

HOUSE OF COMMONS  
ORAL EVIDENCE  
TAKEN BEFORE THE  
SCOTTISH AFFAIRS COMMITTEE

**THE REFERENDUM ON SEPARATION FOR SCOTLAND**

WEDNESDAY 9 JANUARY 2013

PROFESSOR COLIN HARVEY

Evidence heard in Public

Questions 2067 - 2155

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## Oral Evidence

Taken before the Scottish Affairs Committee

on Wednesday 9 January 2013

Members present:

Mr Ian Davidson (Chair)  
Mike Crockart  
Jim McGovern  
Iain McKenzie  
Pamela Nash  
Mr Alan Reid  
Lindsay Roy

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**Examination of Witness**

*Witness:* **Professor Colin Harvey**, School of Law, Queen's University, Belfast, gave evidence.

**Q2067 Chair:** Could I welcome you to the Committee and start off by asking you to introduce yourself and explain your specialism?

**Professor Harvey:** My name is Professor Colin Harvey from the school of law, Queen's university, Belfast. I also served as a human rights commissioner in Northern Ireland from 2005 to 2011. One of the areas that we focused on during that process was drafting a Bill of Rights for Northern Ireland, and obviously we did grapple with issues around national identity from a Northern Ireland perspective and how that related to human rights. In my own work, I have focused over the years on the rights of migrants and asylum seekers. I have written a book on seeking asylum in the UK, for example. My focus is primarily on the human rights dimensions of this—international, regional and national.

**Q2068 Chair:** Could I start off by asking you, when new countries are created, what sort of considerations have to be taken into account when citizenship is being determined and awarded?

**Professor Harvey:** I would like to start by framing it in the context of international human rights standards, of internationalising the conversation about borders, citizenship and nationality. Internationalising the conversation and placing it in human rights terms is helpful in thinking about an issue that can be difficult, complex and controversial. I say that because international human rights law places a focus on human rights, the rights of the human person and the rights of all persons within the jurisdiction of the state. That focus is helpful, in that the primary issue is not someone's status, but jurisdiction within the state. That is a helpful way of framing it.

International human rights law also sets out the rights and responsibilities that states themselves have. It sets out the rights that states must provide to all persons, but I think—and this presses us on to what we are dealing with today—international human rights law sets out obligations on a right to a nationality. The Universal Declaration of Human Rights, article 15, for example, deals with “the right to a nationality”. International human rights law speaks to the issue of the avoidance of statelessness. A pressing issue in these sorts of situation is that in no circumstances must someone be left stateless as a result of successor states. Issues of

non-discrimination and also, of course, issues of self-determination are dealt with in international human rights law. The framework is also helpful in thinking about the continuity of obligations.

From my perspective, both as an academic and as an advocate of human rights, there is an important issue here around continuity of human rights standards. Human rights belong, if you like, to all people in Scotland, and it is important to bear in mind that, whatever happens constitutionally to Scotland, no backward or regressive steps should be taken in relation to the rights that people in Scotland enjoy. Just to take the Belfast perspective here, bear in mind that embedded within our Belfast agreement is the notion of equivalence of rights on the island of Ireland, so that whatever choice is made by people in Northern Ireland—to remain in the United Kingdom or to join the rest of Ireland—they will enjoy equivalence in relation to rights, whatever constitutional decision they happen to make. There is also a network of international institutions there.

A starting point in framing this for me, in the work that I have done, is to begin to see it internationally, in the context of international human rights standards, which are there and which speak to some of the issues we are dealing with today, and to how people should be treated in the event of constitutional change. But I suppose the question that arises from that is, in this conversation that is being had, in the process itself and what follows, who is ensuring that these human rights standards—these international human rights obligations—are being taken into account, that the process is being adequately proofed to ensure that human rights and a rights-based approach are informing what is done, so that all persons within the jurisdiction of the state enjoy protection and we do not end up in a situation where, as a result of constitutional change, backward steps are taken in relation to rights?

**Chair:** Okay. Do you want to come in directly, Lindsay?

**Q2069 Lindsay Roy:** Yes. You mentioned a right to a nationality. Is there a right to more than one nationality?

**Professor Harvey:** It is very clear. The UK established constitutional tradition is fully accepting of the notion of dual nationality. You are speaking to someone who works in Belfast, and in the context of our agreement there is a recognition that people have a right to identify as British, Irish or both. We are speaking in the constitutional context of the UK, where there is an established recognition of dual nationality, and in whatever constitutional conversations happen one would hope that the established British tradition of recognising dual nationality or multiple forms of nationality would continue into that conversation.

**Q2070 Lindsay Roy:** Does that mean that you have a nationality within the Irish Republic and within Great Britain?

**Professor Harvey:** It is the idea flowing out of our agreement that people in Northern Ireland, as part of that agreement, have a right to be British, Irish or both. Obviously there are particular circumstances in Northern Ireland that have informed that, but also, of course, in terms of the history of Britain, Britain has recognised historically the notion of dual nationality—the notion that if you have another nationality you do not lose your British nationality and you do not have to give up your other nationality in order to acquire British nationality. In a sense, the constitutional context is conducive to recognition of dual nationality.

**Q2071 Chair:** Can I pick up a couple of points? You said that people had the right to a nationality, but I cannot, presumably, wake up tomorrow morning and decide I want to be Canadian. No. So the right to a nationality is a two-way street, isn't it? It is not just that any

**Professor Harvey:** I would like an opportunity to respond to it. The significance of internationalising the constitutional conversation is that international law makes it absolutely clear that states enjoy the right to determine nationality, and to control entry, stay and removal of people on their territory, subject to international legal obligations. So there is a recognition that it is for states to determine.

**Q2072 Chair:** Do I take it, then, that what you are saying is, as a result of constitutional change, nobody should be left behind, that some arrangement has to be made for everybody and nobody is left stateless as a result of any constitutional change? That seemed to me to be the main point you were making in your initial contribution.

**Professor Harvey:** A major concern in the international community is statelessness, which is a continuing problem, a continuing human rights violation. You only have to look at the Kuric and Others v. Slovenia case.

**Q2073 Chair:** I understand. I am conscious that you have to leave at 4 o'clock and I want to cut to the chase. The main observation you were making is that, as a result of this change, international law would preclude anyone becoming stateless who was not already in that position. If that is the position you are taking, I think we understand it. May I just clarify? You said that one would hope that dual nationality was not being precluded, and it would continue and so on, and you did mention that the dual nationality in Ireland was a result of an agreement. Presumably, to have any sort of dual nationality situation here in relation to Scotland and the UK, that would similarly require an agreement and is not in itself automatic.

**Professor Harvey:** Obviously, the Irish context is different. There are particular circumstances in Ireland. There is an historical context before the Good Friday agreement in relation to the Irish state, Irish nationality law, and obviously the claims over the jurisdiction of the island of Ireland. So the context is not simply the Belfast agreement. But obviously the Belfast agreement was an agreement negotiated between the participants in our peace process and the British and Irish Governments. I suppose the Irish context that you raise is important, because what it does in fact show is that, over time, a very good co-operative relationship can emerge between independent states.

**Q2074 Chair:** Of course it is right that things can emerge, but they do not necessarily do so. Am I right to take out of the point that you made that the Belfast agreement was in fact an agreement—an agreement between the Republic of Ireland and, presumably, the United Kingdom acting on behalf of Northern Ireland—that was mutually acceptable and it did not, as it were, appear fully formed from heaven or anywhere else? It had to actually be agreed, and in those circumstances each of the participants effectively had a veto.

**Professor Harvey:** One of the lessons learned from our process is that where our process has moved forward in Northern Ireland has been when there has been secure and good inter-governmental co-operation involving the UK and Ireland. That co-operative relationship is evident today in this precise area of borders, nationality and citizenship—

**Q2075 Chair:** Wait. I am sorry, but I asked you a quite clear question and I think a simple yes or no would suffice. I was saying that in these circumstances of the Belfast agreement it was necessary, was it not, to have an agreement that required the agreement of each side, and that without the agreement and support of each side there would not have been

an agreement? So this cannot be imposed from the outside and does not arise automatically, and any parallel with Scotland and the UK would, by definition, require an agreement.

**Professor Harvey:** I think you are talking about a very different context. Obviously, Northern Ireland was emerging—is emerging—from a period of violent political conflict.

**Q2076 Chair:** No two contexts are alike. I am not worried about the context. I understand fully. I am just trying to clarify whether or not you are saying to us that the parallel that we could draw from the Belfast agreement is that there has to be an agreement: if we are to have Scotland and the rest of the United Kingdom, in order to have an agreement there actually has to be an agreement between the two parties. This cannot be imposed unilaterally; there is no international body that imposed the Belfast agreement. Therefore, any Scotland-UK agreement would have to be acceptable to each side.

**Professor Harvey:** We are obviously talking about a political process, a multi-party agreement that was at the core of where we are now in Northern Ireland and at the core, yes, of creating relationships that people in Northern Ireland would have thought unimaginable in historical terms, with the First Minister being Peter Robinson and the Deputy First Minister Martin McGuinness. That process of negotiated agreement led to a subsequent set of co-operative arrangements, but obviously there are very particular circumstances in Northern Ireland, with a period of violent conflict.

**Chair:** That is right.

**Professor Harvey:** One of the things, and one of the framing contexts for this conversation, has to be the fact that in these islands—I will put it in those terms—there is a set of participative, co-operative and good relations between all the governmental entities, and there are a number of forums in which there is co-operation already. There is evidence of that in a British-Irish context, but if you look at something like the British-Irish Council, in which all the democratic entities do participate, the British-Irish Parliamentary Assembly and—

**Q2077 Chair:** I am aware of that. I am a Member—as an Additional Member—of that, so I think we are aware of that. Could I come on to another point, then? Again, I am conscious of the fact that you have to go at 4 o'clock. If Scotland became a separate state, would everybody living in Scotland at that time automatically become a citizen of the new state?

**Professor Harvey:** One of the things that will have to be determined as part of this discussion, and based on the notion that in international law states have the right to determine nationality—who are members of that state—it is one of the issues where I think clarification would be helpful in relation to the sorts of principle that we might expect to apply in the context of shaping nationality and citizenship. From my perspective, obviously, in the context of international human rights law, of having this debate, and mindful of what those international standards are—

**Q2078 Chair:** I am sorry, you are losing me. Is that a yes or a no? I am asking you quite clearly: in the event of Scotland becoming a separate country, would, in your view, everyone who is resident in Scotland at that time automatically become a citizen?

**Professor Harvey:** The people of Scotland would have to decide. Obviously, some of this is speculative and that is why the word “clarification” has arisen. It is speculative in the sense that, post-referendum, whatever the outcome, there would have to be a decision made by the Scottish people.

**Q2079 Chair:** Fine. That is no then; it is not automatic. Decisions would have to be taken by somebody. That is fine. It is helpful just to clarify that. If it is the case that it is not

automatic and decisions would then have to be taken by somebody, what sort of guidelines in international law and precedent would inform the rules that were drawn up? Are there firm boundaries about who would and would not become citizens? Presumably, people who were born there and had been there for 25 generations would become citizens, but somebody who had arrived the night before might not. What is the sort of balance that is struck and how is it achieved?

*Professor Harvey:* You have already heard evidence as to how nationality and citizenship work globally. The reason why I have raised the focus on the international human rights dimension today, in the context of clarification, is that we need, in a sense, to have an understanding of what the principal basis for that conversation is going to be. There is guidance in international law. There are international conventions in relation to statelessness. You have heard about the European Convention on Nationality from 1997, but there is a very useful convention from the Council of Europe, a convention of 2006, on the avoidance of statelessness in the context of successor states. That sets out in reasonably clear terms some of the principles that might inform the position taken in relation to nationality and citizenship, emphasising that right to nationality, the importance of avoiding statelessness, non-discrimination, and how nationality and citizenship can be acquired in ways that are compliant with human rights law. The UK has not ratified the nationality convention from 1997 or this 2006 convention, but the principles are there in international law.

**Q2080 Chair:** What are the principles, then? Tell us what principles are there that would help guide us as to who automatically became a citizen.

*Professor Harvey:* First of all, the convention from 2006 quite clearly sets out that there is a right to nationality. It quite clearly sets out the parameters, if you like—the principal parameters—of that. It sets out what the obligations are on the predecessor state and the successor state in relation to nationality and citizenship.

**Q2081 Chair:** What are these parameters?

*Professor Harvey:* In terms of parameters of birth, domicile, permanent residence, and also in this particular context, there will be an issue around holding prior British nationality and how that is worked out. But what the convention tries to do, I think, is to set out in broad terms some of the principles that should inform the debate on nationality and citizenship to avoid statelessness.

**Q2082 Chair:** We get that. We are absolutely clear that we do not want to have, as a result of any division, anybody falling between the cracks and ending up stateless. We understand that completely. If we have a situation where everybody at the moment in Scotland has an existing status, all those who have a status will keep that, either English or Scottish. What we are not clear about is how and on what criteria it will be determined whether or not somebody is Scottish.

*Professor Harvey:* Here is where we need—it is one of the words I have used—clarification. We are speculating on what a future decision might be, but we understand the parameters in terms of international standards. Also, of course, there is a European Union context to all this in terms of the implications of decisions made in Scotland, which you have heard evidence about, in relation to granting citizenship of Scotland and what the implications are for other EU member states—because one consequence is that you become an EU citizen as well. So there is the realm of speculation; there are the parameters of how you do this in a way that does not take backward steps in relation to human rights standards and what people currently enjoy. But, as in any independent small state, there will be an element of decision as to who citizens will be.

**Chair:** Right.

**Q2083 Pamela Nash:** It is a pleasure to have you with us, Professor Harvey. I think it is fair to say that international law is deliberately vague on nationality and immigration status, to allow countries to have that debate within their own countries, and every culture deals with nationality very differently. But international law is there to prevent statelessness and even our own British immigration law is designed to prevent statelessness. Are there any other examples you can think of outside the British Isles that could be helpful to us as a Committee to look at what might possibly constitute nationality in Scotland? Also, we are talking about birth and domicile, but we are particularly interested in Scots living in the rest of the UK at the moment, for instance—and a lot of Ulster Scots are here today as well. Are there any other examples of countries splitting in that way, and how they dealt with nationality and stayed within international law?

**Professor Harvey:** Thank you. Obviously, there are two responses to that. One is in terms of the international human rights context. It is now quite specific in relation to what the obligations are on a state and how it treats all persons within its jurisdiction, including migrants, asylum seekers and refugees. One of the things I would like to underline today in this conversation is that this is an opportunity to speak about how we can improve the human rights protection that migrants, asylum seekers and refugees currently enjoy.

**Q2084 Chair:** No, it is not. We will come on to the question of migrants, asylum seekers and others once we have established what the rules and guidelines are for those who already have existing citizenship. We recognise that there is an important category of migrants, asylum seekers and the like, but what we want to clarify first of all is what happens to the vast majority of people who do not fall into those categories. Could we maybe focus on that, and, as I said before to you outside, at the end we will give you the opportunity to add any additional points that you want to make to us? Those particular areas of concern of yours may be best coming in there. Coming back to Pamela's point, are there any particular precedents that you would point us to that might be helpful about the secession of one state from another?

**Professor Harvey:** There are a number of examples from a European context of where this can go wrong. I mentioned earlier a case, which you will be aware of, from last year, *Kuric and Others v. Slovenia*, a judgment of the Grand Chamber of the European Court of Human Rights. That is a very good example of where this can go badly wrong, with 26,000 erased people, no longer on the permanent residence register, as a result of Slovenia's declaration of independence from the former Yugoslavia. The applicants in that case went to the European Court of Human Rights and successfully argued that there was a violation of article 8, the right to private and family life; a violation of article 13, on the right to an effective remedy; and a violation of article 14, in combination with article 8, in relation to non-discrimination. That case is a wonderful example of where this can go badly wrong in a European context. Obviously, there are other contexts from the former Yugoslavia.

**Q2085 Chair:** Was it a particular ethnic group that felt that, or was it geographically based? How did they fall between those stools, as it were?

**Professor Harvey:** On declaration of independence, a deadline was set for registration that affected people who held the citizenship of the former Yugoslavia. For a variety of reasons, the people in that group did not register.

**Q2086 Chair:** I am sorry, what group is that?

**Professor Harvey:** People who held the nationality of the former Yugoslavia and who were permanent residents in Slovenia—a group of people who, for a variety of reasons, did not register by the deadline. As a result of not registering, they lost their permanent residence.

**Q2087 Chair:** Can I just clarify? You described “a group”. Is that simply an aggregation of individuals, or was there anything about them, as it were? Were they an organised group? Were they Romany or something else, or was it just a series of individuals who forgot to do their forms in time?

**Professor Harvey:** My understanding is that the group was made up of a range of individuals, including members of vulnerable groups, who did not, for a variety of reasons, register in time, and lost permanent residence. In some cases, as a result, they were treated as aliens living in Slovenia illegally. What is interesting about that case is that there were many and various attempts to remedy this situation, but it went through the European Convention system and the Grand Chamber ruled on it. It is a good example. Obviously there are other examples, such as the break-up of the USSR. Another example is Czechoslovakia, the “velvet divorce” there and the relationship between the Czech Republic and Slovakia subsequent to that. Those may or may not provide useful examples.

**Q2088 Chair:** My understanding is that there was no difficulty about the allocation of citizenship between Czechs and Slovaks in the break-up of Czechoslovakia. Is that correct? Ways were found harmoniously whereby people chose to be either one or the other. Can you clarify whether or not there was dual nationality retained for both groups in those circumstances?

**Professor Harvey:** My understanding is that you are right to say that ways were found in co-operation between the two new states to resolve this issue, but the question was, “Were there examples?”, and that is one.

**Q2089 Chair:** My understanding was that in Czechoslovakia, when it split, the decision was an either/or, so it was not a question of dual nationality. If you can have either/or—my understanding from the former Soviet Union is that in most of, if not all, the situations there was an either/or decision—I am not clear whether international precedent then determines that with Scotland and the UK the position would be either/or or dual. Leaving aside the Irish precedent and “harmonious” and all the rest of it, harmony is not necessarily guaranteed, particularly when we have just been having discussions about the forcible removal of Trident and a number of other issues. So I am not clear whether we can automatically assume that this would be harmonious, and whether dual nationality would be acceptable to either side, never mind both sides. Am I right in thinking that it is entirely possible, from international precedent, that the countries involved here could copy the Czech or the former Soviet Union example and say, “It’s either/or, and you have to make a choice”?

**Professor Harvey:** The starting point was the constitutional context of the UK, where there is current recognition. But one of the implications of independence and having independent statehood would be making decisions around your own nationality law, so we are venturing into the realms of speculation as to what may or may not happen in the event that the decision is taken.

**Q2090 Chair:** That is right, but our job is to try and identify the issues about which there is doubt, so that we can ask both the Scottish Government and the UK Government for clarification. What you are saying to us is that it would be entirely possible for either the UK Government or the Scottish Government, or both, to say, “We want to have an either/or situation,” so that people in Scotland, after secession, would have to determine either to be

Scottish or to be British, and they would not be able automatically to retain both. Is that correct?

*Professor Harvey:* I think there are a number of things going on here. One is the shared history of relations in Britain and the relationships, and the good relations, that exist.

**Q2091 Chair:** I understand all that. We have spent weeks going over background and stuff like that. I am asking a fairly straightforward question. I want to clarify whether or not we should be asking the Scottish and the UK Government whether they have any intention to make it an either/or. I want to clarify whether in fact they could do that if they wished.

*Professor Harvey:* It is not for me to tell you what to do, and we are in the realms of speculation, but independent states can make decisions in relation to that. One of the logical implications of what I have said is that international law makes it clear that states have the right to determine their nationality, immigration and asylum systems, within international legal boundaries. So there are boundaries to that. What I have tried to argue today, and what I have tried to say, is that there are principles and rules out there that can guide that conversation. As for clarification by the UK Government and the Scottish Government, it is not my role to do this—but what I would say is that it would be helpful, from a human rights perspective, for there to be clarification that there would be no backward steps in relation to this conversation.

**Q2092 Chair:** Fine, we accept that. The clerk has taken notes and we have picked up that point about no backward steps.

*Professor Harvey:* Those backward steps, let us be clear, could go in either direction. Let me put it this way—

**Q2093 Chair:** Would forcing people to make an either/or choice be seen by you in your analysis as being a backward step? I would have thought that, if people had to choose, there would be nobody falling, as it were, between the cracks. Everybody would have a nationality if they had had one already. Therefore, that is not in itself a backward step. Is that correct?

*Professor Harvey:* One of the things I hope I am making clear is the element of choice in this and the importance of not arbitrarily depriving somebody. One of the things that the Universal Declaration of Human Rights article 15 makes clear is that you cannot arbitrarily deprive somebody of their citizenship.

**Q2094 Chair:** That is right. But you could presumably say to them, “You can get a citizenship, but you have to choose whether you want citizenship A or citizenship B,” in the event that Scotland seceded from the United Kingdom. Either Government could say, “You cannot have both. You have to choose.” That would be compatible, would it not, with international legislation and so on?

*Professor Harvey:* It would be, in the realm of speculation, possible to conceive, but in the constitutional context that we are currently in, also thinking about looking across to Northern Ireland, how conceivable would it be that that option would be taken? We are in the realms of speculation.

**Chair:** That is our job, in a sense. That is what we will try and clarify with the respective Governments.

**Q2095 Mr Reid:** You were saying that Governments have a choice to define or determine nationality, so if someone, after Scotland became independent, chose to take

**Professor Harvey:** In the UK constitutional tradition, as I understood it, and UK constitutional law, immigration and nationality law, Britain has not normally withdrawn its citizenship in the context of somebody opting to take another citizenship. That is where we are in the realm of, again, the established constitutional tradition informing—

**Chair:** It would not be illegal.

**Q2096 Mr Reid:** But policies can change. Within the context of the European Convention on Human Rights, for example, would it be lawful for the UK to change policy and then say, “You have taken an active decision to take out Scottish citizenship. Therefore, you are no longer a UK citizen”?

**Professor Harvey:** There are a number of points there in relation to how that process itself—in domestic law, actually—is undertaken, so there are question marks there.

**Q2097 Mr Reid:** Let us say that Parliament passes a law.

**Professor Harvey:** Yes, but one of the realms we are in is the speculative one of talking about two independent states, their relationship with each other and how they determine their future immigration, nationality and asylum law. Let us be clear from the UK context: look at what has happened in the UK since 1971 in this Parliament; look at the number of statutes that have been passed in relation to immigration, asylum and nationality; look at the changes that have been made. Independent states like the UK make decisions to change their nationality, immigration and asylum law, and do it in a way that is compatible. So, again in that speculative realm, it is possible for the new UK and the independent Scotland to make decisions, but what I suppose I am saying here is there is a framework for this. Yes, you have a right to make these decisions, but one of the artificial aspects of this conversation, to be frank, is that both states would be working in a network of international and regional standards and institutions at which international co-operation is already happening and where there are existing standards. It is not a case of a blank global slate.

**Chair:** No, that is right. If everything was harmonious, then everything would be harmonious, but we cannot assume that everything will be so, particularly when there are all sorts of other issues involved about Trident being flung out, currency, Europe and all the rest of it. This will be one chip among many and we want to identify the parameters.

**Q2098 Mr Reid:** I want to put one example to you. At the moment, any UK citizen living within the EU is entitled, if they are over a certain age, to a winter fuel payment. When I say to English MP colleagues that, if Scotland became independent, people over 65 would still be entitled to a winter fuel payment from the UK Government, they are all horrified and say, “We’ll definitely put a stop to that.” But the only way they can put a stop to that is by removing citizenship, because if people have UK citizenships in the EU they are entitled to the same benefits as UK citizens living within the UK. That would certainly be an impetus for the residual UK Parliament to remove UK citizenship from people who had opted to take Scottish citizenship. What do you think would happen in that context?

**Professor Harvey:** Again, in the realm of speculation, I have tried to frame this in the context of a shared history and the co-operative nature of relationships around these islands, but let us be pragmatic as well. The UK and Ireland have good co-operative relationships because it is in the firm strategic interests of both states to have those relationships on a co-operative basis. One way of looking at Northern Ireland and the land border of Northern Ireland with Ireland is that it is a back door into Ireland, or is it a back door into the UK? And when you say that—

**Q2099 Chair:** I am sorry, but can you come back to the question of winter fuel payments and just clarify that point? We understand all these other issues. I am presuming that the British taxpayer does not pay winter fuel payments to everybody in the Republic of Ireland. So, if we had a Republic of Scotland, is there any reason why the UK Treasury would want to pay winter fuel payments to everybody in Scotland, and, if not, how would it discriminate between who it had to pay and who it did not?

*Professor Harvey:* Again, we are in the realm of what decisions will be taken within the newly constituted UK. It would be for the UK to decide what it wanted to do.

**Q2100 Chair:** Fine. That is very helpful. It would be for the UK to decide whether it wanted to continue paying winter fuel payments to people in Scotland, and it may be that the only way that they could stop that would be by withdrawing people's UK citizenship if they had taken out Scottish citizenship.

*Professor Harvey:* We are in the realm of speculation.

**Chair:** Indeed we are.

**Q2101 Mr Reid:** I take your point that if everything is harmonious then people reach agreement, but we do not know whether this break-up, if it happens, is going to be harmonious or not. So another question I was going to ask is, if the UK Government decided that if someone took out Scottish citizenship they wanted to remove their UK citizenship, could they do that for Scotland while not taking the same decision as far as Ireland was concerned?

*Professor Harvey:* We are raising a number of complex questions in relation to citizenship and nationality law, but the shared tradition is clear and also, historically, that is not a position the UK has adopted. But again, in the realm of guessing as to what might happen in the event that the relationship deteriorates very badly, both states could then take decisions post-independence that might have serious repercussions for people living on either side of that newly formed border. Part of the conversation I want to have today is to raise the fact that it is important, therefore, to frame that in an international context, in a human rights context, and to say that there should be no backward steps taken. But it will be for the UK Government to decide who it wanted to—

**Q2102 Mr Reid:** But could it adopt a different policy towards former UK citizens in Scotland, as opposed to UK citizens in Ireland? Could it adopt different policies for two different countries?

*Professor Harvey:* You would be into an interesting debate as to the justification of the legitimate aim involved in doing that.

**Q2103 Pamela Nash:** This is a difficult conversation because we, as a Committee, are looking for all the possibilities and the practical possibilities. Winter fuel allowance is a really good example, because that is currently already happening. Our Government here are paying that to many Irish citizens who have dual citizenship with Britain, but, as you said, that would not be the entire population. We are just looking at possibilities at the moment, but would it be possible for the UK to have a different policy for their citizens in Ireland from its policy for those in Scotland?

*Professor Harvey:* One of the issues that would be problematic is that, if, in determining your nationality law, you adopted differential approaches to exactly the same category of British citizen, you would be in the realms of, "Are you treating exactly the same

category of citizen on a like basis?” That would raise that question in nationality law, because one of the issues there is non-discrimination between different and similar nationality groups.

**Q2104 Pamela Nash:** Could that then be challenged in international courts?

*Professor Harvey:* If, with precisely the same category of citizenship, you were to treat people differentially, you would be raising the question of non-discrimination in that context.

**Q2105 Chair:** Can I be clear, then? Would you describe as a single category people who had dual nationality, or would you see as different categories—which could therefore be dealt with differently—people on the one hand who had joint Scottish and UK nationality, and people on the other hand who had joint Irish and UK nationality? Would these be two different categories that you could deal with differently, or would they all be lumped together as being one category who had joint UK and somebody else’s nationality?

*Professor Harvey:* No, it is specifically in relation to somebody who has precisely the same category of British citizenship.

**Q2106 Chair:** Yes, I think I understand that. What I am trying to clarify, though, is the precise category in these terms—simply to have dual nationality, whatever the second country is, or is it to have joint Scottish-UK, joint Irish-UK or joint Canadian-UK nationality? Are all these different categories considered to be separate, so that different rules could be applied to all of them?

*Professor Harvey:* One response is that, interestingly, British citizenship is only one category of British nationality. There are six categories of British nationality, of which British citizenship is but one. The question is raising the issue of, “What about somebody who is in one of those categories being treated differently?” I am raising that question mark, but bear in mind that British citizenship is only one of a range of categories of British nationality and—

**Q2107 Chair:** I know, but, leaving that aside, could you possibly just deal with the question I did actually ask you?

*Professor Harvey:* Could you explain your question further?

**Q2108 Chair:** In response to Ms Nash you indicated that the British Government would not be able to discriminate among what was considered to be the same category of British citizen. I am asking you whether or not, in that context, people with dual nationality would all be considered to be a single category, or whether those who had joint Scottish and UK citizenship would be considered to be a different category from those who had Irish and UK citizenship, and therefore could be dealt with differently.

*Professor Harvey:* Again, we are talking about the winter fuel payment to people who would be residing, as I understand it, in an independent Scotland—people who enjoyed a category of British citizenship, but who resided in a newly independent Scotland, and the question of whether they would continue to receive a benefit accorded to other people in exactly the same category. I am just saying that that would raise a question mark in my mind, but one of the things to bear in mind in the conversation, again, is that, in the hypothetical situation that we are speaking about, it would be for states within the confines of their existing obligations to determine how they wanted to do this. Bear in mind that recent legislation—

**Q2109 Chair:** So the UK could decide what it wanted to do. If the UK decided it wanted to stop winter fuel payments for people in Scotland who had chosen Scottish nationality, it would be able to do so.

**Pamela Nash:** That was for people with dual citizenship.

**Chair:** Okay: if people had dual citizenship, the UK could say, “Right, you are no longer UK citizens. You are Scottish citizens exclusively, so we do not have to pay you winter fuel allowance.”

**Professor Harvey:** The UK Government can take a decision in relation to its citizenship categories, so it can make that decision.

**Chair:** Fine, that is excellent, yes.

**Professor Harvey:** But the only question I was raising was, for example, for somebody residing in Spain, another EU Member—someone in precisely the same category—the question marks might arise in those sorts of contexts. But one of the focal points we are talking about is independent states determining their law and policy on citizenship. Bear in mind the fact that the UK has moved in recent years, for example, to introduce rules on deprivation of citizenship for British citizens provided that they are not stateless. So the law on this moves, and it can move in both directions.

**Q2110 Pamela Nash:** Just to be clear, though, if the UK Government decided to treat people with dual citizenship in one country—Scotland—differently from those in Spain or any other country, there is a possibility that that could be challenged under international law.

**Professor Harvey:** I would raise a question mark. I also want to raise something else in that context.

**Q2111 Pamela Nash:** It is not impossible that it would not, but there is nothing to prevent that from happening.

**Professor Harvey:** Just to be clear also, one of the points I made at the start about no backward steps will raise a very interesting debate in this sort of context. If it happens to arise that this context works out, for example, in the realm of economic and social rights, where people do take tangible backward steps as a result of what happens post this decision, as to what they might do about that, one of the starting points for this discussion is really the human rights framework, which tries to say that one of the important things is that, whatever decision you take constitutionally, there are broadly equivalent levels of protection that exist into the future and there are no backward steps as well.

**Q2112 Chair:** I am not sure I understand all that. We have just been hearing that 6,000 people working at the Faslane naval base are likely to lose their jobs in the event that all the submarines leave as a result of separation. That would clearly be an economically backward step for those who are made unemployed. Are you saying that they would have the right to take some sort of action against either the UK or the Scottish Government through human rights legislation?

**Professor Harvey:** One of the instruments in international law is the International Covenant on Economic, Social and Cultural Rights 1966. The UK has ratified that convention and is a party to it. One of the interesting principles that emerge from that covenant relates to the point about no retrogressive measures to be taken in relation to the social and economic rights enjoyed by people. But we are talking then about the context of two independent states that would exist, and we are again in the realm of guessing what might happen in the event of that.

**Chair:** I am sorry, but I don’t understand that answer, actually. I am totally lost.

**Q2113 Jim McGovern:** I have listened with great interest to what Professor Harvey is saying, but I don’t think I have heard a definitive answer to any question yet. Every answer you give says it is about speculation, it is hypothetical or, “We are in the realms of

speculation here.” Can you start trying to answer the questions? We are here to listen to your answers, and hopefully they will be helpful, but up till now I don’t think I have heard a definitive answer.

**Professor Harvey:** I think I have given very clear and definitive answers in terms of the framework for a conversation that is about a decision that may or may not be taken in relation to this—

**Jim McGovern:** “May or may not be”.

**Professor Harvey:** And the sorts of international, legal and other standards that exist that will frame the conversations to follow that, the constitutional legal tradition in the UK context, examples and evidence from the Irish experience, and the Irish experience in relation to dealing with the UK and the framework for thinking about this, some of the questions that may need further clarification in the area of human rights law and in other areas too. But we are talking about a referendum process for the people of Scotland to decide its future and then, beyond that, for any new democratic arrangement in Scotland to decide its future law and policy. In that context, what we are talking about is how you frame that discussion and the sort of standards that are—

**Chair:** No, that is not actually what we are talking about. What we think we are talking about is identifying the issues that we want to make the people of Scotland aware of as possibilities. We want, for example, to make the people of Scotland aware of whether or not it is possible for either Scotland or the UK to decide that there will be no joint nationality, and a whole number of issues like that. We want to clarify for them what the parameters of the options are for the main state actors in this regard.

**Q2114 Lindsay Roy:** May I try and clarify something? One of the things you have said quite clearly is that equality and good will in terms of relationships between the two countries is of fundamental importance in terms of dual nationality. Yes?

**Professor Harvey:** Yes. One of the—

**Q2115 Lindsay Roy:** What we are trying to establish are what you would call the “known knows” and the “known unknowns”. These are the things that you are calling speculation. To take it on a bit further, what would happen to second generation youngsters who, for example, were born in the UK as British citizens, then Scotland became independent, and later they moved to South Africa? Would they be able to acquire or retain British citizenship? Presumably they could retain British citizenship. Would they be able to acquire Scottish citizenship, or is that an unknown?

**Professor Harvey:** No, let me be clear on this. An independent state will have to establish its own nationality law. You have seen and heard evidence about how long it took Ireland to get on to the statute books its own citizenship and nationality law. Ireland is working this year on a single code for immigration. How long down the line is that from 1922? In the UK context, there have been a large number of statutes passed. Look, it will be for the Scottish people, the Scottish Parliament, to decide what its nationality law will be in the context of political relationships. I have referred to legal issues, but some of this—a lot of this—is about politics.

**Q2116 Lindsay Roy:** That is why we are here.

**Professor Harvey:** But they will be political relationships that will be taken forward in a shared constitutional context where there is recognition historically of dual nationality. The hope would be—but this would be for democratic institutions to decide—that that generosity of spirit would be reflected, because it is already reflected in other relationships in these

islands and it is already reflected in, for example, the work on the common travel area that goes on between the UK and Ireland as well.

**Q2117 Lindsay Roy:** But that would fundamentally depend on the quality of relationships between the two Governments, if there was a post-independence era.

*Professor Harvey:* Yes. The Irish example is an example of where there were moments of good, solid co-operation between the UK and Irish Governments and moments when that was not so.

**Q2118 Chair:** That is right, but am I not right in thinking that the UK and Ireland have got pretty much free travel, because they have a commonly agreed visa scheme, which basically means that Britain decides the visa scheme that it wants and Ireland agrees with that? If Ireland did not agree, the danger would be that people that the UK was not willing to allow into the UK would come in on a much looser visa scheme through Ireland and migrate. In order to avoid border controls, the reality is that Ireland has simply accepted the writ of the United Kingdom in this regard.

*Professor Harvey:* The Irish example is relevant to this conversation because there is a land border—I think, approximately, a 320-mile land border—between Northern Ireland and the south of Ireland. With 300 ways of crossing that border, it is not realistic for the two states to have that form of immigration control. The common travel area facilitates those arrangements, but the joint statement that Alan Shatter, the Minister for Justice, and Damian Green, the then Immigration Minister, made in December 2011 clearly set out a programme for further development of the common travel area. One of the issues for discussion within that is the development of a common visa within the common travel area. Also, you will know that they are piloting movement of people on short-stay visas within the common travel area for 16 countries. That is further evidence of good working relationships.

**Q2119 Chair:** That is right. So if we apply that precedent to Scotland, if people get on fine, people all get on fine. If, however, people do not get on fine, and Scotland adopts a policy in relation to visas that is at wide variation from that of the United Kingdom, it will be up to the United Kingdom to decide whether it wants to introduce border controls. The evidence we have had had in terms of a number of public statements from some figures in the SNP has been that they want to be much more relaxed about allowing immigration into Scotland. I can understand why the UK would have some reservations about Scotland becoming a back door into London in particular—the idea that migrants would just come round the top end and flood down to London. It would be effectively like the channel tunnel, only 300 miles wide. In those circumstances, it would presumably be up to the UK either to say that Scotland had to abide by the same rules, or unilaterally to introduce border controls. Is that or is that not correct?

*Professor Harvey:* Obviously, both states are members of the European Union as well, which is developing policy in relation to common—

**Q2120 Chair:** But not in Schengen.

*Professor Harvey:* They are not in Schengen, but the EU is developing a common asylum policy and working on immigration policy as well. That is another context, you know. Other EU member states—

**Q2121 Chair:** No, it is not, surely, because the UK and Ireland have both deliberately decided to stay out of Schengen. Given that Schengen does not apply, surely the

point that I made earlier about the UK having either the right to have Scotland accepting its visa policy or the right unilaterally to create border controls is correct.

*Professor Harvey:* What I am trying to underline is—

**Q2122 Chair:** I know what you are trying to underline, but I want you to answer the question I am asking you.

*Professor Harvey:* It is that the UK and Ireland have—all I can provide you with is evidence from what has happened in the past—found it to be in the strategic interests of both states to have good co-operative relationships.

**Q2123 Chair:** Up to a point, Lord Copper! It is not in the interests of the United Kingdom, after Scotland secedes, to have open borders if Scotland is allowing people to come in by the boatload. You would accept that presumably.

*Professor Harvey:* And other EU member states would have an interest in whatever policy was adopted in Scotland in relation to citizenship, nationality and immigration.

**Q2124 Chair:** Only if Scotland was then an entry point to those other countries. Given that the UK is not in Schengen, there is no automatic access from the UK or from these islands to the rest of Europe. Therefore, to some extent it does not matter, surely, to the rest of Europe.

*Professor Harvey:* The evidence from the common travel area is, one, it is possible—possible or conceivable—to have good co-operative relationships between a small state and its larger neighbour in relation to these issues that are mutually beneficial to both for a variety of strategic reasons. But also it is worth bearing in mind, and it is clear from the debates in the Scottish Parliament—look at the debate that happened in the Scottish Parliament on International Migrants Day—that there are, as I understand it, specific demographic targets that Scotland has in relation to its working-age population.

**Chair:** That is right, yes.

*Professor Harvey:* If you look at the figures, it is something like 88% of long-term migrants to the UK come to England and 87% of those are between the ages of 25 and 44 approximately, so Scotland has its own particular demographic issues. All I am saying, and what the evidence demonstrates, in looking at the common travel area that has already existed, is that it is possible for flexibility, recognising the needs of Ireland and the needs of the UK, to be built into a co-operative relationship that ensures the needs of both are adequately met.

**Chair:** Yes, I understand that.

*Professor Harvey:* And the UK-Ireland relationship at the moment, as evidenced in the joint statement made in 2011, is indicative that that common travel area idea seems to enjoy support.

**Q2125 Chair:** That is right. Do you also accept that the Irish Government has changed its policy in order to fit in with the UK Government's policy in this matter? The alternative was that the UK Government would apply some form of border control to stop unlimited migration from the Irish Republic through the back door, through Northern Ireland into the rest of the UK, and, if Scotland allowed much laxer entry circumstances into Scotland, given that over 50% of those who are given asylum in Scotland migrate to London within a very short time, it would be seen as a back door, and potentially you would have border restrictions there also.

*Professor Harvey:* It is vital to underline this point. From the perspective of states, back doors open both ways. That is important to bear in mind in relation to thinking

objectively about how the Irish state and the UK state see this, but also to bear it in mind in relation to how the Irish state takes forward this issue. Ireland has its own particular circumstances and the land border with Northern Ireland, and attaches a particular value and significance, as the UK Government does, to a common travel area for the mutual benefit of both, for the mutual benefit of the economic performance of both.

**Q2126 Chair:** Yes, under shared rules.

**Professor Harvey:** One of the issues around the common travel area that this debate might help to open up is further clarification and maybe even, down the road, formalisation of the common travel area along Schengen-type transparent lines. As you will know, and as the evidence you have already heard has said, we are talking about something that until 1971 operated as an administrative arrangement, in legal terms, in the UK. So one of the hopes would be—

**Q2127 Chair:** That is right. If there was a Schengen-type arrangement across the UK as a whole, you would require to have a commonly agreed external frontier that would require that Scotland would have to be in step with the rest of the United Kingdom and vice versa.

**Professor Harvey:** We are second-guessing what a future Scottish Government and Parliament—

**Q2128 Chair:** No, we are not. We are asking hypothetical questions here. That is not second-guessing. We want to be able to identify the options.

**Professor Harvey:** Let me finish. We are second-guessing that, but the question mark would be, is it likely that a future Scottish Government would, as the Irish Government and Irish state have done over successive generations, see the strategic benefit of full and active participation in a common travel area? The response to that is that, like the Irish Government, Scotland may well see the benefits to being part of the common travel area, when we think about the shared history of relationships between these islands. One of the things I wanted to underline today is that there is a shared history on these islands and a distinctiveness to those relationships that will, I think, persist. Think about the place that I come from—the Ulster Scots tradition in Northern Ireland, and all the sets of relationships that exist. There is a shared history there, and part of this discussion may open up opportunities, as well, to talk to each other around these islands, too, as part of this wider conversation.

**Chair:** Yes, fine.

**Q2129 Mike Crockart:** You are painting a very rosy picture of the islands remaining all happy and harmonious, joining together, forming a larger common travel area, and it will all work and we will not need to join Schengen and things like that. But the big issue for Scotland is that it is all about visas and tourism, and where we want people to be coming to Scotland from, surely. So you can well see that, post-independence, a Scottish Government in need of immigrant workers, in need of tourism, may well look at the European Union and the common visa arrangements there as being a better bet than the common travel area, surely.

**Professor Harvey:** Yes is the answer to that question. A new Scottish—

**Q2130 Mike Crockart:** Thank you for such a definitive answer, because I think it is the first one we have had. I will take that and take it on from there, and say that, if that is the case, surely it has implications for border control, because you have then opened up a back door. I am sorry, but I don't really understand this idea of a back door working in two directions, because if you have opened up a back door there for visa arrangements or people being able to come into Scotland on a European visa, then it will only be going in one

direction. That would then necessitate a remainder UK Government doing something if they did not want to be affected by that.

**Professor Harvey:** We are trying to establish what future Governments may or may not do with their immigration and asylum law.

**Q2131 Mike Crockart:** We are trying to establish potentials.

**Professor Harvey:** The premise of your question is that the relationship is a difficult one in which either state will have an interest in what the other does. What I am saying is that there is evidence from the Irish context that, yes, that has happened with Ireland and the UK, and the land border they share through Northern Ireland. Ireland can see the land border with Northern Ireland as a back door into Ireland. The UK can see that land border as a back door into the UK. Both states will have an interest in whatever immigration, asylum and visa policies are adopted by the other state. What I am trying to underline is that the evidence suggests that, in the Irish and UK context, the strategic interest in having a mutually co-operative relationship in that area—

**Chair:** Yes, we understand all that. We know that it is much better if people get on fine, but what we are trying to explore is what happens, what are the parameters, what is the freedom of action that people have if they do not. I think maybe in the remaining minutes that you have you could restrict yourself to what would happen in bad circumstances, rather than saying that good is better, because I think we generally understand that point.

**Q2132 Mike Crockart:** It is not even the fact that such questions arise only if the relationships break down. We could have a perfectly reasonable relationship continuing between Scotland and a remainder UK, but Scotland could take the view that economically it made more sense to go down the European route, have a European visa and be part of Schengen. It is not to do with relationships breaking down. It would be an independent state making a choice for itself.

**Professor Harvey:** Yes. The UK is a wonderful example of this. The UK in relation to its engagement to the European Union has taken a highly selective opt-in/opt-out approach to this whole area.

**Q2133 Mike Crockart:** Therefore, you accept that Scotland could take an entirely different approach.

**Professor Harvey:** We are talking about a potential independent Scotland following the UK, taking a selective opt-in/opt-out approach to the EU, also taking a selective negotiated opt-in/opt-out approach to the common travel area as well. So you are talking about a new state in a sense making a decision about whom or what it engages with in relation to these areas of law and policy.

**Q2134 Mike Crockart:** On a slightly different topic, there is a debate that you will be aware of about Scotland's status within the European Union and whether it would automatically remain a member of the European Union on secession from the United Kingdom. I understand that your law background is much more in the international human rights side of things, but do you have a view on whether Scotland would retain automatic membership or would have to reapply?

**Professor Harvey:** One way of approaching this, which might not be the way you necessarily like, is to say that it would be hard to see an independent Scotland not at some stage being a member of the European Union, with all the context—

**Q2135 Mike Crockart:** That is not the question.

**Professor Harvey:** That that implies. My understanding is that the Scottish Government, whatever position is taken—and that is an ongoing and controversial debate in relation to the EU—has expressed a desire to be part of the European Union. So I think, rather than dwell on that, one of the concrete things we can do today—you have wanted me to be concrete—is to say that we could operate on the assumption that an independent Scotland would be another member state of the European Union, and that these conversations—

**Q2136 Pamela Nash:** The EU has said—the President of the European Commission has said—that it won't.

**Professor Harvey:** Either. I am very much aware of what has been said by the President in relation to this. I am not talking about automatic versus application. Whatever route is taken, it is hard to imagine Scotland, either automatically or by application, not ending up as a member of the European Union.

**Q2137 Chair:** Eventually.

**Professor Harvey:** Eventually.

**Pamela Nash:** The UK might leave, at this rate.

**Q2138 Jim McGovern:** Would it be subject to an application? The argument seems to be whether it would be automatic or not.

**Professor Harvey:** What I am saying is that, rather than dwell on that question—

**Jim McGovern:** No, I want to dwell on it. I want you to answer that.

**Chair:** We do want to dwell on that. We want to explore some of the difficult things. I am tempted to shoot myself, because we have been trying to get you to answer—

**Mike Crockart:** I can second that.

**Chair:** Thank you. We have been trying to get you to answer straight questions and you always keep sliding off into assuming that everything is fine. We want to explore what happens if there are difficulties. I don't know if we will get any straighter answers from you in the remaining 19 minutes or so, but it would be helpful if you gave us the benefit of your expertise to illuminate areas that are difficult. We understand the point that it would be nice if everything was nice. Mike, do you want to have another go, or have you given up?

**Q2139 Mike Crockart:** I will have another go. I entirely agree that it is, in all likelihood, far more likely that Scotland would end up being part of the European Union, but the process by which it gets there will affect the conditions of that membership. That is really what we are trying to get to, whether one is more likely than the other. If it is on application, that opens up all sorts of difficult issues that we would then have to look at and that would affect the whole relationship with how borders and all of these other things that we are talking about would then become live, whereas, if it is an automatic membership, then those, to a certain extent, are placed to one side. That is why it is such an important question about what the process will be and, therefore, what the end conditions will be. We cannot simply put it to one side and say, "Whatever process we take, Scotland will end up as part of the EU." That might be true, but it is important to look at what that end result will look like. That is what we are trying to get to—to use your legal expertise to say which is the more likely route that we will end up taking, and, therefore, what the likely conditions are that we will end up facing.

**Professor Harvey:** Look, the likely outcome of this is that other EU member states will not only have an interest in what Scotland decides on all these areas, but in certain areas, in relation to, for example, Scottish citizenship, will have an expectation—beyond an expectation on some occasions—of being consulted about what Scotland intends to do

because of the implications for the rest of the EU for the decisions that are taken in Scotland. One of the things I have tried to emphasise—

**Q2140 Mike Crockart:** Can you give some examples of that, to make it more practical for us?

**Professor Harvey:** I have already given the example of Scottish citizenship. If Scotland is a member of the European Union and it has rules for granting citizenship, people become citizens of the European Union with the rights, entitlements and debates that flow around EU citizenship, and all other member states of the European Union obviously have an interest in a decision taken in Scotland.

**Q2141 Chair:** Right, they would have an interest. Would they be able to block Scotland? If Scotland decided, in the way that the Scottish football and rugby teams do, to give caps to anybody that is good enough and whose granny has ever been to Scotland, for example, would the EU be able to stop Scotland saying that all of these people can be Scottish citizens? They would have an interest. What I do not understand quite is what “have an interest” means.

**Professor Harvey:** To be a member of the European Union, as with a number of international clubs, there are often conditions and rules. In the area of borders, nationality, citizenship, immigration and asylum, you will all know already that in admitting members to the European Union, the European Union takes a view on the immigration and asylum regime in the state. One thing we have not touched on today is that one of the things that an independent Scotland will have to do is to establish its own immigration and asylum bureaucracy. You will all be very aware here of what the bureaucracy of immigration and asylum involves. That will be for Scotland to establish. The EU will have an interest in the sort of structures that are put in place within an EU context.

**Q2142 Chair:** What does “have an interest” mean? Will they just be interested bystanders or will they be able to specify, “You have to do X, Y and Z”?

**Professor Harvey:** Bear in mind two things. One thing that the Scottish Government have referred to is a more welcoming approach to issues like immigration and asylum. Secondly, bear in mind that the EU is developing a common European asylum system. In fact, we are in the second phase of the development of a common European asylum system. I know that the coalition Government in London take a view on that system, but one of the issues in the development of that common system is the development of common standards. So, other EU member states, in the event of Scotland showing an interest to opt in selectively, will equally be interested in the immigration and asylum regime that is to be established in Scotland.

**Q2143 Chair:** I understand this point about “take an interest in”. You keep using this term. Are you saying to us that as part of the decision-making process of the EU to decide whether or not Scotland is allowed to join—or to continue in membership, depending on what type of view you take—they would specify the type of immigration and asylum policy that Scotland had, and that Scotland would therefore not be entirely without constraint in deciding its own policy?

**Professor Harvey:** It is clear that the EU does have conditions for membership, yes, and includes a broad range of areas.

**Q2144 Chair:** Fine. Asylum and immigration would be one of those areas and Scotland would not be independent in that regard if it wished to join the EU. It would have to take the Brussels rules.

**Professor Harvey:** One of the points made was of Scotland taking a more selective opt-in approach to the European Union. One consequence of doing that, of course, is moving towards things like a common European asylum system. The clue is in the title, right? It is a common European asylum system of shared standards and rules at which people are working towards harmonisation and convergence of standards. Scotland would have to be in line with that.

**Q2145 Chair:** What would happen, in your view, if that policy was wildly different from that adopted by the United Kingdom and you did not have a common border? Presumably, if the Scottish system was laxer, you could then clearly have people coming and being given permission to remain in Scotland and then having an open border to England in general and London in particular. Would that not cause difficulties on an England-Scotland basis if there were differential policies on immigration and asylum?

**Professor Harvey:** It could cause problems if that were to happen. It is not the answer that you want, I know, but the evidence from the UK-Ireland relationship is that that could happen in the UK and Ireland relationship as well. But in that relationship, in the development of the common travel area and the development of co-operation, there has been a recognition that it is in the strategic interests of both the UK and Ireland, who share a land border, through Northern Ireland, with each other, to co-operate on immigration and asylum.

**Q2146 Chair:** That is fine. So a separate Scotland would not only have to agree its immigration policy with the European Union; it would also really have to come to an agreement on its immigration and asylum policy with the United Kingdom.

**Professor Harvey:** It would be one issue for—

**Q2147 Chair:** There would be hundreds of other issues, that is right, but Scotland would not, as it were, be independent when it came to determining its policy. It would have to take the line from the EU and then seek to achieve a consensus with the United Kingdom.

**Professor Harvey:** In the event of an independent Scotland taking a highly selective in-out approach that is different from the UK and Ireland relationship, there would have to be, yes, those sorts of thing.

**Q2148 Chair:** You have to presume that the purpose of being separate and independent is in order to make different choices, because if you make the same choices, then there is no point in being separate. So we are assuming that Scotland is seeking separation in order to do things differently and, therefore, I think that point has certainly been very helpful. Can I clarify whether there are any rules in relation to military personnel achieving citizenship that we ought to be aware of? Again, if they are citizens of Scotland or citizens of the United Kingdom at the moment, presumably there would, again, be the same argument about choosing and so on. If, for example, they are citizens of Fiji, and they are in the British Army and decide to join the Scottish forces, are there any rules that would require them to be given Scottish citizenship?

**Professor Harvey:** Again, the word is not “require”, but in the realm of what has happened thus far, for example, in the British constitutional tradition, there has been a recognition of generosity in relation to military personnel and the award of citizenship. We are in the realm of working out what a future Scottish Government would do, but that is the context.

**Q2149 Chair:** That is right; they would be free to choose. The Scottish Government would be free to choose that. There is not a firm rule that says they will have to take them.

**Professor Harvey:** A future Scottish Government in the area of immigration, asylum, nationality and citizenship is going to have to put in place both the legal infrastructure of immigration, asylum, nationality and citizenship and also the bureaucracy of immigration, asylum and—

**Q2150 Chair:** Yes. Can I just clarify another point, to go back slightly to the point about people who are in Scotland at the time of separation and who are not UK citizens—for example, Polish citizens? I take it at the time of separation there is no rule that automatically assumes that they would be granted Scottish citizenship and therefore presumably, if they are economic migrants, it would be up to the Scottish Government to decide whether or not to give them citizenship.

**Professor Harvey:** The Scottish Government would have to decide on its nationality law.

**Chair:** What this illustrates for us in relation to previous conversations that we have had is that it would be possible to have a situation where Polish citizens were voting in a referendum for Scotland to become a separate country, but would then not necessarily be granted citizenship of that country—which does, on the face of it, seem a trifle bizarre, but those are the areas we are trying to explore at the moment.

**Q2151 Lindsay Roy:** Can you give us an idea—you mentioned bureaucracy—what setting up the separate bureaucracy to define and allocate Scottish citizenship would involve in terms of personnel, costs and expense?

**Professor Harvey:** We have dwelt a lot on what the law might be, but obviously, in order to have an immigration and asylum system, you would need the equivalent of the current UK Border Agency. There is the border force that would have to be established, but also in relation to an appeals process, for example, would you have new tribunals established in order to hear appeals for immigration and asylum? At the moment, there are, I think, approximately 19,000 staff working in the UK Border Agency and Border Force combined. Morph that on to the population of Scotland. But creating an immigration, asylum and nationality regime will not just be about legal standards; it will be creating the actual bureaucracy and—

**Chair:** But, to be fair, that applies across everything, whether it is pensions, benefits and all of these in the formation of a new state. We understand the issue about the bureaucracy.

**Q2152 Lindsay Roy:** But it will be front-loaded costwise. It would be quite expensive initially because you are setting up a new system.

**Professor Harvey:** There is obviously one element of the shared experience that I can comment on, and that is that there is a shared experience of migration management in Britain. There is obviously shared experience of operating the current system, officials who work or have worked in Scotland, and there are aspects of migration policy—although immigration is not a devolved matter—that are managed on a Scottish basis, but it would cost money to establish a system. One of the points to make, and the Chair has made it, is that small states around the world demonstrate that there are not insurmountable challenges, although all states large and small struggle with issues of migration management.

**Q2153 Chair:** Okay. Are there any final points? I just have one that we do want to pick up in relation to the Irish situation. Can you clarify for us the relationship between Irish citizenship and British citizenship in 1923, and how that evolved? My understanding is that Britain essentially took the view that Ireland might come back into the fold; therefore, they were much looser in relation to the rights of Irish citizens at that stage and that, subsequently, has been overtaken to some extent by the Belfast agreement. Could you take us through a little bit of that?

**Professor Harvey:** It can be encapsulated quite simply in the fact that both states, as I understand it, saw the issue differently at the time. The UK Government saw it from one perspective and the Irish state Government saw it from another perspective. It was not till 1935 that the Irish state developed its own legislation in this area. I think it seems likely that an independent Scotland would get there slightly more quickly than happened in the Irish context. There are obviously particular circumstances in Ireland, but, obviously, you have referred to the Belfast agreement again, and further evidence that inter-governmental co-operation between a small state, Ireland, and its larger neighbour is possible and is possible in areas such as—

**Q2154 Chair:** That is right, but, to be fair, the Irish Republic did not throw out Trident, which is likely to sour the atmosphere somewhat. But we will come on to that later.

**Professor Harvey:** This is an important point to bear in mind, and I have said it a number of times. There are similarities and differences. We have talked about the land border. I come from a jurisdiction that has experienced violent political conflict—not just political disagreement, but violent conflict. The Irish example is also one that emerged from violent conflict. What I have tried to do today—and I think I have answered your questions—is say how we need to frame the constitutional conversation. There are principles that can help us to do that, but there will be elements of all these areas that will be for a future Scottish state and a newly configured UK to decide. But what I hope I have provided and can provide are some of the principles upon which that conversation might go forward, and there might be a constructive conversation.

**Q2155 Chair:** Okay. I did say when we spoke briefly outside that at the end I would give you the opportunity to answer any questions that we have not asked you, in case there were any answers that you had prepared that we have not raised yet. You have managed to cover almost everything, but is there anything that you feel we should have asked you that we have not?

**Professor Harvey:** I would underline today the first point—the one that I started with—of internationalising this discussion, of the importance of the human rights framework in taking this debate forward, and in the continuity of those human rights. Obviously, in the area of citizenship, nationality and immigration we are often obsessively focused on somebody's status. What I have tried to do in my work, and what people who work in human rights try to do, is to see each person in this room first as another human person. Law, not just politics, has evolved internationally to establish the rights that all persons within the state—all within the jurisdiction of the state—enjoy. You only have to look at the debates that are happening here in London around the Human Rights Act and the European Convention on Human Rights to get a sense of the sorts of debate that are happening now.

What I would hope—and it is a hope—is that there is an opportunity, by framing this in human rights terms, to have a constructive conversation about how we do all of this on these islands better than we currently do it. If you look at what committee after committee report says from the UN and other human rights bodies, the UK Government approach at present leaves a lot to be desired. So, in the area of borders, immigration, asylum and

nationality, I want a better quality of conversation between these islands on how we do this better and how we improve human rights protection as a result of all these constitutional conversations—the Scottish referendum debate, the debate that is happening in Ireland around a constitutional convention, and the debates that have been happening around Bills of Rights. How do we do this better? The lesson from all this, and from my experience and background, is that whatever constitutional status people choose, they also have recognised and embedded human rights, not just by virtue of their nationality, but by virtue of being within the jurisdiction of the state and of being a person.

**Chair:** Thank you very much for coming along. This has been very interesting—not always what we expected, but that is not necessarily your fault.