Mishandling the Law

Gerry Adams and the Supreme Court

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Foreword by Rt Hon. Geoffrey Cox QC MP

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About the Authors

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Foreword

By Rt Hon. Geoffrey Cox QC MP, Attorney-General 2018-2020

Policy Exchange's Judicial Power Project provides an invaluable counterpoint to the expansive liberal constitutionalism that has come to be the prevailing legal orthodoxy of our day. One regrettable feature of that new orthodoxy has been a subtly expanding fissure in mutual understanding between the institutional elements of our constitution. Brought about, in part, by the hasty and ill-conceived changes wrought by the Constitutional Reform Act 2005, this fissure manifests itself in different ways: among elected politicians by an apparent weakening of the instinctive reflex of support for the judicial function; in the Supreme Court, perhaps, by a growing naivety about the practical ways in which government and Parliament work. I do not, of course, mean at a theoretical level, but rather that the House of Lords Appellate Committee's daily experience of being part of the parliamentary and legislative processes and close to the culture of both Whitehall and Westminster engendered an intuitive appreciation of the internal mechanisms of our democracy and our government. To the current Supreme Court, some might say, too much of that knowledge is theoretical.

In this new paper, the Judicial Power Project analyses a recent Supreme Court judgment which seems to the authors to reflect a misunderstanding of an important feature of how government works. The judgment concerns Gerry Adams's convictions in 1975 for escaping from lawful custody. In allowing his appeal, the Supreme Court has opened the door to further legal proceedings, which may require payment of compensation to Adams and others for their detention. This consequence of Gerry Adams's victory before the Supreme Court may itself warrant legislative intervention, as the authors argue, but more troubling still are the judgment's wider implications for how government is carried out.

At the heart of effective modern government is the *Carltona* principle. A decision entrusted by Parliament to the Secretary of State may generally be taken in his name by a suitably qualified official and the Secretary of State is responsible for such decisions to Parliament. This constitutional principle has been an accepted and essential common law contribution to the practical functioning of government since Lord Greene, recognising long established practice, expounded it in 1943.

So embedded is the principle in the practice of Whitehall, in our political culture and in the common law that any doubt or ambiguity in its application would have very significant and deleterious implications for the efficient organisation of government. Exceptions to its operation, save where it is by legislation expressly excluded or qualified, are few and

the courts have hitherto been remarkably reluctant to hold that it has been displaced by statutory implication.

Richard Ekins' and Stephen Laws' close and convincing analysis of the judgment of the Supreme Court in the Gerry Adams case explains how some surprising aspects of the reasoning of the Court depart from that approach and could undermine the certainty with which the principle has hitherto been assumed to take effect. They robustly contend that the Court's conclusions rest upon shaky foundations and a misreading of the legislative intention.

Their formidable arguments are thoroughly discussed in the text and may be judged for themselves but one striking implication of the Court's central reasoning for concluding that the *Carltona* principle was impliedly excluded has jarred with my own recent experience as a senior minister of the Crown and to my mind reinforces the justice of the authors' criticism of it. The Court observed that while Article 4(1) of the 1972 Order conferred the power to make an interim custody order on "the Secretary of State", Article 4(2) provided that "an interim custody order shall

be signed by a Secretary of State, Minster of State or Under Secretary of State." To the Court this must impress upon the reader the inevitable conclusion that the meaning of so arranging the provisions was to separate the functions of considering and then deciding to make the order, which exclusively belonged to the Secretary of State personally, and of signing it, which could be effected additionally by those others. The authors make some powerful points about why such a separation would be contrary to legal certainty and good administration.

I would add that to me the Supreme Court's interpretation has an odd ring to it and does not reflect any governmental practice of which I am aware. It reduces the supernumerary signatory to something that is difficult to reconcile with any normal concept of the ministerial role. In signing such an order, it cannot be that the minister is expected merely to act as a rubber stamp. He surely must satisfy himself it is properly made. Why would the legislator require him as a senior minister of the Crown to sign at all if he is not to take the effective responsibility for the decision, a decision which on the Court's construction he cannot make? And if all he is doing is signing, *per procurationem*, for the Secretary of State, who has taken a personal decision, why require that to be done by the most senior ministers of the department? I find it very difficult indeed to presume this to have been the legislative intention.

Professor Ekins and Sir Stephen Laws acknowledge that their call for the intervention of Parliament to restore certainty and to eliminate the potential consequences of the voluminous litigation that may be expected to arise from this judgment is by no means straightforward. If they are even half-right, however, in their bleak predictions, the Government may well have to do so.

Introduction

By Rt Hon. the Lord Butler of Brockwell KG GCB CVO, Cabinet Secretary 1988-1998

The consequences of the Supreme Court judgment in allowing Gerry Adams' appeal against his conviction for attempting to escape from lawful custody almost 45 years ago are potentially very damaging. So there are grounds for serious concern if, as argued in this powerful new paper by Policy Exchange's Judicial Power Project, something has gone badly wrong in the Supreme Court's handling of the law in this case.

My own experience confirms the paper's argument that the *Carltona* principle is fundamental to our way of government. The principle should not be set aside by the courts, save when it is clear that the legislator intended as much. But in the context of this case, it is quite clear to me that the intention of the legislator in making the Detention of Terrorists (Northern Ireland) Order 1972 was to permit a Secretary of State, Minister of State or an Under Secretary of State to authorise temporary detention. Personal consideration by the Secretary of State for Northern Ireland was not required.

In addition to the arguments advanced by Professor Ekins and Sir Stephen Laws, I would draw attention to the fact that under our law and constitution, any Secretary of State may exercise the powers of any other Secretary of State. This reinforces the argument that had the legislator intended to require personal consideration by the Secretary of State for Northern Ireland it would surely have done so expressly. What the 1972 Order instead does, as the paper shows, is to specify how *Carltona* is to apply, by providing that only a Minister of State or Under Secretary of State may act in the name of a Secretary of State in ordering temporary detention.

The Supreme Court's ruling invites Gerry Adams and many others who were detained between 1972 and 1974 to seek damages. In a time of national economic crisis, few can welcome the prospect that the government might now be obliged to pay substantial damages to Mr Adams and to others detained during that period.

Just as worrying are the judgment's political costs. The Supreme Court has given force to those who would say that the British government acted without regard to the law in 1972. Even if the Supreme Court judgment were correct, I am convinced that this is not the case. At the very most this is a technicality. Moreover, in casting doubt on the *Carltona* principle's centrality to government and to the interpretation of legislation, the Supreme Court judgment could spur litigation that will hamstring effective government and create unnecessary doubt about who in government may lawfully act.

The path of least resistance, especially for a government facing other challenges, might be simply to hope that the Supreme Court's judgment proves less damaging in practice than is now to be feared. This paper makes clear that neither the government nor Parliament can safely make that assumption. I am persuaded that the judgment needs to be overturned by urgent legislation, as the authors of the paper recommend.

Executive summary

On 13 May 2020, the Supreme Court quashed Gerry Adams's convictions, in March and April 1975, for escaping from lawful custody. Mr Adams had been detained under the authority of an interim custody order (ICO), purportedly made under the Detention of Terrorists (Northern Ireland) Order 1972. The question for the Supreme Court was whether the making of an ICO in relation to a person required personal consideration by the Secretary of State or whether the case might be considered, and an ICO lawfully made, by a Minister of State. In Mr Adams' case, the ICO was signed by the Minister of State. In October 2009, Mr Adams became aware of a government document that had been made public, which revealed that a legal advisor to the Attorney General, giving advice in relation to the prosecution of Mr Adams, had had doubts about the lawfulness of an ICO that had not received personal consideration by the Secretary of State himself. Some years later Mr Adams appealed against his conviction; he was granted leave to appeal out of time in late 2017.

In February 2018, the Northern Ireland Court of Appeal dismissed Mr Adams' appeal against conviction, relying heavily on the *Carltona* principle, by which civil servants (duly, but usually implicitly, authorised to do so by a Secretary of State) lawfully exercise powers conferred by Parliament on a Secretary of State. The Supreme Court allowed his appeal. Giving judgment for the unanimous court, Lord Kerr reasoned that the *Carltona* principle was not strictly a presumption and that in any case it could not stand against the clear wording and intention of the 1972 Order, which indicated that the Secretary of State had to consider each case in person. This conclusion, he said, was reinforced by the gravity of internment and the deprivation of liberty it involved.

The Supreme Court's reading of the 1972 Order is mistaken. Properly interpreted, the Order did authorise Ministers of State to exercise the Secretary of State's power to detain, and Parliament, when approving the Order, was informed by the Attorney General in person that the power to *make* an ICO was exercisable by all those authorised to *sign* an ICO: a Secretary of State, a Minister of State, or an Undersecretary of State. The Supreme Court, failing to consider and address this plain and authoritative statement of the government's intention and meaning in making the Order, held that that government *could* not have intended "sign" to mean "make".

The *Carltona* principle informs the framing of the Order in a way that the Supreme Court misunderstands. The principle is fundamental to the workings of government. It means that power conferred on the Secretary of

State to "decide", "make", "pay", etc., etc., is exercisable by civil servants authorised by the Secretary of State to exercise it on his responsibility and in his name, by instruments in the form "the Secretary of State has decided/made", "will pay", etc., etc. This is exemplified by any number of statutory authorisations from, at latest, the nineteenth century. In some cases, lawmakers may nonetheless intend to require the personal involvement of the Secretary of State. They are likely to do so expressly – for example by requiring the order to be made "under the hand" of the Secretary of State. No such requirement was made in this case. On the contrary, the 1972 Order authorised an ICO to be made under the hand of a Secretary of State, Minister of State, or Under Secretary of State. As Parliament was authoritatively informed and accepted.

In view of the political salience of making an ICO and its implications for personal liberty, the 1972 Order restricted the operation and effect of the *Carltona* principle by requiring that an ICO would not be lawfully "made by the Secretary of State" unless it was signed by the Secretary of State or a Minister of State or Undersecretary of State (usually a Parliamentary Under Secretary of State but also, if necessary, the Permanent Under Secretary of State, the most senior civil servant in the Department). In short, only a top-ranking figure in government, and in practice in the Northern Ireland Office, could exercise the Secretary of State's power to make an ICO. The Order was structured so that, while the Secretary of State would not be required to be personally involved in making an ICO, someone of comparable political responsibility or standing would be.

The Supreme Court's judgment has major implications. It is obviously a major propaganda victory for Gerry Adams and for others who opposed the actions Her Majesty's Government took to restore peace and maintain order in Northern Ireland after 30 March 1972. However, more importantly, it puts in doubt possibly hundreds of detentions, as well as related convictions, and exposes the government to the risk – or certainty – of numerous legal proceedings for false imprisonment, to which it will have no defence. It also invites proceedings before the Strasbourg Court, for breach of Article 5 of the European Convention on Human Rights (the right to liberty), alleging that the unlawfulness of the detention is a reason for that Court to revise its important 1978 ruling that the UK's derogation from the ECHR, including Article 5, was properly made.

The Supreme Court's duty is to uphold the law without fear or favour and the factors mentioned in the preceding paragraph would not have been a reason for refusing to allow Mr Adams' appeal. However, they do provide a powerful reason for Parliament now to legislate to put the lawfulness of these detentions beyond doubt, treating ICOs made by a Minister of State or Under Secretary of State to be lawful, as it was reasonable and legitimate for everyone to have assumed at the time. This would avoid inviting a flood of unnecessary and misconceived litigation – misconceived because the ICOs in question and the detention orders to which they led should be regarded as having been in substance and reality lawful in 1972-1975 – and the Supreme Court's 2020 ruling should be

judged to be clearly wrong and legislatively correctable without injustice to anyone (and without reversing any order won from the court by Mr Adams himself). Even if the government must now be taken to have failed in its own Order to make clear what it obviously actually intended, the unlawfulness that resulted was clearly at most the result of a technical error made in good faith, and is very different in kind from the paradigm cases of unlawful arrest or detention. In all cases the ICO was only a preliminary step and the substance of whether the initial detention should be continued was independently decided within a short period otherwise than by a Minister.

Without legislative intervention there is a real risk that the government will be unfairly required to compensate persons for detention that should be regarded as in fact perfectly lawful, including persons whose involvement in terrorism was found, for the purposes of the making of a subsequent detention order, to make their detention under the legislation justifiable and necessary.

More generally, the Supreme Court's judgment introduces unnecessary doubt into the relationship between a Secretary of State or another Ministerial departmental head and junior ministers and civil servants. The *Carltona* principle is fundamental to the workings of government and frames how legislation has been drafted and understood for more than three-quarters of a century. It is fully open to Parliament to make clear when the personal involvement of the Secretary of State is required, as it has done in certain legislative contexts. The Supreme Court's judgment casts very considerable doubt on the extent to which the *Carltona* principle can be relied on either in future or in relation to numerous past transactions of government over a very long period – possibly millions of them. It invites legal challenges to exercises of the Secretary of State's powers in a very wide range of contexts, including, but not only, matters central to national security.

It would be desirable for the Supreme Court itself to reverse course, affirming the *Carltona* principle at the earliest possible opportunity and so to avoid significant damage to the effective operation of the governance of the nation. It may not be possible for this to happen quickly enough. So, Parliament should legislate speedily to rectify matters.

How a conviction in 1975 came to be quashed in 2020

The Detention of Terrorists (Northern Ireland) Order 1972,[1] which came into force on 7 November 1972, made provision for the Secretary of State to make an order for temporary detention:

> *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…*

This "interim custody order" (ICO) authorised the detention of the person in question for a period of up to 28 days. The person would be released within 28 days unless the Chief Constable referred his case to a Commissioner for determination; the person would continue to be detained under the ICO only until his case was so determined. The Commissioner (a former judge or senior lawyer) would determine whether he was satisfied that the person was concerned with terrorism and whether detention was necessary to protect the public. If satisfied, the Commissioner would make a detention order (if not, the person would be released). A person might appeal against the making of a detention order in his case to the Detention Appeal Tribunal created by the Order.

An ICO was made in relation to Gerry Adams on 21 July 1973. The ICO was signed by a Minister of State in the Northern Ireland Office. Article 4(2) of the 1972 Order provided that "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." His case was referred to a Commissioner on 10 August 1973 who determined that Mr Adams should continue to be detained and duly made a detention order.[2] Mr Adams tried to escape on 24 December 1973 and again on 27 July 1974. He was convicted of two charges of attempting to escape from lawful custody on 20 March and 18 April 1975 and ordered to serve 18 months' imprisonment on the first charge and three years on the second, to be served concurrently. He did not appeal against conviction.

The Supreme Court notes that in October 2009 Mr Adams became aware of an opinion dated 4 July 1974 given by Mr Hutton QC (later Lord Hutton of Bresagh), then legal adviser to the Attorney General.[3] The opinion responded to a request for directions in relation to the proposed prosecution of Adams and three others involved in the escape(s) in question and concluded that a court would probably hold that an ICO

1. SI 1972/1632 (NI 15)
2. The Court of Appeal held, at paragraphs 53-54, that the making of a lawful ICO was a condition precedent to the Commissioner's jurisdiction to make a detention order. If the ICO was invalid, the subsequent detention order would not render detention lawful. The Supreme Court did not question this holding.
3. And later Lord Chief Justice of Northern Ireland, 1989-1997, and a Lord of Appeal in Ordinary,1997-2004.

could not validly be made unless the Secretary of State had considered the matter personally. This opinion was uncovered, the Supreme Court says, under the "30-year rule",[4] under which certain government records become available to the public 30 years after their creation.

Mr Adams later applied for an extension of time in which to appeal his convictions. Leave was granted by Gillen LJ on 20 April 2017 and the appeal was heard by the Northern Ireland Court of Appeal on 16 January 2018. The ground of the appeal was that the prosecution was said to have failed to prove that the ICO, dated 21 July 1973, was a valid ICO. Proof of compliance with Article 4(2), in respect of the signing of the ICO, did not constitute proof of compliance with Article 4(1), which, the appellant maintained, required the Secretary of State personally to consider whether the ICO should be made. The Court of Appeal dismissed the appeal on 14 February 2018.[5] The case proceeded to the Supreme Court. The sole question was whether making an ICO required the personal consideration by the Secretary of State of the person subject to the order or whether an order could be made by a Minister of State. There was no evidence that the Secretary of State had personally considered whether Mr Adams should be the subject of an ICO, and the case proceeded on the basis that he had not.

Neither the Court of Appeal nor the Supreme Court make clear why the contents of the Hutton opinion should be thought to constitute a ground for appeal out of time. Arguably, this issue was not a question for either appellate court to decide, but was instead a question for the judge who allowed leave to appeal out of time. Still, the question deserves an answer. Why was the opinion relevant to the safeness of Mr Adams's conviction for escaping from unlawful custody? It confirmed that there were doubts within government about whether an ICO required the Secretary of State's personal consideration or whether the ICO might lawfully be made by a Minster of State or an Under Secretary, exercising the Secretary of State's power to order temporary detention. Perhaps the opinion also confirmed, or implied, that the Secretary of State had not in fact considered the case of Mr Adams himself and thus had not personally exercised his power in relation to Mr Adams. But this possibility would have been apparent from the start on the face of the ICO itself, which was signed by the Minister of State but not the Secretary of State. It would have been perfectly open to Mr Adams to defend himself against the charge of escape from lawful custody, or to appeal against his conviction within time, by arguing that there was no evidence that the Secretary of State had personally considered his case. The argument would almost certainly have failed – and rightly so – but the argument was there to be made, quite apart from the public availability of the Hutton opinion. Indeed, that opinion would seem to anticipate that such an argument could be made.

It is not a good precedent to set that the disclosure many years later of a privileged document containing evidence of inconclusive internal discussions, within the prosecution team, about the applicable law should form the basis for a subsequent appeal against conviction. All the more so when the matter discussed involved no confidential facts or policies,

4. Now a "twenty-year rule" as a result of amendments to the Public Records Act 1958 by the Constitutional Reform and Governance Act 2010.
5. *R v Adams* [2018] NICA 8

but pure matters of law equally open to consideration – with complete "equality of arms" – by the other party's legal advisers.

The Hutton opinion was not the only document disclosed under the so-called 30-year rule. The Court of Appeal's judgment outlines the range of documents in more detail:

> *16. The trigger for the appellant's late appeal was the disclosure of documents by the Government under the 30 year rule. On 4 December 1973 an official in the Law Officer's Department in Belfast sent a note to the Northern Ireland Office to the effect that ICOs should be considered by the Secretary of State personally. On the other hand a legal officer to the Home Office took a different view in a note to the Northern Ireland Office on 30 January 1974. This debate appears to have prompted a change of practice in 1974 from the decisions on ICOs being made by the Secretary of State or the Minister of State or the Permanent Under Secretary of State to one where the decisions were made by the Secretary of State alone.*[6]
>
> *17. The documents released by the government included an Opinion of JBE Hutton QC, then Senior Crown Counsel for Northern Ireland (later Lord Hutton) and legal advisor to the Attorney General, who under the direct rule system was Attorney General for England and Wales and Northern Ireland. That Opinion, dated 4 July 1974, was in response 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.*
>
> *18. In March 1974 Harold Wilson's Labour Government replaced the Conservative Government. On 17 July 1974 the Attorney General raised the issue with the Prime Minister and the Secretary of State and discussed the possibility of immediate legislation to address the issue. A letter from the Attorney General's Chambers to 10 Downing Street dated 22 July 1974 set out the Attorney General's conclusion on the issue. It was stated that the matter had been considered further in consultation with leading Counsel and with the legal advisor to the Northern Ireland Office. The conclusion was that, while the matter was certainly not free from doubt, on balance a court would probably hold that the requirements relating to an ICO were satisfied if a Minister of State or Under Secretary of State had considered the case and that it was not essential that the Secretary of State should personally consider the papers. It was acknowledged that there remained a substantial risk that a court could decide otherwise.*
>
> *19. The papers disclose that Merlyn Rees, the Secretary of State under the Labour Government, required personal involvement in all ICOs. A document entitled 'Procedure for Making Interim Custody Orders', dated 11 November 1974, provided that the Secretary of State would decide whether an ICO would be made. This approach was born out of caution based on legal advice, as is apparent from paragraph 3 of the statement which suggests that "the safer*

6. At the time, the Home Office's legal advisers also acted as the civil service legal advisers to the Northern Ireland Office. The Northern Ireland Office contained three Ministers of State and had a ministerial "Parliamentary Under Secretary of State" as well as its civil service head holding the office of "Permanent Under Secretary of State". Note added by authors.

construction …. is that only the Secretary of State can make the order."

One can see why these documents might have made Mr Adams wish that he had challenged the lawfulness of the ICO made against him on 21 July 1973. It is rather less obvious why the courts should think that the release of the documents into the public domain should warrant allowing an appeal out of time. Again, it was open to Mr Adams to challenge the ICO at the time, during his trial or on appeal made within time. Doubts amongst government lawyers, and a change in practice born of an excess of caution, do not amount to new evidence or a change in circumstances that warrants reconsideration by an appellate court. Still, permission to appeal out of time having been granted, it fell to the Court of Appeal and then the Supreme Court to determine whether an ICO might lawfully be made by the Minister of State without the Secretary of State's personal involvement.

The Court of Appeal's judgment reviews the authorities in relation to the *Carltona* principle, many of which post-date the 1974 Hutton opinion. The Court took the *Carltona* principle to establish that where Parliament empowers a specified Minister to take a certain decision, generally that decision may be taken by an appropriate person on behalf of the Minister, with the decision constitutionally being that of the specified Minister – and is not to be regarded as having been delegated. The starting point is that the *Carltona* principle applies. Its application may be displaced by express words or necessary implication, which may be derived from the context, wording or framework of the legislation. The gravity of the decision forms part of the context and may help determine whether Parliament intended to exclude the Carltona principle, but this consideration (the seriousness of the subject matter) is not determinative. The Court took the authorities to establish that the fact that a decision results in loss of liberty is not, in itself, sufficient to displace the *Carltona* principle. And the Court concluded further that nothing in the text or framework of the 1972 Order required the principle to be displaced.

Lord Kerr gave the judgment for the Supreme Court with which the other four judges agreed.[7] His judgment rejects the premise on which the Court of Appeal had relied, viz. that the question is whether Parliament expressly or by necessary implication displaced the *Carltona* principle. Instead, he reasoned that the question should be approached by way of textual analysis, unencumbered by any presumption that Parliament intends the principle to apply.

While Lord Kerr says that the question of whether there is a presumption that Parliament intends the *Carltona* principle to apply may be left for decision another day, his judgment nevertheless does in fact rely on there being no such presumption. He parts company with the Court of Appeal in his evaluation of the significance of the subject-matter of the 1972 Order, reasoning that a power to detain without trial, which might result in indefinite detention, supports the argument that Parliament intended the power to be exercised only by the Secretary of State himself and not by a Minister of State or an Under Secretary of State in his name. Lord Kerr also rejects any idea that this reading of the Order would place an "excessive"

7. *R v Adams (Northern Ireland)* [2020] UKSC 19

administrative burden on the Secretary of State. This was in contrast to other cases involving the *Carltona* principle, such as one involving release on licence of prisoners serving a mandatory life sentence for murder, where the court referred to the "considerable" burden that would fall on the Secretary of State if the principle did not apply in holding that it did.

The answer to the question before the Supreme Court, Lord Kerr concludes, is to be found straightforwardly in the text of the Order itself, the language and structure of which, he says, make very clear that making an ICO requires the Secretary of State personally to consider each case. According to the judgment, the language of Article 4(1) unambiguously requires personal consideration and the relationship between Articles 4(1) and (2) confirms that it is the Secretary of State who must himself decide whether an ICO should be made. It would make no sense, Lord Kerr suggests, for the 1972 Order to distinguish between the making of the ICO (by the Secretary of State) and the signing of the ICO (by the Secretary of State, Minister of State or Under Secretary) save to make clear that the ICO must be made personally by the Secretary of State.

Like the Court of Appeal below, but for rather different reasons, Lord Kerr also concluded that the language of the 1972 Order was neither ambiguous nor obscure and did not lead to absurdity. Therefore, the rule in *Pepper v Hart*, which permits reference to parliamentary materials (especially the statement of a Minister or other promoter of a Bill) in order to clarify the meaning of an enactment, was not applicable. In addition, the parliamentary material placed before the Court was, he said, contradictory and insufficiently certain to be helpful. This material is discussed below.

In short, the 1972 Order, so the Supreme Court held, required the Secretary of State personally to make each ICO. There was no evidence that the Secretary of State had personally considered the case of Mr Adams and therefore the ICO purportedly made in relation to him was unlawful. It followed that in attempting to escape he had not been attempting to escape from lawful custody and his convictions were quashed accordingly. This is another way of saying that his detention from 21 July 1973 was unlawful. (His detention following sentence on 20 March 1975 was lawful; quashing the conviction does not render the term of imprisonment served for conviction unlawful). It would seem likely that Mr Adams will now bring proceedings for false imprisonment. He may also apply to the European Court of Human Rights for breach of his Article 5 right to liberty.

How the 1972 Order should have been read

Article 4 of the 1972 Order provides:

> (1) *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 (hereinafter in this order referred to as an "interim custody order") for the temporary detention of that person.*
>
> (2) *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.*
>
> (3) *A person shall not be detained under an interim custody order for a period of more than 28 days from the date of the order unless his case is referred by the Chief Constable to a Commissioner for determination and where a case is so referred the person concerned may be detained under the order only until his case is so determined.*
>
> (4) *A reference to a Commissioner shall be by notice in writing, of which a copy shall be sent to the Secretary of State and to the person to whom it relates.*

The 1972 Order was replaced by the Northern Ireland (Emergency Provisions) Act 1973, which came into force on 8 August 1973. Schedule 1 to the Act reproduced the text of the Order; section 31(5) provided that anything done under the 1922 Act or 1972 Order, so far as it could be done under the 1973 Act, was to have effect as if it had been done under the 1973 Act. The 1973 Act provisions were in turn replaced by Part 1 of Schedule 1 to the Northern Ireland (Emergency Provisions) (Amendment) Act 1975, paragraph 4(1) and (2) of which again reproduced the wording of Article 4(1) and (2) of the 1972 Order.

The central passage in the Supreme Court's judgment is paragraphs 28-32. In paragraph 28, Lord Kerr reproduces the text of Article 4(1). In paragraph 29, he says:

> 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.*

This is a badly misconceived way to frame and determine the meaning of Article 4(1). Whenever an enactment confers power on the Secretary of State, the *Carltona* principle is an obvious and important part of the context. Lord Kerr's interpretive approach could be repeated with almost every Ministerial power on the statute book, with the court concluding, absurdly, that "Absent the possible invocation of the *Carltona* principle, there could be no doubt that resort to the power to [do any of a million different things] was reserved to the Secretary of State alone." The whole point of *Carltona* – the reason why it is fundamental to the working of our system of government – is that when powers are conferred on a Secretary of State or other ministerial head of a government department it is taken for granted that they may be exercised by persons for whose actions the Secretary of State or than Minister carries both legal and political responsibility.

Nothing in the text of Article 4(1), taken alone, suggests that the Secretary of State must *personally* exercise the power to make an ICO and is forbidden from requiring civil servants under his direction, or junior ministers over whom he has authority, from exercising his power. The only possible ground on which to infer that the legislative intention was that the power to make an ICO must be exercised by the Secretary of State personally is the formulation "Where it appears to the Secretary of State…". But this cannot be capable of supporting that conclusion. The formulation, as it and similar formulations do in thousands of other statutory provisions, sets out the pre-condition for the exercise of a statutory Ministerial power. In this case the condition is "that a person is suspected of [involvement in terrorism]". So far as we know, in no other case has this or a similar formulation been construed as itself requiring the Secretary of State's *personal* consideration – even if it does of course have the effect that whatever it requires to appear to the Secretary of State must appear instead to whoever acts in the Secretary of State's name, and similarly with requirements for the Secretary of State to suspect or be satisfied of something, or to determine some matter, before acting. As the Court of Appeal said, in paragraph 43:

> *…these words are a common legislative formula and have not been found to be the basis for any necessary implication of personal consideration. For example, McCafferty's Application, relating to the recall to prison of a person on licence, concerned the power of the Secretary of State to make an order "if it appears to him" that certain conditions are satisfied.*

The Supreme Court does not address this passage. Lord Kerr is simply wrong to assert that the unambiguous meaning of Article 4(1) is that the Secretary of State must himself exercise the power.

Having asserted an untenable construction of Article 4(1), without

discussing the significance of "Where it appears to the Secretary of State…", Lord Kerr proceeds to discuss the relationship between paragraphs (1) and (2). His understanding of how the two provisions interact, is the centrepiece of his judgment. In paragraph 30, Lord Kerr sets out the text of Article 4(2). He then says:

> 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.*

This reading of the relationship between paragraphs (1) and (2) of Article 4 is misconceived. The misconception is grounded, again, on a failure to grasp the significance of the *Carltona* principle, a principle that obviously informed the legislative intention that explains Article 4. Pace Lord Kerr's reading, the obvious reading of Article 4(1), in the absence of Article 4(2), would be that the Secretary of State has power to make an ICO and – by virtue of the *Carltona* principle – the power could lawfully be exercised by a junior Minister or a civil servant for whom he has constitutional responsibility. The point of Article 4(2) is plainly to address and specifically to narrow this normal (*Carltona*-based) reading of paragraph (1), not to displace the *Carltona* principle altogether but rather to narrow the class of persons who may act in the Secretary of State's name. The whole point of Article 4(2) is to require that the decision to make an ICO is reserved to the Secretary of State himself, a Minister of State or an Under Secretary of State. In this way, responsibility for an important decision is maintained at a high level, without necessarily always having to be taken at the highest level and to require personal consideration by the Secretary of State himself.

Lord Kerr's argument from the use of the words "An interim custody order *of the Secretary of State*" misfires. Every ICO is an act of the Secretary of State, just as the multitude of decisions made by civil servants in exercise

of other statutory powers conferred on ministers are treated as acts of the responsible minister and not of the civil servant. The language and structure of Article 4 makes clear, rightly, that legal and political responsibility for the exercise of the power to make an ICO is that of the Secretary of State. Moreover, the power cannot be exercised by just anyone for whom he has responsibility, but can only be exercised by the Secretary of State himself (in which case he will sign the order),[8] a Minister of State or Under Secretary of State.

The ICO is made when the Secretary of State, Minister of State or Under Secretary of State signs an order. The signature confirms that the ICO has been made under the authority of a person entitled, in accordance with the terms of the Order, to exercise the Secretary of State's power to order detention. When an ICO is made, with the required signature, it authorises detention of the person. Lord Kerr introduces an illusory distinction between making the order and signing it. He says that it would have been simple for paragraph (1) to provide that the Secretary of State may make *and sign* the order. But this would have been entirely anomalous. The answer to Lord Kerr's question about why the Order in paragraph (2) addresses the question of who may sign the ICO is that it does so in order to specify who may exercise the Secretary of State's power to detain, and to restrict and override the normal operation of the *Carltona* principle. For under that normal operation the Secretary of State could give a standing direction to a whole class of civil servants in the department to exercise the powers conferred on the Secretary of State – and is usually taken to have done so implicitly, until requiring a change, by accepting the organisational arrangements within the department on taking office.

Lord Kerr implies that the structure of the Order is intended to reserve to the Secretary of the State alone the power to detain, with the function of the Minister of State or Under Secretary of State simply to complete the formalities and to certify that the Secretary of State really did himself make the ICO. This is not plausible. The exercise of a statutory power is not a transaction in private law, requiring formalities to be satisfied, such that an order must be made *and* signed. The signing of the order is the making of the order and the signatory exercises the Secretary of State's authority. The function of the signature, in the absence of provision giving it a different function, is to indicate that the order has been made in accordance with the power. No person who is the subject of an ICO, and no person relying on the authority of the ICO to detain that person, should be required to look behind the ICO and to investigate whether the Secretary of State himself has personally considered the case. The signature of the Minister of State or Under Secretary of State (or of course the Secretary of State himself) confirms that the Secretary of State's power to order detention has been exercised by a person lawfully entitled to exercise it.

Our reading of the relationship between Article 4(1) and (2) is reinforced by the fact that no lawmaker in 1972 would have anticipated that the inner workings of government departments would be disclosed to the world at large or be capable of being disclosed. Any lawmaker seeking

8. The Interpretation Act 1978 provides, as did the Interpretation Act 1889 before it, that "Secretary of State" means one of Her Majesty's Principal Secretaries of State. It follows that any Secretary of State may exercise powers conferred on "a [or much more often "the"] Secretary of State".

to restrict the persons capable of making an order would inevitably have concentrated any provision to that effect on the one aspect of the order that was apparent on its face – the person signing it. The ICO, signed by a person named in (2), would have been understood to have been, and been intended to have been, authority for detention, without any question arising as to whether the Secretary of State had personally considered the case. This gives rise to other questions about the context in which the 1972 Order was made, to which we now turn.

The context in which the 1972 Order was made

The Supreme Court's judgment says very little about how and by whom the 1972 Order was made. Lord Kerr concludes that Parliament intended to reserve to the Secretary of State alone the question of whether to make an ICO. But the 1972 Order was not enacted by Parliament. It was a statutory instrument made under authority of the Northern Ireland (Temporary Provisions) Act 1972. The relevant legislative intention was that of Her Majesty in Council, which is to say of the government. It is no answer to say that the statutory instrument could not be made without approval of the Houses of Parliament. The 1972 Order was made by Her Majesty in Council on 1 November 1972, tabled before Parliament on 6 November and came into force on 7 November. In accordance with the terms of the 1972 Act, the Order would have lapsed if it had not received parliamentary approval within 40 days and such approval was provided, in the House of Lords on 7 December and the House of Commons on 11 December. This detail, which neither the Court of Appeal nor the Supreme Court set out in their judgments, is important. It frames the relevance of the parliamentary materials and bears on the importance of the administrative burden it would place on the Secretary of State if he had to consider the making of each ICO. It also frames how one understands the perceived significance of the subject-matter, which is important in its bearing on legislative intention, but not as an "autonomous factor" warranting judicial transformation of the terms of the Order.

The legislative history

The opening paragraph of the Supreme Court's judgment begins with the history:

> *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.*

The second half of this paragraph is a good summary of how the 1972 Order operated. But the first half wrongly implies that the 1972 Order, because it might be said to form part of an ongoing policy of "internment", also formed part of the legal regime that began under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 and the regulations contained in the schedule to that Act – regulations amended by the Civil Authorities (Special Powers) Act (Amending) Regulations (Northern Ireland) 1956, which were made by the Minister of Home Affairs in Northern Ireland under section 1(3) of the 1922 Act. In fact, the 1972 Order replaced that regime.

Regulation 11(1) had authorised the arrest without warrant of persons suspected of having acted, acting, or being about to act in a manner prejudicial to the preservation of peace and maintenance of public order and Regulation 11(2) had provided that any person so arrested might be detained by order of the Minister of Home Affairs until discharged by the Attorney General or brought before a court. Regulation 12(1) had provided that the Minister for Home Affairs, on the recommendation of a senior RUC officer or an Advisory Committee that internment of a person was expedient to preserve peace and maintain order, had authority to order that person to be interned, which order had to make provision for an Advisory Committee to consider representations the person might make against the order.

Internment, as such, had been introduced into Northern Ireland on 9 August 1971. Direct rule was introduced on 30 March 1972. Section 1(1) of the Northern Ireland (Temporary Provisions) Act 1972 provided (a) for the Secretary of State to discharge all functions that belong to the Government or any minster of Northern Ireland, or head of a department of the Government of Northern Ireland and (b) for the Secretary of State to discharge all functions of a department of the Government of Northern Ireland or, except as the Secretary of State otherwise directs, for the functions to be discharged by the department on behalf of the Secretary of State and subject to his direction and control. Section 1(3) authorised Her Majesty by Order in Council to make laws for Northern Ireland. Section 4(1) provided that before an Order was made under section 1(3) a draft should be approved by resolutions of each House of Parliament unless by reason of urgency the Order had to be made without a draft being approved, in which case section 4(2) provided that the Order would cease to have effect (but without prejudice to anything done under the Order) unless it received approval within forty days after the day on which it was made.

Paragraph 2(1)(a) of the Schedule to the 1972 Act authorised the Secretary of State by order to appoint persons to discharge any functions exercisable by him by virtue of section 1(1), other than the power under section 1(3) of the 1922 Act to make regulations with respect to the preservation of peace and maintenance of order. Paragraph 2(1)(b)

provided for the Secretary of State by order to appoint persons to discharge any function conferred upon him by an Order in Council made under section 1(3) of the 1972 Act, subject to any provision to the contrary in such an Order in Council. Paragraph 2(2) provided that anything done by a person appointed under paragraph 1 shall be of the same validity and effect as if done by the Secretary of State but that no such appointment shall preclude the Secretary of State from discharging any functions himself.

From 30 March 1972, the powers of the Minister for Home Affairs were exercised by the Secretary of State. Section 1(2) of the 1922 Act authorised the Minister for Home Affairs to delegate all or any of his powers under that Act to a police officer. The Secretary of State made an order appointing a Minister of State or a Parliamentary Under-Secretary of State as persons entitled to exercise the power to make orders under Regulation 11(2), (viz. the provision containing the nearest equivalent under the pre direct rule regime to the ICO provision of the 1972 Order). There was no express delegation in relation to the making of internment orders (that is, Regulation 12) or orders for release from internment. After 30 March, no orders under Regulation 12 were made, but some use was made of Regulation 11(2). Also, hundreds were released from internment. The Detention of Terrorists (Northern Ireland) Order 1972 introduced new arrangements, which were defended by the government in Parliament as the end of internment and as a quasi-judicial procedure rather than executive detention.

The Secretary of State clearly had authority under the 1972 and 1922 Acts to detain persons suspected of terrorism and to authorise junior ministers to order detention. In framing the 1972 Order, under the authority of the 1972 Act, the government intended to replace the previous "internment" regime with a quasi-judicial procedure for determining who should be detained. It had freedom, under the Act and under the 1922 Act too for that matter, to specify who should decide on temporary detention pending later determination by the Commissioners and Tribunal on appeal. In authorising the Secretary of State to order temporary detention, and in specifying that Ministers of State and Under Secretaries of State may sign an order of the Secretary of State, the 1972 Order replaces the regime that had prevailed between 30 March and 7 November 1972. It ended the Secretary of State's power to order indefinite detention but maintained his power, and the authority of junior ministers for whom he was responsible, to order temporary detention, similar to Regulation 11(2). In other words, there are very good reasons to think that in making the Order on 1 November 1972, Her Majesty in Council intended Ministers of State and Under Secretaries of State, but no one else, to be able to act on the Secretary of State's behalf, thus restricting the normal operation of the *Carltona* principle, by subjecting it to a tailor-made limitation.

Parliamentary materials

This inference about the government's legislative intention is powerfully reinforced by the parliamentary materials, in which the government outlines the practice it had followed between 7 November (on which date the Order came into force) and 11 December (at which point the approval of the House of Commons was sought, without which the Order would lapse). The Court of Appeal and the Supreme Court both go wrong in taking the relevant test to be *Pepper v Hart*.[9] The question is not how to construe an Act of Parliament, to which the statements of the Minister or sponsor of the Bill might be relevant. The question is rather how to construe a statutory instrument, made under an emergency procedure which would lapse without parliamentary approval but the meaning and effect of which is settled by the legislative intention on 1 November 1972. *Pickstone v Freemans PLC* is authority for the proposition that the explanations the government provides for draft regulations (in that case made under the authority of section 2 of the European Communities Act 1972) and the criticisms voiced in parliamentary debates are relevant to the intentions of Parliament in approving the regulations.[10]

Lord Kerr's judgment does not set out the relevant parliamentary materials. The Court of Appeal did set them out, in paragraph 21, saying:

> *While not relying on the historical material for interpretation purposes the appellant [Gerry Adams] did rely on two statements from Hansard as aids to interpretation. First a statement of the Lord Chancellor in the House of Lords on 19 July 1973 on the debate on the Bill leading to the 1973 Act. It was stated that "the Secretary of State makes a temporary order only if (he) is personally satisfied that the person concerned" was involved in terrorism. The second statement is that of the Attorney General in the House of Commons on 11 December 1972 in a debate on the draft of the 1972 Order. It was stated that "under Article 4(2) an interim custody order can be made also by a Minister of State or by an Under Secretary of State". The appellant states that the Attorney General was in error in making that statement. There may be an error to the extent that Article 4(2) is concerned with the signing of an ICO rather than the making of an ICO and the distinction is not acknowledged.*

The next two paragraphs continue:

> *22. This court is satisfied that the rule in Pepper v Hart cannot assist the appellant in the present circumstances. The enactment is not ambiguous or obscure in the sense that engages the rule nor is its literal meaning leading to absurdity and the rule does not apply. In any event the statements relied on appear to be contradictory.*
>
> *23. A further statement of an official is not a Hansard statement, it does not fall within the rule in Pepper v Hart and cannot inform the interpretation of the legislation. By a note dated 2 July 1975 an official stated that when drafting the 1972 Order it was considered that the Secretary of State should take the decision in relation to an ICO but as he would not always be present in person the signature on the order could be that of a minister. The note referred*

9. [1993] AC 593
10. [1989] 1 AC 66

> *to the opinion of the Attorney General that an ICO would be valid without involvement of the Secretary of State.*

The Supreme Court rejected the parliamentary materials very quickly, agreeing with the Court of Appeal that the test in *Pepper v Hart* was not satisfied and that the statements in Parliament were uncertain and/or contradictory. We have already noted that both courts here misstate the relevant test that applies to a statutory instrument like the 1972 Order. We add that upon examination, the parliamentary material is highly relevant and confirms that the government intended, and Parliament approved a statutory instrument to the effect that, the Minister of State and the Under Secretary of State could act without the Secretary of State's personal involvement.

It was not the Secretary of State but a Minister of State for Northern Ireland who moved the motion in the House of Commons that the 1972 Order be approved. He noted that he had signed more than one ICO since 7 November and had found it to be a weighty responsibility. He was challenged by Sir Elwyn Jones MP who said:

> *It would seem also from the terms of Article 4(2) that an interim custody order shall be signed not merely by the Secretary of State but by a Minister of State or by an Under-Secretary of State. The Minister of State has just told us that he has had the heavy responsibility of signing some himself. I find that difficult to reconcile with Article 4(1), which requires that the matter must "appear" to the Secretary of State. Perhaps we can have some enlightenment upon this apparent contradiction.*

The point was answered in effect by the Attorney-General, who closed the debate. But we interject to note that Sir Elwyn had misread Article 4(2), which does not require the ICO to be signed by the Secretary of State *and* by a Minister of State or Under Secretary of State. Likewise, the reference to what "appears" to the Secretary of State to be the case is not grounds to infer that personal consideration is required; statutory precedents from across the whole range of UK government make this abundantly clear.

In closing the debate, the Attorney-General informed the House:

> *The order provides that where it appears to the Secretary of State that a person is suspected of having been concerned in the commission of terrorism he may make an interim custody order. This involves terrorism, which means the use of violence for political ends, whether violence against an individual or a group, violence for the purpose of putting the public or any section of it in fear. It must appear to the Secretary of State that the person has been concerned in the commission or attempted commission of acts of terrorism, and Article 4 brings in those whom it is suspected have been concerned:*
>
> > *"in the direction, organisation or training of persons for the purpose of terrorism".*
>
> *One of the Principal reasons for it being only the Secretary of State under Article 4(1) whereas* ***under Article 4(2) an interim custody order can be***

> ***made also by a Minister of State or by an Under-Secretary of State*** *is the need for speed which sometimes arises. The Secretary of State is not always there, but the Minister of State and the Under-Secretaries can take this very preliminary step. I assure the House that rigorous inquiry is undertaken before this step is taken. As will be seen from the rest of the order, this is the only stage at which the Executive in the shape of the Minister intervenes in the process.*

The words we have highlighted in bold make the government's understanding of Article 4, and its legislative intention in making the 1972 Order, unmistakably clear. The Supreme Court should have considered this unequivocal statement, which flatly contradicts the Court's interpretation.

The Attorney's statement was interrupted by Biggs-Davison MP who interjected to ask:

> *Does this mean that a Minister so designated outside the Northern Ireland Office would be able to act?*

The Attorney answered:

> *In practice it will mean only the Secretary of State, the Minister of State or any Under-Secretary of State in the Northern Ireland Office, because they will be the Ministers in Northern Ireland.*
>
> *All that they do at this stage is to make the interim custody order. Where it so appears, and when that order has been made, limited to 28 days, the chief constable has the responsibility of referring it to the commissioner, or the person is released. If there is any unreasonable or improper delay between such a reference and the hearing so that weeks or months pass and a person who has had an interim custody order imposed against him does not appear before the tribunal, there exist the general supervisory powers of other courts which can ensure that this process is carried out in accordance with the order.*

These parliamentary materials are obviously highly relevant to how Article 4 should be understood. They make very clear that the government understood the Order it had made, on 1 November, and for which it now sought parliamentary approval, to permit a Minister of State or Under Secretary of State to exercise the Secretary of State's power to order temporary detention. (The Attorney's statement provides some ground to interpret Under Secretary of State narrowly to refer only to the Parliamentary Under Secretary of State, rather than the Permanent Under Secretary of State. However, his statement does not strictly rule out the latter.)

The government's understanding of the intended meaning and effect of Article 4(1) and (2) was also set out in the House of Lords. On 7 December, Lord Windlesham, Minister of State for Northern Ireland moved the motion that the 1972 Order be approved. In closing the debate, he said:

> *I might add that the interim custody order will usually be made within 72*

> *hours of the person's arrest, and a person cannot be detained in right of his arrest for more than a day or two. I should also say, although this is no part of the Order but an administrative safeguard, that* ***applications for interim custody orders are by no means automatically granted by the Secretary of State. There is a thorough process of scrutiny before he, or anyone on his behalf, decides whether or not to sign one at all.***

The bolded words, not quoted in either judgment, make clear, first, that to sign the order is to make the order – one *decides* whether to sign, which is to grant an application for an ICO – and, second, that the Secretary of State's power to order temporary detention may be exercised by others who act on his behalf, which must be a reference to a Minister of State or Under Secretary of State, as Article 4(2) provides.

What about the Lord Chancellor's statement in relation to the Bill that became the 1973 Act? Recall that section 31(5) of the Act provided that anything done under the 1922 Act or 1972 Order, so far as it could be done under the 1973 Act, was to have effect as if it had been done under the 1973 Act. The Lord Chancellor said:

> *The Secretary of State makes a temporary order only if he is personally satisfied that the person concerned is both a terrorist or concerned in terrorist activities and that his detention is necessary for the protection of the public. Both conditions have to be fulfilled before the Secretary of State is entitled to exercise his power. That power is purely temporary. The man goes before the commissioner, who will either confirm the Secretary of State's order—in which case the man stays inside because the commissioner is satisfied both that the man is a terrorist and that his detention is necessary for the protection of the public—or he does not confirm it, in which case the man goes completely free. In the former case—that is, where he stays inside—the man has a further right of appeal to the tribunal, which he must exercise, as the noble and learned Lord rightly says, within 21 days.*

The appellant, Mr Adams, relied on the first sentence. But the context makes entirely clear that the Lord Chancellor is simply not addressing the question of whether the Secretary of State's power may be exercised by a Minister of State or Under Secretary of State. Instead, he is making clear that the Secretary of State cannot order detention unless he is satisfied that the person is involved in terrorism. (Strictly, the Lord Chancellor is wrong to say that the Secretary of State must also be satisfied that his detention is necessary for the protection of the public. That question is for the Commissioner in due course.) Whoever exercises the Secretary of State's power must likewise be satisfied that the person whose detention is ordered is involved in terrorism.

Administrative burden

Many of the cases in which the *Carltona* principle is discussed make much of the administrative burden that would come to bear on the Secretary of State if he personally had to exercise the powers that Parliament conferred upon him. In *R (Doody) v Secretary of State for the Home Department*,[11] which

11. [1994] 1 AC 531

concerned the Secretary of State's power under the Criminal Justice Act 1967 to decide when those serving mandatory life sentences might be released, the House of Lords approved this statement of Staughton LJ in the Court of Appeal:[12]

> *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.*

Lord Kerr noted the Court of Appeal's reliance on this passage and commented, in paragraph 18:

> *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.)*[13] *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.*

In the next paragraph, he continued:

> *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.*

But the question of whether there would be a "considerable" burden, as paragraph 18 above paraphrases the reasoning of Staughton LJ in *Doody*, or even an "excessive" burden, as Lord Kerr puts it in paragraph 19, on the Secretary of State is not a question of evidence, such that the Crown must prove that it would have been considerable or excessive. The question is instead whether Her Majesty in Council on 1 November 1972 anticipated that it would be a burden on the Secretary of State to require him personally to consider each ICO. Lord Kerr is wrong to say that the question is to be asked in relation to "the time of the making of the ICO". True, in paragraph 39, he changes the focus to the time of the making of the Order, asserting that "there was no reason to apprehend (at the time of the enactment of

12. *R (Doody) v Secretary of State for the Home Department* [1993] QB 157, 196

13. One should add that Staughton LJ says that the 274 figure in 1990 was unusual and that the average number, calculated across a period of slightly more than 23 years, was 127 a year. This is the context in which Staughton LJ goes on to say: "Every such case demands serious consideration, and the burden of considering them all must be substantial."

the 1972 Order) that this would place an "impossible" burden [another linguistic shift away from "considerable"] on the Secretary of State." But what is freely asserted is freely denied. His speculation about what the government must have apprehended, and thus intended, is implausible and inconsistent with statements made in the House of Commons. His assertion about what "should not have been impossibly difficult for Mr Whitelaw to do" is also flatly inconsistent with the reported facts about how many ICOs were made in 1973. In an article published in 1986, R. J. Spuit estimated that there were 436 detention orders made under the 1972 Order in the first year of its operation, an estimate based on figures reported in the House of Commons on 5 December 1973.[14]

The passage in paragraph 39 goes on to say "Indeed, the subsequent experience with Mr Merlyn Rees scotches any notion that this should be so. This again presents a stark contrast with *Doody*." Lord Kerr is wrong to rely on the subsequent practice of the Labour government, which does not change what the Conservative government intended on 1 November 1972, or what the Houses of Parliament understood they were approving in December that year or, as we have seen, the number of ICOs in fact made by the government in 1973. Further, Lord Kerr's acknowledgment that Mr Rees's practice may have followed from the perception of legal risk undercuts his conclusion that the practice somehow confirms that the burden was manageable. That is, Mr Rees may simply have made rather fewer ICOs than the government would have made had Mr Rees permitted the Minister of State and Under Secretary of State to act. Alternatively, or in addition, the practice adopted by Mr Rees may also reflect a change in *policy* about the merits of detention, and that subsequent change does not establish that the government or Parliament in 1972 expected it to be possible for the Secretary of State himself to make each ICO. The merits of Mr Rees's practice are not in question; the point is that Lord Kerr cannot reasonably rely on that practice to confirm that requiring the Secretary of State personally to consider each case did not impose an excessive burden on him, still less that this establishes what the government intended on 1 November 1972.

Lord Kerr does not discuss the numbers of ICOs that were made or the difficulties that it would impose on the Secretary of State if he had to consider each in person. The Minister of State for Northern Ireland, in his speech to the House of Commons on 11 December 1972, noted that since 7 November 45 ICOs had been made. This is somewhat more than one each day on average. It significantly exceeds the frequency in Doody (whether one takes the figure of 274 cases in 1990 or the average of 127 cases each year across a much longer period) that was thought sufficient to support the interference that Parliament intended the *Carltona* principle to apply. The Supreme Court's speculation about the administrative burden that Article 4 would impose on the Secretary of State, if the *Carltona* principle were taken to be wholly displaced, is simply groundless. That burden, reported to the House of Commons on 11 December and reasonably anticipated by a government facing an uncertain and changing context in Northern

14. R. J. Spuit, "Internment and Detention without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice (1986) 49 *Modern Law Review* 712, 722, footnote 79. This figure likely refers to detention orders made by Commissioners, rather than ICOs, but each detention order required an ICO first to have been made.

Ireland, powerfully supports the inference that personal consideration by the Secretary of State – as distinct from personal consideration by any one of the identified (small) set of politically responsible ministers – was not required.

In addition, Lord Kerr does not mention the consideration that is analogous to, but different from, the "excessive burden" factor and also required the burden of making an ICO to be spread. That consideration also emerges from the Parliamentary proceedings. It is clear that one thing in contemplation was that an ICO might need to be made in urgent circumstances in which the Secretary of State for Northern Ireland himself was unavailable, perhaps – in those days – in the air or otherwise out of contact. Lord Kerr's reading of the 1972 Order would, in those circumstances, have required a decision by another Secretary of State in a different department, rather than a decision by a junior Northern Ireland Office minister – the very thing that had been indicated to Parliament should be avoided in practice.

The seriousness of temporary detention

Much of Lord Kerr's judgment aims to make clear that the authorities establish that the seriousness of the subject-matter ("the seriousness of the consequences" as he sometimes puts it) is relevant to the question of whether the Secretary of State must *personally* exercise his statutory power. He rejects Brightman J's apparent conclusion in *In re Golden Chemicals Products Ltd* [1976] Ch 300 that nothing turns on the seriousness of the subject-matter, preferring, with the Court of Appeal below, to think that it is a factor. Lord Kerr says:

> *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.*

We have seen that that this "cannot have been other than deliberate" is the exact reverse of the fact, which was stated by the Attorney-General, no less, to Parliament, assuring the House than in Article 4(2) "sign" means "make and sign". Lord Kerr goes on:

> *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.*

We have addressed the problems with paragraph 37 above. The problem with paragraph 38 is that Article 4 does not give the Secretary of State the power to detain individuals "for an indefinite period", let alone "potentially for a limitless period". The power is to detain for up to 28 days, subject to reference to a Commissioner, a reference that requires another agent to act and which then imposes a duty on the Commissioner, a quasi-judicial office, to determine the case. The merits of this legal regime are something on which opinions may differ. However, Lord Kerr has still overstated the legal consequences of an ICO, mischaracterising Article 4 in a way that does not fit how the government understood the Order it was making on 1 November and defending in the Houses of Parliament in December. And again, the law as it stood immediately before the 1972 Order is relevant too. The Order is intended to liberalise the regime by removing the Secretary of State's power to intern *stricto sensu* (Regulation 12) and making temporary detention the first step in a quasi-judicial process of detention, not under his control. Lord Kerr does not consider this legislative history. He runs together the 1922 Act and the 1972 Order all as an undifferentiated "internment" regime and thus fails to note that the 1972 Order was not a momentous new step but rather was understood to be an interim measure adopted as arguably a liberalising measure (in the midst of a conflict and after the introduction of direct rule).

In some contexts, the seriousness of the subject-matter of a statutory power will help support the inference that Parliament intends to qualify or displace the *Carltona* principle.[15] But any such process of inference has to characterise the statutory power accurately and, in particular, has to recognise how the legislator (here, Her Majesty in Council) has understood the power and the seriousness of the consequences of its exercise. The extent to which a power limits personal liberty is thus relevant to the process of inferring what the legislative intention is likely to be, but is not an "autonomous factor" justifying departure from that intention. When, in a case such as this, the legislator has clearly taken the importance of personal liberty into account and has settled how the power should be framed, the judicial duty is to uphold the legislative choice. It may be that Lord Kerr agrees, for he says in paragraph 38 above that the seriousness of detention "provides an insight into Parliament's intention". But his judgment in effect treats the seriousness of the ICO, as judged by the Supreme Court in 2020 rather than Her Majesty in Council (or the Houses of Parliament) in 1972, as the factor warranting qualification of the intended meaning of the Order.

15. W Wade and C Forsyth, *Administrative Law* (11th edition, 2014), 266-269.

Putting the *Carltona* principle in its place

Having dismissed Gerry Adams's appeal against conviction, the Court of Appeal on 16 April 2018 dismissed his application for permission to appeal to the Supreme Court. However, the Court of Appeal did certify 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.*

The importance of the *Carltona* principle was thus front and centre in this appeal.

The *Carltona* principle

In *Carltona Ltd v Comrs of Works*,[16] the Court of Appeal considered an order for the requisition of a factory under the Defence (General) Regulations 1939, which order was to be made by the Commissioners of Works. The First Commissioner of Works was the Minister of Works and Planning and the decision was made by the Assistant Secretary, a civil servant, in that Ministry on behalf of the Commissioners of Works. The decision was challenged on the basis that the Commissioners of Works or indeed the First Commissioner had not personally considered the matter. The Court of Appeal rejected the challenge, with 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.*

16. [1943] 2 All ER 560

> *Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.*

This is a very important constitutional principle. It forms part of the background against which Parliament legislates, as Mr Justice Sales (now Lord Sales) observed in his extra-judicial reflections on the principle of legality.[17] It is central to the workings of parliamentary government, in which the Secretary of State routinely takes political and legal responsibility for the acts of others. Legislation sometimes displaces or qualifies the principle, requiring personal consideration by the Secretary of State or limiting the persons who may lawfully act on behalf of the Secretary of State. But this is quite clearly a departure from the default, a departure that adopts a range of familiar drafting techniques.

The Supreme Court and the *Carltona* principle

The Supreme Court's judgment in *Adams* questions the *Carltona* principle:

> *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 enjoinder 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,*

17. Sir Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 *Law Quarterly Review* 598

> *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.*

And to similar effect, near the conclusion of his judgment he says:

> *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.*

The Supreme Court's willingness to read the 1972 Order without a presumption that the *Carltona* principle applies led it into a serious legal error in this case. By both putting and putting aside the question whether there is a presumption that the *Carltona* principle applies, the Supreme Court has badly undermined the principle itself and the rule of law, for the judgment creates needless doubt about the lawfulness of a host of legal acts which would otherwise (rightly) be of unquestioned legal validity.

Lord Kerr's judgment is only the second time the Supreme Court has given serious consideration to the *Carltona* principle. The first was *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, in which Lord Reed gave judgment for the court (with which Lord Neuberger, Lady Hale, Lord Sumption, and Lord Hodge agreed). In *Bourgass*, Lord Reed rightly notes that the principle is not one of delegation but "Rather, the principle is that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself." He notes further, relying on the House of Lords judgment in *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254, that it is possible that Parliament may impliedly exclude or limit the operation of the principle. In that judgment, Lord Griffiths had said, at page 303:

> *There are three examples of such a limitation in the Act of 1971. Section 13(5) provides:*
>
> > *"A person shall not be entitled to appeal against a refusal of leave to enter, or against a refusal of an entry clearance, if the Secretary of State certifies that directions have been given by the Secretary of State (and not by a person acting under his authority).. ."*
>
> *and see also sections 14(3) and 15(4).*
>
> > *There is no such limitation in respect of the decision to deport, nor would the Act be workable if there was such a limitation.*
>
> *Where I find in a statute three explicit limitations on the Secretary of State's power to devolve I should be very slow to read into the statute a further implicit limitation.*

In *Bourgass* itself, the question concerned whether a prison governor was

able to exercise the Secretary of State's power under Rule 45(1) of the Prison Rules 1999. Lord Reed concluded that the governor was the holder of a separate statutory office, rather than a civil servant under the direction of the Secretary of State and that the relevant rule, and other rules too, distinguished between the Secretary of State and prison governors and other prisoner officers. It would defeat the purpose of the rule for the governor to act for the Secretary of State, removing the very safeguard against abuse that involvement of the Secretary of the State was intended to answer. Lord Kerr's judgment does not cite *Bourgass*, which certainly seems to take for granted, rightly, that while Parliament may limit or exclude the operation of *Carltona*, it is otherwise the default rule.

The statutory default

Whatever the Supreme Court now says, the default position on the basis of which all legislation has actually been drafted for at least three quarters of a century (though doubtless for far longer) is that *Carltona* does apply unless there are substantial reasons for thinking that it does not. The Supreme Court should not have cast doubt on this fundamental building block for the operation of the machinery of government, by what is a heavy and only rhetorically veiled blow at the established understanding of existing law.

Even in the case of the exercise of powers to make legislative instruments, *Carltona* is regularly relied on, without express provision. The following extracts from section 3.7 "Signature" in the Government Legal Service's Statutory Instrument Drafting Guidance (March 2015) make the point:

> 3.7.1 *In most Departments any instrument which comes before the JCSI [Joint Committee on Statutory Instruments] is signed by a Minister. This will usually be the junior Minister responsible for the instrument's subject matter. Instruments sometimes require to be made by more than one Minister or Department (who may be acting jointly or severally), or require the confirmation, approval or consent of some further Minister or Department. In such cases the instrument should be signed by or on behalf of all such Ministers or Departments. The date of signing should be added against each signature, even though it repeats a date already inserted. Where there is more than one signature, the instrument is taken to be made on the last date of signing, and this should be entered as the 'made' date in the italic heading below the title of the instrument (see paragraph 3.3.2 above). See also SIP section 2.10.*
>
> 3.7.2 *For instruments where the enabling power is vested in 'the Secretary of State' see the discussion of that term in Annex 1. Note that any superfluous signature invites potential JCSI/SCSI [Joint Committee on Statutory Instruments/Select Committee on Statutory Instruments] criticism as causing confusion as to who the makers were and when it was made. Furthermore, it could at worst cast doubt on validity. In the unreported first instance judgment in 1983 in the case of Chris International Foods v Secretary of State it was held that the exercise by one Minister of a power simply on the instructions of another Minister was not a valid exercise of the power.*

...

> 3.7.5 *Where an instrument is local and not laid before Parliament so that it does not come before the JCSI it is often signed by an official. If an official is signing the preferred formula is title of post followed by "for and on behalf of the Secretary of State for [...]".*

This guidance clearly indicates – and assumes – that it is important that the signatory and the maker of the instrument should always coincide (see also section 3.20 of Statutory Instrument Practice, 5th edition, November 2017). This practice runs hand in hand with the presumption of regularity and the assumption that the internal arrangements of the department would and should be shielded from view, but should not diverge from what is required to be seen publicly. For almost all of the last three quarters of a century – and certainly in 1972 – the assumption would have been, both for statutory instrument making and for other decisions, that the transactions between the Minister in charge of a department and the junior Ministers and officials in the department would be legally and constitutionally protected from judicial and public scrutiny, but that the actual decision maker should nevertheless be identified on the face of what is done. A greater transparency about the internal workings of government that has resulted from various different factors in recent years but in particular from the Freedom of Information Act 2000 means that the assumption that those internal workings would not be made public is not as sound as it was. But it was the only conceivable basis for legislating in 1972. It requires a disregard for the operation of the machinery of government, and the historical context, not to see that the obvious and only explanation for the form of the provision in Article 4(2) lies in this analysis.

However, the guidance set out above is not the most important indication of the assumptions on which legislation has been drafted for as long as any living person involved in the process would be able to remember. You do not need extra legislative materials or insider information to know that the actual assumption in practice in the production of legislation has been that *Carltona* is the default. It is obvious from an examination of the statute book which, over the vast majority of its content, is silent on the question of *Carltona*.

All secondary legislation is drafted for the government of the day, and in practice all primary legislation too– because of the government's right to the initiative in Parliament on legislative matters and the de facto veto it has over the passage of legislation so long as it commands a majority in the House of Commons.

Given the central importance of the *Carltona* principle to the practical operation of the machinery of government, it is inconceivable that government would ever willingly be a party to the production of legislation that left the applicability of that principle in any degree of doubt, or to be worked out by the courts over time. It is therefore implausible to infer that such was the legislative intention. The silence in most cases is the

most powerful testimony that, so far as the real intentions of legislators is concerned, *Carltona* has invariably been treated as the default. Government can only operate on the basis that it is certain from the day legislation comes into force exactly what arrangements it needs to make for the practical exercise of the powers it confers on Ministers.

A study of legislative practice clearly demonstrates that the Carltona principle has been expressly addressed in legislation only where the significance of the subject-matter indicated that an assumption of the need for direct Ministerial involvement might be made by Parliament or by the courts, and one or both of two other sets of circumstances existed. The first set of circumstances is where Parliament required reassurance that there would be direct Ministerial involvement in decision-making. The other is where high level involvement in decision-making beyond the involvement of the Ministerial head of the department might be needed in some circumstances. There may also be cases where personal involvement by the Minister at the head of a department was assumed to be appropriate and accepted by government, but no legislative provision was made, because no reassurance about that was sought in Parliament. These cases may be difficult to identify, although the practice in relation to statutory instruments that is discussed above may be enough to suggest that this is an area where convention, as well as law, has a part to play.

So far as statutory practice is concerned, consider the Interception of Communications Act 1985. Here is an example of a provision designed to produce the result that Lord Kerr found to be intended in the case of 1972 Order and it is drafted very differently. Section 2 (now repealed) authorised the Secretary of State to issue warrants and required him not to issue a warrant unless he considered it necessary in the interests of national security, preventing or detecting serious crime, or safeguarding the economic well-being of the UK. Section 4 provided that:

> (1) *A warrant shall not be issued except—*
>
> > (a) *under the hand of the Secretary of State; or*
> >
> > (b) *in an urgent case where the Secretary of State has expressly authorised its issue and a statement of that fact is endorsed thereon, under the hand of an official of his department of or above the rank of Assistant Under Secretary of State.*
>
> (2) *A warrant shall, unless renewed under subsection (3) below, cease to have effect at the end of the relevant period.*
>
> (3) *The Secretary of State may, at any time before the end of the relevant period, renew a warrant if he considers that the warrant continues to be necessary as mentioned in section 2(2) above.*
>
> (4) If, *at any time before the end of the relevant period, the Secretary of State considers that a warrant is no longer necessary as mentioned in section 2(2)*

above, he shall cancel the warrant.

(5) A warrant shall not be renewed except by an instrument under the hand of the Secretary of State.

(6) In this section "the relevant period"—

(a) in relation to a warrant which has not been renewed, means—

(i) if the warrant was issued under subsection (1)(a) above, the period of two months beginning with the day on which it was issued; and

(ii) if the warrant was issued under subsection (1)(b) above, the period ending with the second working day following that day;

(b) in relation to a warrant which was last renewed within the period mentioned in paragraph (a)(ii) above, means the period of two months beginning with the day on which it was so renewed; and

...

To similar effect, section 5 of the Regulation of Investigatory Powers Act 2000 (the enactment of which superseded the 1985 Act) authorised the Secretary of State to issue a warrant authorising or requiring interception of communications and required the Secretary of State not to issue an interception warrant unless he believes the warrant is necessary on various grounds and is proportionate. Section 7 then provided:

(1) An interception warrant shall not be issued except—

(a) under the hand of the Secretary of State; or

(b) in a case falling within subsection (2), under the hand of a senior official.

(2) Those cases are—

(a) an urgent case in which the Secretary of State has himself expressly authorised the issue of the warrant in that case; and

(b) a case in which the warrant is for the purposes of a request for assistance made under an international mutual assistance agreement by the competent authorities of a country or territory outside the United Kingdom and either—

(i) it appears that the interception subject is outside the United Kingdom; or

> (ii) the interception to which the warrant relates is to take place in relation only to premises outside the United Kingdom.
>
> (3) An interception warrant—
>
> (a) must be addressed to the person falling within section 6(2) by whom, or on whose behalf, the application for the warrant was made; and
>
> (b) in the case of a warrant issued under the hand of a senior official, must contain, according to whatever is applicable—
>
> (i) one of the statements set out in subsection (4); and
>
> (ii) if it contains the statement set out in subsection (4)(b), one of the statements set out in subsection (5).
>
> (4) The statements referred to in subsection (3)(b)(i) are—
>
> (a) a statement that the case is an urgent case in which the Secretary of State has himself expressly authorised the issue of the warrant;
>
> (b) a statement that the warrant is issued for the purposes of a request for assistance made under an international mutual assistance agreement by the competent authorities of a country or territory outside the United Kingdom.
>
> (5) The statements referred to in subsection (3)(b)(ii) are—
>
> (a) a statement that the interception subject appears to be outside the United Kingdom;
>
> (b) a statement that the interception to which the warrant relates is to take place in relation only to premises outside the United Kingdom.

The significance of these provisions is that they make clear when and to what extent the Secretary of State must personally consider the matter in question, and they do so by way of specifying that the warrants must be made "under the hand of the Secretary of State". They also make limited provision for the Secretary of State's power nonetheless to be exercised and signed by senior officials and they do so by providing that the warrant is to be issued "under the hand of a senior official". In the latter case, they specifically limit the signing by an official to two cases. The first case is one in which the express authorisation of the Secretary of State himself is required. In the other case, no such authorisation is required but other conditions must be satisfied. In both cases however, the further condition has to be certified on the face of the instrument and does not rely on extraneous evidence of the direct involvement of the Secretary of State or the fulfilment of the other condition. In addition, there is no attempt in either case to gloss the provision that specifies that the Secretary of State

must believe certain conditions fulfilled before making the order. Even where the provision enables an official to sign a warrant in cases where the Secretary of State has not himself expressly authorised its issue, *Carltona* is left, as still applicable, to do the job of securing that the requirement of belief falls on the person actually making the order, in the name of the Secretary of State.

The relevant provisions of the Regulation of Investigatory Powers Act 2000 have now been replaced: principally by the provisions in sections 30 and 40 of the Investigatory Powers Act 2016. The drafting is slightly different and the policy a bit more complex, but certain essential features remain the same. The express involvement of the Secretary of State personally is specifically required in the cases where it is intended. The sections expressly indicate when a signature is not to constitute making. There are other cases where it clearly does. In those cases, the fulfilment of the conditions precedent to the making of the order have to be set out on the face of the order and no attempt is made to gloss the reference to the Secretary of State in the provisions setting out the conditions that the Secretary of State must consider to be satisfied before a warrant is issued and signed by an official without the Secretary of State's express authority (see e.g. section 19(3)).

Consider section 71 of the Serious Organised Crime and Police Act 2005, as amended, which provides in terms that "The Secretary of State for Business, Energy and Industrial Strategy, acting personally" is a specified prosecutor within the meaning of the Act. This excludes *Carltona*.

Consider section 28(1) of the Extradition Act 1989, essentially identical to the provision under consideration in *Adams*:

> *Any warrant or order to be issued or made by the Secretary of State under this Act shall be given under the hand of the Secretary of State, a Minister of State or an Under-Secretary of State.*

And finally, note section 33 of the Criminal Justice Act 1961:

> *Any order of a Secretary of State under this Part of this Act shall be given under the hand of the Secretary of State or of an Under-Secretary or Assistant Under-Secretary of State.*

These statutory precedents, perhaps especially the 1961 provision (which predates the 1972 Order), make very clear that Parliament sometimes intends to limit the *Carltona* principle by limiting the class of persons who may act on the Secretary of State's behalf. This technique confirms the default application of the principle. It also confirms that the standard way in which to authorise only a limited class of persons to exercise the Secretary of State's power is to specify under whose hand the order or warrant is to be issued and to require any circumstances that qualify who may make and sign the order to be set out on the face of the order. These precedents – this technique – put the 1972 Order in proper perspective, undermining Lord Kerr's distinction between making and signing and his inference that the Secretary of State must always personally consider

the case and make the decision, but that a Minister of State or Under Secretary of State may then issue the ICO, without this mismatch ever being recorded on the face of the order.

The contrast with the interception warrant cases is quite startling. In those cases there may be occasions when the Secretary of State authorises an act but cannot record it, but the warrant is only validly issued if the senior official, under whose hand the warrant is issued, attaches to the warrant a statement of fact confirming the Secretary of State's personal authorisation.

The Supreme Court's misunderstanding

It is surprising to see the attempt to clarify and modify the application of the doctrine in the context of the 1972 Order construed to mean the very opposite of what was actually intended. The premise on which provisions like Article 4(1) and (2) were undoubtedly drafted was that the *Carltona* principle would be in place and silently operative unless deliberately displaced. It was almost certainly recognised that the involvement of fundamental issues of civil liberties could put the appropriateness of that default position in doubt both as a matter of good governance or political acceptability, and even, conceivably, as a matter of law. The requirement of high level involvement would have been accepted, and the required involvement was indicated by reference to the only means by which it could be identified on the face of the instrument, the signature of the decision maker. If a further condition as to those involved in the decision-making had had to be fulfilled – such as clearance with the Secretary of State personally – the statute would have required that too to be set out on the face of the order

In all the precedents it was assumed that *Carltona* would still operate to make the decision by someone else in the Secretary of State's name a decision of the Secretary of State for legal, conceptual and political responsibility purposes. It was *Carltona* itself that made it clear that a delegation of the decision-making as such is superfluous and inappropriate. A delegation made unnecessary by *Carltona* should not be legislated for because it is a well-known drafting axiom that the unnecessary in legislation tends to turn septic. Operating on the signature requirement, rather than on the power itself was a neat way, and it was almost certainly thought a necessary subtlety, to indicate how far down in the department the Secretary of State's decision making on the question could go. It also avoided prejudicing the assumption that, once made, it was still – just as if undelegated – a decision of the Secretary of State for all other purposes.

It has long been the practice in British government, independently of law, to ensure that, where the matters that were subject to Ministerial executive recommendations or decisions impinged directly on important individual civil liberties, the decisions should be taken personally by the responsible Minister. This is demonstrated by the long-established practice in relation to the prerogative of mercy in the death penalty cases and also for pre-1985 Act interception warrants – both of which involved

the exercise of non-statutory, prerogative powers. It is also an analogous respect for non-legal constitutional proprieties in the case of Ministerial decisions on the content of legislative instruments that dictates the practice in relation to statutory instruments that is set out above in the guidance on the signing of subordinate legislation.

The consequences of the Supreme Court's judgment

The Supreme Court has held that Gerry Adams was unlawfully detained from 21 July 1973. He is likely to bring proceedings for the tort of false imprisonment. He cannot bring an action for damages under the Human Rights Act 1998 because that Act does not have general retrospective effect. However, he is free to apply to the European Court of Human Rights, alleging breach of his Article 5 right to liberty, which is breached by unlawful detention. Mr Adams has, predictably but not entirely without cause, claimed that the Supreme Court's ruling must render unlawful many of the detentions of suspected terrorists that took place after 7 November 1972.[18] Anyone who was the subject of an ICO which was not signed by the Secretary of State himself, which might include scores if not hundreds of persons detained between 7 November 1972 and the change in policy introduced on 11 November 1974. Not all those persons will have been detained by way of an ICO signed by the Minister of State or Under Secretary of State, but many will have been.

The government thus faces the prospect of hundreds of lawsuits for the tort of false imprisonment, in which good faith, absence of negligence and so forth are no defence. It may well be required to pay tens of millions of pounds in damages to those who were detained. One might hope that only minimal damages would be awarded, in view of the context of the detention and the grounds on which the lawfulness of the detention has been called into question, which on one view is a technical failure of process rather than a substantive absence of justification. However, this hope is not well supported, for the courts might just as easily reason that the persons in question were detained without trial, in some cases for extended periods of time, and that all persons are entitled to robust compensation for unlawful detention, even if they were suspected terrorists. The latter approach is more likely, and the government will be encouraged, for obvious reasons, to settle early and fully, rather than to contest claims which it cannot win.

This state of affairs is not one that anyone should welcome. The Supreme Court has badly misinterpreted the 1972 Order (both as to its political substance and as to the formalities which the Court has directly misinterpreted) and has held, almost half a century after the fact, that many decisions to detain suspected terrorists were made improperly, without power. In reality, the ICOs signed by persons other than the Secretary of State were lawfully made and the decision whether detention should

18. Gerry Adams: 'It's up to the UK government now to address the cases of other internees', 13 May 2020 https://www.thejournal.ie/re-adme/gerry-adams-maze-prison-5098340-May2020/

be more than temporary was made by a quasi-judicial process in which ministers had no involvement.[19] Parliament and government should not tolerate this state of affairs to continue. The government should invite Parliament to enact legislation that would deem all ICOs made (signed) by a Minister of State or Under Secretary of State to have been lawfully made. This would put an end to litigation alleging that detention was unlawful and that compensation is now to be paid. While Parliament should not legislate to restore Mr Adam's conviction for escaping from lawful custody, the proposed legislation could certainly prohibit him, or any other person who was the subject of an ICO, from recovering compensation for alleged false imprisonment.

It is entirely proper for Parliament in this context to consider legislating to limit the damage the Supreme Court's judgment does to the rule of law and to justice. The legislation should, as we say, preserve the immediate effect of the judgment, which is the quashing of Mr Adams's conviction. But the legislation need not leave it open to him to recover compensation from the government and, more importantly, the legislation should close the door to further challenges of this kind.

The proposed legislation might be the subject of a legal challenge by way of the Human Rights Act 1998, for alleged breach of the Article 6 right to a fair trial, and a challenge in the European Court of Human Rights itself for breach of the Article 5 right to liberty and the Article 13 right to an effective remedy. True, in 1978 the European Court of Human Rights accepted that the UK's detention measures were "strictly required by the exigencies of the situation", which meant that they fell within the scope of the UK's Article 15 derogation and did not constitute breaches of Article 5.[20] But the premise of that judgment was that detention was lawful in domestic law. The Supreme Court's judgment undermines that premise and Strasbourg case law would provide Mr Adams with arguable grounds on which to persuade the Court to revisit its 1978 ruling and to hold that the UK's derogation did not prevent his detention from breaching Article 5. This would not only compound the propaganda victory Mr Adams has already secured, but would also place the UK under an obligation in international law to pay such compensation as the Court might award.

Neither legal challenge could impugn the validity of the remedial legislation we propose, but it would of course provide an opportunity for political opponents of reform, which would include Mr Adams and his supporters but also many human rights law enthusiasts and other reflexive opponents of parliamentary action to correct mistaken or problematic judgments. The principled case for the legislation, which the UK should be prepared to make in argument before the European Court of Human Rights would be that the legislation was correcting a mistaken interpretation of the 1972 Order and thus restoring the law as it had rightly been understood. Corrective legislation of this kind is a vital part of the UK's constitutional tradition, which the Strasbourg Court should respect.

This litigation has proven a means for Mr Adams to challenge, again, the merits of British policy in Northern Ireland during the Troubles. The

19. The ICO was authority for detention after 28 days only if the Chief Constable referred the case to a Commissioner and temporary detention continued only until the Commissioner determined the case.

20. *Ireland v United Kingdom* [1978] ECHR 1

victory he secured in the Supreme Court is obviously embarrassing for Her Majesty's Government. It unmeritoriously reinforces the narrative that the actions of the UK government in Northern Ireland were lawless. But still more important, even than the judgment's immediate and direct implications for the government's exposure to litigation for false imprisonment – not to mention other challenges that may be made to convictions for attempting to escape from lawful custody – is the judgment's implications for the *Carltona* principle.

In putting the standing of that principle in doubt, the judgment threatens the smooth workings of our whole system of government. An unknown number of legal and constitutional relations are put at risk by the Supreme Court's reasoning. The judgment cannot help but encourage claimants to challenge the exercise of a Ministerial power, in this or that context, by persons other than the Minister in question personally. Lord Kerr's insistence that the principle is not a presumption, his stress on the seriousness of the subject matter and his approach to determining whether personal consideration imposes an excessive burden on the Secretary of State – all these features of the judgment, and especially the first, tend seriously to undermine the validity of exercises of statutory power, including the making of statutory instruments. The implications for how government operates could scarcely be more serious.

Even if it were possible to assume that the case will in practice have very little effect on the way future cases are decided by reference to *Carltona*, that is not going to be the perception in Whitehall, where relying on the principle for future executive and for legislating will be seen to be at best risky and often unsafe. It is bound to provide an extra opportunity for anyone now seeking to oppose government policy using litigation in the courts. More litigation to obstruct policy is itself damaging to government, even if most of it is unsuccessful. The case itself amply illustrates what happens when a doubt, even an unreasonable and misconceived one, arises about whether the principle can be relied on. The system reacts with an abundance of caution and Ministerial heads of department will find themselves being asked to make many more decisions themselves. Distracting Ministers from strategic issues and bogging them down in the detail would of course be a godsend to Sir Humphrey Appleby; but real-life civil servants and Ministers are likely to see it as seriously damaging to the quality of national governance.

The question is how these consequences are to be averted. The best course of action might be for a new panel of the Supreme Court, ideally consisting of more than five Justices, authoritatively to reject the approach taken in *Adams*, recalling *Bourgass* and affirming in strong terms that the courts continue to recognise *Carltona* as a fundamental constitutional principle, which informs how legislation is framed and understood.

There is no guarantee that the Supreme Court will make such a decision, not least since the timing and framing of litigation is unpredictable. If *Adams* is taken up by claimants as a ground to unravel and challenge a range of governmental decisions, as may be likely, then perhaps the opportunity

will arise sooner rather than later. But the effect on government is going to be immediate and it will take months if not years for such a case to arrive back in the Supreme Court.

The cost in the meantime would be real, with the government unable without risk or intolerable inconvenience to exercise numerous statutory powers. There is a very strong case for rapid legislation to reverse *Adams*, making clear that the *Carltona* principle is indeed the default. The legislation might not be easy to frame. No provision to state the law to be what you think it already is can ever be easy to frame, and it is going to have to find a way to distinguish the known intentional exceptions from those the courts might now wrongly infer. In addition, it is almost inevitable that retrospective validation of past acts will itself be challenged in the courts. Nevertheless, the alternatives are all worse and the government now needs to invite Parliament to enact legislation to correct the Supreme Court's error.

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