Neutral Citation Number: [2025] EWCA Civ 226

Case No: CA-2024-000772

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT
LORD JUSTICE WILLIAM DAVIS AND THE HONOURABLE MRS JUSTICE MAY DBE
[2024] EWHC 211 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2025

Before:

DAME VICTORIA SHARP
(PRESIDENT OF THE KING'S BENCH DIVISION)
LORD JUSTICE LEWIS
and
MR JUSTICE COBB

- -

Between:

THE KING (on the application of QUAYE)

Respondent

- and –

THE SECRETARY OF STATE FOR JUSTICE **Appellant**

- -
- -

Ben Watson KC and Rachel Sullivan instructed by **Government Legal Department**) for the **Appellant**
Edward Fitzgerald KC and Pippa Woodrow (instructed by **Bhatt Murphy Solicitors**) for the **Respondent**

Hearing dates: 11 and 12 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DAME VICTORIA SHARP. P. handed down the following judgment.

INTRODUCTION

1. This is the judgment of the court.

2. This appeal concerns the arrangements governing the sentencing of persons who commit murder when they are children. In summary, those who commit murder whilst they are under the age of 18 are sentenced to detention at His Majesty's pleasure ("DHMP"). As part of that sentence, the trial judge determines the minimum term that the person must serve in detention before he may apply to the Parole Board to be released on licence. In addition, prior to 18 February 2021, the appellant, the Secretary of State for Justice, operated a policy whereby any person sentenced to DHMP could apply for a review of the minimum term after serving one-half of that minimum term, essentially on the ground that he had shown exceptional progress while in detention such that the minimum term ought to be reduced.

3. On 10 May 2014, the respondent, Jesse Quaye, and another person, Ayomindy Bile, together stabbed and killed a 21-year-old man, Connor Barrett, at a party in Hemsby in Norfolk. Mr Quaye was born on 15 August 1996 and was aged 17 years and 9 months at the date of the commission of the murder. Mr Bile was aged 15 at the time of the murder. On 20 November 2014, they were both convicted at the Crown Court in Norwich by which time Mr Quaye was aged 18 and Mr Bile was still 15 years old. They were sentenced on 16 January 2015 to DHMP pursuant to section 90 of the Powers of the Criminal Court Act 2000 ("the PCCA"). The judge specified that they must serve a minimum of 15 years in detention before they would be eligible to apply to the Parole Board for release on licence.

4. Section 128 of the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act") inserted sections 27A and 27B into the Crime (Sentences) Act 1997 ("the 1997 Act"). Those sections deal with reviews of the minimum term imposed as part of a sentence of DHMP. Section 27A provides that only persons who were under 18 at the time when the sentence of DHMP was imposed can apply for a review of the minimum term. Persons who were aged 18 or more at the time of sentence could not apply for a review of their minimum term. Those provisions took effect from 28 June 2022.

5. As Mr Quaye was 18 years old when he was sentenced to DHMP, he was not eligible to apply for a review of his minimum term when he had served one-half of that term. Mr Bile, who was 15 years old when he was sentenced to DHMP, was eligible to apply for a review. Mr Quaye claimed that the absence of a right of review in his case amounted to a breach of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") as it amounted to arbitrary detention. Alternatively, he claimed that the legislative provisions involved imposing a heavier penalty on him than that which was imposed at the time when he committed the offence and so constituted a breach of Article 7(1) of the Convention. He also claimed that the provisions involved a breach of Article 6 of the Convention which guaranteed a right to a fair trial. He further claimed that the absence of a right of review gave rise to discrimination on the grounds of age contrary to Article 14 of the Convention read with Article 5.

6. The Divisional Court held that the removal of the possibility of a reduction in the minimum term did give rise to a risk of arbitrary detention and would "inevitably result in a number of offenders serving longer than lawfully they should" (see paragraph 59 of its judgment). It concluded that that was incompatible with Article 5 of the Convention. It dismissed the claim based on Article 6 and considered that it was not necessary to reach a conclusion on whether the provisions were incompatible with Article 7 of the Convention. They also held, however, that the absence of the possibility for those aged 18 when sentenced to apply for a review of the minimum term amounted to unlawful discrimination contrary to Article 14, read with Article 5, of the Convention. They granted declarations that sections 27A(1) and (11) of the 1997 Act were incompatible with Article 5 and Article 14 of the Convention.

7. The Secretary of State appeals. There are two grounds of appeal, namely that the Divisional Court erred in concluding that section 27A of the 1997 Act was incompatible with (1) Article 14, read with Article 5, of the Convention and (2) Article 5 itself. By a respondent's notice, Mr Quaye seeks to uphold the decision on an additional ground, namely that section 27A is incompatible with Article 7 of the Convention as "it amounts to a retrospective (and adverse) alteration to the sentence imposed upon [him] given that the duty to review the provisional minimum term is an inherent and inextricable part of the unique sentence of" DHMP. Mr Quaye also seeks to adduce further evidence.

THE FRAMEWORK

The Historical Position

8. The age of criminal responsibility, that is the age at which a person may be found guilty of a criminal offence, is 10. There is a conclusive presumption that a child below the age of 10 cannot be guilty of an offence (section 50 of the Children and Young Persons Act 1933 ("the CYPA") as amended). The age at which a person becomes an adult is currently 18 and was formerly 21 (see section 1 of the Family Law Reform Act 1969).

9. Children were liable to be sentenced to death for murder until the early part of the last century. The death penalty was abolished by the Children Act 1908 which provided, instead, for children to be detained during His Majesty's pleasure. That was a form of detention first used for insane persons who could not be tried and found guilty of a criminal offence but whose detention was necessary for their safety or the safety of others: see the Criminal Lunatics Act 1800.

10. Section 103 and 105 of the Children Act 1908 provided as originally enacted that:

> "**103. Abolition of death sentence in case of children and young persons**
>
> Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the court shall sentence the child or young person to be detained during His Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as

> the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody.
>
> …..
>
> **105.— Provisions as to discharge of children and young persons detained in accordance with directions of Secretary of State**
>
> (1) A person in detention pursuant to the directions of the Secretary of State under the last two foregoing sections of this Act may, at any time, be discharged by the Secretary of State on licence.
>
> (2) A licence may be in such form and may contain such conditions as the Secretary of State may direct.
>
> (3) A licence may at any time be revoked or varied by the Secretary of State, and where a licence has been revoked the person to whom the licence related shall return to such place as the Secretary of State may direct, and if he fails to do so may be apprehended without warrant and taken to that place."

11. Those sections were replaced, in materially similar terms, by section 53 of the CYPA. The Murder (Abolition of Death Penalty) Act 1965 provided that no person would suffer death for murder and that a person (other than a child) convicted of murder was to be sentenced to imprisonment for life. Section 1(5) substituted section 53(1) of CYPA with the following:

> "(1) A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life, nor shall sentence of death be pronounced on or recorded against any such person; but in lieu thereof the court shall (notwithstanding anything in this or in any other Act) sentence him to be detained during Her Majesty's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Secretary of State may direct."

The operation of a sentence of DHMP imposed under section 53 CYPA

12. A sentence of DHMP is a sentence of detention for an indeterminate period. The Secretary of State had to keep the sentence under review to determine at which point it was no longer necessary or appropriate to keep the offender in detention. He could release the offender on licence, either conditionally or unconditionally, and that period of licence would continue until the end of the offender's life.

13. At various dates, the arrangements governing release altered. Following the enactment of section 61 of the Criminal Justice Act 1967, the Secretary of State could only release a person serving a sentence of life imprisonment or a person detained during His Majesty's pleasure if the Parole Board recommended the offender's release. Those provisions were replaced by Part II of the Criminal Justice Act 1991. Under section 35 of that Act, it was a matter for the Secretary to State to determine when the case of an adult sentenced to life imprisonment for murder (a mandatory life prisoner, that is one whose sentence was fixed by law) or an offender who had been detained at His Majesty's pleasure following the commission of a murder when the offender was a child, would be referred to the Parole Board. It was a matter for the Secretary of State to determine in his discretion whether to accept a recommendation by the Parole Board that the offender should be released.

14. The practice was for the Secretary of State to fix a minimum period, referred to as the tariff, during which an offender serving a sentence of DHMP would be detained. The Secretary of State considered the views of the trial judge, and the recommendations of the Lord Chief Justice, in determining that minimum period or tariff. Once that minimum period had expired, the Secretary of State would release the offender on licence if recommended to do so by the Parole Board.

15. Sentences of DHMP were considered in *R v Secretary of State for the Home Department, Ex p. Venables and Thompson* [1998] AC 407. That case concerned two 10-year-old boys who murdered a two-year-old child. The trial judge recommended a tariff of 8 years' detention; the Lord Chief Justice recommended a tariff of 10 years. The Secretary of State determined that the minimum period that each of the offenders must serve in prison before release on licence would be 15 years.

16. The House of Lords, by a majority, held that that the Secretary of State was under a duty to keep the minimum period, or tariff, under review. The majority considered that the Secretary of State had to consider not only punishment and deterrence but also factors relevant to the welfare of the child in determining whether the point had been reached where it was no longer necessary to continue the detention of the offender. The arrangements for parole did not alter the intrinsic nature of a sentence of DHMP.

17. Following that decision, the European Court of Human Rights held in *V v United Kingdom* (1999) 30 EHRR 121, that the fixing of a minimum term was part of the criminal proceedings and involved sentencing. Article 6(1) of the Convention applied and that guaranteed a fair hearing by an impartial tribunal independent of the executive and the Secretary of State was not independent of the executive. Following that decision, new legislative provisions, described below, were adopted in relation to sentences passed on or after 30 November 2000. For sentences to DHMP imposed prior to that date, the Secretary of State would effectively accept the recommendations as to tariff made by the Lord Chief Justice.

18. In *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159, the House of Lords had to consider a sentence of DHMP imposed before 30 November 2000, that is a sentence where the minimum term was fixed by the Secretary of State. He consulted the trial judge who recommended a tariff of 16 years and Lord Chief Justice who recommended a tariff of 14 years. The Secretary of State fixed a minimum term of 15 years. The House considered both the proper

understanding of the decisions of the majority of the House of Lords in *R v Venables*, and whether that reasoning was affected by the fact that the tariff or minimum period was in effect fixed by the recommendation of the Lord Chief Justice.

19. At paragraph 1, Lord Bingham, with whom Lord Nicholls, Lord Hoffman, Lord Hope and Baroness Hale agreed, identified the issue as follows:

> "1. My Lords, the question in this appeal is whether a sentence of detention during Her Majesty's pleasure ("HMP") imposed before 30 November 2000 on conviction of a child or young person for murder imports a requirement that the minimum term to be served by that person be subject to periodic review, even though the length of that term has in effect been fixed by the Lord Chief Justice of England and Wales."

20. At paragraph 9, Lord Bingham summarised the arguments of the parties as follows:

> "9. As foreshadowed in the foregoing paragraphs, the parties are sharply divided in their understanding of the decision of the majority of the House in *Ex p Venables*. The Secretary of State reads that decision as applicable only where the minimum term of an HMP detainee is set by the executive, and as having no application where (as here) it has been set by a judge. Thus he rejects any duty of continuing review even in an old (pre-30 November 2000) case. The respondent does not accept this reading. She contends that the decision describes and defines the essential nature of a sentence of HMP detention as including a duty of continuing review. Whatever the position of a detainee to whom section 82A applies, on which the respondent makes no concession, her position is unaffected: the new legislation does not apply to her; her minimum term remains subject to continuous review; and the fact that the term was approved by the Lord Chief Justice does not alter that condition."

21. At paragraph 10, Lord Bingham identified the propositions established by the House of Lords in *Venables* in the following terms:

> "Instead I shall summarise the propositions which, in my judgment, are clearly established by these opinions. (1) Section 103 of the Children Act 1908 introduced, and section 53(1) substantially re-enacted, provision for detention during His Majesty's pleasure as a special sentence devised to reflect the reduced responsibility and special needs of those committing murder as children or young persons. It was a sentence which was expressly differentiated from the sentence which the law required to be passed on those committing murder as adults, in that it required account to be taken of the detainee's welfare: see the opinion of Lord Browne-Wilkinson [1998] AC 407, 496a-e, 498b-500b; that of Lord Steyn, at pp 518g-h, 520h-522c, 524d-g; that of Lord Hope of Craighead, at

> pp 529f-530e, 532a-b, 534e-535a. That the majority opinion is to be so understood is confirmed by Lord Lloyd of Berwick, dissenting, at p 513h. (2) It has been an important and distinctive feature of the sentence of HMP detention that the detainee should be subject to continuing review so that the detainee may be released if and when it is judged appropriate to do so: see Lord Browne-Wilkinson, at pp 499h-500f, 502h-503a; Lord Steyn, at pp 522h-523b; Lord Hope, at pp 532a-e, g, 534e-535a, 535b-c. (3) The Murder (Abolition of Death Penalty) Act 1965, which in effect amended section 53(1), confirmed the existence of that feature and the Criminal Justice Act 1991 did not remove it: see Lord Browne-Wilkinson, at pp 500f-502f; Lord Steyn, at pp 522c-h, 523b-524d; Lord Hope, at pp 529g-532a, 534c-e. (4) While there is or may be no objection in principle to the fixing of a minimum term to be served by an HMP detainee before the grant of parole, such term may only be provisional, since the progress of the detainee in custody, reported through continuing review of the detainee's progress, may call for it to be varied downwards: see Lord Browne-Wilkinson, at p 500e; Lord Steyn, at pp 518f, 520a-b; Lord Hope, at pp 535f-536g. These propositions point towards the correctness of the respondent's submission and the conclusions reached by the courts below. For if (as was held) the sentence of HMP detention under section 53(1) imports a duty of continuing review and the Acts of 1965 and 1991 have not removed that feature, and if (as is clear) section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 does not affect the respondent's sentence because it was imposed before 30 November 2000, the respondent remains subject to a sentence which imports a duty of continuing review and the Secretary of State cannot absolve himself from that duty by indicating that he will not perform it."

22. In considering the arguments advanced on behalf of the Secretary of State, Lord Bingham considered first the argument that the majority of their Lordships in *Venables* were influenced by the fact that the tariff was fixed by the Secretary of State whereas, following the decision of the European Court, the tariff in relation to pre 30 November 2000 sentences of DHMP, was now being fixed by the recommendation of the Lord Chief Justice. Lord Bingham rejected that argument at paragraph 11 stating:

> "But their decisive conclusions, summarised in para 10(1) and (2) above, rested on the inherent nature of the sentence of HMP detention, not on the identity of the authority setting the minimum term if, varying the sentence as originally conceived and enacted, there was to be a minimum term. The majority would have upheld a requirement of continuing review even if the minimum term had been set judicially, because that was an intrinsic feature of the sentence."

23. Next, Lord Bingham considered the argument that there was no inherent requirement of continuing review where the detainee is no longer a child. Lord Bingham rejected that argument at paragraph 12 stating:

> "The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation. It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age."

24. Lord Bingham considered and rejected other arguments put forward on behalf of the Secretary of State. He noted the argument that the situation pre-30 November 2000 would be anomalous in comparison to those sentenced after that date (where the arrangements, described below, involve the trial judge fixing the minimum term) and also sentences of detention imposed under section 53(2) of CYPA. In relation to those arguments, Lord Bingham said at paragraph 15 that:

> "…whether an anomalous distinction exists between pre- and post-30 November 2000 HMP detainees depends on the interpretation of section 82A, an issue not now before the House. It is true that no continuing duty of review applies to other sentences imposed on young offenders, because other sentences do not have the special features of HMP detention: that is anomalous only if it is thought that they should have those features. There is nothing anomalous in according a monitoring role to the Secretary of State, as described above. Nor, in my opinion, is it anomalous to continue to treat a person who committed a crime as a child or young person differently from one who committed a crime as an adult. In referring to detention during Her Majesty's pleasure the 1908 and 1933 Acts used a form of words first found in the Criminal Lunatics Act 1800 (39 & 40 Geo III, c 94), a clear indication that those so sentenced were not regarded as fully responsible. A crime committed by a person who is insane or under age does not cease to be such because he later regains his sanity or becomes adult."

25. Finally, Lord Bingham gave his conclusion on the issue identified in the following terms:

> "17. I accordingly conclude that the progress of those sentenced to HMP detention before 30 November 2000, whose minimum terms have been set by the Lord Chief Justice and have not expired, should remain subject to continuing review for

> reconsideration of the minimum term imposed if clear evidence of exceptional and unforeseen progress is reasonably judged to require it. I would dismiss this appeal."

The PCCA, the Criminal Justice Act 2003 and the Sentencing Act

The PCCA

26. Section 90 of the PCCA replaced earlier provisions and provided that where a person convicted of murder appeared to the court to be under 18 at the time the offence was committed, the court should order him to be detained during Her Majesty's pleasure. Section 82A was inserted into the PCCA with effect from 30 November 2000. The section dealt with the determination of tariffs where the court imposed a life sentence. Those were defined to include DHMP. The material provisions as originally enacted provided:

> "82A.— Determination of tariffs.
>
> (1) This section applies if a court passes a life sentence in circumstances where—
>
> (a) the sentence is not fixed by law; or
>
> (b) the offender was aged under 18 when he committed the offence.
>
> (2) The court shall, unless it makes an order under subsection (4) below, order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this section as the *"early release provisions"*) shall apply to the offender as soon as he has served the part of his sentence which is specified in the order.
>
> (3) The part of his sentence shall be such as the court considers appropriate taking into account—
>
> (a) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it;
>
> (b) the effect of any direction which it would have given under section 87 below (crediting periods of remand in custody) if it had sentenced him to a term of imprisonment; and
>
> (c) the early release provisions as compared with sections 33(2) and 35(1) of the Criminal Justice Act 1991.
>
> (4) If the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, no order should be made under subsection (2) above, the court shall order that, subject to

> subsection (5) below, the early release provisions shall not apply to the offender.
>
> (5) If, in a case where an order under subsection (4) above is in force, the offender was aged under 18 when he committed the offence, the Secretary of State shall at the appropriate stage direct that the early release provisions shall apply to the offender as soon as he has served the part of his sentence which is specified in the direction.
>
> (6) The appropriate stage, for the purposes of subsection (5) above, is when the Secretary of State has formed the opinion, having regard to any factors determined by him to be relevant for the purpose, that it is appropriate for him to give the direction.
>
> (7) In this section—
>
> *"court"* includes a court-martial;
>
> *"life sentence"* has the same meaning as in Chapter II of Part II of the Crime (Sentences) Act 1997.

27. The section proceeded on the basis, therefore, that the court passing the sentence would determine the minimum term to be served having regard to the seriousness of the offence. That term had to be served before the early release provisions in section 28 of the 1997 Act applied. Those provisions imposed a duty on the Secretary of State to release an offender (a) who had served the minimum term fixed by the court and (b) in respect of whom the Parole Board had directed release (see section 28(5) of the 1997 Act). The Parole Board could only give such a direction if it were satisfied that it was no longer necessary that the person be confined for the protection of the public. In such cases, the Secretary of State no longer had a role in determining the minimum term that had to be served: that was fixed by the sentencing court. The Secretary of State did not assess the question of risk once that minimum term had been served: that was for the Parole Board.

The Criminal Justice Act 2003

28. Provisions governing the effect of life sentences imposed on or after 18 December 2003 were contained in Chapter 7 of Part 12 of the Criminal Justice Act 2003 ("the 2003 Act"). These provisions applied to a sentence of imprisonment for life in the case of an adult and a sentence of detention during Her Majesty's pleasure (see section 277 of the 2003 Act). Section 269 provided so far as material:

> **269 Determination of minimum term in relation to mandatory life sentence**
>
> (1) This section applies where after the commencement of this section a court passes a life sentence in circumstances where the sentence is fixed by law.

> (2) The court must, unless it makes an order under subsection (4), order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this Chapter as *"the early release provisions"*) are to apply to the offender as soon as he has served the part of his sentence which is specified in the order.
>
> (3) The part of his sentence is to be such as the court considers appropriate taking into account—
>
> > (a) the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and
> >
> > (b) the effect of [section 240ZA (crediting periods of remand in custody) or of any direction which it would have given under section 240A (crediting periods of remand on certain types of bail) if it had sentenced him to a term of imprisonment.
>
> …..
>
> (5) In considering under subsection (3) or (4) the seriousness of an offence (or of the combination of an offence and one or more offences associated with it), the court must have regard to—
>
> > (a) the general principles set out in Schedule 21, and
> >
> > (b) any guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21.

29. Schedule 21 provided the starting point for determining the minimum term in the case of adults and children convicted of murder. At the time that it was originally enacted, the starting point for the court in determining the appropriate minimum term in the case of an offender under 18 at the time the offence was committed was 12 years. That could be adjusted upwards or downwards having regard to the aggravating or mitigating features of the offence (which specifically included the age of the offender). The starting point for determining the minimum term in the case of adults depended upon the circumstances of the crime but, as originally enacted, varied from 15 years to a whole life order. The provisions have been amended over time and, at the time that Mr Quaye was sentenced, provided for a starting point of 25 years in the case of an adult who took a knife to the scene and used it to commit murder. The starting point in relation to those aged under 18 at the time of the offence remained at 12 years.

30. Further, a court considering the seriousness of the offence had to consider the offender's culpability and the harm which the offence caused (see section 143 of the 2003 Act). In addition, a court dealing with a child also had to have regard to the welfare of the child (section 44 CYPA).

31. The 2003 Act created a Sentencing Guidelines Council whose functions included issuing sentencing guidelines relating to the sentencing of offenders (see sections 167 and 170). A court had to have regard to any relevant guideline in sentencing an offender (see section 172).

32. Any court making an order under section 269(2) had to state in open court its reasons, in ordinary language, for deciding on the order made and had, in particular, to state which of the starting points in Schedule 21 it had chosen and the reasons for doing so (section 270). Section 271 provided for an appeal against an order made under section 269 fixing the minimum term to be served before the offender could apply for parole.

The Sentencing Act 2020

33. The relevant sentencing provisions are now contained in the Sentencing Act 2020 ("the Sentencing Act"). Section 259 replaces section 90 of the PCCA and provides that the court must order that an offender who appears to have been aged under 18 at the time that he committed an offence of murder is detained during Her Majesty's pleasure. Provisions governing the effect of life sentences are included in Chapter 8 of Part 10. Life sentences are defined to include sentences of life imprisonment (in the case of an adult), detention for life (imposed on a child pursuant to section 250 and 258) and DHMP: see section 324 of the Sentencing Act.

34. Section 321 of the Sentencing Act provides for the fixing of a minimum term order and provides, so far as material, that:

> "(1) Where a court passes a life sentence, it must make an order under this section.
>
> (2) The order must be a minimum term order unless the court is required to make a whole life order under subsection (3).
>
> …..
>
> (4) A minimum term order is an order that the early release provisions (see section 324) are to apply to the offender as soon as the offender has served the part of the sentence which is specified in the order in accordance with section 322 or 323 ("the minimum term").
>
> ….."

35. Section 322 applies where the court passes a life sentence for an offence which is fixed by law. That includes murder where the court must pass a life sentence which is defined in these circumstances to include a sentence of DHMP. Section 322 provides so far as material that:

> *"Minimum Term*
>
> (2) If the court makes a minimum term order, the minimum term must be such part of the offender's sentence as the court considers appropriate taking into account—

> (a) the seriousness of—
>
> (i) the offence, or
>
> (ii) the combination of the offence and any one or more offences associated with it, and
>
> (b) the effect that the following would have if the court had sentenced the offender to a term of imprisonment—
>
> (i) section 240ZA of the Criminal Justice Act 2003 (crediting periods of remand in custody);
>
> (ii) and section 240A of that Act (crediting periods on bail subject to certain restrictions);
>
> including the effect of any declaration that the court would have made under section 325 or 327 (specifying periods of remand on bail subject to certain restrictions or in custody pending extradition).
>
> *Determination of seriousness*
>
> (3) In considering the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, under—
>
> (a) section 321(3) or (3C) (determining whether to make a whole life order), or
>
> (b) subsection (2) (determining the minimum term),
>
> the court must have regard to—
>
> (i) the general principles set out in Schedule 21, and
>
> (ii) any sentencing guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21.

36. Schedule 21 again sets out starting points for determining the minimum term and specifies aggravating and mitigating factors (including the age of the offender) which might require the starting point to be adjusted upwards or downwards to fix the appropriate minimum term. There is provision for the court to have regard to the culpability of the offender and the harm caused (section 62 of the Sentencing Act). A court must follow any sentencing guidelines issued by the Sentencing Council, which has replaced the Sentencing Guidelines Council) unless the court is satisfied that it would be contrary to the interests of justice to do so (section 59 of the Sentencing Act). The court must explain in ordinary language the reasons for, and the effect of, the sentence (section 52).

Sentencing Guidelines and Case-law

37. The Sentencing Council has issued a definitive guideline on sentencing children and young persons (i.e. those under 18 at the date of sentencing). Section 4 of the guideline sets out they key elements when sentencing a person aged under 18. In relation to age and maturity, paragraph 4.9 of the current guideline notes that the consideration of age is different when sentencing children and young persons as compared with adults. Further, it notes that even in response to children and young persons, the response of the courts is likely to be very different depending on whether the child or young person is at the lower end, or in the middle, or towards the top of the age bracket. Section 6 deals with an offender who crosses a particular threshold between commission and sentencing for the offence, such as a person who was a child or young person at the time of commission of the offence but who was an adult at the date of sentencing. Paragraph 6.2 states that the court should take as its starting point the sentence likely to have been imposed at the date when the offence was committed. See, generally, the decision of the Court of Appeal in *R v Ahmed* [2023] EWCA Crim 281, [2023] 1 WLR 1858, especially at paragraphs 21 to 22.

38. Furthermore, even in cases where an offence was committed when the person was aged 18 or over, the sentencing court must when sentencing such offenders have regard to their maturity at the time they committed the offence. As was explained in *Attorney General's Reference (R v Clarke)* [2018] EWCA Crim 185, [2018] 1 Cr. App. R. (S) 52:

> "5. Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R. v Peters* [2005] EWCA Crim 605; [2005] 2 Cr. App. R. (S.) 101 (p.627) is an example of its application: see [10]–[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: *thelancet.com/child-adolescent* ; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday. The ages of these offenders illustrate the point. The youth and immaturity of Clarke and Thompson were appropriate factors for the judge to take into account in these cases event though both were over 18 when they offended. It is apparent that the judge did so, not only in the case of Andrews."

See also, the decision in *R v BGI* [2024] EWCA Crim 1591 especially at paragraphs 27 to 28.

The Role of the Secretary of State

39. The way in which sentences of DHMP operate now is different from the way in which they operated prior to 30 November 2000. The court must now determine the minimum term that an offender will spend in prison before being eligible for release (if the Parole Board direct release). That minimum term is fixed, having regard to the starting point set by Parliament in Schedule 21 to the 2003 Act and now the

Sentencing Act, and the aggravating and mitigating features identified by that Schedule (which include the age of the offender). The minimum term will have regard to the seriousness of the offence, which involves an assessment of culpability and harm. As an aspect of culpability, the sentencing court will have considered the age and maturity of the offender. Where an offender was under the age of 18 at the time of the commission of the offence, but was sentenced when aged 18 or over, the court will, when determining the minimum term, have regard to the offender's culpability as at the time that the offence was committed.

40. In those circumstances, a sentence of DHMP no longer involves the Secretary of State periodically reviewing the case of an offender to determine whether or not the time has come at which it is appropriate to release the offender. That issue is now decided first by the court which fixes the minimum term the offender must serve in detention, in accordance with detailed provisions enacted by Parliament, and then, secondly, once that minimum term has been served, by the Parole Board directing that the offender may be released as he can be managed in the community. It would be inconsistent with the statutory framework for the Secretary of State to retain a power, or be under a duty, periodically to review the case to determine whether a different and lower (or higher) minimum term is appropriate.

41. In the light of that, a question could still arise as to whether the Secretary of State retained a role to modify the minimum term because of circumstances arising after the minimum term has been fixed by the court. In practice, the Secretary of State did continue to consider whether there were circumstances in which the minimum term should be reduced. The process is described at paragraphs 14 and 15 of the judgment of the Divisional Court:

> "14… the system established by the Secretary of State was as follows: any offender serving a sentence of DHMP was entitled to apply for a review of the minimum term at the halfway point of that term and thereafter at two yearly intervals; when an application was made, a dossier would be prepared by those responsible for the offender in custody; that dossier would be provided to a High Court judge; the judge would make a decision which took the form of a recommendation to the Secretary of State; the Secretary of State always abided by the recommendation of the judge.
>
> 15. The criteria for reduction of a minimum term to which an offender subject to a sentence of DHMP were set out by the Secretary of State. Evidence of one or more of the following was required: exceptional progress in prison resulting in a significant alteration in the offender's maturity and outlook since the time of the offence; risk to the offender's continued development should they remain in a custodial environment; any matter calling into question the basis on which the original minimum term was fixed. A judge conducting a reconsideration of the tariff of an offender serving a sentence of DHMP would apply those criteria. In practical terms, the first criterion, namely exceptional progress, almost always was the matter

> considered by the judge. That was the issue to which the dossier prepared in relation to the offender was directed."

42. With effect from 18 February 2021, the policy of the Secretary of State was that offenders sentenced to DHMP when aged 18 or over would not be eligible to apply for a review while those under the age of 18 would continue to eligible to apply for a review.

43. The precise legal basis upon which the Secretary of State continued to consider applications to review a minimum term fixed by the sentencing judge was not fully considered by the courts. It is unlikely that that power derived from the statutory provisions governing sentencing. In *Smith*, Lord Bingham said at paragraph 13 that a "reduction in the sentence imposed by the court is a well-recognised exercise of executive clemency". In *R (Cunliffe) v Secretary of State for Justice* [2016] EWHC 984 (Admin), the Divisional Court described the position as one where the "Secretary of State does retain the general power of executive clemency, a more modern description of the royal prerogative of mercy, usually exercised on compassionate grounds such as grave illness". The better view is that this is the basis upon which the Secretary of State carried out reviews for those sentenced after 30 November 2000. The exercise of a prerogative power to review the minimum term in the light of events after the minimum term was fixed would not necessarily be inconsistent with, or impliedly removed by, the statutory framework created by section 82A of the PCCA and now the Sentencing Act. In any event, as explained below, Parliament has now provided, by virtue of section 27A(1) and (11) of the 1997 Act, that there is no right for an offender serving a sentence of DHMP imposed when he was aged 18 years or older to apply for a review of the minimum term. The continued existence, and certainly exercise, of a power, whether derived from the prerogative or elsewhere, to consider an application to review a minimum term in those circumstances would be inconsistent with the will of Parliament as expressed in section 27A of the 1997 Act as amended.

The Statutory Provisions in the Present Case

44. The present case concerns the compatibility of section 27A and 27B of the 1997 Act, as amended, with Articles 5 and 7 and Article 14, read with Article 5, of the Convention. The purpose underlying those sections can be gleaned from the words of the statute, read in context, and having regard to legitimate aids to interpretation. The Government White Paper entitled "A Smarter Approach to Sentencing" presented to Parliament in September 2020 is a legitimate aid, albeit a secondary one, as it may explain the background to the legislation and identify the mischief or problem being addressed and the purpose of the legislation: see, generally, *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, paras 29–31.

45. Section 5 of the White Paper deals with youth sentencing. That dealt with, amongst other things, the starting points for the minimum term in cases of murder committed by children and noted, at paragraph 317, that:

> "These starting points, as they currently stand create a significant gap between the way older teenagers and younger adults are sentenced. Whilst it is right that children are treated differently from adults because they have the capacity to

> develop and mature in a way adults do not, the way starting points are currently set means that a 17-year-old who commits murder can receive a much shorter tariff than someone who has just turned 18 – even if the crime is more serious. We do not believe that this is fair to the families of victims, who can often feel as though the person responsible for the loss of their loved one has been missed from being eligible for an appropriate minimum term on account of a matter of weeks or months of difference in age."

46. The White Paper proposed moving away from a starting point of 12 years' detention in all cases of children who commit murder. For cases of exceptionally high seriousness or particularly high seriousness as defined, it proposed a minimum term of 14 years for a person aged 10-14 and 20 years for a person aged 15 to 17. For offences where the murderer took a knife or weapon to the scene intending to use it to commit an offence or to have it available as a weapon, and used it to commit murder, it proposed a minimum term of 13 years for a person aged 10-14 and 17 years for a person aged 15 to 17. For all other offences, it proposed a minimum term of 8 years for a person aged 10-14 and 10 years for a person aged 15 to 17.

47. The next section of the White Paper dealt with tariff reviews for murders committed by children and, in view of the arguments in this case, it is necessary to set out those paragraphs. They provide:

> "**Tariff reviews for murder**
>
> 327. Offenders sentenced to DHMP may apply to the High Court for a review of the length of the tariff at the halfway point. The purpose of this review is to determine whether the tariff should be reduced and, for a view to be successful, the child must show exceptional progress in custody. If the application is unsuccessful, the child can continue to apply every subsequent two years until the tariff expiry date.
>
> 328. The existence of reviews is an important part of ensuring that the tariff remains appropriate, as children change and develop as they mature. It is also clear, however, that the existence of the review procedure—particularly the opportunity for continuing reviews after the halfway point—can be extremely distressing for the families of victims. Families are contacted every time an offender applies for a review and are given the opportunity to provide a new victim personal statement, a process which in many cases causes them to relive the circumstances of the crime and feel as though they have to advocate again for justice for their loved one. This difficult process is also unlikely to lead to any benefit for the offender, as subsequent reviews are rarely successful and very few offenders take advantage of the opportunity to apply again.
>
> 329. This is why we propose to reduce the number of reviews an offender is entitled to after they turn 18. Offenders who are

> given life sentences for murders committed over the age of 18, or those who commit murders as children but who are not sentenced until they are over 18, are not entitled to reviews, reflecting the fact that adults do not go through the same accelerated development and maturation that children do. Our new system will be based on this principle.
>
> 330. We propose a new, fairer system that recognises that offenders who were sentenced to DHMP as children but have since turned 18 in custody are now adults and have passed the age where significant development occurs, while still accounting for the fact that they were children and still maturing when the crime was committed and they were sentenced. Under the new system all offenders sentenced when under 18 would receive the opportunity to apply for one tariff review at the halfway point of their sentence. This will allow the High Court to take into account any development or maturation since the crime was committed. However, the offender will only be eligible for subsequent reviews covering the period until they turn 18. This change will make the tariff review policy equitable for all offenders who are given life sentences for crimes they committed as children, regardless of their age when they are sentenced, while also reflecting the fact that adult offenders are not eligible for any reviews.
>
> 331. Removing eligibility for continuing reviews past the age of 18 will provide more clarity for victims' families and keep them from having to continually revisit the events that led to the loss of their loved one. Continuing reviews provide very little practical benefit for offenders, and this change will ensure that all offenders who have reached adulthood are treated equally while still offering the opportunity for rehabilitation and making allowances for the process of development and maturation in children."

48. The statement in paragraph 320 that offenders who "commit murders but who are not sentenced until they are over 18 are not entitled to reviews" was wrong at the time it was written. In September 2020, when the White Paper was presented to Parliament, the policy of the Secretary of State was to invite applications for a review from those over and under 18 when sentenced. The inaccuracy was drawn to the attention of the Secretary of State in a submission dated 16 October 2020. The policy was changed with effect from 18 February 2021, as explained above, and offenders aged 18 or more at the date of sentence were not invited to apply for a review of their minimum term.

49. Parliament enacted the 2022 Act. Section 127 modified the starting points for determining the minimum term set out in Schedule 21 to the Sentencing Act in the case of murder committed by children. Section 128 of that Act inserted a new section 27A and 27B into the 1967 Act. That section allowed offenders who were under 18 at the time of sentencing to apply to the Secretary of State for a review of the minimum term after serving one-half of the minimum term. Unless the Secretary of State

considers that the application is frivolous or vexation, he must refer it to the High Court. A further application is permitted only after two years have expired since the last application and if the offender is under the age of 18 at the date on which the further application is made. In practice this latter situation is likely to arise only rarely. Given the starting points, and likely length of any sentence, a further review is likely to be available only to those aged about 10 or 11 or 12 at the time they committed the offence and who are sentenced to a minimum term of about 6 years.

50. The material provisions of section 27A are:

> "**27A Sentence of detention during Her Majesty's pleasure imposed on a person under 18: application for minimum term review**
>
> (1) This section applies to a person who—
>
> (a) is serving a DHMP sentence, and
>
> (b) was under the age of 18 when sentenced; and such a person is referred to in this section as a *"relevant young offender"*.
>
> (2) A relevant young offender may make an application for a minimum term review to the Secretary of State after serving half of the minimum term.
>
> (3) An *"application for a minimum term review"* is an application made by a relevant young offender for a reduction in the minimum term.
>
> (4) Where a relevant young offender has made an application for a minimum term review under this section, the offender may only make a further such application if—
>
> (a) the period of 2 years beginning with the day on which the previous application was determined has expired, and
>
> (b) the offender is under the age of 18 on the day on which the further application is made.
>
> (5) Where the Secretary of State receives an application under this section, the Secretary of State must—
>
> (a) consider the application, and
>
> (b) unless the Secretary of State forms the view that the application is frivolous or vexatious, refer it to the High Court.
>
> (6) Where the Secretary of State decides not to refer the application to the High Court, the Secretary of State must give

notice of that decision, and the reasons for it, to the relevant young offender.

…..

(8) In this section—

"DHMP sentence" means a sentence of detention during Her Majesty's pleasure imposed (whether before or after this section comes into force) under a provision listed in column 1 of the table in subsection (9);

"minimum term", in relation to a person serving a DHMP sentence, means the part of the sentence specified—

(a) in the minimum term order made in respect of the sentence, or

(b) where one or more reduction orders have been made under section 27B in respect of the sentence, in the most recent of those orders;

"minimum term order", in relation to a DHMP sentence, means the order made under the provision listed in column 2 of the table in subsection (9) that corresponds to the entry in column 1 that relates to the sentence.

(10) For the purposes of subsection (4), an application for a minimum term review is determined—

(a) when the court makes a reduction order or a decision confirming the minimum term (see section 27B), or

(b) in a case where the application is not referred to the court, when the Secretary of State gives the relevant young offender notice in relation to the application under subsection (6).

(11) There is no right for any person who is serving a DHMP sentence to request a review of the minimum term other than that conferred by this section."

51. Section 27B deals with the exercise of the power by the High Court.

"27B Power of High Court to reduce minimum term

(1) This section applies where the Secretary of State refers an application for a minimum term review made by a relevant young offender under section 27A to the High Court.

(2) The court may—

> (a) make a reduction order in relation to relevant young offender, or
>
> (b) confirm the minimum term in respect of the offender's DHMP sentence,
>
> and a decision of the court under this subsection is final.
>
> (3) A reduction order is an order that the relevant young offender's minimum term is to be reduced to such part of the offender's DHMP sentence as the court considers appropriate and is specified in the reduction order.
>
> (4) In deciding whether to make a reduction order, the court must, in particular, take into account any evidence—
>
> (a) that the relevant young offender's rehabilitation has been exceptional;
>
> (b) that the continued detention or imprisonment of the offender for the remainder of the minimum term is likely to give rise to a serious risk to the welfare or continued rehabilitation of the offender which cannot be eliminated or mitigated to a significant degree.
>
> (5) In this section *"DHMP sentence"* , *"minimum term"* and *"relevant young offender"* have the same meaning as in section 27A."

52. During the passage of the Bill in Parliament, an amendment was proposed to provide for offenders to be able to apply for a review unless the offender was aged 26 when sentenced rather to those who were under 18 at the date of sentencing. The amendment proposed a change to the clause to "leave out "18" and insert "26"". That amendment was the subject of debate by members of Parliament and a member of the government set out the government's views. The amendment was voted upon and defeated. The legislation as enacted provided that an offender may apply for a review only when under 18 when sentenced.

THE FACTUAL BACKGROUND

53. On 10 May 2014, a 21st birthday party took place at a family home in Hemsby in Norfolk. The victim, Connor Barrett, had volunteered to provide the music at the party. He was 21 years old at the time. Mr Quaye, who was 17 and 9 months at the time, went to the party uninvited with his friend Ayo Bile who was aged 15. Both took knives to the party.

54. At the party, Mr Quaye and Mr Bile first assaulted a young man, Ricky Halliday, who they thought had given them some offence some days or weeks prior to the party. They both attacked him, punching him in the face on a number of occasions, and inflicting bodily harm on him. No weapons were produced during that assault. Mr Halliday spoke to the victim, Mr Barrett, who asked them why they had attacked Mr Halliday. A fight started between Mr Bile and the victim. Mr Quaye went to assist.

Both Mr Quaye and Mr Bile surrounded the victim and he was stabbed four times, dying of his wounds.

55. Mr Quaye was charged with the murder of Mr Barrett. Mr Quaye pleaded not guilty. There was a trial and Mr Quaye was convicted of the offences in November 2014, by which time he was 18 years old. Mr Bile was also convicted. He was still aged 15 (at the time of conviction and sentence). Mr Quaye was also convicted of assault occasioning actual bodily harm on Mr Halliday and possession of an offensive weapon.

56. Sentencing took place on 16 January 2015. The sentencing judge had a forensic psychologist report on Mr Quaye dated 8 January 2015 and a pre-sentence report prepared by a probation officer dated 13 January 2015.

57. The sentencing judge began by identifying the appropriate starting point for murder under Schedule 21 of the 2003 Act. That was 12 years in the case of a person, such as Mr Quaye, who was under 18 years of age at the time that the murder was committed. The judge noted that had Mr Quaye been 3 months older and an adult, the starting point would have been 25 years' custody. The sentencing judge considered the aggravating features. He considered that the taking of knives to the party and the use of knives were aggravating features justifying increasing the starting point. The fact that the murder took place at a residential home and in front of the victim's family, including his younger brother who watched his brother die, were aggravating factors. The mitigating factors were that Mr Quaye did not have any relevant previous convictions (although, on the evidence, he was involved in a gang culture which involved carrying knives). The sentencing judge accepted that Mr Quaye did not intend to kill Mr Barrett (he intended to cause grievous bodily harm) which was a mitigating factor. The sentencing judge noted from the psychologist's report and the pre-sentence report that Mr Quaye did not accept his guilt and did not accept the verdict of the jury. The reports referred to Mr Quaye's difficult background and that he was expecting his first child at the end of the month in which he was sentenced.

58. The judge noted that this was a truly tragic case with no winners. A decent and loving man had had his life taken leaving family and friends distraught and the life of the victim's young son had been devastated. He said that the perpetrators "will spend many years in prison". The sentencing judge then sentenced Mr Quaye and Mr Bile to be detained at His Majesty's pleasure for a minimum term, saying this:

> "Ayo Bile and Jesse Quaye, for the offence of murder of Connor Barrett, you will be detained during Her Majesty's pleasure for a minimum term of 15 years. That means you will be held in custody for at least 15 years, it may be a lot longer, I emphasise that. You will not be released unless and until the Parole Board is satisfied that the risk you pose to the public is manageable in the community. The days you have been on remand in custody will be deducted from that 15 years, 229 in your case Bile, 249 days in your case Quaye."

59. Mr Quaye was also sentenced to nine months' detention for assault occasioning actual bodily harm and 12 months' detention for possession of an offensive weapon. Those sentences were to be served concurrently to the minimum term for murder.

THE JUDGMENT BELOW

60. Mr Quaye applied for judicial review of sections 27A and 27B of the 1997 Act, as amended, seeking a declaration pursuant to section 4 of the Human Rights Act 1998 ("the HRA") that those provisions were incompatible with Articles 3, 5, 6 and 14 of the Convention. At the hearing, Mr Quaye was also given permission to argue that the provisions retrospectively increased his punishment and were incompatible with Article 7 of the Convention.

61. The judgment of the Divisional Court treated Article 14, read with Article 5, of the Convention as the primary claim. It is, however, convenient to deal first with its findings on Article 5, then Article 7, and finally Article 14, read with Article 5, of the Convention.

62. The Divisional Court concluded that the absence of an opportunity to apply for a review of the minimum term was incompatible with Article 5 of the Convention for, essentially, the reasons given at paragraph 59 where it said this.

> "59. Notwithstanding our conclusion in relation to article 14, we shall go on to consider whether the claims of violation of other Convention rights have been made out. Dealing first with article 5, we have determined that section 27A did not change the essential nature of a sentence of DHMP. An inherent element of that sentence is the requirement of continuing review as set out in *Venables* [1998] AC 407 and *Smith* [2006] 1 AC 159. It is in that context that the question of arbitrary detention falls to be considered. In our view the removal of any possibility of a reduction of the minimum term via a review does generate a risk of arbitrary detention sufficient to engage the protection of article 5. Mr Watson's argument—that detention cannot be arbitrary whilst the minimum term is ongoing—fails to engage with the particular review and reduction element of a sentence of DHMP. Mr Fitzgerald was correct to distinguish the sentence of DHMP from an ordinary sentence to which parole provisions apply. The requirement of a continuing review inherent in a sentence of DHMP is unique. Whilst the established system prior to the 2022 Act involved review only at or after the halfway point of the minimum term, any offender serving a sentence of DHMP has their progress regularly examined and recorded by the prison authorities so that, on application for review, all relevant material can readily be assembled. We repeat what was said in *Smith*, namely: "As [a child murderer] grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation." That is why a distinction must be drawn between a sentence of DHMP and other sentences as discussed in *Morgan* [2024] AC 130. Removing any possibility of exercising "a more reliable judgment" so as to reduce the minimum term will inevitably result in a number of offenders serving longer than lawfully they should. That is established by

> the evidence within the memorandum of 16 October 2020. Between 2015 and 2019 around seven offenders sentenced to DHMP after their 18th birthday applied successfully for a reduction of their minimum term. Those offenders would have remained subject to a minimum term longer than necessary best to promote rehabilitation. In the context of an offender serving a sentence for a crime committed when the offender was under 18, that amounts to arbitrary detention."

63. The Divisional Court found that it was not necessary to reach a conclusion on whether the relevant statutory provisions were incompatible with Article 7 of the Convention for the reasons it gave at paragraph 62 of its judgment, namely:

> "62. Article 7 was very much a backstop so far as Mr Fitzgerald was concerned. If section 27A left undisturbed the intrinsic nature of a sentence of DHMP, the effect of the section was unlawful discrimination within the ambit of article 5 and removal of the safeguards against arbitrary detention such as to amount to a violation of article 5. On the other hand, were it to be said that section 27A did change the nature of the sentence, that would amount to the retrospective application of a harsher penalty. In our judgment there is no scope for concluding that section 27A had the effect of changing the nature of the sentence for someone in the claimant's position so as to engage article 7. We are not persuaded that it is necessary or appropriate to reach a conclusion on a matter which we consider to be academic."

64. Before dealing with the specific conclusions of the Divisional Court on Article 14, read with Article 5, of the Convention, it is necessary to note some of its observations on sentencing of children, young people and young adults. At paragraph 19, the Divisional Court noted:

> "19. In almost all cases the type of custodial sentence which may be imposed on a young person will depend on their age at the date of conviction. Thus, pursuant to section 234 of the Sentencing Code, "A detention and training order is available where a court is dealing with an offender for an offence if— (a) the offender is aged under 18, but at least 12, when convicted". The maximum period of a detention and training order is two years. Where someone under 18 falls to be sentenced for a grave crime, section 249 of the Sentencing Code permits a longer period of detention. Such a period can be imposed "where a person aged under 18 is convicted" of a relevant offence. Once a court is dealing with a person aged at least 18 but under 21 at the date of conviction, any custodial sentence will be detention in a young offender institution unless the court is required to pass a sentence of custody for life or a sentence of DHMP: see section 262 of the Sentencing Code."

65. The Divisional Court dealt the principles governing sentencing of children and young persons as set out in the guideline issued by the Sentencing Council (discussed above at paragraphs 37 to 38). It noted that, even when sentencing persons who were aged 18 or over at the time of the commission of the offence, it is not be to assumed that they have the full maturity and all the attributes of adulthood, referring to *Peters* and C*larke* and said at paragraph 24 that:

> "Thus, in the context of sentencing, the fact that a person has reached the age of 18 does not mean the person is to be treated as a mature adult. In *Clarke* the court relied on general experience of life as well as the cited research to justify the conclusion that maturation continues well beyond a person's 18th birthday."

66. At paragraph 31, the Divisional Court considered whether it was entitled to have regard to the debate in Parliament dealing with the proposed amendment to the Bill which provided that reviews could continue until the offender was aged 26. It concluded that it was not entitled to have regard to this material, stating at paragraph 31 that:

> "31. We were provided with an excerpt from Hansard. This set out the debate during the Committee stage of the Bill which became the Police, Crime, Sentencing and Courts Act 2022 in relation to DHMP and eligibility for reviews. The response of a Home Office minister formed part of the excerpt with which we were provided. We are satisfied that there is no proper basis for us to take what was said in Parliament into account. The test for the admission of parliamentary material as explained in *Pepper v Hart* [1993] AC 593, 634 is:
>
> > "reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria."
>
> Section 27A is not ambiguous or obscure. Moreover, what was said by the minister provides no indication of the legislative intention of section 27A. The point in issue in this case was not mentioned by him."

67. In considering the claim under Article 14 of the Convention, the Divisional Court concluded that the statutory provisions were not objectively justifiable. It said this:

"46. We accept that a wide margin of appreciation must be given when considering the judgment of the legislature and the objective justification for differential treatment. The European court uses the phrase "manifestly without reasonable foundation" to state the test for concluding that legislative provisions violate article 14. As was said in *SC* [2022] AC 223, para 160, this is merely a way of describing a wide margin of appreciation. Whilst any issue relating to the liberty of the subject requires close scrutiny, it is not the same as the level of scrutiny to be applied where the difference in treatment arises from what in *SC* at para 100 were termed "suspect" grounds. Age does not fall into that category.

47. In our judgment, even with a low level of scrutiny, there is no objective justification for the differential treatment of offenders sentenced to DHMP who are 18 at the date of sentence. As a preliminary matter, we are satisfied that section 27A as inserted by the 2022 Act did not change the nature and ambit of a sentence of DHMP. It remains a sentence of detention to be imposed on an offender convicted of murder who was under the age of 18 at the time of the offence. In statutory terms it is to be distinguished from a sentence of imprisonment or detention for life. Had Parliament wished to legislate to change the basis of sentencing those who commit the offence of murder when under the age of 18 but who are not sentenced until after their 18th birthday, it would have done so explicitly. It did not do so. The essential nature of a sentence of DHMP is unchanged. It is in that context that the effect of section 27A must be assessed.

48. The first limb of the Secretary of State's justification for the differential treatment of offenders who fall to be sentenced on or after their 18th birthday is that, at the age of 18, a person is an adult. This should be treated as a bright line for the purpose of sentencing. This proposition is not sustainable. As we have set out in our review of the principles of youth sentencing, the age of an offender at the date of conviction in almost all cases will determine the type of custodial sentence to be imposed assuming that only a custodial sentence will be appropriate. But the mere fact that a person has achieved their 18th birthday will not determine whether a custodial sentence should be imposed and, if so, of what length. What is critical is the age of the offender when the offence was committed. As explained in *Ahmed* [2023] 1 WLR 1858 the culpability of the offender must be assessed by reference to age at the time of the offence. This principle is made explicit by the statutory basis of the sentence of DHMP. It is to be imposed on an offender who had committed the offence of murder when aged under 18.

49. We remind ourselves of what was said at para 329 of the White Paper, namely:

> "Offenders who are given life sentences for murders committed over the age of 18, or those who commit murders as children but who are not sentenced until they are over 18, are not entitled to reviews, reflecting the fact that adults do not go through the same accelerated development and maturation that children do."

On its face the White Paper conflated offenders who committed offences over the age of 18 and those who committed murders as children. There was no recognition that this approach failed to reflect established sentencing practice, practice which is given statutory force by the Children guideline coupled with section 59 of the Sentencing Code. Section 27A(11) gives the above passage legislative force. In our judgment it is without reasonable foundation.

50. What was said at para 329 of the White Paper also involved the proposition that someone aged 18 was an adult who would not be subject to "the same accelerated development and maturation" as a child. No evidence was provided for this proposition which formed a significant part of the justification for the differential treatment of an offender sentenced to DHMP on or after his 18th birthday. It was expressly abjured in *Peters* [2005] 2 Cr App R (S) 101 and *Clarke* [2018] 1 Cr App R (S) 52. The sentencing principle that young adults will continue to mature after their 18th birthday has been applied very frequently in the Court of Appeal Criminal Division. It is not necessary to cite the welter of authority which exists. It is of note that the departmental officials who prepared the memorandum dated 16 October 2020 acknowledged the evidence which underpins this sentencing principle.

51. A further objection to the suggestion that achieving the age of 18 before sentence could justify differential treatment comes from analysis of when a review will occur. The evidence in the memorandum of 16 October 2020 is that between 2011 and 2019 the majority of offenders sentenced to DHMP were aged between 15 and 17 at the point of sentence. There is no reason to suppose that this period was unusual in terms of the demographic of those sentenced to DHMP. The evidence corresponds with our experience of such cases, that experience being reasonably wide. The minimum terms imposed on teenage murderers will vary. Until June 2022 the starting point under Schedule 21 to the 2020 Code was 12 years but the minimum term very often would be significantly higher to reflect aggravating factors. Under Schedule 21 as revised by the 2022 Act minimum terms are likely to increase. In any event a minimum term of 15 years (as imposed on the claimant and his

co-accused) was commonplace. Therefore, a judge will not be considering a review in the average case until the offender is in his early to mid-twenties. In reality the review will not occur precisely at the expiry of half of the minimum term. It will be delayed until the dossier to which we have referred has been prepared after the offender has applied for a review. In the review the judge rarely will be concerned with the development and maturation of the offender between the date of the offence and the offender's 18th birthday. First, it is unlikely that the judge will have any detailed information on that topic. Second, in the majority of cases, the time between the date of the offence and the offender's 18th birthday will be relatively short. The evidence placed before the judge will be directed to the offender's progress over the whole of their time in custody. The nature of the progress has to be exceptional. One aspect of exceptional progress is that it must be sustained. The judge will reach a view on whether there should be any reduction in the minimum term based on what has occurred over the entirety of the sentence as served at the time of the review. It is not uncommon for the crucial progress to be made when an offender has passed their 25th birthday. The case of *Re Herbert* [2020] EWHC 216 (Admin) is a paradigm of this phenomenon. In those circumstances, there is no logic in distinguishing between offenders aged 18 at the date of sentence and those under 18 at that point. The distinction is without reasonable foundation.

52. Setting the age at the date of sentence as the cut-off point for allowing a review of the minimum term is arbitrary. We acknowledge that the same can be said for the identification of the date of conviction as the relevant date for determination of the type of sentence. However, this only determines the type of sentence. As we have explained, the nature of the sentence will be considered by reference to the age of the offender at the time of the offence. That is the point at which it appropriate to assess culpability. The date of sentence can be subject to delay for a variety of reasons. Young offenders will require reports to be prepared before sentence can be imposed. The time taken to prepare such reports will vary. Young people who commit the offence of murder often do so as part of a group. Delays will occur as different members of the group are arrested and charged. A trial of several young people can take a significant time to complete. It will be commonplace in such a case for as long as 12 months to pass between the date of the offence and the date of sentence. The criminal justice system currently is suffering from substantial delays due to a backlog of cases. Whilst cases of homicide involving young people will be given priority, it is not always possible to provide the degree of expedition that would be ideal. The consequence of those factors is that one offender who committed an offence of

> murder when (for instance) they were just 17 might be sentenced when they were still 17 whereas another offender of the same age who committed a very similar offence might reach his 18th birthday before the date of sentence. The fact that the second offender was 18 at the date of sentence would be random and wholly unconnected with the offender's culpability. Differential treatment resulting from random events cannot be objectively justified."

68. The Divisional Court considered, but rejected, the claim that the absence of an opportunity for a review of the minimum terms amounted to a breach of Article 6 of the Convention which guarantees a right to a fair trial. It said this:

> "61. It follows that we conclude that sections 27A(1) and 27A(11) are incompatible with article 5. We shall make a declaration to that effect. We do not reach the same conclusion in relation to article 6. We can state our reasons shortly. Mr Fitzgerald submitted that, because the minimum term imposed as part of a sentence of DHMP in any given case is provisional, the ongoing duty to review is part of the sentencing process. Removal of the right to review is an interference with that process. We disagree. A review of the minimum term imposed pursuant to a sentence of DHMP is an administrative stage undertaken after sentence for the purpose of ascertaining whether the minimum term remains appropriate. It is not another hearing to set the sentence. *Dudson* [2006] 1 AC 245 related to the application of article 6 in connection with the initial determination of the appropriate minimum term. It was not concerned with a subsequent review of the minimum term once it had been set. Mr Watson pointed out that there was no authority to support the claimant's argument. We are satisfied that article 6 is not engaged by the provisions of section 27A."

69. The Divisional Court conclusions were expressed at paragraphs 63 and 64 in the following terms:

> "63. For the reasons we have set out above there will be a declaration under section 4 of the Human Rights Act 1998 that section 27A(1) and 27A(11) of the Crime (Sentences) Act 1997 as inserted by section 128 of the Police, Crime, Sentencing and Courts Act 2022 are incompatible with articles 5 and 14 of the European Convention."
>
> 64. The claimant in his grounds sought a declaration that sections 27A and 27B in their entirety are incompatible with the Convention. That is not a tenable position. Mr Fitzgerald expressly disavowed any challenge to the provisions in section 27A which effectively prevent more than one review of a DHMP minimum term. His submissions were directed solely to the position of an offender sentenced on or after his 18th birthday. Only subsections (1) and (11) relate directly to such

> an offender. Section 27B is concerned only with the exercise of the power of review by the High Court. Nothing in that section relates to the matters with which we are concerned.

70. Paragraph 4 of the order of the Divisional Court therefore provides that:

> "A declaration is granted under section 4 of the Human Rights Act 1998 that sections 27A(1) and 27A(11) of the Crime (Sentences) Act 1997 as inserted by section 128 of the Police, Crime, Sentencing and Courts Act 2022 are incompatible with articles 5 and 14 (read with article 5) of the European Convention on Human Rights."

THE APPEAL

71. The Secretary of State appeals with the permission of the Divisional Court on two grounds, namely that the court erred in concluding that sections 27A and 28 of the 1997 Act as amended were incompatible with (1) Article 14, read with Article 5, of the Convention and (2) Article 5 of the Convention.

72. By a respondent's notice, Mr Quaye seeks to uphold the order made by the Divisional Court on the alternative ground that the relevant statutory provisions are incompatible with Article 7 of the Convention:

> "… on the basis that it amounts to a retrospective (and adverse) alteration to the sentence imposed … given that the duty to review the provisional minimum term is an inherent and inextricable part of the unique sentence of HMP detention".

73. No challenge is made to the finding that the relevant statutory provisions are compatible with Article 6 of the Convention. We say nothing further about that issue.

74. Mr Quaye also applies to adduce further evidence. In fact, an application to adduce that evidence was made and refused by the Divisional Court. The application is in effect an appeal against the refusal to admit that evidence. It is dealt with below.

75. It is appropriate to consider the issues raised by the grounds of appeal and the respondent's notice in the following order, namely whether the provisions of section 27A and 27B of the 1997 Act, as amended, are incompatible (1) with Article 5, (2) Article 7, or (3) Article 14, read with Article 5, of the Convention.

FIRST ISSUE –ARTICLE 5 OF THE CONVENTION

The Submissions

76. Mr Watson KC, with Ms Sullivan, for the Secretary of State, submitted that the Divisional Court was wrong to hold that section 27A was incompatible with Article 5 on the grounds that it presents a risk of detention becoming arbitrary while an offender is still serving the judicially-set minimum term imposed at sentence. In such a case, the question of lawfulness does not arise. That approach was consistent with *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1. Further, Mr Watson submitted that the Divisional Court erred by proceeding from the starting

point that section 27A did not change the essential nature of a sentence of DHMP and that an inherent element of the sentence was the requirement of continuing review.

77. Mr Fitzgerald KC, with Ms Woodrow, for Mr Quaye, submits that the Divisional Court was correct to conclude that section 27A gave rise to a risk of arbitrary detention for the reasons it gave at paragraphs 59 to 60 of its judgment. He submitted that the maintenance of detention without the prospect of review was contrary to the nature of a sentence of DHMP. He submitted that a sentence of DHMP did not fix an immutable tariff which had to be served in full. Rather it set a provisional sentence and was subject to review. The minimum term had to be reducible. If not, an offender might be detained after the point when it was no longer necessary to detain him.

Discussion

78. The material provision is Article 5(1) of the Convention which provides that:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person following conviction by a competent court."

79. There are a number of principles established by the European Court as to when detention contravenes Article 5(1). These include an obligation to ensure that detention is lawful as it is in conformity with national law and follows a procedure prescribed by law. Further, there is a requirement that the detention should not be arbitrary or unjustified and should be in keeping with the purpose of protecting individuals from arbitrariness. See per Lord Reed, with whom the other members of the Supreme Court agreed, at paragraphs 2 and 5 of the decision in *Brown*.

80. Those principles can be seen in operation in the case law of the European Court. In *Saadi v United Kingdom* (2008) 47 EHRR 17, the Grand Chamber was dealing with the question of whether detention for the prevention of unauthorised entry into the United Kingdom was justifiable under Article 5(1)(f) (holding that it was). The Grand Chamber said this (references omitted):

> "67. It is well established in the Court's case law under the sub-paragraphs of Art.5(1) that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paras (a)–(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Art.5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Art.5(1) and the notion of "arbitrariness" in Art.5(1) extends beyond

> lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.
>
> 68. While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Art.5(1), key principles have been developed on a case-by-case basis. It is moreover clear from the case law that the notion of arbitrariness in the context of Art.5 varies to a certain extent depending on the type of detention involved.
>
> 69. One general principle established in the case law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Art.5(1). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.
>
> …..
>
> 71. The Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Art.5(1)(a), where, in the absence of bad faith or one of the other grounds set out at [69] above, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Art.5(1)."

81. Similarly, in *James v United Kingdom* (2013) 56 EHRR 12, the European Court was dealing with sentences of imprisonment for public protection. These were indeterminate sentences. The offender had to serve a fixed minimum term or tariff but could be imprisoned thereafter until the Parole Board was satisfied that the particular offender no longer presented a risk to the public. The particular issue concerned the absence of courses during the period after the expiry of the minimum term or tariff which would assist the offender in addressing the risk of his re-offending. The European Court set out the following principles (references omitted):

> "188. It is well established in the Court's case law that any deprivation of liberty must fall within one of the exceptions set out in subparas (a)–(f) and must also be "lawful". The parties do not dispute that the exception to the general right to liberty set out in art.5(1) which is relevant in the present cases is that contained in art.5(1)(a) of the Convention, namely detention after conviction by a competent court.

189. For the purposes of art.5(1)(a), the word "conviction" has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty. [45] The Court has also made it clear that the word "after" in subpara.(a) does not simply mean that the detention must follow the conviction in point of time: in addition, the detention must result from, follow and depend upon or occur by virtue of the conviction. [46] In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue. [47] In this connection the Court observes that, with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong. Indeed, as the Court has previously indicated, the causal link required by subpara.(a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court or on an assessment that was unreasonable in terms of those objectives.

190. Where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law.

191. However, having regard to the object and purpose of art.5(1), it is clear that compliance with national law is not sufficient in order for a deprivation of liberty to be considered "lawful". Article 5(1) also requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. [51] The Court has not previously set out an exhaustive list of what types of conduct on the part of the authorities might constitute arbitrariness for the purposes of art.5(1) but some key principles can be extracted from the Court's case law in this area to date. [52] These principles should be applied in a flexible manner having regard to the degree of overlap among them and given that the notion of arbitrariness varies to a certain extent depending on the type of detention involved.

…..

195. Fourthly, the requirement that detention not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question. However, the scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. For example, in the context of detention pursuant to art.5(1)(a) , the Court has generally been satisfied that the decision to impose a sentence of detention and the

> length of that sentence are matters for the national authorities rather than for this Court. [67] However, as noted above, it has indicated that in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary….."

82. In applying those general principles to the facts, the European Court noted that the offenders "do not dispute that their detention during their tariff periods fell within the exception set out in Article 5(1)(a)". Rather, in that case, the question was whether the continued imprisonment after the expiry of the tariff period for purposes of public protection was compatible with Article 5 because of the delay in providing them with access to rehabilitative courses and held that the delay did give rise to arbitrary detention.

83. Finally, in *Brown*, the Supreme Court considered at paragraph 39 that:

> "…it is only after the tariff has expired that any question can arise whether the continued detention is arbitrary, and therefore not "lawful" within the meaning of article 5(1)(a)."

84. We apply those principles to the present case. First, it is clear that the sentence of DHMP and, in particular, the fixing of the minimum term, was lawful as a matter of national law and was imposed following the procedure prescribed by law. Section 82A of the PCCA required the sentencing judge to fix the minimum term that Mr Quaye would serve in detention. The sentencing judge did so, following the procedure laid down by law, which included the obtaining of relevant reports, the fixing of the starting point by reference to legislation, and the identification of aggravating and mitigating features.

85. Furthermore, the sentence reflected the purpose of fixing a minimum term having regard to the seriousness of the offence, measured by the harm caused and Mr Quaye's culpability, assessed in the light of the relevant legal framework. That included assessing his culpability in the light of his maturity and understanding as at the time that he committed the offence. That process involved a finding of guilt and the imposition of a sentence commensurate with the gravity of the offence and the culpability of the offender. That is not arbitrary. As recognised in *Saadi*, the "decision to impose a sentence of detention and the length of that sentence are matters for the national authorities" (paragraph 71).

86. The basis for the Divisional Court's conclusion that the absence of a process for applying for a review and reduction of the minimum term generated a risk of arbitrary detention was that section 27A of the 1997 Act did not change the essential nature of a sentence of DHMP. It considered that an inherent requirement of that sentence was a continuing review of whether detention was justified as set out in *Venables* and *Smith*.

87. With respect to the Divisional Court, that conclusion fails to take account that the operation of a sentence of DHMP, imposed pursuant to section 90 of the PCCA, was altered by the provisions of section 82A with effect for sentences imposed on or after 30 November 2000. Prior to that date, the decision on when to release an offender sentenced to DHMP lay with the Secretary of State. The period of detention itself was indeterminate in nature. The Secretary of State had to determine from time to time, having regard to factors such as the need for punishment and other factors such as welfare, whether detention was still justified. The way in which the sentence operated was altered by section 82A. The sentencing judge now determined the minimum term that must be served prior to the offender being eligible for release once the Parole Board directed that the offender could be managed in the community. The sentencing judge did so in accordance with the relevant legislation and relevant case law and sentencing guidelines. It cannot, in our judgment, be said that detention in accordance with those statutory provisions was arbitrary or unlawful. The absence of an opportunity whereby an offender could apply to the Secretary of State seeking, as an act of clemency, a reduction of the minimum term by reference to events occurring after sentence (essentially, exceptional progress in prison) does not render detention pursuant to the sentence imposed under section 90 of the PCCA (or section 259 of the Sentencing Act) arbitrary or unlawful.

88. We therefore conclude that the Divisional Court erred in concluding that a period of detention imposed in accordance with the relevant statutory provisions was incompatible with Article 5 of the Convention. We allow the appeal on this ground and set aside the declaration that section 27A(1) and (11) of the 1997 Act is incompatible with Article 5.

89. For completeness, we note that the arguments accepted by the Divisional Court would also apply to a situation where an offender sentenced to DHMP was restricted to one application to review the minimum term (unless, exceptionally, the offender was still under 18 at the time that a second review was due). If, (contrary to our view), it was inherent in a sentence of DHMP that there be a continuing review of whether the minimum term continued to be justified, then that would, logically, require the opportunity for further reviews designed to perform that function. Furthermore, there is an additional logical problem with the decision of the Divisional Court that the absence of an opportunity to apply for a review may lead to arbitrariness because it is inherent in a sentence of DHMP that there be a continuing review of the appropriateness of the minimum term. That requirement must be said to be inherent or implicit in the provisions of section 90 (or section 259) of the relevant statute. But section 27A(11) expressly provides that there is no right to apply for a review of the minimum term except in the circumstances provided by section 27A. Thus, it cannot any longer be a requirement of domestic law that a person aged 18 at the date of sentencing must have an opportunity to apply for a review. The risk of arbitrariness cannot then be said to flow from any inconsistency between the sentence as provided for by section 90 (or section 259) of the relevant statute and the later Act. The later Act removes that element from the sentencing process. The case law of the European Court does not require that an offender sentenced to a particular sentence must have the opportunity to apply for a review of that sentence. It is not, easy, therefore, to ascertain on what basis it is said that section 27A(1) and (11) is incompatible with Article 5 of the Convention.

THE SECOND ISSUE - ARTICLE 7 OF THE CONVENTION

The Submissions

90. Mr Fitzgerald and Ms Woodrow, both of whom made written and oral submissions on this issue, submitted that if section 27A had redefined the scope of the penalty, by removing the opportunity to apply for a reduction of the minimum term, then it was incompatible with Article 7 of the Convention as it imposed a heavier penalty. They submitted that the alteration was not merely a change in the arrangements for early release but involved an alteration in the penalty itself. They relied upon the decision of the European Court in *Del Rio Prada v Spain* (2014) 58 EHRR 1037, *Kupinskyy v Ukraine* (application no 5084/18, judgment on 10 November 2022) and the decision of the Divisional Court in *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin), [2020] 1 WLR 3932.

91. Ms Sullivan, who dealt with this matter on behalf of the Secretary of State, submitted that there was a distinction between a measure which constitutes the penalty and the execution of the penalty. Changes in relation to the method of execution of the penalty do not give rise to a violation of Article 7. Any alteration in the arrangements governing the ability to apply for a review of the minimum term concerned the execution of the penalty. In addition to the cases relied upon by the respondent, Ms Sullivan relied upon *Morgan v Ministry of Justice* [2023] UKSC 14, [2023] 2 WLR 905.

Discussion

92. Article 7(1) of the Convention provides:

> "(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".

93. The second sentence of Article 7(1) guarantees that a heavier penalty shall not be imposed than that which was applicable at the time that the offence was committed. The meaning of penalty is an autonomous Convention concept.

94. The European Court and the Supreme Court have consistently drawn a distinction between a penalty and a measure that concerns the execution or enforcement of a penalty. Measures concerning the execution or enforcement of a penalty do not fall within the prohibition contained in Article 7(1) of the Convention: see *Morgan v Ministry of Justice* [2023] UKSC 14, [2023] 2 WLR 905 at paragraphs 78-97.

95. In *Morgan*, the relevant provisions in force at the time of sentencing provided that when a court imposed a determinate sentence it must specify a period (referred to as the custodial period) at the end of which the offender was to be released on licence. That custodial period was not to exceed one half of the term of the sentence. That meant that an offender would be released on licence after serving one half of the sentence in custody. The provisions governing early release (i.e. release before the

end of the term of the sentence) was subsequently amended in respect of specified terrorist offences so that an offender would only be released after serving two-thirds of the sentence (not one-half as had previously been the case). The Supreme Court reviewed the case law of the European Court and concluded that changes in the regime governing the period at which an offender serving a determinate sentence might be released on licence, including those which meant that an offender might serve more of the determinate sentence in custody rather than on licence, involved the execution or enforcement of a penalty, not the penalty itself (which was the determinate sentence imposed by the court). They did not, therefore, fall within Article 7(1) of the Convention.

96. That approach reflects the consistent case law of the European Court. That understanding is not altered by the cases on which the respondent relied. Dealing first with *Del Rio Prada,* the European Court considered what constituted a penalty and determined whether changes in the measure affecting the early release from prison concerned the execution or enforcement of the penalty and so fell outside scope of Article 7(1). It said, so far as material, that:

> "82. The wording of art.7(1), second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity. [46] The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.
>
> …..
>
> 83. Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of art.7 . [48] In the *Uttley* case, for example, the Court found that the changes made to the rules on early release after the applicant's conviction had not been "imposed" on him but were part of the general regime applicable to prisoners, and far from being punitive, the nature and purpose of the "measure" were to permit early release, so they could not be regarded as inherently "severe". The Court accordingly found that the application to the applicant of the new regime for early release was not part of the "penalty" imposed on him.
>
> …..

> 90. In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time, or in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time."

97. The facts in *Del Rio Prada* were that the offender was sentenced in eight different criminal proceedings to sentences for terrorist related offences, including a number of murders. The individual sentences imposed for all the offences amounted to over 3,000 years' imprisonment. Under the law in force at the time, the maximum time to be served was 30 years' imprisonment. Further, an offender was entitled under the laws to remission of sentence in exchange for work done. The offender in this case had become entitled to 3,282 days remission in respect of work she had undertaken. It was understood that those days would reduce the maximum sentence of 30 years. A subsequent change in the case law led to the 3,282 days only being used to reduce the individual sentences as they were being served. In those circumstances, given that the combined length of the individual sentences was over 3,000 years, the 3,282 days remission would not, in practice result in any reduction in the time spent in prison. Had they been applied to reduce the maximum sentence of 30 years, the offender would have spent approximately 9 years less in prison. The European Court found that the practice of the Spanish courts had been to treat the maximum sentence as a "new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention should be applied" (paragraph 99). Consequently, the "penalty imposed on the applicant thus amounted to a maximum of 30 years' imprisonment, and any remission for work done in detention would be deducted from that maximum penalty" (paragraph 103). On those specific facts, the European Court said:

> "108. That being so, although the Court agrees with the Government that arrangements for granting adjustments of sentence as such fall outside the scope of art.7, it considers that the way in which the provisions of the Criminal Code of 1973 were applied in the present case went beyond mere prison policy.
>
> 109. Regard being had to the foregoing and to Spanish law in general, the Court considers that the recourse in the present case to the new approach to the application of remissions of sentence for work done in detention introduced by the "Parot doctrine" cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant as the Government have argued. This measure taken by the court that convicted the applicant also led to the redefinition of the scope of the "penalty" imposed. As a result of the "Parot doctrine", the maximum term of 30 years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a 30-year

> sentence to which no such remissions would effectively be applied.
>
> 110. The measure in issue accordingly falls within the scope of the last sentence of art.7(1) of the Convention."

98. In other words *Del Rio Prada* does not alter the basic position that "arrangements for granting adjustments to sentence as such fall outside" the scope of Article 7(1). It was the particular facts of that case which led to the conclusion that the measures in question concerned the penalty itself, rather than the method of executing or enforcing it (as noted by Lord Stephens in *Morgan* at paragraph 94).

99. Similarly, the decision in *Kupinskyy v Ukraine* relied upon by the respondent does not alter matters. There an offender was sentenced in Hungary to life imprisonment for murder with the possibility of release on parole after serving twenty years of imprisonment. He was deported to Ukraine. The Ukrainian courts recognised that the sentence was one of life imprisonment without forfeiture of property and with the possibility of seeking release on parole after serving twenty years. Some years later, the district court refused an application by the offender for release on parole noting that he was serving his sentence under Ukrainian law which did not provide for release on parole for life prisoners. The European Court said:

> "47. The Court reiterates that in its established case law a distinction is drawn between a measure that constitutes in substance a "penalty" and a measure that concerns the execution of a penalty…..Whether the case concerned a change in the regime for release on parole within the country or such a regime took place as the result of a transfer of prisoners, the Court has consistently held that such a regime relates to the execution of a sentence and thus excludes the application of Article 7…..
>
> "51 The Court notes that unlike the cases in which a change in the regime for release on parole was found to belong exclusively within the domain of the execution of a sentence ….. in the present case the applicant's transfer and, in particular, the manner in which his penalty was converted ultimately amounted to a change from a regime allowing release on parole to no availability of parole at all. As the Court has found, the applicant's sentence imposed as a result of the conversion is irreducible under current Ukrainian law… Thus the principal difference between the present case and previous ones concerning the transfer of prisoners …is that those cases concerned the terms for granting parole in the State to which the prisoner was transferred, while in the present case there is an issue of the unavailability of parole as a matter of law. The Court also observes that, as can be seen from its relevant provisions, the Hungarian legislation does differentiate between reducible and irreducible life sentences … and provides for both. In the applicant's case, the domestic courts in Hungary

> had explicitly decided to impose on him a reducible life sentence and not an irreducible one.
>
> …..
>
> 56. The Court therefore concludes that by converting the applicant's original reducible life sentence to one that was irreducible under Ukrainian law the domestic courts in the particular circumstances of the present case went beyond mere measures of enforcement and changed the scope of the applicant's penalty. Article 7 is therefore applicable in the present case."

100. That decision again confirms the general position that changes in the arrangements governing release before the end of a sentence are matters concerning the execution and enforcement of the sentence. The position was different in that case because "in the particular circumstances" the applicant's sentence was converted from one where he was sentenced to life imprisonment but was eligible for parole after serving twenty years, to a sentence under Ukrainian law where he was imprisoned for life, and would have to spend the rest of his life in prison with parole not being available.

101. Applying the principles governing Article 7(1) to the present case, we have no doubt that the arrangements governing the ability to apply for a reduction in the minimum term to be served concerns the execution and enforcement of the sentence. The sentence of DHMP is an indefinite one. Following a conviction for murder, the offender is sentenced by the court, in accordance with the relevant statutory provisions and case law, to serve a minimum term in detention. The penalty includes the minimum term to be served.

102. The arrangements in place until February 2021 permitted applications to be made to the Secretary of State seeking a reduction, as an act of clemency, in the minimum term. Decisions refusing such applications did not extend the minimum term fixed by the court. If an application were granted, and the minimum term were reduced, the applicant would be able to apply earlier to the Parole Board for release on licence than would otherwise have been the case. Further, the application was to be determined by reference to matters occurring after sentence, essentially, exceptional progress in prison. The arrangements did not involve determination of the appropriate minimum term reflecting the seriousness of the offence; that was the responsibility of the court that sentenced the offender. The arrangements, therefore, were concerned with the manner of execution or enforcement of the sentence, including the minimum term, fixed by the court and did not fall within Article 7(1) of the Convention. Similarly, the arrangements made by section 27A and 27B by which a court could reduce the minimum term having regard, in particular, to whether the offender's rehabilitation has been exceptional or whether continued detention or imprisonment for the remainder of the minimum term would give rise to a serious risk to the welfare or continued rehabilitation of the offender, concern the manner of execution or enforcement of the penalty fixed by the sentencing court. For those reasons, neither the withdrawal of the arrangements by the Secretary of State in February 2021, nor the statutory provisions enacted in 2022 providing for a limited ability for certain offenders to apply for a reduction in the minimum terms, fall within the scope of Article 7(1) of the Convention.

THE THIRD ISSUE – ARTICLE 14, READ WITH ARTICLE 5, OF THE CONVENTION

The Issue and the Submissions

103. The primary issue between the parties is whether the provisions in section 27A of the 1997 Act, as amended, are objectively justified for the purposes of Article 14 of the Convention.

104. Mr Watson submits that they are. He submits that the intention of Parliament was to make arrangements whereby those aged under 18 at the date of sentence were given the opportunity of applying for at least one review of the minimum term and those aged 18 and over were not. Parliament was entitled to adopt a bright line rule indicating which offenders could and which could not apply for a review and the selection of 18 as the date of sentence, the date when a person is an adult was a justifiable one. Further, the aim of the legislation was to reduce the distress to victims' families which was also a legitimate aim and it was proportionate to limit the opportunity for seeking review to those who were under 18 at the time of sentence.

105. Mr Fitzgerald submitted that the minimum term fixed pursuant to section 82A of the PCCA was a provisional sentence only. It was inherent in a sentence of DHMP that the minimum term would be subject to review from time to time. The Divisional Court was correct to conclude, therefore, that section 27A did not alter the inherent nature of a sentence of DHMP. He submitted that the date of sentence rarely, if ever, had any bearing on the date on the seriousness of an offence or the culpability of the offender and might be outside the control of the offender. He submitted that the arrangements in section 27A treated those aged 18 as fully developed adult offenders to whom welfare principles, rehabilitative considerations, and the differentiated approach to those who offended in childhood, did not apply. That approach was wrong and had been condemned by the courts. He submitted that that section 27A gave rise to concerns about other rights such as those guaranteed by Articles 3 and 5 and operated unfairly and retrospectively in respect of those respondent who had a legitimate expectation of an opportunity for a review.

Discussion

106. Article 14 of the Convention provides as follows:

> "Prohibition on Discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

107. As appears from its terms, Article 14 can only be considered in conjunction with the enjoyment of one or more of the substantive rights or freedoms set out in the Convention. The relevant right here is the right to liberty set out in Article 5, the material parts of which are set out above. In broad terms, the approach to the question of whether differential treatment is contrary to Article 14 involves consideration of

the following issues, albeit that different cases express the issues in different language:

> (1) does the subject matter of the complaint fall within the ambit of a Convention right;
>
> (2) are people who are in analogous, or relevantly similar, situations treated differently;
>
> (3) is that difference in treatment based on an identifiable characteristic amounting to a status; and
>
> (4) does the difference in treatment have an objective and reasonable justification? That in turn involves consideration of whether the measure giving rise to the differential treatment pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The burden lies on the appellant in the present proceedings to demonstrate that the legislative measures are objectively justified.

108. In the present case, it is accepted that the claim falls within the ambit of a Convention right, i.e. Article 5. It is accepted that an offender who committed an offence of murder whilst a child but was sentenced when aged 18 or over is in an analogous position to another offender who was under the age of 18 when he was sentenced. It is accepted that the differential treatment is done on the ground of age which is another status. See paragraph 32 of the judgment of the Divisional Court. The relevant issue, therefore, if the fourth issue identified in paragraph 106 above.

109. The difference in treatment arising under section 27A of the 1997 Act as amended is that offenders aged 18 or over at the time of being sentenced to DHMP do not have the opportunity to apply for a review of the reduction in the minimum term imposed by the sentencing court when fixing the minimum term under section 82A of the PCCA (or now, section 321 of the Sentencing Act) whereas those aged under 18 at the time of sentence will have at least one opportunity to apply for a review of their minimum term. The issue is whether the difference in treatment is justified. It is for the appellant to demonstrate that the legislation is objectively justified.

110. The difference in treatment arises from the operation of legislation enacted by Parliament, namely sections 27A and 27B, as inserted into the 1997 Act by the 2022 Act. It is helpful, first, to consider the proper approach to be adopted by the courts when considering the compatibility of provisions of primary legislation with Article 14 of the Convention.

The Appropriate Approach

111. The appropriate approach is that set out by the Supreme Court in *R (SC and others) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2022] AC 223. That case concerned the provision of welfare benefits but the judgment makes it clear that the approach it sets out applies to "legislation in relation to general measures of economic and social strategy". The approach to proportionality gives appropriate weight, usually substantial weight, to the judgment of the legislature in fields such as "economic and social policy, national security, penal policy and matters

raising sensitive moral and ethical issues" (paragraph 161). The subject matter here concerns the legislative choice in terms of penal policy, and the balancing of the interests of victims' families with the interests of offenders.

112. The aim or purpose of the legislation is primarily to be deduced from the terms of the legislation. The court may have regard to background material, such as a White Paper, or explanatory notes, which may indicate the "mischief" or problem that the legislation was addressing. See generally, paragraphs 32, 167 and 172 of the judgment in *SC.* Furthermore, the legislation must also satisfy a proportionality test in that the court must decide whether the means used by the legislature to achieve its policy were appropriate and not disproportionate in its adverse effects (see paragraph 174 of *SC*). For those purposes reference could be made to Parliamentary debates and other Parliamentary material but, as Lord Reed observed in *SC:*

> "182. It is of course true that the relevant question, when considering the compatibility of legislation with Convention rights, is not whether Parliament considered that issue before making the legislation in question, but whether the legislation actually results in a violation of Convention rights. In order to decide that question, however, the courts usually need to decide whether the legislation strikes a reasonable balance between competing interests, or, where the legislation is challenged as discriminatory, whether the difference in treatment has a reasonable justification. If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court's assessment, because of the respect which the court will accord to the view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation.
>
> 183. However, it is important to add two caveats. First, the courts should go no further than ascertaining whether matters relevant to compatibility were raised during the legislative process, if they are to avoid assessing the adequacy or cogency of Parliament's consideration of them, contrary to Lord Nicholls' third principle (in my numbering: para 176 above). The distinction between determining whether, as a question of historical fact, an issue was before Parliament, on the one hand, and determining the cogency of Parliament's evaluation of that issue, on the other hand, is real and must be respected. Undertaking a critical assessment of Parliamentary debates would be contrary to both authority and statute. Furthermore, as I have explained at paras 167–171 above, it would mistake the nature of Parliamentary processes, and create a risk that the

> courts might undermine Parliament's effectiveness. Trawling through debates should not, therefore, be necessary, and is unlikely to be appropriate: a high level review of whether a topic was raised before Parliament, whether in debate or otherwise, should suffice.
>
> 184. Secondly, the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility."

113. Against that background, the question of whether the difference in treatment is shown to be objectively justifiable depends on whether the difference pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the aim and the means employed to achieve it (see paragraph 98 of *SC*). As Lord Reed noted at paragraph 99:

> "99. The court has not itself provided, in its judgments, a systematic analysis of relevant factors or an explanation of how they interact. Its accounts of the general principles it applies are stated at a high level of generality. Nevertheless, patterns emerge, and inferences can be drawn, from a survey of its case law, as I shall explain. It is doubtful whether the nuanced nature of the approach which it follows can be comprehensively described by any general rule. It is more useful to think of there being a range of factors which tend to heighten, or lower, the intensity of review. In any given case, a number of these factors may be present, possibly pulling in different directions, and the court has to take them all into account in order to make an overall assessment. The case law indicates, however, that some factors have greater weight than others."

114. In that regard, as Lord Reed noted:

> "100. One particularly important factor is the ground of the difference in treatment. In principle, and all other things being equal, the court usually applies a strict review to the reasons advanced in justification of a difference in treatment based on what it has sometimes called "suspect" grounds of discrimination. However, these grounds form a somewhat inexact category, which has developed in the case law over time, and is capable of further development by the European court. Furthermore, a much less intense review may be applied even in relation to some so-called suspect grounds where other factors are present which render a strict approach inappropriate, as some of the cases to be discussed will demonstrate."

115. The case law has in the past developed a requirement that, in principle, "very weighty reasons" must be shown to justify a difference in treatment on a "suspect" ground such as sex or gender. Age (the ground for the different treatment in this case) has not been treated as a suspect ground and consequently, very weighty reasons have not

been required to justify differential treatment on grounds of age: see generally *SC* at paragraphs 101 and 114.

116. A further important factor is that the court generally allows a wide margin to the legislature's policy choice in areas of economic and social strategy. See paragraphs 115(2), 142 and 144 to 146 of *SC*. In that regard, as Lord Reed observed in *SC*:

> "180 As Lord Bingham explained, the degree of respect which the courts should show to primary legislation in this context will depend on the circumstances. Among the relevant factors may be the subject-matter of the legislation, and whether it is relatively recent or dates from an age with different values from the present time. Another factor which may be relevant is whether Parliament can be taken to have made its own judgment of the issues which are relevant to the court's assessment. If so, the court will be more inclined to accept Parliament's decision, out of respect for democratic decision-making on questions of political controversy.
>
> 181. In that regard, it is apparent from cases such as *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, para 108 , and *Hirst v United Kingdom* (No 2) (2005) 42 EHRR 41, para 79 , that the European court takes account of whether the legislature has considered the matters which are relevant to a measure's compatibility with the Convention , although that is by no means determinative of its decision. Since the European court is likely to take that into account, the objective of the Human Rights Act suggests that domestic courts should do likewise, in order to enable Convention rights to be properly enforced domestically and not only by recourse to Strasbourg."

117. Against that background, the Supreme Court decided in *SC* that legislation restricting the payment of welfare benefits in the form of tax credits to families with two children did amount to discrimination against women. The aims were to reduce public spending on welfare benefits and to address the unfairness arising from the system and the imposition of an unreasonable burden on those taxpayers paying for the scheme. Those aims were legitimate (see paragraphs 190 to 192 of *SC*). "Parliament had decided that the objectives being pursued by the measure justified its enactment, notwithstanding its greater impact on women" and in those circumstances, the Supreme Court saw no reason on which it could properly take a different view (see paragraph 199 of *SC*). Similarly, in relation to the claim that the legislation discriminated against children living in households with more than two children, the assessment of proportionality "ultimate resolves into the question of whether Parliament made the right judgment" and there was "was no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims" (see paragraphs 208 and 209 of *SC*).

Application of the Principles to the Present Case

118. By way of background, it is clear from the White Paper that the existence of the review procedure where offenders could apply for a review of their minimum term, and particularly the opportunity for continuing reviews, was seen as distressing to the families of victims.

119. The aims of the legislation can be determined from the terms of section 27A and 27B of the 1997 Act as amended. Those who were aged 18 or over when sentenced, and who begin their sentence as adults, do not have the opportunity to apply for a review (section 27A(1) and (11)). Those who are serving a sentence of DHMP and were under 18 when sentenced may make an application for the minimum term to be reviewed after serving half of the minimum term fixed by the court (section 27A(1) and (2)). The application is referred to the High Court which must, in particular, take account of whether the offender's rehabilitation has been exceptional, and whether continued detention or imprisonment is likely to give rise to "a serious risk" to the welfare or continued rehabilitation of the offender "which cannot be eliminated or mitigated to a significant degree" (section 27B(1) and (4)). A further application is only allowed if two years has elapsed since the first review and if the offender is still a child, that is still under 18, at the time that the further application is made (section 27A(4)). In practice, that will rarely permit a second review and will only permit a second review where, for example, a child was between about 10 or 12 years old at the time of the offence and was sentenced to a minimum term of six years or less.

120. The legislation, therefore, aims to reduce the opportunities for offenders to apply for a review of their minimum term. It does so by drawing a distinction between those who begin their sentence as adults and who will not have an opportunity to apply for a review. An exception is made for those who begin their sentence when they are children, that is those who are aged between 10 and 17 when sentenced. They will have an opportunity to apply for a review in order to demonstrate, in particular, that whilst serving the first half of their minimum term (part of which at least will be during their childhood) their rehabilitation is exceptional or they face a serious risk to continued progress or welfare which cannot be significantly mitigated. They will only have the opportunity to make a further review if they are still under 18 at the time when a further application can be made and, by definition, any progress in those circumstances, will have occurred when they were children. Bright line distinctions based not on the date of commission of the offence but a later date such as date of conviction are a recognised feature of the criminal justice system. As the Divisional Court recognised, for example, the type of custodial sentence that may be imposed on a person will depend upon their age at the date of conviction not their age at the time of committing the offence (see paragraph 19 of the judgment). Bright line distinctions based on the date of sentence, and differentiating between those who begin their sentence as adults and those who are still children (that is, aged between 10 and 17), are similarly acceptable.

121. The aims that the legislation seeks to achieve are, therefore, legitimate ones, seeking to balance the interests of the families of victims with those of offenders. The means adopted involve distinctions based on the age at the time when the offender begins their sentence. The next question is whether there is a reasonable relationship of proportionality between the aims and the means employed.

122. The appropriate approach to apply in this case is that set out in *SC*. Whilst that case concerned the provision of welfare benefits, the judgment in *SC* makes it clear that the

approach it sets out applies to legislation concerning measures of economic and social strategy. That approach gives appropriate weight, usually substantial weight, to the judgment of the legislature in fields such as "economic and social policy, national security, penal policy and matters raising sensitive moral and ethical issues" (paragraph 161 of the judgment in *SC*). The subject matter here concerns legislative choice in terms of penal policy and the balancing of the interests of victims' families with the interests of offenders.

123. The starting point is that the ground for the difference in treatment is not a suspect ground which would, in principle, call for weighty reasons by way of justification. The difference here is based on age when sentenced. Age is not a suspect ground.

124. Next, it is important to bear in mind that the case involves primary legislation enacted by Parliament. Legislation necessarily involves differentiating between different groups of people (see paragraph 162 of *SC*). The scheme enacted by Parliament involved differentiating between different groups of people, those aged 18 when sentenced and those who were still children. The very terms of the legislation required Parliament to determine if age at date of sentencing was an appropriate differentiating feature and whether that would strike the right balance between the interests of victims' families and offenders. In addition, the legislation was enacted relatively recently in 2022. Among the relevant factors in assessing the degree of respect which courts should show to primary legislation is whether the legislation is relatively recent or whether it dates from a time when values were different (see paragraph 180 of *SC*).

125. Furthermore, Parliament expressly considered an amendment which would have provided for persons who were under the age of 26 to have the opportunity to apply for a review. Parliament debated the issue of whether the appropriate age for allowing an offender to apply for a review should be under 26 or under 18. It voted against the amendment. See above at paragraph 52. The legislation provided that only those under 18 when sentenced should have an opportunity to apply for a review. The fact that Parliament has made its own judgment on the issue of the appropriate age for allowing offenders to apply for a review is a very powerful factor indicating that the appropriate balance has been struck.

126. The Divisional Court considered that "there was no proper basis for us to take what was said in Parliament into account" citing *Pepper v Hart* [1993] AC 593 (see paragraph 31 of its judgment). That, with respect, was wrong. The decision in *SC* makes it clear that reference to Parliamentary debates can be taken into account in determining whether the means used by the legislation to achieve its policy was proportionate. Care needs to be used to ensure that the courts go "no further than ascertaining whether matters relevant to compatibility were raised during the legislative process" (paragraph 183 of *SC*).

127. Among the relevant factors in assessing the degree of respect which courts should show to primary legislation is "whether Parliament can be taken to have made its own judgment of the issues which are relevant". If so, the courts will be more inclined to accept Parliament's decision (see paragraph 180 of *SC*).

128. In this case, the fact that Parliament positively considered the issue of whether the opportunity to apply for a review should be given to those under the age 18 or 26 when sentenced, and decided on the age of 18, indicates that Parliament made its own

judgment on an issue which is relevant to the issue of the proportionality of the legislation. That is a legislative choice to which the courts should give appropriate weight which, normally, will be substantial in fields including social policy and penal policy (see paragraph 161 of *SC* and also, by way of example, paragraphs 115(2) and 146 of *SC*).

129. It is appropriate, next, to consider the arguments of the respondent, and the reasons of the Divisional Court, for considering that the legislation enacted by Parliament is, nonetheless, disproportionate. We must take this step as, ultimately, it is a matter for the courts to determine whether the legislation is compatible with the Convention.

130. One reason for the Divisional Court coming to its conclusion was its view that it is inherent in a sentence of DHMP that there must be opportunity for a review which might result in a reduction of the minimum term. The respondent put it in terms that a continuing review was an intrinsic feature of the sentence and that any minimum term may only be provisional, relying on *Smith*. That argument was, essentially, accepted by the Divisional Court at paragraph 47 of its judgment. It said that section 27A "did not change the nature and ambit of a sentence of DHMP" and it remained a sentence of detention which was to be distinguished from a sentence of imprisonment for life or detention for life: see paragraphs 54. At paragraph 47 where the Divisional Court said this:

> "Had Parliament wished to legislate to change the basis of sentencing those who commit the offence of murder when under 18 but who are not sentenced until after their 18th birthday, it would have done so explicitly. It did not do so. The essential nature of a sentence of DHMP is unchanged. It is in that context that the effect of section 27A must be assessed".

131. There are a number of difficulties with the reasoning of the Divisional Court. It is correct that a sentence of DHMP remains a sentence of indefinite duration imposed on an offender who committed murder whilst a child. However, the operation of the sentence has altered over time. Initially, the absence of a fixed duration for the sentence, and of other means of determining when detention should be brought to an end and the offender released on licence, meant that the Secretary of State had to determine whether to bring the detention to an end. The courts held that it was intrinsic to the operation of the sentence that that decision be kept under continuous review. However, that position altered. From 30 November 2000, the court fixed the minimum term that the offender must serve, having regard to the seriousness of the offence. The executive, in the form of the Secretary of State, did not determine that issue. Further, once that period had expired, it was for the Parole Board to determine if the offender could be released on licence and managed in the community. If so, the Secretary of State had to release the offender. If not, he could not. The role of the Secretary of State, as explained above, was to determine whether as a matter of clemency the minimum term should be reduced by reason of events occurring after sentence, principally the progress that the offender had made.

132. More fundamentally, section 27A and 27B clearly do operate to modify the arrangements relating to applications for review. Section 27A(11) expressly provides that "there is no right for any person who is serving a DHMP sentence to request a review of the minimum term other than that conferred by this section". The section

only confers such a right on a person serving a sentence of DHMP who "was under the age of 18 when sentenced". Statute makes it abundantly clear that a person who was aged 18 or over at the time of sentence does not have a right apply for a review of the minimum term. Whatever the source of the power to consider applications for a review of the minimum term, that power has now been restricted. The better view is that the power was an exercise of the royal prerogative and that power has now been replaced or restricted, by the statutory scheme. If, however, the opportunity to apply for reviews was, in some way, derived from the statutory provisions governing sentence (section 103 of the 1908 Act and subsequent sections such as section 90 of the PCCA), then that statutory provision has clearly been modified by the express provisions of sections 27A and 27B of the 1997 Act as amended.

133. Comparison between the position under earlier legislation and the current legislative provision does not assist in considering the compatibility of the current legislation with Article 14 of the Convention. The issue in this case is whether the difference in treatment between those who were aged 18 when sentenced and those under 18 in terms of ability to apply for review, which is now provided for by Parliament in section 27A and 27B, is objectively justifiable for the purposes of Article 14 of the Convention. That depends, essentially, upon whether those statutory provisions seek to achieve a legitimate aim and are proportionate. That is to be assessed by reference to the principles described above not by a comparison between different versions of the legislation.

134. Another principal aspect of the respondent's submissions and the reasoning of the Divisional Court is this; it is said that it is recognised that the maturity of offenders develops over time and, in particular, that offenders continue to develop beyond the age of 18 (referring to *R v Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R (S) 101, and *Clarke* which is discussed above). The Divisional Court observed that the fact that the person has achieved the age of 18 when sentenced will not determine whether a custodial sentence should be imposed and, if so, of what length. Rather it is the culpability of the offender at the date of the commission of the offence which had to be assessed, not his culpability at the time of sentence, as set out in *Ahmed* (which is discussed above). See paragraphs 18 to 24 of the Divisional Court's judgment.

135. Those observations of the Divisional Court are correct. They do not, however, address the issue in this case. Questions of culpability are considered when the minimum term is fixed by the court. The court must impose a sentence of DHMP in the case of murder where the offender was 18 at the time of the offence. It must determine the appropriate minimum term, having regard to the seriousness of the offence which includes the culpability of the offender and the harm done. In assessing culpability, it will necessarily consider the maturity of the offender at the time when he committed the offence. That is true of all offenders, whatever their age. Whether an offender is aged 12, or 15, or 17, the court will consider his culpability at the time that he committed the offence. The same is true if the offender was aged 18, 20 or 25 at the time he committed a murder. The court will, in the light of the case law, assess his culpability as at the time of the offence. Furthermore, sentencing in cases of murder takes place within the framework of schedule 21 to the relevant statute which fixes starting points for murder in the case of adults and children (as at the date of the commission of the offence) and provides for adjustments taking account of aggravating and mitigating factors (which specifically include the age of the

offender). The culpability of the offender as at the time that he committed the offence is, therefore, considered when the court fixes the minimum term. Applications for a review are concerned with events after the sentence has been imposed and, in particular, progress since sentencing and serious risk to welfare or continued rehabilitation. The submissions of the respondent, and the reasons of the Divisional Court, on this issue do not, therefore, provide any real assistance in assessing whether the arrangements governing applications for review in sections 27A and 27B are objectively justifiable.

136. At paragraph 51 of its judgment, the Divisional Court considered the way in which the process of review would occur. It considered that, in what it described as the average case, the review will not be carried out until the offender is his early to mid-twenties and will consider his progress over his entire time in custody, which will include his time as a child and his time after the age of 18. It therefore considered that there was "no logic" in distinguishing between offenders aged 18 when sentenced and young persons.

137. With respect, the Divisional Court is not there carrying out the proper process of assessing the proportionality of legislation to determine whether it is compatible with Article 14 of the Convention. Legislation necessarily involves distinguishing between groups of people and balancing the competing interests of different groups. In the present case, Parliament was weighing the interests of the families of victims of crimes against the interests of offenders. Parliament did not consider that those who were 18 when sentenced and began their sentence as an adult ought to have the opportunity to apply for a review of the minimum term. By contrast, Parliament considered those who were aged 10 to 17, should have the opportunity of applying for at least one review to enable their progress over the entirety of their time since sentencing to demonstrate if they had made exceptional progress or if there were risks to their welfare (and if they were still under 18 at the time when a second application could be made, to allow them to do so). When balancing the competing interests of victims' families and offenders, it is not illogical to draw a distinction between those who begin their sentence as adults and those who are still children aged between 10 and 17 when they begin their sentence.

138. The Divisional Court noted that the date of sentence could be delayed for a variety of reasons (see paragraphs 52 and 53 of its judgment). That is true. But the process of legislating necessarily involves drawing distinctions, identifying groups by reference to certain characteristics, and weighing competing interests. Legislation is not disproportionate merely because, in some cases, circumstances mean that an individual will fall into one group rather than another. Furthermore, the Divisional Court does not in its judgment recognise that Parliament has considered, and decided, where the balance lies in the present case. It consciously adopted a system based on age when sentenced. The Divisional Court does not appear specifically to have considered that matter when assessing whether the legislation has been shown to be objectively justifiable.

139. The Divisional Court considered whether the aim of protecting victims' families was a legitimate one. As the Divisional Court were bound to acknowledge, victims' families would be told of the existence of a review. The Divisional Court minimised the significance of that fact because their view was that it was highly unlikely that the victims' families would have anything useful or relevant to say. With respect, we

again disagree with the approach of the Divisional Court. It is clear from the background material that the existence of a review could be extremely distressing to victims' families. We can well understand that. The family will have experienced the murder of a member of their own family. They will have seen the court fix the minimum term that the offender must serve before he can be considered for release on licence. That will be based on the harm caused and the culpability of the offender. If that offender applies to have that minimum term reduced, with a view to seeking parole and being released on licence earlier, then as already mentioned, and in fairness to the family so it seems to us, they will need to be informed of that. It is easy to imagine the distress to a victim's family that that would cause. The aim of alleviating that distress by eliminating or reducing the number of cases where such a review might occur is a legitimate one.

140. It was also submitted on behalf of the respondent that section 27A and 27B raised concerns in relation to other, substantive Convention rights including Articles 3 and 5. The legislation was said to operate retrospectively and therefore unfairly affect the legitimate expectation of offenders who had sought to make exceptional progress. There is no proper basis, and no evidence, on which it could legitimately be concluded that the arrangements governing the opportunity for applying for a review of a minimum term involve torture or inhuman or degrading treatment contrary to Article 3 of the Convention. For the reasons given above, the statutory provisions do not give rise to any risk of arbitrary or unlawful detention contrary to Article 5. They do not operate retrospectively in a way which contravenes Article 7 of the Convention. So far as expectations are concerned, courts are required to explain in ordinary language what the effect of the sentence is. They will, typically, explain what the minimum term is which offenders must serve before they are eligible for release on licence and that release may occur some time after they have served their minimum term. By way of example, Mr Quaye was told that he would be "detained at Her Majesty's pleasure for a minimum of 15 years. That means you will be held in secure custody for at least 15 years, it may be a lot longer I emphasise that. You will not be released unless and until the Parole Board is satisfied that the risk you pose to the public is manageable in the community". The expectations of offenders will be conditioned by the minimum term and the decision of the Parole Board on risk, not on the possibility of applying for a review, which may be unsuccessful, of the minimum term because of events occurring after the sentence.

141. Finally, Mr Fitzgerald submitted that a heightened or enhanced or close degree of scrutiny should be applied to the legislation given that the liberty of the subject is involved, the magnitude of what is at stake and the risk of arbitrariness. It is right, however, to bear in mind in that respect that the restriction on liberty arises, firstly, out of the imposition of the sentence of DHMP imposed for murder, and the elements of the minimum term to be served, reflecting the seriousness of the offence, and release on licence which depends upon the assessment of risk by the Parole Board. The issues in this case do not concern those matters. Secondly, for the reasons given already, the legislative provisions do not give rise to arbitrariness or unlawful detention. Thirdly, we are dealing with the opportunity to apply for a review of the minimum term fixed by the court. There is no entitlement to any reduction in the minimum term. That said, we accept that the legislation does affect the interests of offenders. The possibility of a reduction the minimum term that must be served before the offender becomes eligible for consideration for release on licence is likely to be

significant for an offender. Those who were aged 18 when sentenced will not have an opportunity under the legislation to apply for a review. That has to be borne in mind when assessing the proportionality of the legislation. That said, the appropriate approach to determining whether the legislation has been shown to be objectively justifiable is that set out in *SC* and described above.

142. Standing back from the details then, we consider that the position is this. The aim of the legislation was to reduce the distress of victims' families by reducing the opportunities for offenders to apply for reviews of the minimum term fixed by the court to reflect the seriousness of the offence in accordance with the legislation and relevant case law and guidelines. The legislation did so by providing that those who were 18 when sentenced, and who began their sentences as adults, would not be eligible to apply for a review. Those who were under 18 when sentenced, i.e. they were aged 10 to 17, would have at least one opportunity to apply for a review (and possibly, but likely only in rare cases, a second review if they were still children when the time for applying for a second review arose). The review would consider, in particular, whether their progress in detention and any serious risk justified reducing the minimum term. The difference in treatment was based on the age when sentenced. It was not based on a suspect ground such as gender or race where, in principle, weighty reasons would be needed to justify the difference in treatment. Further, the difference in age was determined recently by Parliament. It did so having specifically considered whether those aged under 26, rather than under 18, should have the opportunity to apply for a review of the minimum term and decided that the appropriate distinction was whether the person was 18 when sentenced. That reflected Parliament's legislative choice and Parliament's balancing of the competing interests of victims' families and offenders. That choice deserves respect. None of the reasons given by the Divisional Court, or advanced on behalf of the respondent, cast any doubt on the assessment made by Parliament that the legislation strikes a fair balance between the competing interests.

143. For those reasons, we consider that the legislation does pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The appellant, on whom the burden lies, has established that the difference of treatment provided for by section 27A and 27B of the 1997 Act is objectively justified. Put differently, the legislation is objectively justified using the test, as expressed in cases such as *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700, and paragraph 92 of *R (A) v Compensation Injuries Compensation Authority* [2021] UKSC 27, [2021] 1 WLR 3746. The difference in treatment is justified. The legislation has a legitimate aim. It is rationally connected to that aim and is no more intrusive than it requires to be. It strikes a fair balance between the competing interests.

144. For those reasons we would allow the appeal on ground 1. We would set aside the declaration that sections 27A(1) and (11) of the 1997 Act as amended are incompatible with Article 14, read with Article 5, of the Convention.

ANCILLARY MATTERS

145. By a respondent's notice, the respondent applied to admit further evidence. In fact, the respondent had made an application to admit that evidence to the Divisional Court and the application had been refused. That appears from paragraph 3 of the order of

the Divisional Court which provides that permission is refused in respect of the "application dated 6 June 2023 to rely on further evidence". The appropriate course of action was for the respondent to seek to appeal that part of the order, demonstrating that the order was wrong or unjust (as provided for by CPR 52.21), rather than simply making an application to this Court to adduce further evidence.

146. The further evidence comprised two witness statements of offenders sentenced to DHMP. The Divisional Court refused to admit this evidence as it was irrelevant to the claim (see paragraph 5 of its judgment). No reason was advanced as to why this conclusion was wrong and, at the hearing before this Court, Mr Fitzgerald no longer sought to have that evidence adduced. The application referred to a witness statement of a solicitor Mr Creighton. To the extent that that sought to adduce evidence of review decisions of the High Court, the Divisional Court considered that leave was not needed to adduce those. So far as the statement contains one paragraph referring to the respondent's instructions as to what he knew of the review process and his motivation, it is unclear whether it was still sought to adduce that. For the avoidance of doubt, we have in any event, considered that paragraph and the reports of the respondent's progress whilst in detention.

147. Finally, there is a report by Dr Delmage. This is said to be an expert report (although no permission was granted for such a report under CPR 35.4 and there was no statement by Dr Delmage that he understood and had complied with his duty to the court as required by CPR 35.10). The statement contained Dr Delmage's views on the development of the brain. It appears that the evidence was sought to address the question of whether an individual's brain and maturity continue to develop after the age of 18. As the Divisional Court noted at paragraph 24, the courts approach sentencing on the basis that an individual's understanding and maturity may continue beyond 18. It considered that the evidence of Dr Delmage added nothing and permission to rely on that evidence was refused as it was unnecessary. We see nothing wrong or unjust in those conclusions and, whilst we have considered the statement, we would not allow the evidence of Dr Delmage to be admitted. We would also draw attention to the observations of the Divisional Court in *R (AB) v Chief Constable of Hampshire* [2019] EWHC 34612 (Admin) that expert evidence is rarely necessary to resolve a claim for judicial review and on the importance of giving careful thought to whether it is appropriate to seek to rely on expert evidence. That is particularly true in cases where the challenge is to the compatibility of legislation with a Convention right. It is unlikely, for example, that such issues will depend upon expert neurological evidence. Further, if it is thought necessary to seek to adduce evidence, it is rarely likely to be appropriate to leave that issue to be determined at the substantive hearing of the claim.

CONCLUSION

148. Section 27A and 27B of the 1997 Act, as amended, are compatible with Articles 5, 7 and 14, read with Article 5, of the Convention. The provisions do not involve arbitrary or unlawful detention contrary to Article 5. They do not impose a heavier penalty than the one that was applicable at the time contrary and are compatible with Article 7. The difference in treatment provided for by section 27A and 27B is objectively justifiable; the legislation pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim that the legislation seeks to achieve. We allow the appeal and set aside the

declarations that section 27A(1) and (11) of the 1997 Act, as amended, are incompatible with Articles 5 and Article 14, read with Article 5, of the Convention.