



Easter Term
[2020] UKSC 19
On appeal from: [2018] NICA 8

JUDGMENT

R v Adams (Appellant) (Northern Ireland)

before

**Lord Kerr
Lady Black
Lord Lloyd-Jones
Lord Kitchin
Lord Burnett**

JUDGMENT GIVEN ON

13 May 2020

Heard on 19 November 2019

Appellant
Sean Doran QC
Donal Sayers BL

(Instructed by PJ McGrory & Co
Solicitors)

Respondent
Tony McGleenan QC
Paul McLaughlin BL

(Instructed by Director of Public
Prosecutions, Public Prosecution
Service)

LORD KERR: (with whom Lady Black, Lord Lloyd-Jones, Lord Kitchin and Lord Burnett agree)

Introduction

1. From 1922 successive items of legislation authorised the detention without trial of persons in Northern Ireland, a regime commonly known as internment. Internment was last introduced in that province on 9 August 1971. On that date and for some time following it, a large number of persons were detained. The way in which internment operated then was that initially an interim custody order (ICO) was made where the Secretary of State considered that an individual was involved in terrorism. On foot of the ICO that person was taken into custody. The person detained had to be released within 28 days unless the Chief Constable referred the matter to a commissioner. The detention continued while the commissioner considered the matter. If satisfied that the person was involved in terrorism, the commissioner would make a detention order. If not so satisfied, the release of the person detained would be ordered.

2. An ICO was made in respect of the appellant on 21 July 1973. The order was signed by a Minister of State in the Northern Ireland Office. The matter was referred to a commissioner by an Assistant Chief Constable on 10 August 1973 and the commissioner decided that the appellant should continue to be detained.

3. The appellant tried to escape from the place where he was detained on 24 December 1973. He was convicted of the offence of attempting to escape from lawful custody on 20 March 1975 and sentenced to 18 months' imprisonment. He tried to escape again on 27 July 1974 and was convicted of a like offence on 18 April 1975 when a sentence of three years was passed, to be served consecutively to that imposed a month earlier.

The issue

4. At stake on this appeal is the validity of the ICO made on 21 July 1973. Although an ICO could be signed by a Secretary of State, a Minister of State or an Under Secretary of State, the relevant legislation provided that the statutory power to make the ICO arose "where it appears to the Secretary of State" that a person was suspected of being involved in terrorism. There is no evidence that the Secretary of State personally considered whether the appellant was involved in terrorism. On the assumption (which is common to the parties to the appeal) that he did not, the question arises whether the ICO was validly made.

5. The reason that this matter has come to light so many years after the appellant's convictions is that under the "30-year rule" an opinion of JBE Hutton QC (later Lord Hutton of Bresagh) was uncovered. The 30-year rule is the informal name given to laws in the United Kingdom and other countries which provide that certain government documents will be released publicly 30 years after they were created.

6. Mr Hutton was the legal adviser to the Attorney General when he gave his opinion. It was dated 4 July 1974 and responded to a request for directions in relation to a proposed prosecution of the appellant and three others involved in the attempted escape on 24 December 1973. Mr Hutton concluded that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally.

The proceedings

7. The appellant became aware of Mr Hutton's opinion in October 2009. He had not appealed his convictions before then. Some time after learning of the opinion, he applied for an extension of time in which to appeal his convictions. That application was granted by Gillen LJ on 20 April 2017.

8. The appellant's appeal was heard by the Northern Ireland Court of Appeal (Morgan LCJ, Sir Ronald Weatherup and Sir Reginald Weir) on 16 January 2018. On 14 February 2018, the Court of Appeal unanimously dismissed the appeal, the judgment of the court being delivered by Sir Ronald Weatherup: [2018] NICA 8. An application for permission to appeal to this court was dismissed by the Court of Appeal on 16 April 2018 but the court certified the following question as one constituting a point of law of public general importance: "Whether the making of an interim custody Order under article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 [SI 1972/1632 (NI 15)] required the personal consideration by the Secretary of State of the case of the person subject to the order or whether the *Carltona* principle operated to permit the making of such an Order by a Minister of State."

9. The reference to the "*Carltona* principle" here relates to the decision of the Court of Appeal in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560. In that case it had been argued that an order for the requisition of a factory under the Defence (General) Regulations 1939, which was to be made by the Commissioners of Works, should have been made by a commissioner personally. The First Commissioner of Works was the Minister of Works and Planning and the decision was made by the Assistant Secretary in that Ministry on behalf of the Commissioners of Works. The Court of Appeal rejected the argument, Lord Greene MR observing, at p 563:

“In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case.”

10. Sir Ronald Weatherup considered that the *Carltona* principle had been amplified and reinforced in cases which were decided after Mr Hutton had given his opinion. That opinion had been strongly influenced by the consideration that deprivation of liberty was a matter of the utmost gravity and that scrupulous compliance with the precise enjoiner in article 4 of the 1972 Order was required. Sir Ronald noted that subsequent case law suggested that the seriousness of the subject matter was not to be regarded as determinative. It was a factor relevant to whether Parliament had intended to disapply the *Carltona* principle but was not decisive of that issue. The court relied for that conclusion on *In re Golden Chemicals Products Ltd* [1976] Ch 300 and *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254.

11. In the *Golden* case, what was in issue was the provision in the Companies Act 1967 which stated that, if it appeared to the Secretary of State that it was expedient in the public interest that a corporate body should be wound up, he could present a petition for its winding-up. That power had been exercised by the Inspector of Companies in the Department of Trade acting for the Secretary of State. It was held that there was no obligation on the Secretary of State to exercise the power personally. It had been argued that the exercise of the power involved a serious invasion of the freedom or property rights of the subject and that it should be exercised only by the Secretary of State in whom it had been invested. Brightman J accepted that the power given to the Secretary of State “was of a most formidable nature which may cause serious damage to the reputation or financial stability of the company” (p 310). But he rejected the notion that a true distinction required to be drawn as a matter of law between powers which the minister must exercise personally and those which can be exercised by an officer of his department, if that distinction was based on the seriousness of the subject matter.

12. It is important to recognise that Brightman J’s judgment was based on his rejection of the claim that a distinction should be drawn *as a matter of law* between those cases in which the exercise of the power would have serious and grave consequences for those affected by it and cases where such consequences were not expected. Sir Ronald Weatherup said this about Brightman J’s judgment at para 30:

“This court is satisfied that the seriousness of the subject matter is a consideration in determining whether a power must be exercised by the Minister personally, although *as Brightman J found*, it is not a determining consideration.” (Emphasis added)

13. It appears to me that Brightman J did not find that the seriousness of the subject matter was a consideration to which regard must be had in deciding whether a power must be exercised by a Minister personally. To the contrary, he held that that was not a consideration which was relevant at all in deciding whether the power should be exercised by the Minister or by an officer in his department. This, I believe, is clear from the following passage at p 310 of Brightman J’s judgment:

“If there is a true distinction which must be drawn as a matter of law between powers which the Minister must exercise personally and those which can be exercised by an officer of his department, I might well come to the view that the power given by section 35 is so potentially damaging that it falls into the former category, however burdensome that may be to a Secretary of State personally. But is such a distinction to be drawn? I find no warrant for it in the authorities. In fact, the reverse. The accuracy of the breath test equipment with which *R v Skinner* [1968] 2 QB 700 was concerned was of vital importance to every motorist as indeed the judgment of the Court of Appeal recognised ... If a motorist fails the breath test he is arrested. So if the equipment over-registers, an innocent subject is placed under arrest; if it under-registers, a potentially lethal motorist is let loose on the highway. Yet the Court of Appeal decided that although such a ‘vitaly important matter might well have occupied the Minister’s personal attention ... there is in principle no obligation upon the Minister to give it his personal attention’: p 709. As Mr Chadwick pointed out, there are important cases in which the Minister will exercise a statutory discretion personally, not because it is a legal necessity but because it is a political necessity.”

14. Now, as it happens, I consider that the Court of Appeal in this case was right to hold that the seriousness of the consequences is a consideration to be taken into account in deciding whether a power must be exercised by the Minister personally and, to the extent that he suggested otherwise, Brightman J was wrong. I shall return to that debate later in this judgment. But, for reasons that will appear, there are other considerations beyond this issue which are of greater significance in the resolution of this appeal.

15. The next case referred to by Sir Ronald Weatherup was *Oladehinde*. In that case the Home Secretary authorised certain officials in the immigration department of the Home Office to act on his behalf to decide whether to issue a notice of intention to

deport persons under the Immigration Act 1971. It was argued that the structure of the Immigration Act, which differentiates between the powers of immigration officers permanently concerned with entry control and subsequent policing of illegal immigrants and the powers of the Secretary of State in relation to deportation, carried the clear statutory implication that the powers of the Secretary of State were not to be exercised by immigration officers.

16. That argument was rejected. At p 303, Lord Griffiths said:

“It is well recognised that when a statute places a duty on a minister it may generally be exercised by a member of his department for whom he accepts responsibility: this is the *Carltona* principle. Parliament can of course limit the minister’s power to devolve or delegate the decision and require him to exercise it in person.”

Three instances in the Immigration Act where the power to delegate was limited were identified. In each case the conferring of the power on the Secretary of State was accompanied by words such as “not [to be exercised] by a person acting under his authority”. The absence of such a formula in relation to the issue of a notice of intention to deport was considered to be conclusive. Not only was there no express limitation but the presence of express exclusion of delegation in other sections was a clear indication that the implication of such an exclusion in relation to the issue of an intention to deport was inapt.

17. It is clear that the decision in *Oladehinde* did not address the question whether the exercise of the power had serious consequences for those affected by it. What mattered was the interpretation of the statute. By contrast, in *Doody v Secretary of State for the Home Department* [1993] QB 157, the issue of the seriousness of the consequences was certainly in play. In that case section 61(1) of the Criminal Justice Act 1967 conferred power on the Secretary of State to release a life prisoner. In effect, this empowered the Home Secretary to fix a tariff period which had to be served before release could be considered. In at least some instances in the *Doody* case the tariff had been fixed by a minister of state or a Parliamentary under-secretary of state. It was argued that the tariff period had to be decided upon by the Secretary of State personally.

18. That argument was rejected by Staughton LJ (whose judgment on this point was subsequently endorsed by the Appellate Committee of the House of Lords [1994] 1 AC 531). At p 196, after discussing the substantial number of mandatory life sentence cases that required to be considered each year, Staughton LJ said this:

“Every such case demands serious consideration and the burden of considering them all must be substantial. I can see nothing irrational

in the Secretary of State devolving the task upon junior ministers. They too are appointed by the Crown to hold office in the department, they have the same advice and assistance from departmental officials as the Secretary of State would have, and they too are answerable to Parliament.”

Sir Ronald Weatherup quoted this passage at para 34 of his judgment without comment. It appears to me that two observations about the passage may be made. First, it was firmly established in evidence that a considerable burden would fall on the Secretary of State if he was required to consider every tariff case. (In 1990 no fewer than 274 mandatory life sentence cases were considered.) Secondly, as Staughton LJ stated (at 196B), there was no express or implied requirement in the 1967 Act “that a decision fixing the tariff period, or for that matter a decision to release a prisoner on licence, must be taken by the Secretary of State personally”. On that account, it was not irrational for him to devolve the task to junior ministers.

19. Neither consideration obtains in the present case. On the first point (a possibly excessive burden on the Secretary of State), there was no evidence that at the time of the making of the ICO, it would have been unduly onerous for the Secretary of State, then the Rt Hon William Whitelaw MP, personally to consider each application for an ICO. Indeed, the Rt Hon Merlyn Rees MP (who was Secretary of State in the Labour government which came to power in March 1974) considered all ICOs personally. Sir Ronald Weatherup suggested that this practice was “born out of caution based on legal advice” - para 19 of his judgment. That may be so but the fact that Mr Rees was able to carry out this task himself from March 1974 onwards is a clear indication that it should not have been impossibly difficult for Mr Whitelaw to do the same in July 1973, some eight months earlier.

20. On the second question (whether there was an express or implied requirement in the legislation that the Secretary of State must personally consider if an order should be made) the position under the 1972 Order is quite different from that of the 1967 Act. I will discuss that difference when I come to consider the relevant legislative provisions.

21. There is a further point to be made about *Doody*. An argument had been made that, in the days of capital punishment, it was the practice for the Home Secretary personally to decide whether to recommend a reprieve and it was pointed out that political memoirs had recorded how seriously that responsibility was regarded. It was suggested that the fixing of a tariff period for life prisoners was likewise of great importance to the individuals affected. That submission was accepted by Staughton LJ but he considered that Parliament must have been well aware of the great burden that would be imposed on senior ministers if they were required to review each case personally - see p 196C-D. The significance of this is the implicit acknowledgment, contrary to the view of Brightman J in *Golden*, that the seriousness of the consequences

is a consideration to be taken into account. It seems to me, however, that this, in the estimation of Staughton LJ, was as a contribution to the insight that it would provide as to Parliament's intention, rather than ranking as an autonomous factor.

22. After dealing with *Doody*, Sir Ronald went on to consider a number of authorities from Northern Ireland. The first of these was *R v Harper* [1990] NI 28. In that case the appellant had been convicted of a number of serious offences, largely as a result of admissions made by him during interviews by the police. Among the grounds of appeal was a claim that extension of the appellant's detention had wrongly been authorised by a Parliamentary under-secretary of state where the relevant statutory provision (section 12(4) of the Prevention of Terrorism (Temporary Provisions) Act 1984) provided that a person arrested under section 12(1) should not be detained for more than 48 hours but that the Secretary of State may, in a particular case, extend that period. The document extending the period in the appellant's case had not been signed by the Secretary of State. The argument was rejected by the Court of Appeal on the basis that there was no reason to conclude that this was a power that could not be devolved to a junior minister.

23. The Court of Appeal in *Harper* relied on Brightman J's judgment in *Golden*. For the reasons given earlier, I do not believe that to have been correct, but this does not bear on the decision in *Harper*. In that case there was nothing in the legislation which gave rise to the possibility of implying any restriction on the power of the Secretary of State to devolve the function of signing the extension order to the under-secretary. And there was certainly no express restriction. The decision in *Harper* therefore involved the straightforward application of the *Carltona* principle. I consider that it does not assist in the resolution of the present appeal, where, as I shall discuss below, there are substantial reasons for implying a restriction on the power of the Secretary of State to devolve the making of ICOs to a junior minister.

24. Sir Ronald Weatherup also referred to the decision of the Court of Appeal in Northern Ireland in the case of *McCafferty's Application* [2009] NICA 59. That case involved a prisoner who had been released on licence while serving a sentence for possession of an explosive substance. His licence was revoked, and he was arrested a month after his release. The revocation of the licence was authorised by the minister of state for security in the Northern Ireland Office. He purported to act under section 1(3) of the Northern Ireland (Remission of Sentences) Act 1995 which provided that the Secretary of State could revoke a person's licence if it appeared to him that that individual's continued liberty would present a risk to the safety of others or that he was likely to commit further offences. The prisoner applied for a writ of habeas corpus. Among other arguments presented on his behalf was the claim that his detention was unlawful because it had not been authorised by the Secretary of State but by a junior minister. This argument was rejected. Coghlin LJ, delivering the judgment of the court, observed at para 17:

“... In general, it is to be implied that the intention of Parliament is to permit the *Carltona* principle to apply rather than to require a personal decision by the named decision-maker. For the purpose of deciding whether the power is to be implied factors to be considered include the framework of the relevant legislation and, in particular, whether any specific contrary indications appear in the language, and the importance of the subject matter. ... a decision taken with regard to the liberty of the subject may attract the *Carltona* principle. In our view there is nothing in either the framework or the language of the 1995 Act that indicates a contrary Parliamentary intention. ...”

25. It is unnecessary for the purposes of the present appeal to reach a firm conclusion on the question whether it is now established that there is a presumption that Parliament should be taken to have intended that the *Carltona* principle should apply. It is true that in *Oladehinde* Lord Griffiths said that a statutory duty placed on a minister may “generally” be exercised by a member of his department, but I believe that he was not there proposing that there was a legal presumption to that effect. I am not persuaded that the authorities, apart from *McCafferty* and the decision of the Court of Appeal in the present case, have espoused that position. It is, of course, the case that Parliament legislates against the background that the *Carltona* principle is well-established. And it is also relevant that Parliament has shown itself on occasions willing to register the displacement of the principle in explicit terms. These considerations must influence the judgment as to whether, properly construed, a particular item of legislation is in keeping with the principle or not. But that does not amount, in my opinion, to the creation of a presumption in law that the principle must be taken to apply unless it has been removed by express statutory language.

26. My provisional view is that the matter should be approached as a matter of textual analysis, unencumbered by the application of a presumption, but with the enjoiner of Lord Griffiths well in mind. In this way, whether the *Carltona* principle should be considered to arise in a particular case depends on an open-ended examination of the factors identified by Coghlin LJ in *McCafferty*, namely, the framework of the legislation, the language of pertinent provisions in the legislation and the “importance of the subject matter”, in other words, the gravity of the consequences flowing from the exercise of the power, rather than the application of a presumption. But, as I have said, it is not necessary in this case to reach a final view on whether there is such a presumption, not least because, if there is indeed a presumption, the statutory language in this instance is unmistakably clear, and has the effect of displacing it.

27. Coghlin LJ decided that there was nothing in the framework of the legislation or the statutory language that expressly contraindicated the application of the *Carltona* principle in the *McCafferty* case. With that conclusion I have no quarrel. But, again, this does not provide an answer in the present case because of what I consider to be the significant difference between the wording of the 1972 Order and the 1995 Act. Unlike

the 1972 Order, the 1995 Act does not stipulate one role for the Secretary of State alone and a quite separate role that can be discharged by the Secretary of State *or* junior ministers. (I shall discuss this further below.) I am of the view, therefore, that, as in *Harper*, the *McCafferty* decision does not assist in resolving the central issue in this appeal.

The relevant legislation

28. Article 4(1) of the 1972 Order provides:

“Where it appears to the Secretary of State that a person is suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism the Secretary of State may make an order (hereafter in this Order referred to as an ‘interim custody order’) for the temporary detention of that person.”

29. The language in this paragraph is clear and precise. Its apparent effect is unambiguous. It is the Secretary of State who must consider whether the person concerned is suspected of being involved in terrorism etc. Absent the possible invocation of the *Carltona* principle, there could be no doubt that resort to the power to make an ICO was reserved to the Secretary of State alone.

30. Article 4(2) provides:

“An interim custody order of the Secretary of State shall be signed by a Secretary of State, Minister of State or Under Secretary of State.”

31. Considered together, paragraphs 1 and 2 of article 4 have two noteworthy features. First there is the distinct segregation of roles. In paragraph 1 the making of the Order is provided for; in paragraph 2, the quite separate function of signing the ICO is set out. If it had been intended that the *Carltona* principle should apply, there is no obvious reason that these roles should be given discrete treatment. It would have been a simple matter to provide in paragraph 1 that the Secretary of State “may make [and sign]” an ICO. The question therefore arises, why was provision made for the different roles in two separate paragraphs of the article. The answer appears to me to be self-evident: it was intended that the two functions called for quite distinct treatment.

32. The second noteworthy feature of article 4(2), when read together with 4(1), is that the ICO to be signed is *that of the Secretary of State*. Why would this stipulation

be required if an ICO could be made by a minister of state? Why not simply state that, “An interim custody order ... shall be signed by a Secretary of State, Minister of State or Under Secretary of State”? The use of the words, “of the Secretary of State” surely denotes that the ICO is one which is personal to him or her, not a generic order which could be made by any one of the persons named in paragraph 2. If a minister of state made the ICO and then signed it, could he be said to sign the order of the Secretary of State? Surely not.

Pepper v Hart

33. The rule in *Pepper v Hart* [1993] AC 593 can be succinctly stated. As Lord Browne-Wilkinson said (at p 640), reference to Parliamentary materials is permitted “where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear”.

34. In this case, the Court of Appeal considered that the conditions prerequisite on the invocation of the rule were not satisfied, Sir Ronald Weatherup pithily saying at para 22 of his judgment that the language of the 1972 Order was not ambiguous or obscure nor did its literal meaning lead to absurdity and that, in any event, the statements made in Parliament on which the appellant sought to rely were contradictory.

35. I agree, although I suspect for rather different reasons from those of the Court of Appeal, that the language of the enactment is neither ambiguous nor obscure. Although Sir Ronald did not expressly say so, it seems likely that the Court of Appeal considered that the language of the 1972 Order clearly indicated that the intention of Parliament was that the *Carltona* principle should be in play in relation to article 4(1) of the 1972 Order. I, on the other hand, for the reasons that I have given, am firmly of the view that, properly construed, article 4(1) unmistakably points to the conclusion that the power that was invested in the Secretary of State by that provision was one which should be exercised by him or her personally.

36. But, in any case, I fully agree that the statements made in Parliament about whether the power in article 4(1) was invested in the Secretary of State alone or whether recourse could be had to that power by a junior minister do not partake of the quality of certainty required to meet the third criterion of the *Pepper v Hart* test. On that account, I consider that the Parliamentary statements are not admissible.

Discussion

37. The Court of Appeal approached the central issue in this case on the basis that there was a presumption that the *Carltona* principle would apply to article 4(1) of the 1972 Order. In para 25 above, I have questioned whether such a presumption exists. Even if it does, I am satisfied that it is clearly displaced by the proper interpretation of article 4(1) and (2), read together. The segregation of the two functions (the making and the signing of ICOs) cannot have been other than deliberate.

38. When one allies this to the consideration that the power invested in the Secretary of State by article 4(1) was a momentous one, the answer is, I believe, clear. The provision did nothing less than give the Secretary of State the task of deciding whether an individual should remain at liberty or be kept in custody, quite possibly for an indefinite period. In agreement with Staughton LJ's view in *Doody* (see para 21 above), I consider that this provides an insight into Parliament's intention and that the intention was that such a crucial decision should be made by the Secretary of State. This was, after all, a power to detain without trial and potentially for a limitless period. This contrasts with *Doody* where, at least, the prisoner whose tariff period was to be determined had been convicted after due process.

39. A further factor that militates towards the conclusion that it was intended that the Secretary of State should personally decide on the fate of a person whose detention was sought was that there was no reason to apprehend (at the time of the enactment of the 1972 Order) that this would place an impossible burden on the Secretary of State. Indeed, the subsequent experience with Mr Merlyn Rees scotches any notion that this should be so. This again presents a stark contrast with *Doody*.

40. For these reasons, I have concluded that it was Parliament's intention that the power under article 4(1) of the 1972 Order should be exercised by the Secretary of State personally.

Conclusion

41. The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully. It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed.