

## Lord Reed of Allermuir

### Departing from Precedent: The Experience of the UK Supreme Court<sup>1</sup>

I am honoured and grateful to have been invited to take part in this conference. I convey to you the best wishes of the judges of the United Kingdom, and their support in these extremely difficult times.

One of the problems which confronts any final court is deciding how to strike a balance between ensuring legal certainty, through the consistency of its decisions, and ensuring the continued relevance of its case law in the face of changing conditions. If it is too easy to depart from earlier decisions, then certainty of outcome and consistency of treatment will be diminished, which would be detrimental to the rule of law. But if it is too difficult to depart from earlier decisions, then the law risks becoming ossified and out of touch with present-day society. This dilemma can be acute in a common law system, where fundamental legal principles are determined by case law, and where courts are generally bound to follow previous decisions (“precedents”) on the question before them. But to some degree it is a problem faced by all courts from which there is no further appeal. I hope that the UK experience may therefore be of some interest to judges of the Supreme Court of Ukraine.

The UK Supreme Court is a relatively new court, although it has deep roots in history. It replaced the Appellate Committee of the House of Lords in 2009 as the UK’s most senior appellate court.<sup>2</sup> One of the things we inherited from our predecessors is the test we apply when deciding whether to depart from our own case law. That test is set out in a Practice Statement issued by the House of Lords in 1966,<sup>3</sup> supplemented by a body of case law in which it has been applied.

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<sup>1</sup> This paper was delivered virtually at the International Conference on Implementation of the Rule of Law: the Role of the Supreme Court in Modern Conditions, held by the Supreme Court of Ukraine on 20 January 2023. I am indebted to Rebecca Fry for her assistance in its preparation.

<sup>2</sup> Jurisdiction was transferred from the House of Lords to the Supreme Court by the Constitutional Reform Act 2005, section 40 and Schedule 9.

<sup>3</sup> Practice Statement (HL: Judicial Precedent) [1966] 1 WLR 1234, [1966] 3 All ER 77 (26 July 1966). The Practice Statement has equal effect in the Supreme Court, so it has not been necessary for the Court to re-issue it as a fresh statement of practice in the Court’s own name. See *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, para 25 (Lord Hope). See further UK Supreme Court Practice Direction 3.1.3, available at: <https://www.supremecourt.uk/procedures/practice-direction-03.html>

In the UK, following precedent is an important means of ensuring that the law is clear and predictable.<sup>4</sup> Indeed, from the late 19<sup>th</sup> Century until the Practice Statement was issued, the House of Lords could not depart from its previous decisions at all.<sup>5</sup> The Law Lords took the view that allowing a final court precedent to be overruled would undermine confidence in its status as decided law. They considered that the risk of cases of individual hardship arising due to a rigid adherence to precedent had to be tolerated in order to avoid what one Lord Chancellor described as “the disastrous inconvenience... of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions.”<sup>6</sup>

This inflexibility resulted in considerable “judicial gymnastics”, as it has been described, as the Law Lords sought to distinguish precedents they did not wish to follow: in other words, to find a basis on which an earlier decision could be differentiated from the case currently before the court.<sup>7</sup> As was pointed out, the courts’ readiness to distinguish earlier decisions on inadequate grounds, where the decisions could not be overruled, was itself damaging to certainty and consistency.<sup>8</sup> By 1966, it had become accepted that greater flexibility was needed to enable the country’s highest court to correct wrong turns and to enable the common law to develop in response to changes in society.<sup>9</sup>

The Practice Statement therefore seeks to strike a balance between the expectation that existing principles and precedents should be adhered to and the sometimes conflicting expectation that those principles and precedents should be in accordance with our contemporary understanding of fairness and justice.<sup>10</sup> It begins by emphasising the importance of precedent in providing “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.” It goes on to recognise, however, that “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.” Accordingly, while previous decisions of the

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<sup>4</sup> See for example *Knauer v Ministry of Justice* [2016] UKSC 9, para 21 (Lord Neuberger and Lady Hale).

<sup>5</sup> The doctrine of self-binding precedent is usually attributed to *London Tramways v London County Council* [1898] AC 375. However, the rule that the Appellate Committee of the House of Lords was bound by its own previous decisions can be traced to earlier decisions. See David Pugsley, “London Tramways (1898)” (1996) 17 *Journal of Legal History* 172 and Louis Blom-Cooper, “1966 and All that: The Story of the Practice Statement”, in Louis Blom-Cooper, Brice Bickson and Gavin Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford University Press, 2009), Ch. 9, p. 129.

<sup>6</sup> *London Tramways* (n 5 above) at 380 (Earl of Halsbury LC).

<sup>7</sup> Neil Duxbury, “Final Court Jurisprudence in the Crystallisation Era” (2023) 139 *LQR* 153 at 159.

<sup>8</sup> *R v National Insurance Commissioner, ex parte Hudson* [1972] AC 944, 966 (Lord Reid).

<sup>9</sup> See Louis Blom-Cooper, “1966 and All that: The Story of the Practice Statement”, n 5 above; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013), pp. 263–8.

<sup>10</sup> Alan Paterson, *The Law Lords* (Palgrave, 1982), p. 156.

House of Lords would normally be binding, the Court could depart from them when it appeared “right to do so.”

Although the Practice Statement was issued by the House of Lords, it has equal effect in the Supreme Court.<sup>11</sup> In accordance with the Court’s Practice Directions, when an appellant asks for permission to appeal a decision to the Supreme Court, they are required to indicate in their application form whether they propose to ask the Court to depart from one of its own decisions or from a decision of the House of Lords.<sup>12</sup> There are twelve Justices on the Supreme Court, but we usually hear appeals in panels of five. However, if permission to appeal is granted in a case in which the Court is asked to depart from precedent, an enlarged panel will be convened to decide the case.<sup>13</sup> This is done, at least in part, to address the risk that, in cases where the Justices are divided, a differently constituted panel might have decided the case differently.

As I have explained, under the 1966 Practice Statement, the Supreme Court will depart from its previous decisions or from decisions of the House of Lords where it is right to do so. So, the important question is, when will it appear right?<sup>14</sup>

The answer is: not very often. The Supreme Court will be “very circumspect”<sup>15</sup> before accepting an invitation to invoke the 1966 Practice Statement, because it considers it to be “important not to undermine the role of precedent and the certainty which it promotes.”<sup>16</sup> Accordingly, the Court will not overrule a past decision simply because the Justices would decide the case differently today.<sup>17</sup> As was said in one of the cases, if a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal, and finality of decision would be utterly lost.<sup>18</sup> The Court is also likely to be slower to reconsider detailed questions of construction of legislation or other documents, which

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<sup>11</sup> See n 3 above.

<sup>12</sup> UK Supreme Court Practice Direction 3.1.3, available at: <https://www.supremecourt.uk/procedures/practice-direction-03.html>. The application form is available at: <https://www.supremecourt.uk/docs/form-01-permission-to-appeal.pdf>

<sup>13</sup> The criteria for sitting with an enlarged panel are set out on the Supreme Court’s website: [Panel numbers criteria - The Supreme Court](#)

<sup>14</sup> David Feldman, “Departing from Retained EU Case Law”, UK Constitutional Law Association blog, 11 January 2021, available at: <https://ukconstitutionallaw.org/2021/01/11/david-feldman-departing-from-retained-eu-case-law/>

<sup>15</sup> *Knauer*, n 4 above, para 23 (Lord Neuberger and Lady Hale).

<sup>16</sup> *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, para 87 (Lord Hamblen).

<sup>17</sup> *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, para 49 (Lord Wilson), citing *Horton v Sadler* [2007] 1 AC 307, para 29 (Lord Bingham).

<sup>18</sup> *Ex parte Hudson* (n 7 above), p 997 (Lord Pearson).

are often a matter of impression, than broader questions raising issues of legal principle.<sup>19</sup> The Practice Statement encourages particular caution in cases where overruling a previous decision risks disturbing retrospectively the basis on which contracts and other commercial transactions have been entered into. It is evident that businesses need certainty that the contracts which they enter into will be interpreted and enforced in a predictable way. The same is true of settlements of property and tax arrangements. There is also a particular need for certainty in the criminal law.<sup>20</sup> More generally, it tends to be easier to reconsider a recent precedent than one which has stood for a long time, since people are more likely to have relied on a decision in the latter category.<sup>21</sup> The Court will also consider whether any proposed change in the law is so complex, or carries with it potential injustices or wider implications, so that the matter is more appropriately left to the legislature.<sup>22</sup> On the other hand, the Court will reconsider a decision which is thought to be impeding the proper development of the law,<sup>23</sup> or is clearly causing uncertainty,<sup>24</sup> administrative difficulties or individual injustice.<sup>25</sup>

The Court has shown itself to be willing to depart from precedent in cases where it has become clear that the common law is in need of updating. Let me give you some examples.

First, the Court has been willing to overturn domestic precedent to keep pace with the jurisprudence of the European Court of Human Rights.<sup>26</sup> By way of illustration, a decision in 2013<sup>27</sup> concerned claims brought against the government by families of troops who had been killed while on duty in Iraq. One of the issues was whether British soldiers killed during military operations abroad were, at the time of their deaths, within the jurisdiction of the UK for the purposes of Article 2 of the Convention. In a decision taken three years earlier,<sup>28</sup> the Supreme Court had concluded that, unless they were on a UK military base, Convention rights

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<sup>19</sup> *Ex parte Hudson* (n 8 above), pp 966 (Lord Reid) and 1024 (Lord Simon of Glaisdale). See also *R v G* [2004] 1 AC 1034, paras 30-35 (Lord Bingham).

<sup>20</sup> *Horton v Sadler* (n 18 above), para 31 (Lord Bingham).

<sup>21</sup> *Ex parte Hudson* (n 8 above), p 993 (Viscount Dilhorne).

<sup>22</sup> *Ex parte Hudson* (n 8 above), p 1025 (Lord Simon of Glaisdale); *Knauer* (n 3 above), para 26.

<sup>23</sup> *Ex parte Hudson* (n 7 above), p 966 (Lord Reid).

<sup>24</sup> *Oldendorff v Tradax Export* [1974] AC 479, pp 533 and 535 (Lord Reid).

<sup>25</sup> *Ex parte Hudson* (n 8 above), p 1024 (Lord Simon of Glaisdale).

<sup>26</sup> Strasbourg decisions are not binding on the Supreme Court (or any other UK court), but must be taken into account in so far as they are relevant to the proceedings before us (Human Rights Act 1998, section 2(1)). The UK courts should not apply a lower standard than that contained in the principles and minimum threshold requirements of the Strasbourg jurisprudence (*R v Secretary of State for the Home Department, ex parte Amin* [2003] UKHL 51).

<sup>27</sup> *Smith v Ministry of Defence* [2013] UKSC 41.

<sup>28</sup> *R (Catherine Smith) v Secretary of State for Defence* [2010] UKSC 29.

did not apply to British troops on active service overseas. However, an intervening Strasbourg decision<sup>29</sup> made it clear that this conclusion could no longer be maintained.

Secondly, the Court has departed from precedent in cases where it considers it to be clear that the law has taken a wrong turn and there is no prospect of legislative reform to address it. A case decided in 2020<sup>30</sup> provides a recent illustration. The appeal to the Supreme Court concerned the issue of limitation, which is analogous to the civilian concept of prescription. In a previous case,<sup>31</sup> the House of Lords held that where a cause of action is based on a mistake of law, and the law was uncertain at the relevant time, the mistake is discovered (or could reasonably be discovered), and the limitation period therefore begins to run, only when a decision of a final appellate court authoritatively establishes the true state of the law. This effectively meant that there was often no limitation period for bringing proceedings in such cases. The Supreme Court overruled this decision, and the majority adopted a new test: the limitation period starts once a reasonably diligent person in the position of the claimant could have known that there was a real possibility that a mistake of law had been made. There was no prospect of legislative reform: the government had made it clear that Law Commission recommendations for reform of the law of limitation would not be taken forward.

Thirdly, the Supreme Court has departed from precedent where it has become clear that doing so is consistent with the needs, expectations and values of contemporary society. A recent example<sup>32</sup> was a medical negligence case brought following complications during the delivery of the claimant's baby. The claimant had diabetes, which meant that she was more likely to have a large baby, giving rise to a risk of complications during a normal delivery. Her doctor had failed to advise her of this risk, or of the alternative possibility of delivery by caesarean section. The claim was dismissed by the lower courts, who applied the test set out in a House of Lords' decision in 1985, according to which the amount of information to be given to a patient was a matter of medical judgment.<sup>33</sup> However, the Supreme Court rejected this approach. It pointed out that, as a result of both societal and legal changes, today's patients expect to be told a lot more about their treatment than they may have in the past, so that they can be involved in decisions concerning their treatment. The claimant's doctor should therefore

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<sup>29</sup> *Al Skeini v UK* (2011) 53 EHRR 589.

<sup>30</sup> *Test Claimants in the Franked Investment Income Group Litigation and others v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47.

<sup>31</sup> *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49.

<sup>32</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

<sup>33</sup> *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

have advised her of the substantial risk of complications if her baby was delivered in the normal way.

This has been a whistlestop tour of the Supreme Court's experience in departing from its own precedents, or those of its predecessor, the House of Lords. Naturally, the Court is often also asked to depart from lower court precedents. It will be cautious about doing so where the precedents have stood for many years, especially in areas of the law where certainty is especially important. It is also worth noting that departure is only one way in which the Court engages with precedents. In many cases, the Court prefers to refine or qualify the principles articulated in an earlier decision, so that their meaning and application can be better understood.<sup>34</sup> In this way, we are engaged in continual dialogue, both with our predecessors and with the judges who will develop the common law after us.

I am mindful that precedent does not play the same role in every legal system. Every country will strike its own balance between the certainty that comes from consistency with the past and the need for the law to develop in response to changes in society. I hope you have found something of interest in what I have told you about how these matters are developing in the UK Supreme Court.

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<sup>34</sup> For a recent example of this, see *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, in which the Court addresses questions arising from its earlier decision in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23 and the decision of the Divisional Court in *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin).