Reversing the Supreme Court's judgment in R v Adams

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

Foreword by Rt Hon Lord Brown of Eaton-under-Heywood, Rt Hon Lord Butler of Brockwell KG GCB CVO, Lord Carlile of Berriew CBE KC, Rt Hon Lord Howard of Lympne CH KC, Rt Hon Lord Howell of Guildford, Lord Macdonald of River Glaven KC, Rt Hon Lord West of Spithead GCB DSC and Lord Wolfson of Tredegar KC

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About the Authors

Professor Richard Ekins KC (Hon) is Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government in the University of Oxford.

Sir Stephen Laws KCB, KC (Hon) is Senior Fellow of Policy Exchange's Judicial Power Project and former First Parliamentary Counsel.

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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 of us that urgent legislation was needed to overturn the judgment and to limit its damaging consequences.

The judgment invited Gerry Adams and others who were detained between 1972 and 1974 to seek compensation for unlawful detention or 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 any other time. And most importantly of all, the judgment put in doubt the general application and extent of the *Carltona* principle, which is fundamental to our way of government.

In a paper for Policy Exchange published a fortnight after the judgment, Professor Ekins and Sir Stephen Laws outlined a compelling critique of the Supreme Court's reasoning and made a powerful case for remedial legislation, not to reverse the outcome of the appeal and to reinstate Adams's conviction, but rather to limit the judgment's wider consequences.

An amendment to the Northern Ireland Troubles (Legacy and Reconciliation) Bill now provides an opportunity to realise this end. Tabled by Lord Faulks KC and Lord Godson, the amendment would reverse the central holding of the Supreme Court's judgment, providing (a) that interim custody orders made by the Minister of State were lawfully made and (b) that no compensation shall be paid to anyone whose conviction, or detention, turned on the validity of an interim custody order.

In this new paper for Policy Exchange, Professor Ekins and Sir Stephen outline the background to the amendment, including the support it has received in the House of Lords already, and make the case for its enactment, answering two objections that might be made to it.

The amendment is an intelligent means to protect and fortify the *Carltona* principle. It is not the only means that Parliament might adopt – the paper also outlines a more general solution – but this amendment, which

is now before the House, would go a very long way towards restoring the constitutional law and practice that the judgment in *Adams* unsettles. It deserves support.

The authors of the paper anticipate that the amendment may be opposed as an unfair, retrospective exercise of Parliament's legislative authority that is incompatible with Article 6 of the European Convention on Human Rights.

For the reasons they give, this would be a wholly mistaken analysis.

The judgment was wrongly decided and it is surely within Parliament's authority, and indeed is 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.

Sometimes restoring legal clarity that has been lost necessitates retrospective legislation. Neither Gerry Adams nor anyone else has acted to their detriment in reliance on the Supreme Court's misunderstanding of the 1972 Order and legislation that reverses the judgment in *Adams* does not treat anyone unfairly.

Even if one accepted that the Supreme Court's judgment 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 be 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 does not aid the cause of reconciliation in Northern Ireland to leave open the possibility of meritless litigation that follows from a clearly mistaken Supreme Court judgment, litigation that is unfair to those who made the law in 1972 and applied it thereafter.

Parliament has an opportunity in this amendment to fix the problems to which the Supreme Court's judgment has given rise. We very much hope that it will take it.

Introduction

Lord Faulks KC and Lord Godson have tabled an amendment to the Northern Ireland Troubles (Legacy and Reconciliation) Bill. The amendment would introduce a new clause to the Bill that would address the authorisation of interim custody orders under the Detention of Terrorists (Northern Ireland) Order 1972. (We have set out the text of the Faulks/Godson amendment in the first appendix to this paper.) The point of the amendment is to reverse the legal effects of the Supreme Court's judgment in *R v Adams* [2020] UKSC 19, in which the Court allowed Mr Gerry Adams's appeal against his conviction in 1975 for escaping from lawful custody on the grounds that the interim custody order authorising his detention had been signed by a Minister of State – and had not been considered personally by the Secretary of State.

The amendment would not revive Mr Adams' conviction. But it would reverse the central holding of *Adams*, which was that the 1972 Order required the Secretary of State personally to make the decision to issue an interim custody order. The amendment would correct the Supreme Court's misapprehension about the nature of the *Carltona* doctrine (or principle) and about its relevance to the making of interim custody orders: by providing that the correct legal position is, and always has been, that the 1972 Order authorised a Minister of State (amongst others) to make an interim custody order and not only to sign an order that the Secretary of State had personally decided should be made. The amendment would also limit the further consequences of *Adams*, namely the risk that persons detained under an interim custody order, including Mr Adams, will now seek compensation for unlawful detention or (as in Mr Adams' own case) compensation for "wrongful conviction" for having been convicted for attempting to escape from what the Court has now decided was not lawful custody.

This research note outlines the background to the amendment and then anticipates and answers two possible objections. The first is that the amendment is not a fit means to repair the more general damage to the *Carltona* principle that the Supreme Court's judgment causes, because the amendment focuses too narrowly on retrospective validation of decisions taken under the 1972 Order. The second is that the amendment would not be compatible with Article 6 of the European Convention on Human Rights (ECHR) because it would interfere retrospectively with existing civil proceedings. We argue that the amendment poses no risk whatsoever to the application of the *Carltona* principle in other contexts. On the contrary, the amendment would help secure the application of *Carltona*, minimising the risk that *Adams* will destabilise it. Further, the amendment is compatible with Article 6, as is obvious from a consideration of the detail of the amendment, the context in which it would be enacted, and the relevant case law about Article 6.

The background to the Faulks/ Godson amendment

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 the 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 and was convicted of two offences of attempting to escape from lawful custody in 1975, and 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. The application was granted by Gillen LJ on 20 April 2017. With respect, 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. It was fully open to Mr Adams, at the time of his trial, to challenge the lawfulness of the interim custody order 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.

On 14 February 2018, the Northern Ireland Court of Appeal rejected the appeal. On 13 May 2020, the United Kingdom Supreme Court allowed the appeal, holding that the 1972 Order required the Secretary of State 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. Thus, the order was unlawful. It followed, the Court concluded, that Mr Adams had not been lawfully detained and that his conviction could not stand.

The Supreme Court's judgment was clearly wrong. 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. This reading of the 1972 Order was supported by the *Carltona* doctrine, which provides that a power conferred on a Secretary of State may be exercised by other ministers or civil servants on his behalf, unless Parliament directs otherwise. The 1972 Order had qualified the application of the *Carltona* doctrine, by specifying that only a Minister of State or 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, the long-standing constitutional presumption, or the parliamentary history.

These weaknesses in the Court's reasoning were set out in 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*, and has been raised several times in the House of Lords by a number of eminent jurists. 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 2023. In *The Supreme Court's misunderstanding in the Gerry Adams case: A personal view*, 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, with Lord Reed seeming unwilling to defend the judgment and coming close to agreeing that it was mistaken.

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 has ordered the Secretary of State to reconsider his application for compensation under section 133 of the 1988 Act.

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 the Faulks/Godson amendment. The amendment was strongly supported by peers from across the House, including: Lord Butler of Brockwell, 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, but has published an article in *The Telegraph* in support of the amendment, explaining why the Supreme Court's judgment was clearly wrong and why Parliament must take the opportunity to reverse it.

The Faulks/Godson amendment is now to be considered by the House on the second day of the Bill's Report Stage on 26 June 2023 (Baroness Hoey is now also sponsoring the amendment). It is unclear whether the Government will support the amendment.

Is the amendment a suitable means to repair and protect the *Carltona* principle?

We anticipate that the Government may decline to support the amendment on the grounds (a) that legislation focusing on the 1972 Order (rather than setting out a more general legislative fix) might 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 be better to attempt to repair and protect the *Carltona* principle through litigation.

If these arguments are advanced, the House of Lords should reject them.

The first argument is that the amendment's focus on the 1972 Order would weaken the application of the *Carltona* principle in other contexts by implying (somehow) that Parliament did not intend the the repair of the principle to apply more generally.

Such an inference would be entirely implausible. Legislation expressly reversing *Adams*, making clear that a Minister of State was always able to act on behalf of the Secretary of State under the 1972 Order, would not support an inference that Parliament does not intend *Carltona* to apply in other contexts in the way it was thought to apply before *Adams*, or that it does intend to endorse the extension of the erroneous reasoning in *Adams* to other cases, while making it inapplicable to the facts of that case itself No domestic court would read the amendment in this way. The obvious point of the amendment is to reverse the central holding of *Adams*, which would mean that no future court would be able to rely on *Adams* as having been correctly decided. If counsel were to raise *Adams* in support of the proposition that the *Carltona* principle is *not* a presumption about Parliament's intentions, the court would reject the argument on the grounds that Parliament had expressly reversed the judgment that supported that proposition, and had rejected the Supreme Court's reasoning. Thus, the amendment would return the *Carltona* principle to how it was understood before *Adams*. Parliament would have indicated, by legislating to reverse *Adams*, that the courts had misunderstood the intention of the 1972 Order and the application of the principle to it; and it would be perverse for any court to infer that silence about comparable cases implied that they should nevertheless be construed according to the analysis in *Adams*.

Subsection (1) of the amendment is a clear and obvious correction

of the Supreme Court's judgment and it will be read as such by our courts. It would be possible to be more express still, introducing another subsection that would expressly require courts to treat *Adams* as having been wrongly decided. This would not be necessary, in our view, but it could be done and it would clearly prevent the Supreme Court's judgment from destabilising the law in other cases. Again, it is inconceivable that the amendment would be taken to put in doubt how *Carltona* should be applied in other cases. If there was still any worry that the amendment risks confusing or misdirecting the courts, the amendment could easily be adapted to provide a saving to the effect that nothing in the legislation is to be taken as requiring any new limitation on the application of the *Carltona* principle in any other context.

The second argument is that a more general restoration of the *Carltona* principle would be a very difficult and complex drafting exercise, which might not in fact be possible, because there are thousands of statutory provisions to which the principle is relevant.

This would not be a good argument for declining to enact either general remedial legislation or this amendment in particular. Drafting legislation to affirm the correct operation of the *Carltona* principle – and thus to address the risk that *Adams* will destabilise that principle – is entirely possible. What is required is legislation that reverses the Supreme Court's misstatement in *Adams* that the *Carltona* principle is *not* a presumption about legislative intent. Policy Exchange's 2021 paper, *How to Amend the Judicial Review and Courts Act*, set out a draft clause to this effect, entitled "Acting on behalf of the Secretary of State". The clause was framed to introduce a new section to the Interpretation Act 1978, which would have expressly established a presumption that the *Carltona* principle applies and would have corrected in turn each misconception on which the Supreme Court relied in its reading of the 1972 Order. (We have set out the text of the clause in the second appendix to this note.) If Parliament were to enact this clause, it would restore the proper understanding of the *Carltona* principle, reversing *Adams* with general effect.

What are the risks (if any) of legislating in this way, risks that would make it too difficult, or even impossible, for Parliament responsibly to undertake?

First, there may be a risk that the legislation could change the law so that the *Carltona* principle would apply in some cases to enable the Government to rely on it where a court might otherwise have concluded that it does not apply. This would not be a disaster. There is no risk to Government from widening the class of possible decision makers in particular cases and, equally, no obligation on the Government to make use of the widened class. If that is the price of greater clarity about the application of the principle, it would be a legitimate outcome for the legislation. From a practical point of view, what the Government needs from the law is clarity about when it can rely on the *Carltona* principle and when it cannot. It is enough to justify amending the law if an amendment can produce greater clarity than results from the law as it stands after *Adams*. The objective

of remedial legislation need not be the perfect codification of what the law would have been if *Adams* had not been decided. If enacting clearer statutory rules did turn out to have an unexpected and unacceptable widening effect in a particular case, that would give rise to a political imperative to legislate to impose an express requirement for the Secretary of State personally to make the relevant decision, and the problem would be solved in that way.

Secondly, one might speculate that legislating to clarify *Carltona* risks inadvertently narrowing the class of decision makers in particular cases with, consequentially, adverse practical consequences. This is extremely unlikely but could be easily, even if unnecessarily, guarded against by an express saving for the previous width of the rules along the lines suggested above in relation to the more specific Faulks/Godson amendment, the text of which is set out in the first appendix.

There are no other practical risks that arise from a general solution along the lines set out in the second appendix. And no amount of studying legislation and other circumstances in which the *Carltona* principle applies can uncover any others. There is no good reason to conclude that a general legislative response to *Adams* is either likely to prove over complex or impossible.

Lord Faulks KC and Lord Godson have proposed an amendment that aims to limit the effect that *Adams* has on the *Carltona* principle by making clear that the Supreme Court's judgment misconstrued the 1972 Order. It does not aim to clarify the *Carltona* principle more generally by putting it on a statutory footing. But the only reason for this is that the amendment had to be of limited operation to be clearly within the scope of the Northern Ireland Troubles (Legacy and Reconciliation) Bill. There are, indeed, good reasons for the Government to invite Parliament to enact more general legislation with a wider effect along the lines set out in the second appendix. In the meantime, however, it would be possible for the Government to support the Faulks/Godson amendment in response to the immediate problem in the context of reconciliation in Northern Ireland, while also launching a consultation on a more general clarification. In practice, that would mitigate any supposed risks of the limited nature of the Bill amendment being misunderstood.

It would be no answer to the Faulks/Godson amendment to say that reversing *Adams* is impossible without a codification of the application of the *Carltona* principle in general. The objective of any legislation should be to mitigate the damage done by the Supreme Court's judgment to the maximum extent possible, and as soon as possible. The question is whether the Faulks/Godson amendment would deliver a clearer and more satisfactory outcome than either the status quo, in which *Adams* remains uncorrected (and may unsettle existing legal arrangements and give rise to further litigation), or the likely outcome of any future invitation to the Supreme Court to reverse or distinguish *Adams*. The answer to that question is obviously yes, which is why the amendment warrants support.

The third argument against a legislative response to the Adams case

is that instead of enacting remedial legislation, the Government should instead aim to repair and protect the *Carltona* principle by way of litigation, aiming to find a test case in which it might persuade the courts to distinguish *Adams* or even to overrule it.

It would be a bad mistake to think that waiting for litigation to solve the problem can provide the clarity that is needed. Any development of the law by the courts is bound to be more complex and obscure than any solution contained in legislation. In the nature of case law development, it has to proceed on the basis that at some level or other *Adams* was rightly decided. That is likely to involve manufacturing complicating subtleties and grounds of distinction that are bound to be incompatible with clarity. And, if the objection is to retrospection, any litigated solution, in so far as it overrules *Adams*, will be as retrospective as anything that Parliament enacts. The courts have no power to develop the law except by reference to the principle that what they say it is now is what it has always been.

Parliament should make clear that the Government would be wrong to tolerate or prolong a state of affairs in which the law is needlessly uncertain (even if the extent of uncertainty is itself unclear) or over complex as a result of it putting its faith in (a) an opportune test case arising and (b) such a case being satisfactorily resolved by the courts. In relation to (b), we suspect that the Supreme Court may welcome an opportunity to correct *Adams*. However, there can be no guarantee that a future court will reverse *Adams* or that it will find itself able to restore the law as it stood before *Adams* in a way that gives the Government the clarity it needs about the rules it can rely on in future. The Supreme Court will be no better placed then than Parliament is now to decide how to correct the law, and indeed it is likely to be less well placed to consider the background and effect of any change. It is a mistake to pass up an opportunity for remedial legislation in the hopes that future litigation will provide the courts with an opportunity, which they may not take, to self-correct. In relation to the problems *Adams* raises, both scepticism about legislating and confidence in litigating are misconceived.

Is the amendment compatible with Article 6 of the ECHR?

The point of the Faulks/Godson amendment is not only to restore the previous understanding of the *Carltona* principle. The point is also to limit the other, more direct legal effects of *Adams*, which follow from the Supreme Court's holding that interim custody orders made in the 1970s were unlawfully made where it cannot be established (half a century later) whether the Secretary of State personally considered them. The judgment invites other attempts to appeal, decades late, against criminal convictions, including for escaping (or attempting to escape) from lawful custody. The judgment also invites litigation attempting to secure compensation for unlawful detention or applications for compensation for wrongful conviction for escaping (or attempting to escape) from lawful custody. The Supreme Court acted wrongly in allowing Mr Adams' appeal against conviction. Parliament should legislate to ensure that no other convictions should be unsettled on this basis and that no compensation should be paid in these circumstances, because on a correct analysis the convictions were entirely legitimate and the detention in question was entirely lawful.

If Parliament passes up the opportunity for remedial legislation and instead waits on the outcome of litigation, then that would leave open the prospect of compensation being paid to suspected terrorists as a direct result of the Supreme Court's misconstrual of the 1972 Order. It is possible that clause 39 of the Bill will stop most of the 300-400 civil claims that have been made in the wake of the *Adams* judgment. We understand that some 40 or so claims were filed before 17 May 2022 and thus would survive clause 39, but may still be rejected on the grounds that they are out of time. However, it is also entirely possible that the courts may conclude otherwise, despite the claims having been brought decades late, because the claims turn on the Supreme Court's judgment in *Adams* and/or on the more recent "discovery" that the Secretary of State had no personal involvement in the relevant interim custody order – something that might be inferred from the fact that another Minister signed the order and that evidence whether it was actually considered by the Secretary of State is unobtainable. (See further Lord Howell's paper, noted above.) An argument along these lines persuaded the High Court in Belfast on 28 April 2023 to allow Mr Adams's application for judicial review of the Secretary of State's conclusion that the reversal of his conviction turned on

the legal change that made the personal involvement of the Secretary of State a relevant factor, rather than on a new or newly discovered fact (viz. the evidence about the actual extent of that personal involvement). Thus, the High Court ruled that the Secretary of State was wrong to conclude that Mr Adams was simply ineligible for compensation under section 133 of the Criminal Justice Act 1988.

Perhaps the Government will be able successfully to appeal this ruling. Our point, though, is that there is some risk that the 40 or so claims will go ahead, and that there is a real risk that other appeals against conviction will succeed, per *Adams*, with related applications for compensation for wrongful conviction. No compensation should be paid in any of these cases. The Supreme Court's judgment misconstrues the 1972 Order and wrongly concludes that lawful detention was unlawful. If or when Mr Adams and others secure compensation for wrongful conviction or false imprisonment, he and others will have been unjustly compensated for what were in truth not wrongs at all. Paying compensation in this type of case would be analogous to a windfall gain that arises from a legal technicality, such as a minor procedural error on the part of a decision-maker. But paying compensation to Mr Adams and others would be worse because the Supreme Court's judgment is wrong – it contradicts the actual legislative intent of the 1972 Order and of the Parliament that approved it – which means that compensation would be paid only because of the Court's mistake of law.

Article 6 has been understood to provide that legislation that has the effect of removing a cause of action, or that alters the result of litigation, requires strict justification. In deciding whether legislation can be justified, it is important to attend closely to how the legislation changes the law and especially why it does so. Retrospective legislation does not necessarily breach Article 6, especially not if the point of the legislation is to correct a technicality and clarify the law.

The Faulks/Godson amendment rules out compensation being paid because of a legal mistake. The mistake in question is *not* the Government's in failing to ensure that the Secretary of State personally considered interim custody orders in the 1970s (and/or to keep better records of such personal involvement). The mistake is the Supreme Court's – in misconstruing the 1972 Order to require such personal involvement. The mistake was made almost fifty years after the events in question – it should never have come before the courts because leave to appeal should have been denied – and it has the effect of evading the limitation restrictions that would, and should, otherwise have applied. In ruling out compensation, and thus disbarring claims in tort and applications under the 1988 Act, the amendment will restore the law as it stood until the Supreme Court unsettled it. In any evaluation of the amendment's effect on Article 6, it is important to recognise that in substance the amendment is not stripping claimants of their right to seek redress for legal wrongs, but is clarifying that there was no legal wrong and limiting the implications of the Supreme Court's judgment to the contrary effect.

The case law of the European Court of Human Rights does not provide that retrospective legislation, even legislation that limits or bars ongoing proceedings, necessarily breaches Article 6. On the contrary, the question is whether such legislation can be squared with the principle of the rule of law and the idea of a fair trial that Article 6 affirms. The relevant statement of principle is to be found in *Zielinski v France* (1999) 31 EHRR 19 at [57]:

> *The court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.*

In deciding whether retrospective legislation is compatible with Article 6, it is important that legislation is intended to correct a legal mistake or to limit its reach. In *R (Reilly) v Secretary of State for Work and Pensions (No. 2)* [2016] EWCA Civ 413, the Court of Appeal considered legislation that was intended to validate regulations that had been quashed as ultra vires. The Court accepted that if Parliament had been merely correcting a technicality this would have supported the case that the retrospective legislation was compatible with Article 6. The Court said, at [99]:

> *The starting-point must be our rejection of Mr Eadie's previous submission that this is a mere drafting error case where the defect on which the claimants who had brought appeals relied self-evidently failed to reflect the intention of Parliament. In such a case it is understandable that the weight to be given to respecting the letter of the law should be less; and that is at least the primary strand in the reasoning of the ECHR in such cases as National & Provincial, OGIS and EEG.*

Thus, it is clear that retrospective legislation that is intended to limit claims that take advantage of a drafting error is likely to be compatible with Article 6.

The Faulks/Godson amendment amounts to the correction of an error on a technicality of the sort that the case law under Article 6 allows to be corrected retrospectively. In this case, the error was actually 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. The Order was made at a time when, as constitutional law and practice were then understood, it was inconceivable that there could be any evidence (which it would be possible or appropriate to adduce) of who actually decided to make the interim custody order, other than the signature on that order. The signature requirement was in fact an obligation to provide evidence of who had decided to make it (again, see Lord Howell's paper). It followed, in that context, that a provision allowing a person to sign the order had to be understood as also providing authority for that person to make the decision about whether it should be made. And technicalities resulting from errors made by the courts are just as much capable, and

in need, of retrospective correction as those made by legislators – in fact even more so as judicial errors, as in this case, are necessarily errors having retrospective effect, and involve departures from the law as it was made, rather than errors in making it.

But even if one did not accept this analysis and instead assumed that the error was one made by the legislators in 1972 (on the unrealistic basis 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), then 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. And 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 – namely, that the only evidence that is left that reveals who decided to make the interim custody order is the signature on it.

There is another way in which the Faulks/Godson amendment corrects a technicality, such that its effect on legal proceedings is compatible with Article 6. As mentioned above, detention under the 1972 Order only began with the making of an interim custody order. Detention 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 escaped from custody, his continuing detention, beyond the period of the interim custody order, had been authorised by a Commissioner who had made a fresh decision. The Court of Appeal, which rejected Mr Adams's appeal, held, at paragraphs 53-54, that the making of a lawful interim custody order was a condition precedent to the Commissioner's jurisdiction to make a detention order. Thus, the Court held, if the interim custody order was 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 elsewhere, the interim custody order was 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 was a technicality, which might reasonably be put right by remedial legislation. By validating interim custody orders, the Faulks/Godson amendment prevents 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 unjustifiably compensated.

Other relevant cases, upholding retrospective legislation that prevents the applicant from securing a victory in litigation against the state, are reviewed in the recent judgment of *Enterprise Managed Service Ltd v Secretary of*

State for Housing [2021] EWHC 1436 (Admin), which upheld retrospective legal change as compatible with Article 6. The Court in that case noted the significance of the fact that the legal proceedings, which the retrospective change rendered moot, were at an early stage. The 40 or so proceedings that survive clause 39 are still at a very early stage, which is relevant to the question of whether the amendment complies with Article 6.

One cannot fairly evaluate whether the Faulks/Godson amendment is compatible with Article 6, without noting (a) that the Supreme Court's judgment was clearly wrong and (b) that the judgment unravels legal acts carried out, and decisions which were made, decades earlier and should never have been open to challenge so many years after the fact. In legislating to restore the validity of interim custody orders, and to rule out litigation in relation to them, Parliament would be acting to vindicate the rule of law rather than to compromise it. And it would be doing so in a way wholly consistent with the general objectives of the Bill before Parliament.

In any case, even if one sets aside the fact that *Adams* was clearly wrong, there are "compelling grounds of the general interest", to use the term deployed in the *Zielinski* case, for retrospective legislation in this case.

The first of these is to vindicate and repair the *Carltona* principle, the clear operation of which is essential to practical public administration. Removing legal doubt about the validity of interim custody orders is a means to this end (unless the Government were to advance more general legislation).

The second compelling ground is to deal fairly with the legacy of the Troubles by refusing to pay unjustified compensation, which will frustrate rather than promote community reconciliation, and to secure that the truth is told about what was done, namely that detention pursuant to interim custody orders and any subsequent detention orders was lawful and convictions for escaping from lawful custody were warranted. The amendment has the effect of making it impossible for unjustifiable claims for false imprisonment to succeed. Subsection (3) also makes clear that compensation cannot be secured on the basis of *Adams*, including by way of an application under section 133 of the 1988 Act. (Without subsection (3), a section 133 application by Mr Adams might still succeed; clause 39 of the Bill may limit claims for false imprisonment that are initiated after 16 May 2022, but it does nothing to limit further appeals against conviction or applications for statutory compensation for wrongful conviction.)

It is very difficult to accept that the rule of law requires anyone, even the Government, to pay substantial sums of compensation now because it is no longer practicable to produce evidence of how a matter was handled more than half a century ago. This is not to concede that the Government should ever have been obliged to prove that the Secretary of State personally considered every interim custody order. The 1972 Order clearly authorised the Minister of State to make an interim custody order and the Supreme Court was quite wrong to conclude otherwise. But the practical effect of the Supreme Court's reasoning is now to hold

against the Government its "failure" to record evidence of the Secretary of State's personal involvement, when no such involvement was required and when the point of requiring the Minister of State to sign the order was to provide authority for detention without the need for evidence of the Secretary of State's personal involvement. The Supreme Court's handling of the 1972 Order is deeply unfair to those who acted under its authority. In legislating to correct this mishandling, Parliament would not be acting unfairly.

In short, it is the Supreme Court's retrospective change to the previous general understanding of the law that is incompatible with the rule of law and unfair to those who had relied on that understanding – not any legislative attempt now to remedy that incompatibility and that unfairness.

Clause 39 of the Bill is retrospective and the Government takes the view that it complies with Article 6. In paragraph 88 of the Government's human rights memorandum, dated 16 May 2022, the Government says that the clause is a proportionate means to the legitimate aim of promoting reconciliation in Northern Ireland because:

> *The current high volume of litigation is detrimental to reconciliation. When a settlement or a verdict is reached in a civil claim renewed attention is often drawn to events and crucially, to grievances, from the past which contribute to the inability of Northern Ireland to reconcile itself with the Troubles. The often adversarial nature of these processes, and the resource-intensive, indirect nature of State disclosure processes means that Plaintiffs in Northern Ireland are often left frustrated and wondering whether cover-ups are taking place. These processes do not serve the purpose of reconciliation and in fact, could be said to further entrench different groups to their positions and feed distrust. Reducing the scale of civil litigation and bringing it to an end sooner will therefore aid reconciliation, by helping to draw a line under the past and preventing the trial of very stale claims.*

Reversing *Adams* and preventing compensation being paid to suspected terrorists (detained pursuant to interim custody orders properly made by a Minister of State and any subsequent detention orders) does not undermine this justification. The claims, and applications, for compensation that have been made consequent on *Adams* are unjustified and will contribute to "the inability of Northern Ireland to reconcile itself with the Troubles." The Faulks/Godson amendment is a more categorical limitation than that set out in clause 39. The difference in treatment is justified precisely because the amendment addresses a discrete subset of cases that concern interim custody orders made under the 1972 Order, which in 2020 was misinterpreted by the Supreme Court, opening the door to further meritless litigation. Other civil litigation does not share this important distinguishing feature.

In accepting the Faulks/Godson amendment, Parliament would be restoring the limitation on criminal appeals and civil claims that always should have been applied in this context and which was wrongly undone by the courts in allowing Mr Adams to appeal out of time and then to succeed

in his appeal. Parliament would also be addressing the incompleteness of the Bill as it stands, which limits actions in tort or delict or under fatal accidents legislation but does not limit appeals against conviction (decades after the fact) or applications for compensation for wrongful conviction, which pose similar risks to civil litigation. Legislating to address these other types of legal proceeding, not currently covered by the Bill will also "aid reconciliation, by helping to draw a line under the past and preventing the trial of very stale claims."

Legislation that provides that interim custody orders are to be treated as always having been lawful, and thus rules out the payment of compensation, does not treat litigants unfairly. The Supreme Court's judgment in *Adams*, and the spectre of hundreds of claims for compensation being brought in consequence, has understandably alarmed and outraged many in Northern Ireland. The Bill already limits some of those claims, but does so inadvertently, without addressing the particular features of *Adams* which warrant more specific and targeted legislative intervention. The amendment is not inconsistent with the justification for clause 39, but is justified by further grounds that are specific to its particular features. In reasoning about whether the amendment is compatible with Article 6, it is imperative to address squarely the significance of the fact that *Adams* was wrongly decided and to acknowledge the extent to which retrospective legislation to reverse the legal effects of this judgment would in this case restore, rather than compromise, the rule of law. Legislation is necessary, in this context, both to aid community reconciliation (by avoiding making unjust payments decades late that will cause justified outrage), and to avoid perpetuating a falsehood about the lawfulness of what was done under the legislation providing for detention.

Appendix One: 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 Two: Acting on behalf of the Secretary of State

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."

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Policy Exchange
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