Neutral Citation No: [2018] NICA 8 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **WEA10550** *Delivered:* **14/02/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

R

Respondent;

-v-

GERARD ADAMS

Appellant.

_____

Before: Morgan LCJ, Sir Ronald Weatherup and Sir Reginald Weir

_____

Sir Ronald Weatherup (delivering the judgment of the Court)

[1] This is an appeal against convictions on 20 March 1975 and 18 April 1975 on counts of attempting to escape from detention contrary to paragraph 38(a) of Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act") and common law. Mr Doran QC and Mr Sayers appeared for the appellant and Mr Simpson QC appeared for the respondent.

[2] The first conviction concerned an attempt to escape on 24 December 1973, in respect of which the appellant was sentenced to 18 months imprisonment. The second conviction concerned an attempt to escape on 27 July 1974 and the appellant was sentenced to three years imprisonment, consecutive to the earlier sentence. On the first trial the appellant represented himself and on the second trial the appellant refused to recognise the court. No appeals were lodged against either conviction until over 40 years later. The appeals were prompted by the disclosure of Government papers under the 30 year rule. Extensions of time to appeal against the convictions were granted by Gillen LJ.

The legislative framework for detention

[3] From 1922 legislation provided for internment without trial in Northern Ireland. During the more recent "Troubles" the power was exercised on 9 August

1971 and from time to time thereafter. The statutory scheme provided for the Secretary of State to make an Interim Custody Order ("ICO") where it appeared that a person was involved in terrorism. The person detained was required to be released within 28 days unless the Chief Constable referred the matter to a Commissioner, in which event the detention continued. The Commissioner would then make a Detention Order if satisfied that the person was involved in terrorism or the Commissioner would otherwise order the release of the person detained.

[4] An ICO was made in respect of the appellant on 21 July 1973 and the order was signed by the Minister of State at the Northern Ireland Office. Notice of Reference to a Commissioner was made by an Assistant Chief Constable on 10 August 1973 and thus the appellant continued to be detained. The first attempted escape occurred on 24 December 1973. A Detention Order was made by a Commissioner on 16 May 1974. The second attempted escape occurred on 26 July 1974.

[5] The issue in this appeal concerns the validity of the ICO made on 21 July 1973. The statutory power to make the ICO arose "where it appears to the Secretary of State" that a person was suspected of being involved in terrorism. The legislation also provided that the ICO be signed by a Secretary of State, Minister of State or Under Secretary of State. The practice prior to 1974 appears to have been that ICOs were made by the Secretary of State or Minister of State or Under Secretary of State. In respect of the ICO made on 21 July 1973 in relation to the appellant there was no evidence that the matter was considered personally by the Secretary of State. Hence the issue is raised as to whether an ICO was required to be considered personally by the Secretary of State.

[6] The statutory powers relating to detention were contained in the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 ("the 1922 Act") and the regulations contained in the schedule to the 1922 Act. Under section 1(3) of the 1922 Act the Minister of Home Affairs had the power to make regulations for further provisions for the preservation of the peace and maintenance of order.

[7] The principal regulations in the schedule to the 1922 Act were amended by the Civil Authorities (Special Powers) Act (Amending) Regulations (Northern Ireland) 1956 No. 191.

Regulation 11(1) provided for the arrest without warrant of any person suspected of acting or of having acted or of being about to act in a manner prejudicial to the preservation of the peace or the maintenance of order.

Regulation 11(2) provided that any person so arrested may on the order of the Minister of Home Affairs be detained until he has been discharged by direction of the Attorney General or brought before a court of summary jurisdiction.

Regulation 12(1) provided that, where it appeared to the Minister of Home Affairs, on the recommendation of an officer of the RUC not below the rank of County Inspector or of an Advisory Committee, that for securing the preservation of the peace and of the maintenance of order in Northern Ireland, it was expedient that a person who was suspected of acting or having acted or being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order, be interned, the Minister of Home Affairs may order that the person be interned. The order made was required to include express provision for the due consideration by an Advisory Committee of any representations which the person detained may make against the order.

[8] Direct rule of Northern Ireland was introduced on 30 March 1972. The powers of the Minister of Home Affairs were then exercised by the Secretary of State. New interim arrangements for detention were introduced on 7 November 1972 under the Detention of Terrorists (Northern Ireland) Order 1972 ("the 1972 Order"). The power of arrest under Regulation 11(1) of the Special Powers Regulations remained in force but the detention powers were now exercised under the 1972 Order. When the appellant's ICO was made on 21 July 1973 the 1972 Order applied.

[9] Article 4 of the 1972 Order contained the relevant provisions in relation to the ICO –

> "(1) Where it appears to the Secretary of State that a person is suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism the Secretary of State make an order (hereinafter in this order referred to as an "interim custody order") for the temporary detention of that person.
>
> (2) An interim custody order of the Secretary of State shall be signed by a Secretary of State, Minister of State or Under Secretary of State.
>
> (3) A person shall not be detained under an interim custody order for a period of more than 28 days from the date of the order unless his case is referred by the Chief Constable to a Commissioner for determination and where a case is so referred the person concerned may be detained under the order only until his case is so determined.
>
> (4) A reference to a Commissioner shall be by notice in writing, of which a copy shall be sent to the

> Secretary of State and to the person to whom it relates."

Article 5 contained provision for adjudication by a Commissioner as follows:

> "(1) Where the case of a person detained under an interim custody order is referred to a Commissioner, the Commissioner shall enquire into the case for the purpose of deciding whether or not he is satisfied that
>
> (a) that person 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.
>
> (2) Where a Commissioner decides that he is satisfied as aforesaid he shall make an order (hereafter in this order referred to as 'detention order') for the detention of the person in question, and otherwise shall direct his discharge."

[10] The interim arrangements in the 1972 Order were replaced by the 1973 Act with effect from 8 August 1973 and the 1922 Act and the 1972 Order were repealed. The provisions for ICOs and Detention Orders were contained in Schedule 1 of the 1973 Act. By section 31(5) of the 1973 Act, anything done under the 1922 Act or the 1972 Order, so far as it could have been done under the 1973 Act, was to have effect as if it had been done under the 1973 Act. Thus the ICO of 21 July 1973 made under the 1972 Order then took effect under the 1973 Act.

[11] When the appellant made his attempted escapes on 24 December 1973 and 21 July 1974 and when the Detention Order was made on 16 May 1974 the 1973 Act was in force. Section 38 of the 1973 Act provided that any person who, being detained under an ICO or a Detention Order, escaped, would be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or both. The charges of attempting such an escape arose under common law and the appellant was charged and convicted accordingly.

<u>The delegation of the powers of detention</u>

[12] Section 1(2) of the 1922 Act provided that the Minister of Home Affairs may delegate all or any of his powers under the Act to a police officer. Thus there was express statutory power to delegate the making of ICOs under the 1922 Act. The Northern Ireland (Temporary Provisions) Act 1972 transferred the power of delegation from Northern Ireland Ministers to the Secretary of State and provided that the Secretary of State could appoint other persons to exercise such functions. On 19 April 1972 the Secretary of State made an order appointing the Minister of State or the Parliamentary Under Secretary of State to exercise the power to make orders under Regulation 11(2) of the Special Powers Regulations. There were five other powers under the Special Powers Regulations in relation to internees and detainees of which three were delegated by the Secretary of State by order of 25 May 1972, namely removal to hospital, removal to court of detainees and removal to court of internees. Two such powers were not delegated, namely the making of internment orders and orders for release from internment. These powers rested in the hands of the Secretary of State from the imposition of direct rule on 30 March 1972 until the repeal of Regulation 11(2) on 7 November 1972. All of these measures related to the express statutory power of delegation of functions. No such provision for delegation was contained in the 1972 Order or the 1973 Act. There was no such power of delegation when the ICO was made in respect of the appellant on 21 July 1973.

[13] The issue in the present case is not one of delegation. Under what is known as the *Carltona principle* a decision assigned by Parliament to, for example, a Secretary of State, when permissibly exercised by another Minister or by an appropriate official, is constitutionally the decision of the Secretary of State. When is such a process permissible?

The Carltona principle

[14] In *Carltona Limited v Commissioners of Works* [1943] 2 All ER 560 the Court of Appeal in England and Wales considered an order for the requisition of a factory under the Defence (General) Regulations 1939, which order was to be made by the Commissioners of Works. The First Commissioner of Works was the Minister of Works and Planning and the decision was made by the Assistant Secretary in that Ministry on behalf of the Commissioners of Works. The decision was challenged on the basis that the Commissioners of Works or indeed the First Commissioner had not personally considered the matter. The Court of Appeal rejected the challenge and set out the principle as follows:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally

> attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

[15] Two particular matters might be noted. First the constitutional point that the person actually making the decision was thereby acting as the specified decision-maker. Second, insofar as there is an implication that oversight of such decision-making is a matter for Parliament rather than the courts, it is now apparent that such decisions may be subject to Judicial Review and may be challenged in criminal proceedings.

The release of government papers

[16] The trigger for the appellant's late appeal was the disclosure of documents by the Government under the 30 year rule. The need for the Secretary of State to consider personally the making of an ICO had given rise to some debate among officials and legal advisers in government circles. On 4 December 1973 an official in the Law Officer's Department in Belfast sent a note to the Northern Ireland Office to the effect that ICOs should be considered by the Secretary of State personally. On the other hand a legal officer to the Home Office took a different view in a note to the Northern Ireland Office on 30 January 1974. This debate appears to have prompted a change of practice in 1974 from the decisions on ICOs being made by the

Secretary of State or the Minister of State or the Permanent Under Secretary of State to one where the decisions were made by the Secretary of State alone.

[17] The documents released by the government included an Opinion of JBE Hutton QC, then Senior Crown Counsel for Northern Ireland (later Lord Hutton) and legal advisor to the Attorney General, who under the direct rule system was Attorney General for England and Wales and Northern Ireland. That Opinion, dated 4 July 1974, was in response to a request for directions in relation to a proposed prosecution of the appellant and three others involved in the attempted escape on 24 December 1973. Mr Hutton concluded that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally.

[18] In March 1974 Harold Wilson's Labour Government replaced the Conservative Government. On 17 July 1974 the Attorney General raised the issue with the Prime Minister and the Secretary of State and discussed the possibility of immediate legislation to address the issue. A letter from the Attorney General's Chambers to 10 Downing Street dated 22 July 1974 set out the Attorney General's conclusion on the issue. It was stated that the matter had been considered further in consultation with leading Counsel and with the legal advisor to the Northern Ireland Office. The conclusion was that, while the matter was certainly not free from doubt, on balance a court would probably hold that the requirements relating to an ICO were satisfied if a Minister of State or Under Secretary of State had considered the case and that it was not essential that the Secretary of State should personally consider the papers. It was acknowledged that there remained a substantial risk that a court could decide otherwise.

[19] The papers disclose that Merlyn Rees, the Secretary of State under the Labour Government, required personal involvement in all ICOs. A document entitled 'Procedure for Making Interim Custody Orders', dated 11 November 1974, provided that the Secretary of State would decide whether an ICO would be made. This approach was born out of caution based on legal advice, as is apparent from paragraph 3 of the statement which suggests that "the safer construction …. is that only the Secretary of State can <u>make</u> the order."

<u>The use of parliamentary materials for interpretation</u>

[20] While all the materials released are of considerable historical interest they do not inform the court's interpretation of the statutory provision. The use of extraneous material in statutory interpretation is governed by the rule in *Pepper v Hart* and the appellant relied on the description of that rule in *Bennion on Statutory Interpretation* as follows:

> "(1) In arriving at the legal meaning of an enactment to which this section applies the court may

> have regard to any statement, as set out in the official report of debates (Hansard) on the Bill for the Act, which satisfies the requirements of sub-sections (3) to (5) below, together with such other Parliamentary material (if any) as is relevant for understanding that statement and its effect. In allowing an advocate to cite the material the court must ensure that he or she does not in any way impugn or criticise the statement or the reasoning of the person making it.
>
> (2) This section applies to an enactment contained in an Act where, in the opinion of the court construing the enactment, it is ambiguous or obscure, or its literal meaning leads to an absurdity.
>
> (3) The statement must be made by or on behalf of the Minister or other person who is the promoter of the Bill.
>
> (4) The statement must disclose the mischief aimed at by the enactment, or the legislative intention underlying its words.
>
> (5) The statement must be clear."

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

[22] This court is satisfied that the rule in *Pepper v Hart* cannot assist the appellant in the present circumstances. The enactment is not ambiguous or obscure in the sense that engages the rule nor is its literal meaning leading to absurdity and the rule does not apply. In any event the statements relied on appear to be contradictory.

[23] A further statement of an official is not a Hansard statement, it does not fall within the rule in *Pepper v Hart* and cannot inform the interpretation of the

legislation. By a note dated 2 July 1975 an official stated that when drafting the 1972 Order it was considered that the Secretary of State should take the decision in relation to an ICO but as he would not always be present in person the signature on the order could be that of a minister. The note referred to the opinion of the Attorney General that an ICO would be valid without involvement of the Secretary of State.

Grounds of appeal

[24] The appellant's grounds of appeal are as follows –

(1) The conviction of the appellant on 20 March 1975 of the offence of attempting to escape from detention contrary to paragraph 38(a) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 and common law (Bill No. 799/74) is unsafe in that:

(i) The prosecution failed to prove that the interim custody order dated 21 July 1973, on the basis of which the appellant's detention had been authorised, was a valid interim custody order.

(ii) Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972, under which the interim custody order had been made, required the Secretary of State personally to consider whether the person subject to the order 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 purposes of terrorism.

(iii) Proof of compliance with Article 4(2) of the Order, in respect of the signing of the interim custody order by a Minister of State, did not constitute proof of the matter required by Article 4(1).

(iv) The prosecution failed to adduce proof of the above condition precedent to the making of the interim detention order under which the appellant was held; in the absence of such proof the conviction of the appellant was wrong in law and the evidence available to the learned trial judge.

(2) The subsequent conviction of the appellant on 18 April 1975 of the offence of attempting to escape from detention contrary to paragraph 38(a) of Schedule 1 of the Northern Ireland Emergency Provisions Act 1973 (Bill No. 140/75) is unsafe on the same basis as the above.

The appellant's submissions

[25] The appellant contends that Article 4(1) required the Secretary of State to consider personally each ICO.

In summary, this is said to arise in the first place from the wording of Article 4(1) which specifies the Secretary of State as making an order where certain matters appear to the Secretary of State.

Secondly, this is said to arise from the framework of Article 4 and the wording of Article 4(2) which refers to an order of the Secretary of State and then to the signing of that order by the Secretary of State or the Minister of State or the Under Secretary of State. Had the making of the order, as opposed to the signing of the order, been intended to be carried out by anyone other than the Secretary of State then it is argued that it could have been so stated.

Thirdly, that the decision to make an ICO is of such import and gravity, interfering so significantly with a fundamental to liberty, that it requires the personal consideration of the Secretary of State.

Further in relation to the second attempt to escape on 26 July 1974 the appellant was by then subject to the Detention Order made by the Commissioner on 16 May 1974. The appellant contends that a valid ICO was a condition precedent to the making of the Detention Order. Reliance is placed on *McElduff's Application* [1972] NI 1 where McGonigal J considered an application for a writ of *habeas corpus* after an arrest under the 1922 Act. There was then a re-arrest of the applicant under Regulation 11(1) of the Special Powers Regulations and subsequent detention under Regulation 11(2) of the Special Powers Regulations. McGonigal J concluded that a Detention Order could not be made under Regulation 11(2) if the purported arrest under Regulation 11(1) was not a valid arrest.

[26] The appellant also adopted the Opinion of Mr Hutton QC. That Opinion stated that the legal authorities provided support for arguments both for and against the proposition that the Secretary of State himself must consider the case for an ICO. The Opinion then set out the arguments that the Secretary of State himself need not consider each case, relying on the *Carltona principle*. The Opinion then set out the arguments that the Secretary of State himself must consider each case, relying on the wording and framework of Article 4 on the grounds already outlined on behalf of the appellant; focusing on the statutory power based on "where it appears to the Secretary of State" that a certain situation exists as support for personal consideration by the Secretary of State; relying on war time decisions relating to detention under Regulation 18B of the Defence (General) Regulations 1939; referring to the importance of the subject matter involving deprivation of liberty and the comment on *De Smith on Judicial Review of Administrative Action* that some matters are so important that the specified Minister must address himself to them personally. Having set out the arguments for and against personal consideration by the Secretary of State it was concluded that the point was arguable and the outcome

would not be certain but that a court would probably find that it was a condition precedent to the making of an ICO that it should be the decision of the Secretary of State personally. It was stated that the counter-argument would probably not prevail in face of the Regulation 18B cases.

The respondent's submissions

[27] On the other hand the respondent contends that the *Carltona principle* applied and that the Minister was entitled to make the decision to issue the ICO.

In summary, reliance was placed on an earlier decision of this court in *McCafferty's Application* [2009] NICA 59 in relation to what was said to be similar wording and similar gravity, involving loss of liberty by the revocation of a licence and recall to prison.

In the alternative the respondent relied on the presumption of regularity by which the ICO signed by the Minister in accordance with Article 4(2) was sufficient to satisfy the presumption on the face of the document that it was lawfully made in the absence of proof to the contrary.

Further in relation to the second attempt to escape on 26 July 1974 the respondent argued that by that date the Commissioner had made a Detention Order under a distinct statutory procedure by which he had been satisfied 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 purposes of terrorism and that his detention was necessary for the protection of the public. Thus the respondent contends that the Detention Order overtook any irregularity in the ICO.

The Regulation 18B cases

[28] It is necessary at this stage to refer to the Regulation 18B cases. *Liversidge v Anderson* [1942] AC 206 is the most well-known. Regulation 18B provided that the Secretary of State could make a detention order against a person if he had reasonable cause to believe that the person was, in effect, a danger to the war effort. The order was made by the Home Secretary personally so the issue of devolution to another Minister or official did not arise. The case had proceeded on an application on behalf of the detainee for particulars of the grounds for the reasonable belief of the Home Secretary. Two matters were considered by the House of Lords. The first was whether the court could inquire further than the good faith of the Home Secretary (not being a basis of challenge in the particular case) and review the facts on which the Home Secretary had made his decision. It was decided that there was no question of fact for the court to consider and thus no entitlement to particulars of the grounds for the reasonable belief. The second matter was whether there was an onus on the Secretary of State, he having relied simply on the signed order. It was decided that the presumption of regularity applied and the order was valid.

[29] The Regulation 18B cases did not feature in the judgment in *Carltona*, which was decided under the same regulations, although dealing with requisition of property rather than loss of liberty.

The development of the *Carltona principle*

[30] The *Carltona principle* has developed since Mr Hutton's Opinion in 1974. In *Re Golden Chemical Products Limited* [1976] Ch 300 the Companies Act 1967 provided that, if it appeared to the Secretary of State that it was expedient in the public interest that a corporate body should be wound up, the Secretary of State may present a petition for it to be wound up. This power was exercised by an official who was the Inspector of Companies in the Department of Trade acting for the Secretary of State. It was held that there was no obligation on the Secretary of State to exercise the power personally. It was argued that the exercise of the powers involved serious invasion of the freedom or property rights of the subject and they should be exercised personally. Brightman J recognised that the power given to the Secretary of State was of a most formidable nature which may cause serious damage to the reputation or financial stability of the company. However he rejected any distinction between those powers that should be exercised by a Minister personally and those which need not, if that distinction was based on the seriousness of the subject matter. This court is satisfied that the seriousness of the subject matter is a consideration in determining whether a power must be exercised by the Minister personally, although as Brightman J found, it is not a determining consideration.

[31] With reference to the decisions taken concerning Regulation 18B of the Defence (General) Regulations 1939 Brightman J noted that the appeals proceeded on the basis that the decision was taken and was rightly taken by the Minister personally. He accepted that there are important cases in which the Minister will exercise a statutory discretion personally, not because it is a legal necessity but because it is a political necessity and the Regulation 18B cases were stated to be examples of that approach.

[32] The principle was considered by the House of Lords in *R (Oladehinde) v Secretary of State for the Home Department* [1991] 1 AC 254. The Secretary of State for the Home Department authorised certain officials of not less than Inspector level serving in the Immigration Department of the Home Office to act on his behalf to decide whether to issue a notice of intention to deport persons under the Immigration Act 1971. The applicant's first argument was that immigration officers were holders of a statutory office and as such were independent of the executive arm of Government and therefore the *Carltona principle* could not extend to the exercise of the Secretary of State's powers by an immigration inspector. This argument was rejected as the immigration officers were held to be civil servants in the Home Office and not statutory officeholders. Alternatively the applicant argued that the structure of the Immigration Act, which differentiates between the powers of immigration

officers permanently concerned with entry control and subsequent policing of illegal immigrants and the powers of the Secretary of State in relation to deportation, carried the clear statutory implication that the powers of the Secretary of State were not to be exercised by immigration officers.

[33] Lord Griffiths in the House of Lords stated that it was well recognised that when a statute placed a duty on a Minister it may generally be exercised by a member of his Department for whom he accepted responsibility and that Parliament could of course limit the Minister's power to devolve or delegate the decision and require him to exercise it in person. There were said to be three examples of such limitation in the 1971 Act which, after referring to decisions by the Secretary of State, had added in parenthesis "and not by a person acting under his authority". There was no such limitation in respect of the decision in question. Lord Griffiths concluded that where the statute contained three explicit limitations on the Secretary of State's power to devolve he would be very slow to read into the statute a further implicit limitation.

[34] In *R (Doody) v Secretary of State for the Home Department* [1994] 1 AC 531 the Criminal Justice Act 1967 provided that the Secretary of State considered the date on which those serving mandatory sentences of life imprisonment might be released upon licence. Decisions were not taken by the Secretary of State personally but by a Minister of State or Parliamentary Under Secretary of State. The House of Lords approved the approach to the *Carltona principle* stated by Staughton LJ in the Court of Appeal and noted there may be express or implied requirements that a decision be taken by the Secretary of State personally. It was noted that the fixing of a tariff period for life prisoners was of great importance to the individuals affected and it was stated:

> "Every such case demands serious consideration and the burden of considering them all must be substantial. I can see nothing irrational in the Secretary of State devolving the task upon junior ministers. They too are appointed by the Crown to hold office in the Department, they have the same advice and assistance from departmental officials as the Secretary of State would have, and they too are answerable to Parliament."

[35] The *Carltona principle* has been considered on several occasions in this jurisdiction. Two examples from this court may be considered. First of all, in *R v Harper* [1990] NI 28 section 12(4) of the Prevention of Terrorism (Temporary Provisions) Act 1984 provided that the Secretary of State may extend the period of detention of a person arrested under the Act. The decision to extend the period of detention was made by the Parliamentary Under Secretary of State, a decision that was upheld by the Court of Appeal applying the *Carltona principle*. In the Court of

Appeal, Hutton LCJ (as JBE Hutton QC had then become) rejected the comparison with the Regulation 18B case of *Liversidge v Anderson* [1942] AC 206 as the question before the House of Lords was not whether the Home Secretary must himself sign the detention order, as it was clear that he had signed that order. Further, Hutton LCJ referred to Brightman J in *Golden Chemicals*, that a Minister might exercise his statutory discretion personally, not because of a legal necessity but because of a political necessity, Regulation 18B cases being examples.

[36] The second case is *McCafferty's Application* [2009] NICA 59 where, under the Northern Ireland (Remission of the Sentences) Act 1995, in relation to those released from prison on licence, "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 was likely to commit further offences. The decision to revoke the applicant's licence was taken by the Minister of State and not the Secretary of State, a decision that was upheld by the Court of Appeal on the basis of the *Carltona principle*.

[37] The Court of Appeal in *McCafferty's Application* referred to a passage in *De Smith's Judicial Review of Administrative Action* where orders may have to be taken by Ministers personally, an earlier version of which had been referred to in Mr Hutton's Opinion. To reflect the changing approach, the text in 1974 at the time of Mr Hutton's Opinion stated –

> "Some matters, however, are so important that the Minister must address himself to them personally. It may be that orders drastically affecting the liberty of the person – eg deportation orders, detention orders made under wartime security regulations and perhaps discretionary orders for the rendition of fugitive offenders – fall into this category"

By the time of the decision in *McCafferty's Application* in 2009 the text of *De Smith's 6th Edition* referred to in the judgment (and later appearing in the 7th Edition) was less emphatic -

> "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 – eg 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."

[38] The authority for including deportation orders preceded *Carltona*. That authority will be further diminished by *Oladehinde*, although the House of Lords was dealing with a notice of intention to deport rather than a deportation order. The detention orders under wartime security regulations were referred to above as examples of political necessity rather than legal necessity. The authority for rendition of fugitive offenders was *R (Enahoro) v Brixton Prison Governor* [1963] 2 QB 455. The Home Secretary decided to return the applicant to Nigeria but then referred the matter to Parliament, leading to the claim was that he had abdicated his responsibility. It was decided that in referring to Parliament the Home Secretary was consulting Parliament, as he was found to be entitled to do, and that he had retained the power to make the final decision. The court did not refer to the *Carltona principle.* Rather the court assumed that the Home Secretary could not delegate the decision. The court could proceed on the basis of that assumption as it was satisfied in any event that the Home Secretary would take the final decision. The issue we are concerned with did not arise. The editors of *De Smith* may well say that support for categories of cases concerning matters of such importance as to require personal consideration is at best equivocal.

[39] The approach set out by this court in *McCafferty's Application* was as follows. 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 there are specific contrary indications appearing in the language and the importance of the subject matter.

[40] A recent example from the Court of Appeal of England and Wales is *R (Forsey) v Northern Derbyshire Magistrates' Court* [2017] EWHC 1152 (Admin). The applicant sought Judicial Review of the decision of a District Judge not to stay proceedings for an offence arising from an alleged failure by an employer to give notice to the Secretary of State of certain redundancies. The legislation provided that such proceedings should be instituted only by or with the consent of the Secretary of State or by an officer authorised for that purpose by special or general directions of the Secretary of State. The decision to prosecute was taken by an official who was a senior lawyer employed by the Secretary of State, a decision that was upheld under the *Carltona principle*. The applicant contended that the wording of the legislation displaced the *Carltona principle*. By providing that authority to prosecute could be authorised by an officer by special or general directions of the Secretary of State there was express provision for delegation which was said to be inconsistent with the devolution of the decision by the Secretary of State. It was held that the additional words permitting devolution described an additional class of person who may institute proceedings.

[41] The applicant also relied on the context of the legislation dealing with industrial relations and the handling of redundancies which was said to be a sensitive and controversial area and an indicator that Parliament had intended that the Secretary of State personally or those nominated by him should have the power to initiate proceedings. Having taken note of the nature of the legislation it was concluded that it did not provide any significant support for an implication that Parliament intended to exclude the *Carltona principle*. Treacy LJ stated that in the absence of any express exclusion of the *Carltona principle* the issue was whether there arose a necessary implication that the principle was excluded. That required a careful examination of the statutory language and its context, including a consideration of factors said to point towards exclusion of the principle. There was said to be at the very least a starting point that the *Carltona principle* applied and that it required displacement. The principle may be displaced by materials or considerations which lead to the conclusion that Parliament intended to exclude the principle.

[42] The position maybe stated as follows –

(i) The *Carltona principle* establishes that where Parliament specifies that a decision is to be taken by a specified Minister, generally that decision may be taken by an appropriate person on behalf of the Minister.

(ii) The decision taken by the appropriate person is constitutionally that of the specified Minister.

(iii) The starting point, if not the presumption, is that the *Carltona principle* applies.

(iv) The application of the *Carltona principle* may be displaced (or rebutted) by Parliament using express words or by necessary implication.

(v) The necessary implication that Parliament intended to exclude the *Carltona principle* may be derived from the wording of the legislation and the framework of the legislation and the context.

(vi) The seriousness of the subject matter is an aspect of the context and may be taken into account in determining whether it is a necessary implication that Parliament intended to exclude the *Carltona principle*, although it is not determinative.

<u>The wording, framework and context of the legislation</u>

[43] The appellant relies on the wording of Article 4(1) of the 1972 Order which states that "where it appears to the Secretary of State" that the conditions for the making of an order exist "the Secretary of State may make an order" as requiring personal consideration by the Secretary of State. However these words are a common legislative formula and have not been found to be the basis for any necessary implication of personal consideration. For example, *McCafferty's Application,* relating to the recall to prison of a person on licence, concerned the power of the Secretary of State to make an order "if it appears to him" that certain conditions are satisfied.

[44] The appellant relies on the wording and framework of Articles 4(1) and 4(2) of the 1972 Order where the former provides that the Secretary of State may make the order and the latter provides that the order may be signed by a Secretary of State, Minister of State or Under Secretary of State. Clearly a distinction has been drawn between the making of the order and the signing of the order. Clearly the making of the order is the more significant decision. The signing of the order is the authority on which officials act to detain the person subject to the order. The distinction indicates that the appropriate person who might act on behalf of the specified Minister may be more confined under Article 4(1) than under Article 4(2). It does not lead to the necessary implication that only the Secretary of State may make the order.

[45] Further, reliance was placed on the Article 4(2) reference to the ICO "of" the Secretary of State as indicating that the ICO should be made by the Secretary of State personally. Article 4(2) is clearly referring back to the ICO made by the Secretary of State under Article 4(1) but does not speak to whether or not it may be made on his behalf.

[46] The appellant relies on the gravity of such an order, involving as it does the loss of liberty of the subject. This court is satisfied that the gravity of the subject matter is a relevant consideration in a determination whether the *Carltona principle* has been displaced in a particular case. Brightman J in *Re Golden Chemical Products* stated that a distinction based on degrees of seriousness of the invasion of freedom of property rights of the subject was "impossibly vague". We understand that discussion to concern a distinction between those cases to which the *Carltona principle* applied and those to which it did not, namely that seriousness was being proposed as a determining feature, a proposal that was rejected. We are satisfied that the seriousness of the subject matter is not determinative of the application of the principle but is a relevant consideration. In this regard we agree with the Court of Appeal in *McCafferty's Application* that the factors to be considered include the importance of the subject matter.

[47] A decision that results in loss of liberty is not in itself sufficient to displace the *Carltona principle*. *McCafferty's Application* involved a recall to prison. *Doody* involved the refusal to release a mandatory life sentence prisoner. *R v Harper*

concerned extended detention by executive decision under the Prevention of Terrorism (Temporary Provisions) Act 1984. In the present case the detention of the appellant involved an ICO and a Detention Order so that the appellant was detained by executive decision and then by adjudication by a Commissioner. The provisions under the Special Powers Act and Regulations and under the 1972 Act and under the 1973 Act led to derogations by the United Kingdom under Article 15(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which derogations were notified to the Council of Europe on 20 August 1971 and 23 January 1973. However this court has not been satisfied that it is a necessary implication that the undoubted seriousness of the subject matter of the decision and the context of the decision displace the *Carltona principle*.

[48] The appellant further relied on the reasons advanced by Mr Hutton QC in his 1974 Opinion. It may be noted first of all that the Opinion balances the competing arguments for and against the application of the *Carltona principle* rather than applying the modern approach, which is to look for material that might displace the initial application of the *Carltona principle*.

[49] Secondly, the reason stated for the balance falling against the application of the *Carltona principle* was based on the comparison with the Regulation 18B cases. The cases referred to were *Stewart v Anderson and Morrison* [1941] 2 All ER 665, *R (Green) v Secretary of State* [1942] AC 284 and *Liversidge v Anderson* [1942] AC 206, all of which pre-dated the decision in *Carltona*. However when Hutton LCJ came to consider the *Carltona principle* in *R v Harper* in 1990, concerning extended detention under the emergency legislation, he distinguished the Regulation 18B cases. This was done on the basis that the question before the House of Lords in *Liversidge and Anderson* was not whether the Home Secretary must deal personally with the detention order. Further, reference was made to the observation of Brightman J that Regulation 18B cases are examples of a Minister exercising a discretion personally "not because it is a legal necessity but because it is a political necessity".

[50] Thirdly, the Opinion stated the argument that the *Carltona principle* applied generally but that certain important matters required the personal decision of the Secretary of State, of which detention was stated to be an example, referring to the passage in *De Smith's Judicial Review of Administrative Action*. As noted above the wording of the passage in De Smith was altered in subsequent editions and the authorities relied on are certainly equivocal.

[51] This court has not been satisfied that there is material or information available that displaces the *Carltona principle*. Accordingly we are satisfied that the decision to make the ICO could have been made by an appropriate person on behalf of the Secretary of State. We are satisfied that the Minister was an appropriate person. A narrower approach was taken in *Doody* when it was stated that there was nothing irrational in the Secretary of State devolving the decision to a Minister. The present case did not involve a decision of an official in the department. As in *Doody,* the

decision was taken by a Minister, appointed by the Crown, having the same advice and assistance from officials in the department as the Secretary of State and also being answerable to Parliament.

The effect of the later Detention Order

[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.

[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.

The effect of the presumption of regularity

[54] The respondent relied on the presumption of regularity in relation to the making of the ICO by the Secretary of State. The presumption is that all things are presumed to have been lawfully done, unless proved to the contrary. However this presumption is displaced where there is evidence to the contrary. In the present case it is apparent that the Secretary of State did not consider the appellant's case on the making of the ICO. Accordingly the respondent may not rely on the presumption of regularity as to the making of the ICO by the Secretary of State personally. Had the court accepted the argument on behalf of the appellant that the *Carltona principle* did not apply it would have rejected the respondent's argument in relation to the presumption of regularity.

[55] The order was made and signed by the Minister of State on behalf of the Secretary of State. The court has found that the Minister of State was an appropriate person to make the ICO on behalf of the Secretary of State. It does not appear that there was any evidence before the court which convicted the appellant as to the actual decision-making of the Minister of State. However, here the principle of regularity has a place, in that it may be presumed that the ICO was made lawfully, in the absence of any evidence to the contrary. There was no finding by the court on the conviction of the appellant of any irregularity. There is no evidence before this court as to any irregularity in the making of the order by the Minister on behalf of

the Secretary of State. There is no basis on which this court could displace the presumption of regularity in the making of the ICO by the Minister on behalf of the Secretary of State.

Conclusion

[56] This court has power to quash a conviction that is considered to be unsafe. It has not been contested that the appellant attempted to escape on the two occasions specified. The contest has concerned the validity of the ICO. This court has been satisfied as to the validity of the ICO made by the Minister on behalf of the Secretary of State. Accordingly the court is satisfied that the convictions are safe. The appeal is dismissed.