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Judgment: approved by the Court for handing down | *Delivered:* **16/12/09**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION FOR WRIT OF HABEAS CORPUS BY TERENCE McCAFFERTY

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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COGHLIN LJ

[1] This is the judgment of the Court.

[2] The appellant in this case is Terence McCafferty and on the 5 of March 2009 he applied by way of Motion on Notice for a Writ of Habeas Corpus directed against the governor of Her Majesty's Prison Magaberry. That Motion came on for hearing before a Divisional Court on the 9 of March 2009 and the Motion was dismissed on that date, the judgement of the court being delivered by Weatherup J. The appellant now appeals that decision. For the purpose of the appeal the appellant was represented by Mr O'Donoghue QC and Mr Devine while Mr Maguire QC and Mr McMillen appeared on behalf of the respondent. The court is grateful to both sets of counsel for their carefully prepared and well researched skeleton arguments and oral submissions.

Factual background

[3] On 1 July 2005 the appellant was convicted of possession of explosive substances with intent to endanger life contrary to section 3 of the Explosive Substances Act 1883 in respect of which he received a sentence of imprisonment of 12 years. That offence was a scheduled offence for the purposes of part VII of the Terrorism Act 2000 ("the 2000 Act") and, as a consequence of the provisions of Section 79 of that Act, the maximum

remission available to the appellant was one third of the term of imprisonment. However, by virtue of Section 1(2) of the Northern Ireland (Remission of Sentences) Act 1995 (the "1995 Act") a person to whom that section applies shall be released on licence for any period during which he is prevented from being discharged in pursuant of prison rules by virtue of the application only of Section 79 of the 2000 Act.

[4] The practical effect of this legislation is that a prisoner to whom Section 79 of the 2000 Act and Section 1(2) of the 1995 Act apply may be released on licence at the half way point of his prison term and will remain on licence until he reaches the two thirds point at which time his release becomes unconditional.

[5] On 23 November 2008, upon reaching the halfway point of the term of imprisonment, the appellant was released on licence. That licence was due to expire on 22 November 2010 upon which date he would reach the two thirds point of the term.

[6] On 18 December 2008 a decision was taken by Mr Paul Goggins MP, the Minister of State for security at the Northern Ireland Office, to revoke the appellant's licence upon the ground that he had formed the view that the appellant's continued liberty would present a risk to the safety of others and that he was likely to commit further offences. The legal basis for that decision was Section 1(3) of the 1995 Act which provides that:

> "The Secretary of State may revoke a person's licence under this section if it appears to him that the person's continued liberty would present a risk to the safety of others or that he is likely to commit further offences; and the person whose licence is revoked shall be detained in pursuance of his sentence and, if at large, be deemed to be unlawfully at large."

[7] As a result of the decision referred to at paragraph [6] hereof the appellant was apprehended and returned to prison on 22 December 2008. On the same date the applicant received a letter from the Minister for Security dated 18 December 2009 in which the reasons for the decision for revoking the applicant's licence were stated as follows:

> "In reaching that decision Paul Goggins had regard to information made available to him that you are a leading and active member of the Real Irish Republican Army (RIRA), who held the position of 'officer commanding' of RIRA prisoners within HMP Maghaberry prior to your release from prison in November 2008. During your sentence, you

> remained in regular contact with senior RIRA members and involved in directing RIRA business, and displayed a clear desire to continue your involvement in RIRA activity on your release, including in becoming involved in plans for attacks that would present a threat to public safety.
>
> From immediately on your release you have been in regular contact with leading RIRA figures. It is assessed that you have taken up a leading role in the organisation and have been involved in plans to conduct attacks.
>
> In these circumstances and with regard to the provisions of the Act Paul Goggins considered that it was both appropriate and proportionate that your licence should be revoked at this time."

By the same letter the appellant was informed of his right to make written representations to the Secretary of State about the revocation of his licence and that any such representations would be considered by a Remission of Sentences Commissioner from whom the Secretary of State would accept advice about whether or not the appellant should be released again on licence in respect of the sentences that he received for the 2002 offence.

[8] It appears that arrangements were made for the appellant's initial hearing before the Commissioner to take place on 19 November 2009 but that a preliminary issue has arisen as to the extent of the role and powers of the Special Advocate. It seems that it has been necessary to appoint a Special Advocate because of the reliance by the respondent upon "damaging information" which cannot be revealed to the appellant or his legal representatives.

The case on behalf of the appellant

[9] In a succinct and well presented submission Mr O'Donoghue argued that the clear wording of Section 13 restricted the decision to revoke a person's licence to the Secretary of State personally and did not permit either the delegation or devolution of such a decision to the Minister of State in accordance with the "Carltona principle" – see Carltona Limited v Commissioners of Works [1943] 2 All E.R. 560. In support of his submission Mr O'Donoghue relied upon the clear wording of the statute including, in particular, the power of the Secretary of State to bring the Act into force by statutory instrument in accordance with Section 2 and the power to make orders suspending or later reviving any licence granted under Section 1 in accordance with Section 3. He also emphasised the importance of the

function entrusted to the decision-maker, namely, the power to make decisions about the liberty of the subject. In doing so Mr O'Donoghue relied upon the decisions in Oladehinde v Secretary of State for the Home Department [1990] 3 All E. R. 393, R (On the application of the Chief Constable of the West Midlands Police) v Birmingham Justices [2002] EWHC 1087 (Admin) and Ramawad v Canada (Minister of Manpower and Immigration) 81 DLR (3d) 687. He also referred the court to paragraph 5-164 of De Smith's Judicial Review (6th Ed.) in which the learned authors state:

> "It may be that there are, however, some matters of such importance that the Minister is legally required to address himself to them personally, despite the fact that many dicta that appear to support the existence of such an obligation are at best equivocal. It is, however, possible that orders drastically affecting the liberty of the person – e.g. deportation orders, detention orders made under wartime security regulations and perhaps discretionary orders for the rendition of fugitive offenders require the personal attention of the Minister."

While he accepted that Section 13 of the 1995 Act must be taken to have been introduced by Parliament in the context of the decisions in Carltona and R v Secretary of State for the Home Department Ex Parte Doody [1993] 1 All E. R. 151 and [1994] 1 AC 531, Mr O'Donoghue argued that such acceptance did not necessarily mean that all cases concerning the liberty of the subject could be delegated or devolved in accordance with the Carltona principle.

[10] In a subsidiary argument Mr O'Donoghue submitted that, even if it had been legitimate for the power to be exercised in accordance with the Carltona principle, the decision to revoke the appellant's licence was vitiated by the apparent bias of the decision-maker, the Minister of State for Security. In this context he relied upon the test for apparent bias approved by the House of Lords in Porter v Magill [2002] 2 AC 357 per Lord Hope at page 49. Mr O'Donoghue submitted that, since his primary consideration was security and the reduction of any risk thereto, taking into account all the relevant circumstances, the fair-minded and informed observer would conclude that there was a real possibility of bias if the Minister of State was permitted to make the decision. This does not appear to have been a ground that was argued in particular detail before the Divisional Court.

The decision of the Divisional Court

[11] In a clear and well reasoned judgment Weatherup J, acknowledged that the court was prepared to accept, for the purposes of this case, that, in considering whether it was to be implied that a decision might be devolved,

the importance of the issue might be a matter to be included in the assessment in addition to the language of the relevant statute, the subject matter and the framework of the relevant legislation. He recorded that the court had considered the language of the Act, the subject matter and the framework of the legislation and concluded that there was no ground for requiring the decision to be taken personally by the Secretary of State. Weatherup J observed that, in general, it is to be implied that the intention of Parliament is to permit the Carltona principle to apply rather than to require a personal decision by the named decision-maker and there was nothing to indicate the contrary in the present case. The Divisional Court rejected the argument that the Minister of State was not an appropriate person to make the decision because he was the Minister of State for Security.

Discussion

[12] The Carltona principle was originally articulated by Lord Greene MR in Carltona Limited v Commissioners of Works and Others [1943] 2 All E. R. 546 at 563 in the following terms:

> "In the administration of government in this country the functions which are given to Ministers (and constitutionally properly given to Ministers because they are constitutionally responsible) are functions so multifarious that no Minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in the country by individual ministries. It cannot be supposed that this Regulation meant that, in each case, the Minister in person should direct his mind to the matter. The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the Minister. The Minister is responsible. It is he who must answer before Parliament for anything that his official have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the Minister would have to answer for that Parliament. The whole system of departmental organisation and administration is based on the view that Ministers, being responsible to Parliament will see that important duties are committed to

> experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

In R v Secretary of State for the Home Department Ex Parte Oladehinde [1990] 2 All E. R. 367 Lord Woolf, in giving the judgment of the Court of Appeal, observed at page 374 that the reference to Parliament in the final sentence of the quotation from Lord Greene's speech must now be read as subject to the courts usual role on an application for judicial review and the House of Lords ultimately agreed that the issue could be the subject of a legal remedy.

[13] There is no doubt that the Act of 1995 has, as its subject matter, one of the most basic and important human rights, namely, liberty of the subject. However, as Mr O'Donoghue conceded, Parliament must be taken to have passed the legislation with the Carltona principle and the decision of the House of Lords in R v Secretary of State for the Home Department Ex Parte Doody [1994] 1 AC 531 in mind.

[14] The case of Doody was concerned with the procedure for fixing the period for which prisoners sentenced to mandatory life imprisonment should serve for retribution and deterrence before their sentences could be reviewed ("the tariff"). In such circumstances, the case clearly concerned the liberty of the subject. In the course of giving the leading judgment Lord Mustill adopted the reasoning of Staughton LJ in the Court of Appeal in relation to the issue of delegation. In the Court of Appeal [1993] 1 All E. R. 151 Staughton LJ, at page 176, referred to the statement of principle by Lord Greene MR in Carltona and observed that:

> "Parliament frequently confers powers on a Minister who is the political head of a department. Much less frequently it confers powers on an official of a particular description or grade. I know of no instance, and counsel were not able to find one, where the power is conferred on a junior minister. But it is absurd to suppose that every power which is conferred on the political head of a department must be exercised by him and him alone. It is in general sufficient that the power is exercised by a junior minister or an official on his behalf."

[15] In this jurisdiction Re Quigley's Application [1997] NI 202 was a case concerning an application to extend the detention of an arrested person for a further three days in accordance with Section 14(5) of the Prevention of Terrorism (Temporary Provisions) Act 1989. Nicholson LJ delivering the judgment of the Divisional Court said, at page 205:

> "It is a well established general principle that when a statutory power is given to a Minister it may be exercised by a junior minister or by a senior official in the Minister's department. This applies to the power given to the Secretary of State under Section 14(5) (see R v Harper [1990] NI 28 at pages 48-52 per Hutton LCJ, giving the judgment of the court of Appeal). The power of Baroness Denton as a junior minister to authorise the extension of time was not challenged."

More recently in Re An Application by Samuel Henry for Judicial Review [2004] NIQB 11 Weatherup J considered whether an extension of restriction of association of a prisoner authorised by a Deputy Director of Operations in the Northern Ireland Prison Service was invalid because Rule 32 of the Prisoner and Young Offenders Centre Rules (Northern Ireland) 1995 provided that a prisoner's association should not be restricted without the agreement of the Secretary of State. In the course of delivering his judgment Weatherup J referred to the Carltona principle and noted that in McKernan v The Governor of HM Prison [1983] NI 83 the Court of Appeal had considered a similar power of the Secretary of State under Rule 24 of the Prison Rules (Northern Ireland) 1954 which, in that case, had been exercised by a Minister of State. The Court of Appeal had accepted that the power did not have to be exercised by the Secretary of State personally. Weatherup J noted the passage in De Smith, Woolf and Jowell on Judicial Review of Administrative Action (5th Edition) at pages 369-373 upon which Mr O'Donaghue seeks to rely , inter alia, expressing a caveat that there might be certain matters of such importance that the Minister is legally required to address himself to them personally. He then went on to record that the Carltona principle had been applied in many contexts and that he was satisfied in all the circumstances that the exercise of the power to restrict association could properly be undertaken by officials on behalf of the Secretary of State.

[16] In a case the facts of which are very similar to the instant appeal Carswell LCJ considered an application for judicial review of a decision by the Secretary of State for Northern Ireland to revoke the licence granted to a released prisoner and recall him to prison in accordance with Section 1(4) (*b*) of the Northern Ireland Remission of Sentences Act 1995 in Re Adair's Application [2003] NIQB 16. In that case the learned Lord Chief Justice ultimately concluded that the function of the Sentencing Commissioners was to advise the Secretary of State with whom the ultimate responsibility for the decision continued to rest. In the course of his judgment he dealt with the proposition that the Secretary of State's power of decision, being a judicial power, could not be validly delegated in the following terms at paragraph [8] saying:

> "It may be said of the Secretary of State's power to revoke a licence that his decisions partake of a degree of policy as well as the process more akin to judicial process of determination of the facts which may have to be established in order to justify the exercise of the power. Nevertheless, it is a matter which is of very considerable consequence to the persons in respect of whom it is exercised and it is specifically conferred on the Secretary of State. In these circumstances there is a good deal to be said for the proposition that, subject to the Carltona principle, its exercise is not capable of delegation."

[17] In our view the approach to this issue has been correctly and helpfully set out in the judgment of the Divisional Court. In general it is to be implied that the intention of Parliament is to permit the Carltona principle to apply rather than to require a personal decision by the named decision-maker. For the purpose of deciding whether the power is to be implied factors to be considered include the framework of the relevant legislation and, in particular, whether any specific contrary indications appear in the language, and the importance of the subject matter. We respectfully agree with the Divisional Court that the case of Doody cannot be distinguished in principle and the authorities in this jurisdiction referred to above confirm that a decision taken with regard to the liberty of the subject may attract the Carltona principle. In our view there is nothing in either the framework or the language of the 1995 Act that indicates a contrary Parliamentary intention. Section 2 of the 1995 Act provides powers that are common to a vast array of legislative measures and section 3 powers may be frequently encountered in statutes dealing with licences or similar concepts.

Bias

[18] Mr O'Donoghue advanced a number of submissions in support of his argument that the Minister of State for Security was to be regarded as biased in accordance with the Porter v Magill formula, the main thrust of which was that:

(*i*) The Minister's primary function was to ensure the security of Northern Ireland and an informed and fair-minded observer would be likely to consider that it was unlikely that he would be able to exercise independent judgment in relation to a person believed to constitute a threat to such security.

(*ii*) Such a belief was likely to be reinforced by the fact that the Minister would be likely to have access to "damaging information" which could not be seen by the appellant or his advisors for security reasons.

[19] After giving the matter careful consideration we do not consider that there is any substance in this aspect of the case advanced by Mr O'Donoghue. The Secretary of State for Northern Ireland has the ultimate responsibility for the security of the State. Both he and the Minister will have the same concerns for and receive the same briefings about matters of security and both are subject to the same systems of accountability. Both occupy high offices of State. In such circumstances, it is entirely appropriate that the Minister of State should be entitled to exercise the Secretary of State's decision making functions under the 1995 Act.

[20] Accordingly, we have reached the conclusion that this appeal must be dismissed.