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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

AN APPLICATION BY TERENCE McCAFFERTY
FOR A WRIT OF HABEAS CORPUS

Mr Justice Weatherup and Mr Justice Treacy

WEATHERUP J

[1] This is an application by Terence McCafferty for the issue of a Writ of Habeas Corpus and it concerns his detention in HMP Maghaberry pursuant to an Order of the Minister of State at the Northern Ireland Office, Paul Goggins, on 18 December 2008. Mr O'Donoghue QC and Mr Devine appeared for the applicant and Mr Maguire QC and Mr McMillen for the respondent.

[2] The background, as appears from the grounding affidavit of the applicant, is that on 1st July 2005 the applicant was convicted of possession of explosives with intent to endanger life, which is a scheduled offence under Part VII of the Terrorism Act 2000, and he was sentenced to 12 years' imprisonment. The normal remission period is one half of the sentence but by section 79 of the Terrorism Act 2000 it is provided that the remission granted under Prison Rules in respect of a sentence for imprisonment in Northern Ireland for a scheduled offence shall not, where it is for a term of 5 years or more, exceed one-third of the term.

[3] On 22 November 2008, the applicant was released on licence under the Northern Ireland (Remission of Sentences) Act 1995, which provides at section 1(2) that -

> "A person to whom this section applies shall be released on licence for the period …. during which, by reason only of

> section 79, he is prevented from being discharged in pursuance of the prison rules."

Thus it is that, between the period of normal remission at the completion of one half of the sentence and the period of remission under the Terrorism Act at the completion of two-thirds of the sentence, the prisoner will be released on licence.

[4] On 18 December 2008, the Minister of State revoked the applicant's licence and returned him to prison under the 1995 Act on the grounds that his continued liberty would present a risk to the safety of others and that he was likely to commit further offences. Section 1(3) of the 1995 Act provides that -

> "The Secretary of State may revoke a person's licence under the 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…."

[5] The issue that arises is whether the statutory power to revoke the licence that is granted to the Secretary of State is a power that must be exercised personally by the Secretary of State or whether it is a power that is capable of lawful devolution to the Minister of State under the 'Carltona principle' (Carltona Ltd v Commissioner of Works [1943] 2 All ER 546).

[6] A preliminary issue arises as to whether the present proceedings are a criminal cause or matter. Counsel were of the view that this was not a criminal cause or matter and our preliminary view was that this was not a criminal cause or matter. However, we have reflected further on the matter. First of all, it should be noted that the application is by Originating Motion for a Writ of Habeas Corpus and under the Administration of Justice Act 1960 it was provided that on a criminal application for Habeas Corpus a refusal of release may only be ordered by the Divisional Court and the 1960 Act provided that a criminal application equated to a criminal cause or matter. It seems that the 1960 Act was repealed by the Access to Justice Act 1999. However, the Rules of the Supreme Court (Northern Ireland) contain a similar provision in Order 54, Rule 4(2), which provides in relation to an application for a Writ of Habeas Corpus that -

> "Where such an application in a criminal cause or matter is heard by a single judge and the judge does not order the release of the person restrained, he shall direct an originating motion to a court consisting of two or more judges."

[7] As a result, when the application came on for hearing as an urgent matter on 6 March 2009, we sat as a Court of two Judges in order to determine both the preliminary issue as to whether this was a criminal cause or matter and in order to determine the substantive issue as to whether a Writ of Habeas Corpus should be issued. In so doing we sought to avoid a repeat application to another Court in the

event that the application were to be heard by a single Judge who decided against the applicant and the matter were found to be a criminal cause or matter.

[8] Is this a criminal cause or matter? The issue was considered by Carswell LCJ in Adair's Application [2003] NIQB 16, which was an application for judicial review of a decision to revoke a licence under the Northern Ireland (Remission of Sentences) Act 1995, that is, the same provision as the present case. The issue of criminal cause or matter is of equal relevance in relation to judicial review because Order 53, which applies to judicial review, provides that in a criminal cause or matter the Court shall comprise three Judges, or by direction of the Lord Chief Justice, two Judges, or by consent a single Judge. Carswell LCJ considered that for there to be the stamp of proceedings of a criminal nature there must be in contemplation the possibility of trial by a Court for some offence. It was concluded that the challenge to the revocation of the licence was not a criminal cause or matter on the ground that, although the applicant was in prison for a criminal offence, his licence and recall were a subsequent issue, which was not itself a matter that could lead to a criminal trial for an offence.

[9] Last week a Divisional Court comprising Kerr LCJ, Higgins LJ and Girvan LJ delivered judgment in Alexander and Others' Application [2009] NIQB 20. The case concerned applications for judicial review by a number of persons who claimed wrongful arrest on the basis that their arrests were not 'necessary', which is a requirement now introduced into the PACE Order. The Court carried out a review of the authorities on the issue of a criminal cause or matter. The general approach to establishing a criminal cause or matter is to ascertain whether the applicant has become involved in a process that puts him at risk of conviction or sentence. We refer only to Amand v Secretary of State [1943] AC 147 where the applicant had been detained in England to be removed to the Netherlands on the grounds that he was a deserter from the Dutch Army. The House of Lords held that the application for Habeas Corpus was a criminal cause or matter. Lord Wright stated the approach as follows -

> "… if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is thus put in jeopardy."

[10] In Alexander the Court was satisfied that the applications concerned a criminal cause or matter. Upon arrest for criminal offences the applicants are involved in a process that places them at risk of conviction. Further the Court considered the jurisdiction of a Court that sat with two or more Judges where it was not dealing with a criminal cause or matter. Reference was made to Coleman's Application [1988] NI 205 where the Court of Appeal heard an appeal from the Divisional Court and concluded that the application had not concerned a criminal cause or matter. However Lowry LCJ concluded that the first instance

Divisional Court comprising two Judges had jurisdiction to hear an application that was not a criminal cause or matter. Accordingly we have jurisdiction in the present application, whether or not this is a criminal cause or matter.

[11] Is the applicant involved in a process that places him at risk of conviction or sentence? The applicant is detained further to his conviction and sentence by a Court. His recall to prison further to the revocation of his licence is on foot of that sentence. The present issue concerns the validity of the revocation of the licence. The applicant is not in jeopardy of conviction or sentence by reason of the revocation. He is, of course, at risk of continued detention on foot of the sentence imposed by the Court, which is a different matter. Thus the process in which the applicant is involved concerns the revocation of his licence and the issue concerns the manner in which his licence has been revoked. Accordingly it is our conclusion that this is not a criminal cause or matter. Further to the decision in Coleman's Application we have jurisdiction to hear the application, even though this is not a criminal cause or matter. For the avoidance of doubt it should be stated that, as this is not a criminal cause or matter, any appeal against our decision is an appeal to the Court of Appeal and not directly to the House of Lords.

[12] Returning then to the substantive issue, which concerns the power of the Minister of State to exercise the power granted to the Secretary of State under section 1(3) of the 1995 Act. The Carltona principle is stated on this basis -

> "In the administration of government in this country the functions which are given to ministers and are properly 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 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 out if it 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 has done under his authority, and, if for an important matter he has 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 did not do that, Parliament is the place where complaint must be made against them."

[13] To the Carltona principle there may be exceptions where the Minister must take the decision personally. That may arise expressly or impliedly under the statute in question. In addition the devolution of the decision may be challenged as being irrational in the circumstances. The issue has been considered by the House of Lords in Oladehinde v Secretary of State [1991] 1 AC 254. Immigration inspectors had been authorised by the Secretary of State for the Home Department to act on his behalf to issue notices of intention to deport under the Immigration Act. It was held that since the immigration officers and inspectors were civil servants they fell within the principle that when a statute placed a duty on a Minister it would generally be exercised by a member of his Department for whom he accepted responsibility. Accordingly the Secretary of State could validly authorise immigration inspectors to take provisional decisions to deport persons from the United Kingdom.

[14] Lord Griffiths noted in relation to the Carltona principle that Parliament may expressly limit the power to devolve or delegate the decision and require the specified decision maker to exercise the power in person. There were three examples of such express limitation in the Immigration Act, with the wording referring to a decision to be made by the Secretary of State and then adding in brackets 'and not by a person acting under his authority'. Lord Griffiths stated that the immigration service was comprised of Home Office civil servants for whom the Home Secretary was responsible and he could see no reason why he should not authorise members of that service to take decisions under the Carltona principle, provided they did not conflict with or embarrass them in the discharge of their specific statutory duties under the Act and that the decisions were suitable to their grading and experience.

[15] The Carltona principle may also involve the decision being taken, not by an official, but by a junior Minister. The House of Lords dealt with that situation in relation to a decision concerning the liberty of the subject in Doody v Secretary of State [1993] 3 All ER 92, which concerned the setting of the tariff for a life sentence prisoner. The House of Lords endorsed the position stated in the Court of Appeal [1993] 1 All ER 151. Staughton LJ discussed the issue of delegation, referred to Carltona and stated -

> "In the present case, there is no express or implied requirement in the 1967 Act that a decision fixing the tariff period - or for that matter a decision to release a prisoner on licence - must be taken by the Secretary of State personally. Is it then irrational for the Secretary of State, by devolution, to allow such decisions to be taken by a minister of state or a parliamentary under-secretary of state?"
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> "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."

[16] In the present case the applicant contends that the decision was of such importance, concerning the liberty of the subject, that it should be taken personally by the Secretary of State. In addition the applicant contends that the structure of the legislative scheme contains a number of pointers which indicate personal responsibility for decisions under the legislative scheme. In the first place the applicant submits that it must be implicit in the legislation that the Secretary of State has power to revoke the licence before the release of the prisoner, referring to the wording of section 1(3) of the Act where it refers to 'continued liberty'. Secondly, the applicant submits that it must be implicit in the legislation that the Secretary of State may impose conditions on the licence. Thirdly, the applicant refers to the right to make representations granted to an applicant under section 1(4) of the 1995 Act and that the applicant may be detained for some time before those rights may be exercised. All of these matters are said to be examples of the important powers that fall to be exercised in relation to the liberty of the subject that it must be assumed, the applicant contends, that they would be exercised by the Secretary of State in person.

[17] In Adair's Application Mr O'Donoghue appeared for the applicant and argued that the Secretary of State's power was a judicial power that could not validly be delegated. Carswell LCJ stated that 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 the judicial process of determination of the facts which may have to be established in order to justify the exercise of power. Nevertheless, it was said to be a matter of very considerable consequence to the persons in respect of whom the power was exercised and it was 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".

[18] In the present case both parties relied on that last sentence as supporting their respective positions. In our view the sentence amounts to a recognition of the power to devolve such decisions. If the Lord Chief Justice had thought that the decisions had to be taken personally by the Secretary of State, he would not have made this reference to the Carltona principle at all. However, it is to be noted that he went no further than to say that "…. there is a good deal to be said …." for non-delegation. In any event, it was not necessary for Carswell LCJ to decide the point because he found that the Secretary of State had been the decision-maker and the role of the Commissioner who had been involved in the process had been merely advisory.

[19] The applicant seeks to distinguish Doody on the facts, in that this case involves the revocation of a licence and Doody involved the setting of a tariff for a life sentence prisoner. Obviously there is a difference between revocation, which concerns consideration of the risk of re-offending and tariff setting, which is the fixing of the period of detention. However, we do not see any difference in principle

between the two situations even if they are of rather different character. It is to be noted that in Doody the important issue of the liberty of the subject was in play.

[20] Mr O'Donoghue attached particular significance to the importance of the issue as a consideration in relation to the power to devolve decisions. In Re Golden Chemical Products Ltd [1976] 2 All ER 543 Brightman J was concerned with the powers of the Secretary of State to petition for a winding-up of a company in the public interest and the Court upheld the exercise of the power by an official on behalf of the Secretary of State. Brightman J stated -

> "If there is a true distinction which must be drawn as a matter of law between powers which the minister must exercise personally and those which can be exercised by an officer of his department, I might well come to the view that the power given by section 35 is so potentially damaging that it falls into the former category, however burdensome that may be to a Secretary of State personally. But is such a distinction to be drawn? I find no warrant for it in the authorities. In fact, the reverse."

[21] Brightman J referred to R v Skinner [1968] 2 QB 700, which Mr O'Donaghue refers to his in extensive and very helpful skeleton argument. The case concerned a matter which was there described as of vital importance to every motorist, namely the breath test equipment. It was stated that the Court of Appeal had decided that although this was a vitally important matter, which might well have occupied the Minister's personal attention, there was no principle or not obligation upon the Minister to give it his personal attention. The Court adopted Counsel's remark that there were important cases in which the Minister may exercise a statutory discretion personally, not because it was a legal necessity but because it was a political necessity.

[22] Mr O'Donoghue then relies on a passage in De Smith on Judicial Review of Administrative Action, at paragraph 5.164 of the 6th Edition and in earlier editions –

> "It may be that there are, however, some matters of such importance that the Minister is legally required to address them personally. There appears to be no English case in which an exercise of discretion was held invalid on this ground and many of the that appear to support the existence of such an obligation are at best equivocal. It is, however, possible that other 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."

[23] The footnote refers to Golden Chemicals as being against the text and contrasts Ramawad v Minister of Manpower and Immigration [1978] 2 SCR 375 in the Supreme Court of Canada. The appellant applied for a new employment visa and was concerned to obtain entry into Canada under immigration legislation. A special inquiry officer determined that the applicant had violated the conditions of his previous visa and therefore the Minister, who had power to waive the violation because of special circumstances, allowed the special inquiry officer to make that decision. The decision was that there were no special circumstances. Thus there had been devolution or delegation by the Minister and Pratte J held that the authority of the Minister, under the regulations, to rule on the existence of special circumstances that would justify waiving the prohibition could not be exercised by the special injury officer pursuant to any implied delegation of authority from the Minister.

[24] Whether it may be presumed that the decision will be taken, not by the Minister but by responsible officers in his Department, will depend on the intent of Parliament as it may be derived from matters that include the language used in the statute and the subject matter of the discretion entrusted to the Minister. In the Immigration Act Parliament had recognised the existence of different levels of authority and the decisions granted by Parliament to each such levels was clearly specified in the Act. The Court examined the general framework of the Act, which it was thought contained clear evidence of the intention that the discretionary powers entrusted to the Minister be exercised by him rather than officials. The legislation, because of the way it was framed and also, possibly, because of its subject matter, and the wording, make it impossible to say that the power of the Minister to delegate was implicit. This view was reinforced by a section of the Act that provided that the Minister may authorise the Deputy Minister or a Director to perform and exercise any of the duties, powers and functions under the Act. That amounted to n express provision that the powers may be exercised by a Deputy Minister or Director and therefore a special inquiry officer, who is not one of the specified parties, does not have the right to do so. Of note for present purposes is the reference to taking account of matters that include the subject matter of the legislation.

[25] Finally we refer to the judgment of Sedley LJ in R (Chief Constable of West Midlands Police) v Birmingham Justices [2002 EWCA 1087 (Admin) which concerned the exercise of the power assigned to the Chief Constable to make applications for ASBOs. It was agreed that the power did not have to be exercised personally, the issue concerned the identity of those entitled to exercise the power. Sedley LJ referred to the Carltona principle being based on the head of a department being responsible for the department. It was stated that there was good reason to differentiate between those offices which are the apex of an organisation itself composed of office-holders or otherwise hierarchically structured, and those offices designated by Parliament because of the personal qualifications of the individual holder. One can readily infer that when Parliament confers functions on a chief officer of police, "all but the most important are likely to be delegable" whereas the likelihood is that powers conferred on a medical officer of health or on a statutory

inspector, each professionally qualified as an individual, are to be exercised by the office-holder alone.

[26] We are prepared to accept, for the purposes of this case, that in considering whether it is to be implied that a decision may be devolved, the importance of the issue may be a matter that may be included in the assessment of the language of the relevant statute and the subject matter and the framework of the legislation, in determining what Parliament must have intended in relation to the exercise of a particular power. Such considerations may go to whether the decision must be made personally by the named Minister and, where the decision may be devolved, as to the identify of those to whom it may be devolved.

[27] In the present case we are of the opinion that Doody is not distinguishable in principle. The 1995 Act was introduced in the knowledge of the Carltona principle and the Doody decision. We have considered the language of the Act, the subject matter and the framework of the legislation and conclude that there is no ground for requiring the decision to be taken personally by the Secretary of State. 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 we see nothing to indicate the contrary in the present case. We are satisfied that the decision is capable of devolution. We are satisfied that the Minister of State would be an appropriate person to make the decision on behalf of the Secretary of State and that he too is subject to the same appointment system and the same accountability to Parliament and the same briefing from departmental officials as the Secretary of State. Nor do we consider that the Minister of State was not an appropriate person to make the decision because he was the Security Minister. We do not find any basis for considering that the Minister of State should be disqualified from making the decision because he was the Security Minister at the time.

[28] Accordingly we are satisfied that the decision was lawfully made by the Minister of State. We refuse the application for a Writ of Habeas Corpus.