Misjudging Parliament's reversal of the Supreme Court's judgment in *R v Adams*

Policy Exchange

Richard Ekins KC (Hon) and Sir Stephen Laws KCB, KC (Hon)

Preface by Rt Hon the Lord Hope of Craighead KT

Foreword by Lord Bew, Rt Hon the Lord Butler of Brockwell KG GCB CVO, Lord Caine,Lord Faulks KC, Lord Godson, Rt Hon the Lord Howard of Lympne CH KC, Rt Hon the Lord Howell of Guildford, Rt Hon the Lord Keen of Elie KC, Lord Lisvane KCB DL, Lord Macdonald of River Glaven KC, Rt Hon the Lord Powell of Bayswater KCMG, Lord Verdirame KC and Rt Hon the Lord West of Spithead GCB DSC.

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Preface

The Rt Hon the Lord Hope of Craighead KT, Deputy President of the Supreme Court of the United Kingdom (2009-2013) and Lord of Appeal in Ordinary (1996-2009)

One of the pillars of our unwritten constitution is the power of Parliament in the exercise of its sovereign authority to reverse decisions taken by our highest courts with which it disagrees. It is inherent in the exercise of this power that it extends to the giving of retrospect effect to the legislation that it enacts. The aim of the legislation is to restore the law to what it was before the judgment was issued. Without the power to legislate retrospectively the decision with which it disagrees would not be able to be reversed.

Perhaps the best example of the exercise of this power in comparatively recent times is the War Damage Act 1965, by which Parliament retrospectively reversed the decision of the House of Lords in *Burmah Oil, v Lord Advocate* [1965] AC 75. Parliament exercised the same power when it enacted sections 46 and 47 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. These sections were designed to reverse retrospectively the decision of the UK Supreme Court in *R v Adams* [2020] UKSC 19. It was seen to have departed from the settled understanding of the *Carltona* principle for the administration of government in this country when it set aside an interim custody order because it had been made by a Minister of State and not personally by the Secretary of State.

That is the background to this paper, which addresses the government's proposal to repeal those sections in the exercise of its powers under section 10 of the Human Right Act 1998. The purpose of this proposal is to give effect to a declaration by the High Court of Justice of Northern Ireland in *Dillon & Ors* [2024] NIKB 11 in favour of Patrick Fitzsimmons, one of the applicants for judicial review in that case, under section 4 of the 1998 Act. The retrospective/retroactive effect of sections 46 and 47 was held to be incompatible with his rights under Article 6 of, and Article 1 of Protocol 1 to, the European Convention of Human Rights. This paper advances powerful reasons for thinking that this decision was misdirected. But the government has decided not to appeal against it, so it must proceed instead on the basis that action may need to be taken to remove the incompatibility. This, then, gives rise to two crucial questions which require the most careful and urgent attention.

The first is whether the action which the government is proposing to take should be taken at all. The second is whether it is right that it should

do so by statutory instrument under section 10 of the 1998 Act. This paper explains why the answer to each of these questions should be in the negative.

As to the first, Parliament is not obliged by the 1998 Act to act on a declaration of incompatibility. This may be one of those exceptional cases where it is the public interest that it should not do so. The ground on which the finding of incompatibility was based, namely the retrospective effect of sections 46 and 47, strikes at the heart of the power of Parliament in the exercise of its authority to reverse decisions with which it disagrees. It should not surrender that power unless it has been driven to so on grounds of unquestionable authority. They do not exist in this case. It is for this reason too that proceeding under section 10 in this case is wholly inappropriate. A Minister may make an order under that section if there are compelling reasons for doing so. One can understand that there may be issues as to the best use of parliamentary time. But for Parliament to surrender its power to reverse decisions with which it disagrees raises questions of great constitutional importance which, as they require to be carefully and fully debated, only primary legislation can address.

Foreword

Lord Bew, Chair of the Committee on Standards in Public Life 2013-2018
Rt Hon the Lord Butler of Brockwell KG GCB CVO, Cabinet Secretary 1988-1998
Lord Caine, Parliamentary Under-Secretary (Northern Ireland Office) 2021-2024
Lord Faulks KC, former Minister of Justice and Chair of the Independent Review of Administrative Law
Lord Godson, Director of Policy Exchange
Rt Hon the Lord Howard of Lympne CH KC, former Home Secretary and Leader of the Opposition
Rt Hon the Lord Howell of Guildford, Minister of State for Northern Ireland 1972-1974
Rt Hon the Lord Keen of Elie KC, former Advocate General for Scotland
Lord Lisvane KCB DL, former Clerk of the House of Commons
Lord Macdonald of River Glaven KC, former Director of Public Prosecutions
Rt Hon the Lord Powell of Bayswater KCMG, Private Secretary to the Prime Minister 1983-1991
Lord Verdirame KC, barrister and Professor of International Law, King's College London
Rt Hon the Lord West of Spithead GCB DSC, former Parliamentary Under-Secretary of State for Security and Counter-Terrorism

When the Supreme Court decided in May 2020 to allow Gerry Adams's appeal against his conviction in 1975 for attempting to escape from lawful custody, it was apparent to many parliamentarians that urgent legislation was needed to overturn the judgment and to limit its damaging consequences. We were aided in reaching this conclusion by a paper that Policy Exchange published a fortnight after the judgment, in which Professor Ekins and Sir Stephen Laws provided a compelling critique of the Supreme Court's reasoning and made a powerful case for remedial legislation.

The point of enacting remedial legislation was not to reverse the outcome of the appeal and to reinstate Adams's conviction, but rather to limit the judgment's wider consequences. First amongst these wider consequences was the doubt the judgment introduced about the status, application and extent of the *Carltona* principle, which is fundamental to our way of government. In mishandling that principle, and misinterpreting the legislation under which Adams and others were detained in the 1970s, the judgment also opened the door for a new wave of litigation claiming compensation for unlawful detention and wrongful conviction, payment of which would seem to be a very poor use of scarce public funds in a time of national economic crisis, or indeed at any other time.

It was for this reason that peers supported legislation to reverse the

central holding of the Supreme Court's judgment, making clear that interim custody orders made by the Minister of State in the 1970s had been lawfully made – and in this way vindicating the *Carltona* principle. The legislation also provided that, in consequence, no compensation should be paid to anyone on the grounds that his conviction or detention rested on an interim custody order that had been made by the Minister of State. An amendment to the Northern Ireland Troubles (Legacy and Reconciliation) Bill tabled by Lord Faulks KC and Lord Godson was accepted by the Government and, after some drafting changes, became sections 46 and 47 of the Bill when it was enacted.

The amendment(s) were debated in both Houses of Parliament and adopted without division. Every parliamentarian that spoke, in both Houses of Parliament, including the then Opposition shadow Secretary of State for Northern Ireland, supported legislating in this way. Parliament was unusually united in reasoning that the Supreme Court's judgment was mistaken and that it needed to be reversed in order to restore the long-established understanding of the *Carltona* principle.

Parliamentarians were aware of the risk that the legislation might be attacked as an unfair, retrospective exercise of Parliament's legislative authority that is incompatible with Article 6 of the European Convention on Human Rights. In a second paper for Policy Exchange, published in June 2023, Professor Ekins and Sir Stephen anticipated and addressed this argument. For the reasons they gave in their paper, which was raised in debate in the House of Lords, it was quite clear that the legislation was entirely compatible with Article 6 and was not unfairly retrospective.

Predictably, a claimant, Patrick Fitzsimmons, applied to the Northern Ireland High Court for a declaration that sections 46 and 47 were incompatible with his rights under Article 6 and Article 1, Protocol 1 (the right to property). In February 2024, the Northern Ireland High Court agreed and exercised its power under section 4 of the Human Rights Act 1998 to make such a declaration. In this new paper for Policy Exchange, Professor Ekins and Sir Stephen consider the High Court's reasoning and find it unpersuasive. We agree with them that the High Court misunderstood the reasons for which Parliament acted, mishandled the case law of the Strasbourg Court that it purported to apply, and failed to do justice to Parliament's reasoning in deciding to reverse the Supreme Court's judgment.

The High Court's treatment of sections 46 and 47 formed only one part of its complex judgment, many aspects of which were appealed to the Court of Appeal. But in July 2024, the new Government decided to abandon the appeal against the five declarations of incompatibility that the High Court had made, including the one in relation to sections 46 and 47. The Government has now tabled a draft Remedial Order that, inter alia, purports simply to repeal these two provisions. It has failed to provide reasons for abandoning the appeal and, in particular, to explain the basis on which it considers the legislation is incompatible with Convention rights. As Professor Ekins and Sir Stephen argue, it seems obvious that

the Government has simply failed to differentiate this declaration from the others. It bears repeating, while many of the provisions of the 2023 Act were controversial, sections 46 and 47 were not. The Government supported their enactment when in opposition and has not made any case for their repeal.

The Government should not have abandoned the appeal against the declaration, especially in view of the High Court's questionable assumption that only the Supreme Court was able to recognise that *R v Adams* had been wrongly decided. The High Court's treatment of this point was badly confused, for the reasons set out in this paper, but the logic of its judgment should have compelled the Government to pursue its appeal, not to abandon it.

By abandoning the appeal, the Government has triggered its powers under section 10 of the Human Rights Act to amend or repeal sections 46 and 47. But the Government should only use this power when it has "compelling reasons" for so doing. There is no reasonable case for the use of section 10 in this context. On a careful analysis, which this paper provides, it is clear that the provisions are entirely compatible with Convention rights and domestic and European case law. There is no urgency that warrants the Government in using section 10 to repeal these provisions, ever more so since the Government intends to bring forward a Bill to repeal and replace the 2023 Act. The draft Remedial Order is also technically deficient and may not work as the Government intends.

The Supreme Court's judgment in *R v Adams* was a mistake and it was within Parliament's authority, and indeed was its responsibility, to intervene to set the law right, to restore the law actually enacted in 1972. The supremacy of Parliament, which is the bedrock of our constitution, undoubtedly entails the ability to enact legislation that reverses the effect of judicial decisions which misconstrue Parliament's legislative intention. This proposition is affirmed by domestic case law, but is also consistent with European case law, which the High Court's judgment mishandled.

Sometimes restoring legal clarity that has been lost necessitates retrospective legislation. Neither Gerry Adams nor anyone else acted to their detriment in reliance on the Supreme Court's misunderstanding of the 1972 Order and in reversing the judgment in *R v Adams* Parliament did not treat anyone unfairly. The legislation came into force before any further legal claim had been heard, let alone determined, a vital point that the High Court simply overlooked.

Even if one accepted that the Supreme Court's judgment in *R v Adams* was correct, which we do not, the judgment at most exposed a technicality, which should not require payment of substantial damages. In other words, it would have been simply unjust to force the Government to pay compensation from the public purse for what was not an injustice but at most a procedural glitch.

It would not have aided the cause of reconciliation in Northern Ireland to leave open the possibility of meritless litigation that followed from a clearly mistaken Supreme Court judgment, litigation that would be unfair

to those who made the law in 1972 and applied it thereafter. Many of us made these points in 2023, when the legislation was debated and enacted. For all these reasons, no parliamentarian and no minister should accept the High Court's conclusion that the legislation was incompatible with Convention rights.

The Government should not have abandoned its appeal and should not now make a Remedial Order repealing the legislation. Proceeding in this way would fail to respect Parliament's recent, unanimous decision and would avoid and distort the important debate that is needed before sections 46 and 47 are repealed. We strongly support Policy Exchange's critique of the High Court's judgment and the Government's response to it and call on the Government now to reconsider its draft Remedial Order and to undertake not to repeal sections 46 and 47 by ministerial order.

Executive summary

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 was always set to be a controversial enactment. The Labour Party fought the 2024 election undertaking to repeal and replace it. But sections 46 and 47 of the 2023 Act were *not* controversial when enacted. These two provisions were adopted unanimously by Parliament in response to the Supreme Court's 2020 judgment in *R v Adams*, in which the Court wrongly allowed Gerry Adams's appeal against his 1975 conviction for attempting to escape from lawful custody.

In *R v Adams*, the Supreme Court misinterpreted the 1972 legislation under which Mr Adams was detained. In so doing, the Court undermined the established understanding of the fundamental *Carltona* principle, which provides for how powers conferred on the Secretary of State may be exercised, in practice, by others for whom the Secretary of State takes responsibility. The judgment also opened the door for Mr Adams and hundreds of others detained in the 1970s to claim "compensation" for what should always have been recognised as lawful detention. This is why the judgment matters and why Parliament was right to reverse it.

Sections 46 and 47 originated in an amendment tabled by Lord Faulks KC and Lord Godson to the Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022, as it then was. Their amendment attracted cross-party support in the House of Lords and was accepted in principle by the then Government. In place of the Faulks/Godson amendment, the Government proposed what are now sections 46 and 47. The then Opposition supported the Government amendments, as did both Houses after debate, but without division. Nevertheless, the Government now proposes to repeal sections 46 and 47 by exercising its powers under section 10 of the Human Rights Act 1998 – not, it seems, because of any change of mind about their merits, but simply because in February 2024 a judge of the Northern Ireland High Court declared them incompatible with Convention rights.

This paper considers the High Court's reasoning and shows that the Court was wrong to conclude that sections 46 and 47 were incompatible with Convention rights. It argues that the Government was wrong to accept the declaration of incompatibility, wrong to abandon the appeal to the Court of Appeal, and wrong to decide to repeal sections 46 and 47 by ministerial order.

Parliament's decision in 2023 to legislate in response to *R v Adams* was a considered decision, fully consistent with constitutional principle, and supported by all parliamentarians after reasoned debate. It should

not be undone now by a statutory instrument made by ministers who are obviously not thinking carefully about the merits of the provisions, the High Court's misconceived evaluation of them, or the damaging consequences of their repeal.

The High Court's reasoning went wrong at every stage, beginning with the Court's conclusion that sections 46 and 47 were not in fact enacted in order to vindicate the *Carltona* principle. Nor did the Court do justice to Parliament's concern that paying compensation to Gerry Adams and others would be unjust. Indeed, the Court seemingly would not accept that Parliament enacted sections 46 and 47 precisely because it thought that the judgment was wrongly decided. The High Court also wrongly concluded that the sections had nothing to do with peace and reconciliation in Northern Ireland, a chain of reasoning that led it improperly to question proceedings in Parliament.

The Court wrongly asked itself whether the Supreme Court's judgment, which the legislation overturned, was "settled", whereas it should have asked this question about the law and practice before *R v Adams*, which Parliament aimed to restore. The Court misunderstood the significance of the manner and timing of the legislation, which was not some kind of vindictive response to the prospect of compensation being paid to Gerry Adams. The Court did not address the highly significant fact that sections 46 and 47 came into force before any claim for compensation had been heard, let alone determined. The High Court also misunderstood the scope of the legislation and its effects, understating the number of cases to which the legislation applied and their complexity, which was relevant to the burden that hearing these cases would place on the courts.

It was not unfair for Parliament to respond to a surprising Supreme Court judgment, which had called into question the validity of decisions made almost half a century ago, by legislating to restore their validity and to prevent further litigation, while taking care to avoid overturning any acquittal or blocking any pending appeal against conviction. Parliament had very strong reasons for legislating in this way, including to restore the legislator's original intention, to uphold the law as it was understood between 1972 and 2020, to prevent compensation being paid in reliance on a mistaken interpretation of the law, to avoid overburdening the Northern Ireland courts, and to promote peace and reconciliation by preventing meritless and controversial litigation and claims for compensation.

Shortly after the general election, the new Government abandoned the previous Government's appeal against the declarations of incompatibility made by the High Court. The Government did not provide then, and has not provided since, any explanation for why it abandoned the appeal against the High Court's declaration that sections 46 and 47 were incompatible with Convention rights. The most plausible inference is that the Government has not distinguished this particular declaration from the other declarations made by the High Court and Court of Appeal in relation to other provisions of the 2023 Act – and thus has not thought through the tension between its reasoned and reasonable support for sections 46

and 47 at the time of enactment and its uncritical acceptance now of the High Court's rhetorically comprehensive, but substantively groundless, conclusions.

It bears noting that the Government's power under section 10 of the Human Rights Act 1998 to repeal sections 46 and 47 has only arisen at this time because of the Government concession of the appeal against the High Court's judgment, which necessarily makes any further appeal to the Supreme Court impossible. The perverse irony of this is that both the High Court and Court of Appeal had reasoned that only the Supreme Court could find that *R v Adams* had undermined the *Carltona* principle and was wrongly decided. The High Court and the Court of Appeal were wrong to reason in this way, but the mystery is why the Government would accept a declaration made on that premise, rather than pursue appeals that, on the High Court's own logic, were obviously warranted, necessary even.

The Government has now laid a draft Remedial Order before Parliament, which aims simply to repeal sections 46 and 47. This is constitutionally objectionable. The Government has not made any kind of case for there being "compelling reasons" (as required by section 10 of the Human Rights Act) to make a Remedial Order in advance of the primary legislation about legacy issues that it has promised. That legislation will provide the necessary opportunity for proper parliamentary deliberation and debate about whether and in what respects new provision needs to be made about the effect of sections 46 and 47. It should not be pre-empted by a process that carries a serious risk that the distinct questions that arise about those sections are not isolated and considered with the appropriate care. In addition, by taking the form of a simple and premature repeal of sections 46 and 47, rather than by spelling out how entitlements and liabilities removed by those sections are to be revived, the Remedial Order defectively disregards the normal rules about the effect of a repeal and risks giving rise to serious legal uncertainty. That includes immediately reviving on a much wider front, and arguably aggravating, the uncertainty about the fundamental *Carltona* principle that resulted from the Supreme Court decision in *R v Adams*.

Whatever one's views about the other provisions in the 2023 Act, Parliament was united in thinking that sections 46 and 47 were a reasonable and necessary response to a badly mistaken and damaging Supreme Court judgment. No plausible case has been made for their repeal, either by the High Court (or the Court of Appeal) or the Government. Indeed, the Government has made no case at all. Parliamentarians should refuse to support this cavalier dismissal of their recent handiwork, a dismissal that cannot be squared with Parliament's legitimate freedom to respond to a wrongly decided judgment with remedial legislation that restores the legal status quo ante.

Introduction

Parliament enacted sections 46 and 47 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 in response to the Supreme Court's judgment in *R v Adams*,[1] which had allowed Gerry Adams's appeal against his conviction in 1975 for attempting to escape from lawful custody. The Supreme Court had reasoned that the "interim custody order" (ICO) made in 1973 in relation to Mr Adams was unlawful because it had been made by a Minister of State rather than by the Secretary of State personally.

In a paper published shortly after the judgment,[2] we argued that the Supreme Court had misunderstood the 1972 Order that authorised the making of ICOs, in part because of the Court's confusion about the status and significance of the *Carltona* principle, which is fundamental to modern parliamentary government. We warned that, without legislative intervention, there was a real risk that the Government would be unfairly required to compensate persons such as Mr Adams whose detention, for suspected involvement in terrorism, should in fact be regarded as perfectly lawful. More generally, we warned that the Supreme Court's judgment cast considerable doubt on the extent to which the *Carltona* principle could be relied on, either when legislating in future or in relation to numerous past acts of government under existing or previous legislation. In that way it introduced needless and damaging uncertainty into the law and invited unjustifiable legal challenges to exercises of the Secretary of State's powers in a very wide range of contexts.

For these reasons, we strongly supported Parliament's decision to enact sections 46 and 47 of the 2023 Act, provisions that validate with retrospective effect ICOs made and signed by Ministers of State and Under Secretaries of State, rather than by the Secretary of State personally. (The full text of sections 46 and 47 is set out in Appendix One of this paper; the key provisions are section 46(2) and (3) and section 47(1).)

Parliament's legislative intervention restored the law as it stood before the Supreme Court's mistake. The legislation did not reinstate Mr Adams's conviction or unfairly strip any person of the fruits of their litigation. The legislation was justified in order to make clear that the Supreme Court had misread the 1972 Order and to restore the otherwise settled understanding of the *Carltona* principle and its application in a context like *Adams* – the understanding that the Court's judgment had put into doubt. The legislation was also justified in order to prevent compensation unjustly being paid to persons who had not in truth been wronged at all, an injustice that would be likely to work against peace and reconciliation in Northern Ireland. Finally, the legislation was justified in order to

1. [2020] UKSC 19; 13 May 2020
2. R Ekins and S Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 30 May 2020)

prevent the Northern Ireland courts wrongly being burdened by having to hear appeals against conviction or to determine proceedings claiming compensation for unlawful detention on the grounds that a person's detention upwards of 50 years earlier began with a decision to make an ICO by a person authorised to sign an ICO, rather than by the Secretary of State personally.

In enacting sections 46 and 47, Parliament was taking responsibility for the statute book and intervening to correct a significant judicial error, the consequences of which promised to be very damaging indeed. Parliament's constitutional role has always extended to the enactment of legislation that it thinks is necessary to change the law when the court has misunderstood it, or developed it in ways that threaten the common good. Sometimes this requires retrospective legislation, which may be necessary precisely in order to protect settled legal expectations and to vindicate the rule of law. It is thus dismaying that a human rights law challenge to the legitimacy of this recent legislative intervention has succeeded in the Northern Irish courts and, worse, that the new Government has accepted that the intervention was in breach of the European Convention on Human Rights and is proposing to undo Parliament's correction using a ministerial order.

The context is this. On February 2024, the Northern Ireland High Court ruled (i) that a number of provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 were incompatible with the Northern Ireland Protocol, and thus should be disapplied by virtue of section 7A of the European Union Withdrawal Act 2018 and (ii) that other provisions were incompatible with Convention rights and that the Court should exercise its power under section 4 of the Human Rights Act 1998 to declare them incompatible.[3]

This paper questions the High Court's declaration that sections 46 and 47 of the Act are incompatible with Convention rights.

One of the claimants in this complex case, Patrick Fitzsimmons, argued that sections 46 and 47 of the 2023 Act were incompatible with Article 6 (right to a fair trial), Article 7 (no punishment without law) and Article 1, Protocol 1 (A1P1) (protection of property).

In the aftermath of the Supreme Court's 2020 judgment, Gerry Adams had, predictably, applied for compensation for wrongful conviction. A number of others detained in similar circumstances in the 1970s, including Mr Fitzsimmons, also appealed against their convictions and/or applied for compensation for wrongful conviction and/or began proceedings for compensation for false imprisonment or breach of their Article 5 right to liberty. Mr Fitzsimmons' appeal against conviction succeeded but his legal proceedings for compensation, which were at an early stage, were barred by sections 46 and 47, at which point he applied for declarations of incompatibility under section 4 of the Human Rights Act.

The High Court held that in enacting sections 46 and 47, validating ICOs with retrospective effect, Parliament had breached the claimant's rights under Article 6 and A1P1. (The Court held that the claimant had no

3. *Re Dillon and others* [2024] NIKB 11

standing to bring an Article 7 claim.)

The then Government appealed to the Northern Ireland Court of Appeal. On 29 July 2024, the Secretary of State for Northern Ireland announced that the new Government had abandoned the previous Government's grounds of appeal against the High Court's various section 4 declarations of incompatibility – including the declaration in relation to sections 46 and 47. On 20 September 2024, the Northern Ireland Court of Appeal gave judgment and commended the Government's decision to concede that sections 46 and 47 are incompatible with Convention rights.[4]

The 29 July announcement also made clear that the Government intended to exercise its powers under section 10 of the Human Rights Act 1998 to make a Remedial Order amending the 2023 Act to remove the incompatibilities that the High Court had found. On 4 December, the Government laid a draft Remedial Order before Parliament, which, so far as the subject matter of this paper is concerned, confined itself to repealing sections 46 and 47.[5]

This paper considers the High Court's reasoning and challenges the Court's conclusions that sections 46 and 47 of the 2023 Act are incompatible with Convention rights. Our argument is that the High Court mischaracterised Parliament's intention in enacting those two provisions and wrongly assumed that *Adams* was rightly decided.

On the High Court's logic, it would seem to be impossible for a court, or at least any court other than the Supreme Court itself, to recognise that legislation is compatible with Article 6 precisely because it is intended to correct a judicial error, and in particular to restore the law that the legislator intended to make in the first place. But this reasoning, we shall show, is perverse, not to mention out of line with relevant case law. Further, the High Court failed to grasp the wider significance of *Adams*, and its undesirable implications for the *Carltona* principle, implications which Parliament was clearly concerned to limit in enacting sections 46 and 47. In addition, the High Court did not do justice to Parliament's decision that paying "compensation" to Gerry Adams, and others detained in similar circumstances, would be unjust and damaging.

The Government was wrong to concede that these two provisions were incompatible with Convention rights. The new Government should have maintained the previous Government's appeal against the Court's findings on this point, first to the Court of Appeal and on to the Supreme Court if need be.

The paper argues, finally, that the Government is wrong to propose to exercise its remedial powers under section 10 of the Human Rights Act 1998 to repeal sections 46 and 47. Amending the 2023 Act in this way would be wrong on the merits and an unconstitutional abuse of section 10 of the 1998 Act. It would also – not least because of the Government's stated intention to repeal and replace the 2023 Act more generally – assume an untenable reading of the requirement in section 10 that the section should be exercised only when there are "compelling reasons for proceeding under" that section, rather than using primary legislation.

4. *Re Dillon and others* [2024] NICA 59.
5. Northern Ireland Office, A proposal for a Remedial Order to amend the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, December 2024.

Parliamentarians, we argue, should refuse to approve the draft Remedial Order because of its inclusion of the repeal of sections 46 and 47 of the Act, which, properly understood, clearly do not breach Convention rights, and also, incidentally, because the draft Order's attempt to undo sections 46 and 47 is technically defective and gives rise to a serious degree of uncertainty about its effect.

The Supreme Court's decision in *R v Adams*

The Detention of Terrorists (Northern Ireland) Order 1972 authorised detention of persons suspected of involvement in terrorism. Detention began with the making of an interim custody order, which was an exercise of a power conferred by the 1972 Order on the Secretary of State. The Order specified that only the Secretary of State, a Minister of State or an Under Secretary of State could sign an interim custody order.

Mr Gerry Adams was detained on 1 July 1973 pursuant to an interim custody order signed by a Minister of State. His detention under the order was for 28 days and was then superseded by detention under a detention order made by an independent Commissioner, whose decisions were appealable. While subject to detention under the detention order, he attempted to escape on 24 December 1973 and 27 July 1974. This led to two convictions for the offence of attempting to escape from lawful custody in 1975, for which he was sentenced to two periods of imprisonment, to be served consecutively.

In October 2009, Mr Adams discovered that a government legal advisor had written an opinion dated 4 July 1974, which concluded that a court would probably hold that an interim custody order was only lawfully made if the Secretary of State had considered the matter personally. Sometime later, Mr Adams applied for an extension of time in which to appeal against his convictions.[6] The application was granted by Gillen LJ on 20 April 2017.

There are very good reasons for thinking that the application should have been rejected. The discovery (release) of the legal opinion in question was not a new fact which provided grounds to allow an appeal against conviction more than forty years late.[7] It was fully open to Mr Adams, at the time of his trial, to challenge the lawfulness of the ICO and any effect of its unlawfulness on the subsequent detention order, on the basis that the interim custody order appeared on its face to have been made as a result of a decision by the person who signed it. Nothing in the release of the legal opinion had any bearing on those questions. Neither the content of the opinion nor the fact of its eventual disclosure had any connection to the proper interpretation of the 1972 Order, and the Supreme Court never suggested otherwise.

On 14 February 2018, the Northern Ireland Court of Appeal rejected the appeal.[8] On 13 May 2020, the United Kingdom Supreme Court allowed the appeal,[9] holding that the 1972 Order required the Secretary of State

6. It is not clear exactly when Mr Adams applied for an extension; see *R v Adams* [2020] UKSC 19 at [7].
7. Similarly, uncovering "evidence" that the Secretary of State was not in fact personally involved in the making of an ICO is not a new fact that justifies permission to appeal out of time. Each ICO declared on its face who had made it, viz. the person who had signed it. If this was not the Secretary of State, it was a person authorised by the 1972 Order to act on behalf of the Secretary of State but taking responsibility for making the ICO in question. On the absurdity of the suggestion that a Minister of State signs an order as a mere functionary of the Secretary of State, without taking responsibility for making the order, see the foreword to our 2020 paper, written by Sir Geoffrey Cox KC MP, as he now is.
8. *R v Adams* [2018] NICA 8
9. *R v Adams* [2020] UKSC 19

personally to consider (and thus to make) each interim custody order. In this case, there was no evidence that the Secretary of State had personally considered whether to make the order, and some evidence that he had not. On that basis, the Supreme Court concluded, the interim custody order was unlawful. It followed, the Court decided, that the detention order that followed was also illegal, which meant that Mr Adams had not been lawfully detained at the time of his attempted escape and that his conviction could not stand.

The Supreme Court's judgment was obviously wrong. Read as an enactment forming part of the body of legislative provisions of the British state, the 1972 Order clearly authorised a Minister of State or an Under Secretary of State to act on behalf of the Secretary of State in making an interim custody order.[10] This reading of the 1972 Order was supported and indeed required by the *Carltona* doctrine, which lays down that enactments (whether by primary or secondary legislation) that confer power on a Secretary of State are to be presumed to mean – unless they expressly or by implication exclude the presumption – that the power may be exercised by other ministers or civil servants on his behalf. The 1972 Order had qualified the application of the *Carltona* doctrine, by providing that in making an interim custody order only a Minister of State or an Under Secretary of State could act on behalf of the Secretary of State. The Supreme Court's conclusion that the power could only be exercised by the Secretary of State personally is impossible to reconcile with the text of the Order taken as an instrument of the modern British state, with the long-standing constitutional presumption, or with the parliamentary history.

Moreover, the distinction that the Supreme Court sought to make between acting on behalf of the Secretary of State to decide about whether the ICO was made and acting in relation to the signing of the ICO could not have been intended in 1972 or properly taken to be the law at any time while the 1972 Order was in force. At that time – as the law on public interest immunity and the presumption of regularity was understood – it would have been thought quite impossible for evidence of what had actually taken place in a Minister's private office to be adduced in court – either to confirm or to contradict the inference that the signatory and decision-maker were the same. In that context, restricting those who might sign an ICO to specified persons would have been thought the most straightforward way of qualifying the Carltona principle to ensure that the decision to make an ICO should be made only by one of the designated signatories.

These weaknesses in the Court's reasoning were set out in greater detail in our paper for Policy Exchange, *Mishandling the Law: Gerry Adams and the Supreme Court*, published on 30 May 2020. The paper was endorsed by Geoffrey Cox QC MP (former Attorney General of England and Wales) and Lord Butler of Brockwell (former Cabinet Secretary), both of whom expressed particular concern about the judgment's impacts on the *Carltona* principle. The paper's critique was echoed by Lord Sumption (former Supreme Court Justice), writing in *The Times*,[11] and has been raised several

10. 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.

11. Lord Sumption, "Supreme Court's Gerry Adams decision has left the law in an awful mess", *The Times*, 2 July 2020

times in the House of Lords by a number of eminent jurists.[12] It was also supported by Lord Howell of Guildford, former Minister of State for Northern Ireland, in his paper published by Policy Exchange on 10 June 2020.[13] Lord Howell explains the 1973 practice, confirming that the 1972 Order was made and applied on the understanding that Ministers of State had authority to make interim custody orders on behalf of the Secretary of State, who was often unavailable. Lord Howell confirmed also that, in view of its political salience, the Secretary of State would almost certainly have been involved in discussions about whether to make the interim custody order in relation to Mr Adams. He notes that the 1972 Order would have been utterly unworkable if the lawfulness of detention had remained uncertain unless and until proof had been provided that the Secretary of State had personally considered each case. The merits of the Supreme Court's judgment were also raised with Lord Reed, President of the Court, in two of his meetings with the Constitution Committee of the House of Lords, on 17 March 2021 and on 6 April 2022,[14] with Lord Reed seeming unwilling to defend the judgment and saying, in response to Lord Howell, "From what you say, it sounds like a wayward judgment, in which case it will be put right in another case. Without studying it myself, I could not say."[15]

12. See for example the debate about the Judicial Review and Courts Bill, 7 February 2022, per Lord Faulks KC, Lord Howard of Lympne CH, KC and Lord Trevethin and Oaksey KC.
13. Lord Howell, *The Supreme Court's misunderstanding in the Gerry Adams case: A personal view* (Policy Exchange, 10 June 2020)
14. Constitution Committee, House of Lords, Annual evidence session with the President and Deputy President of the Supreme Court
15. On 17 March 2021. In his evidence on 6 April 2022, in response to related questions, Lord Reed said:

    "The decision it came to was a unanimous decision. I did not take part in it myself. I understand that it is a controversial decision, legally as well as perhaps politically. It is always open for any party, including in this case the Government, who wants to test the correctness of a case to raise the point again. The Carltona principle is one that obviously pervades government and sooner or later there will be another case in which somebody relies on the Adams decision and there will be scope then, if anybody wishes to challenge the correctness of Adams, for us to reconsider it."

Mr *Adams*'s compensation claim

After succeeding in his appeal in May 2020, a month later Mr Adams applied to the Secretary of State for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988. The Secretary of State took the view, in a letter dated 15 December 2021, that Mr Adams was not eligible for compensation under this section because the reversal of his conviction did not turn on a new or newly discovered fact that shows beyond reasonable doubt that there had been a miscarriage of justice. On 28 April 2023, the High Court in Belfast allowed Mr Adams' application for judicial review challenging this determination and ordered the Secretary of State to reconsider his application for compensation under section 133 of the 1988 Act.[16]

16. *Re Adams* [2023] NIKB 53

The enactment of sections 46 and 47 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023

On 11 May 2023, on the last day of the Committee Stage for the Northern Ireland Troubles (Legacy and Reconciliation) Bill, the House of Lords considered an amendment tabled by Lord Faulks KC and Lord Godson.[17] The Faulks/Godson amendment introduced a new clause into the Bill that would address the authorisation of ICOs, reversing the legal effects of the Supreme Court's judgment in *Adams*. (The text of the Faulks/Godson amendment is set out in Appendix Two.) The amendment was strongly supported by peers from across the House, including Lord Butler of Brockwell (former Cabinet Secretary), Lord Macdonald of River Glaven KC (former Director of Public Prosecutions), Lord Howell of Guildford, Lord Sandhurst KC, Baroness Hoey, and Lord Dodds of Duncairn. Lord Brown of Eaton-under-Heywood (former Supreme Court Justice and former Law Lord) was unable to attend the 11 May debate and retired from the House on 19 June (and died on 7 July), but published an article in *The Telegraph* in support of the amendment,[18] explaining why the Supreme Court's judgment was clearly wrong and why Parliament must take the opportunity to reverse it.

The Faulks/Godson amendment was considered by the House on the second day of the Bill's Report Stage on 26 June 2023 (with Baroness Hoey by this time also sponsoring the amendment). In advance of 26 June, it was unclear whether the Government would support the amendment. In a new paper for Policy Exchange, entitled *Reversing the Supreme Court's judgment in* R v Adams and published on 23 June, we considered and rejected two reasons why the Government might have been reluctant to accept the amendment. The paper set out the background to the amendment and made clear that there were very strong reasons of principle to enact it.

The first possible objection to the amendment was that it was not a suitable means to repair the more general damage that *Adams* does to *Carltona* principle and thus to protect that principle. The line of argument that we anticipated and rejected was (a) that legislation focusing on the 1972 Order (rather than setting out a more general legislative fix) would be counter-productive, (b) that a more general legislative fix would be very difficult and might not even be possible, and (c) that it would

17. The Bill had its first reading in the House of Commons on 17 May 2022 and its first reading in the House of Lords on 5 July 2022. It received Royal Assent on 18 September 2023.

18. Lord Brown of Eaton-under-Heywood, "The Supreme Court got it wrong with the Gerry Adams judgment – Parliament should overturn it", *Telegraph*, 20 June 2023

be better to attempt to repair and protect the *Carltona* principle through litigation. We made clear that, on the contrary, the obvious point of the amendment was to reverse the central holding of *Adams* by making clear that the Supreme Court had misunderstood the legislator's intention in enacting the 1972 Order. The amendment would prevent *Adams* from being relied upon in future cases for the proposition it articulates that the *Carltona* principle is *not* the default presumption about legislative intent. In this way, the amendment would help restore the law as it stood before *Adams*. We argued, further, that it would be irresponsible for Parliament and the Government simply to leave it to the Supreme Court, in some future case, to correct its own error. This would be to tolerate and prolong a state of affairs in which the law was needlessly uncertain by wrongly relying on whether a suitable test case would arise and on whether the court would choose to resolve it in a way that would provide a sufficient remedy for the mischief created by *Adams*. In the meantime, reliance on the principle as the default position continued day by day in multiple government activities and needed to continue to be the basis on which all new legislation is drafted.

The second possible objection to the amendment was that it was incompatible with Article 6. The amendment aimed not only to repair the damage that *Adams* did to the previous understanding of the *Carltona* principle, and in that sense to restore it, but also to limit the other, more direct legal effects of *Adams*, namely further appeals against conviction for escaping (or attempting to escape) from lawful custody, litigation seeking compensation for unlawful detention, and applications for compensation for wrongful conviction. We argued that Parliament had very good reason to legislate to ensure that no other convictions would be unsettled on the basis of the Supreme Court's misreading of the 1972 Order and that no compensation would be paid in these circumstances, because on a correct analysis the convictions were entirely legitimate and the detention in question was entirely lawful. We considered the case law of the European Court of Human Rights and made clear that the Faulks/Godson amendment was compatible with Article 6 because it was intended to correct a legal mistake (made by the Supreme Court rather than the Government), to restore legal certainty, and to prevent compensation unjustly being paid to persons who did not deserve it – not having been wronged at all – by or on behalf of those who had justifiably relied on the law as it was understood before the Supreme Court retrospectively reinterpreted it. Further, there were compelling grounds for retrospective legislation quite apart from remedying the retrospective injustice perpetrated by the judgement itself, namely to vindicate the *Carltona* principle and to deal fairly with the legacy of the Troubles by refusing to pay unjustified compensation – which would tend to frustrate rather than to promote community reconciliation – and to ensure that the truth was told, namely that detention pursuant to interim custody orders had been perfectly lawful.

Our 23 June paper was backed by eight distinguished peers, including Lord Brown, Lord Butler, Lord Carlile of Berriew KC, Lord Howard KC, Lord

Howell, Lord Macdonald KC, Lord West of Spithead, and Lord Wolfson of Tredegar KC. On 26 June, the House of Lords considered the Faulks/Godson amendment, which was introduced by Lord Faulks KC and strongly supported by Lord Butler, Lord Howell, Baroness Hoey and Lord Murphy of Torfaen (former Labour Secretary of State for Northern Ireland). Baroness Suttie expressed her hope that the Government would give the matter more thought in view of its wider implications for *Carltona*. Lord Caine, the Minister, accepted the principle of the amendment and undertook to bring forward an amendment on third reading, an undertaking which Lord Faulks warmly accepted, withdrawing the Faulks/Godson amendment from the House. On 4 July 2023, the House of Lords considered and approved, without division, the Government's amendments, which now form sections 46 and 47 of the 2023 Act. In speeches in the House, Lord Faulks and Lord Godson welcomed the Government's amendments, as did Lord Dodds of Duncairn, Baroness O'Loan, and Lord Murphy. Lord Pannick did not speak against the amendments, indeed he too supported them, but did attempt to argue that Lord Kerr, for the Supreme Court in *Adams*, had not ignored the *Carltona* principle or thrown it into doubt, but rather had simply read the 1972 Order in a particular way.

On 18 July, the House of Commons considered the Lords' amendments. While the Bill as a whole remained very controversial, the amendments that became section 46 and 47 were accepted without division. The Secretary of State for Northern Ireland made clear that:

> *…it has always been the Government's understanding that interim custody orders made by Ministers of the Crown under powers conferred on the Secretary of State were perfectly valid. In order to restore clarity around the legal position and to make sure that no one is inappropriately advantaged by a different interpretation of the law on a technicality, the Government tabled amendments that retrospectively validate all interim custody orders.*

These amendments were welcomed by Gavin Robinson MP and by the Shadow Secretary of State for Northern Ireland, Peter Kyle MP (now Secretary of State for Science, Innovation and Technology), who said:

> *In the other place, amendments were introduced to stop Gerry Adams receiving compensation, following a Supreme Court ruling in 2020. We support the upholding of the Carltona principle and that amendment.*

The Bill, including sections 46 and 47, received Royal Assent on 18 September 2023.

The High Court's decision in *Fitzsimmons*

On 8 September 1975, the claimant, Mr Fitzsimmons, was convicted of attempting to escape from lawful custody. His initial period of detention began with an interim custody order dated 1 March 1973, which was signed by a Parliamentary Under Secretary of State. His further period of detention must have been authorised by a Commissioner, making a fresh determination, which may have been confirmed on appeal.

In the wake of *Adams*, the claimant appealed against his conviction. An extension of time to appeal was granted. (As in relation to *Adams* itself, we say that no extension should have been granted in this case or any other similar case: no new fact had emerged that justified allowing an appeal out of time). On 14 March 2022, the claimant's conviction was quashed, applying *Adams*, and on 10 March 2022,[19] the applicant began proceedings seeking damages for false imprisonment and breach of his Article 5 right to liberty. He also applied, on 27 June 2023 for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988.

Sections 46 and 47 had the effect of making it impossible for Mr Fitzsimmons to continue his proceedings seeking damages or to maintain his application for compensation. The question for the High Court was whether the legislation's retrospective validation of ICOs, which had this effect on Mr Fitzsimmons's proceedings and application, was compatible with Article 6 or A1P1.

The High Court had considered Article 6 in the context of a separate challenge to section 43 of the 2023 Act,[20] and had set out its analysis of the Article 6 case law beginning, at [381], with *Nait-Liman v Switzerland*.

In that case, the Strasbourg Court remarked that "the right to a court is not absolute; it is subject to limitations permitted by implication since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard".[21] It went on to add, in familiar words, that limitations would not be compatible unless they had a legitimate aim and unless there was a proportionate relationship between the means employed and the aim.[22] The High Court then went on to quote, at [408], *Scordino v Italy (No.1)*, in which the Strasbourg Court remarked that Article 6 "preclude[s] any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence judicial determination of a dispute".[23] The High Court noted that these principles were restated and affirmed in the more recent judgment of the Grand Chamber in *Vegotex International SA v*

19. So, four days before his conviction was quashed.

20. Section 43(1) provides that "A relevant Troubles-related civil action that was brought on or after the day of the First Reading in the House of Commons of the Bill for this Act may not be continued on and after the day on which this section comes into force." The High Court declared this provision incompatible with Article 6 and disapplied it in reliance on section 7A of the European Union Withdrawal Act 2018. Section 43(2) provides that "A relevant Troubles-related civil action may not be brought on or after the day on which this section comes into force." The High Court did not declare this provision incompatible with Article 6 or disapply it.

21. [2018] 3 WLUK 861 at para. 102

22. para. 104

23. [2007] 45 EHRR 7 at para. 126

Belgium [2023] 76 EHRR 15, which it went on to consider in some detail.

In *Vegotex*, the Strasbourg Court had to consider legislation enacted in response to a Court of Cassation ruling. The case concerned tax assessment proceedings. The administrative practice at the time was that the tax authorities would serve a payment order on a company, an order which had the effect of interrupting the five-year limitation period after which the debt would have been time-barred. The Court of Cassation in 2002 disrupted this practice by holding that a payment order did *not* interrupt the limitation period. The legislature responded in 2004, enacting legislation that provided that a payment order constituted a "valid act interrupting the limitation period". The enactment had effect in relation to the applicant's tax affairs, in relation to which a payment order had been made in October 2000, interrupting the limitation period that was otherwise about to end. The question for the Strasbourg Court was thus whether the legislation breached the ECHR.

The High Court quoted at length from *Vegotex*, noting at [670] the following general test (emphasis added by the High Court in its judgment):

> 92. *In the context of civil disputes, the Court has repeatedly ruled that although, in principle, the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of fair trial enshrined in Article 6 precludes any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, save on compelling grounds of the general interest* …
>
> 93. *There are dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable (see* National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom, 23 *October 1997* …*). Respect for the rule of law and the notion of a fair trial therefore require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection*…

The High Court noted, at [671], that the Strasbourg Court would consider a number of different matters in deciding whether legislation was justified on compelling grounds of general interest. The High Court quoted from para. 108 of the Strasbourg Court's judgment:

> *The court will assess… whether or not the line of case-law overturned by the legislative intervention complained of had been settled (see paragraphs 109-12 below); the manner and timing of the enactment of the legislation (see paragraphs 113-14 below); the foreseeability of the legislature's intervention (see paragraphs 115-19 below); and the scope of the legislation and its effects ((see paragraphs 12022 below).*

The quotation omits, per the ellipsis, the phrase "the compelling nature of the relevant grounds referred to above as a whole and in the light

of the following elements". This is important because the High Court's judgment goes on to consider each of these four elements, as we outline below, but does not clearly assess the compelling nature of the grounds for the legislation as a whole.

The Strasbourg Court concluded that there had been no violation of Article 6. At [672], the High Court purports to quote extensively from the Grand Chamber's judgment on point, setting out paras 73-77 in full. In fact, the quotation was from paras 73-77 of the Third Chamber's judgment, not the Grand Chamber's. We have set out below the material passages from the quoted material relied on by the High Court:

> 73. … *By enacting the retrospective provision in question, the legislature sought to counteract the effect of the Court of Cassation ruling, which itself was retrospective, and to reaffirm the legality of an administrative practice that had not seriously been called into question… Thus, the aim of the legislature's intervention was to reassert the administrative authorities' original intention. Accordingly, it was not unforeseeable…*
>
> 74. *The Court must also have regard to the fact that what was at stake was not simply the protection of the State's financial interests… The aim in the present case was also to ensure that taxes were paid by those who were liable for them…*
>
> 75. *The legislature's intervention was designed to ensure legal certainty.* …
>
> 76. *It therefore appears that, until the Court of Cassation judgment of 10 October 2002, the applicant company itself considered the limitation period to have been interrupted by the payment order of 24 October 2000. Having hoped, rather than expected, to be able to benefit from the new case-law of the Court of Cassation… it could not therefore have been surprised by the legislature's response…*
>
> 77. *Accordingly, in the specific circumstances of the present case, the measure in question was based on compelling grounds of general interest, the aim being to restore the interruption of the limitation period by payment orders that had been served well before the Court of Cassation's 2002 judgment, and thus to allow the disputes pending before the courts to be resolved without affecting taxpayers' substantive rights…*

Purporting to apply *Vegotex*, the High Court noted, at [683], that "only compelling grounds of general interest are sufficient to justify retrospective and/or retroactive legislation which has the effect of influencing the judicial determination of a dispute." The Court said that two justifications had been advanced by the Secretary of State, viz. "to provide legal certainty through the restoration of the *Carltona* principle and reducing the burden on the Northern Ireland courts system."

The High Court's main analysis is to be found in a long paragraph, [697], which sets out nine considerations that the Court takes to be relevant to the question of whether there were compelling grounds of

a general interest to justify interference with Article 6. In view of this paragraph's importance to the judgment, we set it out in full:

i. *The case-law with regards to the validity of ICOs made under the 1972 Order was definitively settled by the unanimous Supreme Court ruling in* R v Adams. *It is on this basis that the applicant has now brought several undetermined claims which were brought before the 2023 Act entered into force. The court is further bound by the Supreme Court's finding that the* Carltona *principle was not undermined but rather displaced by the "unmistakably clear" language, a conclusion that appears to have been shared in July 1974 by JBE Hutton QC. In* Vegotex, *the legitimacy of the administrative practice "had not seriously been called into question" and had been reaffirmed by the Court of Cassation (see para [38]). The same cannot be said in relation to unlawfully made ICOs following the Supreme Court's ruling.*

ii. *The court is satisfied that the manner and timing in which the ICO amendments were introduced militate against the respondent's contention that the restoration of the* Carltona *principle constitutes a compelling ground of general interest. The amendment was only introduced on the last day of Committee stage in the House of Lords on 11 May 2023, two weeks after this court's decision in* Re Adams. *According to the initial advice dated 18 May 2023, "it aimed to prohibit the bringing of compensation claims linked to the Supreme Court ruling in Gerry Adams' favour in 2020." This amendment was initially opposed by the Government due to its perceived "limited impact." Therefore, despite references to the* Carltona *principle in Government advice and in the House of Lords debate at Third Reading, the Government's policy intent, in my view, skews disproportionately in favour of securing an amendment to "bar 'Adams-type' compensation claims." Indeed, in a final advice opened to this court dated 28 June 2023 the explanation of the policy intent makes no mention of the* Carltona *principle. Rather, it restates the express purpose of prohibiting civil cases, applications for compensation as a result of miscarriages of justice and appeals against conviction "brought directly as a result of the ruling in* R v Adams." *Certainly, the amendment could hardly be said to be in pursuit of the Legacy and Reconciliation Policy objectives of the 2023 Act. Rather, it was ad hoc and reactive to the* Adams *litigation.*

iii. *This policy intent manifests itself in the statutory language of sections 46 and 47. In this respect, the absence of any reference to the* Carltona *principle in the provision is significant.*

iv. *In line with the considerations identified by the Grand Chamber in* Vegotex *and also the recent decision of* Legros *discussed above (see para [412]), the court is satisfied that the retroactive/retrospective effect of sections 46 and 47 was unforeseeable and rendered the applicant's article 6 rights unassailable in practice. In particular, the court is influenced by the fact that the impugned provisions go further than section 43. The applicant was unable to sustain any claim until after his conviction was quashed on 14 March 2022. At the earliest, the possibility of any such a claim would only have arisen after the Supreme Court's decision on 13 May 2020. This is not a case where the potential plaintiff/applicant has waited for*

many years and allowed a limitation period to accrue before initiating proceedings.

v. *The scope of the impugned provision is narrow. They are concerned solely with the validity of ICOs and with preventing benefit to those identified following* R v Adams *as having been unlawfully detained on foot of ICOs that were unlawfully made. They have no wider effect.*

vi. *The fact remains that as a matter of law the applicant has been acquitted of the offence which forms the basis of his claims. He should be treated as such accordingly.*

vii. *The court is not persuaded by [the Secretary of State's] characterisation of the Supreme Court decision in* Adams *as being based on "a technicality". As the Supreme Court pointed out the power invested in the Secretary of State by Article 4(1) was "a momentous one", involving the detention of citizens without trial. The court was clearly alive to the* Carltona *principle taking the view that it was displaced by "unmistakably clear" wording of the statutory language.*

viii. *The court is not persuaded that the interference is justified on the basis of an alleged burden on the courts. There is simply no evidential basis to sustain this. The cohort affected is small.*

ix. *If it is felt necessary to restore the* Carltona *principle or put it on a statutory footing, this can be achieved without retroactively interfering with the rights of a small number of individuals.*

It will be clear that the High Court was attempting to apply the four elements noted in para 108 of the Grand Chamber's judgment in *Vegotex*. Thus, (i) concerns whether or not the legislation overturned a settled line of case-law, (ii-iii) concern the manner and timing of the legislation, (iv) concerns the foreseeability of the legislative intervention, and (v-ix) concern the scope of the legislation and its effects. The division between these points is not watertight.

In paragraph [698], the High Court simply concluded that in light of these considerations the Secretary of State has not demonstrated compelling grounds of a general interest to justify the interference in the applicant's Article 6 rights.

The High Court went on to apply the same analysis in relation to A1P1,[24] holding that the applicant's civil claim for false imprisonment was an "asset" and that the legislation was an unjustified interfered with this asset. However, the same did not hold, the High Court said, for the claimant's claim for breach of Article 5, which was hopeless insofar as it concerned detention in 1973, 27 years before the Human Rights Act came into force, or for statutory compensation for miscarriage of justice, because the High Court's judgment in *Re Adams* was under appeal and thus was not "settled" for the purposes of A1P1.

24. See [699-703]

The flaws in the High Court's reasoning in *Fitzsimmons*

The High Court's misidentification of the relevant grounds justifying legislative intervention

The question for the High Court was whether there were compelling grounds of general interest to justify sections 46 and 47. It was thus extremely important for the High Court to identify with care which grounds justified these provisions – the reasons that Parliament had for enacting them – before going on to consider whether the grounds were strong enough to justify retrospective legal change and interference in ongoing judicial proceedings. Unfortunately, the High Court did not carefully identify the relevant grounds that justified sections 46 and 47, but instead misstated or overlooked the grounds on which Parliament acted in enacting these provisions.

At [683], the High Court noted that two justifications had been advanced by the Secretary of State, viz. "to provide legal certainty through the restoration of the *Carltona* principle and reducing the burden on the Northern Ireland courts system."

This passage appears in the course of a summary of the submissions of counsel for the claimant and the next paragraph, [684], sets out the claimant's two arguments for why providing legal certainty by restoring the *Carltona* principle could not have been a ground justifying the legislation. The first was that the Supreme Court's decision in *Adams* did not in fact undermine *Carltona* and that far from undermining legal certainty the Supreme Court's judgment had provided it, until that is this legislation had unsettled the law. The second was that the legislation did not mention *Carltona* at all and that a close reading of the legislative history confirmed that the point of the legislation was not in fact to restore the *Carltona* principle but rather to stop compensation being paid to Mr Adams and others in his position.

The next paragraph, [685], summarised the claimant's argument that the small number of cases that had been identified when the amendment was introduced, about 40 claims in all, was insufficient to support the conclusion that the legislation was required to reduce an onerous burden on the courts. That is, the claimant accepted that reducing the burden on the courts was a relevant ground but argued that it was not a compelling ground.

Thus, argued the claimant (per the summary in [686]), there were no compelling grounds of general interest. Note that counsel seems to have taken for granted that preventing compensation from being paid to any person, in reliance on the Supreme Court's judgment in *Adams*, was not a relevant ground at all. The High Court's summary of counsel's submission, at [684], strongly implied that "denying compensation" was an illicit purpose, hence the conclusion "that this legislative intervention was 'ad hoc', 'reactive' and 'unforeseeable.'"

In [689], the High Court summarised the Secretary of State's argument "that the restoration of the *Carltona* principle constitutes a compelling ground of general interest sufficient to justify the interference." In the following paragraph, [690], the High Court's summary of the Secretary of State's submission continued thus:

> … It is argued that the evidential material reveals a consistent focus on, and support for, the restoration of the Carltona principle. As observed by the House of Lords, there was a concern that individuals would be inappropriately advantaged by the UKSC's decision and there was a need to restore the widely held view of Parliament that the Carltona principle applied to situations such as those dealt with in Adams. From Parliament's perspective, the ICO provisions necessarily required retrospective application to reverse an error of the Supreme Court which itself had retrospective effect. Finally, reliance is placed on several authorities supporting the proposition that defects of a technical nature such as drafting errors may provide a proper basis for retrospective legislation.

This summary of the submission focuses on restoration of the *Carltona* principle but does note, in passing, the "concern that individuals would be inappropriately advantaged by the UKSC's decision". However, the High Court never identifies this as a distinct relevant ground of the legislation, save indirectly in the course of rejecting the submission that restoration of the *Carltona* principle was a ground at all. Thus, the Court never seems to have asked itself whether "denying compensation" to anyone who sought to rely on *Adams* was a compelling ground of general interest.

In the critical passage of the judgment, paragraph [697], the High Court effectively adopted the submissions of counsel for the claimant, rejecting the Secretary of State's argument that restoring the *Carltona* principle was a relevant ground for the legislation. That is, the High Court did not say that "restoring Carltona" was not a compelling ground of general interest, but rather denied that it was a ground at all.

The Court adopted the argument that Parliament's real intention was to deny compensation to Mr Adams and others in his position, such as the claimant. Again, the High Court did not consider whether denying compensation could be a compelling ground of general interest and indeed in effect failed to treat it as a ground at all, focusing instead on (a) restoration of the *Carltona* principle (which the Court said could not justify the legislation because it was not why Parliament legislated and in any case was not necessary) and (b) on reducing the burden on the courts (which the Court said was not a compelling ground in view of the small number of

cases that the legislation would block from proceeding). The High Court accordingly failed squarely to consider whether sections 46 and 47 were justified on the grounds that limiting payment of compensation to Mr Adams and others was necessary to promote reconciliation in Northern Ireland, save to assert that "the amendment could hardly be said to be in pursuit of the Legacy and Reconciliation Policy objectives of the 2023 Act."

In these ways, the judgment failed to identify accurately the relevant grounds for the legislation, the reasons why Parliament enacted the legislation.

On the High Court's reasoning, section 46 is inexplicable, for it is section 47 that spells out and qualifies the implications of section 46, limiting further proceedings and the payment of compensation but permitting appeals against conviction that predate commencement to proceed. Section 46 is the lead provision and was manifestly framed as a provision to restore the validity of ICOs that had been made by a person authorised to sign the ICO – a Minister of State or Under Secretary of State – rather than by the Secretary of State personally. This was a direct legislative reversal of the Supreme Court's conclusion in *Adams* that an ICO was only valid if made by the Secretary of State personally, albeit a reversal that did not restore Mr Adams's criminal conviction.

The obvious inference from the legislative structure, which was supported by the legislative history and set out in argument by counsel (see [689-690]), was that Parliament thought that the Supreme Court's judgment was wrongly decided. Parliament clearly reasoned that the Court had misinterpreted the 1972 Order and had wrongly concluded that the legislator's intention had been to require ICOs to be made by the Secretary of State personally – even if they were to be signed by a Minister of State or Under Secretary of State. Parliament enacted section 46 (the validity of ICOs) and section 47 (prohibition of proceedings and claims for compensation) in order to restore the law that the legislator made in 1972, which the Supreme Court had overturned, with retrospective effect, in 2020. For the restoration of the law as it stood until 13 May 2020 to be effective, the legislation necessarily had to be retrospective.

In this context it is worth noting that the High Court had a submission before it, which it summarised in paragraph [690], to the effect that the payment of compensation to any person detained subsequent to an ICO having been made by a person authorised to sign the ICO, but not by the Secretary of State personally, would be a windfall gain arising from a technicality. So, even if Parliament had thought that the Supreme Court's judgment was not in error, it might nonetheless have thought it was important to require future cases, including applications for compensation, to be decided on the premise that an ICO was lawfully made even if it was not made by the Secretary of State personally. This conclusion could reasonably have been made on the grounds that the validity of ICOs had not been effectively questioned until May 2020 and that it was wrong to permit legal proceedings to be initiated – and especially for compensation

to be paid – on the basis of a challenge half a century later to the validity of ICOs. Parliament might also have reasoned further that while a period of detention may have begun with an ICO, any further period of detention would have been authorised by an independent Commissioner, such that the validity of the longer period of detention should not be called into question by challenging the ICO.

It is clear from the enactment of section 46 that this was not the main or only ground on which Parliament chose to enact the two sections. If it had been the objective, it could have been achieved entirely by a provision confined to something along the lines of section 47 alone. However, it is plausible, given that we know that the issue of compatibility with Convention rights was a matter to which Parliament was alive, that the fact that it would have been reasonable for Parliament to legislate under these circumstances to prevent a windfall arising from a technicality was a contributory factor in Parliament's reasoning that its legislation was compatible with the Strasbourg jurisprudence. In any event, the Court did not do justice to the argument in its analysis at [697]. It rejected what it said was counsel's submission that it was the Supreme Court's judgment in *Adams* that was based on a technicality. It missed the point that the argument required it to consider, instead, whether it was the payment of compensation that would be based on a technicality.

The supposed binding effect of *R v Adams*

While the High Court noted that the premise of the Secretary of State's submission was that the Supreme Court's judgment in *Adams* was wrongly decided, the High Court did not squarely consider whether, or why, Parliament thought that *Adams* was wrongly decided.

Instead, in rejecting the conclusion that a relevant ground of the legislation was to restore the *Carltona* principle, the High Court twice noted that it was bound by the Supreme Court's judgment in *Adams*. The first occasion was in its opening summary of the Secretary of State's submission (emphasis added):

> 689. *The respondent, whilst acknowledging this court is bound by the Supreme Court's decision in* R v Adams*, proceeds on the premise that it was wrongly decided. In essence, the respondent contends that the Court failed to have regard to the constitutional presumption that Parliament should be taken to have intended that the* Carltona *principle should apply. In any case, the respondent submits that the decision of the UKSC in* Adams *is not dispositive and that the restoration of the* Carltona *principle constitutes a compelling ground of general interest sufficient to justify the interference.*

This summary of the submission suggests that it is somehow incoherent, as if asserting that counsel for the Secretary of State had argued that *Adams* was wrongly decided despite knowing full well that the High Court could not accept this submission because it was bound by the doctrine of precedent to accept that *Adams* had been rightly decided.

The second point at which the High Court refers to the binding effect

of *Adams* is in (i), the first of the nine considerations set out in the pivotal paragraph [697] (emphasis added):

> *The case-law with regards to the validity of ICOs made under the 1972 Order was definitely settled by the unanimous Supreme Court ruling in* R v Adams. *It is on this basis that the applicant has now brought several undetermined claims which were brought before the 2023 Act entered into force. The court is further bound by the Supreme Court's finding that the* Carltona *principle was not undermined but rather displaced by the "unmistakably clear" language, a conclusion that appears to have been shared in July 1974 by JBE Hutton QC.*

This passage misunderstands the binding effect of precedent. The ratio of the Supreme Court's judgment is that the language of the 1972 Order, read in its context, required ICOs to be made by the Secretary of State personally. The Supreme Court's reasoning – that the language of the 1972 Order was sufficiently clear to displace the *Carltona* principle (rather than to qualify its application, by limiting authority to make ICOs to those who were authorised to sign them) – is the problem. The further problem is that the Supreme Court saw fit to suggest that the *Carltona* principle was not a presumption at all. When the High Court says that it is bound to accept that the Supreme Court's judgment did not undermine the *Carltona* principle, it is worth recalling exactly what the Supreme Court said about the principle in the course of its judgment, at paragraph [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.*

This analysis of the principle is incompatible with the legislative practice and case law across at least the past seventy years, including *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54.[25] It gives rise to needless doubt about the nature of the *Carltona* principle and its application.

Strictly, the question for the High Court was not whether *Adams* was authority for the proposition that the *Carltona* principle is not a presumption about legislative intent. Rather, the question for the High Court was whether Parliament was concerned that one effect of *Adams* would be

25. Professor Timothy Endicott has suggested that *Adams* is arguably per incuriam insofar as it fails to engage with *Bourgass*. See his *Administrative Law* (5th edition, OUP, 2021), 291.

to undermine confidence in the meaning and application of the *Carltona* principle and thus whether the legislation was enacted in part to restore confidence in the principle's application.

Parliament reasoned that the approach taken by the Supreme Court in *Adams* put the *Carltona* principle in doubt because the Court had wrongly concluded that the language of the 1972 Order, with its limitation on who was permitted to sign the 1972 Order, displaced the *Carltona* principle and because the Court had taken the principle not to be a presumption about legislative intent.

The ratio of the Supreme Court's judgment is not that *Adams* does not undermine the *Carltona* principle. The Supreme Court may well have thought that its judgment – its interpretation of the 1972 Order – did not undermine the principle, but the question is whether in fact it did undermine it in future. And that is a question which was not before the Supreme Court and which it could not answer authoritatively. Indeed, it is not strictly a legal question at all, but rather a question of fact about whether *Adams* introduces unnecessary or administratively troublesome doubt into the application of the *Carltona* principle and reliance on it. In any case, it is obvious that the Supreme Court's assumption that its judgment did not undermine the principle arose partly because it had misunderstood the principle, per paragraph [25], undermining it by needlessly sowing doubt about the principle's standing and future application.

Thus, the High Court went badly wrong in saying that it was bound to accept that *Adams* did not undermine the principle. This is important because the High Court's reflection on the relationship between *Adams* and the *Carltona* principle is as close as the Court ever gets to considering whether *Adams* was rightly decided and, more to the point, whether Parliament thought that it was wrongly decided and enacted sections 46 and 47 in order to restore the legal status quo ante.

It thus seems that the High Court considered the legislation's compatibility with both Article 6 and A1P1 on the premise that *Adams* was rightly decided. In that way, it failed to consider whether Parliament might have enacted the legislation on the grounds that the case was an error or tacitly assumed that, if Parliament had acted on this ground, then Parliament was wrong so to do. This approach cannot be reconciled with the European and domestic case law, which quite clearly recognises that the legislature is entitled in principle to enact legislation that reverses a judicial decision with retrospective effect – either because the legislature judges this to be necessary to correct a judicial error and to restore the law that it intended to make or because the legislature thinks that the consequences of the judicial decision will be so damaging as to require correction. Whether this is a compelling ground of general interest is a further question. But in answering that question, the High Court was not required by the doctrine of precedent to presuppose that Parliament was legislating to reverse with retrospective effect a decision that had been rightly decided.

Protecting the *Carltona* principle as a ground justifying sections 46 and 47

The High Court proceeded on the premise that *Adams* did not undermine the *Carltona* principle. It reasoned also that restoring the *Carltona* principle was not in fact a ground for enacting the 2023 legislation, and that the point of the legislation was instead to deny compensation to Adams and others and to reduce the burden on the Northern Ireland courts. The High Court took the view, at (ii), that:

> *…despite references to the* Carltona *principle in Government advice and in the House of Lords debate at Third Reading, the Government's policy intent, in my view, skews disproportionately in favour of securing an amendment to "bar 'Adams-type" compensation claims.*

This analysis of the legislation was supported, the High Court inferred, at (iii), by the absence of any express reference to the *Carltona* principle in the two provisions.

The High Court's analysis of the legislative history was entirely misconceived.

The High Court did not differentiate between the Faulks/Godson amendment, which was introduced on 11 May, and the Government amendment, which was adopted at Third Reading on 4 July. Tacitly adopting the claimant's argument to this effect (see [684]), the High Court inferred that the Faulks/Godson amendment was introduced in response to (that is, was *provoked by*) its own decision in *Re Adams* almost two weeks earlier, allowing Gerry Adams's application for judicial review of the decision that he was not eligible for compensation for wrongful conviction.

This was speculation on the High Court's part. It ignored the long-standing criticism of *Adams*, in our work and in Parliament, as well as the timetable of the Northern Ireland Troubles (Legacy and Reconciliation) Bill, which clearly was not responsive to the April 2023 judgment. The Bill provided an opportunity to reverse *Adams*; there is no reason to think that the Faulks/Godson amendment was provoked by *Re Adams* in particular, rather than by our suggestion in 2020 (and at later junctures) that a legislative solution was needed – at the earliest legislative opportunity – to remedy the mischief created by the Supreme Court decision.

Having speculated about the timing, the High Court's subsequent analysis of the legislative history, in (ii), repeatedly confused the Government's policy intent, as made out in "the initial advice dated 18 May 2023" (which presumably commented on the Faulks/Godson amendment) and "a final advice opened to this court dated 28 June 2023" (presumably commenting on the Government's amendment), with Parliament's intentions.[26] This conflation is expressly forbidden by the Supreme Court in *R (SC) v Secretary of State for Work and Pensions*.[27] In its disregard of Supreme Court precedent bearing directly on the use of legislative history in human rights litigation,[28] the High Court's judgment is per incuriam.

26. It is not clear whether the "advice" to which the High Court refers was ever made known to Parliament. It seems, from the judgment, that it may simply have been produced in argument before the Court, which simply reinforces the point, which authority and principle alike confirm, that it was irrelevant.
27. [2021] UKSC 26 at [32] and [166]
28. *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [163-185], per Lord Reed, summarised at [2] (7)(iii) (emphasis added):

    "…that the will of Parliament is expressed in the language used by it in its enactments, which must be the primary source when identifying the aim of the legislation; that ministerial statements, and documents emanating from the executive, such as a ministerial statement of compatibility, cannot be attributed to Parliament or treated as indicative of Parliament's intention; that material placed before Parliament, and statements made in the course of debates, may be relevant as background information in ascertaining the objective of the legislation and its likely practical impact; that material of that kind may also be relevant in demonstrating, as a matter of fact, that issues bearing on proportionality were considered by Parliament during the course of the legislative proceedings; but that the proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members of the legislature."

The background to the adoption of sections 46 and 47, which we set out earlier in this paper, makes very clear that peers were concerned to address the implications that *Adams* had for the *Carltona* principle.

This was not simply something that was mentioned at Third Reading. Likewise, the High Court's analysis is contradictory insofar as it notes that *Carltona* was mentioned in some Government advice but not in the final advice dated 28 June 2023. While this advice does not settle either the Government's intentions or still less Parliament's intentions, it is entirely plausible that the 28 June 2023 analysis would simply aim to explain the direct, immediate legal effect of the provisions, namely that they restore the validity of ICOs and make clear that there can be no further appeals or claims for compensation on the basis that they were improperly made. That is, it is no surprise that a document of this kind did not go on to explain the full reasons why Parliament sought to make these changes to the law.

The reasons for the enactment were that Parliament accepted that *Adams* had been wrongly decided because the Supreme Court had misinterpreted the 1972 Order, a misinterpretation that arose because it had misunderstood the relevance of the *Carltona* principle in this context and, more generally, had misstated the nature of the principle. Similarly, the absence of any express reference to *Carltona* on the face of the statute does not support the inference that the legislation was not intended to restore *Carltona*. The obvious point of validating ICOs that had not been made by the Secretary of State personally was to reverse the Supreme Court's ruling, which centred on the Court's understanding and application of the *Carltona* principle, while also removing any possible doubt by spelling out the legal consequences that follow.

The approach of the Government throughout the parliamentary proceedings does not appear to have questioned the proposition that some clarification of the *Carltona* principle following the *Adams* decision in the Supreme Court would be desirable. Instead, the Government's initial hesitation was about whether the Bill was the right vehicle for that and whether the matter was urgent enough if it was not the best vehicle. In the end, the Government withdrew its initial reservations and proposed an amendment. The intention of Parliament and its justification for legislating should not be sought in the grounds on which the Government was initially reluctant to see a Bill amended. If the Bill was amended subsequently, as it was, the Government's earlier reservations are irrelevant, and Parliament's approach to the matter has prevailed.

The High Court's reading of the legislative history was clearly wrong. Almost every peer who discussed the Faulks/Godson amendment or the Government's later amendment made clear his or her concern about the Supreme Court's judgment and the importance of restoring the *Carltona* principle – by reversing the conclusion of *Adams* that an ICO had to be made by the Secretary of State personally – and thus endorsed the proposition that the Supreme Court's reading of the 1972 Order, and application of the *Carltona* principle, had been a mistaken inference about the legislator's

intent. The only peer who said otherwise was Lord Pannick, on Third Reading, who nonetheless supported the legislation. And his analysis was not inconsistent with the proposition that the practical effect of *Adams* might have been to create a doubt about the extent to which reliance could be put on the *Carltona* principle in the case of provisions with similar wording to the 1972 Order. Rather, his remarks amounted only to expressing a belief, or perhaps a hope, that the Supreme Court's judgment could or would, in due course, be confined to its particular facts.

It is wholly implausible to conclude that the legislation was not intended, amongst other things, to restore the *Carltona* principle. But the High Court also seemed to doubt that the legislation was even capable of restoring that principle. That is, the Court seemed to reason that Parliament could not rationally have enacted sections 46 and 47 in order (intending) to repair the damage that *Adams* had done to the understanding of the principle and to confidence in its application in other cases and circumstances.

This conclusion about the High Court's reasoning follows from (iii), in which the Court made much of the absence of any express reference to *Carltona* on the face of the statute, (v), where the Court said that the provision applied only to a narrow set of cases and had no wider effect, thus taking for granted that the provision did not restore *Carltona*, and (ix), where the Court said that if it was felt necessary to legislate about *Carltona*, this would not have required retrospective legislation.

This chain of judicial reasoning is incompatible with Parliament's actual reasoning, which is apparent from the statutory text and the context of enactment and is confirmed by the legislative history. It is also obviously wrong. Given the doubt that *Adams* cast on the extent of a principle on which millions of decisions had relied over a period of more than three quarters of a century, a solution directed specifically at the principle would have had to involve a very considerable amount of retrospection.

It is certainly true, as we said in our June 2023 paper,[29] that Parliament could have enacted a general legislative fix in order to restore the *Carltona* principle. But it was also able, and perhaps simpler, to restore the principle by reversing *Adams*, indicating that it was wrongly decided and thus requiring later courts to treat it as an insecure foundation for making inferences about legislative intent. The Northern Ireland Troubles (Legacy and Reconciliation) Bill provided an opportunity to make such a change, with an amendment responding to *Adams* which was within the Bill's scope because it addressed the legacy of the Northern Ireland Troubles (*Adams* was a legacy case and opened the door to hundreds more legacy cases) and promoted reconciliation.

In restoring the validity of ICOs, Parliament made clear that it rejected the way in which the Supreme Court had read the 1972 Order, thus reinstating the intended meaning of the 1972 Order, which had assumed no distinction between the making and signing of an ICO. Parliament reasoned that in validating ICOs, and thus rejecting the Supreme Court's interpretation of the 1972 Order, it would make it untenable for subsequent courts to follow the Supreme Court's approach to interpretation, including

29. R Ekins and S Laws, *Reversing the Supreme Court's judgment in* R v Adams (Policy Exchange, 23 June 2023)

its understanding and application of the *Carltona* principle. No subsequent court could responsibly adopt *Adams* as a model for how to infer Parliament's intentions as regards the *Carltona* principle in any enactment. Parliament had directly reversed the Supreme Court's conclusion about the validity of ICOs, a conclusion that had followed from the Court's reading of the 1972 Order and thus its reasoning about the *Carltona* principle, as well as its obiter dicta about the nature of the principle.

The first reason for enacting sections 46 and 47, restoring the validity of ICOs made by persons authorised to sign them and preventing further legal proceedings or claims for compensation premised on their invalidity, was thus to correct the Supreme Court's misunderstanding of the *Carltona* principle and related misreading of the 1972 Order.

The other grounds for enacting sections 46 and 47

The second reason for enacting sections 46 and 47 was to ensure that no person was "inappropriately advantaged" because of the Supreme Court's misinterpretation of the 1972 Order. That is, Parliament reasoned that a person detained under an ICO made by a Minister of State or Under Secretary of State had been lawfully detained and that it was wrong to treat him as if he had not been lawfully detained, especially if this required paying compensation to him for "wrongful conviction" or "unlawful detention". As we noted above, the High Court never identified this as a distinct relevant ground and thus did not ask whether it was a compelling ground.

The third reason for the legislation was to avoid imposing an undue burden on the courts. The High Court did recognise that this was a relevant ground justifying the legislation, but its treatment of whether it was a compelling ground was unpersuasive, as we explain below.

The fourth reason for enacting sections 46 and 47 was to promote reconciliation in Northern Ireland by (a) preventing a further wave of legacy cases from being litigated in the Northern Ireland courts, which would be likely to prompt further division and recrimination, and (b) preventing payment of compensation to persons who had been detained in the 1970s on suspicion of involvement in terrorism, compensation that would be seen by many in Northern Ireland to be wholly unwarranted and indeed offensive.

The High Court did not consider this justification for the legislation. However, in its analysis of the legislative history, the High Court said that "the amendment could hardly be said to be in pursuit of the Legacy and Reconciliation Policy objectives of the 2023 Act."

This was not a question for the High Court to decide or indeed to consider. It was for the parliamentary authorities to consider and advise on whether the Faulks/Godson amendment was within the scope of the Bill and then it was for Parliament itself to consider when discussing the merits of the amendment. In questioning whether the amendment related to the objectives of the Act and was within the scope of the Bill, the High Court fell afoul of Article 9 of the Bill of Rights 1689, which prohibits the

courts from questioning proceedings in Parliament.

In any event, it clearly was within the scope of the Bill precisely because it was proposed as part of the process, rightly or wrongly, of drawing a line under outstanding legal issues from the Northern Ireland Troubles. The court was also running afoul of Article 9 in questioning whether Parliament was right, on the merits, that the amendment furthered the objectives of the legislation, as its acceptance of the amendment indicates it thought it did.

It was perfectly reasonable for Parliament to take the view that allowing the Supreme Court's judgment in *Adams* to stand, and allowing it to support further appeals against conviction or claims or applications for compensation (to be fought out in the courts), was likely to undermine peace and reconciliation in Northern Ireland. The *Adams* judgment was, for good reason, a cause of considerable disquiet in Northern Ireland and further litigation and payments of compensation would compound this.

In legislating to rule out such further litigation or applications for compensation, Parliament reasonably aimed to restore the law as it was understood to be until May 2020 and to prevent the damaging consequences that flowed from its unsettlement. But our more immediate point is that the High Court should have recognised this ground for the legislation before evaluating whether it was a compelling ground of general interest. It never did.

The High Court thus failed to get to grips with the grounds of the legislation, which entirely undermined its eventual conclusion that there were no compelling grounds.

The High Court's mishandling of the *Vegotex* elements

In evaluating whether sections 46 and 47 were compatible with Convention rights, the High Court purported, in paragraph [697], to apply the four elements that the Grand Chamber had considered in *Vegotex* in the course of determining whether there were compelling grounds of general interest for the legislation. Unfortunately, the High Court mishandled each element.

Element 1 in *Vegotex* – Whether or not the case law overturned by the legislation had been settled

In relation to the first element, the High Court distinguished *Vegotex* on the grounds, inter alia, that the case law overturned by sections 46 and 47 had been settled:

> i. *The case-law with regards to the validity of ICOs made under the 1972 Order was definitively settled by the unanimous Supreme Court ruling in* R v Adams. *It is on this basis that the applicant has now brought several undetermined claims which were brought before the 2023 Act entered into force. The court is further bound by the Supreme Court's finding that the* Carltona *principle was not undermined but rather displaced by the "unmistakably clear" language, a conclusion that appears to have been shared in July 1974 by JBE Hutton QC.* In Vegotex, *the legitimacy of*

> *the administrative practice "had not seriously been called into question" and had been reaffirmed by the Court of Cassation (see para [38]). The same cannot be said in relation to unlawfully made ICOs following the Supreme Court's ruling.*

This was a badly mistaken analysis. The High Court asked itself whether the Supreme Court's judgment in *Adams* was settled, whereas the right question to ask should have been whether "the administrative practice" of Ministers of State and Under Secretaries of State making ICOs was settled up until the Supreme Court's judgment invalidated this practice. The answer to that question is obviously yes, the practice was settled, with no challenges to its validity until 2018 and no successful challenge until 2020, when the Supreme Court allowed an appeal from the Court of Appeal.

The problem seems to be that the High Court limited itself to the brief summary of the Grand Chamber's reasoning, at [108] of the Strasbourg Court's judgment, and did not consider the substance of the Grand Chamber's analysis at [109-112].

The High Court was simply wrong to say that the legality of the practice in question in *Vegotex* "had been reaffirmed by the Court of Cassation". What had happened (as the Grand Chamber made clear at [110]) is that some lower courts had found consistently with the practice subsequently found by the Court of Cassation to have been unlawful. In other words, as the Grand Chamber put it at [123], prior to the decision of the Court of Cassation, there was "a settled practice administrative practice, reflected, furthermore in the predominant case law of the lower courts in the matter". In *Fitzsimmons*, there was likewise a settled practice that had not been challenged prior to *Adams*.

It was in relation to this element of *Vegotex*, that the High Court noted that it was bound by the Supreme Court's judgment in *Adams*. This was a non sequitur. Whether the Supreme Court's decision was correct, or had to be treated as correct, was irrelevant to the question of whether the practice as it stood before *Adams* was settled.

In any event, Parliament was entitled as a matter of European human rights law to change the law with retrospective effect, even if the High Court thought (or thought that it was bound to accept) that *Adams* was correctly decided, provided that it had compelling grounds of general interest for so doing. Further, in reaching the conclusion that *Adams* was wrongly decided, and that the administrative practice as it stood before the judgment was in line with the legislator's intention, it was open to Parliament to consider evidence that was not before the High Court, including the evidence given by Lord Howell of Guildford in his Policy Exchange paper and in the House of Lords, that the actual intention of the legislator had been to authorise Ministers other than the Secretary of State to make ICOs.

Thus, the High Court misdirected itself by asking the wrong question. Had it asked the right question, it would have had no alternative but to find that the administrative practice in question had been settled and had

not been challenged in court for decades.

Element 2 in *Vegotex*: The manner and timing of the retrospective correcting enactment

In relation to the second element, the High Court analysed the legislative history and said, at (ii), that it was "satisfied that the manner and timing in which the ICO amendments were introduced militate against the respondent's contention that the restoration of the *Carltona* principle constitutes a compelling ground of general interest."

For the reasons we have given above, the High Court's analysis of the legislative history was wholly misconceived, not to mention arrived at in a manner inconsistent with binding Supreme Court authority. Furthermore, the High Court's analysis clearly did not bear on whether any of the other three grounds for retrospective legislation were justified.

The High Court also failed to consider any of the other reasons why a court, following *Vegotex*, might consider the manner and timing of the enactment. In *Vegotex* itself, the Grand Chamber took it be significant that the legislature had acted promptly after the Court of Cassation's decision, reversing its effect within a year and a half, which "clearly signalled its intention not to allow the effects of that judgment to continue over time". The High Court did not consider the significance of the fact that the amendment was only put before Parliament some three years after the Supreme Court's judgment, a delay which might be thought to weaken the case for retrospective legislation. However, the delay is readily explained by the disruption caused by the pandemic, subsequent pressures on legislative time, the absence of an appropriate bill before the Northern Ireland Legacy Bill was introduced in May 2022, and the slow pace of progress of civil claims after *Adams*. It is true that the Government did not invite Parliament to respond to *Adams* in the Bill as introduced, with the amendment being tabled by backbench peers before being accepted in principle by the Government, but, if anything, this strengthens the justification for the legislation, which was scarcely an attempt by the Government improperly to secure an advantage in litigation.

The High Court also failed to consider the critical point that sections 46 and 47 were enacted, and came into force, before any cases had been determined. The civil claims that Mr Fitzsimmons and others had initiated had yet to be heard, let alone decided. The judgment in *Re Adams* was under appeal and, in any case, did not itself confer a settled right to compensation for wrongful conviction.

In this respect sections 46 and 47 were comparable to the Damages (Asbestos-related Conditions) (Scotland) Act 2009, which reversed the decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd*.[30] The legislation had retrospective effect, "to be treated for all purposes as having always had effect",[31] save that it had no effect in relation to a claim that had been settled or legal proceedings that had been determined before the legislation came into force.[32] (The decision in *Rothwell* had itself come decades after the relevant employment and insurance periods and

32. Section 4(3) of the 2009 Act
30. [2007] UKHL 39, [2008] AC 281
31. Section 4(2) of the 2009 Act

had unsettled existing legal expectations.) In *AXA General Insurance v HM Advocate*,[33] the Supreme Court rejected an argument that the 2009 Act was incompatible with A1P1 (the argument that it was incompatible with Article 6 had been rejected at first instance and not pursued on appeal).

The analogy between *AXA* and *Fitzsimmons* is strong, with sections 46 and 47 responding to *Adams* – as the Scottish Parliament in 2009 had responded to *Rothwell* – by restoring the law as it was understood to be between 1972 and 2020, and preventing the new 2020 understanding from being applied in future cases (about past acts), save for those that had already been decided (specifically: appeals against conviction allowed) when the sections came into force. The High Court did not consider *AXA*, but if it had, the Court would have been forced to confront the significance of the fact that sections 46 and 47 did not apply to cases that had been determined.

The relevant principles are properly handled in the recent judgment of *Enterprise Managed Service Ltd v Secretary of State for Housing*,[34] which upheld retrospective legal change as compatible with Article 6. In that case, the High Court of England and Wales noted the significance of the fact that the legal proceedings, which the retrospective change rendered moot, were at an early stage. The legal proceedings that sections 46 and 47 prevent from advancing are also still at a very early stage (or have yet to be initiated at all), which is relevant to the question of whether those provisions are compatible with Article 6. The High Court in *Fitzsimmons* did not attend to this point, failing to distinguish between legislative interference with a settled judicial determination and legislative interference with proceedings that have not yet been heard or determined.

Element 3 in *Vegotex*: The foreseeability of the legislative intervention

In relation to the third element, the High Court said, at (iv), that it was:

> *…satisfied that the retroactive/retrospective effect of sections 46 and 47 was unforeseeable and rendered the applicant's article 6 rights unassailable in practice. In particular, the court is influenced by the fact that the impugned provisions go further than section 43. The applicant was unable to sustain any claim until after his conviction was quashed on 14 March 2022. At the earliest, the possibility of any such a claim would only have arisen after the Supreme Court's decision on 13 May 2020. This is not a case where the potential plaintiff/applicant has waited for many years and allowed a limitation period to accrue before initiating proceedings.*

The last three sentences are irrelevant because the question is not whether the claim by Mr Fitzsimmons was unreasonably delayed or unforeseeable, but rather whether the legislation itself was unforeseeable.

These three sentences, which focus on whether Mr Fitzsimmons had acted promptly in initiating legal proceedings, taken together with the reference to section 43, which aimed to draw a line under past claims, strongly imply that the High Court evaluated sections 46 and 47 as if they

33. [2011] UKSC 46
34. [2021] EWHC 1436 (Admin)

were analogous to a hard limitation period. But the obvious difference between sections 46 and 47, on the one hand, and section 43, on the other, is that the former provisions were enacted in order to restore the legislator's original intention and/or "the administrative practice" (to use the language of *Vegotex*) that had been followed since the 1972 Order's enactment. That is, Parliament enacted these two provisions because it thought that the Supreme Court's judgment in *Adams* was mistaken and/or had consequences that needed to be averted. It follows that the retrospective legislative intervention was foreseeable because the judgment in *Adams* was clearly wrong and because Parliament obviously had good reason to intervene to prevent further litigation questioning the validity of decisions made almost half a century earlier.

The Third Chamber in *Vegotex*, to which the High Court had referred, found (at [73]) that the retrospective legislation in question in that case "was not unforeseeable", as its aim was to reassert the legislator's original intention. The High Court should have addressed the fact that part of the point of enacting sections 46 and 47 was to restore the original intention of the 1972 Order.

The approach of the Grand Chamber was to ask whether retrospective legislation undermined a litigant's legitimate expectations when it began its claim. In *Vegotex* itself, the Grand Chamber reasoned that, when it began its claim, the applicant company could not have expected or hoped to have benefited from the decision of the Court of Cassation given the settled administrative practice that had been followed until that decision. The company's legitimate expectation was accordingly not defeated by the retrospective legislation. If the High Court had followed this approach, it would have asked whether the retrospective legislation in this case was unforeseeable in fact when Mr Fitzsimmons began his claim for damages in March 2022. The question was not whether the intervention was in fact foreseen, but whether it was unforeseeable.

The Strasbourg Court has found in other cases that such interventions are not unforeseeable when the legislature is seeking to re-affirm the original intention of the legislation.[35] There is no need for the retrospective legislation to be initiated or announced or intimated before the claim is made provided that it is sufficient that it was not "absolutely unforeseeable" that the situation needed to be addressed. In March 2022, when Mr Fitzsimmons made his claim, it was a matter of public record that the Government was shortly to introduce legislation addressing the legacy of the Northern Ireland Troubles and limiting investigations and legal proceedings. It must at that point have been foreseeable (one certainly cannot say that it was "absolutely unforeseeable") that the legislation shortly to be introduced might address *Adams* and/or that the legislation would be amended by Parliament to address *Adams*, as in fact took place. That this was foreseeable is confirmed, further, by the fact that concerns about *Adams* had been raised repeatedly in the Houses of Parliament before the legislation was introduced, as well as in the press and, soon after the decision, by us.

35. See for example *Hôpital Local Saint-Pierre d'Oléron v France* (2018) Nov 8 App 18096/12 at [72]-[73]

In *National & Provincial Building Society v United Kingdom* (1998) 25 EHRR 127, the European Court of Human Rights upheld legislation that retrospectively validated regulations that the House of Lords had ruled to be ultra vires. The Strasbourg Court also upheld related legislation that retrospectively validated Treasury orders that were being challenged by way of judicial review proceedings. The Court took it to be significant that the legislation was intended to restore Parliament's original intention and that the proceedings that were swept away were at an early stage. The Court said at para 112:

> *Article 6 § 1 cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are a party. It is to be noted that in the present case the interference caused by section 64 of the 1992 Act was of a much less drastic nature than the interference which led the Court to find a breach of Article 6 § 1 in the Stran Greek Refineries and Stratis Andreadis case (cited above). In that case the applicants and the respondent State had been engaged in litigation for a period of nine years and the applicants had an enforceable judgment against that State in their favour. The judicial review proceedings launched by the applicant societies had not even reached the stage of an inter partes hearing. Furthermore, in adopting section 64 of the 1992 Act with retrospective effect the authorities in the instant case had even more compelling public-interest motives to make the applicant societies' judicial review proceedings and the contingent restitution proceedings unwinnable than was the case with the enactment of section 53 of the 1991 Act. The challenge to the Treasury Orders created uncertainty over the substantial amounts of revenue collected from 1986 onwards (see paragraph 42 above).*

In applying *National & Provincial Building Society*, the Court of Appeal of England and Wales in *R (Reilly) v Secretary of State for Work and Pensions (No. 2)*,[36] noted, at [53], three features that were significant, namely:

(1) "that the illegality identified [by the House of Lords] in *Woolwich 1* was a 'technicality', which created a 'loophole' that was evidently contrary to the (reasonable) intention of Parliament to tax income in the gap period";
(2) "[i]t could and should always have been anticipated that Parliament would take steps to recover the tax in question once the loophole was identified";
(3) the proceedings that the legislation affected predated introduction of the legislation but came after the Government had announced that it would legislate and "were thus only 'existing proceedings' in a very formal sense".

In relation to (2), the Court of Appeal added that "whether retrospective legislation could have been foreseen …is not so much a factor in its own right as a corollary of the fact that the defect in question evidently did not reflect the original legislative intention." The Strasbourg Court in *Vegotex* did not go quite this far, being concerned about the extent to which

36. [2016] EWCA Civ 413

retrospective legislation undermines the litigant's legitimate expectation, but it is true and important that it is readily foreseeable that the legislature will legislate to restore the law to what it intended to enact, when it has either misfired or been misinterpreted.

On the merits, the Court of Appeal in *Reilly* thought that none of these factors applied to the legislation that it was considering. But at least the first two factors apply to the facts of *Fitzsimmons* – the Supreme Court's decision was contrary to the intention of the legislator and legislative correction was foreseeable in part for that reason. (Note that it is not the case that *Adams* exposed what to quote the first feature set out in Reilly was a loophole "that was evidently contrary to the (reasonable) intention of Parliament". Instead, the judgment was flatly contrary to the actual intention of the legislator.)

It also remains true and important that the proceedings that sections 46 and 47 concern were still at an early stage. This is not legislation that reverses an acquittal or strips from any person the fruits of their litigation (with the possibly arguable exception of *Re Adams*). Again, in common with the legislation in *AXA*, the legislation does not reverse any judicial determination, but rather preserves the result of appeals against conviction that have been allowed since *Adams*. It is also clearly legislation that aims to protect legal certainty, by (a) restoring the law as it stood until 2020 and thus preventing challenges to the lawfulness of ICOs, and (b) limiting the risk that the Supreme Court's misunderstanding of the *Carltona* principle and misreading of the 1972 Order will undermine confidence in the principle.

Element 4 in *Vegotex*: The scope of the legislation and its effects

In relation to the fourth element, the High Court said, at (v), that the scope of the legislation was "narrow" and had "no wider effect" than addressing the validity of ICOs and "preventing benefit" to those who had "been unlawfully detained on foot of ICOs that were unlawfully made". For the reasons given above, this analysis, which again presupposes that *Adams* was rightly decided, was a misunderstanding of Parliament's reasoning in enacting sections 46 and 47. The High Court did not address the point that the most direct effect of the legislation – Parliament's proximate intention – was to restore the validity of ICOs that had been presumed for decades to have been valid.

What we note for present purposes, however, is the High Court's further assertion, at (viii), that "[t]he cohort affected is small", which it took to be a reason to reject the argument that the legislation was justified to avert a burden on the Northern Ireland courts. The High Court went on to say, at (ix), that the legislation applied only to "a small number of individuals".

In fact, the High Court did not carefully consider how many claimants had brought, or might bring, proceedings and thus how many claims sections 46 and 47 concern. This makes the Court's assertions about the legislation's scope and effect wholly unreliable.

At [685], the High Court summarised the applicant's submissions thus:

> *…the applicant rejects the comparison drawn between the provisions of the Act dealing with ICOs and section 43 which shuts down civil claims. Not only does the former go further, denying the applicant the benefit of any grace period, but the number of cases identified at the outset of the ICO amendment likely to be affected (around 40 civil actions) is not sufficient to support the argument that prohibiting such cases will reduce some unduly onerous burden on the courts system. Additionally, the applicant submits the cohort in respect of compensation for miscarriage of justice is even smaller given the facility for the identification of lead cases.*

It seems very likely that the High Court adopted this submission in concluding that the legislation applied only to a small cohort.

In our June 2023 paper, making the case for why an amendment was necessary, we noted that section 43 (clause 39 as it then was) might stop most of the 300-400 civil claims that were thought to have been filed in the wake of *Adams*, with only 40 or so having been filed before 17 May 2022, which is the day on which the Bill was introduced to Parliament.[37] (Section 43(2) bars Troubles-related civil claims filed after the section comes into force; section 43(1) applies this bar with retrospective effect to civil claims filed on or after 17 May 2022.) That is, we reasoned in June 2023 that the amendment was necessary to stop around 40 civil actions, as well as applications for compensation for "wrongful conviction".

On 26 June 2023, Lord Caine, the Minister, said to the House of Lords:

> *On the numbers of cases in scope, we are aware of around 300 to 400 civil claims being brought on a similar basis to the Adams case, including those at pre-action stage, with 40 writs filed before First Reading of this Bill. It is therefore likely that a number of Adams-type cases will be allowed to continue in spite of the prohibition on civil claims in Clause 39 of the Bill. We are aware that this amendment has a wider application than just civil damages claims, which are otherwise within the scope of Clause 39, but the numbers of other types of cases in scope are limited.*
>
> *The Government also understand that the amendment covers applications for compensation for miscarriages of justice under the statutory scheme established by Section 133 of the Criminal Justice Act 1988, following the reversal, as a result of the Adams judgment, of convictions for escaping or attempting to escape from internment facilities. The Government anticipate that it is unlikely that many more cases could in theory be brought along these lines; based on the numbers of escapees, this is unlikely to be more than around 30 and could be substantially less.*

While Lord Caine seems to have reasoned, as we did at the time, that section 43 (clause 39) would block the majority of the 300-400 civil claims, viz. those that had been filed before May 2022, in fact section 43 as enacted includes subsection (9), which provides "This section does not apply to a relevant Troubles-related civil action if, or to the extent that,

37. That is, the overwhelming majority of the 300-400 had been filed *after* 17 May 2022.

section 47(1) applies to the action (prohibition of civil claims alleging invalidity of interim custody orders)."

Thus, within the scheme of the Act, it is section 47 rather than section 43 that prevents the 300-400 civil claims from proceeding. In evaluating the scope and effects of sections 46 and 47, the High Court should have considered their application to around 300-400 civil claims that were being brought at the time of the amendment. (Lord Caine's estimate includes claims at the pre-action stage, so it is difficult to say with precision how many claims were underway, and at what stage, when the amendments were made and when section 47(1) itself came into force.[38])

The High Court declared section 43(1) incompatible with Article 6. The High Court's assertion, at (viii), that there was "no evidential basis" for the claim that the legislation was justified to avoid imposing a burden on the courts in view of the "small number of individuals" involved does not make sense in view of its treatment of section 43(1).

The Court, at [393], quoted Lord Caine's observations that the number of cases is hard to quantify but that around 700 civil claims had been filed as at 17 May 2022. While the High Court concluded that section 43(1) was disproportionate, it nonetheless accepted that reducing the burden on the Northern Ireland courts was a legitimate aim and it did not reject this rationale on the grounds that the legislation concerned only a small number of cases. It is hard to see why the number of cases is sufficient to justify section 43(1) but obviously insufficient to justify section 47(1), which bars the 300-400 civil claims that had been initiated, even if at quite an early stage, when the amendment was introduced in June 2023. In any case, the judgement about what constitutes an unacceptable burden on the courts should be for Parliament to make in view of its responsibility for public expenditure and the justice system.

Section 47 limits civil claims and claims for compensation, including claims that were initiated before the section came into force. (The section also limits appeals against conviction other than those for which leave to appeal was granted, or which were referred to the Court of Appeal by the Criminal Cases Review Commission, before the section came into force.)

In reflecting on the scope of the legislation, the High Court seemed to consider only cases that had begun. But the legislation applies also to civil claims, criminal appeals and claims for compensation that are initiated after the legislation came into force. It is unclear how many such claims might be brought. More than 1,900 people were subject to internment in Northern Ireland. Lord Butler asked the Government, in June 2020, how many persons had been detained by ICOs signed by a Minister of State or Under Secretary of State. The Government did not provide a meaningful answer. It may be difficult for the Government now to determine who was detained in the early 1970s and on what basis. But putting the point at its lowest, the High Court's analysis of the scope of the legislation simply fails to consider how many further claims might be brought. Insofar as the legislation's further reach is of uncertain extent, this is relevant to an assessment of its importance. The High Court was wrong to evaluate the

38. Sections 46 and 47 came into force on 18 November 2023, two months after the 2023 Act was enacted (see further section 63(2)).

legislation on the premise that it applied only to "around 40 civil claims".

The High Court understated the number of cases. It also failed to address the complexity of adjudicating them, which is relevant to the burden that would be placed on the courts.

Apart from cases in which there may be special damages (such as loss of earnings) or an award for injury to the claimant's physical or mental health by reason of his confinement, an award of general damages for false imprisonment may reflect at least three elements:

i. compensation for the claimant's loss of liberty;
ii. compensation for any consequential injury to the claimant's feelings; and
iii. compensation for any consequential injury to his reputation.

In respect of the basic award of compensation for loss of liberty, there would inevitably have been an issue whether each individual would have been detained some fifty years earlier in any event had the Secretary of State personally made the ICO in his case. To obtain more than nominal damages, the claimant would have to show that there was a realistic prospect that he would not have been detained had the Secretary of State (rather than another Minister) made the ICO. If there was no such realistic prospect, then no more than nominal compensatory damages would be payable. The outcome of that issue would also have affected any award under other heads.

It follows that claims for damages for false imprisonment might well require a "closed material procedure" to consider any information which may remain sensitive that was before the Minister when he made the ICO. If in any particular case an ICO might not have been made by the Secretary of State personally, then the assessment of damages for false imprisonment would not be straightforward given the lapse of time and the consequent likely difficulties of obtaining evidence to support or refute the various elements of any claim. The issues to be litigated are not straightforward and their determination could well require substantial judicial resources, which the 2023 Act was legitimately concerned to protect.

In considering the scope and effects of the legislation, the High Court also recited, in (vii), the Supreme Court's analysis of the power to detain as "a momentous one", in order to support the High Court's conclusion that *Adams* was not "based on 'a technicality'".

This was a non sequitur. The significance of the power to detain was relevant in principle to how the 1972 Order should have been interpreted even if it did not support the Supreme Court's conclusion. However, it does not follow that the Supreme Court's conclusion, that the Secretary of State had to make each ICO personally, was not a technicality or, in particular, that in legislating to reverse the consequences of this decision, for cases yet to be determined, the legislation was not capable of being understood as legislation correcting a technicality, a classification that domestic and European case law clearly says is relevant to Article 6.

The High Court confused the argument that the Supreme Court's reasoning in *Adams* itself was based on a technicality with the argument that in relation to its implications for other cases yet to be determined (or claims for compensation) the judgment would be a technicality that Parliament might fairly address (correct) by way of retrospective legislation.

Sections 46 and 47 correct an error on a technicality of the sort that the case law under Article 6 allows to be corrected retrospectively. The error was made by the Supreme Court, which failed to appreciate that the 1972 Order had to be construed by reference to the context in which it was made, including the contemporaneous legal context as to what was evidentially possible so far as proving who made an ICO is concerned, and that by not construing it in that context it was itself sanctioning a retrospective and unfair legal change.

But what if one did not accept this analysis and instead assumed that the error was one made by the legislators in 1972 – on the unrealistic and hypothetical premise that they should somehow have foreseen that the words they used would not be clear enough to authorise the Minister of State to authorise detention if law and practice subsequently developed to allow the courts to look behind the signature? That too is just the type of technical error that it is permissible retrospectively to correct in order to prevent a technicality being unfairly exploited to secure an undeserved windfall benefit.

Moreover, the justification for remedial legislation in this case is further reinforced now because the factual situation has reverted to the one that was legitimately assumed by the original legislators as the basis for the wording used. With the passage of time the only reliable evidence that it is practicable now to find about who decided to make the interim custody order is the signature on it. Half a century after the event (when producing the evidence, even if it exists, has become for all practical purposes impossible), the Supreme Court retrospectively decides that the Government needs to be able to produce evidence that the Secretary of State personally authorised the Minister of State's signature. If that is a situation that does not deserve retrospective rectification, it is difficult to know what would.

We also mentioned above another way in which sections 46 and 47 should properly be seen as tackling a technicality – an erroneous assertion of a technical deficiency – such that their effect on legal proceedings is compatible with Article 6. Detention under the 1972 Order only began with the making of an interim custody order. But it was only able to continue for more than 28 days when the Chief Constable had referred the matter to the Commissioner (a former judge or senior lawyer) who would consider the matter afresh. If the Commissioner was satisfied that the person in question was involved in terrorism, the Commissioner would make a detention order.

When Mr Adams attempted to escape from custody, his continuing detention, beyond the period of the ICO, had been authorised by a

Commissioner who had made a fresh decision.[39] The Court of Appeal, which rejected Mr Adams's appeal, held, at [53-54], that the making of a lawful ICO was a condition precedent to the Commissioner's jurisdiction to make a detention order. Thus, the Court held, if the ICO had been invalid, the subsequent detention order could not render subsequent detention lawful. The Supreme Court did not question this holding.

For the reasons we have given above and in detail in our May 2020 Policy Exchange paper, the ICO should properly have been regarded as perfectly lawful. But even if it was not, and the Commissioner strictly had no jurisdiction to make a detention order, the Commissioner's lack of jurisdiction might reasonably be put right by remedial legislation. By validating ICOs, sections 46 and 47 prevent detention orders, which were made by a separate and otherwise legitimate and independent quasi-judicial process, from being undermined by a technicality affecting the earlier process and prevents persons who a Commissioner had been satisfied were involved in terrorism from being unjustly compensated. The High Court noted the Secretary of State's argument on similar lines, at [680-681], but did not give any adequate reason for rejecting it.

The High Court's conclusion that Parliament did not have compelling grounds for legislating

The preceding paragraphs show how the High Court fundamentally misunderstood Parliament's reasoning in enacting the legislation and demonstrate that the Court failed to apply the *Vegotex* elements properly to assess whether Parliament had compelling grounds for enacting section 46 and 47. These flaws in the High Court's reasoning left it unable to see the obvious case for the legislation.

One basic problem with the High Court's reasoning is perhaps also made clear in (vi) of paragraph [697] of its judgment, where the it said:

> *The fact remains that as a matter of law the applicant has been acquitted of the offence which forms the basis of his claims. He should be treated as such accordingly.*

Neither Mr Fitzsimmons's acquittal nor his original conviction formed the basis of his claim, which was instead a claim for damages for unlawful detention. (His acquittal might have grounded a subsequent application for compensation for wrongful conviction, which section 47(4) would have prevented, but this was not the subject of the proceedings in *Fitzsimmons*.) The legislation did not reinstate Mr Fitzsimmons's, or any other person's, conviction. In enacting sections 46 and 47, Parliament took care not to disturb any successful appeal against conviction.[40] The High Court seems to have assumed that in deciding whether to legislate Parliament is required to accept that the applicant was wrongly convicted because he was unlawfully detained and "should be treated as such accordingly", viz. not prevented from bringing further proceedings seeking damages for his unlawful detention (or applying for compensation on the basis of his

39. The same was true for Mr Fitzsimmons.

40. The Article 7 claim wrongly took sections 46 and 47 to be a retrospective imposition of criminal liability on acts that were not proscribed by law at the time. On the contrary, sections 46 and 47 prevent further appeals against conviction, appeals that would set aside convictions that were in truth perfectly lawful and should not be called into question on the basis of a misreading of the relevant legislation. Article 7 does not require that a person must be able to appeal against his conviction half a century out of time or still less that legislation reversing a judicial error and restoring the enacted law is retrospective criminal legislation.

wrongful conviction).

What the High Court did here was to beg the question about whether there were compelling grounds of general interest for Parliament to legislate to restore the validity of ICOs and to prevent further legal proceedings challenging their validity and seeking damages. The High Court wrongly seemed to think that in enacting sections 46 and 47 Parliament unravelled past legal arrangements. On the contrary, the legislation secured the validity of acts that had been wrongly called into question by the Supreme Court in *Adams*, limiting the damage that the Supreme Court's judgment is likely to do by addressing its future consequences after the legislation came into force.

The domestic and European case law makes crystal clear that the legislature is entitled in principle to enact retrospective legislation, including even legislation that reverses the outcome of litigation, provided it has good reasons for so doing, reasons which may include restoring the original intention of the legislator or preventing someone from an unjustifiable windfall gain.

The validity of ICOs had been unchallenged for almost half a century. The Supreme Court's judgment in *Adams* overturned settled practice, which was itself in line with the legislator's intention in enacting the 1972 Order. This judgment spurred hundreds of new claims, and perhaps many more, challenging the lawfulness of detention and seeking compensation. Parliament was justified in legislating to restore the validity of ICOs made decades earlier and thus to bring the law back into line with the original intention and the unbroken practice. Legislating in this way made clear that the Supreme Court's application of the *Carltona* principle in relation to the 1972 Order had been an unsound inference about legislative intent with potentially serious implications right across the statute book.

There was no unfairness to any person in Parliament's decision to restore the validity of ICOs made in the 1970s, while taking care not to reverse the outcome of any previous appeal against conviction. The High Court implied, at (iv), that the retrospective effect of the legislation was unfair because the claimant had only been able to bring a claim for compensation (or to apply for compensation) *after* his conviction was quashed on 14 March 2022. And, the Court said, no claimants were able to bring a claim for compensation until *after* the Supreme Court's judgment on 13 May 2020.

The High Court's point may have been that one should not blame the applicant or others like him for failing to have brought proceedings earlier in time. But in fact, it had always been open to Mr Fitzsimmons, as to Mr Adams, to challenge the validity of the ICO made in relation to him.

The Court of Appeal in 2017 should not have granted Gerry Adams permission to appeal out of time. The discovery of the Hutton memorandum was not a new fact that had any bearing on whether an appeal was warranted. Likewise, the Court of Appeal should not have granted Mr Fitzsimmons permission to appeal out of time, for the Supreme Court's decision in *Adams* was not a new ground of appeal that excused his failure

to appeal against his conviction in the 1970s. It had been perfectly open to him then to argue that an ICO was only valid if it was made personally by the Secretary of State himself. In both cases, the court mischaracterised a question of law as a question of fact. There was no newly discovered fact disclosing that the Secretary of State had not considered or decided upon the making of the order – that was always an inference that could have been, and indeed was intended to be, drawn from the Minister of State's signature.

Similarly, it was perfectly open to claimants to bring a claim for compensation, for false imprisonment, before the Supreme Court's judgment on 13 May 2020, just as it was always open to persons detained in the 1970s, or convicted for attempting to escape or escaping from lawful custody, to challenge their detention, and thus their convictions, on the grounds that wrongly persuaded the Supreme Court almost a half century later in *Adams*.

When the Supreme Court allows an appeal many years after the fact on grounds that attract widespread criticism and parliamentary disquiet, it is certainly foreseeable that Parliament will legislate to limit the further application of the judgment, to limit the damage that it does to established law and practice and to averts its future consequences.

The applicant did not rely on *Adams* in any way save to apply for leave to bring an appeal against conviction out of time and to claim compensation, again all in relation to events that had otherwise been settled and known for decades. Sections 46 and 47 restore the position as it stood between the 1972 Order and the 2020 judgment, but do not reinstate the claimant's conviction. The legislation does not unfairly strip any person of the fruits of litigation, but does prevent further judicial decisions from compounding the Supreme Court's error in *Adams*.

The legislation applies to claims that have been made before the Act came into force, but none of the claims in question has yet been determined, or even heard, which is highly relevant to an assessment of the legislation's compatibility with Article 6 and A1P1.

It would be unjust to pay compensation to any person for their detention on the basis of an ICO made by a Minister of State (and confirmed by an independent Commissioner or Tribunal) or to a person who was convicted for escaping from such detention. Paying such compensation – and hearing hundreds of cases about the lawfulness of ICOs – would be inimical to peace and reconciliation in Northern Ireland.

It is very likely that in most cases the Secretary of State, on the same material, would have made the same order as the Minister of State and any further period of detention would have been authorised by a decision by an independent Commissioner or Tribunal and should not be treated as if it had been unlawful.

It would be unjust to pay compensation to a person who had been correctly detained for suspected involvement in terrorism, which would be a wholly undeserved windfall for the individuals in question. Determining the relevant claims, which might mean at least 300-400 cases, would have

imposed significant burdens on the Northern Ireland courts, potentially involving closed material proceedings. In the very unlikely event that the claims were thought to merit more than a nominal award of damages, this would have proven difficult to quantify given the lapse of time and the complex issues involved. If the courts had been required to hear and determine these cases, this would inevitably have prejudiced the speed of disposal of claims by other litigants.

Despite the delay in the wake of the Supreme Court's judgment (at the height of the pandemic), it was not absolutely unforeseeable that, when a legislative opportunity occurred, Parliament might legislate to restore the validity of ICOs and to bar compensation claims. On the contrary, it was readily foreseeable that Parliament might legislate in this way, especially in view of the concerns raised by many parliamentarians in the wake of the judgment. The Northern Ireland Troubles (Legacy and Reconciliation) Bill was introduced two years after the Supreme Court's judgment and provided an opportunity to consider legislating in relation to *Adams*, which was a legacy case. The legislation was introduced as a result of cross-party and independent backbench pressure, was supported both by the Government and the Opposition in both Houses, and was passed without division in each House after debate. This legislative history disarms any suggestion that the Government acted unfairly in relation to Article 6 rights, and reinforces the respect that the High Court should in any event have paid to Parliament's reasoned decision to legislate.

The Government's wrongful concession in the Court of Appeal

On 29 July 2024, the new Secretary of State for Northern Ireland advised Parliament that the Government had written to the Northern Ireland Court of Appeal to abandon all its grounds of appeal against the section 4 Human Rights Act declarations of incompatibility made in *Dillon*. The statement noted the Government's manifesto commitment to repeal and replace the Northern Ireland Troubles (Legacy and Reconciliation) Act.

The statement notes that the previous Government's approach to legacy was unpopular in Northern Ireland, especially the conditional immunity provisions in the Act. Nothing in the statement addresses the section 4 declaration of incompatibility made in relation to sections 46 and 47 save the annex which lists the five declarations made by the High Court, one of which concerns these two provisions.

More specifically, the statement says:

> *Victims and survivors have felt ignored by the previous Government's approach to legacy, which has been clearly rejected across communities in Northern Ireland. The conditional immunity provisions, in particular, have been opposed by all of the Northern Ireland political parties and by many victims and survivors, as well as being found by the Court to be unlawful.*
>
> *The action taken today to abandon the grounds of appeal against the section 4 Human Rights Act declarations of incompatibility demonstrates that this Government will take a different approach. It underlines the Government's absolute commitment to the Human Rights Act, and to establishing legacy mechanisms that are capable of commanding the confidence of communities and of victims and survivors.*

It is perhaps unsurprising that the Government has abandoned its appeal against four of the five declarations of incompatibility, insofar as the Labour Party consistently opposed the legislation in question. However, it is surprising that the Government abandoned its appeal against the declaration of incompatibility in relation to sections 46 and 47, which, after all, it (as the Opposition) supported in both Houses of Parliament and is clearly severable from the declarations relating to other provisions of the 2023 Act.

The Secretary of State's statement does not distinguish between the

different declarations of incompatibility, and it is plausible to infer that the Government conceded its appeal against all five, taken together as a set, without differentiating one from another. This inference is supported by the statement's baffling assertion that conceding these grounds of appeal underlines the Government's commitment to the Human Rights Act. If and to the extent that the Government thinks that the provisions of the 2023 Act in relation to which there have been declarations are indeed incompatible with Convention rights, conceding an appeal is intelligible. But it is unclear why or when the Government formed a different view about the compatibility of sections 46 and 47. Appealing against the High Court's declaration of incompatibility in the case of those sections would obviously not detract from "the Government's absolute commitment to the Human Rights Act", a commitment which cannot or should not entail an abdication of appeal rights or an assumption of infallibility about the courts, whether at first instance or at any subsequent appeal.

For the reasons we have given above, the Government should not have conceded its grounds of appeal against the declaration that sections 46 and 47 are incompatible with Article 6 and A1P1. The Government was right, when in Opposition, to support these amendments, in order first to restore confidence in the *Carltona* principle and second to prevent compensation unjustly being paid. The speech of Peter Kyle MP, Shadow Secretary of State for Northern Ireland, in the House of Commons in July 2023 made clear the Opposition's support for both those purposes. The Government should have distinguished this declaration of incompatibility from the other four and should have maintained the appeal against this declaration, just as it did in relation to other aspects of the High Court's judgment that it reasoned were of wider significance and concern.

Again, an absolute commitment to the Human Rights Act is entirely compatible with the appellate hierarchy and with arguing one's case before the Court of Appeal and then the Supreme Court. Indeed, by conceding the point and abandoning the appeal, the Government effectively disarmed the Court of Appeal, and even more importantly the Supreme Court, from having an opportunity to clarify whether in its view sections 46 and 47 were incompatible with Convention rights.

This is a matter of serious concern not only because the High Court's reasoning was unpersuasive and should have been corrected. The High Court assumed that it had to accept that the Supreme Court's decision was correct, which would seem to entail, on the Court's own logic (which the Government seems to have accepted), that only the Supreme Court could conclude that *Adams* was wrongly decided and thus that legislation reversing it with retrospective effect was justified and compatible with Convention rights.

By conceding the appeal, the Government has prevented the Supreme Court from considering and reaching this conclusion, despite the fact that the lower courts have said (albeit we say incorrectly) that no other court can. In this way, the government has unwisely and damagingly sacrificed the opportunity to have the Supreme Court address – as Lord

Reed suggested to Parliament might be helpful –the implications of *Adams* for the *Carltona* principle.

The Court of Appeal's judgment on 20 September made additional declarations of incompatibility, which the Government has made clear that it will implement. On 7 October, the Secretary of State made a further statement to Parliament, saying:

> *As set out in my statement of 29 July, the Government has begun preparations to lay in Parliament a draft remedial order under section 10 of the Human Rights Act 1998 to remedy the original declarations of incompatibility made by the High Court, including the immunity provisions. In light of the additional declarations of incompatibility made by the Court of Appeal, I am reviewing this process and will update the House in due course.*

The two statements thus spelled out that the Government intended to lay a draft Remedial Order before Parliament shortly, which would remove from the statute book the provisions that the High Court and Court of Appeal have declared to be incompatible, including sections 46 and 47.

As mentioned above, the draft Remedial Order containing the repeal of sections 46 and 47 was laid before Parliament on 4 December 2024 and was accompanied by a written statement by the Secretary of State, in which he said:

> *The Order will also enable all civil proceedings that were prohibited by the Legacy Act, including future cases, to proceed. This means that individuals will once again be able to bring Troubles-related cases to the civil courts – a basic right denied them by the Legacy Act.*
>
> *In addition to laying this Remedial Order, I can also announce today that I will introduce primary legislation when parliamentary time allows.*
>
> *This legislation will implement our promise to restore inquests, starting with those that were previously halted by the Legacy Act.*

The draft Remedial Order will be considered by the Houses of Parliament in 2025. The Joint Committee on Human Rights has invited submissions in response to the Order.

The Court of Appeal's judgment

Following the Government's concession, the Court of Appeal's 20 September judgment briefly addressed the High Court's reasoning in relation to sections 46 and 47, while also commenting on the Government's concession that these two provisions are incompatible with Convention rights. (The concession, on 29 July, came after the date of the hearing in which the initial grounds of appeal were argued.)

At [47], the Court of Appeal noted that the Secretary of State had appealed against the judgment in *Fitzsimmons* on the grounds that the High Court had erred in law:

> *…in failing to consider that the restoration of the* Carltona *principle represented a compelling ground of general interest; and* [i]*n failing to conclude that the impugned ICO provisions correct an error on the part of the UKSC in* Adams *(although this was not pursued with any vigour at the hearing, recognising that this court would be bound by the UKSC's reasoning in* Adams).

The Court of Appeal's judgment considered the question of standing in relation to an Article 7 claim in some detail, but the Court's main comment on sections 46 and 47 was at [288]:

> *It follows from the SOSNI's concession that he now accepts that the interference with the applicant's possession effected by retroactive legislative intervention does not pursue a legitimate aim and/or does not strike a fair balance between the general interest and the protection of the respondent's fundamental rights. Again, we consider the concession properly made in the* Fitzsimmons *case. Although we have obvious sympathy with the basic constitutional position that Parliament is entitled to change the law to correct what it perceives to be errors or unintended consequences flowing from court decisions, it will rarely be permissible in Convention terms to do this with retrospective effect where it interferes with citizens' property rights. This court was, of course, constrained to follow the reasoning of the Supreme Court in the* Adams *case. It would only be open to that court to determine that its previous decision was wrongly decided. However, the amendments to the Bill which became the ICO provisions were not introduced by the government; and we found the justification offered, namely that these were required in order to restore the* Carltona *principle to its rightful place, to be unconvincing. The* Carltona *principle is broadly unaffected by the conclusion of the Supreme Court in* Adams, *which was essentially that, as a matter of construction of the relevant emergency provisions, that principle was excluded from operation in those particular cases.*

This passage repeats the main errors in the High Court judgment. The Court of Appeal purported to recognise that Parliament is entitled to change the law to correct a judicial error, but said that it will rarely be permissible to do so in a way that interferes with property rights, where the "property rights" in question are the interests in bringing legal proceedings premised on the error.

This is an unfortunate overstatement. Parliament does not act unfairly and/or in violation of Convention rights when it enacts legislation that restores the original legislator's intention and prevents would-be litigants from exploiting a court's misinterpretation of legislation in order to secure a windfall gain. This is even more clearly the case where the legislation does not strip any person of the fruits of litigation, viz. has a savings clause to leave untouched any judgment that has been secured before the legislation comes into force. Sections 46 and 47 are framed in this way.

Like the High Court below, the Court of Appeal asserted that it "was constrained to follow" the Supreme Court's reasoning in *Adams*, implying that it was not open to it to consider whether the legislation was justified because that judgment had been wrongly decided. On this logic, only the Supreme Court could act fairly to the Secretary of State because only the Supreme Court could recognise that Parliament had legislated in response to a wrongly decided judgment that had failed to give effect to the legislator's intention.

As we have said, we think this is wrong and we maintain that the doctrine of precedent does not require the Court of Appeal, any more than the High Court, to accept that the Supreme Court's reasoning in *Adams* was correct. In particular the law does not require the lower courts to assume that Parliament has legislated to reverse a correctly decided case.

This supposition on the Court of Appeal's part, especially taken with their commendation of the Secretary of State's concession, undermined the Court's claim to entertain "obvious sympathy" for Parliament's constitutional entitlement to change the law in response to judicial errors, which must include the capacity to restore the law that a court decision has unsettled by enacting corrective legislation with retrospective effect. Such legislation may be needed to vindicate the rule of law.

However, the Court of Appeal seems not only to have assumed it was bound to accept that *Adams* was rightly decided but also to have suggested that it was, in fact, rightly decided. The Court of Appeal's evaluation that *Adams* had no wider practical implication for the *Carltona* principle was just simply wrong – and was not an evaluation shared by Parliament.

Furthermore, despite what the Court of Appeal said, it is simply irrelevant that the Faulks/Godson amendment was not introduced by the Government. (Of course, it is also true that the Court of Appeal was wrong to assert that it is was this amendment that determined the final form of the legislation, rather than the replacement Government amendments moved after the Government had accepted the need for an amendment.) If this point has any relevance at all it is only to demonstrate that the Government changed its mind about what was needed and that its

previous hesitation about the need for an amendment formed no part of the relevant background for justifying the final form of the Act.

For the reasons we gave in our June 2023 paper and which peers gave in the House of Lords, and which the Secretary of State and the Shadow Secretary of State gave in the House of Commons, the amendments that resulted in sections 46 and 47 were required in order to restore the previous accepted understanding of the 1972 Order, including the nature of the *Carltona* principle and its application in this context.

Sections 46 and 47 were also justified, as again the statutory text in its context and the legislative history make clear, to prevent the injustice, and waste of public money, of "compensation" being paid to persons who in truth had not been wronged at all, because their detention had in fact been perfectly lawful.

The Court of Appeal did not address this second rationale for the legislation at all. The Court framed the legislation as an attempt by Parliament to correct what was in truth no judicial error at all (because *Adams* was rightly decided) without adequate respect for property rights, namely litigation that had been initiated in reliance on the imagined error. For the reasons we have given above, this is a complete misunderstanding of the legislation, which makes it impossible for Parliament to exercise "the basic constitutional position" with which the Court of Appeal says, disarmingly, that it has "sympathy".

Further, the approach taken by the Court of Appeal, like that of the High Court, cannot be reconciled with *Vegotex* or with the other domestic and European case law considered in this paper.

The imprecision of the Court of Appeal's analysis is confirmed by the opening sentence of the passage above, which asserted that the Secretary of State "now accepts that the interference with the applicant's possession effected by retroactive legislative intervention does not pursue a legitimate aim and/or does not strike a fair balance between the general interest and the protection of the respondent's fundamental rights".

For the Court of Appeal responsibly to have accepted the concession and to exercise its discretion under section 4 of the Human Rights Act to declare an enactment incompatible with Convention rights,[41] the Court should have taken responsibility itself for the conclusion that the legislation did not have a legitimate aim, and/or that the legislation disproportionately interfered with the applicant's Article 6 or A1P1 rights.

In short, the Government was plainly wrong to concede this ground of appeal and the Court of Appeal was wrong to accept the concession and, on the basis of the concession, to exercise its discretion to declare the legislation incompatible with Convention rights. The Court of Appeal was not freed by the concession, especially in view of the fact that the matter had already been argued, from its duty to consider whether sections 46 and 47 were in truth incompatible with Convention rights.

Thus, while the Court of Appeal's judgment formally approved and restated the High Court's declaration of incompatibility, the judgment is in fact empty, a failure of adjudicative responsibility. The failure in this

41. The Court of Appeal said that "we confirm the declaration of incompatibility made by the trial judge", which did not make entirely clear whether the Court was itself exercising the section 4 power to make a declaration or simply recording that the Government's appeal against the declaration had been abandoned.

case is all the more pronounced when, as we have argued, on the Court's own logic, which mandates that Parliament is very unlikely to be able to justify legislation responding to a Supreme Court decision unless and until the Supreme Court has an opportunity to reconsider its own decision, it should not have taken the (late) concession to free it from its duty and should, on the contrary, have strongly encouraged the Secretary of State to appeal to the Supreme Court.

Why the Government should not make, and Parliament should not accept, a Remedial Order

Section 10 of the Human Rights Act makes provision for a Minister of the Crown by order to make amendments to legislation, including to repeal legislation. This "power to take remedial action", as the section is entitled, arises, according to section 10(1), if a provision of legislation has been declared by a UK court under section 4 to be incompatible with a Convention right (or if it appears to the Minister as a result of a finding of the Strasbourg Court in proceedings against the UK that a provision is incompatible with an obligation of the UK arising out of the ECHR).

Section 10(2) provides that the Minister who "considers that there are compelling reasons for proceeding under this section… may by order make such amendments to legislation as he considers necessary to remove the incompatibility." Schedule 2 of the Act makes further provision for remedial orders, including authorising amendment of legislation by order without parliamentary approval in urgent cases (but making provision for the order to lapse if not later approved) or in other cases requiring parliamentary approval before the order comes into force.

Standing Orders require the Joint Committee on Human Rights (JCHR) to review each draft remedial order and to report to each House whether the special attention of each House should be drawn to the draft Order on any of the grounds on which the Joint Committee on Statutory Instruments may so report in relation to most other statutory instruments and whether the JCHR recommends the draft order be approved. In 2001, the JCHR set out a statement of principle on the making of remedial orders:[42]

> 32. *As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill. This is likely to maximize the opportunities for Members of each House to scrutinize the proposed amendments in detail. It would allow amendments to be made to the terms of the proposed amendments to the law during their parliamentary passage. (The procedure under section 10 of and Schedule 2 to the Human Rights Act 1998 does not allow for Parliament directly to amend either a draft remedial order or a remedial order—only to suggest amendments.) In many cases it may be easy to remove an incompatibility by means of a short Bill which could be drafted quickly and passed speedily through both Houses. Such a Bill may often be politically uncontroversial. Proceeding by way of a Bill*

42. Joint Committee on Human Rights, *Making of Remedial Orders*, Seventh Report of 2001-02 Session, para.32

> *may result in the incompatibility being removed far more quickly than would be possible using the non-urgent remedial order procedure, which (as we point out in our Sixth Report) could allow eleven months or so to elapse between the making of the declaration of incompatibility and the coming into effect of the necessary amendment to the law. Sometimes there may be good reasons for proceeding by Bill even where the matter is more complex. For example, if it is necessary to establish a regime of inspection, regulation, appeal or compensation in order to remove the incompatibility, or to authorize significant expenditure, in order to provide adequate and continuing safeguards for Convention rights, it might be preferable (constitutionally and practically) for those arrangements to be set out in a Bill rather than effected by way of subordinate legislation.*

However, the JCHR went on to note, at paragraph 33, that there might be "compelling reasons" to proceed by way of section 10 if, without limitation: an amendment relates to legislation under major review, where a short Bill to amend the legislation might be difficult or inappropriate; where the legislative timetable is fully occupied with important or even emergency legislation; where waiting for a slot in the legislative timetable might involve significant delay; or where the need to avoid delay is particularly pressing (as it might be when involving the life, liberty, safety or security of individuals) and the section 10 procedure would be likely to be faster than a short Bill.

There are very strong reasons of constitutional principle for the Government not to proceed with the proposed draft Remedial Order so far as it relates to sections 46 and 47 of the 2023 Act.

The Government should leave anything they propose to do about those sections for the primary legislation that it has announced that it will bring forward in due course. There are no compelling reasons, in the terms set out in section 10 and in the JCHR's 2001 statement of principle, for the Secretary of State to repeal the relevant provisions of the Act by order at an early date. It would be much better, in terms of good constitutional practice, for the Government to introduce a Bill that will provide an opportunity for both Houses to consider all the proposed amendments of the 2023 Act closely and to amend the Bill rather than to be forced to accept or reject a draft order.

The 2023 Act was passed very recently indeed by Parliament in full knowledge of the human rights questions affecting its provisions. This is not a rectification of a pre-Human Rights Act incompatibly; nor is it an incompatibility that was inadvertently created by Parliament. It is a recent and conscious enactment by Parliament that it would be constitutionally highly inappropriate to change otherwise than by way of primary legislation.

Moreover, it is far from clear that the form of the repeal proposed in the draft Remedial Order is appropriate or indeed sufficient to achieve what, it can be assumed, the Government is trying to achieve. Section 16(1)(a) of the Interpretation Act 1978 is very clear: a repeal does not "revive anything not in force or existing at the time at which the repeal takes effect". The effect of the 2023 Act – and in particular section 46(2) to (5)– was that

various potential causes of action and the reciprocal liabilities that went with them ceased to exist. If the rights and liabilities are to be revived, that should be done expressly. It is a more complex process and requires more detail, and certainly more Parliamentary consideration, than the adoption of a straightforward repeal in a statutory instrument would suggest.

The retrospective re-imposition of liabilities is something which, if done, needs to be done without any equivocation or ambiguity. The rule in the Interpretation Act 1978, like many of the other provisions of that Act, does make the default effect of a repeal subject to the qualification "unless the contrary intention appears"; and it might be argued that what the Government is trying do in the provision is easy enough to guess and indeed is set out in the Ministerial statement. However, the argument that "the intended effect can be inferred from external materials even though the provision itself fails accurately to articulate it" is not usually regarded as an adequate defence for defective retrospective legislation, particularly, when the simplicity of the form adopted also appears to be disguising the significance and complexity of what is being done, as well as its retrospective effect.

It would be an implausible or illegitimate premise for construing the Order that it was made in ignorance of a basic rule about the effect of a repeal set out in the Interpretation Act. A contrary intention for the purposes of the Interpretation Act always needs, at the very least, to be founded on some express wording in the legislation and there is none that can be relied on in this case. It is also particularly important that provisions retrospectively reviving rights and liabilities, which may well have to be tested in litigation, should be drafted with absolute clarity to avoid the unnecessary uncertainty and expense that will be caused by creating a vulnerability to such litigation. Given that what should have been done to give effect to what the Government intended by the Remedial Order is something more detailed and also potentially more controversial than a simple repeal, it should have been left for the proposed primary legislation.

The focus of this paper, is on the declaration of incompatibility in relation to sections 46 and 47 and we have not considered the extent to which the other repeals in the draft Order are adequately drafted for their intended purpose, although section 16 of the Interpretation Act does need to be considered in that context too. But in the case of sections 46 and 47 there are also further reasons why those sections should not be dealt with in the draft Order.

As we have already explained, it also seems to us that the Government has not carefully differentiated this declaration of incompatibility from the other four declarations that the High Court made and has instead accepted all of them, conceding the grounds of appeal against them, as if they formed a job lot, rather than considering each on its merits.

This is an obvious problem, not least since it brings out the inconsistency of the Government's position in relation to sections 46 and 47, sections, which it accepted at the time and yet now treats as if they were provisions it had always opposed. It would be much better for the Government to

remove sections 46 and 47 from the scope of the draft Remedial Order. The Government should instead reserve any change that it proposes to make in respect of those provisions to the Bill to repeal and replace the 2023 Act as a whole, a Bill that should not overturn Parliament's recent and unanimous reversal of the Supreme Court's mistaken judgment in *Adams*.

If the Government persists with a draft Remedial Order that repeals sections 46 and 47, as well as making changes in response to the other declarations of incompatibility made by the High Court and the Court of Appeal (or perhaps proposes another such order that properly sets out what it intends to revive with its repeal of those sections), parliamentarians in both Houses should question why the Government is proceeding in that way. They should also ask why it now accepts that the legislative response to *Adams*, which it supported at the time, breaches Convention rights.

If the answer is that the Government has an "absolute commitment to the Human Rights Act", and thus undertakes to exercise section 10 to legislate in response to a declaration of incompatibility, the next questions should be (a) how this approach can be squared with the structure of the Human Rights Act, which reserves to Ministers and Parliament responsibility for deciding whether or how to respond to a declaration of incompatibility, and (b) why the Government has chosen to concede the grounds of appeal from the High Court's decision and, especially, why it has chosen not to appeal to the Supreme Court.

Parliamentarians should demand that the Government amend the draft Remedial Order to avoid any premature legal change in respect of the declarations made about sections 46 and 47. There is no compelling reason for the Government to proceed in advance of the legislation that it is proposing about legacy issues or to forestall the debate on what it will propose in that legislation. There is no urgency, and "no compelling reason", that warrants immediate action in respect of matters already half a century in the past, and nor is there any saving of parliamentary time for higher priorities, given that these matters are likely to be brought back to Parliament in the proposed Bill.

It should be noted that the Explanatory Memorandum to the draft Remedial Order says that:

> *7.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for targeted amendments which are required to implement court judgments.*

And:

> *9.1 A full Impact Assessment has not been prepared for this instrument because this Order is required to implement a court judgement [sic].*

The introduction to the draft Order also says that it amends the 2023 Act in order "to implement the February 2024 judgment of the High Court in Northern Ireland".

This choice of language discloses a fundamental misunderstanding

of constitutional principle. Section 10 of the Human Rights Act confers a discretion on Ministers and section 4(6) of the Act makes clear, or confirms, that there is no obligation to comply with a declaration. Neither Government nor Parliament "are required to implement court judgments" when the judgment in question is a section 4 declaration of incompatibility. And the Government is not excused from its responsibility to think about the consequences, including the costs, of changing the law by asserting that the change that it proposes to make is made in response to a declaration.

In considering that part of the draft Order that purports to reverse the effects of sections 46 and 47, parliamentarians must consider whether the High Court was right about the practical and financial burden that, but for the enactment of the legislation, would have been imposed as a result of *R v Adams*. (For the reasons we have given, the High Court was not in a position to judge this burden and was mistaken in its analysis and assessment of it.) It is that burden that will constitute the "impact" of reversing sections 46 and 47 and the Government is absolutely wrong to imply that Parliament in effect has no choice except to accept the High Court's assessment and to agree to the draft Remedial Order without considering the impact of doing so.

If the Government were, in the end, to propose an effective reversal of sections 46 and 47 in primary legislation, reviving the rights and liabilities that ceased to exist as a result of those sections, and if Parliament were to support this proposal, then the claimants would be able to resume their litigation and claims for compensation. This is not a situation in which any person's life, liberty or security is in jeopardy, to recall the JCHR's outline of cases in which there is a particularly pressing need to avoid delay.

If the Government does make a Remedial Order reversing the effect of sections 46 and 47, and if Parliament approves the Order, then the Government must bring forward, as a matter of urgency, more general legislation that restores and supports the *Carltona* principle, so that it can be relied on as safely as was thought possible before the *Adams* case. We have proposed such legislation in earlier work (see further Appendix Three). The undesirability of casting further doubt on the *Carltona* principle by repealing sections 46 and 47 before enacting a more general reinforcement of the principle is another reason why it would be better to leave addressing those sections for the primary legislation that is proposed for later and could provide the necessary reinforcement at the same time.

Appendix One: Sections 46-47 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023

46 Interim custody orders: validity

(1) This section applies in relation to the functions conferred by—

(a) Article 4(1) of the 1972 Order, and

(b) paragraph 11(1) of Schedule 1 to the 1973 Act,

(which enabled interim custody orders to be made, and which are referred to in this section as the "order-making functions").

(2) The order-making functions are to be treated as having always been exercisable by authorised Ministers of the Crown (as well as by the Secretary of State).

(3) An interim custody order is not to be regarded as having ever been unlawful just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

(4) The detention of a person under the authority of an interim custody order is not to be regarded as having ever been unlawful just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

(5) Subsections (3) and (4) do not limit the effect of subsection (2).

(6) This section and section 47 apply only in relation to an exercise of any of the order-making functions which was conduct forming part of the Troubles (see, in particular, section 1(2)); and for this purpose any exercise of any of the order-making functions must be assumed to have been conduct

forming part of the Troubles unless the contrary is shown.

(7) In this section and section 47—
"1972 Order" means the Detention of Terrorists (Northern Ireland) Order 1972 (S.I. 1972/1632 (N.I. 15));

"1973 Act" means the Northern Ireland (Emergency Provisions) Act 1973;

"authorised Minister of the Crown" means a Minister of the Crown authorised to sign interim custody orders—

(a) by Article 4(2) of the 1972 Order (in the case of such orders under that Article), or
(b) by paragraph 11(2) of Schedule 1 to the 1973 Act (in the case of such orders under that paragraph);

"interim custody order" means an interim custody order under—

(a) Article 4 of the 1972 Order, or
(b) paragraph 11 of Schedule 1 to the 1973 Act;

"order-making functions" has the meaning given in subsection(1).

47 Interim custody orders: prohibition of proceedings and compensation

(1) On or after the commencement day, a civil action may not be continued or brought if, or to the extent that, the claim that is to be determined in the action involves an allegation that—

(a) the person bringing the action, or another person, was detained under the authority of an interim custody order, and
(b) that interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

(2) On or after the commencement day, criminal proceedings relating to the quashing of a conviction may not be continued or brought if, or to the extent that, the grounds for seeking to have the conviction quashed involve an allegation that—

(a) the person bringing the proceedings, or another person, was detained under the authority of an interim custody order, and
(b) that interim custody order was unlawful because an

authorised Minister of the Crown exercised any of the order-making functions in relation to the order.

(3) If criminal proceedings relating to the quashing of a conviction are pre-commencement proceedings—

(a) subsection (2) does not apply to the criminal proceedings;
(b) section 46 does not prevent the court from quashing the conviction on the ground that an interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions.

(4) On or after the commencement day, no compensation for a miscarriage of justice is to be paid in respect of a conviction that has been reversed solely on the ground that an interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions.

(5) Regulations under section 58(2) which make provision that is consequential on section 46 or this section—

(a) may amend this Act (including this section);
(b) (whether or not they make such amendments) are subject to made affirmative procedure, unless they are instead made in accordance with section 58(5) (the affirmative procedure) or 58(6) (the negative procedure).

(6) In this section—

"commencement day" means the day on which this section comes into force;

"compensation for a miscarriage of justice" means compensation under section 133 of the Criminal Justice Act 1988;

"pre-commencement proceedings" means proceedings—

(a) for which leave was given before the commencement day, or
(b) which follow from a referral made by the Criminal Cases Review Commission before the commencement day.

Appendix Two: The Faulks/ Godson amendment

After clause 38, insert the following new clause:

"Authorisation of interim custody orders under the Detention of Terrorists (Northern Ireland) Order 1972

(1) Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 is to be treated as always having had effect as authorising an interim custody order under that article in relation to a Troubles-related offence to be made by and with the authority of any Minister of the Crown whose signature was required for the making of such an order (and not just by and with the authority of the Secretary of State personally).

(2) Subsection (1) does not revive any criminal conviction quashed before the coming into force of this section.

(3) But a person whose conviction for any Troubles-related offence (whether or not quashed) or whose detention (whether or not as a consequence of such a conviction) depended, directly or indirectly, on the validity of such an interim custody order is not entitled, by or under any enactment or otherwise, to receive any damages or compensation in respect of that conviction or detention if the only reason for impugning its validity relates to whether the order was made by and with the authority of the Secretary of State, personally.

(4) Subsection (3) applies irrespective of whether the claim for damages or compensation was made before or after the coming into force of this section."

Appendix Three: A Bill to enact the Carltona principle and presumption

After section 12 of the Interpretation Act 1978, insert –

"**12A Exercise of powers and duties**

(1) Where the provision of any enactment confers a power or imposes a duty on any Minister of the Crown it is implied, unless the contrary intention appears, that the *Carltona* principle applies.

(2) Where the provision of any enactment confers a power or imposes a duty on a Minister of the Crown it is implied, unless the contrary intention appears, that the power may be exercised or the duty carried out on the Minister's behalf by any person for whose actions the Minister, pursuant to his office, takes responsibility.

(3) Where the provision of any enactment confers a power or imposes a duty on a Minister of the Crown it is implied, unless the contrary intention appears, that the Minister is not required personally to exercise the power or carry out the duty.

(4) Where the provision of any enactment provides (in whatever terms) that the instrument by which any power or duty is to be exercised or carried out by a Minister of the Crown may be signed by a specified office holder, that enactment is to be construed, unless express provision is made to the contrary, as authorising that office holder to exercise or carry out that power or duty without consulting that Minister in relation to that particular case.

(5) In this section –

(a) "Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975; and

(b) "office holder" means a person holding office as a Minister of the Crown or an official in a government department of the level of seniority specified in the enactment.

(6) This section applies to enactments contained in Acts and subordinate legislation whenever passed or made [and also to any Northern Ireland legislation (within the meaning of section 24)] whenever passed or made."

Policy Exchange

"While I can well understand the approach and analysis of the Supreme Court in R v Adams, I agree with the authors of this paper that it underplayed the importance of the Carltona principle. Context and balancing of relevant factors, including the Carltona principle itself, are critical but my view is that the decision in R v Adams did not give sufficient weight to the importance of the principle, which is critical to the operation of modern government.

"Sections 46 and 47 were a legitimate attempt by Parliament to endorse the significance of the presumption under the Carltona principle.

"I agree with the authors of this paper that, rather than including sections 46 and 47 within the draft Remedial Order, it would be better to address them in legislation to repeal and replace all or part of the 2023 Act. Alternatively, the Government should bring forward swiftly legislative provisions which make clear the presumption under the Carltona principle. Either course would enable parliamentarians to express their views."

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"The Government's decision to repeal sections 46 and 47 of the Northern Troubles Act 2023 is inexplicable and unexplained. Policy Exchange's compelling new paper lays bare the many constitutional and practical problems to which this decision gives rise. Parliament must now ask hard questions about why the Government is determined to override Parliament's recent, unanimous decision to vindicate the Carltona principle and to block Gerry Adams from being paid public money. The Government's defence of its decision to abandon a winnable appeal – that this signals its 'absolute commitment' to the Human Rights Act – makes no sense and warrants the sharp criticism that this paper ably provides."

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