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The Human Rights Act and the Doctrine of Precedent

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Conflicts between domestic precedents and subsequent decisions of the European Court of Human Rights have resulted in the lower courts following prior domestic decisions even when convinced that they will be overruled on appeal. The standard interpretation of the decision of the House of Lords in Kay v Lambeth *holds the lower courts to domestic precedents that are manifestly inconsistent with the subsequent Strasbourg jurisprudence and admits only the most limited exception. This article advances an alternative approach to the relationship between the domestic courts' obligations under the Human Rights Act 1998 and the doctrine of precedent by analysis of the nature of the doctrine of precedent and the reasons offered by Lord Bingham in his leading judgment in* Kay. *This analysis is then extended and applied to two recent cases in which the lower courts have considered themselves bound by a decision of the UK's highest appeal court that fails to give due effect to the applicants' Convention rights.*

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1. INTRODUCTION

The European Convention on Human Rights and Fundamental Freedoms 'speaks in abstract terms'[1] and thereby leaves much scope for interpretation. The European Court of Human Rights (ECtHR) has, for example, noted that the 'the concept of "private life" [to which 'respect' is to be given under Art 8(1)] is a broad term not susceptible to exhaustive definition'.[2] It is therefore unsurprising that the interpretation given to some of the Convention rights by the domestic courts has, on occasion, diverged from that given by the ECtHR. There have, in particular, been a number of cases in which the domestic courts have adopted a noticeably narrower interpretation of the concept of private life to that subsequently adopted by the ECtHR.[3] This raises questions about the operation of the domestic rules of precedent with regard to the Convention rights given domestic effect by the Human Rights Act 1998. The central question, according to Lord Bingham in a 2006 decision of the House of Lords, is 'whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the court in Strasbourg'.[4] This phrasing implies a context in which domestic precedents are generally binding on the lower courts, thereby restricting discussion to whether the 1998 Act permits departure from what would otherwise be a duty of strict adherence.

* I am grateful to those who have read and commented on earlier drafts of this paper, particularly Deryck Beyleveld, Fiona de Londras, Roger Masterman and the two anonymous reviewers. All errors are mine.

1 R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) p 358.

2 *Pretty v UK* (2346/02) (2002) 35 EHRR 1 at [61].

3 Cf eg *R (Pretty) v DPP* [2001] UKHL 61 with ibid; and *R (S and Marper) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39 with *S & Marper v UK* (30562/04 and 30566/04) (2009) 48 EHRR 50.

4 *Kay v Lambeth LBC; Leeds CC v Price* [2006] UKHL 10 at [40].

Whether or not we accept this starting point, and this paper will not, the 1998 Act does not expressly address the situation where there is a conflict between a domestic precedent and the later jurisprudence of the ECtHR. Section 6(1) makes it unlawful for the domestic courts, as public authorities, to act in a way that is incompatible with the Convention rights specified in s 1(1). Section 2(1) requires domestic courts to take account of any relevant Strasbourg judgment or opinion when determining a question in connection with these rights. But the effect of these two interconnected duties on the force of domestic precedents is not specifically addressed. In the period since the House of Lords purported to authoritatively rule on Lord Bingham's question, there has been surprisingly little academic discussion of this specific issue,[5] as opposed to the general affect of s 2(1).[6]

Lord Bingham's own answer in *Kay v Lambeth LBC; Leeds CC v Price* supported continued adherence to a 'binding domestic decision', while recognising that there was at least a 'partial exception' to this general 'rule'.[7] As will be shown in the next section, subsequent decisions have interpreted and applied this ruling in its most restrictive sense, considering it a strict rule with an exception limited to the 'exceptional' facts of a particular case.[8]

The purpose of this paper is to advance an alternative view on the proper approach of the domestic courts when faced with the situation where a domestic precedent adopts a narrow interpretation of a Convention right that is inconsistent with a later Strasbourg decision. It will be argued that the restrictive reading of Lord Bingham's reasoning mistakenly treats domestic precedents as strictly binding, puts applicants in a weak position in the lower courts relative to the likely outcome of a later appeal, and is not supported by the two reasons given by Lord Bingham in *Kay.* In particular, it will be argued that there can be no more than a strong rebuttable presumption that a domestic precedent will be followed, and Lord Bingham's reasoning supports rebuttal of this presumption in circumstances beyond the facts of the case specifically approved by his Lordship. Further, the approach of the courts in two more recent cases[9] will be challenged and it will be argued that these are examples of cases involving the proper interpretation of Art 8(1) in which it is proper and appropriate for the lower courts to depart from a domestic precedent to give effect to a single decision of the ECtHR.

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5 There are some examples, such as I Leigh and R Masterman *Making Rights Real* (Oxford: Hart Publishing, 2008) pp.71–75 and AL Young 'Precedent' in D Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011) p 91 esp at 102–105. There are also various case notes, including eg S Bright 'Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v' Price' (2006) Con 294, 307–308 and S Foster 'To follow the Supreme Court or Strasbourg? Judicial precedent and the Human Rights Act 1998' (2010) 15 2) Coventry LJ 33.

6 See eg R Masterman 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' (2004) PL 725; J Lewis 'The European ceiling on human rights' (2007) PL 720; J Wright 'Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' (2009) PL 595; A Kavanagh *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), 146–152, F Klug and H Wildbore 'Follow or lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 EHRLR 621 and B Malkani 'A rights-specific approach to section 2 of the Human Rights Act' (2012) 5 EHRLR 516.

7 [2006] UKHL 10 at [40]–[45].

8 Lord Bingham had approved the Court of Appeal's approach in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151.

9 *R (Purdy) v DPP* [2008] EWHC 2565; [2009] EWCA Civ 92; [2009] UKHL 45 and *GC & C v Commission of Police for the Metropolis* [2010] EWHC 2225; [2011] UKSC 21.

2. SUBSEQUENT OSSIFICATION OF *KAY V LAMBETH*

Lord Bingham's decision in *Kay* was supported by a seven-member panel of the House of Lords.[10] His Lordship concluded that, even in the Convention context, the lower courts should ordinarily adhere to the domestic rules of precedent and follow a 'binding domestic decision'. His Lordship recognised a 'partial exception' to this general rule, but did not define that exception beyond approving *D v East Berkshire Community NHS Trust.*[11]

In *East Berkshire*, the Court of Appeal declined to follow the decision of the House of Lords in *X v Bedfordshire*[12] and instead gave effect to the later decision of the ECtHR in *Z v UK*.[13] These cases involving the alleged negligence of public bodies when dealing with actual and suspected child abuse. Lord Bingham supported the Court of Appeal's decision not to follow *Bedfordshire* by referring to three features of the case. First, he noted that the policy considerations underlying the decision to strike out the claim in negligence in the precedent had been 'very largely eroded'. Secondly, *Bedfordshire* had been decided before the 1998 Act and had not made reference to the Convention in its opinions. Thirdly and

> importantly, the very children whose claim in negligence the House had rejected [in *X v Bedfordshire*] as unarguable succeeded at Strasbourg [in *Z v UK*] in establishing a breach of article 3 of the Convention and recovering what was, by Strasbourg standards, very substantial reparation.[14]

Lord Bingham added that, given the restrictions on the lower courts' ability to depart from a precedent, the duty imposed on the lower court by the 1998 Act was primarily to review the Convention arguments put to them and, where possible conflicts arise, 'they may express their views and give leave to appeal' and leapfrog appeals 'may be appropriate'.

In the subsequent case of *R (RJM)* v *Secretary of State for Work and Pensions*, Lord Neuberger (with the agreement of the other law lords) opined:

> Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision. To hold otherwise would be to go against what Lord Bingham decided.[15]

The situation is different, Lord Neuberger added, where the Court of Appeal is faced with a conflict between one of its own decisions and an inconsistent subsequent decision of the ECtHR. His Lordship reasoned that under the ordinary rules of precedent the Court of Appeal is 'freer to depart from its earlier decisions' than those of the UK's highest court and the law of precedent could therefore be developed in a 'principled and cautious fashion' to permit (but not oblige) the Court of Appeal to give domestic effect to the Strasbourg decision.[16] This decision thus upholds the idea that appeal court decisions remain binding on the lower courts save for 'wholly exceptional circumstances'.

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10 [2006] UKHL 10 at [40]–[45].
11 [2004] QB 558.
12 [1995] 2 AC 633
13 (2001) 34 EHRR 97.
14 [2006] UKHL 10 at [45].
15 [2008] UKHL 63 at [64].
16 Ibid, [65]–[66].

This was the approach of the Divisional Court in *Purdy*, which considered itself bound by decisions of the highest appeal court, holding that the exception recognised in *Kay* is 'a very limited one that will apply only in the most exceptional circumstances'.[17] The Divisional Court in *GC & C* also followed an earlier domestic precedent, declaring 'this court is bound by the decision of the House of Lords' and *D v East Berkshire* represents a 'single exception…miles away from this case'.[18] In these cases, which will be examined in depth in section 5, the appeal courts supported the Divisional Court's approach to precedent. Since *Kay,* appeal court precedents on the meaning of a Convention right have been consistently followed in preference to later Strasbourg jurisprudence.[19]

The next section of this paper will examine the doctrine of precedent and its operation in the context of human rights. This will be followed by section 4, which analyses the actual reasoning of Lord Bingham in *Kay v Lambeth.*

3. THE DOCTRINE OF PRECEDENT AND HUMAN RIGHTS

It is often noted that the doctrine of *stare decisis* is 'a cornerstone of our legal system'[20] and 'is woven into the essential fabric of the common law'.[21] This doctrine is classically expressed as the norm that the precedents set by the appeal courts *bind* the lower courts.[22] Formally, all the courts below the Supreme Court are regarded as bound by its decisions (and those of the House of Lords) and the decisions of the Court of Appeal of England and Wales bind the court itself (with narrow exceptions)[23] and all courts below. But is this view of precedent accurate or justifiable?

Even the most cursory perusal of the case law reveals repeated repetition of the view that precedents are binding, often explicitly expressed using the language of 'binding authority' or 'binding precedent'.[24] The case law is similarly replete with the associated language of following, distinguishing, and separating the *ratio decidendi* from *obiter dicta*. That is not to say that there are not cases where a judge has knowingly departed from a precedent of a superior court without distinguishing it, but such cases are exceptional.[25] There are, in particular, cases in which Privy Council decisions have been vested with more than their formal status as 'persuasive' authorities and followed in preference to a formally 'binding' decision of an appeal court. The Privy Council's decision in the *Wagon Mound* on the test for remoteness in negligence was, for example, regarded by the Court of Appeal as displacing its own decision in *re Polemis*.[26] Similarly, the Court of Appeal in *James and Karimi* explicitly followed a decision of the Privy Council on provocation in preference to an

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17 [2008] EWHC 2565 at [45].

18 [2010] EWHC 2225 at [32].

19 For a recent example, see *R (Kaiyam) v Secretary of State for Justice* [2013] EWCA Civ 1587, esp at [5].

20 E.g. [2006] UKHL 10 at [42] (Lord Bingham).

21 B V Harris 'Final Appellate Courts Overruling their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 LQR 408, 412.

22 N Duxbury *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) p 12.

23 *David v Johnson* [1979] AC 264, 324 and 328, and *RJM* [2008] UKHL 63.

24 See eg statements to this effect in the Supreme Court: *Geys v Société Générale* [2012] UKSC 63 at [93] and [141], and *Mills v HSBC Trustee* [2011] UKSC 48 at [40].

25 See eg the discussion of the lower courts' approach to *Re F* [1990] 2 AC 1 in SD Pattinson *Medical Law and Ethics* (London: Sweet & Maxwell, 2006) pp 67– 68.

26 See the discussion of *The Wagon Mound* [1961] AC 388 and re *Polemis* [1921] 3 KB 560 in *Smith v Leech Brain* [1962] 2 QB 405, 415.

earlier decision of the House of Lords of less than 5 years' standing.[27] The Court of Appeal's decision, which has itself been followed,[28] did not even attempt to distinguish the earlier decision of the House of Lords. Instead, it noted that the Privy Council's panel of nine of the Lords of Appeal in Ordinary had agreed that the House of Lords' decision was incorrectly decided and opined that the circumstances were such that 'the result of any appeal on the issue to the House of Lords is a foregone conclusion'.[29]

The exceptional nature of cases in which the lower courts have explicitly decided not to follow a precedent speaks to the respect given to *stare decisis.* As Allen pointed out as far back as 1925,

> The 'binding force' of precedents has, through constant and often unthinking repetition, become a kind of sacramental phrase which contains a large element of fiction.[30]

Indeed, it is apparent that precedents are not regarded as having the same authoritative force as statutes. But neither are they ignored by the lower courts; rather they are treated as carrying significant persuasive force within the common law system. Imbuing precedents with anything more than *significant presumptive authority* would raise insurmountable justificatory problems. As Duxbury has argued, no single principle or theory can explain or justify the formally asserted strict bindingness of precedent.[31] The best that we have, he has argued, is a number of arguments that require 'not an unassailable but a strong rebuttable presumption that earlier decisions be followed'.[32]

Some of the arguments supporting the authority of precedent are consequentialist in the sense of appealing to the predicted effects of adherence to past decisions, such as arguments that following precedent saves the time and effort of repeatedly working through the same points, generates legal stability, facilitates certainty and predictability, and curbs arbitrary judicial discretion. But these outcomes are not guaranteed by following a precedent: it could take greater time to work through conflicting precedents than deciding afresh and the discretion inherent in identifying *rationes decidendi* means that the results are not invariably stable, certain or predictable.[33] There is a further issue of whether the consequences of precedent-following are important enough to outweigh any injustice arising from following a precedent. The support given to precedent-following by consequentialist justifications is not absolute, because departing from a precedent will often have benefits and the weight attached to a particular consequence needs to be weighed against competing values.

Arguments advanced on deontological grounds, in the sense of appealing to a reason held out as an intrinsic good, fare no better as attempts to justify *strict* adherence to precedent. Supporting a decision that comes first in time is simply not an intrinsic good; what is worth honouring is what is good about the past, not the past as such. The formal justice of treating like cases alike does not require *stare decisis* – in fact, formal justice predates it[34] – and does not decisively assist in a world in which no two cases are truly alike in every respect.[35] Thus, agreeing with Duxbury, formal justice needs to operate alongside substantive

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27 *R v James and Karimi* [2006] EWCA Crim 14 following *Attorney General for Jersey v Holley* [2005] UKPC 23 and refusing to follow *R v Smith (Morgan)* [2001] 1 AC 146.

28 *R v Moses* [2006] EWCA Crim 1721.

29 [2006] EWCA Crim 14 at [43].

30 C K Allen 'Precedent and logic' (1925) 41 LQR 329, 334.

31 Duxbury, n 22 above.

32 Ibid, p 183.

33 See E Maltz 'The Nature of Precedent' (1988) 66 NCL Review 367 and Duxbury, above n 22, ch 3.

34 See eg Aristotle *Nicomachean Ethics*, transl. by Roger Crisp (Cambridge: Cambridge University Press, 2000) book V

35 See further P Westen 'The empty idea of equality' (1982) 95 Harv L Rev 537.

justice, so that the underlying principle is surely that 'like cases should be treated alike except where doing so repeats an injustice'.[36]

If we accept that no case for precedent-following is water-tight and the value of precedent rests with its capacity to simultaneously constrain and allow a degree of discretion,[37] then we must conclude that precedents are no more than strong rebuttable presumptions. This conclusion is relevant – indeed, especially relevant – when the precedents in question concern the ambit of human rights to which the lower courts are statutorily bound to give effect. The authority of domestic precedents must also be considered in the light of the statutory requirement in s 2 of the 1998 Act that the courts 'take into account' the Strasbourg jurisprudence when giving effect to the Convention rights. If a decision of a domestic appeal court is not properly considered strictly binding, then an earlier domestic decision cannot be properly treated as if it were a statutory bar to giving effect to a later Strasbourg decision. Further, no court – not even the highest domestic appeal court – may increase the precedential authority of its own decisions because any ruling that it makes must itself be subject to the limits of precedent. Thus, it remains open to the lower courts to decline to follow a precedent where it considers an alternative approach to have a stronger justification or carry greater authority.

Precedent and the jurisprudence of the ECtHR

But is it appropriate for a domestic court to give effect to a decision of the ECtHR when the Strasbourg court does not even give lip service to the idea that its precedents are binding? Article 46 of the Convention requires no more than States 'abide by the final judgment of the Court in any case where they are parties'. In *Cossey,* the ECtHR declared that it 'is not bound by its previous judgments', but 'it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case law'.[38] The court went on to state that it is able to depart from an earlier decision where 'there were cogent reasons for doing so', such as 'to ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions'.[39] In *Goodwin v UK*, the Grand Chamber exercised its freedom to depart from previous decisions of the ECtHR by reversing the actual decision in *Cossey* on the effect of the Convention rights on the legal status of transsexuals. In the process, it quoted another ECtHR decision for the view that 'it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases' and such reasons included having regard 'to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved'.[40]

Thus, although the ECtHR does not formally accept *stare decisis,* it does accept that its precedents have some authority on the basis of the consequentialist concerns of certainty, foreseeability and stability, and the deontological concern of equality before the law. The example given and applied in *Goodwin* of a sufficient justification for departing from a precedent reinforces the view that the Convention is a 'living instrument'.[41] This view recognises that more recent decisions of the Strasbourg court generally have greater authority than older decisions. It is also widely recognised that the weight and influence of any judicial

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36 Duxbury, above n 22, p 177.

37 Ibid, pp 181–182.

38 *Cossey v UK* (10843/84) (1991) 13 EHRR 622 at [35].

39 Ibid.

40 *Goodwin v UK* (2002) (28957/95) (2002) 35 EHRR 18 at [74], citing *Chapman v UK* (27238/94) (2001) 33 EHRR 18 at [70].

41 *Tyrer v UK* (1978) 2 EHRR 1 at [31].

pronouncement of the Court will also turn on 'the level of generality at which it is expressed or its centrality to the decision on the material facts', and a Grand Chamber decision is generally considered more authoritative than one by a Court Chamber.[42]

The UK courts need not, however, adopt the Strasbourg court's approach to its own decisions. As will be shown presently, the approach of the UK's highest court to the Strasbourg jurisprudence under s 2 of the 1998 Act has generally been to consider the ECtHR's decisions to be sufficiently authoritative to give rise to a strong presumption that they will be followed. According to Masterman, the practice has been that 'the relevant Strasbourg jurisprudence is followed in all but the most extreme circumstances – a position which comes close to the domestic courts being bound to follow the Convention case law'.[43] The highpoint of this approach is represented by Lord Bingham's declaration in *Ullah:* the 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[44]

The *Ullah* or 'mirror' principle involves the domestic courts ordinarily following 'any clear and constant' jurisprudence of the ECtHR[45] and any contemporary decision of the Grand Chamber.[46] It is a *qualified* mirror principle. In *Alconbury,* Lord Slynn recognised an exception in 'special circumstances'.[47] In particular, according to Lord Phillips in *Horncastle,* a domestic court may decline to follow Strasbourg if it doubts that 'the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process' to enable the Strasbourg court to reconsider and establish a 'valuable dialogue'.[48] Examples of cases where the Strasbourg court has displayed such misunderstandings are rare. One example is *Osman v UK,*[49] which the ECtHR itself later accepted 'was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by the domestic courts'.[50] Another example is *Morris v UK,*[51] which the House of Lords declined to follow in *R* v *Spear* and opined that the Strasbourg court would have appreciated the relevant rules 'had the position been more fully explained'.[52] Neither of these examples were decisions of the Grand Chamber nor part of a clear and constant line of cases.

The approach of the UK's highest appeal court to the Strasbourg jurisprudence has not gone without criticism.[53] Laws LJ in the Court of Appeal has notably expressed a firm 'hope' that the *Ullah* principle will be revisited by the Supreme Court to allow the domestic courts greater freedom to develop

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42 D J Harris, et al *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009) p 17.

43 Masterman, above n 6, at 727.

44 *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20]

45 *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [26], *Ullah* [2004] UKHL 26 at [20] and Manchester City Council v Pinnock [2010] UKSC 45 at [48].

46 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at [18] and *Secretary of State for the Home Department v AF* [2009] UKHL 28 at [70] (Lord Hoffman) at [108] (Lord Carswell), and [114] (Lord Brown) and *Cadder v HM Advocate* [2010] UKSC 43 at [45]–[46] (Lord Hope).

47 *Alconbury* [2001] UKHL 23 at [26].

48 *R v Horncastle* [2009] UKSC 14 at [11] (Lord Phillips with the agreement of the other members of the SC).

49 *Osman v UK* (23452/94) (2000) 29 EHRR 245.

50 *Z v UK* (29392/95) (2002) 34 EHRR 3 at [100].

51 (38784/97) (2002) 34 EHRR 52 (see also the subsequent Grand Chamber decision: *Cooper v UK* (48843/99) (2004) 39 EHRR 8.

52 *R* v *Spear* [2002] UKHL 31, esp at [12], [29], [66] and [97].

53 See n. 6 above.

> a municipal jurisprudence of the Convention rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases.[54]

His Lordship expressed this view while explicitly declaring the Court of Appeal to be 'bound' by the *Ullah* principle on the basis that it has been repeatedly affirmed by the House of Lords and Supreme Court.[55]

One particularly powerful criticism of the *Ullah* principle is that it treats ECtHR decisions as setting a 'ceiling' on the Convention rights, as opposed to simply using the jurisprudence to set a 'floor of rights'. Strasbourg could find a State in breach of the Convention if it fails to protect the minimum content of an individual's Convention right, but not if the State chooses to grant individuals greater rights against public bodies than it is strictly required to do on the ECtHR's interpretation of the Convention rights. Neither the government during the passing of the Act[56] nor the Strasbourg organs had envisaged ECtHR decisions preventing the domestic courts adopting greater protection.[57]

As Dickson has argued, the goal of the *Ullah* principle – promoting a uniform interpretation of the Convention in all Party States – 'should be an important goal only in situations where what is at stake is the core of a Convention right, that is, the minimum protection which is to be guaranteed by it'.[58] Uniformity is required in those situations to protect against fundamentally different interpretations of the Convention rights throughout Europe,

> But in other situations, such as where a balance needs to be struck between two conflicting Convention rights or between a Convention right and the interests of society or 'the rights of others', it is perfectly acceptable for a State to protect a Convention right to a greater extent than the required minimum, provided that in doing so it does not cease to protect one or more of the other Convention rights to the required minimum.[59]

Dickson goes on to point out that the acceptability of States granting more extensive protection is recognised by both the Convention and the ECtHR. First, certain Convention rights are to be protected 'in accordance with the law' or 'lawfully', which means that States need to comply with any higher standards adopted by their national law if they are to avoid a finding that they have violated the relevant Convention right. Secondly, Art 53 of the Convention expressly states that it should not be construed as limiting any human rights and fundamental freedoms ensured under the laws of any party to the Convention.

In the light of these arguments, this paper does not seek to use the *Ullah* principle to support the Strasbourg jurisprudence being used to impose a ceiling on the Convention rights. Indeed, the argument advanced in section 5 is expressly limited to the situation where the later Strasbourg jurisprudence seeks to define the scope of a Convention right so as to delimit the minimum protection that is to be guaranteed by it.

Another criticism of the *Ullah* principle is that it is undermined by the willingness of the highest appeal court to find exceptions to it. Masterman has listed 13 exceptions derived

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54 *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34 at [64].

55 Citing *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26 at [105], [106]; *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 43 at [19], [20], [86].

56 Hansard, HL Deb vol 583 col 510, 18 November 1997.

57 See Masterman, n 6 above, esp 729–730.

58 B Dickson 'The record of the House of Lords in Strasbourg' (2012) 128 LQR 354, 380.

59 Ibid.

from a 'non-exhaustive (and highly-simplified) survey of the case-law'.[60] With respect, treating the approach of *Alconbury* (which supports departure from the mirror principle in 'special circumstances'), *Horncastle* (which supports departure from the mirror principle where the Strasbourg court has misunderstood domestic law or process) and other such cases as appealing to separate exceptions is uncharitable. Such an approach presents the mirror principle as riddled with unprincipled *ad hoc* exceptions. An alternative interpretation is that all the exceptions are instances of 'special circumstances', understood as those circumstances where it is appropriate and feasible to persuade the ECtHR to depart from its previous approach. Thus, *Horncastle* does not present an alternative exception to *Alconbury;* it instantiates that exception. This interpretation is, it is submitted, consistent with the recent decision of the Supreme Court on section 2(1) of the 1998 Act, issued in October 2013.[61]

In *Chester*, the Supreme Court gave domestic effect to Strasbourg decisions rejecting a general ban on convicted prisoners being permitted to vote. Lord Mance's leading judgment[62] cited with approval the view that deference to Strasbourg was limited by the need for what Lord Phillips in *Horncastle* described as 'valuable dialogue' and what Lord Neuberger in *Pinnock* described as 'constructive dialogue' between the domestic courts and Strasbourg.[63] His Lordship added:

> But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.[64]

Lord Sumption, in a concurring judgment with which Lord Hughes agreed, added that the words 'take into account' in section 2(1) in ordinary English mean no more than consider a decision of the ECtHR and are compatible with rejecting it as wrong, but 'this is not an approach that a United Kingdom court can adopt, save in altogether exceptional cases'.[65] His Lordship considered that the domestic courts are 'bound' to treat decisions of the Strasbourg court

> as the authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly explained, lead to the decision being reviewed by the Strasbourg court.[66]

To sum up, the above analysis supports two propositions. First, the lower courts are not strictly bound by the decisions of the domestic appeal courts. Secondly, the UK's highest appeal court has generally treated decisions of the Strasbourg court on matters of principle as authoritative. Indeed, the level of respect given to the decisions of the Strasbourg court has often been of a similar type to that which it grants to its own decisions,[67] in terms of the level

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60 R Masterman 'The Mirror Crack'd', available at http://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/ (accessed 1/1/14).

61 *R (Chester) v Secretary of State for Justice* [2013] UKSC 63.

62 Lords Hope, Hughes and Kerr simply agreed, and Lords Clarke and Sumption agreed while adding reasons of their own: [2013] UKSC 63, [105] and [112].

63 [2013] UKSC 63, [25]–[26], citing *R v Horncastle* [2009] UKSC 14, [11] and *Manchester City Council v Pinnock* [2010] UKSC 45, [48].

64 [2013] UKSC 63, [27].

65 [2013] UKSC 63, [121].

66 Ibid.

67 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

of reluctance displayed in relation to departing from such decisions. These two propositions are directly relevant to the proper interpretation to be given to s 2(1) when faced with inconsistency between a domestic precedent and a later decision of the ECtHR.

4. THE APPROACH TO PRECEDENT IN *KAY V LAMBETH*

We saw above that Lord Bingham in *Kay* concluded that domestic precedents remain 'binding' in a Convention context with a 'partial exception', and subsequent decisions have interpreted and applied this 'rule' so as to treat *East Berkshire* as representing an extremely limited exception. This approach is difficult to reconcile with the above analysis of the doctrine of *stare decisis* and the general approach of the domestic courts to Strasbourg jurisprudence. This section seeks to analyse his Lordship's reasoning and show that it implies far more flexibility than recognised by subsequent decisions.

Lord Bingham's reasons were prefaced by citation of the 1966 *Practice Statement* to the effect that adherence to precedent 'provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules'.[68] These are examples of the consequentialist arguments examined above and shown to justify no more than a strong rebuttable presumption in favour of following a precedent. No stronger justification was needed for the purpose of the Practice Statement, because it sought to make it clear that the House of Lords was not formally bound by its own decisions. The Lord Chancellor declared that the House would treat its own past decisions as 'normally binding', but would henceforth explicitly 'depart from a previous decision when it appears right to do so'.[69]

The consequentialist concerns quoted by Lord Bingham were used to underpin the first of the two reasons offered for the conclusion that the duties imposed by the 1998 Act do not generally require or permit the lower courts to set aside an otherwise 'binding' precedent on the basis of an apparent inconsistency with a subsequent decision of the ECtHR. *First*, his Lordship opined, a rule permitting departure on the basis of a finding of clear inconsistency between the domestic precedent and the Strasbourg decision could produce inconsistency and uncertainty, and thereby undermine the certainty established by the doctrine of precedent. *Secondly*, adherence to the domestic rule of precedent supports 'constructive collaboration' between the Strasbourg court and the national courts. The second of these reasons was offered as the 'more fundamental'. Both reasons must be considered consistent with Lord Bingham's recognition of an exception to the general retention of the traditional rules of precedent. It is my contention that his Lordship's reasoning implies a wider exception than a literal reading of the summary of the 'extreme facts'[70] of *D v East Berkshire CC* would suggest.

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68 [2006] UKHL 10 at [42], citing ibid.

69 [1966] 1 WLR 1234. The Supreme Court has continued this practice: *Austin v Southwark London Borough Council* [2010] UKSC 28 at [24]–[25].

70 *Kay* [2006] UKHL 10 at [45].

A. Clear inconsistency

When articulating the first of his two reasons, Lord Bingham stated that the appeals before the court 'illustrate the potential pitfalls of a rule based on a finding of clear inconsistency'.[71] His Lordship noted that a finding of clear inconsistency had been made by one but not the other of the two Court of Appeal decisions before it and their Lordships were themselves divided on whether there was a clear inconsistency. According to Lord Bingham:

> The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed ([1972] AC 1027, 1054), 'in legal matters, some degree of certainty is at least as valuable a part of justice as perfection'. That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent.[72]

Thus, a rule based on a finding of clear inconsistency would raise the 'prospect' of the lower courts 'taking differing views of the same issue', which would not provide the level of certainty in legal matters that is provided by adherence to the standard rules of precedent.

It is a trite point to note that the standard rules of precedent provide no guarantee of certainty or predictability, because, even when properly applied, they grant significant interpretative discretion to judges. Lord Bingham's claim, however, is merely that they offer 'some degree of certainty'. Nonetheless, this first reason only supports adherence to the standard rules of precedent where such adherence provides at least the same level of legal certainty as would follow were the lower courts free to depart from a domestic precedent to give effect to a subsequent Strasbourg decision. This is significant because there are cases in which a finding of clear inconsistency can be predicted with at least as much certainty as a finding that the domestic precedent applies to the instant facts and supports a particular conclusion. Indeed, in some cases the standard rules of jurisprudential interpretation, which underpin the doctrine of precedent, would not permit any reasonable alternative to the conclusion that the domestic precedent is inconsistent with a subsequent Strasbourg case.

We need not look far for an example of a case in which it could be predicted with sufficient certainty that the domestic precedent is inconsistent with the subsequent Strasbourg jurisprudence, because Lord Bingham provided one by endorsing the Court of Appeal's decision in *East Berkshire* to depart from the *Bedfordshire* case, as considered above. This implies that it could be predicted with sufficient certainty that the courts would consider the *Bedfordshire* case to be inconsistent with the subsequent Strasbourg jurisprudence. If this were not so, then establishing clear inconsistency would not even be a necessary condition for departing from a domestic precedent to give effect to subsequent Strasbourg jurisprudence; whereas Lord Bingham's objection to a rule relying on establishing clear inconsistency alone is that it could not be sufficient if the requisite standard of certainty is to be maintained. Lord Bingham himself provided a compelling reason for believing *Bedfordshire* to be inconsistent with a subsequent decision of the Strasbourg court, namely, that the very children whose claim in negligence in the House of Lords had failed (on the basis of the absence of a duty of care) succeeded in establishing a breach of Art 3 of the ECHR (the right to be free from inhuman or degrading treatment) in Strasbourg.[73]

In *Kay* itself, the mooted inconsistency was between the decision of the House of Lords in *Harrow LBC v Qazi*[74] and the later decision of the ECtHR in *Connors v UK*.[75] But

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71 Ibid at [43].
72 Ibid at [43].
73 [2006] UKHL 10 at [45], referring to *Z v UK* (2001) 34 EHRR 97.
74 *Harrow LBC v Qazi* [2003] UKHL 43.

establishing an inconsistency between *Qazi* and *Connors* was not clear-cut and could defensibly give rise to differences of opinion. In contrast to the cases considered in *East Berkshire*, *Qazi* and *Connors* had involved different applicants and different facts. Indeed, Mr Qazi's own application to the Strasbourg court had been dismissed as inadmissible[76] and *Qazi* is not even mentioned in the judgment of the ECtHR in *Connors*. Further, the reasoning of the ECtHR in *Connors* left some room for the view that *Qazi* was distinguishable.

Both *Qazi* and *Connors* concerned occupiers who sought to rely on their Art 8 right to 'respect' for their 'home' to challenge a public authority landlord's exercise of its right to possession under domestic property law. Mr Qazi had sought to remain in a local authority property after the joint tenancy that he had with his wife had come to an end. A three-to-two majority in *Qazi* held that Mr Qazi could not rely on Art 8 to defeat the local authority's unqualified right to possession under domestic property law (variously reasoning that either the local authority's right in domestic law to possession meant that there was no infringement of his right to 'respect' for his home under Art 8(1) or the balancing exercise under Art 8(2) would inevitably be determined in the local authority's favour).[77] In *Connors*, the ECtHR found there had been a violation of Art 8 when a gypsy family had been evicted from property that they had occupied for most of the preceding 16 years, even though the family had no right to occupy the property in domestic law. The ECtHR's reasoning in *Connors* had placed some emphasis on the positive obligation owed by the State to the Connors family as members of a vulnerable minority; that is, gypsies.[78] This raised the prospect of distinguishing the case on that basis. The Court of Appeal in *Kay* held that there was no inconsistency between *Qazi* and *Connors*, distinguishing *Connors* as being applicable only 'in relation to cases involving gipsies *[sic]*'.[79] The Court of Appeal in *Leeds* considered that *Connors* could not be treated as simply identifying a discrete exception to the general rule propounded by the majority in *Qazi* and was therefore fundamentally inconsistent with it.[80]

The conjoined appeal of *Kay* and *Leeds* divided the House of Lords on whether *Connors* was compatible with *Qazi*. The majority considered *Connors* to be no more than a narrow exception to the general rule laid down in *Qazi*[81] and therefore essentially compatible with it. The minority considered *Connors* to reject the general rule laid down by *Qazi*.[82] Whichever view one prefers – and subsequent Strasbourg jurisprudence preferred the minority view[83] – there was legitimate debate about whether or not *Qazi* and *Connors* were consistent.

The mooted inconsistency between *Qazi* and *Connors* was therefore not 'clear' at all. Lord Bingham's claim is that the division of opinion over whether there was inconsistency between these cases illustrates the danger of departing from a precedent solely on the basis of a finding of clear inconsistency. This example does illustrate the existence of a category of cases in which reasonable but opposed views can be taken on whether or not there is an

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75 *Connors* v *UK* (66746/01) (2005) 40 EHRR 189.

76 [2006] UKHL 10 at [23].

77 *Qazi* [2003] UKHL 43, cf Lord Hope at [71] and [83]–[84]; Lord Millet at [100] and [107], and Lord Scott at [149].

78 (2005) 40 EHRR 189, esp at [84] and [85]–[95].

79 [2004] EWCA Civ 926 at [106].

80 [2005] EWCA Civ 289 at [30].

81 Lord Scott, Lord Brown and Baroness Hale agreed with [110] of Lord Hope's judgment, which detailed when and how it was open to a court to refrain from proceeding to summary judgment and making a possession order on the basis of a defence based on Art 8.

82 Lords Bingham, Nicholls and Walker held that it must be permissible for Art 8(2) considerations to be raised in *all* cases where in domestic law the occupier's right to possession has come to an end or the occupier never had a right to occupy

83 *McCann v UK* (2008) 47 EHRR 913 at [50], *Kay v UK* (No.37341/06) [2011] HLR 2 and *Manchester City Council v Pinnock* [2010] UKSC 45 (overruling *Kay*).

inconsistency. But that example does nothing to deny the existence of a category of cases in which there can be no reasonable alternative to the conclusion that there is a clear inconsistency between a domestic case and subsequent Strasbourg jurisprudence. There are cases (to be examined below) that are more firmly in that category than the *Berkshire* case. These are cases where the domestic court has held that a specific Convention right is not engaged and the ECtHR later holds *in relation to the same claim by the same parties* that that Convention right is engaged. The likelihood that in other types of cases courts could reasonably disagree as to whether or not the domestic precedent is inconsistent with the Strasbourg decision is quite simply irrelevant to this type of case.

There is a further underlying issue. The 'potential pitfalls' of the lower courts too readily finding a clear inconsistency need to be balanced against the potential pitfalls of the lower courts being prevented from acting on a finding of clear inconsistency in cases where such a finding is as predictable as it is unassailable. The consequence of depriving the lower courts of the power to depart from a domestic precedent – which would, in any event, be inconsistent with any defensible justification of the doctrine of precedent – is that the only way that affected applicants can rely on their Convention rights is to take their claim to the Supreme Court or even the ECtHR itself. Such a course of action is both costly and threatens the protection of fundamental human rights that are supposed to be given domestic effect by the Human Rights Act. Leigh and Masterman poignantly ask why a person prevented from invoking his or her Convention rights by an incompatible domestic authority 'must bear the burden, delay and cost of going to the higher court'.[84] Such a conclusion, they argue, 'runs directly counter to the scheme of the Act: Parliament has clearly decreed, through applying sections 2, 3 and 6 on *all* courts, that they have the task of bringing rights home'.[85] I agree. It is my contention that sufficiently certain and predictable support for a finding of inconsistency exists when (a) a domestic appeal court explicitly declares a specific Convention right not to be engaged as part of its ratio, (b) the same claim by the same applicants is considered by the ECtHR and (c) the ECtHR explicitly declares that that Convention right is engaged. Such a case would provide stronger grounds for a finding of clear inconsistency than supported by the finding of inconsistency in *East Berkshire*, which Lord Bingham cited with approval. Lord Bingham's conclusions must be interpreted accordingly, because a finding of clear inconsistency is unproblematic where those three conditions are satisfied.

B. Constructive collaboration

Lord Bingham offered a further, 'more fundamental reason' for the general need to adhere to the standard rules of precedent:

> The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the [Convention] rights…, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the

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84 Leigh and Masterman, n 5 above, p 74.

85 Ibid (original emphasis). See also *Rights Brought Home: The Human Rights Bill* (Cm 3782) (London: TSO, 1997) [1.19].

> decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.[86]

When Lord Bingham says that the Strasbourg court 'authoritatively expounds the interpretation' of the Convention rights, we need to have regard to the fact that earlier in his speech he had explained that the ECtHR

> is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down.[87]

Thus, on matters concerning the *application* of the principles expounded in Strasbourg to particular facts, national courts are the initial decision-makers and have a margin of appreciation. According to Lord Bingham, however, the Strasbourg court is the ultimate authority on matters of principle concerning the scope and meaning of the Convention rights.[88] It follows that this second line of reasoning does not support adherence to the rules of precedent where the Strasbourg court has *authoritatively* adopted a broader interpretation of a Convention right. To consider otherwise is to contradict the assertion that the Strasbourg court is the ultimate authority.

The general position of the Supreme Court and its predecessor to rulings of the ECtHR – the qualified mirror principle – was considered above. Lord Bingham's reference to 'constructive collaboration' in *Kay* surely means the same thing as Lord Phillips' subsequent reference to 'valuable dialogue' in *Horncastle* and Lord Neuberger's reference to 'constructive dialogue' in *Pinnock*.[89] As was shown above in section 3, the approach of the UK's highest appeal court to this dialogue has been to take the ECtHR to have authoritatively ruled on the interpretation of a Convention right where it has done so in a 'clear and constant' line of cases or a contemporaneous decision of the Grand Chamber, save for special circumstances, such as where insufficient understanding of domestic law is displayed. Thus, the overarching principle of any 'constructive collaboration' is that the ECtHR is the 'ultimate authority' on the scope and meaning of the Convention rights, and the ECtHR will be taken to have authoritatively ruled on the matter in the above circumstances. Lord Bingham's appeal to the need for constructive collaboration is therefore not a sufficient reason to prevent lower courts from giving effect to subsequent decisions of the ECtHR falling within this overarching principle.

Lord Bingham's reference to the principle of 'constructive collaboration' also needs to be interpreted in the light of his approval of the Court of Appeal's decision in *East Berkshire*.[90] The Court of Appeal in *East Berkshire* declined to follow the *Bedfordshire* case[91] to give effect to the ECtHR's decision in *Z v UK*.[92] Lord Bingham did not make any special claim for *Z v UK* on Art 3 – it was not in fact a decision of the Grand Chamber and no consideration was given to whether it was part of a clear and constant line of cases. Instead,

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86 [2006] UKHL 10 at [44].

87 Ibid at [28].

88 See also the subsequent case law on s 2, discussed above and *Smith v Ministry of Defence* [2013] UKSC 41 at [43] (Lord Hope giving the leading judgment). Cf Lord Hoffman's view in *re McKerr* [2004] UKHL 12 at [63].

89 *Horncastle* [2009] UKSC 14 at [11] and *Pinnock* [2010] UKSC 45 at [48]. Both were cited with approved in [2013] UKSC 63 at [25]–[26]. See also M Amos 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 ICLQ 557.

90 [2003] EWCA Civ 1151.

91 [1995] 2 AC 633.

92 *Z v UK* (2001) 34 EHRR 97.

his Lordship simply noted that '[n]o reference was made to the European Convention in any of the opinions' in the *Bedfordshire* case.[93] This implies that it is sometimes consistent with the need to maintain constructive collaboration to follow a decision of the ECtHR in preference to a domestic precedent even it if it is not a contemporaneous decision of the Grand Chamber or part of a clear and constant line of cases.

It is also important to again bear in mind the cost of reading Lord Bingham's reasoning too restrictively on the ability of applicants to enforce their Convention rights in the domestic courts. The Supreme Court has repeatedly granted great weight to the Strasbourg jurisprudence and the recent case of *Chester* has reaffirmed the view that in some cases it will not regard it as appropriate to refuse to follow Strasbourg jurisprudence.[94] Holding the lower courts to a precedent that will almost certainly not be followed on appeal puts applicants in an artificially weak position in the lower courts. This can present a significant hurdle to the ability of applicants to enforce their Convention rights in the domestic courts and thereby bring their rights home.

The next section will focus on the situation where holding the lower courts to a domestic precedent presents a particular risk of artificially weakening the applicant's position; namely, where the domestic precedent adopts a narrow interpretation of Art 8(1) and this is rejected in favour of a broader interpretation with respect to the same parties in Strasbourg.[95] This situation arises in a context in which the ECtHR generally adopts a broad interpretation of para 1 of Arts 8–11 and a narrower interpretation of para 2. As the two cases to be examined in the next part illustrate, there is very little prospect of the Supreme Court continuing to support a narrower interpretation of para 1 in the face of subsequent ECtHR jurisprudence adopting a broader interpretation. In fact, the Supreme Court has consistently deferred to the ECtHR on the ambit of the Art 8(1) right to respect for private life, even where the case in question has yet to form a 'clear and constant' line of cases and is not a decision of the Grand Chamber. It is my contention that sections 2, 3 and 6 of the 1998 Act support a lower court in departing from a domestic precedent on Art 8(1) that will be considered to lack authority before the Supreme Court or the ECtHR.

5. THE APPLICATION OF *KAY* IN SUBSEQUENT CASES

In section 3 of this paper, it was argued that the doctrine of precedent cannot properly be understood as holding the lower courts to be strictly bound by precedent. It was further argued that deference to Strasbourg is most defensible in situations where what is at stake is the core of a Convention right, in the sense of the minimum protection guaranteed by it. In section 4, it was argued that the conclusion supported by the actual reasoning in *Kay* is much less restrictive than is suggested by the subsequent cases addressed in section 2. This section focuses on two of those subsequent cases: *Purdy* and *GC*.[96]

Above, it was argued that Lord Bingham's reasoning does not support the view that a domestic precedent continues to carry significant authority where a subsequent decision of the ECtHR on the same facts reached a different decision and the decision of the ECtHR concerned the scope and meaning of a Convention right, at least in circumstances where the ECtHR's decision was a contemporaneous decision of the Grand Chamber or represents a

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93 *Kay* [45].

94 *Chester* [2013] UKSC 63 *at* [25]–[27].

95 I do not here address other Convention rights, but the case made with regard to Art 8(1) is consistent with the argument advanced with regard to all the 'qualified rights' in Malkani, above n 6, esp 522–526.

96 *R (Purdy) v DPP* [2008] EWHC 2565; [2009] EWCA Civ 92; [2009] UKHL 45 and *GC & C v Commission of Police for the Metropolis* [2010] EWHC 2225; [2011] UKSC 21.

'clear and constant' line of cases and there is no reasonable prospect of arguing that the Strasbourg court has misunderstood domestic law or procedure, or could otherwise be persuaded to depart from its decision. This conclusion does not require us to consider the House of Lords to have incorrectly (in terms of its own reasoning) declared that the lower courts should not have regarded the decision of the ECtHR in *Connors* as undermining the authority of *Qazi.* That is because *Connors* did not fall into the category of cases for which it must be concluded that the domestic precedent is inconsistent.

What if, however, the relevant Strasbourg jurisprudence is a *single contemporaneous decision* of the ECtHR, not a decision of the Grand Chamber, *on the ambit of Art 8(1)*? This is the very issue that arose in *Purdy* and *GC.* It will be argued that (contrary to the decisions in these cases) in such circumstances the lower courts should regard the domestic decision as non-binding and, in any event, leave to appeal should be granted where a lower court decides to follow a domestic precedent instead of the more recent and clearly inconsistent decision of the ECtHR. To hold otherwise where an applicant will thereby be prevented from engaging a Convention right is to inappropriately treat the domestic precedent as if it were strictly binding, fail to give proper consideration to the applicant's Convention rights and invite defeat in the ECtHR.

A. Article 8 and assisted suicide

In *Purdy*, the Divisional Court, Court of Appeal and then the House of Lords were faced with an apparent inconsistency between the decision of the Lords in *R (Pretty) v Director of Public Prosecutions*[97] and the decision of the ECtHR in *Pretty v UK*.[98] The lower courts regarded themselves as bound by the former and therefore denied that Ms Purdy's Convention rights were even engaged.

Both the domestic and Strasbourg decisions in *Pretty* had resulted from a claim brought by Mrs Pretty to the effect that her Art 8 right to private life was violated by the DPP's failure to provide assurance that her husband would not be prosecuted for assisting her to commit suicide. The House of Lords explicitly held that Art 8(1) was not engaged. In the words of Lord Steyn, 'article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die'.[99] If it had been engaged, the House of Lords ruled, the criminalisation of assisted suicide was justifiable under Art 8(2), as seeking to protect the rights of other vulnerable persons. The Strasbourg court ruled that the UK's approach on the application of Art 8(2) fell within the margin of appreciation granted to States.[100] It reached a different view, however, on Art 8(1). It did this by referring to the clear and constant jurisprudence to the effect that the concept of private life is a broad term lacking any exhaustive definition.[101] Private life was said to cover the physical and psychological integrity of a person, be underlain by the notion of personal autonomy and give significance to 'notions of the quality of life'.[102] The Court indicated that it was 'not prepared to exclude' that preventing the exercise of a choice to avoid what Mrs Pretty considers to be undignified and distressing end to her life was an interference with her right to respect for private life as guaranteed under Art 8(1).[103] Under the heading 'The

97 [2001] UKHL 61.
98 (2346/02) (2002) 35 EHRR 1.
99 [2001] UKHL 61. See also [26] (Lord Bingham), [61] (Lord Steyn), [112] (Lord Hobhouse), [124] (Lord Scott). Cf [100] (Lord Hope).
100 (2346/02) (2002) 35 EHRR 1 at [70]–[78].
101 Ibid at [61].
102 Ibid at [61], [65].
103 Ibid at [67].

Court's Assessment', the ECtHR then explicitly concluded that '[t]he Court has found above that the applicant's rights under Art 8 of the Convention were engaged'.[104] Further, in a later case, the ECtHR reaffirmed that the facts of *Pretty* fell within the ambit of Art 8.[105] Thus, one would think that no reasonable interpretation of the decisions relating to Mrs Pretty could conclude that, on the issue of the engagement of Art 8(1), there was anything other than a clear inconsistency between the domestic precedent and the ECtHR.

Ms Purdy argued that the DPP's failure to promulgate a specific policy outlining the circumstances in which a prosecution would be brought for assisting suicide violated her art 8(1) right to private life. The key issue for the lower courts was whether the decision of the Lords in *Pretty* required the conclusion that under domestic law Ms Purdy's predicament did not engage her Art 8(1) right. On no reasonable construction could the *Pretty* case be distinguished on this point, save perhaps in Ms Purdy's favour. Both cases concerned the applicant's interest in whether an identified third party would be prosecuted for assisting her to commit suicide. The cases could potentially be distinguished in Ms Purdy's favour, because, as was later accepted by the House of Lords, Ms Purdy's claim that her art 8(1) right was engaged was actually stronger than that of Mrs Pretty.[106] Ms Purdy was requesting further information to enable her to make a decision about when to travel abroad to commit suicide, either now when she did not require assistance or later when she did; whereas Mrs Pretty was seeking an undertaking that her husband would be immune from prosecution for assisting her to commit suicide.

The Divisional Court reached the conclusion that:

> the somewhat elliptical wording of the European Court at para 67 of *Pretty* [i.e. that it was 'not prepared to exclude' that Art 8(1) was engaged] leaves us in considerable doubt about the extent to which the court might have disagreed with the House of Lords about the ambit of the rights created by Art 8(1).[107]

Further, on the decision in *Kay* to require the lower courts to generally continue to follow a House of Lords decision that is inconsistent with a subsequent decision of the ECtHR:

> The exception is a very limited one that will apply only in the most exceptional circumstances. In our view Lord Bingham was leaving the door a chink ajar to cover unforeseeable but truly exceptional situations. The present case does not fall into that category. It is no more than a difference of opinion as to the ambit of Art 8(1) between the House of Lords and the ECtHR. There do not seem to us to be any additional factors of the kind envisaged by Lord Bingham in Kay.[108]

With respect to Scott Baker LJ and Aikens J, neither conclusion is defensible for the reasons outlined above: to interpret *Pretty v UK* by reference to the elliptical wording of para 67 is to side-line the unequivocal wording of para 87 (and the general approach of the ECtHR in interpreting para 1 of Arts 8–11 widely and para 2 narrowly); and to interpret the exception in *Kay* so narrowly is to ignore the reasons offered by Lord Bingham for the general rule.

The Court of Appeal unreservedly disagreed with the Divisional Court's interpretation of *Pretty v UK* and reached the 'unequivocal' conclusion that the decision of the House of Lords was therefore clearly inconsistent with the decision of the ECtHR.[109] Its interpretation

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104 Ibid at [87].
105 *Burke v UK* (19807/06; 7 July 2006).
106 *Purdy* [2009] UKHL 45 at [39].
107 [2008] EWHC 2565 at [46].
108 Ibid at [45].
109 [2009] EWCA Civ 92 at [47].

of *Kay* was, however, just as narrow, concluding that the exception to the requirement to continue to follow a decision of the House of Lords was confined to 'the very exceptional case, one of an extreme character, or of wholly exceptional circumstances'.[110] The Court of Appeal therefore held that as a matter of domestic law Art 8(1) was not engaged where a person contemplated seeking assistance to commit suicide to avoid what she considers to be an undignified and distressing end to her life. The Court of Appeal did concede that 'it is highly unlikely that the House of Lords will not bow to a decision of Strasbourg on the question of the engagement of Art 8(1) if the matter should fall to be considered by them'.[111] Despite this, the Court of Appeal denied leave to appeal![112] This decision to deny leave to appeal is difficult to reconcile with the recommendation of Lord Bingham in *Kay* that when concluding that there is inconsistency with a Strasbourg authority the lower court 'may express their views and give leave to appeal…[and thereby] discharge their duty under the 1998 Act'.[113]

Lord Hope, giving the leading judgment of the House of Lords, thought it 'plain' that the ECtHR had found Art 8(1) to be engaged[114] and

> it is obvious that the interests of human rights would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg. Otherwise the House would be at risk of endorsing decisions which are incompatible with Convention rights.[115]

Yet, his Lordship declared, the Court of Appeal had been right to follow the decision of the House of Lords in *Pretty* because '[n]o other course was open to it' in the light of *Kay* and *RJM.*[116] His Lordship did not comment on the denial of leave to appeal.

I contend that the appeal courts were correct to conclude that *Pretty* v *UK* had held Art 8(1) to be engaged. Once that conclusion is accepted as manifestly clear, there can be no grounds for denying that the decisions of the House of Lords and the ECtHR were clearly inconsistent. The case for this conclusion is at least as strong as the case for clear inconsistency accepted in *East Berkshire*, as once again the two cases had involved the same parties.

It is distinctly problematic that all three courts restrictively applied a narrow interpretation of *Kay* and, even more so, that the Court of Appeal denied leave to appeal without criticism from the House of Lords. In *Pretty* v *UK*, the ECtHR was undoubtedly addressing an issue of principle of the type for which the House of Lords and Supreme Court has consistently deferred to the ECtHR. The issue was one of interpretation of a Convention right: whether or not Art 8(1) is engaged where a person contemplates seeking assistance when committing suicide to avoid what she considers to be an undignified and distressing end to her life. This is an issue concerning the scope of a Convention right, rather than its application in the context of domestic law.[117] On this point, *Pretty* v *UK* could in no way be said to have overlooked a crucial aspect of domestic law or otherwise lack authority. The House of Lords must therefore be correct to conclude that, even though *Pretty* v *UK* was the first decision of its type, 'the interests of human rights' required it to depart from its previous

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110 Ibid at [54].

111 [2009] EWCA Civ 92, [62].

112 Leave was granted by the House of Lords on 30/03/09: http://iclr.co.uk/case-search/supreme-court-applications/supreme-court-archive (accessed 1/1/14).

113 [2003] UKHL 43at [43].

114 *Purdy* [2009] UKHL 45 at [38].

115 Ibid at [34].

116 Ibid at [32].

117 A view shared by other commentators: see Foster, above n 5, at 38.

decision and to have decided otherwise would present the clear risk of endorsement of decisions that 'are incompatible with Convention rights'. Why, however, does this reasoning not apply equally to the Court of Appeal? Why is it acceptable for the interests of human rights to be frustrated and for the Court of Appeal to endorse decisions that are incompatible with Convention rights? Lord Hope is surely providing a rationale for the conclusion that the ECtHR can sometimes reach a sufficiently authoritative conclusion even when it has not sat as the Grand Chamber or had the opportunity to establish a clear and constant line of case law. Even if this is considered to go too far, which Lord Hope's endorsement of the Court of Appeal's approach to precedent implies, this reasoning supports the view that leave to appeal in this case should not have been refused by the Court of Appeal. Treating leave as discretionary in this case ran counter to Lord Bingham's reasoning, because in no sense did the Court of Appeal's approach facilitate certainty and constructive collaboration between the domestic courts and Strasbourg.

B. Article 8 and the retention of fingerprints and DNA samples

In *GC*, the Divisional Court and then the Supreme Court were faced with a clear inconsistency between the decision of the House of Lords and the ECtHR in *S & Marper*.[118]

S & Marper concerned two separate applicants. S had been charged with attempted robbery but subsequently acquitted, and Marper had been charged with harassment but the case against him had been discontinued. In both cases, they complained that retention of their fingerprints and DNA samples under the relevant domestic legislation violated their Art 8 right. The House of Lords held that Art 8(1) was not engaged (Baroness Hale dissenting),[119] but, if it was, the retention of fingerprints and DNA samples was justified under Art 8(2) as necessary for the prevention of crime and the protection of the rights of others.[120] The same parties brought an application before the ECtHR, which held that the retention of fingerprints and samples did engage Art 8[121] and the 'blanket and indiscriminate nature of the powers of retention…fails to strike a fair balance' and the UK had therefore 'overstepped any acceptable margin of appreciation'.[122]

GC & C concerned two separate applicants whose fingerprints and DNA samples were taken and retained after the cases against them had been discontinued. They complained that the indefinite retention of their data was an interference with their Art 8 rights to respect for private life and could not be justified under Art 8(2). In the Divisional Court, the applicants focussed on the issue of precedent and whether the court was bound by the decision of the House of Lords.[123] The Divisional Court concluded – and on this there could be no reasonable debate – that there was a clear inconsistency between the decision of the House of Lords and the ECtHR in *S & Marper*.[124] The Court further ruled, following *Kay*, that it was nonetheless bound by the decision of the House of Lords on the basis of the 'doctrine of precedent and…legal certainty'.[125] This view treats precedents as if they are strictly binding, which we have seen they cannot be.

Moses LJ, with the agreement of Wyn Williams J, went on to express a view on the exception to the rule in *Kay:*

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118 *R (S) & R (Marper)* v *Chief Constable of the South Yorkshire Police* [2004] UKHL 39; *S & Marper* v *UK* (30562/04 and 30566/04) (2009) 48 EHRR 50.

119 [2004] UKHL 39 at [27] (Lord Steyn), cf [67] (Baroness Hale).

120 Ibid at [36] (Lord Steyn, with the agreement of the other judges).

121 *S & Marper* v *UK* (2009) 48 EHRR 50, [86].

122 Ibid, [125].

123 *GC and C* v *Commission of Police for the Metropolis* [2010] EWHC 2225 at [27].

124 Ibid, at [30].

125 Ibid, at [30].

> In the next paragraph Lord Bingham identified what he described as 'one partial exception'. That single exception is miles away from this case. It relates to a decision made before the introduction of the Human Rights Act 1998, in circumstances where the policy which applied to that decision had been largely eroded and where it was accepted that the previous decision was not good law. The subject *[sic.]* of that decision were the same children whose claims succeeded Strasbourg and who had recovered substantial reparation.[126]

His Lordship declared that the fact that the parties were the same was only one consideration in *Kay* and, in the case before the Divisional Court, the fact that the inconsistent cases involved the same parties afforded no ground for failing to follow the decision of the House of Lords in *S & Marper*.[127] Moses LJ thereby sought to treat Lord Bingham as laying down a set of necessary conditions for the operation of the exception, namely:

(a) the domestic precedent was decided before the introduction of the 1998 Act;
(b) the policy considerations applied in the domestic decision had been eroded and were accepted as no longer good law; and
(c) the same parties who lost in the domestic case succeeded in Strasbourg.

With respect, such a narrow reading of the exception ignores the reasons offered by Lord Bingham for the general rule. The analysis presented above offers an alternative explanation of why the *Berkshire* case represents an exception. Condition (c) represents an instance where it cannot reasonably be doubted that there is a clear inconsistency between the previous decisions. Conditions (a) and (b) represent an instance where the need for 'constructive collaboration' between the domestic and Strasbourg courts does not support adherence to the domestic precedent. More specifically, condition (a) indicates (at least where the Convention rights are not even mentioned) that the domestic court did not fully address the applicant's Convention rights and condition (b) indicates that the Strasbourg hearing does not display a misunderstanding of English law. Thus, the conditions summarised by Moses LJ represent *sufficient* conditions for departure from an earlier domestic precedent, but not *necessary* conditions for such.

Having reached the (in my view problematic) conclusion that it was bound by the decision of the House of Lords in *Marper*, the Divisional Court did permit a leapfrog appeal. Interestingly, the Court expressed itself consistently with the view that it had an obligation to do so by concluding that the:

> appropriate course that I would take is that which is indicated in the speech of Lord Bingham, namely, that this court should give permission to appeal and order a leapfrog appeal to which I should record both the defendant and the Secretary of State have specifically accented.[128]

When the case reached the Supreme Court, no mention was made of the issue of precedent or the use of the leapfrog procedure. Indeed, the arguments before the Supreme Court focused entirely on the appropriate relief or remedy, because it was common ground that, in the light of *S & Marper* in the ECtHR, the previous decision of the House of Lords on Art 8 could not stand.[129] Once again, a single contemporaneous decision of the Strasbourg court was treated as authoritative because it decided a matter of principle concerned with the

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126 Ibid, at [32].
127 Ibid, at [33].
128 Ibid, at [35].
129 *R (GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21 at [15].

scope of Art 8(1), did not display misunderstanding of domestic law or any other defect suggesting that it was not a carefully considered judgment, and was not distinguishable on the facts of the subsequent domestic case. As before, the highest domestic appeal court did not consider it necessary to invoke the 1966 *Practice Statement* before disregarding its previous decision on the basis that it was sufficient under s 2 that the ECtHR had taken a different approach on the scope of a Convention right. This continues to stand in contrast to the approach adopted by the highest appeal court when it departs from its previous decisions for other reasons.[130]

6. CONCLUSION

This paper has re-examined the relationship between *stare decisis* and the statutory duty to take account of Strasbourg jurisprudence. It has been argued that the case law on this issue implausibly suggests that precedents can be strictly binding and gives too much weight to domestic precedents that are inconsistent with subsequent decisions of the ECtHR. Interpreting Lord Bingham's leading judgment in *Kay* by reference to the reasons that he offered to support his conclusions implies a much less restrictive position than has been adopted in subsequent cases. The upshot is that the lower courts should be far more ready to depart from domestic precedents that rely on narrow interpretations of Convention rights that will no longer hold sway with the Supreme Court or ECtHR, and must be prepared to grant leave to appeal when they decide not to follow this course of action. Anything less than this is simply not a defensible attempt to give effect to the doctrine of precedent in the light of the 1998 Act.

130 *Austin* [2010] UKSC 28 at [24]–[25].