Scotland and the EU

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Stephen Tierney: Scotland and the EU: A Comment

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I agree with Sioadháin Douglas-Scott that the accession of an independent Scotland to the European Union is not in any serious doubt. I develop this point in a paper written with Katie Boyle here. In this blog I argue that although accession will no doubt take time, there is unlikely to be any period within which Scotland is effectively cast out of the EU. More speculatively I would like to ask whether there might in fact a duty on the part of the EU to negotiate Scotland’s membership, and whether the Secession Reference to the Supreme Court of Canada may provide an interesting analogy supportive of this argument.

To begin, I am not as sure as Sioadháin that Article 48 would be the route to membership adopted by the EU. I believe Article 48 does offer a plausible mechanism to secure Scotland’s membership, but given that Scotland will become a new Member State and given that the case law of CJEU establishes that specific articles have preference over general ones, it seems that Article 49 offers the more obvious process. Of course politics may take over here so we simply don’t know for now.

In either event detailed negotiations of the terms of membership will be required and a potentially lengthy process of ratification of a new accession treaty (if Art 49 is used) could well ensue. That said, Scotland’s position is in no way analogous to that of accession countries joining the EU, for example, the principle of sincere cooperation, full mutual respect and solidarity found in Art 4 TEU, but can also be expressed constitutional commitments, than an obligation to negotiate its secession where the constitution is silent on both secession and democracy. Based primarily upon this principle, the Canadian court decided that ‘a clear expression of self-determination by the people of Quebec’ imposed duties on the rest of Canada to negotiate. By analogy, a Yes vote in the referendum can reasonably be seen as the expression of the will of the people of Scotland not only to be an independent state but to be part of the EU. A commitment to EU membership is part of the Scottish Government’s proposal for independence; it is contained in the White Paper, ‘Scotland’s Future’ for example. It can be argued strongly that voters are aware that to vote Yes to independence is also to vote for Scotland becoming an independent member of the EU. And since we are discussing a territory which is part of the EU and which wishes to remain part of the EU, it would seem easier to assert an obligation on partners in a union to negotiate the continued membership of a component part, where the principle of democracy, along with citizenship, are express constitutional commitments, than an obligation to negotiate its secession where the constitution is silent on both secession and democracy as it was in Canada.

None of this is to say that there will not be a number of important and possibly contentious issues to be dealt with in the negotiations. Scotland’s relationship to monetary union, the status of existing UK opt outs and the budget rebate all present potential sites of dispute.

Indeed, should the terms of admission be very unfavourable there may well emerge a debate within Scotland as to whether membership of the EU is even desirable; the UK’s own EU trajectory will be relevant to such a debate. In short, Scotland will almost certainly not get all that it wants in seeking to join the EU. But this is very different from any suggestion that it will somehow be cut adrift entirely from the European project.

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