Introduction
I am a University Lecturer in Human Rights Law at the University of Cambridge, where I specialise in UK and European Human Rights Law, including immigration rights under the European Convention on Human Rights. I am an expert in Article 8 European Convention on Human Rights, which has formed the focus of my doctoral and subsequent research. In 2015 I was the recipient of a Cambridge Humanities Research Grant, which funded research at the European Court of Human Rights in Strasbourg where I interviewed judges, members of the registry and attended Grand Chamber hearings. I am writing in a personal capacity drawing upon the knowledge and expertise that I have formed through my professional work. My submission focuses upon the implications of Brexit for the right to remain or enter the UK.

Executive Summary
1. None of the rights protected under Article 8 ECHR are provisional upon membership of the EU. They apply (and will continue to apply) equally to all individuals within the UK regardless of nationality. Thus on the assumption that the UK does not withdraw from the European Convention on Human Rights (ECHR) Article 8 ECHR will continue to apply to European Union (EU) nationals based in the United Kingdom.
2. Regardless of whether the UK withdraws from the EU or the ECHR, the ECHR will continue to apply to UK nationals living in states that have ratified the ECHR (thus it will apply to UK nationals resident in EU member states).
3. Article 8 ECHR provides for a right to respect for private life and family life, both of which provide for a right to remain where the individual has developed personal or family ties in that host state. These ties may include relationships with UK nationals, but such rights may be formed even without these relations where EU nationals are integrated into the host state. Article 8 ECHR is a qualified right, which means that in principle the state can justify interfering with the right in certain circumstances, however, it seems improbable that the UK would be able to justify deporting all EU nationals resident in the UK, or even that it would be able to justify expelling a more limited subset of EU nationals that have developed such ties prior to withdrawal.
4. Article 8 ECHR also provides for some limited rights to enter a host state to be reunited with family members, for example, if spouses, elderly parents, or children wish to join a family member resident in the UK. Entitlement to this right will not be affected by Brexit, but this right is highly limited so if EU rights are removed this aspect of Article 8 ECHR offers very little to compensate.
Right to Remain

**Right to Remain and EU nationals currently in the UK**

5. The right to remain may be based either upon the individual’s family ties or their personal social ties with the country.

6. Thus EU nationals may have acquired rights where they have formed relations with other persons lawfully resident in the host state (this would include e.g. intimate relationships with UK nationals, or having children that are UK nationals). This is evident from the Court’s declaration that ‘the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the convention’.\(^1\) It should be noted that family ties tend to focus upon the nuclear family – spouses, parents and children - they will not necessarily extend to relationships between parents and adult children, nor children with elderly parents, or siblings.\(^2\) Where the Court has been willing to extend family ties is where there is evidence of additional levels of dependency, such as mental or physical health problems.\(^3\)

7. Even if EU nationals have not developed family ties they may be entitled to rely upon the right to remain where they have formed personal ties with the host state due to factors such as the length of time and integration in the host state.\(^4\) Indeed the Court has declared that: ‘it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8’.\(^5\) The Court has also stated that Article 8 ECHR ‘protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of “private life”’.\(^6\)

8. Thus EU nationals currently resident in the UK should be able to establish a right to remain either based upon the family life or private life limb of Article 8 ECHR.

9. The right to remain is not, however, absolute, meaning that the state can justify expulsion in some circumstances. Indeed in some circumstances even settled migrants (which include long-term residents and those who have lived their entire lives in a particular state) may be lawfully removed from that state.

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5 See *Samsonnikov v Estonia* (App. No.52178/10) (3rd July 2012) (available on HUDOC) at [81].

These cases tend to concern applicants that have been convicted of serious crimes.

10. In determining whether an interference is justified the case law of the European Court of Human Rights (Court) attempts to strike a balance between protecting state sovereignty and protecting the private life and family ties of individuals. Overall the Court is quite deferential to state sovereignty. It should be noted, however, that as most of the case law concerns expulsion of applicants who have committed crimes in the host state it is not readily applicable to this situation.

11. It is also important to note that even in cases involving applicants that have committed criminal offences the state has not always been able to justify expulsion.

12. Thus even though the Court gives considerable weight to state sovereignty and even though there is no directly analogous case it appears unrealistic that the UK would be able to justify expulsion of all EU nationals resident in the UK. If the UK is able to justify expelling any EU nationals it will be on a far more limited basis, which will need to be carefully justified as a proportionate measure.

13. The UK would need to satisfy three criteria to justify expulsion under Article 8(2) ECHR: the legality of the measure, the pursuit of a legitimate aim, and that the measure was necessary in a democratic society (proportionality).

14. Provided that the UK put in place appropriate legislation that did not confer arbitrary discretion upon the authorities then it is likely that it would be able to demonstrate that the measure satisfied the legality limb of Article 8(2) ECHR.

15. Demonstrating that the measure pursues a legitimate aim is more contentious. Article 8(2) ECHR states that the following will be accepted as legitimate aims: interests of national security; public safety or the economic wellbeing of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others. As most deportation cases involve the expulsion of those convicted of criminal offences the state usually relies upon national security or the prevention of disorder or crime, however, neither of these aims are applicable to the general expulsion of EU nationals. It is perhaps possible that the UK may attempt to base its arguments upon the ‘economic wellbeing of the country’ or the ‘protection of the rights and freedoms of others’ (respecting the democratic result of the referendum), both are evidently highly contentious and speculative for a variety of reasons, and may not be accepted by the Court. Although it is worth noting that the Court tends to be rather deferential when it comes to the state establishing that it is acting in pursuit of a legitimate aim, and that states do not generally fail on this ground.

16. The more difficult matter is whether expulsion measures can be justified as proportionate. The Court has established criteria that must be taken into account in considering whether expulsion is justified, however, as many of these criteria are directed towards those that have committed criminal offences it is difficult to identify what system (if any) would satisfy the proportionality requirement.\textsuperscript{7}

17. The following of the Court’s criteria are probably relevant: (i) duration of the applicant’s stay in the UK; (ii) applicant’s family situation, such as the length of the marriage; (iii) other factors revealing whether the couple lead a real and genuine family life; (iv) whether there are children in the marriage and, if so, their age; (v) seriousness of the difficulties which the spouse would be likely to encounter in the applicant’s country of origin, although the mere fact that a person may face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion; (vi) best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; (vii) solidity of social, cultural and family ties with the host country and with the country of destination. 

18. The Grand Chamber of the European Court of Human Rights has also declared that ‘…for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion.’ 

19. Applying these criteria it appears improbable that the UK would be able to justify expulsion of EU nationals who have formed relations with UK nationals or have children who are UK nationals.

20. It also appears highly unlikely that the UK would be able to expel EU nationals settled in the UK who have formed personal ties here (regardless of relationships with EU nationals). There is no guidance as to the length of time that an applicant needs to have been resident to establish such ties.

21. Finally, it should be noted that even if a more nuanced approach is developed, it is difficult to see in what circumstances the Court would find expulsion justified. Generally the Court has held that where a host state has knowingly allowed an individual to remain within the host state (even if that individual entered unlawfully) that it is much more difficult to justify expulsion. In the context of EU nationals their argument is even stronger as they have lawfully entered and established ties in the UK.

22. Overall there is no clear indication that the UK would be able to justify expelling any EU nationals with established ties in the UK.

**Right to Remain and EU nationals entering the UK following the referendum but before withdrawal**

23. The same applies to EU nationals entering the UK after the referendum, but before withdrawal from the EU. Although their position may perhaps be found to be more precarious than those who have already established ties in the UK, they are lawfully entitled to enter the UK and there is nothing to preclude them from developing personal and family ties in the intervening period. The Court may be more willing to find that such ties were established at a time when their position was knowingly precarious, as the Court has considered this to be a relevant factor in the past, but this has only been in the context of applicants who have been *unlawfully resident* in a host state during the period at which they established such ties, and even in these cases the Court has been

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9 Maslov v Austria (App. 1638/03) (Grand Chamber) (23rd June 2008).

10 See discussion in Jeunesse v Netherlands (App. No. 12738/10) (3rd October 2014) (available on HUDOC) at [108].
more lenient with applicants where the state has knowingly tolerated their presence. 11 This is a very different position from EU nationals that lawfully enter the UK during the intervening period.

24. Thus it appears that the Court will be unlikely to accept expulsion of EU nationals that become resident and develop personal or family ties in the intervening period before we officially withdraw from the EU.

Right to Remain and EU nationals entering the UK following withdrawal

25. After we have withdrawn from the EU then the rights of EU nationals to enter the UK will depend upon whatever agreement is reached. Regardless of what that agreement entails EU nationals entering the UK post-withdrawal from the EU will continue to have the same Article 8 ECHR rights as other non-UK nationals resident in the UK. Thus if they enter the UK and develop personal or family ties they may be able to claim rights against expulsion in the same way that non-EU nationals currently claim such rights.

Right to Remain and UK nationals currently resident in EU member states

26. Regardless of whether the UK withdraws from the ECHR it will continue to apply to UK nationals living in other EU member states if those nations are signatories to the ECHR. Thus if UK nationals have established personal or family ties in a host state it will be difficult for that state to justify expulsion for primarily the same reasons that apply to the UK.

Right to Enter

27. It is likely that the biggest impact of Brexit will be in cases where a EU national working in the UK wishes his or her spouse, elderly parent or child to come and live with him or her in the UK. At present EU nationals have certain rights to enter the UK, if that position changes then it may be much more difficult for the family members of EU nationals resident in the UK to move to the UK.

28. Article 8 ECHR provides for a very limited right to family reunification, 12 this will not change as a result of Brexit. Decisions on entry will be considered under the family life aspect of Article 8 ECHR, but there is no absolute obligation to admit family members. 13

29. As with deportation the Court uses the notion of the ‘core family’ for the purposes of family reunification cases. 14 This is based upon parents and minor children, although even minor children are not guaranteed entry. 15

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11 See discussion in Jeunesse v Netherlands (App. No. 12738/10) (3rd October 2014) (available on HUDOC) at [108].
12 Abdulaziz, Cabales and Balkandali v United Kingdom (Apps. 9214/80, 9473/81, and 9474/81) (1985) 7 EHR 471.
13 Abdulaziz, Cabales and Balkandali v United Kingdom (Apps. 9214/80, 9473/81, and 9474/81) (1985) 7 EHR 471.
14 The Court has refused to mandate reunification between an elderly mother and her adult daughter where an elderly woman who had suffered a stroke was refused residency in Finland with her daughter (her only surviving relative), Senchishak v. Finland (App. No. 5049/12) (18th November 2014) (available on HUDOC). Nor will the Court necessarily mandate that siblings should be able to join family members, As v Switzerland (App. No. 39350/13) (30 June 2015).
30. Moreover, it is very rare that the Court will require a member state to allow applicants to enter and reside in their country. States may lawfully impose conditions on family reunification, and conditions for family reunification will only violate the right to respect for family life where they are unreasonable. Requiring demonstration of sufficient regular income and capacity to provide for basic needs and cost of subsistence is not unreasonable.\textsuperscript{16} EU nationals resident in the UK will continue to benefit from this right, but as it is highly limited it cannot compensate for the loss of other EU rights.

31. It is thus unlikely that the Court will mandate that the UK has to accept entry of relatives of EU nationals for the purpose of family reunification.

**Conclusion**

32. None of the rights protected under Article 8 ECHR are provisional upon membership of the EU. They apply (and will continue to apply) equally to all within the UK regardless of nationality. Thus on the assumption that the UK does not withdraw from the European Convention on Human Rights, Article 8 ECHR will continue to apply to EU nationals based in the United Kingdom.

33. Article 8 ECHR will also continue to apply to UK nationals resident in states that are party to the ECHR.

34. It is improbable that the European Court of Human Rights will accept expulsion of all EU nationals currently resident in the UK, nor those that become resident and develop personal or family ties in the intervening period before we officially withdraw from the EU.

35. Any individual entitled to enter the UK post-Brexit will also continue to enjoy the protection of Article 8 ECHR.

36. Thus blanket expulsion of EU nationals would be incompatible with Article 8 ECHR. It is also likely that the European Court of Human Rights would regard expulsion of a subset of EU nationals as an unjustified interference with Article 8 ECHR where applicants have developed personal or family ties in the UK.

37. Where a EU national is currently residing in the UK and they have a spouse, elderly parent or child currently resident abroad they will not necessarily be able to rely upon Article 8 ECHR to bring their family members to the UK.

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\textsuperscript{16} See *Haydarie and others v Netherlands* (App. No. 8876/04).