13 May 2020

PRESS SUMMARY

R v Adams (Appellant) (Northern Ireland)

[2020] UKSC 19

On appeal from: [2018] NICA 8

JUSTICES: Lord Kerr, Lady Black, Lord Lloyd-Jones, Lord Kitchin, Lord Burnett

BACKGROUND TO THE APPEAL

From 1922 successive items of legislation authorised the detention without trial of persons in Northern Ireland, a regime commonly known as internment. The way in which internment operated then was that initially an interim custody order ("ICO") was made, under article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 ("the 1972 Order"), 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 the Commissioner, who had the power to make a detention order if satisfied that the person was involved in terrorism. If not so satisfied, the release of the person detained would be ordered.

An ICO was made in respect of the appellant on 21 July 1973. He was detained on foot of that ICO, attempted to escape from detention twice and was twice convicted of attempting to escape from lawful custody on 20 March 1975 and 18 April 1975.

Following the disclosure of an opinion of JBE Hutton QC dated 4 July 1974, published in line with the 30 years' rule, and which suggested that it was a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally, the appellant challenged the validity of the ICO dated July 1973. He argued that the ICO was invalid because the Secretary of State did not personally consider whether the appellant was involved in terrorism, and consequently argues that his following detention and convictions were also unlawful. The Court of Appeal in Northern Ireland dismissed his appeal. The appellant appeals to this court against the Court of Appeal's judgment.

JUDGMENT

The Supreme Court unanimously allows the appeal. It holds that the power under article 4 of the 1972 Order should be exercised by the Secretary of State personally, and, therefore, that the making of the ICO in respect of the appellant was invalid, and that his consequent detention and convictions were unlawful. Lord Kerr gives the judgment with which the other members of the court agree.

REASONS FOR THE JUDGMENT

The question for the court was whether the making of an ICO under article 4 of the 1972 Order required 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 **[8]**. The "*Carltona* principle" relates to the decision of the Court of Appeal in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560, which accepted as a principle of law that 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 **[9]**.

Lord Kerr considered the case law relied upon by the Court of Appeal to determine whether Parliament in the present case had intended to disapply the *Carltona* principle in the present case at **[10] – [27]**. He disagreed with the Court of Appeal's understanding of the judgment of Brightman J in *In re Golden Chemicals Products Ltd* [1976] Ch 300, finding that Brightman J held that the seriousness of the subject matter 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. He considered 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 and, to the extent he suggested otherwise, Brightman J was wrong **[13] – [14]**.

Next, Lord Kerr considered *Oladehinde v Secretary of State for the Home Department* [1991] 1 AC 254. There, the Court concluded that the statutory wording relating to the power under challenge was not, unlike complementary provisions in the relevant Act, expressly limited by way of words such as "not [to be exercised] by a person acting under his authority". The absence of such express limitation of the power in question was a clear indication that *Carltona* there was not disapplied in that case **[15] – [16]**. *Oladehinde* did not consider whether the seriousness of the consequences was a relevant consideration **[17]**.

Lord Kerr then considered *Doody v Secretary of State for the Home Department* [1992] 3 WLR 956. There, *Carltona* was held not to have been disapplied because (1) it was established in evidence that a considerable burden would fall on the Secretary of State if he was to exercise the power personally and (2) there was no express or implied requirement in the Act in question that the Secretary of State exercise the power personally **[18] – [19]**. Neither consideration obtained on the facts of this case; *Doody* was therefore distinguishable **[19] – [20]**. However, Lord Kerr observed that in *Doody* there had been implicit acknowledgement that the seriousness of the consequences is a consideration to be taken into account **[21]**.

Lord Kerr did not consider that *R v Harper* [1990] NI 28 assisted in the resolution of the present appeal **[23]**. He then analysed *McCafferty's Application* [2009] NICA 59, where it was suggested that there is a presumption in law that Parliament intends *Carltona* to apply generally. Lord Kerr did not consider it necessary to determine whether such presumption indeed exists, given that he considered the statutory language on the facts unmistakably clear. However, he expressed an *obiter* view that there is no such presumption at law, and that cases should instead proceed on a textual analysis of the framework of the legislation in question, the language of pertinent provisions in the legislation and the "importance of the subject matter," rather than the application of a presumption **[25] – [26]**.

Lord Kerr then turned to the relevant legislation. He observed that 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. He concluded that, if it had been intended that the *Carltona* principle should apply, there is no obvious reason that these roles should be given discrete treatment **[31]**. The second noteworthy feature of article 4(2), when read with 4(1), is that the ICO to be signed is

that of the Secretary of State. The use of the words, "of the Secretary of State" indicates 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 **[32]**.

Lord Kerr thus reached the following overall conclusions. First, even if a presumption exists that Parliament intends *Carltona* to apply, it is clearly displaced on the facts by the proper interpretation of article 4(1) and 4(2) read together **[37]**. Second, the consideration that the power invested in the Secretary of State by article 4(1) – a power to detain without trial and potentially for a limitless period – was a momentous one provides insight into Parliament's intention and that the intention was that such a crucial decision should be made by the Secretary of State personally **[38]**. Third, there was no evidence that this would place an impossible burden on the Secretary of State **[39]**.

In conclusion, Parliament's intention was that the power under article 4(1) of the 1972 Order should be exercised by the Secretary of State personally. The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully and was wrongfully convicted of the offences of attempting to escape from lawful custody. His convictions for those offences must be quashed **[40]** – **[41]**.

References in square brackets are to paragraphs in the judgment.