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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY WILLIAM BANNON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

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Donal Sayers KC and Lara Smyth (instructed by McCann & McCann, Solicitors) for the Applicant
Paul McLaughlin KC and David Reid (instructed by the Crown Solicitor's Office) for the proposed Respondent

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SCOFFIELD J

Introduction

[1] The applicant was detained between 13 October 1973 and 23 May 1974 under the internment regime then in place in Northern Ireland. His detention was grounded upon an interim custody order (ICO). By the present application, he seeks leave to apply for judicial review of a decision made by the proposed respondent to detain him on foot of the ICO made in his case, with a view ultimately to securing the quashing of the ICO.

[2] The present application arises from the decision of the UK Supreme Court in *R v Adams* [2020] UKSC 19, in which that court held that the power conferred by Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 ("the 1972 Order") was required to be exercised by the Secretary of State personally. The result of this conclusion was that the making of the ICO in respect of the appellant in that case in 1973 was invalid; and that his consequent detention, and subsequent convictions for attempting to escape, were unlawful.

[3] In these proceedings, the applicant contends that the ICO by which he was detained – made (or 'purportedly made' as the applicant might have it) under section 10(5) of, and paragraph 11 of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act") – suffers from the same legal flaw as that identified by the Supreme Court in *Adams*, namely that it was not personally made by the Secretary of State, as it was required in law to be. The 1973 Act repealed the 1972 Order with effect from 8 August 1973 and put in place a broadly identical scheme set out in its first Schedule. I proceed on the basis that – leaving aside for the moment the recently introduced provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act") – the 1973 Act should be construed in the same manner as the Supreme Court construed the 1972 Order.

[4] Mr Sayers KC appeared for the applicant with Ms Smyth; and Mr McLaughlin KC appeared for the proposed respondent with Mr Reid. I am grateful to all counsel for their helpful written and oral submissions.

The applicant's case

[5] The central issue for the Supreme Court in the *Adams* case was whether a decision to make an ICO under the 1972 Order was rendered invalid by the fact that it was made by the Minister of State and had not been personally considered by the Secretary of State. On 13 May 2020 the Supreme Court unanimously allowed the appeal, holding that an ICO made without the personal consideration of the Secretary of State was invalid.

[6] After the judgment in *Adams*, Mr Bannon sought legal advice about his own position. His solicitors then also engaged in correspondence with the Secretary of State. The Northern Ireland Office (NIO) was asked to provide a copy of any order relevant to the applicant's detention under the internment regime and of any other documentation considered by it to be relevant to the issues raised. On 17 January 2022 a copy of the ICO in the applicant's case was made available. It is dated 13 October 1973 and is signed by an Under Secretary of State, rather than the then Secretary of State.

[7] The applicant says that, as in the *Adams* case, the ICO was signed during the tenure of the Rt Hon William Whitelaw MP as Secretary of State for Northern Ireland. It was signed before what the Court of Appeal in *Adams* identified as 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 decisions were made by the Secretary of State alone" (see [2018] NICA 8, at para [16]). In these circumstances, the applicant contends that the ICO in his case was not lawfully made and should be quashed. That is what he seeks by these proceedings. Whether or not that is so would depend upon whether the decision to intern him was made by the Secretary of State personally (with a more junior minister simply giving effect to that decision by signing the ICO) or whether, as the applicant contends, the Secretary of State did not personally authorise his detention at all.

The proposed respondent's case

[8] In pre-action correspondence the respondent raised a number of grounds of objection to the applicant's case, namely (a) limitation or delay; (b) the possibility that the applicant's detention was subsequently authorised by a Commissioner or by the Appeal Tribunal; and (c) an objection in principle that it would be wrong for this court to now intervene, since this would be contrary to legal certainty and/or may unfairly cut across civil proceedings in which the Secretary of State would have the evidential burden of justification for the detention. This last point is essentially a submission that there is an alternative and more suitable alternative remedy which should be permitted to take its course.

[9] The proposed respondent has pointed out that very many requests have been made in recent years for disclosure of internment records under data protection legislation. The consistent experience of the Secretary of State has, I am told, been that these records frequently contain materials which remain sensitive for reasons of national security. The process of review requires consultation with the PSNI and can be labour-intensive and prolonged. At the time of the leave hearing this process had not been undertaken in light of the many existing cases in which responses to subject access requests remained outstanding.

[10] However, the respondent was able to locate some papers relevant to the applicant's internment and these were made available to the court. These indicate that, following an application by the Royal Ulster Constabulary (RUC), an ICO was signed on 13 October 1973 by the Parliamentary Under Secretary of State. (It is initialled "P.M.", which appears to be a reference to the Rt Hon Peter Mills MP, who held that office between 5 November 1972 and 4 March 1974.) A Commissioner's hearing appears to have taken place on 21 May 1974, following which the Commissioner ordered the applicant's release.

Possible further authorisation of detention

[11] As noted above, in his pre-action response the Secretary of State raised the question of whether the applicant's detention may have been subsequently authorised by a detention order made by a Commissioner (pursuant to paragraphs 12 and 24 of Schedule 1 to the 1973 Act). In the event, it became clear that that had not occurred in this case, so that no suggestion could be made that any illegality in the making of the ICO had been 'cured' by a later, lawful process.

[12] Whether under the 1972 Order or the 1973 Act, the Secretary of State had power to make an ICO authorising a person's detention for only up to 28 days. The internee could only be detained for longer than 28 days if his case was referred by the Chief Constable to a Commissioner for determination. Once such a referral had been made, the individual could continue to be detained on foot of the ICO (for a period longer than the initial 28 days) until his case was determined by the Commissioner. The

reference to a Commissioner was made by a notice in writing, a copy of which was to be sent to the Secretary of State and to the person to whom it related (see in the case of the 1973 Act, paragraph 11(4) of Schedule 1).

[13] Where a reference was made to a Commissioner, the Commissioner was required to enquire into the case with a view to determining whether they were satisfied that the detained person had been concerned in the commission or attempted commission of terrorist acts and that their detention was necessary for the protection of the public. If so satisfied, the Commissioner would make a detention order but, otherwise, the Commissioner would direct the individual's release. Commissioners convened an oral hearing and were required to keep a record of the proceedings. Detainees were entitled to give evidence and make submissions at the hearing. They were also entitled to representation by solicitor and counsel. Individuals could then appeal against a detention order to a Detention Appeal Tribunal. The Secretary of State also had power to refer a case back to the Commissioners; and, under the 1973 Act, there was a compulsory review after one year and again after six months from the most recent review.

[14] However, since the pre-action response had been sent, some additional papers in relation to the applicant's detention were located. They indicated that a Commissioner's hearing took place on 21 May 1974 and that the Commissioner refused to make a detention order, ordering Mr Bannon's release. The issue does not therefore arise on the facts of this case. The legality of the applicant's detention would depend on the legality of the ICO which initially authorised it.

Limitation / delay

[15] The proposed respondent submitted that the applicant's challenge was now some 50 years out of time and that, at this remove, this court can no longer grant any effective relief in relation to the impugned detention. He also contended that there was no good reason to extend time, particularly since all of the materials and information required to allow the applicant to mount his challenge had been available to him since the time of his detention. The applicant seeks an extension of time for the bringing of these proceedings, recognising, as he must, that the grounds of challenge did not first arise for the purposes of the Rules of the Court of Judicature (NI) 1980 (RCJ) Order 53, rule 4 in 2022 but much, much earlier.

[16] The Secretary of State relies upon the three-month time limit in Order 53, rule 4. He also relies upon what Lord Diplock said in *O'Reilly v Mackman* [1983] 2 AC 237, at 280-281, to the following effect:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to legal validity of a decision the authority reached in purported exercise of decision-making powers

> for any longer period than is absolutely necessary in fairness to the person affected by the decision."

[17] The courts have frequently emphasised the importance of legal certainty in the context of judicial review time limits since that judgment, including for example in this jurisdiction in *Re Turkington's Application* [2014] NIQB 58 (at para [33], Treacy J referring to good administration requiring "decisiveness and finality" in the absence of compelling reasons); and *Re Musgrave Retail's Application* [2012] 109 (at para [13], Maguire J referring to the "need for speed" in the initiation of judicial review decisions and it being "important that a point in time is arrived at which it can confidently be said that a public law decision is beyond question"). Where time is to be extended, it is well established that there should be a good reason for doing so; and an onus lies upon an applicant seeking such an extension to account for all relevant periods of delay.

[18] The proposed respondent focuses on delay over the entire period since October 1973. He emphasises that the applicant was legally represented at the material time. There is also a handwritten note with the applicant's internment papers which refers to the applicant and then says: "Seen at Reception. States fully understands ICO. No complaints or questions." The Secretary of State therefore invited the court to proceed on the basis that the applicant was personally served with the ICO and that he and his legal representatives had access to it following it being made or, at the very least, in advance of the Commissioner's hearing (along with the written statement served under paragraph 13 of Schedule 1 to the 1973 Act). It is inconceivable, the proposed respondent submitted, that the applicant, as a legally represented detainee who successfully contested his continued detention, would not have had access to the ICO under which he was detained. At the very least, he had the knowledge and means to request a copy. As such, from the date of his detention in October 1973, he should be taken to have known that the order was only signed by the Parliamentary Under Secretary of State. I accept that it is overwhelmingly likely that the applicant would have known in 1973 that the ICO in his case was signed only by the Under Secretary of State and not personally by the Secretary of State.

[19] It is clear that the applicant contacted his solicitor to make enquiries about the legality of his own detention shortly after the decision of the Supreme Court in *Adams* was handed down in May 2020. Correspondence was sent to the proposed respondent seeking confirmation of who signed the ICO on 12 June 2020. A chaser letter was sent by the applicant's solicitor on 14 September 2020. In early January 2021, the NIO indicated that it did not have access to the detention files at that time. Some five months later, further correspondence was sent to the proposed respondent again seeking relevant details. It was only on 17 January 2022 that the NIO responded to provide a copy of the ICO. This was followed relatively promptly by the issue of pre-action correspondence on 22 February 2022. This was responded to on 14 May 2022 but the application for judicial review was issued in April 2022.

[20] The applicant accepts that the ICO in his case is not unlawful on its face. As in *Adams*, the ICO purports to be an order of the Secretary of State. Although it is signed by an Under Secretary of State, it is accepted on the applicant's behalf that such an order *if in fact* authorised by the Secretary of State would comply with the requirements of the 1973 Act. Mr Bannon therefore says that it was only by way of the judgments in the *Adams* case that it became apparent that the practice at the material time was for junior ministers not only to sign such orders but also to make them, that is to say, to purport to authorise the detention without any personal consideration of the matter by the Secretary of State. The evidence which became available in the course of the *Adams* proceedings allowed the Court of Appeal to conclude that the Secretary of State did not consider the appellant's case on the making of the ICO and that the prosecution in Mr Adams' case was not entitled to rely upon the presumption of regularity as that was displaced by evidence to the contrary. Notwithstanding that, the Court of Appeal dismissed Mr Adams' appeal by virtue of its conclusion on the application of the *Carltona* principle. The result was that any challenge to an ICO was at that point impossible to mount, being contrary to Court of Appeal authority (until that was overturned by the Supreme Court).

[21] In view of this, Mr Sayers contended that the applicant could not be criticised for only moving after the decision of the Supreme Court in *Adams* was provided, and doing so promptly thereafter. The applicant then pressed the NIO for a copy of the ICO and brought his application for leave to apply for judicial review within three months of having been provided with it. On the other hand, Mr McLaughlin argued that the *Adams* case did nothing more than interpret the provisions of the 1972 Order to determine whether the *Carltona* principle which operates at common law had been displaced by the statute or whether it continued to apply. The only instrument required to make such an argument was the legislation itself, which was clearly in the public domain. Thus, Mr McLaughlin submitted, from October 1973 the applicant had – or had reasonable means of access to – all that he required to be able to challenge the making of the ICO (and, thus, his detention). Despite this, the applicant brought no application for habeas corpus, nor for judicial review; nor did he mount a civil claim for false imprisonment. He has not identified any reason for not having done so, other than that he only became aware of the possibility that the ICO may have been irregular since the decision of the Supreme Court in *Adams*. Even if he had acted reasonably *since* that decision, the proposed respondent submitted that the applicant had offered no justification of any nature for the 47 year delay between his detention and the Supreme Court decision.

[22] I concluded that this challenge was significantly out of time and that time should not be extended. The grounds for the challenge "first arose" for the purpose of RCJ Order 53, rule 4 when the alleged illegality occurred (assuming the Secretary of State did not play any role in the authorisation of the applicant's detention). The later developments in the *Adams* litigation go only to the reasonableness of the applicant applying late for judicial review rather than when time began to run. As to that, it was open to the applicant, at any stage, to mount the argument which ultimately won the day for Mr Adams in his case in the Supreme Court. Although the

factual position (as to the practice of the relevant ministers) was clarified in the course of the *Adams* litigation, there is no reason to believe that similar clarification would not have been provided in response to an earlier, properly argued challenge. It is also clear that there is at least some potential prejudice to the proposed respondent in this challenge not having been brought many years ago, since the relevant ministers are now deceased and are no longer available to give instructions or evidence.

[23] As to the public interest in permitting the case to proceed, I also accept the proposed respondent's submission that there is a material difference between the present case and the *Adams* appeal. Not only has the relevant point of law already been addressed by the Supreme Court in *Adams*; but that case was an appeal against two criminal convictions. The public interest in extending time to overturn a conviction which was entered on an improper basis is materially different to the present situation.

[24] I also take into account that the court would, realistically, be unable to provide the applicant with any relief which would alter his status as a matter of practicality (even ignoring, for the moment, the provisions of the Legacy Act, discussed further below). His detention is long since over and the ICO has had no effect upon his liberty since that time. Any vindication which the applicant (and others in his situation) might seek has been achieved by the finding in the Supreme Court in *Adams* that ICOs not personally considered by the Secretary of State were unlawful. The ICO in the applicant's case, signed by the Under Secretary rather than the Secretary of State, is not a private document and the applicant is at liberty to publish it or disclose its contents. In truth, the only practical matter at stake between the parties is the possibility of compensation, which could and should have been pursued by way of a civil claim for damages.

[25] Taking all of the above into account, I would decline to extend time in this case. It is very significantly out of time and, although I accept that the applicant sought to act promptly following the matter coming to his attention after the *Adams* litigation in the Supreme Court, that is no excuse for his not raising the issue of the legality of his detention (if he wished to) at a much earlier time. There is no good reason for the delay of the order which would require to be overcome in this case.

Alternative remedy

[26] The proposed respondent also contended that the applicant could, and should, have proceeded by way of a claim for unlawful imprisonment; and that permitting the judicial review application to proceed would (or might) give rise to unfair prejudice to the defendant in any such proceedings.

[27] After the papers had been lodged and the Bill which became the Legacy Act had been given its first reading in the House of Commons, the applicant became concerned that any potential civil claim open to him would fall foul of the intended provision which became section 43 of that Act (which introduces a time bar for

Troubles-related civil actions). When the Bill was being considered, the concern was that, the applicant not having issued a civil claim before its first reading on 17 May 2022, any civil claim he might bring in respect of his detention would then be time-barred. As it happens, the applicant could have issued such proceedings seeking damages for his detention before that time; and, indeed, commenced these proceedings in advance of that cut-off date. He would now face a much more fundamental problem as a result of the provisions of sections 46 and 47 of the Legacy Act, which were not initially proposed in the Bill as introduced to the House of Commons. I address those provisions below but, for the moment, proceed on the basis of the case as it stood when the arguments on leave were made.

[28] As *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 sets out, once a plaintiff in a false imprisonment claim is able to establish that they have been detained, the burden shifts to the detaining authority to prove that their detention was lawful. Detention will be unlawful if there is no statutory power to detain; but also if, although potentially authorised by statute, there is a public law error bearing upon and relevant to the decision to detain (see paras [65]-[66] and [88] of Lord Dyson's judgment). Those principles have since been reaffirmed by the Supreme Court in *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56 and *R (DN Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7.

[29] In a claim for false imprisonment, the legal basis for the applicant's detention would be the central focus. The court determining that claim would have jurisdiction to inquire into and rule upon the validity of any instrument purporting to authorise the detention. The court could grant both declaratory relief and damages. In those circumstances, the applicant could have challenged the validity of his detention on foot of the ICO in his case, and sought damages, in a civil claim.

[30] For the Judicial Review Court to grant certiorari in this case would, the proposed respondent submitted, predetermine one of the key issues in any civil proceedings. However, that would not be the only issue since limitation would also be an important factor. The proposed respondent submitted that a civil claim for damages may be subject to an absolute limitation bar after six years, since the court does not have discretion to extend time for a claim for general damages for false imprisonment, relying upon *Wilson v Northern Ireland Office* [2015] NIQB 115. However, even if that were wrong or the position was more complicated because the claim involved a claim for personal injuries, the fact that the ICO had previously been found to have been invalid in judicial review proceedings may have a bearing on the exercise of the court's discretion as to extending any limitation period.

[31] To grant leave to apply for judicial review would, therefore, in the proposed respondent's submission wrongly cut across issues (including limitation) which ought properly to be dealt with in a civil claim. Moreover, this court may only award damages in a judicial review application if satisfied that "if the claim had been made in a separate action begun by the applicant at the time of making his application, he would have been entitled to such damages" (see RCJ Order 53, rule 7(1)(b)). This

being so, there would be no prospect of damages being granted, the Secretary of State submitted.

[32] The position in relation to limitation if the applicant's claim had simply been brought by way of writ (or if this issue had to be determined in relation to an award of damages by way of remedy in judicial review proceedings) is not necessarily straightforward. Submissions on this ranged across the Statute of Limitations (Northern Ireland) 1958; Articles 3 and 5 of the Limitation (Northern Ireland) Order 1976; Articles 6, 7, 50 of, and paragraph 7 of Schedule 2 to the Limitation (Northern Ireland) Order 1989. Mr McLaughlin invited me to conclude that the limitation period had expired, on the basis set out above and on the basis that the claim was barred before the commencement of the Limitation Amendment (Northern Ireland) Order 1982. For his part, Mr Sayers argued that there might be a possibility of reliance on section 70(1)(b) of the Statute of Limitations, such that the claim was not barred at that point, in that Mr Bannon's right of action was concealed by the fraud of the defendant or his agent, so that the period of limitation would not begin to run until the plaintiff discovered the fraud or with reasonable diligence could have discovered it.

[33] It appeared to me likely that a limitation defence would have been available to the Secretary of State had the matter proceeded by way of civil action but, in the event, I do not need to determine this. I was persuaded that this was a claim which was, in reality, directed towards the ultimate securing of a damages award and that arguments about limitation for that purpose were properly to be determined by the High Court exercising its normal civil jurisdiction in an action begun by writ. Granting leave to apply for judicial review with a view to quashing the ICO as a first step towards the award of damages would, in my view, represent an unnecessary process when a normal civil action would be the more appropriate route for bringing such a claim. As noted above, the High Court would be competent on such a claim to deal with all aspects of the applicant's case. I was not persuaded by Mr Sayers' submission that a civil action would be met with an argument that it should have been pursued by way of judicial review because of the procedural exclusivity of RCJ Order 53. Indeed, I understand from the proposed respondent's submissions many such civil claims have been brought based on allegedly unlawful internment (following the *Adams* decision) and that this was the only such claim to have been mounted by way of judicial review.

[34] The proposed respondent also contended that ruling on the validity of the ICO might have a prejudicial effect upon third party rights, citing those of the prison authorities who detained the applicant on foot of an apparently valid ICO. I did not find this argument persuasive.

[35] However, this was a claim which could have been pursued by way of civil action and, applying the doctrine that judicial review ought not to be invoked where there is an adequate alternative remedy, this would have been a further reason for refusing leave to apply for judicial review.

The implications of the Legacy Act

[36] I mentioned above sections 46 and 47 of the Legacy Act which are now in force. These provisions pose an even more fundamental obstacle to the applicant seeking redress in respect of his period of detention in 1973-1974. Section 46 applies to functions under paragraph 11 of Schedule 1 to the 1973 Act. Section 46(2) provides that the functions of making ICOs "are to be treated as having always been exercisable by authorised Ministers of the Crown (as well as by the Secretary of State)". Section 46(3) provides that an ICO "is not to be regarded as having ever been unlawful just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order". Section 46(4) provides that, "The detention of a person under the authority of an interim custody order is not to be regarded as having ever been unlawful just because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order." In short, the complaint which the applicant wishes to make in these proceedings, or might have made in a civil claim, has been statutorily shut down and deprived of any legal effect.

[37] Also of relevance is section 47. Section 47(1) provides that, on or after the day on which the section comes into force, "a civil action may not be continued or brought if, or to the extent that, the claim that is to be determined in the action involves an allegation that (a) the person bringing the action… was detained under the authority of an interim custody order, and (b) that interim custody order was unlawful because an authorised Minister of the Crown exercised any of the order-making functions in relation to the order."

[38] Although section 47(1) arguably does not preclude an application for judicial review, the effect of section 46(3) is such that the applicant does not have an arguable case in relation to the illegality of the ICO under which he was detained, even assuming all of the relevant facts in his favour. The effect of section 47(1) would also be that he could not secure any damages in an application for judicial review even if a declaration or quashing order could be granted, as a result of Order 53, rule 7(1)(b). Although Colton J considered these provisions to be in breach of Convention rights in his recent judgment on the various challenges to the Legacy Act, *Re Dillon's and Others' Applications* [2024] NIKB (see paras [18], [68], [645]-[703] and [738] in relation to the applicant Mr Fitzsimmons), they were not disapplied as inconsistent with article 2 of the Ireland/Northern Ireland Protocol, as some other provisions of the Legacy Act were. They accordingly remain in force. They represent a further basis upon which the applicant's application for leave ought to be refused.

Conclusion

[39] For the reasons explained above, I refuse the applicant's application for leave to apply for judicial review. His application is out of time; and I decline to grant an extension of time. His claim also ought to have been pursued by way of civil action, rather than by means of an application for judicial review. In any event, in light of the

provisions of the Legacy Act now in force, the substantive application would be doomed to failure.