Scotland Bill

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Introduction

With the exception of a clause mentioning the Special Immigration Appeals Commission, the Scotland Bill at present does not refer to the reserved powers of immigration and nationality, either as matters of historic, or potential, co-operation and consultation between the governments of the United Kingdom and Scotland.

The current and prospective context of the devolution process, including the declared policy of successive Scottish governments, the two referenda, the recommendations of the Smith Commission, and perhaps the outcomes of the United Kingdom parliamentary committee inquiries announced on 21 and 24 July 2015, and the activity of Commonwealth Exchange, suggest the reserved powers, in some measure, will eventually have a place in the Scottish settlement. (Comparison could also be made with the context of the Catalan government's National Immigration Agreement).

My object in this submission is to outline several aspects of United Kingdom and Commonwealth legislation and administrative practice with regard to both immigration and nationality, and, by this review of precedents, to reach tentative conclusions as to their relevance in the devolution process, including Scottish nationality law.

I have discussed some of these aspects in previous submissions to (1) the Smith Commission and (2) the Devolution (Further Powers) Committee of the Scottish Parliament.

In the present submission, in addition to other sources, I have made use of public documents, including the United Kingdom Nationality Instructions, and selected legislation and case law.

Points Considered

The following points are considered in this submission:

(1) whether the United Kingdom or a Commonwealth government has delegated authority in immigration matters to a semi-autonomous or regional administration;
(2) where immigration powers are delegated or devolved, is there a concomitant sub-national status or 'regional citizenship', and the exercise of powers with regard to this status by a local administration;
(3) given the wider context of these two points, what could be the position of the devolved Scottish administration, and of immigration and nationality or citizenship, in terms of legislation and administrative practice.

The Delegation of Immigration Powers

The United Kingdom government has responded in several instances in a significant way to representations by Scottish stakeholders with regard to immigration; for example, the shortage occupations list, the Fresh Talent visa trial, and, reportedly,

the retention of the UK Ancestry visa; but there are precedents, in the governance of its crown dependencies and overseas territories, for the actual delegation of immigration powers and functions.

The crown dependencies, namely (1) the Isle of Man, and (2) Jersey and (3) Guernsey, have or have had each their own immigration service, operating in conjunction with the relevant United Kingdom agencies, and with the United Kingdom authorities having responsibility for external relations.

The Isle of Man has also its own *Immigration Rules*; this is described as being largely similar to, but not absolutely identical with, the *Immigration Rules* of the United Kingdom, and is administered by the government of the Isle of Man under specifically delegated powers.

There are comparable, but not uniform, arrangements under their respective constitutional ordnances, with regard to the immigration services of the British overseas territories, including Gibraltar (also within the European Union), Bermuda, and the Falkland Islands; the nationals of which generally became British citizens under the *British Overseas Territories Act 2002*.

There are several precedents for the devolution of immigration powers within the Commonwealth.

These precedents exist within the context of legal and constitutional systems ultimately of British origin, albeit in the case of Canada and Quebec, incorporating a legal system derived from France; it may be added that, just as the Canadian citizenship legislation of 1946 precipitated changes in British nationality law among the equal partners of the Commonwealth, including the United Kingdom itself, aspects of the Canadian and Australian skilled migration program, such as the 'points test', have influenced contemporary United Kingdom immigration arrangements.

The Commonwealth examples are also better parallels in terms of geography and population; the provinces of Canada, and the states and territories of Australia, are substantial and contiguous sub-national divisions, whereas the crown dependencies are islands, the overseas territories are generally islands remote from the United Kingdom, and, since the return of Hong Kong to China, the dependencies and overseas territories have a small population in comparison with the United Kingdom.

Under section 95 of the *Constitution Act* of 1867, the federal and provincial governments of Canada have concurrent legislative powers with regard to immigration, provincial legislation being ultimately subject to federal, as might be expected; this and other immigration related legislation is supplemented and interpreted by the agreements and accords, such as the Canada-Quebec *Accord* of 1991, between the federal and each of the provincial governments. The respective provincial migration programs include streams for: 'highly skilled workers' nominated by employers or the provincial government; 'skilled workers' nominated by settled relations; recently graduated international students; 'self employed workers'; and entrepreneurs and investors with an established record of business activity.

Similarly, the Australian state and territory governments administer aspects of the federal migration program, including the state sponsorship of highly skilled workers, and state specific investment programs for established entrepreneurs and investors; the states and territories and other stakeholders also influence the evolution of immigration policy, including the mechanisms for identifying regional areas requiring development and occupations 'in demand'.

Two further examples from the Commonwealth can be cited: (1) the (Australian) *Norfolk Island Act 1979* has allowed considerable autonomy in immigration and other matters, co-ordinated with the Australian authorities, although this self-governance may end in 2016; (2) the Cook Islands, a 'state in free association with New Zealand', has even greater autonomy, with the option, not yet taken up, of independence outright.

Reference can also be made to (1) the Danish immigration authorities consulting with the Faeroese government before approving local residence permits, and the visa program for Greenland; and (2), the Finnish immigration and other arrangements for the autonomous Aland Islands.

Lastly, within the United Kingdom itself, certain immigration functions have effectively been devolved to prominent 'approved institutions', such as the Royal Society and the British Academy, in the certificate system applied to some Croatian nationals.

'Regional Citizenship'

I shall now consider several kinds of sub-national status or local citizenship, again mainly, but not exclusively, from the United Kingdom and the Commonwealth:

(1) 'Manx nationality' and Jersey and Guernsey Islander Status, and 'the right to reside' in the United Kingdom;
(2) 'Belonger Status' in the British Overseas territories;
(3) examples from the Commonwealth: 'British subject' status and 'Australian domicile' in Australian law; 'Belongership' in Australia and New Zealand; and Quebec and 'French citizenship' and 'Quebec resident status';
(4) the Aland Islands and the Finnish 'right of domicile';
(5) 'Irish subject status'; and
(6) New Caledonian citizenship, and Catalan ‘residential citizenship’.

For the nationals of each of the British crown dependencies and overseas territories, and some of the Commonwealth and other territories mentioned in the foregoing, there exists or has existed a sub-national status, or regional or internal citizenship, concomitant with local autonomy but not apparently repugnant to or in significant conflict with national legislation, which confers, to quote one parliamentary report, 'many of the rights usually associated with citizenship', including the right to vote and the local right of abode, but is not necessarily co-extensive with an entitlement to British or other citizenship.

In the negative or deprivative sense, British citizens from the crown dependencies - 'Manx nationals', and those from Jersey and Guernsey - who do not have an appropriate connection with the United Kingdom by birth, descent, residence or other

means, therefore have 'Islander Status'; as such, they do not enjoy employment or establishment rights in the European Union, but, in common with British and Irish citizens, have the 'right to reside' in the United Kingdom.

The 'right to reside' in this respect seems to represent or descend from the common British nationality for the United Kingdom as it was before 1922; comparison could be made with the privileging of British subjects, as defined in Australian law, and including 'Irish subjects' or, rather, Irish citizens, in the *Australian Citizenship Act 1948* and *Migration Act 1958*; in the, perhaps unlikely, event of Scottish Independence, the Irish precedent and general historical ties, as well as geography, would probably provide compelling justification to extend this right to Scottish citizens.

'Islander Status' or 'Belonger Status', or 'Belongership', is used in the positive sense in the constitutional and immigration legislation in each of the British overseas territories - as in 'Gibraltarian Status', eligibility for which differs significantly, being the most highly developed, from 'Falkland Islands Status' or 'Bermudian Status', or, in its time, 'Hong Kong Belongership'.

It may be useful at this point to compare (1) the legislative history of 'British subject' status in Australia, and (2) case law for 'Australian domicile'.

Before Federation, each colony effectively had its own nationality law defining British subject status; this included naturalisation, not always mutually recognised, and which was even administered under state law for some years after Federation. British subject status, as the 'imperial' nationality, ended with the *British Nationality Act 1948*; Australian law continued to use the term to define Commonwealth and some non-Commonwealth citizens who had entitlements in terms of, for example, the transitional provisions of the Australian Citizenship Act 1948, electoral enrolment, and immunity from deportation, at least before *Shaw v MIMA*, [2003] HCA 72; see also *Maiorana v MILGEA*, [1993] FCA 177; and, of course, all Australian citizens were held to be British subjects under Australian law, before the *Australia Act 1986* came into effect. New Zealand citizenship law still defines Commonwealth citizens, presumably including New Zealand citizens, as 'British subjects'.

Striking judicial views regarding 'domicile' for immigration purposes, answering almost to an 'Australian status' or 'Belongership' as currently understood in the British Overseas Territories, appear in *Potter v Minahan* [1908] HCA 63; in brief, a British subject born in Australia could lose their domicile status by extended residence abroad (not precisely defined), and, whilst still a British subject, would not be free from immigration control, including deportation, on their attempted return. This seems to reflect colonial arrangements, whereby, for example, the immigration authorities in the colony of Western Australia could refuse to admit a British subject born in and arriving from the colony of Victoria.

Something of the kind may persist in the legislation of at least one British overseas territory; it is said to be possible but 'probably unconstitutional' for a person with 'Bermudian status' to be refused entry into Bermuda.

What amounts to 'Regional citizenship' or 'Belongership' is still known to both Australian and New Zealand law; Norfolk Island and the Cook Islands each formally confer 'permanent residence' in terms identical elsewhere to naturalisation.

From the *Statutes of Quebec*, as current after 1867, it may be possible to extract a notional 'French citizenship' to define the peculiar status of its inhabitants; there is sometimes the impression that whatever the legalities, it was the established usage for the inhabitants of Quebec to describe themselves as 'French citizens'; but, quite apart from the recent attempt to introduce a distinct Quebec citizenship law, 'Quebec resident status', as defined by the provincial government in determining eligibility for educational benefits, may indicate the potential development of another example of 'Belongership' or sub-citizenship or 'internal citizenship'.

Comparison can also be made with the function of 'the right of domicile', or 'regional citizenship' as some have called it, in determining civic and other entitlements in the Aland Islands, and the function of domicile more generally in Finland.

From these last instances especially of local or sub-national status, and some of the other examples mentioned above, it could be held that devolution or autonomy frequently occasions the emergence of an 'internal citizenship', in some cases regardless of the original intentions of the governments involved. Something of the sort could be said of the evolution of British and Commonwealth citizenship law from 1949; and perhaps of the consequences, intended and unintended, of the Scottish and English legislation of 1707.

With regard to Ireland, there appears likewise to have been a limited 'regional citizenship' or 'internal citizenship', recognised at law, before 1922.

The existence of this 'regional citizenship' can be inferred from references to the status of 'Irish subject' in United Kingdom legislation, which was also accepted in what is now the Commonwealth, some of which may still be relevant or current - the *Merchant Shipping Act 1894*, the *Registration of Births, Deaths and Marriages (Army) Act 1879*, and the *Births and Deaths Registration Act 1874*. I understand the term 'Irish subject' was sometimes used in Australian law from 1948, because Irish citizens were for a time regarded as being in the same position as British subjects, but the government of Ireland objected to the latter usage.

These references (and perhaps aspects of Davies v Lynch, *Irish Reports*, 1869-1870, 570 regarding the applicability of British nationality and other law to Ireland), suggest the then existing political and judicial system of the United Kingdom was prepared to regard Ireland as having, or having had, its own nationality law, formed by and operating within British nationality law as a whole between 1801 and 1922.

Accordingly, it could be a worthwhile exercise to determine if Northern Ireland, as the successor to the Kingdom of Ireland, had or has its own nationality law, preserved or established by the *Act of Union* of 1801, which was or is distinct from the citizenship law of the current Republic of Ireland, and at least partly distinct from the British legislation of 1914, 1948 and 1981. (As will appear below, there may be reason to suppose Scottish nationality law applied to some Scottish emigrants in the 17th century).

On New Caledonia and its citizenship, concurrent with French citizenship, see Chauchat and Cogliati-Bantz, "Nationality and Citizenship in a Devolution Context: Australian and New Caledonian experiences", (2008) 27(2) *University of Queensland Law Journal* 193. This situation is not unique in the neighbourhood of Australia; compare the proposed autonomy or independence of 'Tropical Holland', as it was known, during the period from 1949 to 1963, before being incorporated as Irian Jaya into Indonesia, and its land border with then Australian territory.

I note also the recognition of the regional nationalities in the Spanish Constitution, section 2, and, practically, of a 'regional citizenship' in article 7 of the *Catalan Statute*, as mentioned in the Catalan government's National Immigration Agreement and elsewhere, which may become the basis of a substantive Catalan 'regional citizenship', regardless of the outcome of the election later this year. It may also be pertinent to consider whether elements of the old Catalan nationality law have remained in effect.

Having discussed (1) the delegation of immigration powers, and (2) the existence of sub-nationality or internal citizenship, especially within the United Kingdom and associated territories - and, as might be conjectured of legislation operating within a common law system, existing in many places and adapting to local circumstances over extended periods of time, the evidence presented above indicates an historic toleration of autonomy and variety - consideration is now given to (3) the evidence for a separate Scottish nationality law, before and after the *Act of Union*, and the consequences for the process of devolution.

Towards a Scottish Nationality Law

I shall begin with summaries of the several views which have been put forward as to Scottish nationality law, and then attempt analysis of its nature before and after the Act of Union.

Some recent authorities hold that a separate Scottish nationality law has never existed; that a separate English nationality law has likewise never existed; and, that the nationality law of the United Kingdom has no earlier origin than the *Act of Union* in 1707, even in terms of Calvin's case from the century before; further, that there is no legal recognition of Scottish nationality; and that, in the absence of precursor legislation, there is, therefore, no foundation or precedent from which Scottish citizenship legislation could be developed in the event of independence or significant federal autonomy, other than, at least initially, current British nationality law. (See for example, the United Kingdom government's 2014 paper, *Scotland analysis: Borders and Citizenship*). I am inclined to compare the scenario given here with, to use two examples, the nations of the Commonwealth developing their respective nationality laws from 1948 onwards on the basis of British nationality law and the status of British subject, or the citizenship legislation of Papua New Guinea which was in turn developed from the pre-existing Australian legislation relating to the Territory of Papua and the Trust Territory of New Guinea, and the status of 'Australian citizen' (with or without the right of abode in mainland Australia) and 'Australian protected person', and consequent complications, such as the ‘Special Circumstance Visa’).

Others, more moderately, have held that Scottish nationality law, such as then existed, and possibly unrecognised in English law (even in Calvin's case, as pointed

out by Parry in his 1958 *ZAOERV* essay, 'The Duty of Recognising Foreign Nationality Laws'), ceased on the union of Scotland with England, when 'Scotland became as much a part of England as Middlesex', and the status of Scottish subject was accordingly merged into the larger citizenship of the United Kingdom, in much the same way that (as discussed in White v Busby, [1859] NZLostC 69, an interesting New Zealand case on the security of land title), the several Maori nations of New Zealand ceased with the *Treaty of Waitangi* of 1840, their territories became an integral part of the United Kingdom, and their respective citizens acquired British nationality, whilst maintaining pre-existing private rights.

On the other hand, several authorities of weight have held, (with some appearance of probability), that not only did Scottish nationality law exist in 1707, but that at least several elements of it continued to do so for an indeterminate period afterwards, in a symbiosis initially with English and subsequently with British or United Kingdom nationality law; if this is correct, presumably the implicit intention of the Scottish and English parliaments in 1707 was that Scottish (and for that matter English) nationality law in general would subsist largely within and, where distinct, not be repugnant to any common legislation of the United Kingdom; but with the unintended potential for a distinct Scottish nationality law to re-emerge in the event of an approach to independence or significant parliamentary autonomy.

It may be added that the *Sophia Naturalisation Act* of 1705, which naturalised the Electress of Hanover and her family, including George I, and thereby facilitated the Hanoverian succession, can be understood as being part of a separate English nationality law existing before the Act of Union, if any legislation could be claimed as such; its subsequent incorporation into the nationality law of the United Kingdom seems implicit from the fact or necessity (or both) of the repeal of this legislation in the *British Nationality Act* 1948, and the subsequent provision in the current *Nationality Instructions* of guidelines on how to process applications where the claim to British nationality is ultimately based on this repealed legislation.

Although there is no convenient equivalent to the *British Nationality Act 1981* or *Australian Citizenship Act 1948* defining its nature and extent (I am inclined to the view that the Leslie and Hanover litigation cited below goes some way to supplying this deficiency), there does appear to be sufficient proof that Scottish nationality law, had existed at some time before 1707 (see also *Grotian Society Papers*, 1972).

As a general observation, every polity has distinguished between (1) those who have rights and obligations under it, whether as 'natural born' members of the community, or as tolerated 'foreigners' who are deemed to have some or all of these rights and obligations, or may do so one day, and (2) those excluded by loss of civic rights, or by being the subjects of another, allied or hostile, polity; and Scotland before 1707 had a monarch and the 'estates' - peers and parliament, judicial system, universities, and town and trade corporations - all sufficient to promote such distinctions, from which a nationality law could be construed, even in the absence of more definite information.

At the Act of Union in 1707, Scottish nationality law and the status of 'Scottish subject' were defined by:

(1) the common or natural law relating to birth in Scotland and birth abroad to a Scottish born father (as established in Leslie v Grant, in Paton, *Reports of Cases decided in the House of Lords upon appeal from Scotland*, 1849, 68-78), or by marriage;

(2) treaty (the 'auld alliance' with France, and the reciprocal legislation of 1558; but perhaps, from 1603, English treaties establishing extraterritoriality became relevant as well);

(3) by patent or charter or legislation relating to institutions or external territories (the Nova Scotia charters commencing 1621, and subsequently, 1625, 1627, 1628, 1630 and 1633, under which those permitted to settle in 'New Scotland', their children born there and descendants were natural born subjects of Scotland; and subsequently the Bank of Scotland and the Africa and Indies Acts of 1695); or,

(4) denization or naturalisation legislation specific to named individuals or groups of individuals and their families; the *Graham Act* of 1641, and the *Huguetan Act* and *Foreign Protestants Act* of 1707, are mentioned below, but there are others.

So much may be admitted as being beyond dispute, or at least plausible; and evidence is not wanting that, politically and legally, elements of Scottish nationality law were regarded by the United Kingdom government and legal system, and others, as valid from 1707 almost to the present time.

(Official recognition, in either deliberated or routine circumstances, is perhaps the significant consideration, and strict legal consistency or continuity of recognition of lesser importance; the examples presented below fall into either of the 'deliberated', or 'routine' or common usage categories, but compare also the ongoing issue of the accidental official recognition of 'First Nation' and other generally unrecognised travel documents).

The matters indicating the continued existence of Scottish nationality law after 1707 are as follows:

- the union between Scotland and England (like the association between the United Kingdom and the dominions after the implementation of the *Westminster Statute*) was at least in theory between equal partners; private rights are preserved under articles XVIII and XXV of the *Act of Union*, as are public rights, where these are not repugnant to the laws of the United Kingdom as a whole; this indicates the potential survival of elements of Scottish nationality law, and Scottish subject status, among the rights so preserved, but subject to the authority of the United Kingdom parliament, especially with regard to the alteration or repeal of existing legislation, or passage of entirely new legislation; this impression is strengthened by article XV (repealed), which refers to the existence of Scottish subjects after the *Act of Union*, and could imply that this status, and perhaps even of a distinct Scottish nationality law, was not then regarded as inconsistent with the constitutional and legal framework of the United Kingdom as a whole;

- the *Huguetan* and *Foreign Protestant Acts* of 1707, conferring Scottish subject status, were among the last of the old Scottish Parliament, and are plainly

intended to continue in validity, thereby making provision for a distinct Scottish nationality (unless the Scottish parliament is deemed to have had authority to make laws for the United Kingdom before the *Act of Union*), the intention of the Scottish parliament perhaps also being that Scottish subject status would be somehow affiliated or identified with the wider nationality of the United Kingdom the Scottish parliament had subscribed to;

- according to Dr Talbott's research, France recognised Scottish nationality until at least 1907, and apparently still recognises, in very circumscribed circumstances, the reciprocity of nationality under the 'auld alliance';

- the Bank of Scotland charter was confirmed by the United Kingdom parliament several times in the 18th century and again in 1802, and including the notorious last clause, apparently valid until 1820, allowing Scottish and hence British subject status to be acquired by investment, which was the focus of much legislative and other activity during and after the Napoleonic Wars, as described by Fahrmeir in *Migration Control in the North Atlantic World* (Berghahn, 2005) and *The Forgotten Majority: German Merchants in London* (Berghahn, 2014); compare also the parliamentary debate of 1 June 1818 on the *Aliens and Denizens Bill*, and the references in the Scottish press in 1822 to the *Scottish Denizen and Aliens Bill*;

- the United Kingdom and the Commonwealth recognised (or at least did not object to occasional references to) the status of 'Scottish subject', sometimes almost as opposed to 'British subject', well into the 20th century in legislation and case law, parliamentary usage, statistics and other official contexts, examples of which are referred to below.

(It is interesting to note that the term 'subject in Scotland', or 'subject within Scotland', although appearing in the *Act of Union*, and a sensible enough definition in the context of the common citizenship of the United Kingdom, did not attain general acceptance in legal or other contexts to describe the inhabitants of Scotland, although attested as late as *Gibson v Lord Advocate* [1975] ScotCS CSOH 3, which turns on Article XVIII of the *Act of Union*; whereas judicial usage of 'Scottish subject' - whether as an assertion of difference, or merely habit - without further explanation or qualification occurs literally within living memory, in *Inland Revenue Commissioners v Glasgow Police Athletic Association* [1953] AC 380, [1953] UKHL 1).

What seems to be the most important case law relating to the status of Scottish subject is surprisingly recent.

Manningham-Buller, then Attorney-General, in argument in the celebrated *Hanover* nationality case in 1957, relating to the interpretation of the indefinite provisions of the *Sophia Naturalisation Act* of 1705 (HL [1957] 436, 443-444), held that,

(1) article IV of the Act of Union assumes Scottish subjects are to be subjects of the United Kingdom (this article is usually regarded as the origin of United Kingdom citizenship);

(2) 'the Act of Union must not be treated as repealing all the statutory provisions in England and Scotland providing for either English or Scottish nationality';

(3) unless pre-Union English (and, presumably, Scottish) nationality law applied after the Union, so as to govern British nationality law, 'there was no British nationality law at all in existence when the Act of Union took effect';

(4) pre-Union nationality law was 'regarded as still in force after the Union';

(5) those who became English (or Scottish) before or after the Act of Union, 'automatically became citizens of the United Kingdom by virtue of the Act of Union';

(6) subsequent common law did not necessarily cease the status of Scottish subject.

Bearing in mind the nature of the Hanover case and its outcome, these statements, while resembling but not falling into the category of obiter dicta, are consistent with the history of Scottish nationality law after 1707 as outlined above; and, although not a formal policy position, these statements can be inferred to represent a conservative line of interpretation, accepted by the United Kingdom government at that time. (It may be remembered that the House of Lords took a more radical view than the Attorney-General as to the extent of the effect of the *Sophia Act*).

The *Huguetan Act*, like the *Sophia Naturalisation Act*, is of unlimited extent - and indeed some phrasing of the one seems to have been imitated in the other - and makes the banker Jean Henri Huguetan (1667-1749) 'and the children of his body, and all persons lineally descending from him, born or hereafter to be born' Scottish subjects.

It is worth repeating that the *Sophia Act* was repealed in 1948, but there is still guidance in the United Kingdom Nationality Instructions for potential applications based on it; the *Huguetan Act* does not appear to have been repealed, and, like the *Sophia* Act, was presumably incorporated into the nationality law of the United Kingdom in 1707, and with it the status of Scottish subject; it is therefore probable that, in accordance with its unlimited intent, all persons descended from Huguetan are Scottish subjects.

Given also the Attorney-General's interpretation in *Hanover*, and the case law in general, and the current guidelines in the *Nationality Instructions* relating to entitlement under the *Sophia Naturalisation Act* and to denization, any person descended from Huguetan is therefore, in addition to being a Scottish subject, either a British citizen with the right of abode (as may be the case if they were born before 1 January 1983, and their status as a Scottish subject and a British citizen derives from a parent or grandparent who was born in the United Kingdom, as provided for under the *Immigration Act 1971*), or a British Overseas citizen, or may, if their status is equated with denizenship, perhaps be accorded the historical provision of 'administrative recognition', although the latter does not appear to be defined. Compare the *Graham Act* of 1641, which makes all persons descended from the beneficiary free denizens and natural born Scottish subjects 'forever'.

Where the term 'Scottish subject' appears in recent or current United Kingdom legislation, it can be argued its meaning would ordinarily be consistent with an

existing definition or definitions found elsewhere in common or statute law, unless otherwise specified.

The *Registration of Births, Deaths and Marriages Act (Scotland) 1854*, section X, implies that Scottish subject status was usually acquired by birth in Scotland, and made provision for the registration of 'foreign births', usually where both parents were Scottish subjects (and presumably there were instances where registration occurred with one parent only being a Scottish subject), through the British consular network, presumably conferring by this means Scottish subject status, 'by descent' as it were, to use modern terminology - but, as appears from the apparent entitlement through a Scottish born father and mother, it is unclear how far this element of Scottish nationality law is conformable to the then or subsequent ordinary practice of British nationality law. The provision in the same *Act* for the registration of the foreign marriage or death of any Scottish subject is also worth noting, as indicating 'Scottish subject' status in the 19th and perhaps 20th century was a condition more durable than domicile. (The 1965 *Act*, which replaced that of 1854, omits the phrase 'Scottish subject', but there remains a limited provision for 'foreign births' registration).

Provision for the registration of foreign births, similar to the 1854 *Act*, also appears in: the *Merchant Shipping Act 1894* section 254; the *Births and Deaths Registration Act 1874*, section 37; and the *Registration of Births, Deaths and Marriages (Army) Act 1879*, section 2; one or more of which are either still relevant or current legislation. (The latter may in fact still be part of current legislation in the Republic of Ireland, but perhaps should not be construed as indicating recognition now by Ireland of Scottish subject status, just as the acceptance, or at least absence of objection or comment, on the part of the Australian authorities before and after Federation of the term 'Scottish subject' when it appeared in 'imperial' legislation quoted in the *Commonwealth Yearbook*, should be taken to imply current Australian recognition of this status).

The references to 'Scottish subject' or 'Scotch or Irish subject' were presumably deliberate, rather than accidental, although the motivation for doing so presumably cannot now be established. At any rate, the use of these terms does not appear to have been regarded by contemporaries as extra-ordinary or inappropriate, or void of meaning.

If the phrase 'Scottish subject' is taken to have an approximately consistent meaning across United Kingdom legislation (and this will be a disputed point), it seems to follow that the foreign-born child, whose birth was registered in the Foreign Births' Register from 1854 onwards, of Scottish parentage, is also automatically a British citizen.

Not only does this differ from the rules for entitlement for United Kingdom citizenship before 1983, but, given its very distinct character it seems to imply specific repeal or enactment would be required to alter or remove entitlement to Scottish subject status, although this status is largely coextensive with British citizenship as generally understood.

Furthermore, the status of a child of a Scottish subject, born outside Scotland as it is now defined, but elsewhere in the United Kingdom and colonies, dependencies, or

dominions - at least before the *Statute of Westminster* or local citizenship or independence legislation came into effect - is not clear.

Some such births (including, it is said, those of children born in England) were registered in the Foreign Births Register, but neither in terms of the contemporary view that Scotland and England had merged in 1707, nor the current definition of 'alien' in the *Nationality Instructions*, were or are these territories 'foreign'; indeed, pre-1707 Scottish legislation seems to have regarded what is now Nova Scotia, at least, as a part of Scotland.

Given the above, some British and Commonwealth citizens of Scottish descent, but born outside Scotland as now defined, may be regarded as Scottish subjects, being so 'by birth' or 'otherwise than by descent', and with the consequent ability to transmit Scottish subject status 'by descent' for at least one generation.

Admitting (1) the apparent implications of the 1854 *Act*, and (2) the Attorney-General's interpretation in *Hanover*, some Commonwealth and non-Commonwealth citizens who are Scottish subjects or of Scottish descent may thereby also have a claim, 'by birth' or 'otherwise than by descent', or 'by descent', to one or more of the types of British nationality, as defined by the inter-action between:

- the *British Nationality Acts* of 1914, 1948 and 1981, and subsequent British nationality legislation for Hong Kong and other former or current territories,

- the local enactment of the *Statute of Westminster*, or date of local independence, or date of implementation of local nationality law;

- the provisions of the *Immigration Act* of 1971 relating to the right of abode; and

- the apparent absence of any specific or identifiable mechanism to cause the loss of Scottish subject status in the *British Nationality Act 1948* or other legislation.

It may be, for example, that a British national by birth in a qualifying territory under the 1914 or 1948 Acts, retained that status after one of the 'cut off' events, if their mother or a grandparent was born in Scotland, either because their Scottish subject status acts as an 'appropriate qualifying connection' or impacts the interpretation of 'qualifying territory', or otherwise prevented or instantly repaired the loss - even perhaps in the case of, for example, Australians, with a Scottish born mother or Scottish born grandparent, who were, apparently, British subjects 'without citizenship', when the British Nationality Act 1948 came into effect on 1 January 1949, until 26 January 1949, when the Australian Citizenship Act 1948 came into effect. (On the formerly 'indelible' status of the natural born etc. (On the formerly 'indelible' status of the natural born British subject, see, for example, *Singh v Commonwealth*, [2004] HCA 43; it may be that, given the conservative character and evolution of Scottish nationality law since 1707, it is the status of 'Scottish subject' that has remained 'indelible').

If a person in this situation is regarded as being a British citizen 'otherwise than by descent', their children, at least those born before 1 January 1983, may have a claim

to British citizenship with the right of abode even without their having a claim to Scottish subject status.

Other, less conservative, permutations are possible: the case and statute law could be construed that a person born in a non-foreign territory, is a Scottish subject if a parent was a Scottish subject, without registration or application being required, and hence either a British citizen or possibly a British Overseas citizen.

(If the local enactment of the *Statute of Westminster* is regarded as determining the relevant 'cut off' date, then the child born in Canada to a Scottish subject parent before 1931 became a Scottish subject otherwise than by descent, but by descent from 1931; for Australia, 1939; for New Zealand, 1947; and the other dominions accordingly. There may be anomalies: the *Statute* did not apply at the provincial level in Canada before the *Canada Act 1982*, and at the state level in Australia before the *Australia Act 1986*; nor fully in New Zealand before their *Constitution Act 1986*; Western Australia voted to secede from Australia in 1933; Newfoundland never ratified the Westminster Statute).

Citizenship, or the right of abode or similar status, through a grandparent born in a qualifying territory is not without parallel in the history of British nationality and immigration law.

Quite apart from the controversial concept of patriality, and the provisions of the *Immigration Act* 1971, and the "non-standard routes" identified by migration agents, there are:

- the 'UK Grandparent visa' as an avenue to permanent residence;
- the patrilineal descent provisions in the older nationality law (and, it would appear, matrilineal for several years in the 18th century), and the cognate 'denizenship' status suggested in the *Leslie v Grant*;
- some of the registration provisions in the 1948 *Act*;
- eligibility for British Dependent Territory citizenship before 1983; and,
- eligibility for 'Gibraltarian status'.

It is perhaps worth noting here that Irish citizenship, and with it the 'right to reside', can be derived from a grandparent or remoter ancestor born in Northern Ireland.

Integrity of Process

During the independence referendum of 2014, the two main objections against the Scottish Government's citizenship model were:

(1) the potentially very large number of persons with a Scottish born parent or, more importantly, grandparent, and
(2) integrity.

In addressing (1), it could be said that: most persons with a Scottish born parent or even grandparent are probably British citizens already, or otherwise have the 'right to reside'; there is provision, in certain limited circumstances, to acquire British citizenship by descent from a grandparent, provided the intermediate generation meets certain criteria; there is probably a large number of persons who have not

exercised an existing entitlement to a British passport, or, if Commonwealth citizens, the right of abode, and are unlikely to do so; and, in terms of the available statistics for approved UK Ancestry Visa applications, which could give some indication as to possible numbers, it is unlikely that more than 500 of the 4,000 now approved annually are based on Scottish descent.

In addressing (2) the fairly complete range of birth and other records in Scotland, the existence of, for example, the European Union's iFADO/PRADO and other resources, the Australian Document Verification Service, and the kind of work done by the Nasjonalt ID-senter in Norway, suggest integrity of identity documentation, is not an insurmountable problem.

If the probability is admitted that elements of Scottish nationality law have (1) continued to exist since 1707 and (2) in some manner to develop within British nationality law, and are relevant to its operation, albeit only intermittently recognised, the question of where authority now lies to define extent and entitlement becomes important.

In previous submissions, I had simply suggested that this might be a matter for negotiation – for consultation and compromise - between Westminster and Edinburgh. I shall now attempt, on the basis of the foregoing, to answer this question.

Authority

In 1974 the chief law officer of Scotland was asked, given the appearance of the term in a Bill, what would be an appropriate definition of Scottish citizenship. He responded, 'I do not think that anyone in the Law Society of Scotland or in my office has any difficulty about what determines whether a person enjoys Scottish citizenship' (HC Deb 31 July 1974 vol 878 c793).

I have attempted in this submission to give a fuller answer to the question, based on statute and case law, and administrative practice, and to avoid extravagant or unsustainable lines of interpretation; but the anecdote touches on an important matter, that of authority; namely, where does the authority now lie to determine the extent and limits of Scottish nationality law.

Consideration of this question can be divided under four headings; these are merely convenient approximations, which do not necessarily imply a neat or absolute separation or distinction, between what are in fact reciprocal aspects in a continuum of 'Scottish nationality law', such as it may be at the present time:

(1) Scottish nationality and denizenship, as crown prerogatives;
(2) legislative, the crown in parliament;
(3) common law, as evolved before and after 1707;
(4) judicial or regulatory oversight.

If Scottish subject status is deemed by analogy to be in the same category as denizen status, that is, an archaic survival of doubtful current existence or effect (or relevance), Scottish nationality is possibly a crown prerogative and therefore, given the present constitutional and legislative arrangements, unexercised, or, at best,

persons determined by the United Kingdom immigration service as holding this status may be given the notional 'administrative recognition' mentioned as an historical provision in the Nationality Instructions. In the event of a significant degree of Scottish autonomy, denizen status could still become an important issue.

If it is accepted that the Hanover and other case and statute law, as reported above, comprise the Scottish nationality law today, in part defined by the old Scottish parliament, and in part defined by the subsequent parliament of the United Kingdom, then Scottish nationality law is an integral, albeit largely unacknowledged, part of the nationality law of the United Kingdom, and may still have the effect of extending, in some cases, the possible range of entitlement under current legislation to British citizenship or British overseas citizenship.

It is not clear if the Scottish and English parliaments are to be regarded as subsisting within the United Kingdom parliament, given the provisions of the Act of Union and more recent constitutional developments, or if the United Kingdom parliament is an entirely new thing - the heir or successor rather than a partnership which can be resolved into its constituent parts. The current Scottish parliament is perhaps in consequence to be regarded as a new institution rather than a renewal of the old Scottish parliament; but, although the powers of the current Scottish parliament and government are defined by Westminster, the Scottish polity is, in the Union, of equal status to England. On this point, in addition to, for example, the distinction drawn by Molloy, *De Jure Maritimo et Navali*, 1682, 376, between the 'dependent' status of Ireland and the 'independent' or equal status of Scotland, a distinction still considered relevant in argument in Davies v Lynch on the applicability of British nationality and other legislation in Ireland, compare the constitutional history and peculiar status of the Isle of Man or the Channel Islands.

The most conservative approach is that the current United Kingdom parliament succeeds entirely to the powers of immigration and nationality as exercised or inhering to the old Scottish parliament, which the United Kingdom government has not chosen, for the time being, to devolve to the assembly presently known as 'the Scottish parliament' or to the Scottish government; there may be long-term constitutional difficulties if certain powers are denied to these institutions, given the objects and nature of the Union, one of which, to quote Queen Anne, was to preserve the independency of both England and Scotland.

It is open to the United Kingdom parliament to repeal, for example, the *Huguetan Act*, or to pass specific legislation ending the entitlement under other legislation to 'Scottish subject' status; but the precedent of the Hanover case, however, suggests repealed legislation can still give rise to an entitlement to United Kingdom nationality; and the *Act of Union* seems to preclude a 'global' cessation of Scottish subject status, or at least to render it constitutionally difficult.

It should be noted that if, for example, the Scottish parliament has authority over legislation for the registration of births, and chose to permit the registration of persons descended from a person whose birth in Scotland was registered from 1854 (somewhat in the manner of the Gibraltarian population register) or to introduce the phrase 'Scottish subject' into this or other legislation, this action might pose interesting jurisdictional questions, given the preservative effect of the indissoluble *Act of Union*.

The Scottish parliament might also have the authority to define persons as having 'Scottish status' by residence, birth or descent, to determine civic liabilities or entitlements, as in the case of 'right of domicile' in Aland, or 'Quebec resident status', or even 'Belongership' or New Caledonian citizenship, without being held to encroach on the 'reserved powers' . These and other examples may be regarded as constituting terra incognita, but are still potential lines of development.

In contrast to British nationality law, where the apparent intention has been to reduce it to the compass of a single piece of legislation since at least 1914 (but, in addition to the Hanover case, note, for example, the *Hong Kong* and *Falklands Acts*), Scottish nationality law has contained and perhaps still does a significant element of unwritten custom which may be acknowledged in case law from time to time. In *Leslie v Grant* in 1763, it was accepted that birth in Scotland before 1707 generally conferred Scottish subject status - it may be assumed that the children of ambassadors and those deemed foreign enemies in occupation were excluded; children born abroad, if the father was born in Scotland, usually acquired Scottish subject status - unless the father was out of the ligeance of the crown; grandchildren, even of patrilineal descent, were apparently deemed not to acquire Scottish subject status - even though English nationality law admitted latitude on this point, before and after 1707; it may be assumed that the wife of a Scottish husband acquired Scottish subject status on marriage, in accordance with natural law. So much is clear enough; but it is not absolutely clear whether, for example, between 1707 and 1854 Scottish subject status was acquired by any of these means, although Section X of the 1854 *Act* implies either that Scottish subject status was acquired or was inferred to have been acquired at least by birth in Scotland and possibly some other connection with Scotland.

How the elements of an attenuated Scottish nationality law can be assimilated to a nationality law based largely on statute and the associated judicial review and reinterpretation, especially given the *Act* of 1981, is a matter which may yet need to be resolved.

It is also unclear whether the Scottish judicial system by itself, has any authority or competence now to determine an individual entitlement to Scottish subject status, even under the provisions of the Act of Union, given the implications for the United Kingdom, and even allowing for the precedents no doubt established under the 1854 Act.

The long term consequences of the current program of devolution, as proposed in the *Scotland Bill*, are uncertain, but it is not unreasonable to suppose that Scottish and English legal norms will diverge, and this will have implications for the reserved powers, in terms of interpretation and enforcement, especially given current trends in, for example, the interpretation of human rights law.

Finally, the continued existence of Scottish subject status is relevant not only within the immediate context of Scottish devolution, and the administration of United Kingdom immigration and nationality law, but has implications for any Commonwealth country, such as Canada, Australia and New Zealand, where the definition of British subject status is or has been fundamental to its citizenship and other legislation. As already indicated, the importance of the putative existence of Scottish subject status as an avenue to British subject status under Commonwealth

legislation is not necessarily tied to any current recognition by the United Kingdom, as will appear from, for example, the *Australian Citizenship Instructions*.

Conclusions

Two broad conclusions can be drawn from the materials and arguments assembled above:

(1) there is ample precedent for aspects of the United Kingdom migration system to be framed to address the specific economic and demographic interests of Scotland; if it is not practicable to devolve or delegate a measure of immigration powers and functions to the Scottish authorities at this time, such as are already held by the crown dependencies and overseas territories, the devolution process in itself indicates it is highly appropriate to develop an agreed framework for consultation in the formulation of migration policy and service delivery;

(2) if the existence of Scottish nationality law before and after the Act of Union is admitted - and this point at least seems to be beyond doubt, whatever its current character - the consequent existence of Scottish subject status as a sub-nationality or sub-citizenship within British nationality law has implications for the devolution process, United Kingdom immigration and nationality policy, and potentially in many other areas, and will need to be addressed; especially with regard to determining what powers the present Scottish government and institutions already have in this field.

There is a question to which no direct answer, or attempt at an answer, has been given in this submission; namely, if the Hanover case has established the existence in and survival after 1707 of Scottish and English nationality law, is it possible to construe the current existence of the latter; and whether British citizenship as it now stands can be regarded as a composite formed from the nationality laws pertaining to: the kingdoms of England and Scotland; Northern Ireland; the dependencies; and the overseas territories.