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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

IVOR MALACHY BELL

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Before: Treacy LJ, McCloskey LJ & Colton J

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Barry Macdonald QC with Joseph O'Keeffe BL (instructed by Phoenix Law, Solicitors) for the Appellant
Gerald Simpson QC with Philip McAteer BL (instructed by the PPS) for the Respondent

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TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] The appellant appeals against his conviction on 18 April 1975, on a single count that on 26 July 1974 he assisted Gerard Adams, being a person detained under a detention order, in attempting to escape from HMP Maze, contrary to paragraph 38(b) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act"). On the same date the appellant was sentenced to two years' imprisonment.

[2] Fundamentally, this appeal is concerned with the impact on the appellant's conviction of the recent decision of the Supreme Court in *R v Adams* [2020] UKSC 19. The appellant in the present case contends that it follows from the *Adam's* decision that his conviction is wrong in law on the basis that he could not commit the offence under paragraph 38(b) where the person who was the subject of the attempt to escape (Gerard Adams) was, as the Supreme Court found, not lawfully detained.

Background

[3] Gerard Adams, was convicted on 18 April 1975 for the offence of attempting to escape from lawful custody on 27 July 1974 and was sentenced to three years' imprisonment. Mr Adams appealed this conviction and one other to the Court of Appeal (NI) and then to the Supreme Court.

[4] On 13 May 2020, the Supreme Court gave judgment in *R v Adams* [2020] UKSC 19 in which his convictions for attempting to escape lawful custody on 24 December 1973 and also on 27 July 1974 were quashed. The Supreme Court quashed the convictions because the interim custody order ('ICO') under which Mr Adams had been interned was invalid. As a result he was not lawfully detained at the time of the offences for which he was convicted, including the attempt to escape which this appellant, Mr Bell, was convicted of assisting in and which is the subject of this appeal.

[5] In reliance upon the decision of the Supreme Court in *Adams*, the appellant contends that given that Mr Adams was not lawfully detained at the time of his attempted escape the conviction of the appellant for assisting Mr Adams' attempt to escape is unsafe and should now be quashed.

[6] The appellant's conviction relates to assisting Mr Adams' attempted escape on 26 July 1974 on which date Mr Adams was being detained under a detention order. Mr Adams was initially detained on an ICO dated 21 July 1973. Mr Adams' case was then referred to a commissioner who, on 16 May 1974, determined his case and made a detention order on foot of which he was detained pursuant to the provisions of paragraphs 12 and 24 of Schedule 1 to the 1973 Act.

[7] In the scheme for detention by internment in Northern Ireland, the lawfulness of a detention order was dependent upon the validity of the initial ICO on which the subject was detained. The latter was a condition precedent to the former. In *Adams*, Lord Kerr summarised the sequence of orders made under the scheme of 'internment' in Northern Ireland:

> "[1] From 1922 successive items of legislation authorised the detention without trial of persons in Northern Ireland, a regime commonly known as internment. Internment was last introduced in that province on 9 August 1971. On that date and for some time following it, a large number of persons were detained. The way in which internment operated then was that initially an interim custody order (ICO) was made where the Secretary of State considered that an individual was involved in terrorism. *On foot of the ICO that person was taken into custody. The person detained had to be released within 28 days unless the Chief Constable referred*

> *the matter to a commissioner. The detention continued while the commissioner considered the matter. If satisfied that the person was involved in terrorism, the commissioner would make a detention order. If not so satisfied, the release of the person detained would be ordered."*

[8] The 1973 Act provides the requirements for the making of a detention order by a commissioner. Schedule 1, paragraph 12 states:

> "Where the case of a person *detained under an interim custody order* (in this Part of this Schedule referred to as 'the respondent') is referred to a commissioner, the commissioner shall enquire into that case for the purpose of deciding whether or not he is satisfied that —
>
> (a) the respondent has been concerned in the commission or attempted commission of any act of terrorism or the direction, organisation or training of persons for the purpose of terrorism; and
>
> (b) his detention is necessary for the protection of the public."

[9] The power to make a detention order is provided by Schedule 1, paragraph 24 to the 1973 Act which states:

> "24. Where a commissioner decides that he is satisfied in accordance with the provisions of paragraph 12 above, he shall make a detention order for the detention of the respondent, and otherwise shall direct his release."

[10] The Supreme Court held that Mr Adams was not detained under an ICO as no valid order was made. In these circumstances, his case was not lawfully referred to a commissioner under paragraph 12.

[11] The power of the commissioner to make a detention order in paragraph 24 is expressly dependent upon paragraph 12 having been satisfied. If the person was not detained under an ICO then there is no power to refer a case to a commissioner under paragraph 12 and there is no power to make a detention order under paragraph 24. A detention order made in the absence of a valid ICO is also invalid.

[12] The Supreme Court held that the ICO on which Mr Adams was detained was invalid and, therefore, at the dates of his offences (including the same attempt to escape which forms the subject of this appeal) his detention was not lawful and his convictions were quashed (see paragraph [41]). The court reached this conclusion in

full recognition of the fact that a detention order had been made by a commissioner after the impugned ICO had been made.

[13] The Court of Appeal (NI) in *Adams* [2018] NICA 8 determined *obiter* that the making of a lawful ICO was a condition precedent to the referral of the matter to the commissioner by the Chief Constable and to the determination of the commissioner as to the making of a detention order. The court said (at paragraphs 52-53):

> "52. The respondent contends that the second conviction for escape related to a period when the appellant was subject to a Detention Order under paragraph 12 of Schedule 1 of the 1973 Act. Accordingly, a Commissioner had decided that the appellant had been concerned in the commission or attempted commission of an act of terrorism or the direction, organisation or training of persons for the purpose of terrorism and that his detention was necessary for the protection of the public. This Detention Order, it was argued, was a new decision rendering lawful the continued detention of the appellant and rendering safe the appellant's second conviction.
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> 53. Had the court accepted the appellant's argument in relation to the application of the Carltona principle and found the ICO to have been unlawful, the court would have rejected the respondent's argument on the effect of the Detention Order. The court takes the same approach as taken in McElduff's Application [1972] NI 1. *The making of a lawful ICO was a condition precedent to the referral of the matter to the Commissioner by the Chief Constable and to the determination of the Commissioner as to the making of a Detention Order."*

[14] The respondent did not seek leave to appeal to the Supreme Court in relation to this issue.

[15] We agree with Mr Macdonald QC that it follows that, as the Court of Appeal has determined *obiter,* the making of a lawful ICO was a condition precedent to the referral of a case to a commissioner and to the determination of the commissioner on the making of a detention order. In accordance with the decision of the Supreme Court, Mr Adams' detention was not lawful because the ICO on which he was initially detained was invalid and any subsequent detention order based on an invalid ICO is also invalid. The making of a detention order, therefore, is necessarily dependent for its lawfulness on the validity of the ICO.

[16] The respondent submits that the making of the detention order cures the invalidity of an earlier ICO and that the decision of the Supreme Court in *Adams* is of no application to this appeal. We reject this submission which ignores the basic requirement in the 1973 Act for a valid ICO to exist in order for a subsequent detention order to be valid and which would also subvert the entire rationale of the Adam's decision in the Supreme Court. The making of a detention order did not have the effect of converting an otherwise unlawful detention into a lawful detention. If that had been the effect the Supreme Court would not have quashed Mr Adams' conviction for the attempted escape in July 1974.

[17] Mr Adams was not detained on a valid ICO, therefore any referral to or determination of his detention by a commissioner thereafter was unlawful and not in accordance with paragraphs 12 or 24 of the 1973 Act. Any detention order made by a commissioner was, in consequence, also unlawful.

The judgment of the Supreme Court in Adams & the Carltona Principle

[18] The appellant agrees with the respondent that the court is bound by the decision of the Supreme Court in *Adams*.

[19] In *Adams*, the Supreme Court heard an appeal from the Court of Appeal on a certified question of general public importance, as follows (paragraph 8):

> "Whether the making of an interim custody Order under article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 [SI 1972/1632 (NI 15)] required the personal consideration by the Secretary of State of the case of the person subject to the order or whether the Carltona principle operated to permit the making of such an Order by a Minister of State."

[20] The appellant in that case, Mr Adams, was convicted of the offence of attempting to escape from lawful custody on 24 December 1973 and sentenced to 18 months' imprisonment on 20 March 1975. He was also convicted of committing the same offence on 27 July 1974 and was sentenced to three years' imprisonment on 18 April 1975, to be served consecutively to the sentence previously imposed.

[21] Mr Adams had been interned under an ICO made on 21 July 1973 and signed by a Minister of State in the Northern Ireland Office. At that time, an ICO was made under Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 ("the 1972 Order") where it appeared to the Secretary of State for NI ("SoS") that a person was 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. On foot of the ICO, the person was then taken into custody and held without trial. The person was required to be released within 28 days unless the Chief Constable of the RUC referred the matter to a

commissioner. If the commissioner was satisfied that the person was involved in terrorism then he would make a detention order; if he was not so satisfied, the detained person would be released.

[22] The issue in the appeal before the Supreme Court was whether the ICO, under which Mr Adams had been interned, was valid where there was no evidence that the SoS had personally considered whether Mr Adams was involved in terrorism.

[23] Lord Kerr, giving the judgment of the court, considered the application of the *Carltona principle* with regard to the making of an ICO (per *Carltona Ltd v Commr of Works* [1943] 2 All ER 560). The Carltona principle is that, normally, the duties and powers given to Ministers may be exercised by other responsible officials of the relevant Government department.

[24] Lord Kerr analysed the principal cases in which the Carltona principle was applied including *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 in which Lord Griffiths summarised the principle as follows (at p303):

> "It is well recognised that when a statute places a duty on a minister it may generally be exercised by a member of his department for whom he accepts responsibility; this is the Carltona principle. Parliament can of course limit the minister's power to devolve or delegate the decision and require him to exercise it in person."

[25] In *Adams*, after discussing the application of the Carltona principle and its interpretation by the courts, Lord Kerr said (paragraph 26):

> "26. My provisional view is that the matter should be approached as a matter of textual analysis, unencumbered by the application of a presumption, but with the enjoinder of Lord Griffiths well in mind. In this way, whether the Carltona principle should be considered to arise in a particular case depends on an open-ended examination of the factors identified by Coghlin LJ in McCafferty, namely, the framework of the legislation, the language of pertinent provisions in the legislation and the "importance of the subject matter", in other words, the gravity of the consequences flowing from the exercise of the power, rather than the application of a presumption. *But, as I have said, it is not necessary in this case to reach a final view on whether there is such a presumption, not least because, if there is indeed a presumption, the statutory language*

in this instance is unmistakably clear, and has the effect of displacing it."

[26] In respect of the interpretation of Article 4 of the 1972 Order, Lord Kerr found that the Carltona principle did not apply and that the power to make an ICO was one which must be exercised only by the SoS. In quashing the convictions, Lord Kerr stated:

> "37. The Court of Appeal approached the central issue in this case on the basis that there was a presumption that the Carltona principle would apply to article 4(1) of the 1972 Order. In para 25 above, I have questioned whether such a presumption exists. Even if it does, I am satisfied that it is clearly displaced by the proper interpretation of article 4(1) and (2), read together. *The segregation of the two functions (the making and the signing of ICOs) cannot have been other than deliberate.*
>
> 38. *When one allies this to the consideration that the power invested in the Secretary of State by article 4(1) was a momentous one, the answer is, I believe, clear*. The provision did nothing less than give the Secretary of State the task of deciding whether an individual should remain at liberty or be kept in custody, quite possibly for an indefinite period. In agreement with Staughton LJ's view in Doody Page 13 (see para 21 above), *I consider that this provides an insight into Parliament's intention and that the intention was that such a crucial decision should be made by the Secretary of State. This was, after all, a power to detain without trial and potentially for a limitless period.* This contrasts with Doody where, at least, the prisoner whose tariff period was to be determined had been convicted after due process.
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> *39. A further factor that militates towards the conclusion that it was intended that the Secretary of State should personally decide on the fate of a person whose detention was sought was that there was no reason to apprehend (at the time of the enactment of the 1972 Order) that this would place an impossible burden on the Secretary of State.* Indeed, the subsequent experience with Mr Merlyn Rees scotches any notion that this should be so. This again presents a stark contrast with Doody.
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> 40. For these reasons, I have concluded that it was Parliament's intention that the power under article 4(1) of

> the 1972 Order should be exercised by the Secretary of State personally.
>
> 41. *The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully.* It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed."

[27] Accordingly, where the ICO made in respect of Mr Adams was not made by the SoS it was invalid, with the consequence that Mr Adams was not lawfully detained and should not, therefore, have been convicted of attempting to escape from lawful custody. The relevant convictions under appeal to the Supreme Court were quashed.

Impact of R v Adams on the appellant's conviction

[28] The appellant's conviction is for assisting Mr Adams in his attempt to escape on 27 July 1974, the recorded offence date in this case being the day before, 26 July 1974, but related to the same attempt to escape. The safety of this conviction is, the appellant submits, inextricably linked to the decision of the Supreme Court in *Adams* to quash the underlying offence of attempting to escape lawful custody. Thus, it is argued, if Mr Adams was not lawfully detained under a detention order at HMP Maze then the appellant's conviction for an offence of assisting him in attempting to escape is wrong in law.

[29] The offence for which the appellant was convicted was provided for by paragraph 38(b) to the 1973 Act. Paragraph 38:

> "38. Any person who -
>
> (a) being detained under an interim custody order or a detention order, escapes;
>
> (b) rescues any person detained as aforesaid, or assists a person so detained in escaping or attempting to escape; or
>
> (c) knowingly harbours any person required to be detained under an interim custody order or detention order, or gives him any assistance with intent to prevent, hinder or interfere with his being taken into custody,

> shall be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both."

[30] Mr Macdonald contends that:

- the offence for which the appellant was convicted under paragraph 38(b) requires that the person who was assisted (Adams), was *'being detained under an interim custody order or a detention order.'*

- the Supreme Court interpreted the underlying legislation as requiring that an ICO must be made by the SoS and where it was not, the subject of the purported ICO – and latterly a detention order - was not lawfully detained.

- the consequence is that, where the subject of the assistance rendered under paragraph 38(b) was not lawfully detained in HMP Maze under a valid ICO or detention order, the appellant could not in law commit the offence for which he was convicted.

[31] We do not accept the respondent's submission that the words "detained under an interim custody order" in paragraph 38 need not mean that the person who is subject to the order is 'lawfully' or 'validly' detained under an ICO. Such a construction is in our view plainly inconsistent with the decision and orders made by the Supreme Court in *Adams*. The interpretation of paragraphs 12 and 24 to the 1973 Act is clear – we agree with the Court of Appeal in *Adams* that the making of a valid ICO was a condition precedent to the referral of the matter to the commissioner and to the determination of the commissioner as to the making of a detention order. The offence under paragraph 38(b) is dependent on the validity of the underlying ICO and detention order.

[32] We agree with counsel that the legislation providing for internment in Northern Ireland curtailed many of the basic rights and freedoms which existed in all other parts of the United Kingdom, including the right to liberty and the right to a fair trial. The gravity of the consequences for a person subjected to internment must inform how strictly the provisions of that legislation should be construed. Against that background and having regard to the clarity of the Supreme Court's decision in *Adams* we reject the respondent's contention that the legislation for internment in Northern Ireland permits an interpretation that orders made within that scheme of detention include invalid or unlawful orders.

Conclusion

[33] The impact of the decision of the Supreme Court in *Adams* is that the conviction of the appellant is wrong in law, given that he could not commit the offence under Schedule 1, paragraph 38(b) to the 1973 Act where the person who was the subject of the attempt to escape was not lawfully detained under an ICO or

detention order as required. In light of that decision and the principles governing applications for extension of time summarized in *R v Brownlee* [2015] NICA 39 at paragraph 8 we extend time to appeal, allow the appeal and quash the conviction.

Addendum

[34] Following the decision of the court the prosecution applied to the court to certify three questions for the Supreme Court.

[35] Section 41 of the Judicature (Northern Ireland) Act 1978 provides as follows:

> "**41. Appeals to Supreme Court in other criminal matters**
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> (1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor,—
>
> (a) from any decision of the High Court in a criminal cause or matter;
>
> (b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.
>
> (2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.
>
> (3)- (5) …"

[36] Pursuant to section 41 the prosecution applies to this court to certify the following three questions:

(1) Whether the making of a detention order by a commissioner pursuant to the provisions of paragraphs 12 and 24 of Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1973 is rendered unlawful by the fact that the interim custody order preceding it was purportedly made under article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 by a Minister of State rather than the Secretary of State (see *R v Adams* [2020] UKSC 19)?

(2) Whether a person who assisted another person held under such a detention order to attempt to escape from prison is guilty of an offence contrary to paragraph 38(b) of Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1973?

(3) Whether, in any event was the Supreme Court wrong to find in *R v Adams* [2020] UKSC 19 that the making of an interim custody Order under article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 [SI 1972/1632 (NI 15)] required the personal consideration by the Secretary of State of the case of the person subject to the order and that the Carltona principle did not operate to permit the making of such an order by a Minister of State?

[37] By question (3) the prosecution seek to re-open and re-argue the *Adams* case. The court is being asked to certify a point that has recently been decided by the Supreme Court. If the court were to certify in such circumstances there is a real risk of applications to this court seeking leave for points that have, as in the present case, been recently and authoritatively settled in the Supreme Court. The court must give significant weight to the principle of legal certainty. Certifying would undermine the legal certainty of the judgments of the Supreme Court. We do not consider that there is a point of law of general public importance involved in the decision which appears to the court ought to be considered by the Supreme Court.

[38] Questions (1) and (2) are indirect ways of raising the issue in question (3). As to question (1) we observe:

(i) the Court of Appeal in *Adams* determined this point *obiter* [see paragraph [53] of our decision];

(ii) the prosecution in *Adams* chose not to appeal or challenge the conclusion of the Court of Appeal on this point – if it was a point of public importance it is surprising that it eluded the prosecution;

(iii) the Supreme Court considered the legality of the detention in *Adams* and could not have quashed his conviction for attempted escape in July 1974 if his detention had been lawful. Question (1) has already been answered by the Supreme Court and the answer to question (2) inexorably follows from *Adams.*

[39] The overall conclusion of the court is that none of the questions raise a point of law of general public importance which it appears to the court ought to be considered by the Supreme Court. Accordingly leave to appeal is refused.