certain provisions). Current arrangements are therefore flexible, allowing the UK to preserve a high degree of national sovereignty, whilst also participating in cooperation where national interest dictates.

7   The UK Government has, however, opted into a range of instruments, including the Dublin Regime for determining which member state is responsible for assessing asylum applications, which also incorporates the EURODAC database of asylum applicants. These initiatives are designed to limit onward movement of irregular migrants and to prevent multiple asylum applications across EU countries, thus contributing to the UK's immigration control goals. The UK also participates in certain Schengen provisions, including cooperation on police and judicial cooperation and the second-generation Schengen Information System (SIS II). Finally, the UK Government also opted into EU directives on minimum standards for asylum procedures and reception of asylum seekers, as well as the definition of who qualifies for asylum.

8   However, the second and far more significant impact of EU membership relates to provisions on the free movement of workers. EU law enshrines a principle of 'free movement' of EU nationals, meaning that nationals of EU member states are entitled to seek a job and work in any other member country. These entitlements have also been extended to nationals of non-EU countries participating in the European Economic Area (EEA) – Iceland, Liechtenstein, Norway (the EFTA countries) – and to Swiss nationals. EU nationals are also entitled to equal treatment, for example in relation to access to employment, wages and social security. These rights are limited to those who move for work purposes – they do not extend to those who relocate to take advantage of unemployment benefits. In the case of countries newly joining the EU, member states may impose a temporary restriction on their access to the labour market, lasting up to seven years.

9   Free movement not only allows EU/EEA nationals to live and work in the UK, it also implies various social and political rights for those living in other Member States. The 2004 Citizenship Directive establishes a right of permanent residence to EU citizens after five years of uninterrupted legal residence. The same rule applies to family members who are not nationals of an EU country and who have lived with an EU citizen for five years.

10  Leaving the EU and the Single Market would have a number of important repercussions for Scotland. In this paper, we explore the potential consequences for the UK and Scotland. We focus on four main areas:

   • Immigration policy

   • Rights and status of EEA nationals in the UK

   • Integration and diversity

   • Refugee and asylum policy

   For reasons of space, the focus is limited to UK policy and practices on immigration, integration and asylum. We do not discuss in any detail the related issues of border control and migration management, including the implications of Brexit for the Common Travel Area.

## A. Immigration Policy

11  While the effects of withdrawing from free movement provisions will be felt across the UK, the Scottish Government has particular concerns about reduced inflows from EU countries. The Scottish Government is committed to retaining positive net migration, to help meet its population growth target and to enhance economic growth.[4] Prior to the 2000s, Scotland experienced a long period of population decline, which has largely been reversed through net inflows from rUK and overseas. The most recent report from the National Records of Scotland (NRS) shows a continuation of this trend of population growth. In 2016 the population reached its highest recorded level of just over 5.4 million.[5] The NRS also highlight that the net growth was almost wholly attributed to net migration from both overseas and within the UK.[6]

12    In particular, the UK's decision to allow labour market access to nationals of the eight Central and East European (CEE) countries joining the EU in May 2004 (the A-8) contributed to a steady increase in the overall population. The highest increase has come from Polish immigration. Census figures show that between 2001-2011, the number of Polish residents rose from around 2,500 to over 50,000, now overtaking Indian nationals as the largest foreign-born group in Scotland.

13    In addition to concerns about overall population decline, Scotland also faces the challenge of an ageing population. Estimates for the year to end of June 2015 show that the proportion of the population aged 16 or under is now smaller (17%) than that aged 65 or over (18%).[7] Figures from the Office of National Statistics (ONS) show that support ratios (the ratio of people of working age to people of state pension age) are falling. The ratios also vary across the UK nations. In mid-2012, Scotland had a support ratio of 3.18, compared to England's ratio of 3.23. According to ONS projections, these ratios will diverge further: by 2037, Scotland's ratio is projected as falling to 2.61, while England is projected a ratio of 2.77.[8]

14    EU immigration since 2004 has helped offset Scotland's ageing population. EU nationals in Scotland have a lower age profile compared to the Scottish population as a whole: 57% are aged 25-49, compared with 33% of the Scottish population.[9] Moreover, 80% of EU nationals in Scotland are of working age, compared to 65% of the Scottish population as a whole. EU free movement provisions are also flexible in allowing for permanent settlement, thus encouraging a younger population to settle and build families in the UK.

15    EU immigration has also made a substantial contribution to economic growth. Bell *et al* present international evidence that shows that migrants stimulate innovation, contribute to the fiscal surplus and help the economy to achieve positive economic growth.[10] Dustmann and Frattini showed that even during the difficult economic times that followed the economic crash of 2008, migrants contributed almost £2 billion to UK public finances, while it has been estimated that immigrant workers contribute the equivalent

of 4% of the UK's GDP.[11] In a Scottish context, international students clearly demonstrate the value to the economy of just one category of migrant, with Universities Scotland placing their contribution through tuition fees and off-campus expenditure at £800 million each year.[12]

16    In terms of the sectors and occupations most affected by free movement, EEA nationals tend to be concentrated in low skilled occupations (even though they are on average better qualified than UK nationals). However, a substantial number are also engaged in high skilled jobs, implying a 'U-shaped' distribution across wage and skills levels, with migrants concentrated at the top and bottom of the labour market.[13]

17    The right to free movement currently enjoyed by EEA nationals means that employers can hire them without additional restrictions and requirements. This has been of particular benefit in areas where there are labour shortages and/or a poor match with the qualifications and aspirations of the indigenous workforce. Employers in areas such as social care, food processing and agriculture, health care, hospitality and services, and in some areas of teaching, also benefit from the possibility of recruiting freely both within the EU and amongst EU nationals already living in the UK/Scotland.[14]

18    An estimated 28.6% of employed EEA nationals work in distribution, hotels and restaurants, making up just under 7% of employees in that sector. A further 17.1% are concentrated in public administration, education and health, of which 10.5% were employed in health and social care, amounting to 3% of all employees in health and social care.[15] However, it is important not to be too sanguine about the economic benefits of EEA immigration. These patterns of demand for migrant labour have meant that EEA nationals are most frequently employed in lower-skilled and lower-waged jobs, often beneath their levels of professional skill, prior experience and qualifications. Arguably, the availability of foreign workers willing to accept low pay and conditions has also impeded restructuring in a number of sectors.

19 Immigration is also hugely important for the higher education sector in Scotland. Of the UK's four nations, Scotland has the highest overall proportion of international students relative to its total student population (22%).[16] It is distinctive in raising a much higher share of its tuition fee income from international students from outside the EU, compared to other parts of the UK. Scotland also has the highest proportion of EU-domiciled students (9%) according to HESA (2017).[17] There is a risk that withdrawing the fee exemption for EEA nationals studying at Scottish universities would lead to a significant reduction in student numbers.[18] However, this would also imply a reduction in the tax burden associated with supporting their studies.

20 Both the Scottish Government and local authorities in Scotland recognise immigration and longer-term settlement as important means of addressing the particular economic and demographic needs of Scotland. Just under half of Scottish local authorities in 2016-17 identified these issues as a top priority in their single outcome agreements.[19] Similar issues may be replicated in other areas of England, Wales and Northern Ireland where demographic and economic needs differ from those in the South East of the country.

21 The flexibility that EU membership has offered appears to have catered well to this combination of demographic and economic needs. It has allowed temporary forms of migration to evolve into longer-term stays, provided access to services and benefits to sustain workers in relatively precarious and low paid employment, and facilitated family reunion and (re)formation within Scotland.

22 In addition to the demographic and economic arguments for sustaining EEA immigration, the Scottish Government is also committed to ensuring positive net migration as a means of strengthening its international ties, and fostering diversity. As the Scottish Government noted in its paper of December 2016, 'free movement of people is not only necessary for our economy, it is desirable for the cultural and social benefits it brings and the opportunities it affords to us all.'[20] The current Government has been keen to stress the need for Scotland to remain outward-looking and open to immigration following the referendum on EU membership.

23 This pro-immigration position is not necessarily consistent with public opinion in Scotland. Surveys suggest that the majority of Scottish residents favour a reduction in immigration. However, the level of anti-immigrant sentiment in Scotland is lower than in the rest of the UK. For example, the 2013 British Social Attitudes Survey found that 69% of Scottish respondents believed that immigration should be reduced, compared to 78% in England and 86% in Wales.[21] A 2014 survey by the Oxford Migration Observatory reported a sharper divergence in views. The survey found that while a majority (58%) of people in Scotland support reductions to immigration, this level is significantly lower than England and Wales, where support for reductions stands at 75%.[22]

24 This divergence may be partly because, despite the substantial increase in immigration in the late 2000s, levels of immigration remain relatively low compared to other parts of the UK. The 2011 census revealed that Scotland's foreign-born population stands at around 7% of the population, compared to 13.8% in England.[23] It may also be because immigration policy remains a reserved competence, and is therefore not the object of party political mobilization in Scottish politics.

## Challenges and Opportunities of Brexit

25 Immigration is clearly a reserved competence, and under current arrangements the Scottish Government has limited scope for leveraging a distinctive position on EEA immigration. If the current settlement is retained, and the UK withdraws from provisions on free movement as part of its negotiated settlement, then Scotland risks seeing a reduction in EEA immigration, with knock-on effects for population growth and dependency rates, as well as significant labour market shortages in certain sectors. So what are the scenarios for Scotland to retain current EEA inflows?

(a) **Sustain membership of the Single Market.**

26    In a paper published in December 2016, the Scottish Government proposed that Scotland might retain free movement even if the rUK leaves the Single Market. Under this proposal, EEA nationals would continue to have the right to live and work in Scotland, even if they did not retain such a right in rUK; and those living in Scotland would retain rights of free movement in other EEA countries.[24]

27    While a number of commentators, including EU legal experts, suggested that such arrangements could in principle be workable, the UK Government has made it clear that it is unwilling seriously to consider this option.

28    However, given recent political developments since 8th June 2017, it should not be ruled out that the UK may seek continued Single Market access, implying the continuation of free movement of workers. Such an arrangement could potentially be combined with some form of limitation on access to social benefits of EEA nationals, or an emergency break to address public concerns about the volume of flows. In-depth consideration of the options is outwith the scope of this paper.[25]

(b) **Greater devolution of powers of immigration policy.**

29    The Scottish Government has long argued that Scotland should have more autonomy over its immigration policy. The December 2016 paper again mooted the suggestion that Scotland develop its own bespoke points-based system, based on the decentralised systems operating in Australia and Canada. In these countries, states, territories or provinces have the competence to set their own points systems for recruiting labour migrants, deciding on which groups or characteristics to prioritise (e.g. graduates, those working in particular occupations, those with relevant language skills or existing ties to the region). States, territories or provinces may then nominate candidates for admission, who are then approved by the federal government. Those entering these schemes do not face restrictions in terms of which jobs they may access. Typically, they are granted permanent residency rights from the outset, with swift access to citizenship.

30    Such decentralised points-based schemes have been adopted to cater for sub-national variations with regard to demographic pressures, skills or sectoral shortages, and targeted to promote the permanent settlement and integration of immigrants. In this sense, they offer a promising model for Scotland to address its distinct demographic and economic needs.

31    While differentiated points-based systems have clear advantages for Scotland, they also raise substantial political challenges. Such schemes, as we saw, typically build in generous rights for entrants, with no restrictions on access to employment – or, indeed, to welfare and public services. It is difficult to see how such a generous 'settlement' model would be viable under current political conditions, either in Scotland or in rUK. Moreover, such a scheme is likely to raise concerns on the part of the UK Government about the potential for onwards movement from Scotland. The Canadian system does not impose any residence obligations on entrants (although it attempts to encourage entrants to settle in the recruiting province through selecting those with existing ties). The Australian system requires entrants to live and work in the recruiting state for the first two years, but thereafter they may relocate to other parts of the country.

32    More generally, assuming the current UK Government retains its commitment to reducing net migration, we consider it unlikely that it will accept a differentiated approach that implies a substantial increase in immigration to Scotland.

**(c) Expansion of current UK immigration rules to ensure Scottish needs are met.**

33 The third scenario is for the UK to agree more modest adjustments to current immigration policy. One option for this would be to re-introduce a Scotland-specific post-study work scheme (effectively bringing back the 'Fresh Talent' initiative that allowed graduates of Scottish universities to work in Scotland for up to 2 years). Another option would be to allow more flexibility within the current Tier 2 provisions of the UK immigration system. For example, there could be an expansion of the Scotland Occupational Shortage list, which sets out the occupations facing acute shortages in Scotland, and for which employers may recruit non-EEA nationals without conducting a 'resident labour market test'. One could envisage a loosening of the criteria for defining shortages, for example through relaxing the skills or salary threshold. Similarly, it would be possible to lower the skills or salary threshold for the employer-led entry route under Tier 2. Under this route, employers may recruit non-EEA nationals where they can demonstrate that no UK residents are available for the post, and where the job meets a salary and skills threshold. These criteria could be partially relaxed for Scottish employers.[26]

34 This scenario would represent a more modest adjustment of existing arrangements, and as such may be more politically feasible. Such an arrangement could draw on the Swiss experience of setting cantonal quotas, which ensures that the federal government can closely monitor and control overall levels of immigration. However, it should be noted that these adjustments would not be as well suited to addressing Scotland's demographic needs, or for promoting integration and diversity: schemes allowing swifter access to permanent settlement and generous rights for immigrants are better placed to meet these longer-term goals. They would also imply that employers assume the additional financial costs associated with Tier 2 visas (visa application fees, sponsorship licence, certificates of sponsorship, as well as the new Immigration Skills Charge introduced in April 2017).

35 Finally, we note that one of the main challenges for Scotland and rUK will be retaining a supply of labour for low-skilled and seasonal work. From the perspective of Scotland, clearly it will be important to ensure that any UK-wide sectoral scheme is tailored to meet Scotland's particular labour market needs. However, such schemes are often associated with far less generous rights and social protection compared to the channels available to high skilled workers, or to EEA nationals under current free movement rules. The Scottish Government and local authorities have a strong interest in preventing a ratcheting down of rights of temporary workers, which could lead to problems of exploitation and socio-economic precariousness, impeding integration and potentially generating irregular forms of work and movement.

## B. Rights/status of EEA Nationals in Scotland/UK

36 EU membership has offered a particularly flexible framework within which EEA citizens have been able to come to the UK to work, to study, as family members of mobile workers, for flexible periods of time and with a variety of intentions regarding longer-term stay. This flexibility of movement to the UK and within it, as well as within the labour market, has seen EU nationals come to live and work in virtually all areas of the UK and Scotland. This includes both urban areas with more extensive experience of immigration and with very diverse existing communities, and those, often more rural regions, with much less such experience or indeed with a history of out-migration. For example, Polish nationals, now the largest foreign born group in Scotland (making up approximately 1% of the population), are fairly evenly spread across both urban locations (3% in Aberdeen and Edinburgh; 2% in West Lothian and Perth and Kinross; 1% in 18 other local authority areas as diverse as Glasgow City) and the largely rural regions of Angus and the Shetland Islands.[27]

37  Patterns and experiences of migration and settlement from within the EEA have been shaped by a range of social rights associated with free movement and relating to access to the labour market, equality of treatment and access to services and benefits, family migration and reunion, permanent residence and more settled status. In many ways, these extended rights have been beneficial to both EEA nationals and employers. However, as we saw in the last section, there has also been a persistent problem of 'deskilling', with EEA nationals taking on jobs that do not match their skills and qualifications. Barriers to occupational mobility have been identified, often linked to lack of recognition of prior experience and qualifications, or to difficulties in improving English language skills (which may of themselves be related to working hours, shift patterns and clustering of migrant labour).[28] A lack of clear and reliable information relating to employment and contractual rights, exacerbated by difficulties with language, has also been reported as a source of vulnerability and exposure to exploitation within the work place.[29]

38  The right to equal treatment which underpins the principle of free movement extends to job recruitment, conditions of employment, social assistance and tax advantages. However, rights are more limited in relation to social assistance,[30] and have been challenged more recently by the UK Government. This means that whilst EEA nationals enjoy social rights which are closer to those of UK citizens than to those of most non-EEA migrants, there are some (and increasing) restrictions on their access to social assistance: for example, having to fulfil additional requirements such as meeting the 'right to reside' when applying for certain benefits, or providing evidence of a 'genuine prospect of finding work', often interpreted in terms of English language skills.[31]

39  At the same time, open borders and the ease of movement between the UK and many EEA countries has facilitated forms of transnational access to services and indeed livelihoods amongst some EEA nationals. Trips back to the country of origin to use dentists, doctors and specialist services are not uncommon, although not equally available to all,[32]  and patterns of circular or seasonal migration have also been possible.

The availability of some forms of welfare and state support (in-work benefits, social housing, Job Seekers Allowance), in combination with this flexibility in transnational movements, appears to play an important role in facilitating more permanent stays amongst those employed in low-paid and precarious, temporary or seasonal forms of employment. It allows workers to 'bridge' short periods of unemployment, and enables families to pool resources and forms of paid and unpaid labour whilst making a life in the UK.[33]

40  Whilst formally framed in terms of flexible labour and the rights of mobile workers, freedom of movement has facilitated not only labour migration, but also family migration. The demographic composition and patterns of migration within the EU have changed quite markedly over the last decade. While initial migration from the new EU countries appeared to be dominated by young, single men[34] who often engaged in temporary or circular patterns of labour migration and were not expected to stay long-term, more recently, larger numbers of women, as well as a broader age range of migrants, have been arriving.[35] There has also been a sharp increase in numbers of central and east European (CEE) children in British schools since 2004, as well as a year-on-year increase in the numbers of children born in the UK to CEE nationals.[36] While in 2007, the Pupils in Scotland Census recorded only 741 pupils with English as an Additional Language, that number increased to 39,342 in the 2016 Census. Of these, 14,739 pupils gave Polish as their home language.[37] The ability to live in the UK with family members plays a key role in longer-term decisions regarding settlement and attachment to the UK as a more permanent home.[38]

41  The status of permanent residence – which follows five years of lawful residence in the UK – brings with it continued protection under the equal treatment principle, enhanced procedural safeguards against expulsion, and other rights. An EEA citizen with permanent residence status cannot lose these rights or the right of residence if their economic status changes.[39]

42 The rights of EEA citizens already resident in the UK are a vital early issue that should be resolved in the negotiations between the EU and the UK. We recognise that the EU wish this to be addressed and also that the Prime Minister made a recent offer on behalf of the UK Government. It is the case, however, that there is a significant gap between the aspirations of the EU and the offer made by the UK. It is also essential that any agreement reached addresses not only the individual who is living or working in the UK, but also their partners and dependents. The rights of UK nationals living in other EU countries also need to be addressed. Neither group should be used as a bargaining chip in the negotiations.

## Challenges and Opportunities of Brexit

43 Against this background, new systems for regulating and managing migration from EEA states seem likely to impose a much less flexible and more restrictive system. As we saw in the previous section, this may present challenges for various sectors of the economy which have come to rely heavily on the availability and flexibility of EEA nationals as a workforce, something which could in turn have significant knock on implications for the provision and cost of goods and services to the wider population. There may, of course, be an opportunity for larger numbers of UK citizens to take up employment in these sectors, but this will be successful only if skills and aspirations can be matched to the job opportunities available.[40]

44 Significant challenges are likely to arise not only with respect to flows of 'new' migrants, as discussed earlier; but also in regard to the large numbers of people already resident in the UK/Scotland and their various configurations of family and dependents. Mixed families including EEA nationals and UK citizens, or EEA nationals from more than one member state, as well as families with children born in the UK or children who have lived here from a young age may face particular dilemmas and challenges depending on whether, for example, different bilateral agreements are reached with different member states. The complexity and bureaucracy of systems governing the rights and status of EU nationals is likely to increase, and this will put additional pressure on services and systems. It may also widen the gap between rights on paper and their delivery in practice (which is already

often an issue in relation for example to welfare rights).[41]

45 Early findings from research into the impacts of discussions and discourses in the period prior to the opening of Brexit negotiations suggest increasing levels of anxiety and a lowering of longer-term attachment and commitment to the UK/Scotland as a place of residence, although there is little evidence of people making more immediate plans to leave.[42] Brexit may thus lead to a worsening of community relations, to a lessening of incentives to learn English and/or to integrate with other communities and cultures, as well as a sense of not being accepted or belonging.

46 The cessation of free movement rights may have particular repercussions for young people who are currently EEA nationals, but were born in the UK/Scotland, or lived here from an early age and identify primarily as Scottish/British. In an ESRC post-Brexit survey, *Here to Stay?*, of over 1,100 young people aged 12-18 born in Central and Eastern Europe and living now in the UK, over 50% said they felt 'worried' and 'uncertain' over their future in the UK, although the majority thought they were likely to be living in the UK in the year 2020.[43] This group is thus amongst the least likely to say they intend or expect to leave the UK. Nonetheless, they are sensitive to and potentially alienated by anti-immigration discourses in the media and public life. Half of the young people who completed the survey said they have seen an increase in racism post-Brexit, including racism experienced in schools. It seems that debates around Brexit have also affected inter-group relations among young people. It will be of special importance that measures are taken to ensure the ongoing inclusion of these young people into wider communities and UK/Scottish society.

47 Brexit could result in greater (or more equal) opportunities for migration from beyond the EEA to fill labour shortages and gaps. However, given the current UK Government's stance on immigration, it seems unlikely that any expansion of current immigration channels for non-EEA nationals would bestow generous rights. Moreover, if people come to fractured and/or unwelcoming communities, and are treated as guest workers who are expected to leave after a certain period, this will likely impact on integration and diversity more broadly.

48 Brexit and some of the more divisive discourses and stances which have been empowered as a result could increase this gap between rhetoric and practice, potentially leading to greater community tensions. Scotland has not, for example, been exempt from the reported rise in numbers of racist incidents following the decision to leave the EU, and it is likely that unreported cases exceed the numbers reported. Between 2015 and 2016, 3,712 racially motivated hate crimes were recorded by Police Scotland. These are not disaggregated by nationality, yet nationality falls within the 'protected characteristics' of hate crime. In the *Here to Stay?* Survey, more than half of the young people in the UK-wide study said they had experienced racism, either on isolated occasions or more frequently at school and in public places. [44] Therefore, Scotland needs to remain vigilant and proactively tackle racism and discrimination.

49 As outlined in the previous section of this paper, Brexit negotiations could include greater devolution of immigration policy with Scotland (as well as other areas of England, Wales and Northern Ireland) gaining greater control over the numbers of people arriving and the conditions placed upon their stays. Under such a scenario, and in combination with existing powers of the devolved Scottish Parliament and Scottish Local Authorities for the delivery of certain forms of social assistance, proactive measures could be taken to secure rights and entitlements for EEA nationals already living in Scotland and to support their social, cultural and political inclusion in local communities. Some of the differences in access to social assistance and support which currently exist between Scotland and rUK (for example free prescriptions, better access to social housing, the right to free higher education) have already been noted as attractive and significant to EEA nationals' decisions to remain longer term in Scotland. Mechanisms to continue to extend such rights to those already here, or indeed to new arrivals, could be used to counter fears that a differentiated regional immigration policy could be undermined by subsequent onward movement to other parts of the UK. Given Scotland's demographic and economic needs, these would be significant measures, which could mitigate some of the pressures outlined above which might otherwise encourage people already resident in Scotland to leave.

50 The right to equal treatment in the EU Treaties includes the rights of EU citizens resident in the UK to vote and to stand for election in European Parliament elections, and in local elections, including elections to the Scottish Parliament. [45] In the 2014 Scottish Independence Referendum, many EU nationals welcomed the opportunity to vote, as well as the extension of voting rights to those aged 16-18, which they saw as evidence of a more progressive and inclusive political environment. In order to promote a welcoming policy post Brexit, the Scottish Parliament could take proactive steps to continue to protect the current political rights of EU nationals.

## C. Integration and diversity

51 There is an ongoing debate about which indicators are best suited to measure success and failure in relation to immigrant integration. This is because integration is a complex and multi-level process, which takes place across all sectors of society and implicates a broad array of social actors. [46] Integration as a policy objective therefore needs to take a number of interdependent spheres into account, including behavioural (such as residential settlement, educational attainment and labour market participation) and attitudinal (such as how people self-identify).

52 The corollary of integration is minority ethnic and cultural diversity – something that 'can neither be wished out of existence nor suppressed without an unacceptable degree of coercion, and often not even then'. [47] All European societies are faced with these challenges, given that the intermingling of diverse cultural, religious and ethnic groups renews and/or un-settles established social and political configurations.

53 Approaches to integration and diversity can therefore span local and national policy and administration, as well as debates about identity, belonging and community formation. The challenge for Scotland and the UK is both to come to terms with its existing diversity and to fashion ways of *being Scottish and/or British* that are open to renewal. The UK has typically concentrated on integration into core sectors, such as labour market participation, educational outcomes and political engagement. [48] In recent years this has broadened to explicitly include an emphasis on national identity and civic values, first in the areas of migration and naturalisation, and now in a way that embraces most features of social, civic and political citizenship in the UK. [49]

54 In general, the UK has received little by way of direct EU instruction on how to pursue these issues. Beyond non-discrimination stipulations that flow from the ECHR and Treaty of Amsterdam, most EU policies on matters of integration and diversity have remained at the level of guidance. For example, the European Council agreement in 2004 on 'common basic principles' offered support to member states in educating immigrants on 'the host society's language, history, and institutions'.[50] Where the EU has taken a view on matters of integration and diversity, this has tended to concern immigration flows and reception conditions, for example in the European Union Pact on Immigration and Asylum.[51]

55 There is however *indirect* influence in the form of policy mirroring other individual EU member states. Examples include the cultivation and entrenchment of civic integrationist approaches, what Goodman describes as clusters of 'civic hardware'.[52] In the UK, policies on integration have been partly informed by practices in the Netherlands and Denmark, countries which developed integration contracts, classes, tests and ceremonies. Thus the *Nationality, Immigration, and Asylum Act* 2002 explicitly required new citizen applicants to demonstrate a sufficient knowledge of English, Welsh or Scottish Gaelic, and also a sufficient knowledge about life in the United Kingdom.

56 It is important not to overstate this influence. UK approaches also promote the mainstreaming of race and ethnicity monitoring, including statutory and public duties of care detailed in the 2010 Equality Act, while the 'national story' continues to be rewritten to incorporate minorities. Together these distinguish integration and diversity approaches from a number of other EU countries.

## Challenges and Opportunities of Brexit

57 Policy approaches to diversity and integration need to be balanced against each other. If with the onset of Brexit the 'policy image' of diversity approaches become associated with an EU imposition, rather than an endogenous creation, the balance may shift to a form integration in line with those seeking to uncouple as much as they can from the EU. Put in other terms, if diversity becomes part of the 'collateral rhetoric'[53] of Brexit, rather than a long-standing UK concern,

the symbolic politics could undermine integration efforts, by placing the burden of adaptation squarely on the minority in question, rather than in concert with state and society as a whole.

58 Practically, in the area of trade agreements for example, there may well be economic incentives to reduce employer diversity conventions such as outreach work, awareness training, monitoring and positive action. This would be consistent with a less regulated economy in which employee profiles are deemed less important than the inflow and outflow of capital, goods and services. The challenge would be to make the case in Scotland for diversity as an asset to the economy as well as to society.[54] With this risk also come opportunities to renew the case for what works in terms of integration. With the likely permanent settlement of numerous existing EU nationals specific emphasis should be given to strategies which promote integration into core sectors such as labour market participation (for example through the creation of targeted training and recruitment practices); educational engagement through supplementary support at tertiary levels and funded language classes beyond compulsory education; and means to deal with residential clustering where this limits opportunities for wider social participation.

59 Consistent with the 'Scottish Approach' to policy making,[55] measures to maximise outcomes opportunities could be pursued in concert with civil society actors, emboldening a wide range of stakeholders and strategic partners including the Council for Ethnic Minority Voluntary Organisations, the Black and Ethnic Minority Infrastructure in Scotland, the Scottish Refugee Council, and the Equality and Human Rights Commission, among others.

60 Scotland has particular social policy challenges that relate to population diversity broadly conceived,[56] and this is especially pronounced in the area of employment. These discrepancies continue to permeate and hamper integration efforts. It has been shown that black and ethnic minority (BAME) candidates in Scotland pay an ethnic penalty in terms of employment opportunities across the application process. There is also evidence to suggest that many EU migrants, at least in the first few years after arrival, are concentrated in low-skilled occupations, despite their higher qualification levels when compared with UK-born residents.

## D. *Refugees and asylum*

61 EU cooperation on asylum and refugee policy has been evolving since the beginning of the 1990s, and is now grouped within the so-called Common European Asylum System (CEAS). However, the CEAS pursues contradictory aims: on the one hand it promotes member state cooperation in policies aimed at excluding refugees and asylum seekers – as exemplified by the EU-Turkey agreement; but at the same time, through a series of instruments and guidance it  encouraged member states to protect refugees' human rights.

62 The Asylum Procedures Directive[57] one of the 'first phase' CEAS instruments, has encountered particular criticism for setting common minimum standards for national asylum procedures which are perceived as too low, and for sanctioning the development of 'safe country' and 'admissibility' concepts which have had the effect of excluding valid asylum claims.[58] In similar vein, the Dublin III Regulation,[59] which aims to ensure that an asylum claim is only made in one EU member state, has been seen as representing the pursuit of national border control and security aims over ideas of EU 'solidarity'.[60] Because it works alongside the EURODAC database of fingerprints,[61] the 'Dublin Regime' is strongly associated with the policing and security aims which that database fulfils in the EU's Area of Freedom, Security and Justice (AFSJ), and it has also become synonymous with 'burden-sharing' problems, and with the effective breakdown of asylum systems in Italy and Greece, the countries through which most asylum seekers arrive in the EU.

63 As a result, asylum seekers in the EU often encounter national procedures that focus on their travel route, identity documents and means of arrival, rather than on the harms that led them to flee. These procedures exacerbate asylum seekers' anxieties about personal information being disclosed inappropriately, concerns that the Asylum Procedures Directive's restrictions on the sharing of asylum seekers' information with countries of origin do little to allay.[62]

64 The UK has a default 'opt out' position in relation to the CEAS, but it chose to 'opt-in' to the CEAS measures outlined above. The UK also opted into the 'first phase' Qualification Directive (common definitions for who qualifies for protection);[63] the Reception Conditions Directive (minimum standards for housing and subsistence);[64] and the Temporary Protection Directive.[65] The UK has not opted into the revised 'second-phase' more protection-oriented versions of these measures, which makes the legal landscape even trickier to navigate.

65 At the same time as sanctioning procedures that deflect asylum claims, CEAS legislation has also developed substantive refugee law in ways that promote human rights, and the Court of Justice of the European Union (CJEU) has lent support to these developments through its interpretations of CEAS measures. The Qualification Directive defines persecution so that it can include serious harm inflicted by non-state actors as a minimum standard,[66] and its concept of subsidiary protection includes criteria drawn from international obligations under human rights instruments beyond those originally envisaged by the 1951 UN Refugee Convention, such as indiscriminate violence in situations of internal armed conflict.[67] The Qualification Directive also gives legal force to the duty on States to cooperate with asylum seekers as their application is substantiated.[68] EU legislation and the Charter of Fundamental Rights limit and control the detention of migrants and asylum seekers in ways that have had an impact in the UK, notwithstanding the UK's exercise of its opt-outs in this area.[69] The protection of human rights also underpinned the CJEU's judgment prohibiting of 'Dublin' transfers taking place when there was systemic failure in the asylum system of the Member State through which an asylum seeker arrived in the EU,[70] and this resulted in the Dublin III Regulation itself being amended to prevent such transfers.[71]

## Challenges and Opportunities of Brexit

66 The loss of the opportunity to cooperate on refugee and asylum policy within the Area of Freedom, Security and Justice, and the loss of the role of the CJEU, are particular challenges that Brexit poses to asylum policy.

67 The CJEU's role in overseeing the application of the EU asylum law seems remote from the experience of most asylum seekers, but the loss of CJEU oversight could present a challenge to the pursuit of a non-regressive refugee, asylum and human rights policies and practices in the UK. The UK Supreme Court would of course play a greater role in adjudicating over the rights of refugees, however the political and media debate in the UK around refugees and asylum is not currently conducive to a progressive and human rights based approach. The UK Supreme Court can interpret only the Acts that Parliament passes into law.

68 Following Brexit, the UK would be unable to influence the shaping of EU policy towards refugees, in both its exclusionary and its protection-oriented aspects. On the protection side, following Brexit, the UK Government would be unable to cooperate in the development of policies aimed at improving the situation for refugees arriving in the EU,[72] including the adoption of humanitarian visas.[73] On the exclusion side, there could be unintended consequences: if the UK became unable to participate in the Dublin regime following Brexit, it would not be possible for 'Dublin transfers' back to EU entry points to take place. This could lead to more people arriving in the UK without having to be concerned about being sent back to EU entry points.

## The issues for Scotland

69 Participation in the Single Market and the EEA would involve retaining free movement and, although favoured by the Scottish Government,[74] this approach has been rejected by the UK Government to date. Although it is not part of the Schengen regime, the UK operates the Schengen Information System (SIS) in the context of law enforcement cooperation,[75] and SIS operates alongside other EU information sharing systems, including EURODAC (mentioned above).[76] The UK may wish to continue with this arrangement following Brexit. Because of the connection between EURODAC and Dublin, it is likely that the two will go hand in hand, although the direct links between SIS and police/security/anti-terrorism could mean that participation in SIS might be negotiated more easily. As a condition of continued access to such EU data sharing mechanisms, the EU may insist that the UK continue to sign up to EU data protection rules and, in the case of EURODAC, those conditions might involve signing up to the Dublin regime and other standards of human rights protection. Short of independence, participation in the EEA would be an unlikely outcome for Scotland, but it may be possible to argue for some sort of differentiation, and this could be along similar lines to the opportunities given to EEA members to adopt some EU-wide asylum measures, such as the Dublin regime[77] and the Reception Conditions Directive.[78]

70 Even though asylum policy is reserved to the UK Government, the Scottish Government has, since devolution, implemented different policies from the rest of the UK in areas such as access to higher education, healthcare, and asylum seeker integration.[79] Among organisations working with trafficked children, the Scottish Guardianship Service for unaccompanied asylum seeking children is regarded as a best practice model.[80] Legal aid policy, also devolved, has broader scope in Scotland than in the rest of the UK, although asylum law services are under-resourced and focused on Glasgow.[81] More recently, as immigration legislation has reached beyond border control and into broader areas of life, the UK Government has resisted arguments that the Scottish Parliament's consent is required where such legislation affects devolved areas such as childcare and housing: where it affects migrants, asylum seekers and refugees, the legislation has been treated as reserved.[82] The scope for taking a different approach has therefore ebbed and flowed since devolution. Following Brexit, and dependent on the outcome of negotiations with the EU regarding the future relationship between the UK and the EU, the scope for Scotland to take the initiative in relation to asylum policy would continue to depend on such fluctuations.

71 While intergovernmental co-operation between the UK and Scottish Governments may enable Scotland to realise different and potentially more welcoming policies than the rest of the UK, greater devolution of power would make it easier for the Scottish Government to take the initiative on such measures. Such measures would still require careful intergovernmental cooperation, but further devolution would allow for the initiation of measures tailored to the Scottish context, where the pressure to pursue exclusionary policies towards asylum seekers and refugees, although not fully tested yet, appears to be less keenly felt than it is at Westminster. If, as outlined above, Brexit were to lead to greater numbers of migrants, refugees and asylum seekers making their way to the UK border and to the Southeast of England in particular, such measures could meet the objectives of both UK and Scottish Governments. Other initiatives, such as the opening up of safe routes to Scotland, might provoke UK Government concerns about Scotland providing a 'back door' to the rest of the UK. To address such concerns, safe routes could be coupled with, and build on, those initiatives that have been developed since devolution to encourage people to stay in Scotland after status is granted.

72 From the asylum seekers' perspective, fundamental change to the whole asylum process would be required to make their experience more positive. While major institutional change to the asylum decision-making process itself is unlikely to take place in the short-term post-Brexit context, ensuring access to adequately funded legal aid provision would help people to engage positively with their claims for international protection.

## Additional Information

This Advice Paper has been signed off by the RSE's EU Strategy Group and the RSE General Secretary.

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