

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

UKSC 2025/0138

B E T W E E N :

**THE KING on the application of
QUAYE**

Appellant

- and -

SECRETARY OF STATE FOR JUSTICE

Respondent

APPELLANT’S WRITTEN CASE

References to [CA/x] are to para x of the Court of Appeal Judgment: [2024] EWCA Civ 226
References to [DC/y] are to para y of the Divisional Court Judgment: [2024] EWHC 211 (Admin)
References to [MB/a/b] are to tab a, page b of the Main Hearing Bundle

I. INTRODUCTION AND OVERVIEW

1. This case concerns fundamental changes to the treatment of some child offenders¹ subject to detention during His Majesty’s pleasure (“**DHMP**”) - the historic sentence of indefinite detention reserved by statute as the mandatory punishment for those who commit murder as children. This Court (constituted as the House of Lords) has previously held that DHMP is a unique sentence, distinct from adult mandatory life sentences both in objective and substance and designed to reflect the reduced culpability and greater rehabilitative potential of those who offend in childhood. Critically, it was held to include an inherent and defining requirement that any minimum term imposed at the outset must be capable of later review and reduction in light of a detainee’s progress and maturation: *R v Secretary of State for the Home Department, Ex parte Venables* [1998] AC 407 [**MB/66/1419**]; *R(Smith) v Secretary of State for the Home Department* [2006] 1 AC 159 [**MB/57/1246**].
2. The Appellant is a child offender. He was convicted of murder, committed whilst he was still a child. It is for that reason he was sentenced to DHMP.

¹ Unless otherwise indicated, the Appellant uses “child” to mean a person under 18, consistent with s105 of the Children Act 1989 and Article 1 of the United Convention on the Rights of the Child. “Child offender” refers to those whose offence was committed before the age of 18. “Young adult” refers to those aged 18-25 (inclusive).

3. Section 27A of the Crime (Sentences) Act 1977 (“**C(S)A**”)² provides that as of 29 June 2022 child offenders, such as the Appellant, who are (or have previously been) sentenced at or over the age of 18 will now be denied the opportunity to have their minimum term of DHMP reviewed and/or reduced, contrary to the fundamental rationale of their sentence, as identified in *Venables* and *R(Smith)*. The Appellant challenges the compatibility of this legislation with the European Convention on Human Rights (“**ECHR**”) and invites the Court to uphold the declaration of incompatibility made by the Divisional Court under s4 of the Human Rights Act 1998 (subsequently overturned by the Court of Appeal).
4. The Appellant suggests that in order to resolve the issues agreed between the parties in the Statement of Facts and Issues, this appeal raises three questions for the Court to resolve:
 - (1) Are mandatory life imprisonment and DHMP (the mandatory sentences for murder in respect of adults and children) substantively different sentences?
 - (2) If so, did or does DHMP contain an inherent right to review of a minimum term of detention: either (i) when the Appellant was sentenced in January 2015; or (ii) now?
 - (3) If so, does the removal of any opportunity to exercise that right, and/or the removal of that right altogether, from prisoners sentenced after their 18th birthday breach Articles 14, 5 and/or 7 ECHR?
5. It is the Appellant’s case that the answer to each of these questions is yes.

II. SENTENCING CHILDREN AND YOUTHS: BACKGROUND PRINCIPLES

6. It is a fundamental principle of domestic law (recognised in countless authorities, legislative provisions, and public policy) as well as binding international law that those who offend as children must be treated differently from those who offend as adults.³ That is because those who offend as children are recognised as being less culpable for their actions. Further, behaviour in childhood is also understood to be a less reliable indicator of future conduct and to hold greater potential for reform and rehabilitation as maturation continues. The position under ECHR is the same: “*when young offenders are held accountable for their deeds, however serious, this must be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of*

² Inserted by s128 of the Police Crime, Sentencing and Courts Act [MB/44/863]

³ See the Appellant’s Statement of Facts and Grounds at §§4.7 - 4.10 [MB/19/301]

their personality and their capacity for rehabilitation and reformation.” (*Khamtokhu and Asechick v Russia* [GC], (60367/08 and 961/11) 24 January 2017, §80 [MB/75/1762]).

7. These differences are not adequately reflected by a mechanistic reduction of sentences applicable to adults. It is therefore wrong in principle to treat child offenders as “*cut down versions of adult offenders*” (*Ahmed* [2023] 1 WLR 1858, §21 [MB/58/1267]). Rather, the law requires a “*root and branch difference of approach*” when sentencing those who offend as children (see *ZA* [2023] 2 Cr App R (S) 45, §§43, 50-68 [MB/67/1565]). These norms are of fundamental importance as “*ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society*” (*R v G* [2004] 1 AC 1034, §53).
8. The approach to be taken (i.e., whether a defendant is to be treated as an adult or child offender) is determined by the offender’s age *at the date of the offence*. Where a person offends and is convicted as a child it is wrong in principle to sentence him as an adult (in approach or in form) - even where he reaches majority prior to the date of his sentencing hearing, the regime applicable to children continues to apply. Similarly, where a person is convicted in adulthood for a crime committed as a child the approach to be taken is determined by his age at the commission of the offence, and the starting point for sentencing (from which departure will be rare and would require powerful reasons) remains the punishment that he would have received had he been sentenced on the date of the offence, applying principles relevant to child offenders. See: *Sentencing Children and Young People: Definitive Guideline* issued by the Sentencing Council at §6.2 [MB/45/893] – which Courts must follow pursuant to s59(1) of the Sentencing Act 2020, and *Ahmed; R v Ghafoor* [2003] 1 Cr App R (S) 47 §§31-32; and *R v DS* [2013] 1 Cr App R (S) 64)).
9. Whilst the age of 18 represents a bright line for the purposes of legislative frameworks, it is widely recognised both in case-law, and public policy⁴ that “*from a neurological perspective, the human brain is not fully developed in its capacity for cognitive functioning and emotional regulation until well into the period of young adulthood.*”⁵ For the purposes of sentencing therefore, domestic law prohibits treatment of an 18th birthday as a “*cliff edge*” (*R v Clarke* [2018] EWCA Crim 185, §5 [MB/59/1292]). Rather, it is recognised

⁴ “Probation Service Management of Young Adults”, 7 February 2022 §2.1

⁵ Prior, D, Farrow, K., Hughes, N, Kelly, G, Manders, G, White, S and Wilkinson, B (2011) *Maturity, Young Adults and Criminal Justice: A Literature Review*. University of Birmingham: Birmingham

that the principles relevant to sentencing child offenders (including consideration of rehabilitation and welfare), remain relevant to young adults: see *Ahmed* [MB/58/1858], and *Sentencing children and young people: definitive guideline*, §6.2 [MB/45/893].) As a matter of Convention law see *Martin v Estonia* (2013) ECHR 493 §92 to similar effect. See also, ‘General Comment No. 24 (2019) of the United Nations Committee on the Rights of the Child at §31⁶.

10. Finally, and in addition to the norms set out above, international human rights law suggests particular care is needed to ensure that the rights of child offenders are protected in the context of indefinite or life sentences. In *Hussain v United Kingdom* (1996) 22 EHRR 1 at §53 the ECtHR stated that any sentence which “*treated [a child offender] as having forfeited their liberty for the rest of their lives*” would raise “*questions under Article 3 of the Convention*” [MB/72/1697]. When considering the position of child offenders, the Court has also had regard to the *UN General Assembly’s Resolution A/RES/67/166*⁷ and General Comments of the UN Committee of the Rights of the Child⁸) urging states to consider abolishing “*all forms of life imprisonment for offences committed by persons below the age of 18*” (see *Khamtoku* at §80 [MB/75/1762]).⁹

III. THE MEANING AND SUBSTANCE OF DHMP

11. Since the abolition of the death penalty for child offenders by s103 of the Children Act 1908 [MB/37/769], DHMP has been the sentence reserved by statute for those who commit murder in childhood. It is necessary to consider at the outset, the meaning and substance of

⁶ Paragraph 31 provides: “*Child justice systems should also extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process*”

⁷ Resolution A/RES/67/166 was adopted on 20 December 2012, urging States – “... *to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release... is imposed for offences committed by persons under 18 years of age, and ... to consider repealing all other forms of life imprisonment for offences committed by persons under 18 years of age.*”

⁸ General comment No. 10 (2007), recommended: “*Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.*”

⁹ With reference to broader international consensus: the UK is one of only three of the 27 EU countries that retains any form of life sentence for children; In *Mendoza v Argentina*, 14 May 2013 the Inter-American Court of Human Rights found that a sentence similar in operation of DHMP with a minimum term of 20 years was primarily retributive and contrary to the obligations under the UNCRC to structure sentences to promote resocialisation and rehabilitation. The minimum term was disproportionately severe in relation to children and therefore in breach of the prohibition upon inhuman or degrading treatment; and The UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment found that life imprisonment, lengthy or mandatory sentences, have a disproportionate impact on children and cause physical and psychological harm such that they amount to cruel, inhuman and degrading punishment (A/HRC/28/68, 5 March 2015, at §74).

that sentence, both at the time of this Appellant’s sentencing in 2015¹⁰ and following the enactment of s27A CSA on 28 April 2022. This is central to the approach to be taken in respect of each of the Convention Rights at issue in this appeal, and to consideration of the Judgments below. In considering this issue the Appellant hopes the Court is assisted by the chronology of the development of DHMP, provided as Annex 1 to these submissions [MB/3/62].¹¹

12. It is the Appellant’s case that DHMP has always been, and remains, a single sentence, whose rationale contains a unique, inherent and inextricable requirement that any minimum term imposed at the outset must be capable of review and reduction in light of post-sentence progress - as concluded by the Divisional Court [DC/27] [MB/8/184].

(i) The starting point: DHMP as defined in Venables and R(Smith)

13. The nature and substance of DHMP was previously determined by this Court (constituted as the House of Lords) in Venables in 1997 [MB/66/1419], and in R(Smith) in 2006 [MB/57/1246]. In Venables the Court made clear that DHMP is “a separate and distinct sentence from that of life imprisonment” both in nature and in substance. A policy of refusing to consider the welfare and progress of detainees before the expiry of their minimum term (also referred to as “tariff”)¹² amounted to assimilation with the adult mandatory life sentence. That was found to be unlawful:

“ever since the Children Act 1908 there has been legislation in this country requiring child offenders to be dealt with on a basis different from that applicable to adults. In the case of children, Parliament has directed that attention should be given not only to the requirements of punishment and protection of the public from risk but also to the welfare of the child offender. [...] The question is whether it is lawful to adopt a policy which, even in exceptional circumstances, treats as irrelevant the progress and development of the child who has been detained [for the duration of the tariff period]. The answer to that question must depend upon the character of a sentence of detention during Her Majesty's pleasure. If such a sentence requires the Secretary of State to have regard not only to those factors relevant in considering an adult life prisoner (retribution, deterrence and risk) but also to the progress and development of the child whilst detained, it seems to me clear that the policy is unlawful since it excludes from consideration, even in

¹⁰ 15 January 2025, pursuant to s90 of the Powers of Criminal Courts (Sentencing) Act 2000. (Sentencing remarks at [MB/25/433]).

¹¹ The Appellant has sought the views of the Respondent as to whether this document can be “agreed”. It was previously indicated there was unlikely to be objection to the Appellant providing this document for the assistance of the Court, but there has been no indication as to whether the content is capable of agreement. At the time of filing the Respondent’s final position remains unknown.

¹² Since 1983, both minimum term and tariff have been used to refer to the period fixed to reflect the retributive purposes of the sentence.

exceptional circumstances, a factor relevant to the decision whether or not to release the child.” (Lord Browne-Wilkinson, 499H [MB/66/1511])

“[the sentence of DHMP] recognises the special characteristics of the young offender, and especially of the child offender. There is built into the sentence a measure of leniency in view of the age of the offender at the time of the offence. The measure of that leniency, is that in his case, in the working-out of the sentence punishment and welfare, present and future, are both equally relevant. [...] the discretion as to release which is to be exercised by the Secretary of State in the case of these two sentences is a different one. In the case of the mandatory life sentence it is a discretion to bring custody to an end. In the case of the [DHMP] detainee it is a discretion to continue custody for as long, but only for as long, as this is appropriate. This means that the child's progress and development while in custody, as well as the requirements of punishment, must be kept under review throughout the sentence.” (Lord Hope 532A-D [MB/66/1544])

14. In *R(Smith)* the Claimant had been sentenced (at the age of 18) to DHMP pursuant to s53(1) of the Children and Young Persons Act 1933 (“CYPA”), and her tariff was initially fixed by the executive. Following the decision of the ECtHR in *T v United Kingdom* (2000) 30 EHRR 121 (that Article 6 required tariffs to be set by Judges) a new procedure was introduced under section 82A Powers of Criminal Courts Sentencing Act 2000 (“PCC(S)A”)¹³ whereby tariffs would be fixed by the trial judge for those sentenced on or after 30 November 2000. For those (like Ms Smith) sentenced prior to 30 November 2000 (whether under s53(1) CYPA or s90 PCC(S)A), transitional provisions provided that their original tariffs would be re-fixed according to a review and recommendation by the Lord Chief Justice. Following this “judicializing” of DHMP tariffs, the Court was asked to consider whether sentences of DHMP imposed prior to 30 November 2000 still retained the “built in” right to review of the minimum sentence identified in *Venables*.

15. Lord Bingham defined DHMP as being subject to the following principles:

- (1) DHMP is “*a special sentence devised to reflect the reduced responsibility and special needs of those committing murder as children or young persons*”. (§10)
- (2) DHMP is “*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*”. (§10)
- (3) The “*essential nature*” of a sentence of DHMP imports an inherent requirement that the punitive part of the sentence – the minimum term – must be capable of later review and reduction. The Court explained that:

¹³ Inserted by section 60, Criminal Justice and Courts Services Act 2000 enacted on 30 November 2000

“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. (§10) [...]

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. (§12)

- (4) The duty of review and associated reducibility was *“an important and distinctive feature of the sentence of [D]HMP”*. (§10)
- (5) The requirement that the initial minimum term must remain capable of later review and reduction is a reflection of reduced culpability (due to youth) at the time of the offence and lasts the full duration of the sentence:

“[T]he 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. [...] 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”. (§12)

“In referring to [DHMP] the 1908 and 1933 Acts used a form of words first found in the Criminal lunatics Act 1800, a clear indication that those so sentenced were not regarded as fully responsible. A crime committed by a person who is insane or underage does not cease to be such because he later regains his sanity or becomes an adult.” (§15)

- (6) The provisional nature of the initial tariff and associated duty of review identified in *Venables* *“rested on the inherent nature of the sentence of [D]HMP, not on the identity of the authority setting the minimum term.”* Therefore *“[t]he 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”*. (§10)

16. The Court also rejected a submission by the Secretary of State that existence of a right of review created an unacceptable anomaly by reference to other sentences and/or by reference to sentences of DHMP imposed after 30 November 2000. Lord Bingham held:

“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. [...]" (§15)

17. Since 2005 Parliament has consistently maintained its policy of differentiating between the sentences to be imposed upon adult and child offenders, repeatedly re-enacting DHMP (rather than life imprisonment) as the mandatory sentence reserved for those who commit murder as children. Section 90 PCC(S)A, under which the Appellant was sentenced on 16 January 2015, was replaced by s259 of the Sentencing Act 2020 (the "**Sentencing Code**")¹⁴ as of 1 December 2020 and remains in force. It provides that where a person is convicted of murder committed under the age of 18 "*the court must order the offender to be detained during Her Majesty's Pleasure*" (without further definition of that term). Prior to the judgment of the Court of Appeal in this case, the accepted position was that statutory references to DHMP (at least until the introduction of s27A) continued to refer to the sentence described in R(Smith).¹⁵

18. For the avoidance of doubt, and contrary to the assumption of the Court of Appeal [CA/89] [MB/5/150]¹⁶ DHMP does not necessarily require that detainees have access to unlimited opportunities for post-sentence review, nor that the Secretary of State (whether the SSHD or the Respondent) must be the authority responsible for determining whether and to what extent any minimum term should be subject to later reduction (as presumed at [CA/43] [MB/5/131]¹⁷). These suggestions misunderstand the essence of the sentence as defined in Venables and R(Smith) and do not reflect how those cases have been understood or applied in practice. What R(Smith) required was the ability for "*a more reliable judgment [to] be made, perhaps of what punishment [a child murderer] deserves and certainly of what period of detention will best promote his rehabilitation*" based on the greater information and insight available "*as [the offender] grows into maturity*" (§12). The sentence must therefore be capable of later reduction pursuant to a more "*reliable*" assessment of the

¹⁴ [MB/43/827]

¹⁵ The suggestion that the position had changed following the introduction of s82A of the Powers of Criminal Courts (Sentencing) Act 2000 such that the right to review had been removed was briefly raised by the Home Secretary but abandoned during previous litigation. Thereafter it was accepted as trite law that no different approach could be applied to DHMP detainees post 30 November 2000, see Livingstone, Owen and McDonald on Prison Law, 2015, 5th ed OUP at §14.72

¹⁶ The Court of Appeal suggested at [CA/89] that arguments rooted in the ongoing applicability of R(Smith) would "*also apply to a situation where an offender sentenced to DHMP was restricted to one application to review the minimum term*".

appropriate term in light of progress and maturation. The “*right*” or “*power of review*” is “*continuing*” in the sense of lasting *beyond* the point the sentence is imposed and the tariff initially fixed.

19. The mechanism adopted between 2005 and 2022 for giving effect to the rationale and requirements of DHMP was for the Respondent (on or after the halfway point of his/minimum tariff and upon receipt of sufficiently meritorious application by a detainee) to refer the case to the High Court for review. (This is consistent with authorities such as *T v UK* [MB/76/1846] requiring any review and decision as to the length of minimum term to be taken by a Judge). In conducting that review the High Court would have the benefit of material from staff within HM Prisons and Probation (and others) working with the detainee who monitor detainees in custody and produce periodic reports as to progress throughout his or her detention. Upon conducting a review, and applying the principles in *R(Smith)* the High Court has recommended reductions in cases referred on the basis that¹⁸:
- (i) The offender had made exceptional and unforeseen progress during his/her sentence;
 - (ii) The offender’s welfare or continued development might have been seriously prejudiced by his or her continued imprisonment, and the public interest in the applicant’s welfare outweighed the public interest in a further period of imprisonment lasting until the expiry of the current minimum term; or
 - (iii) There was a matter which called into question the basis of the original decision to set the minimum term at a particular level.
20. If a reduction was recommended by the High Court, the minimum term would then be re-fixed and the sentence executed accordingly – as if that had been the minimum term throughout. Consequential matters such as the timeline for preparation of reports, eligibility for consideration by the Parole Board at pre-tariff review, consideration of a move to open conditions and/or consideration by Parole Board in respect of release would therefore be calculated by reference to the amended tariff.
21. The cases found to require a reduction have frequently included those where the child offender had been sentenced after turning 18.¹⁹

¹⁸ See for example *Re Essel* [2021] EHCW 2920 (Admin) §§10-13[MB/68/1579]

¹⁹ See agreed analysis of minimum term reviews conducted by the High Court in respect of those sentenced post-18, prepared before the Court below (at Annex A to the Appellant’s skeleton in the Court of Appeal [MB/35/736])

(ii) Whether the nature of DHMP was fundamentally re-defined on 30 November 2000

22. The Court of Appeal's judgment represents a radical departure from the consensus set out above. The Court found the sentence imposed upon the Appellant never carried any inherent right to review because legislative changes on November 2000 [MB/42/796] had fundamentally altered the meaning of DHMP and removed the right of review from that date onwards. It is the Appellant's case that this is wrong for the following seven reasons.
23. **First:** Statutory provisions must be construed in the context of established legal principles. (*R v Secretary of State for the Home Department, Ex Parte Pierson* [1998] AC 539 p573G-575D and p587C -591G [MB/64/1373 and 1381]). At the time the PCC(S)A was introduced it was established that DHMP was not to be equated with a sentence of imprisonment for life (the adult mandatory sentence for murder) and that it was to be differentiated on grounds which included reference to the in-built duty of review: *Venables*. Section 90 PCC(S)A (which replaced s53(1) CYPA from 25 May 2000) provided at the outset for sentences of DHMP with an inherent right of review. That much is clear from *R(Smith)* because those sentenced under this provision between 25 May 2000 and 30 November 2000 would have been in a materially identical position to the claimant in that case. Neither the CJCSA, nor s82A PCC(S)A materially amended s90²⁰ thereafter. It must therefore be presumed to have continued to provide for the same sentence as before.
24. Further as set out by Lord Steyn in *Venables* (at p523F-524D [MB/66/1535]), in the context of longstanding policy differentiating between the treatment of children and adults in sentencing for murder, a legislative proposal that assimilated DHMP into a form of life imprisonment, and/or under which the development of a child could be ignored during the tariff period, would have been "*deeply controversial*" (see also Lord Browne-Wilkinson at p502B [MB/67/1514]). There is no indication (express or otherwise) in the wording of the PCC(S)A generally or s82A specifically (nor in any of the subsequent legislation cited by the Court) that the sentence of DHMP was being redefined and/or replaced with a substantively new and harsher (albeit identically named) sentence akin to mandatory life imprisonment. Nor was any such policy announced in connection with the CJCSA or

²⁰ Section 60(2) CJCSA amended s90 to expand its imposition to all offences where a mandatory life sentence would be imposed in respect of an adult offender.

debated in Parliament. If the Court of Appeal’s analysis were correct it would amount to the same kind of “*legislation by stealth*” as was rejected in *Venables*. Such a radical shift cannot be presumed by mere implication or achieved by a side-wind. This is all the more so where such a change is liable to impact fundamental rights (as set out below): see also *R v Secretary of State for the Home Department Ex Parte Simms* [2000] 2 AC 115 at p131D-132C [MB/65/1403], and *R(Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax and another* [2003] 1 AC 563 at §8 [MB/55/1162].

25. **Second:** It is plain from the continued application of the principles in *R(Smith)* up until 2022 that there was no “necessary implication” inherent in the Criminal Justice and Courts Services Act 2000 (which inserted s82A) that the right of review and reduction had been removed from sentences of DHMP. Nor was there any such implication in the CJA 2003 or the Sentencing Code. The practice of considering exceptional post-sentence progress remained workable, and reductions to minimum terms were accordingly found to be appropriate, and so applied, in many cases.
26. **Third:** If the Court of Appeal’s analysis were correct, this would mean that since 30 November 2000, the defining difference between the mandatory life sentence and DHMP had been removed - such that adults and children convicted of murder were subject to the same substantive sentence. That proposition is inconsistent with the legislative retention and re-enactment of DHMP as a *separate* sentence specifically reserved for child offenders, distinct from the sentence to be imposed on adult offenders. If Parliament had intended that child offenders (or a section thereof) should be subject to mandatory imprisonment for life it could, and would, have said so. Parliament’s repeated retention of DHMP (both in the PCCS(A) and the Sentencing Code as the sentence for *all* child offenders, with no attempt to define (or re-define) the sentence itself, cannot be presumed to be meaningless.
27. **Fourth:** On a closer analysis, the “operational” changes relied upon by the Court of Appeal either substantially pre-dated s82A and/or did nothing to undermine the nature and rationale of DHMP identified in *R(Smith)*. Each of the changes cited is considered in turn below:

Powers of Criminal Courts (Sentencing) Act 2000

28. The primary change effected by s82A (and the express goal of this legislative response to the decision in *T v UK*²¹) was to ensure that **the procedure for setting the initial tariff**

²¹ See Policy Statement of Jack Straw on 13 March 2000 set out in Appellant’s Annex 1 [MB/3/67]

period was judicialized. That did not alter the nature of DHMP. Lord Bingham’s judgment in *R(Smith)* makes clear that as a matter of principle, the “*identity of the authority setting the tariff*” was irrelevant and that the duty of review would continue to apply “*even if the minimum term had been set judicially because that was an intrinsic feature of the sentence*” (at §11 [MB/57/1254]). Baroness Hale similarly confirmed that “*it makes no difference to the nature of the sentence of [DHMP] whether the punishment part of the sentence is set by the Home Secretary or on the advice of a judge*” (§26 [MB/57/1259]). Further the decision in *R(Smith)* proceeded on the basis that the Lord Chief Justice was the effective decision-maker in fixing the minimum term for pre 30 November 2000 cases (see §14 [MB/57/1256], and also *R(Dudson) v Secretary of State for the Home Department* [2003] EWHC 2797 (Admin) at §26 making clear that “*the role which the Lord Chief Justice agreed to play in the exercise of re-setting tariffs [...] was a judicial role*”).

29. The following features of the PCC(S)A were also emphasised by the Court of Appeal:

- (1) **Section 90 PCC(S)A replaced s53(1) CYPA** in providing for DHMP as the mandatory sentence for those who commit murder under 18 [CA/26] [MB/5/124]. However, as set out above, this did not occur on 30 November 2000, and sentences of DHMP imposed under s90 were not subject to s82A at the outset.²² Those sentenced under s90 from 25 May 2000 were in a materially identical position to the claimant in *R(Smith)*, and thus within the clear scope of that decision.
- (2) **Sentences of DHMP were included within the definition of a “life sentence”** for the purposes of s82A. This was neither new nor significant. DHMP had long since been included within legislative provisions referring to various “life sentences”, “life prisoners” or sentences of “imprisonment for life” prior to November 2000. See for example: s61 Criminal Justice Act 1967²³; Sections 35(2) and 43(2) Criminal Justice Act 1991;²⁴ and Section 34 *C(S)A*.²⁵ In *Venables* the Court made clear that the inclusion

²² Section 90 came into force on 25 May 2000 PCC(S) and was part of the PCC(S)A as originally enacted. S82A was not inserted until 30 November 2000, by s60 of the CJCSA.

²³ This provision introduced a formalised Parole system and referred to the position of DHMP detainees under the heading “release on license of persons sentenced to imprisonment for life etc. See DHMP Chronology at Annex 1 [MB/3/63]

²⁴ This section provided that DHMP detainees were to be included in the definition of “long-term prisoners” for the purposes of that Act. See DHMP Chronology at Annex 1 [MB/3/63]

²⁵ This defined “life sentence” as including DHMP and references to “life prisoners” as including DHMP detainees for the purposes of Section 28 “Duty to release certain life prisoners”. (See DHMP Chronology at Annex 1 [MB/3/63])

of DHMP within the definition of “life prisoners” under s35(2) of the 1991 Act (concerning provisions for release) did not, and could not turn a sentence of DHMP into an sentence of life imprisonment. Like those in s82A, the relevant parts of the 1991 Act were “*procedural provisions which do not alter the nature of the sentence*” (p523E [MB/66/1535]).

- (3) Section 82A(3) provided that **minimum terms** (now set by the court) **were to be determined having regard to “the seriousness of the offence”**. Again, this was not new. Those setting the ‘penal element’ of DHMP for sentences imposed prior to November 2000 (whether the Home Secretary or the Lord Chief Justice) would plainly have been concerned to reflect (*inter alia*) the relative “seriousness” of the offending for which the sentence was being imposed (see for example *Hussain v UK* at §§10-11 [MB/72/1678]). Indeed, to do otherwise would have been arbitrary and unlawful by reference to ordinary principles of public law. The practice adopted by the Lord Chief Justice making recommendations in respect of pre-November 2000 tariffs was set out in his practice statement [2000] 1 WLR 1655 [MB/46/897] and reflected modern sentencing practice, including determination of seriousness by reference to a starting point and aggravating and mitigating factors. Further, even prior to that the Home Secretary was bound to adopt the approach of an “*orthodox judicial sentencing exercise which is directed to the circumstances of the offence and those of the offender*” (*Venables* p537D-E [MB/66/1549]).

In any event, even if it had been novel, the explicit requirement to consider “seriousness” in setting the minimum term has no implications for the rationale of DHMP identified in *R(Smith)*. The reducibility of the minimum term of DHMP was not a consequence of the *reasoning* adopted by those setting the initial tariff. Rather, it is a “*built-in*” recognition of the reduced culpability and increased rehabilitative potential of child offenders.

- (4) Judges setting the tariff would be **subject to the requirement to consider the welfare of the offender** pursuant to s44 CYPA. This again, did not create any substantial difference compared with the treatment of those sentenced prior to 30 November 2000. The Secretary of State in *Venables* recognised that “*in exercising his discretion in relation to child offenders*” he had operated under “*the same duty*” (p 496D [MB/66/1508]). Similarly, the Lord Chief Justice acted in accordance with s44 when re-fixing tariffs post *T v UK*: see *Practice Statement (Crime: Life Sentences)* [2002] WLR

789 §26, [MB/47/902], *R(Dudson)* in the Divisional Court at §21, and the memoranda and correspondence cited at §9 and 12 of that judgment.

Further, the requirement to have regard to the welfare when setting the tariff (i.e. at the start of the sentence) could not displace the need for further review to take into account unforeseeable and exceptional post-sentence progress. See the Divisional Court's decision in *R(Dudson)* finding that a judge fixing the tariff in accordance with s44 CYPA (in that case the Lord Chief Justice) could not be expected to allow for the possibility of exceptional progress as: "*it is not a judicial function to take account of the unforeseeable*" (§20-21). Such progress was instead recognised and taken account of by the possibility of later review identified in *R(Smith)*. See also Practice Statement [2002] 1 WLR 1789 at §27²⁶ [MB/47/903].

- (5) Section 82A made reference to "*early release provisions*" contained in s28(5) and (8) C(S)A which set out **the role of the Parole Board** in assessing risk prior release, upon completion of a prisoner/detainee's minimum term. Again, none of this was materially changed by s82A. The Board had been responsible for determining risk and recommending release in respect of DHMP detainees since its creation pursuant to s61 of the Criminal Justice Act 1967. Tariffs precluding consideration by the Parole Board until their expiry had been included as part of DHMP for many years (since approximately 1983²⁷). The "*early release provisions*" under s28(5) and (8) C(S)A (by which the Parole Board were empowered to *direct* release) had been in force since 21 March 1997 and already applied to DHMP detainees following the expiry of their tariff period (see: *R(Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449 at §11, *T v UK* at §36 [MB/79/1865] and DHMP Chronology at Annex 1 [MB/3/62]). The effect of s82A PCCA as far as the Board was concerned was merely to ensure the process already in operation for assessing risk and determining release

²⁶ This practice statement responded to recommendations of the Sentencing Advisory Panel on minimum terms in murder cases. The Lord Chief Justice stated "*The trial judge can only act on the information before him in taking into account the welfare of the child at the time that he announces the minimum term. It has been suggested that in these circumstances section 44(1) of the 1933 Act requires judges to fix the lowest possible minimum term so as to ensure the Parole Board will consider the case at the correct time if a child happens to make exceptional progress. It is recommended that this suggestion is not followed although it is appreciated that the Home Secretary's view means that apparently exceptional progress by a child while in detention will not influence the date his case is considered by the Parole Board.*"

²⁷ Policy Statement of Leon Brittan, *Hansard* (House of Commons Debates) cols. 505-507. See Annex 1 [MB/3/63]

continued to apply at the conclusion of a detainees' tariff period following the change in the identity of those fixing the tariff.

- (6) Finally, it is noted that, contrary to the Court's analysis [at CA/27] [MB/5/125] the Secretary of State *did* retain a role in determining release insofar as (s)he was responsible for deciding (in practice, upon judicial recommendation) the "*appropriate stage*" at which to direct that the "early release provisions" should apply to detainees for whom no minimum term had been fixed (pursuant to s82A(5) PCC(S)A).

Criminal Justice Act 2003 and Sentencing Code 2020

30. In respect of both the 2003 and 2020 Acts, the Court of Appeal cited various provisions which may be summarised as relating to increased guidance and/or transparency for sentencing judges calculating the length of a minimum term²⁸. Again, none of the provisions to which the Court referred – either explicitly or by necessary implication – ousted or altered the rationale of DHMP or the reducibility of a minimum term as a feature of DHMP:

- (1) To the extent that there was increased transparency and guidance, this was an inevitable facet of judicializing the process of setting minimum term. That did not affect the nature of the sentence: see paragraph 28 above;
- (2) The rationale of DHMP and the inherent requirement for review and reducibility flow from the "*special nature*" of DHMP as a sentence designed to reflect the reduced culpability of child offenders and to promote their rehabilitation - not from the quality of, or procedure for decision-making at the point of fixing the initial ("provisional") tariff. This is evident from *R(Smith)*, (at §10) [MB/57/1253], and further demonstrated by the fact that the measures cited are not materially different to the practice adopted by the Lord Chief Justice in fixing tariffs for those sentenced pre-30 November 2000: *Practice Statement (Juveniles: Murder Tariff)* [2000] 1 WLR 1655 [MB/46/1655].
- (3) Measures introduced in 2005 (and later) cannot be suggested to have affected the nature and rationale of DHMP on 30 November 2000. Either the reducibility of a minimum term of DHMP was fundamentally reformed on that date (by s82A) or it was not. Later improvements to the procedures for setting the initial (i.e., provisional) minimum term

²⁸ These included: further guidance as to how "seriousness" should be assessed; the introduction of Schedule 21 providing for starting points in setting minimum terms; the introduction of the Sentencing Guidelines Council; and the requirement that courts setting a minimum term provide reasons in open court by reference to Sch 21.

cannot have retrospectively altered the position. Principles of legal certainty require that the content of a criminal sentence must be clear at any given point in time (including by reference to Articles 5, 6, 7 and 8 ECHR and to the common law.²⁹)

31. **Fifth:** The Court of Appeal’s suggestion that it was “*inconsistent with the statutory framework [above] for the Secretary of State to retain a power or be under a duty periodically to review the case [...]*” [CA/40]³⁰ was addressed in *R(Smith)* itself. Lord Bingham specifically rejected the submission that it was anomalous to accord a further monitoring role to the Secretary of State following judicialization of tariff-setting (see §15 [MB/57/1256]).
32. **Sixth:** Even if the Court of Appeal were correct to characterise the practice of reducing minimum terms on *R(Smith)* principles as being achieved via the mechanism of “*executive clemency*” (i.e., “*an exercise of prerogative power*”) [CA/43³¹ and 133³²], as recognised in *R(Smith)* itself at §13, this takes matters no further. Sentences imposed pre and post-30 November 2000 were no different in this regard. The *sui generis* mechanism adopted for reviews and reduction in respect of both groups was identical following *R(Smith)*. This analysis of the mechanism by which the requirements of the sentence were given effect, therefore adds nothing to the assertion that the nature of post-Nov 2000 DHMP sentences was fundamentally different.
33. **Seventh:** and finally, it is notable that the Court of Appeal’s analysis is a radical departure from the long-standing consensus of those concerned with minimum term reviews over the last 20 years (including legal practitioners, Judges, and policy-makers) that the sentence of DHMP remained as defined in *R(Smith)* at least until the enactment of s27A. The continued application of those principles has been consistently recognised in the context of countless reviews conducted since 2005. Further, the Court’s findings would mean that the High Court and/or Secretary of State had been regularly and needlessly exerting prerogative powers to reduce *prima facie* irreducible sentences over a substantial period. As the Divisional Court stated: it would be “*remarkable if successive Secretaries of State since 2006 had been referring for review offenders with no legal right to any review of the minimum term.*” [DC/60]³³

²⁹ See for example: *R v Rimmington* [2005] UKHL 63 at §35; *R(Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at §34, *Ex p Simms* at p131D-132CP

³⁰ [MB/5/130]

³¹ [MB/5/131]

³² [MB/5/164]

³³ [MB/8/194]

34. For all these reasons it is the Appellant's case that at the time of his sentencing in 2015, DHMP remained a single sentence which applied equally to all child offenders convicted of murder and included an inherent requirement that the minimum term imposed at the outset be capable of later reduction.

(iii) Whether DHMP was fundamentally re-defined by s27A CSA

35. The further or alternative criticism made of the Divisional Court's reliance on *R(Smith)* as defining the nature and substance of DHMP was that s27A itself amounted to a (necessarily retrospective) re-definition of DHMP - either for some (or possibly all) future and existing sentences. This analysis amounts to an assertion that, by s27A, Parliament has taken the following steps:

- (1) Firstly, it impliedly repealed all previous and contemporary legislation creating and prescribing the sentence of DHMP (as defined in *R(Smith)*) as the mandatory penalty for all those who commit murder in childhood);
- (2) Secondly, it provided that there are now substantially *new* sentences referred to as "DHMP", although the nature and number of these sentences is unclear. The position is that either:
 - (a) there are now two different (but identically named) sentences referred to as DHMP: one which includes an inherent right of review, the process for which is now governed by statute (to be imposed on those *sentenced* under 18); and one that does not include any right to review and is thus in substance an adult mandatory life sentence (to be imposed on those sentenced after 18); or
 - (b) there is one substantially new sentence of DHMP which contains no right to review - akin in substance to mandatory life imprisonment, to which all child offenders convicted of murder are now subject. Those sentenced under 18 are the separately afforded an additional unrelated benefit (i.e., a statutory right of review) but that is not associated with and does not arise as a consequence of the sentence itself.
- (3) Thirdly, it retrospectively re-sentenced either some (if 2(a) above) or all (if 2(b) above) of the child offenders currently serving "old" sentences of DHMP (i.e., sentences containing the features defined in *R(Smith)*) to those new (identically named) sentences.

36. Those propositions ought to be rejected. The Divisional Court was both entitled and correct to conclude that such a radical act of repeal and resentencing could not be achieved by a

side-wind and would have required the clearest possible wording – not least because it would have involved abrogation of fundamental rights (see e.g. section V below in respect of Article 7). See again *Venables*, *Ex Parte Simms* p131D [MB/65/1403], and *R(Morgan Grenfell)* §8 [MB/55/1162].

37. As submitted above, the legislature cannot be presumed to have operated in a vacuum. The Police Crime Sentencing and Courts Act 2022³⁴ (“*PCSCA*”) itself must be construed in the context of longstanding legal principles and consistent practice, which the drafters must be presumed to have had in mind. For almost two decades DHMP has been consistently understood to be materially different from the mandatory life sentence, with distinctive features and an inherent duty of review - reflecting the special circumstances and principles which apply to child offenders. There is no indication in the wording of this Act that the legislature intended to abolish DHMP sentences in substance, or as previously understood. If Parliament had intended that child offenders (or a section thereof) should now be subject to mandatory life sentences it could, and would, have said so. Parliament has not altered the fact that the sentence of DHMP, which has always carried with it the right to seek review and reduction of any minimum tariff fixed at the outset in the light of progress, remains the sentence imposed on *all* those whose offences occurred before their 18th birthday. Section 259 of the Sentencing Code [MB/43/827], by which Parliament provided for the mandatory imposition of a single sentence of DHMP (as defined in *R(Smith)*) upon those who commit murder under 18, remains in force unamended. The retention of DHMP as the single sentence for offences of murder committed in childhood, with no attempt to (re)define it *per se*, cannot be presumed to be meaningless.

38. The validity of the position urged by the Respondent can also be tested by examining the lack of certainty that is produced. It is clear from the propositions above that (unlike the position post *R(Smith)*) they generate significant uncertainty. This includes uncertainty as to both the content and number of sentence(s) which are now referred to as “DHMP”. That degree of uncertainty is not tolerable in the context of criminal sentencing.³⁵ As such, this strongly suggests that the legislature has not in fact sought to repeal and/or create any new substantive sentences, and that references to DHMP refer to a single sentence with distinguishing features, as previously understood.

³⁴ [MB/44/861]

³⁵ See footnote 32 above

(iv) The true impact of s27A

39. For those reasons it is the Appellant's case that s27A has *not* altered the nature or meaning of the sentence of DHMP itself. However, what s27A *does* do is require that some child offenders be denied any opportunity to access or exercise the right (to seek later review and reduction of their minimum term) that is inherent in the sentence to which they are subject. Whether or not DHMP detainees are denied access to this right is determined according to the accident of the child offender's age at the date of their sentencing hearing. This is submitted to be both discriminatory and arbitrary, in contravention of both Articles 14 and 5 ECHR, for the reasons set out below.

IV. ARTICLE 14 ECHR

40. It was eventually conceded during the course of litigation below that the Appellant's case is correct in respect of the first three issues arising under Article 14 - as set out in *Re McLaughlin* [2018] 1 WLR 4250, at §15³⁶ and faithfully applied by the Divisional Court [DC/32] [MB/8/185]. Specifically, it was conceded (and accepted by both the Divisional Court and Court of Appeal) that: (i) the impugned provisions amount to an interference within the ambit of Convention Rights (specifically Article 5) such that Article 14 is engaged, (ii) that the appropriate comparator for Article 14 purposes is another child offender subject to the same sentence whose sentencing hearing fell prior to their 18th birthday. (A direct comparison is available in this case between the Appellant and his co-defendant whose position is materially identical), and (iii) that differential treatment on the basis of age at the time of sentencing is on the grounds of a "status" engaging Article 14. The only real issue was and remains: whether the impugned legislation is "justified".

Justification: the legal test

41. It is for the state to show that the differential treatment complained of is justified (*Khamtokhu*, §65 [MB/75/1758]). To do so it must be shown that (i) the aims pursued are legitimate and rationally connected the differential treatment occasioned, and (ii) the differential treatment has a reasonably relationship of proportionality to the aim pursued.

³⁶Baroness Hale identified four questions which arise in an Article 14 claim, albeit that the questions were not to be "rigidly compartmentalised": "(1) Do the circumstances fall within the ambit of one or more of the Convention rights? (2) Has there been a difference of treatment between two persons who are in an analogous situation? (3) Is that difference of treatment on the ground of one of the characteristics listed or other status? (4) Is there an objective justification for that difference in treatment?"

42. Although contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, “*the scope of the margin will vary according to the circumstances, the subject-matter and the background*” (*Clift v United Kingdom* no 7205/07 13 July 2010, §73 [MB/69/1604]). There may be a “*wide variety of factors*” which, depending on the circumstances might variously “*tend to heighten or lower the intensity of review*” (see *R(SC) v Secretary of State for Work and Pensions* [2022] AC 223 at §142 and §158 [MB/56/1227 and 1231]).
43. It is accepted that the differential treatment in this case does not arise from a “*suspect ground*”, and that significant weight must be afforded to the fact that it arises from primary legislation. Nevertheless, the Appellant maintains that multiple factors exist which ought to heighten the intensity of review to be applied:
- (i) This complaint concerns measures relating to deprivation of liberty. The right to liberty is guarded jealousy under the ECHR as a foundational freedom without which many other basic rights cannot be accessed or enjoyed. See for example *Hurnam v Mauritius* [2009] UKPC 49 citing *X v UK* (Application No 8097/77 E Comm HR) emphasising the centrality of individual liberty as “*a right that is at the heart of all political systems that purport to abide by the rule of law*”. See also *Clift v UK* at §62 [MB/69/1601] stressing “*the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities*”;
 - (ii) The Appellant’s complaint concerns arbitrariness in the context of that deprivation. He alleges arbitrariness both as to (a) the effect of the differential treatment, and (b) that the absence of an effective review mechanism risks detention of child offenders becoming arbitrary in the context of mandatory indefinite sentences. Protection from arbitrariness is at the very core of the protection afforded under Article 5 (*R v Offen* [2001] 1 W.L.R. 253, §93 [MB/62/1347]; *Clift v UK*, §62 [MB/69/1601]). The ECtHR has therefore made clear that, “*while in principle a [...] wide margin of appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful*” (*Clift v UK*, §73 [MB/69/1603]). The Court’s concern in *Clift* that “*where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the*

difference in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention” (§62 [MB/69/1601]) applies equally to this case;

- (iii) The removal of effective access to the right of review of a minimum term involves derogation from the welfare principles applicable to the sentencing and treatment of child offenders, reflected in the sentence of DHMP. Minimum term reviews are the means by which the imperative to have regard to the welfare of child offenders (both under statutory provisions and at common law) is realised and respected in the context of mandatory indefinite sentences. As set out above, as a matter of both domestic and convention law, welfare principles continue to be of relevance notwithstanding that a child offender may have attained majority during the course of the criminal justice process. The Court in *R(SC)* specifically identified the “*best interests of children*” as a factor that may require greater intensity of review given the greater needs and vulnerabilities of young people - even where there is no “*suspect ground*” for discrimination (at §158 [MB/56/1231]).

- 44. These features of the case were erroneously ignored and/or dismissed by the Court of Appeal when considering the scrutiny to be applied to the justifications advanced by the Respondent. The welfare principle did not feature at all, and the relevance of the arbitrariness inherent within the statutory scheme was erroneously dismissed on the basis the Court found no *substantive* breach of Article 5 [CA/141] [MB/5/166]. Even if the Court had been correct in its conclusions on Article 5 alone, the Court was wrong to approach this as a precondition for the relevance of arbitrariness in the context of Article 14. The prohibition of discrimination applies to any rights or remedies falling within the *general ambit* of a Convention Right, including those that are not guaranteed under the Convention but which the State has voluntarily decided to provide (*Clift v UK* [MB/69/1582]).

Submissions on Justification

- 45. The Respondent has advanced myriad purported “justifications” for the relevant provisions over the course of this litigation. None were capable of justifying the arbitrary effects of s27A and the Divisional Court was right to reject those eventually alighted upon.

The impact to be justified

- 46. As a starting point, it is instructive to consider the impact of the differential treatment which falls to be justified. The Appellant makes five points of importance in this regard.

47. **First:** By differentiating between child offenders on the basis of their age *at sentencing*, the impugned provisions operate in a way that is arbitrary and capricious - both in principle and in practice.
48. *As to principle:* The date of sentencing can rarely, if ever, have any bearing on the seriousness of an offence or the culpability of the offender - which must determine the proper approach to sentencing (including the substance of the sentence to which the offender is made subject). As set out above the reducibility of a minimum term of DHMP is an inherent feature of the sentence designed, and required by statute, to reflect the reduced culpability of a child offender. Entitlement to access that defining feature of the sentence must therefore be by reference to age at date of the offence.
49. *As to practice:* In many cases the timing of a sentencing hearing is wholly outside of the control of the young person concerned and arises from a myriad of circumstances unrelated to the offender, offence or the legitimate purposes of sentencing. In the context of ever-increasing (and well documented) delays in the criminal justice system, none of which are attributable to defendants, the legislation operates to deprive child offenders of a sentence designed and reserved for them (in recognition of their youth and reduced culpability) and instead subjects them to an adult life sentence based on sheer caprice. The unfairness inherent in the legislative scheme, particularly in the context of delays in the criminal justice system is uncontroversial. Indeed, such capriciousness was raised by policy officials advising the Respondent during the conception of the s128 PCSCA.³⁷
50. The ECtHR has emphasised that the risk of arbitrariness is to be guarded against particularly closely in the context of the denial of liberty (*Clift v UK* §62 [MB/69/1601]). Indeed, protection from arbitrariness affecting the incidence or length of detention is the overall purpose of the right (*Offen* §93 [MB/62/1347]). Such arbitrariness is submitted to be even less tolerable where it concerns those whose crimes occurred as children (many of whom, such as Appellant, were barely 18 at sentencing) and to whom welfare principles apply. The rationale and evidence required to render such arbitrary treatment proportionate must therefore be substantial.
51. **Second:** The effect of the legislation is to treat those sentenced on or after their 18th birthday as akin to fully developed adult offenders, to whom welfare principles,

³⁷ Exhibit AW1-5 §32 and §42 [MB/25/577 and 579]

rehabilitative considerations and the differentiated approach otherwise relevant to child offenders simply do not apply. Those sentenced at or over 18 are now made subject, in substance, to a mandatory life sentence - rather than DHMP (characterised by a requirement for ongoing concern for welfare and rehabilitation - including an inherent right of review). It is true that the length of the minimum term imposed at trial may be reduced in recognition of a defendant's youth at the time of the offence (although such reduction has also been heavily eroded by other provisions of the PCSCA 2022). However, for child offenders whose sentencing hearing falls after they turn 18, welfare and progress must now be ignored for the duration of their minimum term, even in exceptional circumstances. The legislation effectively requires that these child offenders be treated as "*mini adults*" rather than being afforded the differentiated approach and substantially *different sentence* which is reserved for them because of their youth *at the time of the offence*.

52. Treating child offenders as equivalent to and/or as "cut down" versions of adults is not only contrary to the object and rationale of DHMP, it has been widely condemned as contrary to principles underpinning "*civilised society*" (see: *Venables* 524G [MB/66/1536], and more recently *Ahmed* at §21 [MB/58/1267]). Further it is inconsistent with the Sentencing Guidelines applicable to children and young offenders, given statutory force by s59 of the Sentencing Code [MB/43/801]. Again, such treatment therefore requires compelling and substantial justification.
53. The Court of Appeal minimised the impact of s27A on those sentenced over 18 by proceeding on the basis that there was no substantive change (or differentiation) in the sentence to which they were subject, and that their culpability as child offenders subject to the mandatory sentence of DHMP was solely reflected in the length of the minimum term imposed - rather than the opportunity to seek review of their minimum term (see e.g., [CA/135] [MB/5/164]). This approach was rooted in the Court's erroneous analysis of what a sentence of DHMP means. Having regard to the true position (set out at section III above):
 - (1) The reduced culpability of those who commit murder in childhood by comparison with adult offenders is not reflected merely in the length of the tariff imposed, but in the inherent features (i.e. the substance) of the special sentence reserved for them since 1908. This included in particular the reducibility of the minimum term: see *R(Smith)* at §12. By denying those sentenced over 18 the substantive benefit of the sentence reserved for them, s27A risks "*subvert[ing] the object of this unique sentence.*" (as cautioned by Lord Bingham: *R(Smith)*, §12 [MB/57/1254]).

(2) Differentiating in respect of the *substantive sentence* to which an offender is subject (e.g. whether they are subject to a reducible or irreducible sentence) is distinguishable from differentiation in the *type* (i.e., form) of sentence. Contrary to the Court of Appeal’s analysis [CA/120] [MB/5/161], the existence of measures which provide for differentiation of the latter type by reference to the date of conviction therefore do not justify the proposition that “*bright line distinction based on the date of sentence are similarly acceptable*” in respect of substantive features of a sentence.

(3) It is arbitrary to treat offenders subject to the same sentence differently on the basis of entirely random events that determine age at sentencing. That is particularly so when the sentence is specifically required by statute to reflect culpability at date of the offence.

54. **Third:** The impugned provisions raise concerns in relation to other substantive rights including Articles 5 and 7. These concerns were dismissed by the Court of Appeal on the basis that they found no breaches of free-standing convention rights [CA/140] [MB/5/166]. For the reasons set out below, that was incorrect in relation to Articles 5 and/or 7. But in any event, in requiring substantive breaches as a precondition for consideration of the impact on other rights, the Court applied the wrong test. In the context of Article 14, the extent of the impact of differential treatment on interests “within the ambit” of convention rights is relevant - whether or not there is a separate substantive breach of a substantive convention right. As stated above, the prohibition of discrimination applies to any rights or remedies falling within the general ambit of a convention right, including those the State has voluntarily decided to provide: (see for example *Clift v UK* [MB/69/1582]).

55. **Fourth:** The legislative scheme operates retrospectively. Even setting aside the question of whether s27A breaches Article 7, the unfairness of the retrospective *impact* on child offenders who have already made exceptional progress to rehabilitate is relevant to the assessment of proportionality required under Article 14. Even if *R(Smith)* did not apply to those already sentenced, and/or in the event s27A has fundamentally altered the nature of DHMP, those in the Appellant’s position plainly had a legitimate expectation of an opportunity for review. The Court of Appeal was wrong to suggest that the expectations of offenders may be conditioned only by the words of the sentencing judge setting the initial minimum term and any assessment by the Parole Board thereafter [CA/140] [MB/5/166]. The Appellant’s expectations were realistically and reasonably conditioned by the universal

practice and operation of the criminal justice system including the practice of the Secretary of State, the Courts, Prison and Probation Services, and legal representatives. All of those actors proceeded on the basis that minimum terms of DHMP were reducible, and that detainees would be able to apply for review in the event that their progress was sufficiently exceptional. Notably, it is on this basis that many offenders have first engaged in rehabilitative programmes – including restorative justice measures that have been of benefit to both victims, child offenders and the public more generally.

56. Further, the Court of Appeal was wrong in principle to deny the relevance of the position under earlier legislation [CA/133] [MB/5/164]. The Divisional Court were correct that the PCSCA cannot be viewed as a “*fresh start*” for sentencing child offenders convicted of murder [DC/54] [MB/8/192]. Both the effect and the impact of the impugned provisions cannot properly or adequately be assessed in a vacuum. Where rights have been retrospectively removed, this is not only relevant, it requires weighty justification – particularly where the rights denied were (and/or remain) an inherent feature of the special sentence to which the Appellant remains subject. The exercise called for is to determine *inter alia* whether there is a “*reasonable relationship of proportionality*” between the means employed by the Respondent and the aims sought to be realised. The means chosen, and their effect on the detainees prejudiced by the new change, are therefore highly relevant to the proportionality issue. There can be no more obvious injustice than to retrospectively increase the harshness of the measure originally imposed on child offenders, in breach of the settled expectations of those sentenced before the introduction of section 27A.

57. **Finally:** Section 27A also undermines important the public interests served by the sentencing principles requiring a differentiated approach to be taken to child offenders – particularly in the context of those who have committed very serious crimes. It is clear, from the concurring speech of Baroness Hale in *R(Smith)* (at §25) that the rationale underpinning the need for minimum term reviews is relevant not only to the retributive aspects of sentencing, but also to the public interest in rehabilitation and prevention of offending (as well associated resourcing burdens):

“[...] an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity. That is no doubt why the Children and Young Persons Act 1933, in section 44(1), required, and still requires, every court dealing with any juvenile offender to have regard to his or her welfare. It is important to the welfare of any young person that his need to develop

into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done.” (§25 [MB/57/1258]) [Emphasis added]

The Appellant’s Primary Justification: the “principle adopted by Parliament”

58. The Respondent’s primary justification, as advanced before the Courts below, relies on the underlying “rationale” for the legislation, also referred to by the Respondent as the “principle adopted by Parliament”³⁸, articulated as follows:

- i. *[A]dults do not go through the same accelerated development and maturation that children do”. (White Paper, §329³⁹)*
- ii. Children who have “*since turned 18 in custody are now adults and have passed the age where significant development occurs*” (White Paper, §330⁴⁰). It was further, (and expressly) confirmed in oral submissions before the Divisional Court that the rationale relied upon by the Respondent was that “*relevant maturation ceases at 18*”.⁴¹
- iii. It was said to follow therefore that: “*the tariff review of an adult who was already an adult when sentenced will be less likely to identify any further development of such significance that they affect the terms of the tariff originally imposed*”⁴². Put another way, the Respondent submits that “*the underlying purpose of a tariff/minimum term review does not apply with the same force to adults*”.⁴³
- iv. This approach also follows from previous “justifications” advanced by the Respondent, including that the proposition that legislation sought to “*equalize*” the treatment of adult offenders and child offenders who have attained majority prior to sentencing, who were suggested to be in materially comparable positions.⁴⁴

59. The manifestly erroneous nature of this “rationale” relied on by Respondent, is evident having regard to the following material, catalogued by the Divisional Court at [DC/49-51] [MB/8/190]:

³⁸ Respondent’s Summary Grounds of Defence §58 [MB/20/356]

³⁹ Exhibit AW1-4 [MB/25/555]

⁴⁰ Exhibit AW1-4 [MB/25/555]

⁴¹ Oral submissions of Respondent’s counsel before the Divisional Court.

⁴² Respondent’s Detailed Grounds of Defence §41, and skeleton before the Divisional Court §50 [MB/22/376]

⁴³ Respondent’s skeleton before the Court of Appeal, §44(e) [MB/32/696]

⁴⁴ See Respondent’s Summary Grounds of Defence §34 [MB/20/350], and pre-action response [MB/14/221]

- i. **Judicial decisions affirming neuroscientific research** which makes clear that the age of 18 does not bring any appreciable or reliable change in the rate (or level) of maturation, and that relevant development can be expected to continue unabated well-past the age of 18.⁴⁵ It is for this reason that the courts have repeatedly rejected a “*cliff edge*” approach to sentencing. See: *Peters* §11 11 [MB/63/1359], *Clarke* §5 [MB/59/1292], and *Daniels* [2019] 4 WLR 52 §§30-32 [MB/60/1305] as examples of the “*welter*” of authorities recognising the neuroscientific consensus to this effect [DC/50] [MB/8/190];
- ii. **Innumerable decisions of the High Court:** repeatedly recognising exceptional and unforeseeable progress in those sentenced post-18. The Divisional Court’s unimpeachable analysis of these review decisions [DC/51] [MB/8/190] demonstrates the fallacy of asserting that progress capable of effecting the assessment of culpability and rehabilitative potential is substantially “less likely” to occur after the age of 18. Further analysis of available review decisions of DHMP detainees sentenced after 18 [MB/35/736]⁴⁶ shows that in almost all cases – regardless of when sentencing occurs – exceptional progress justifying minimum term review manifests significantly *after* the age of 18 – consistent with the evidence that maturation continues apace and slows in the early/mid-twenties after which exceptional progress may start to be made (if it does), and will need to be demonstrated over a significant period thereafter. The Appellant’s own case is a further example (reports describe a dramatic change commencing from the age of twenty-three [MB/17/229]).
- iii. **MOJ Policy:** the Court is also entitled to have regard to the fact that the Respondent’s own policy position is contrary to the propositions underlying the legislative scheme. His policy recognises that “*a child’s entry into adulthood is not a singular event at the age of eighteen but rather is a slow process of maturation lasting until the mid-twenties, and in some cases longer.*”⁴⁷
- iv. **Sentencing Guidelines:** As the Divisional Court set out [DC/49] [MB/8/190]: the approach adopted in the White Paper also failed to reflect established sentencing practice, which is given statutory force by the Sentencing Counsel’s Definitive

⁴⁵ See for example the literature summarised at Annex A to the Appellant’s Statement of Facts and Grounds - which has never been disputed.

⁴⁶ Annex A to the Appellant’s Court of Appeal Skeleton. This document was agreed between the parties.

⁴⁷ “Probation Service Management of Young Adults” 7 February 2022 at §§2.1 [MB/18/260]

Guideline on Child Offenders [MB/45/868] coupled with s59 of the Sentencing Code [MB/43/801].

60. Whilst the Court of Appeal accepted that relevant maturation continues past the age of 18, they dismissed this as irrelevant to any issue in the case because “*questions of culpability are considered when the minimum term is fixed by the Court*” [CA/135] [MB/5/135]. With respect, the Court of Appeal’s analysis is both wrong and misses the point. It is wrong because culpability is reflected both in the *nature* of the sentence imposed (DHMP rather than mandatory life imprisonment) as well as the length of minimum term: see paragraphs 13-39 above. As to the issue of relevance: the fact that maturation is on-going bears directly on whether the “*rationale*” relied upon to justify the legislative scheme is capable of providing a “*reasonable foundation*” for the differential treatment complained of. It is submitted to be uncontroversial that a Court considering the proportionality of legislation under Article 14 is entitled, if not *required*, to examine the foundational propositions or “principles” said to justify legislation, and to assess whether they in fact support the proposition and means contended for: see for example the approach taken in Mathieson v Secretary of State for Work and Pensions [2015] 1 WLR 3250 [MB/49/938] endorsed in R(SC) at §88-91 [MB/56/1210]. The Divisional Court was thus entitled (and required) to consider the ‘logic’ and sufficiency of the justifications advanced by the Respondent – whose burden it is to justify the differential treatment. In doing so the Divisional Court was not acting improperly (as suggested at [CA/137] [MB/5/165]). Against the background set out above, the “*principles*” by which the Respondent sought to justify s27A were obviously unsustainable.
61. The fact of Parliament having legislated (and therefore, on the Respondent’s case, having adopted or endorsed the rationale advanced) does not automatically render that rationale correct and/or reasonable. Nor does it render the resulting measures automatically proportionate. Whilst significant weight should be afforded to the views of the legislature (and was by the Divisional Court), the foundational “*principle[s] adopted by parliament*” on which the differential treatment is based were manifestly erroneous. In the circumstances the Divisional Court was correct to conclude that they could not provide a “*reasonable foundation*” for the differential treatment complained of.

The Respondent's Secondary Justification: reducing potential impact on victims

62. The exclusion of those sentenced over 18 from seeking a review is also said to be justified as a benefit to victims' families because (a) it was asserted to provide more "*clarity*" or "*certainty*" and (b) it reduced the number of families who may potentially be caused "*extreme distress*" – relying on the Government's White Paper at §328-331⁴⁸. The Appellant's case is that the Court of Appeal went too far in finding that the impact of the differential treatment complained of could properly be considered proportionate by reference to potential distress of victims' families engaged with the minimum term review process. In doing so it failed to acknowledge and/or give proper weight to both (i) the true impact of the differential treatment set out above, and (ii) to the following matters:
63. First: As recognised by the Divisional Court [DC/56] [MB/8/192] the mischief sought to be addressed (set out in the White Paper⁴⁹) was the possibility of "*extreme distress*" for victims' families. The Court of Appeal at [CA/139] [MB/5/165] erroneously proceeded on the basis that such distress was associated with the existence of a single review, rather than *repeated* reviews – as demonstrated in the White Paper at §328 [MB/25/555]. The Court therefore failed to recognise that, in removing reviews altogether for a significant cohort of DHMP detainees, the measures went *beyond* what was necessary (and thus proportionate) to address the mischief complained of. The extent of any additional harm for victims associated with a **single review** is unclear.
64. Nor was any consideration given by the Court to the availability of less intrusive measures which were dismissed as a consequence of a legal error by the then Lord Chancellor. Requests made during the legislative process by officials seeking an opportunity to explore ways of mitigating the capricious effect of endemic delays in the criminal justice system were denied. That denial was on the basis that that the trial judge could take account of such matters in fixing the original sentence⁵⁰ [MB/25/579] – when in fact the law does not allow for this, as noted by the Divisional Court [DC/53] [MB/8/191].
65. Second: the benefit associated with removal of reviews for all those in the Appellant's position is necessarily limited. On the Respondent's own case the use of minimum term review on more than one occasion was already rare⁵¹. Further, given the indefinite nature

⁴⁸ Exhibit AW1-4 [MB/25/555]

⁴⁹ Exhibit AW1-4 [MB/25/554]

⁵⁰ See AW1-4 at §32 and §42 and comments of Lord Chancellor

⁵¹ White Paper AW1-4 at §328 [MB/25/555] and AW1-4 at §25-29 [MB/25/577]

of DHMP and that release is subject to Parole Board review, denying minimum term reviews does not, on any view, mark an end (or even a significant reduction) to the occasions upon which the circumstances of the offence will be revisited. Nor does it provide any certainty as to the actual point of release. Indeed, the removal of minimum term review arguably it leads to greater uncertainty at the conclusion of the minimum term, in the absence of any prior indication of the offender's progress. This is simply not an area where finality or certainty is in fact achievable.

66. Nor is it clear that victims' families generally, or any single family in particular, will be afforded greater procedural clarity as a result of this legislative scheme (as contended for by the Respondent).⁵² The new regime is arguably *more* complex in that it creates (at least) four categories of offenders convicted of murder, rather than two distinguished by their age when offending. Greater clarity could have been achieved by clearer information for families about the sentencing and review process, and appropriate support.
67. It also important to note that rehabilitation of child offenders cannot be *presumed* to be contrary to the interests of victims in every case. The powerful motivation to engage with rehabilitative and restorative justice programs offered by minimum term reviews can, and has been, of meaningful benefit to victims.
68. Third: differentiation between *victims* on the grounds of an offenders' age at the *date of sentence* is also arbitrary. Differentiation *by reference to sentencing dates* is not, in itself, rationally related to the *extent* of a victim distress or the aim of mitigating/removing it.
69. Fourth: To the extent that any generally applicable impact on victims (including the degree of potential distress) can reliably be presumed, the court is entitled to consider the importance of the principles undermined by the impugned legislation. Those seeking to have their minimum terms reviewed are merely seeking to access a fundamental legal right inherent within the sentence imposed upon them in recognition of the principles applicable to child offenders in the context of mandatory indefinite detention. The undisputed position is that minimum terms reviews are *not* sought excessively nor that the criteria for applications to be accepted is too lenient. An analogy may be drawn with appeals (including appeals out of time) and applications before the Parole Board. Each carries the potential to

⁵² Summary Grounds of Defence §13(ii), 51(iv) relying on the White Paper §331 [MB/25/555] (which was concerned with repeat reviews).

unsettle victims. However, it is unthinkable that all such rights of review could be extinguished simply for that reason – whether in an individual case or generally. It is recognised that such a possibility is a necessary part of meeting the public interest in ensuring the fair and robust application of relevant legal principles and thus the rule of law.

70. The Court of Appeal was wrong to suggest that in recognising the factors set out above, the Divisional Court minimised the (potential) impact on victims’ families of being informed of the existence of a review [CA/139] [MB/5/165]. The Divisional Court was entitled to assess the impact on victims by reference to the true position and extent of their involvement in minimum term reviews. The Court expressly stated that:

“even affording a wide margin of appreciation, the interests of victims did not provide an objective justification for those aged 18 at sentence being deprived of a review. That is not to ignore or to diminish the position of victims’ families. Rather, it is to engage in an objective assessment as to how the rights of those families can impact on a particular aspect of an offender’s detention”. [DC/57] [MB/8/193]

Parliamentary Sovereignty

71. A central criticism of the Divisional Court’s judgment by the court below was an alleged failure to give sufficient weight to the fact that Parliament had legislated. The Court of Appeal relied on Parliament’s legislative act *per se* and also on the parliamentary debate held on 10 June 2021 [MB/29/658] in respect of a proposed amendment which would have altered the reference to age 18 to that of 26 in the draft s27A [CA/125-128] [MB/5/162]. The Appellant submits that these criticisms were flawed for the following reasons.

72. First: the Court was wrong to criticise the Divisional Court for failing to recognise and/or give weight to Parliament’s view of “*where the balance lies*” [CA/138] [MB/5/165]. The Divisional Court was explicit that a “*wide margin of appreciation*” was applied to Parliament’s decision to enact the impugned legislation – as contended for by the Respondent [DC/57] [MB/8/193]. (Indeed, the Appellant submits that the Court is entitled to apply a stricter standard in the circumstances of this case for the reasons set out at paragraph 43 above). The conclusion that the differential treatment was not justified was (correctly) reached notwithstanding the great weight afforded to Parliament’s decision to adopt it.

73. Further, and in any event – the “*balance*” identified by the Court of Appeal was the wrong one. It failed to recognise (for example) the true impact occasioned by s27A including the

nature, extent and caprice of the retrospective re-sentencing represented by the impugned provisions for those such as the Appellant (see paragraphs 47-57 above).

74. Second: in respect of the Parliamentary debate on 10 June 2021 the Court failed to recognise that the debate was affected by critical misconceptions as to the effect of the proposed provisions and that Parliament did not in-fact address the key issues before the Court. Having been (erroneously) assured by the Minister that the legislation allowed for reviews in “*almost all cases*” and that it was “*only subsequent reviews*”⁵³ that would be precluded, the debate suggests that lawmakers merely sought to remove the possibility of *repeat* reviews rather than reviews altogether. Further, the issue of retrospectivity and the frustration of legitimate expectation for those previously sentenced was *never* raised. It is therefore not clear, contrary to the Court’s analysis [CA/125-128] [MB/5/162], that Parliament could be taken to have exercised its own judgment and/or confronted all “*matters relevant to compatibility*” during the legislative process. As the Divisional Court recognised: - “*The point in issue in this case was not mentioned by [the Minister]*” [DC/31] [MB/8/185].

75. It is also noted that the White Paper presented to Parliament (in common with advice provided to the Respondent during the legislative process⁵⁴) erroneously asserted that there was no *existing* legal entitlement to minimum term reviews for the those sentenced over 18 (§329 [MB/25/555]) – the implication being that no existing legal rights were being retrospectively removed for this group. This was, again, wrong. It reflected neither the law following *R(Smith)* (nor the Respondent’s policy at that time (until February 2021)).

76. Where legislation is premised on an erroneous legal or factual misapprehension this ought to be capable of reducing the deference to be shown to the legislature when assessing proportionality, both because it undermines the suggestion that Parliament had exercised its own judgment on all relevant matters, and because it may have the result that less intrusive measures were not explored (see, in a different context: *Akili Charles v Attorney General of Trinidad and Tobago* [2022] UKPC 31 at §§64-66 [MB/81/1987]). In this case, both the “*principles*” underlying the rationale for the legislative scheme (see paragraph 58

⁵³ Hansard c489 – 490 [MB/29/663-4]

⁵⁴ See Exhibit AW1-5: briefing on 16 October 2020 §17 [MB/25/576] and Exhibit AW1-6: briefing on 11 December 2020 §9 [MB/25/584] indicating that HMP detainees who had been sentenced over 18 were **not** entitled to reviews as a matter of law.

above), and lawmakers' understanding of the effect of s27A, were inaccurate [DC/31] [MB/8/185].

77. Third: whilst purporting to give great weight to the judgment of Parliament, the Court of Appeal simultaneously failed to give *any* weight to Parliament's view that all those who commit murder in childhood should be made (and/or remain) subject to DHMP (rather than mandatory life imprisonment), and its decision to maintain both s259 of the Sentencing Code (providing for the imposition of DHMP), and s59 of the Sentencing Code (giving statutory authority to the principles on sentencing children and young persons set out in the Sentencing Council's Definitive Guideline) unamended.
78. Finally: the approach adopted by the Court of Appeal (and contended for by the Respondent) goes beyond appropriate deference to Parliament. It amounts instead to abrogation of the Court's duty to determine, for itself, the compatibility of s27A with the Convention. Whilst the fact Parliament has chosen to legislate is a significant factor in the assessment of proportionality, it cannot be determinative. Here the legislation is, as submitted above: underpinned by a rationale that is manifestly erroneous, adopts an approach which is contrary to core legal principles necessary in a "*civilised society*"⁵⁵, goes beyond that which was necessary to address the core mischief complained of, has deleterious impact upon the rehabilitative progress of child offenders, and operates arbitrarily in the context of deprivation of liberty. Given those circumstances the Court is both entitled and bound by section 4 of the Human Rights Act 1998, to declare it incompatible with Convention Rights. This does not subvert traditional constitutional principles; it is to uphold them.

V. ARTICLE 5 ECHR: Arbitrary and Excessive Detention

79. Article 5 provides in relevant part that:

1. 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 after conviction by a competent court; [...]

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

⁵⁵ Per Lord Steyn in *G* [2004] 1 AC 1034, §53. See also *Venables* at p534 A quoting Howard, Criminal Law, 4th ed. (1982), p343A "*No civilised society regards children as accountable for their actions to the same extent as adults*".

80. Any deprivation of liberty must be in keeping with the core underlying principle of Article 5: protection from arbitrariness (*Brown v Parole Board for Scotland and others* [2017] UKSC 69, [2018] AC 1, §2 [MB/48/912]). Article 5 also lays down positive obligations on states to take appropriate steps to prevent persons within their jurisdiction from being arbitrarily detained in contravention of Article 5 (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09 13 December 2012, §239).
81. Detention may become arbitrary, even where authorised under domestic law (including pursuant to a conviction by a competent court), where it does not serve a legitimate purpose and/or is not proportionate to that legitimate aim: *R v Offen* [2001] 1 WLR 2531 [MB/62/1325]; *R v Lichniak* [2002] UKHL 47, §16 [MB/61/1317]; *Weeks v United Kingdom* (1988) 10 EHRR 293 [MB/80/1933]. In *Weeks* the European Court therefore found that “lawfulness” of detention under Article 5(1)(a) (even where it follows conviction by a competent court) presupposes on-going consistency of detention with the objective of the sentence imposed. As such:
- “The causal link required by Article 5(1)(a) might eventually be broken if a position were reached in which a decision not to release, or to re-detain [a prisoner on life license] was based on grounds that were inconsistent with the objectives of the sentencing court. In those circumstances, a detention which was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary, and, hence, incompatible with Article 5.”* (§49 [MB/80/1952]. See also §§57-58).
82. It is the Appellant’s case that s27A is contrary to Article 5 because:
- (1) it is *prima facie* arbitrary to detain a person on a basis or in a manner that is contrary to the sentence imposed upon him. To subject a child offender to (in substance) a mandatory adult life sentence with an irreducible minimum term, and/or on the basis that welfare and progress must be ignored, even in exceptional cases, contrary to the rationale, substance and objective of the sentence to which he is mandatorily subject (i.e., DHMP) - is therefore submitted to be *prima facie* arbitrary; and
 - (2) denying DHMP detainees any possibility of a review, and thus the possibility of a reduction in the minimum tariff fixed at trial, generates a risk of unnecessary or excessive (and thus arbitrary) detention.
83. The rationale underlying the sentence of DHMP (and the right to review a minimum term) recognises that the requirements of punishment (and thus the appropriate length of the minimum term to be imposed) can only be “provisionally” assessed at the time of

sentencing, and may change when a fuller and more informed assessment is possible following greater maturation: *R(Smith)* §12 [MB/57/1254]; *Peters* §11 [MB/63/1359]. The sentence therefore specifically envisages that the minimum term imposed by the sentencing judge for the purpose of retribution may, in the final analysis go beyond that which is necessary.

84. Later review of the minimum term fixed at trial is the mechanism by which it is ensured that child offenders subject to DHMP serve only that term which is necessary for the proper purposes of sentencing. The right to seek a minimum review in circumstances where an offender has made appropriate progress is therefore a critical safeguard, ensuring the ongoing legitimacy of detention, without which it is acknowledged within the rationale of the sentence itself, that detention may become arbitrary and excessive.
85. Where the punitive purposes of sentencing are exhausted, and the offender poses no ongoing risk to the public, his detention will have no proper penological purpose and will therefore have become “arbitrary”: see *Offen* [MB/62/1325] and *Lichniak* at §16 [MB/61/1317]. See also *Atkins v Virginia*, 536 U.S. 304 (2002)⁵⁶ and *Graham v Florida* 560 U.S. 48 (2010)⁵⁷.
86. The “essential aim” of article 5 is “to confer protection against arbitrary or unjustified deprivation of liberty” (*Brown*, §2 [MB/48/912]). Minimum term reviews are the protective measure by which such arbitrariness is guarded against in the context of mandatory indefinite sentencing of child offenders, it being recognised within the rationale of the sentence that the provisional minimum term imposed by the sentencing judge may, in the final analysis be excessive and unjustified. By removing any ability to review and amend the provisional minimum term s27A therefore carries the risk that the penological purposes of sentencing become exhausted and detention may thus become arbitrary in substance.
87. The Court of Appeal’s reasoning in respect of Article 5 was premised on its erroneous finding that sentences of DHMP had been rendered irreducible and akin to adult life

⁵⁶ The United States Supreme Court held that a sentencing measure does not measurably contribute to a valid penological purpose if it is “nothing more than the purposeless and needless imposition of pain and suffering and hence a [cruel and unusual] punishment”.

⁵⁷ The United States Supreme Court held that assessing the proportionality of sentencing measures requires specific consideration of whether the practice in question advances “the goals of penal sanctions that have been recognised as legitimate”. The Court emphasised that “a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense”.

sentences either on 30 November 2000, or upon enactment of s27A. As a result, the Court failed to recognise the special nature of the sentence of DHMP. The assertion that no issue under Article 5 can arise before the expiry of the prisoner's tariff, only holds if one assumes that the tariff fixed in the case of an HMP detainee is intended to be a once and for all determination of an immutable sentence. However, the whole rationale of the sentence of DHMP, is inconsistent with that proposition (see *R(Smith)* at §§10 – 12 and §15 [MB/57/1253]).

88. Reliance on decisions such as *Brown* and *Kaiyam v United Kingdom* (2016) 62 E.H.R.R. 13 [MB/74/1723] is similarly misplaced. Those cases do not address circumstances where, as here, detention is maintained contrary to the sentence imposed. This is a unique type of sentencing exercise because of the rehabilitative objective and unique features of DHMP. The sentence itself recognises the possibility that detention could become arbitrary if the tariff originally fixed were immutably maintained despite exceptional progress on the part of the young offender and further clarification of their relative culpability. That would be inconsistent with the purpose of the sentence – and therefore arbitrary. The Appellant submits that the Divisional Court was therefore correct to find that:

“the sentence of DHMP [must be distinguished] 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 half-way 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. 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 7 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.” [DC/59] [MB/8/193]

VI. ARTICLE 7 ECHR: Retrospective Harshening of the Appellant's Sentence

89. Article 7 states (in relevant part) that states are forbidden from imposing “a heavier penalty [...] than the one that was applicable at the time the criminal offence was committed.” This

has been interpreted to include a prohibition on the retrospective harshening of an individual's criminal sentence: *Del Rio Prada v Spain* (42750/09) (2014) 58 EHRR 37 [MB/70/1610].

90. In defining “penalty” the ECtHR has also drawn a distinction between measures within the scope of the actual sentence imposed (such as the reducibility of a term of imprisonment: *Kupinsky v Ukraine* (5084/18) 10 November 2022 [MB/76/1767], and measures representing the mere “*execution or enforcement*” of a penalty (such as a change in the procedures for conditional release: *Kafkaris v Cyprus* (21906/04) (2009) 49 EHRR 35, §151 [MB/73/1719]). Whilst a substantive sentence may not be altered to the detriment of an offender retrospectively, greater flexibility is permitted in respect of matters relating to mere execution and enforcement.
91. The Appellant’s primary position has always been that he remains subject to a sentence that imports a duty of *continuing* review. However, if (as the Respondent has submitted) the impugned legislation has gone further and altered the fundamental nature of (some) sentences of DHMP such that the right to seek review has been removed, then the Appellant’s case is that this amounts to a breach of Article 7 ECHR.
92. It is obvious that legislative amendment of a judicially imposed sentence, six years after its imposition, is retrospective. Moreover, that retrospective alteration enacted by s27A has the effect of subjecting the Appellant to a *harsher* sentence. That is because the tariff originally fixed provisionally and capable of later reduction, has now been rendered immutable; and the right to a review has been altogether removed. By virtue of s27A, the Appellant’s sentence has been substantially transformed from a sentence of DHMP to an adult mandatory life sentence in all but name.
93. The Court in *Del Rio Prada* set out (at §90) the proper approach to determining “*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*” as follows:
- “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.” [MB/70/1642]
94. Applying that approach: at the time of the Appellant’s sentencing DHMP had been “clearly defined in law” by this Court in *Venables* and in *R(Smith)*. That definition

explicitly included the possibility that the minimum term could be reduced. That position was also reflected in the application of the law throughout the period up until 28 April 2022, when s27A came into force, and in the policies and process of the Courts, and those acting on behalf of the Secretary of State (in prisons, probation, courts and in policymaking) throughout the Appellant’s sentence between 2015 and 2022. Having regard to “*domestic law as a whole*” therefore, the position is clear.

95. The purpose of the right to review of a tariff of DHMP is to ensure that the term ultimately served is proportionate and remains justified by reference to the proper penological purposes of sentencing children, in the context of a mandatory indefinite sentence. This is not some extraneous measure concerned with release (which is a separate matter for the Parole Board), execution or enforcement. Rather the reducibility of a minimum term is “*built into the sentence*” (*Venables* p532A-D [MB/66/1544]) and forms an “*intrinsic*” part of the essence, rationale, or object of the sentence itself (*R(Smith)* at §§10-12 [MB/57/1253]). It is therefore to be distinguished from the provisions under scrutiny in *Morgan v Ministry of Justice* [2023] 2 WLR 905 [MB/50/961], and *R(Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) [MB/54/1128]. By removing the right to seek review and reduction of a minimum term, the legislation (as contended for by the Respondent) fundamentally changes the nature, rationale and a core feature of the sentence imposed on the Appellant. The House of Lords made clear in both *R(Smith)* and *Venables* that the potential for review and reduction was a defining feature of DHMP, and was the critical aspect distinguishing from an adult mandatory life sentence following the introduction of tariffs. To remove that defining feature must therefore amount to a “*redefinition of the penalty itself*” (Cf. *R(Khan)* at §105 [MB/54/1154]).
96. The position of this Appellant is submitted to be akin to that of the Applicant in *Kupinsky* [MB/76/1767]. That case is authority that the *reducibility* of a mandatory term of imprisonment imposed as part of a lifelong sentence is a feature of the sentence *itself*; and that measures impacting the extent to which that period is reducible therefore go beyond a mere “*execution and enforcement*”. In the present case, the Appellant’s previously *reducible* sentence has similarly been rendered *irreducible* and thus substantively changed.
97. Further, a review and reduction of a minimum term cannot properly be described as merely an “*arrangement governing release before the end of a sentence*” [CA/100] [MB/5/155]. Minimum term reviews – unlike the provision under consideration in *Kafkaris* - are “*a*

measure ... in which a penalty is fixed” and thus an aspect of the sentence itself rather than mere enforcement. The punitive term to be served (itself a “penalty”) is ultimately determined by reference to the outcome of any review. A reduction made following a review alters the minimum term and thus amounts to an “*act of sentencing*” (*T v UK* §110 [MB/79/1911]. See also *R (Dudson) v Secretary of State for the Home Department* [2006] 1 AC 245 [MB/53/1111] in which the process of resetting the minimum term proceeded on the basis that was Article 6 was engaged.) In reviewing a minimum term, the High Court performs the function described in *R(Smith)* as seeking to arrive at “*a more reliable judgment*” of what term best meets the legitimate penological purposes for which DHMP is imposed (§12 [MB/57/1254]). That unique exercise cannot reasonably be described as mere “*execution or enforcement*”. Rather, it is part of the substantive sentencing process.

98. Section 27A therefore is a measure which ‘relates to a change in the penalty imposed’ and comes within the test for the application of Article 7(1) formulated in *Del Rio Prada* at §109 [MB/70/1647], and in *Morgan* at §104(2) [MB/50/993].
99. Finally, in determining the Article 7 issue, the Court must also consider foreseeability (see *Del Rio Prada* at §91 [MB/70/1642]). In this case, the scope and features of DHMP were crystal clear following *R(Smith)* and by reference to universal longstanding practice of the Courts and the criminal justice system more generally. There was no means by which the Appellant could have foreseen that DHMP would be fundamentally revised and stripped of its defining feature. contrary to consistent and long-standing domestic principles, practice, and case-law of both this Court and the High Court conducting minimum term reviews.
100. Much of the Court of Appeal’s reasoning flowed from its finding that the right to review of the minimum term was not an inherent feature of DHMP at the time of the Appellant’s sentencing. The Appellant has set out the reasons that is incorrect. However, even assuming the Court of Appeal’s findings had been technically correct, the Court failed to consider how the sentence was “*applied*” *in practice* and what DHMP was *understood* to include “*at the time*” it was imposed. That was required, even when that application or understanding has been altered by later judicial correction or clarification (*Del Rio Prada* at §90 [MB/70/1642]). Plainly the application of the law by all relevant actors in 2015 (whether correct or not) was that a minimum term of DHMP was inherently capable of reduction.

101. Further, insofar as the Court of Appeal's decision was premised on the assertion that reviews (prior to February 2021) "*did not involve determination of the appropriate minimum term reflecting the seriousness of the offence*" [CA/102] [MB/5/155], that reasoning was misconceived. The basis on which HMP detainees could seek a reduction were threefold and included, where "*a new matter [...] calls into question the basis of the original decision to set the tariff at a particular level*" (*Re Essel* [2021] EWHC 2920 (Admin), §11 [MB/68/1579]). Properly understood, the exercise of reviewing and re-fixing the minimum term was not limited to consideration of matters unrelated to the principles of sentencing, it was a decision as to the proper punishment of the convicted person.

CONCLUSION

102. The Appellant therefore invites this Court to find that s27A is incompatible with Articles 14 (read with Article 5), 5 and/or 7 ECHR. That is because:

- (1) DHMP is (and remains) a unique sentence designed to reflect the special circumstances of those who commit murder as children. Its object and nature are different from mandatory life imprisonment and necessitate an inherent requirement that the minimum term imposed at the outset be capable of later review and reduction;
- (2) The removal of any mechanism by which to exercise the inherent right to seek review of a minimum term of DHMP from some detainees based on their age at the date of sentence amounts to differential treatment within the ambit of Article 5. That treatment is unjustified because:
 - i. The right to review flows from the inherent nature of the sentence of DHMP and reflects reduced culpability for murder committed in childhood. There is no proper basis to distinguish between the culpability of child offenders by reference to age at the date of sentencing, and thus to differentiate in respect of their entitlement to access the rights and features built into the sentence mandated for them.
 - ii. There is no reasonable foundation for the "*principle*" adopted by Parliament and/or justification that those sentenced over 18 are less likely to *benefit* from the features of DHMP which are built in to reflect their reduced culpability as child offenders (i.e. that they are less likely to make exceptional progress as a consequence of maturation.)

- iii. Differentiating between those subject to the **same** sentence based on age at sentencing is arbitrary in principle and capricious in practice given the myriad of matters affecting the date of sentencing hearings that are unconnected with an offender or their culpability.
 - iv. Whilst the aim of reducing the potential for “extreme distress” to victims’ families is legitimate, less intrusive measures were available given that this was primarily associated with repeated reviews. Further, the necessarily limited benefit to victims of removing reviews altogether cannot begin to justify the injustice and far-reaching impact of the differential treatment (including by reason of retrospectivity), and the extent to which it undermines fundamental principles governing the treatment of child offenders.
 - v. The fact Parliament has legislated is a weighty factor in assessing proportionality but is not determinative and cannot render s27A proportionate in all the circumstances of this case.
- (3) The removal of any mechanism by which to exercise the right of review (and thus to access a reduction) of DHMP renders detention contrary to a fundamental rationale of that sentence and is *prima facie* arbitrary. Further, it generates a risk of arbitrary detention in the event the legitimate penal purposes of detention become exhausted prior to the expiry of the minimum tariff fixed at the outset - as envisaged by the sentence itself.
- (4) If, contrary to (1) above, s27A removes the right to review altogether (either for some or all DHMP sentences), this amounts to a fundamental alteration in respect of a defining feature of the sentence of DHMP as previously understood and imposed upon the Appellant, both in law and in practice. The retrospective application of s27A therefore offends against the Article 7 prohibition upon retrospective increases for criminal penalties.

EDWARD FITZGERALD KC
PIPPA WOODROW
Doughty Street Chambers

SIMON CREIGHTON
Bhatt Murphy Solicitors

26 APRIL 2026

ANNEX 1 to Appellant’s Written Case: DHMP CHRONOLOGY

28 July 1800	Criminal Lunatics Act 1800	DHMP was first introduced into English law. The Act was entitled “ <i>An Act for the Safe Custody of Insane Persons Charged with Offences</i> ”. Under Section 2 persons found by a jury to be insane were to be “ <i>kept in strict custody until His Majesty’s Pleasure shall be known.</i> ” It was also provided that “ <i>in all cases of insanity so found, it shall be lawful for His Majesty to give such order for the safe custody of such person so found to be insane, during his Pleasure, in such place and in such manner as to His Majesty shall seem fit.</i> ”
1 April 1909	Children Act 1908 (“Children’s Charter”)	The death penalty was abolished for children (aged 10-16). DHMP introduced as the alternative sentence. Section 103 provided that: “ <i>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 while so detained shall be deemed to be in legal custody.</i> ” Under Section 105 a DHMP detainee could be discharged on license “ <i>at any time</i> ” by the Secretary of state.
13 April 1933	Children and Young Persons Act 1933, s53(1)	Sections 103 and 105 of the Children Act 1908 were re-enacted in essentially identical terms but the upper age limit was extended (from 16 to 18). Section 53 provided (in relevant part) “(1) <i>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. [...]</i> (4) <i>Any person so detained as aforesaid may at any time be discharged by the Secretary of State on licence. [...]</i> ”
12 Sept 1949	Home Office instructions	Section 44 of this act also imposed, from this date, a duty on the court to “ <i>have regard to the welfare of the child or young person</i> ” brought before it.”
Sept 1953	Royal Commission Report	This instruction called for annual reports on all those detained under either Section 53(1) or Section 53(2) so that the Home Secretary could monitor their personal and medical progress and be in a position to exercise his powers of release “ <i>at any time</i> ” under Section 54 of the 1933 Act. They indicated that the detainee was to be released at the earliest possible moment. This report on Capital Punishment 1949-1953 referred to “ <i>deterrent purpose of the sentence</i> ” as one factor to be taken into account when deciding on the release of any Section 53(1) detainee along with “ <i>the circumstances of the crime, of the history and character of the offender, of his behaviour during detention and of the prospects of his conduct when released</i> ” (§188).

9 Nov 1965	Murder (Abolition of the Death Penalty) Act 1965 comes into force	Death penalty was abolished for adults and replaced with a mandatory sentence of life imprisonment for adult offenders convicted of murder. In respect of child offenders, section 1(5) amended section 53(1) CYP A to provide: <i>(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.</i> Section 1(2) provided in respect adult sentences of imprisonment for life that the court could recommend a minimum term of imprisonment prior to release to the Secretary of State: <i>"on sentencing any person convicted of murder to imprisonment for life, the court may at the same time declare the period which it recommends to the Secretary of State as the minimum period which should elapse before the Secretary of State orders the release of the person on licence."</i>
27 July 1967	Criminal Justice Act 1967 enacted	This legislation introduced a formalised Parole System. Section 61 provided: "Release on licence of persons sentenced to imprisonment for life, etc. <i>The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life or a person detained under Section 53 of the Children and Young Persons Act (young persons convicted of grave crimes), but shall not do so in the case of a prisoner sentenced to imprisonment for life or to detention during Her Majesty's Pleasure or for life except after consultation with the Lord Chief Justice of England, together with the trial judge, if available."</i> Section 59 set out the constitution and function of the new Parole Board. At that stage panels would take decisions based on documentary information and (if necessary) a report from an interview conducted with the prisoner by one of its members. Oral hearings were not provided for.
30 Nov 1983	SSHD Policy statement (Leon Brittan). <i>Hansard</i> , cols. 505- 507	This policy announcement introduced the notion of fixed tariffs for life sentences by which sentences would be broken down into component parts of retribution, deterrence, and protection of the public. Although, the announcement explicitly applied to adults it was also applied to DHMP detainees in practice. The practice adopted was that the SSHD would (after three years had passed post-sentence) fix a minimum period, referred to as the tariff, during which an offender serving a life sentence would be detained. This represented the minimum period necessary to satisfy the requirements of retribution and deterrence. The SSHD considered the views of the trial judge, and recommendation of the Lord Chief Justice, in determining that minimum period. Once the tariff had expired, the SSHD would release the offender on licence once recommended to do so by the Parole Board.

**IN THE SUPREME COURT
R (Quaye) v Secretary of State for Justice**

UKSC 2025/0138

15 Nov 1984	<i>Re Findlay</i> [1985] A.C. 318	The House of Lords upheld the policy whereby the Secretary of State imposed minimum punitive terms of his own devising on adults convicted of certain categories of murder and sentenced to life imprisonment. This policy was to meet public concern that certain adult murderers were not serving enough time in custody. The House of Lords recognised the Secretary of State's need to develop broad policies for the "early release" of mandatory lifers and fixed term prisoners which maintained public confidence in the system and were sensitive to "public opinion" (p 333B-C).
2 Mar 1987	<i>R v SSHD</i> <i>Ex p</i> <i>Hanscombe</i> (1988) 86 Cr App R 59	The Divisional Court held that it was necessary for the SSHD to consult the Chief Justice and trial judge when setting a minimum term of imprisonment for adult discretionary life sentences. It also required the 3-year waiting period prior to the fixing of a tariff to be abolished as there was a real risk in some cases (e.g. arson) that the tariff period would expire before a first review was completed. Insofar as the decision expressly applied to mandatory lifers (and was applied to DHMP detainees), it justified the Secretary of State's discretion to depart from or amend the judicial recommendations as to tariff by reference to the Secretary of State's need " <i>to maintain public confidence</i> " and reflect " <i>public concern about violent crime</i> ".
2 Mar 1987	<i>Weeks v</i> <i>United</i> <i>Kingdom</i> (1999) 10 E.H.R.R. 293	The Applicant (a child offender) complained of Article 5 breaches in respect of his detention on recall pursuant to a discretionary life sentence imposed for robbery. The ECtHR held that the necessary judicial control of the lawfulness of detention required under the Convention was not incorporated into the original conviction and sentencing, as new issues affecting the lawfulness of detention might arise in respect of a later period of detention pursuant to a sentence of life imprisonment. Given the particular nature of the reasons warranting an indeterminate sentence (which were substantially rehabilitative), the applicant was entitled to a review at the moment of any return to custody (i.e. recall) and also at reasonable intervals during the course of his imprisonment (§56-58).
23 July 1987	SSHD Policy Statement (Mr Hurd)	Following the decision in <i>Handsome</i> , this statement abolished the three-year wait before fixing the tariff period of discretionary life sentences and DHMP.
25 Oct 1990	<i>Thynne v UK</i> (1990) 13 EHRR 666	The ECtHR recognised the special rationale of the discretionary life sentence, distinguishing it from the punitive purposes of the mandatory life sentence, which therefore required judicialization of the release decision. Neither a prisoner's right to make recommendations to the Parole Board, nor the possibility of judicial review of the Board's decision amounted to a sufficient review of the lawfulness of a discretionary lifer's detention (or re-detention) for Article 5(4) purposes. The Applicant was entitled to seek a review of the lawfulness of his detention at reasonable intervals post-tariff expiry, and to have the question of lawfulness decided by a court.

25 July 1991	Criminal Justice Act 1991, Part II enacted	Provisions reconstituting the Parole Board were introduced as a consequence of the decision in <i>Thynne</i>. It was accepted that logic dictated the judicialization of both the tariff and the post-tariff release decisions. Section 35(2) of the Criminal Justice Act replaced provisions of the CJA 1967 relating to release on parole. Under Section 35: “Power to release long-term and life prisoners”: “(1) <i>After a long-term prisoner has served one-half of his sentence, the Secretary of State may, if recommended to do so by the Board, release him on licence.</i> (2) <i>If recommended to do so by the Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not a discretionary life prisoner.</i> (3) <i>The Board shall not make a recommendation under subsection (2) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.”</i> Section 43(2) provided that Part II shall apply to persons serving DHMP as it applies to those serving sentences of life imprisonment. Under Section 43(3) references to “life prisoners”, “prison” and/or “imprisonment” included DHMP detainees. Section 32 defined the role and procedures to be adopted by the Parole Board, providing (in part) that: (1) <i>There shall continue to be a body to be known as the Parole Board (“the Board”) [...]</i> (2) <i>It shall be the duty of the Board to advise the Secretary of State with respect to any matter referred to it by him which is connected with the early release or recall of prisoners.</i> (3) <i>The Board shall deal with cases as respects which it makes recommendations under this Part on consideration of—</i> (a) <i>any documents given to it by the Secretary of State; and</i> (b) <i>any other oral or written information obtained by it,</i> <i>and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and shall consider the report of the interview made by that member. [...]</i>
20 April 1993	<i>R v SSHD Ex p Prem Singh</i> , Times, April 27, 1993	The Divisional Court found that DHMP was different from adult mandatory life sentences and was closer, in substance, to discretionary life sentences. This was because “<i>the fact that the mandatory life prisoner may be given similar rights as regards release on licence does not alter the fact that the mandatory life sentence is justifiable as punishment for the whole of its period</i>” (pp24C-25B)

24 June 1993	<i>R v SSHD Ex p Doody</i> (1994) 1 A.C. 531	The House of Lords reviewed the procedural safeguards to be applied by the Home Secretary when fixing tariffs for adult mandatory lifers (p 559A-F); the power authorised the Home Secretary to have regard to " <i>broad considerations of a public character</i> " than the judiciary (p 559A); and therefore to exceed the period recommended by judges.
27 July 1993	SSHD Policy statement (Mr Howard) <i>Hansard col s. 861-864</i>	This statement was a direct response to the decision in <i>Doddy</i> . It (<i>inter alia</i>) re-affirmed the Secretary of State's right to select his own criteria in determining tariffs/release but made changes to reflect the fairness requirements in that decision. The statement also made clear the government's understanding that DHMP detainees were to be treated as equivalent: " <i>Everything that I have said about the practice of the Secretary of State in relation to mandatory life sentence prisoners applies equally to persons who are, or will be, detained during Her Majesty's Pleasure under Section 53(1) [...]</i> ".
18 July 1994	<i>R v SSHD ex parte Hickey</i> [1995] QB 43	The Court of Appeal determined that in respect of DHMP detainees, the appropriate release provisions were those in s35(2) CJA 1991 (the same as those applicable to mandatory life imprisonment), and not those relating to discretionary life prisoners.
21 Feb 1996	<i>Hussain and Singh v UK</i> (21928/93) (23389/94) (1996) 22 EHRR 1	The ECtHR held that for the purposes of the Convention, " <i>by its nature and objective</i> ", a sentence of DHMP was comparable to discretionary (rather than mandatory) life sentences for adults. As such, the reasoning in <i>Thynne</i> and <i>Weeks</i> applied such that the applicant was entitled to have an opportunity to seek review of his post-tariff detention before a Court. This requirement was not satisfied by Parole Board reviews because the board could not order release (save immediately after recall) and applicants had no right to oral hearings or to examine witnesses.
21 Mar 1997	Crime (Sentences) Act 1997 enacted	Provisions introduced to empower the Parole Board with the necessary powers to comply with the ECtHR's judgments in <i>Hussain</i> and <i>Singh</i> . Section 28 "Duty to release certain life prisoners" (which under s34 included DHMP) therefore provided for the Parole Board (rather than the SSHD) to direct release in respect of DHMP and discretionary life prisoners. It also provided (for the first time) statutory authority for the setting of tariffs, which continued to be fixed by SSHD in respect of all child offenders, and by the court in respect of adult discretionary life sentences. Section 28 provided that: “(1) <i>A life prisoner is one to whom this section applies if—</i> <i>(a) the conditions mentioned in subsection (2) below are fulfilled; or</i> <i>(b) he was under 18 at the time when he committed the offence for which his sentence was imposed.</i> <i>(2) The conditions referred to in subsection (1)(a) above are— (a) that the prisoner's sentence was imposed for an offence the sentence for which is not fixed by law; and (b) that the court by which he was sentenced for that offence ordered that this section should apply to him as soon as he had served a part of his sentence specified in the order.</i> ”

		(3) <i>A part of a sentence specified in an order under subsection (2)(b) above shall be such part as the court considers appropriate taking into account— (a) the seriousness of the offence, or the combination of the offence and other offences associated with it; and (b) the effect of any direction which it would have given under section 9 above if it had sentenced him to a term of imprisonment.</i> (4) <i>Where in the case of a life prisoner to whom this section applies the conditions mentioned in subsection (2) above are not fulfilled, the Secretary of State shall direct that this section shall apply to him as soon as he has served a part of his sentence specified in the direction.</i> (5) <i>As soon as, in the case of a life prisoner to whom this section applies—(a) he has served the part of his sentence specified in the order or direction (“the relevant part”); and (b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.</i> (6) <i>The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless—(a) the Secretary of State has referred the prisoner’s case to the Board; and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.</i> (7) <i>A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time— (a) after he has served the relevant part of his sentence; [...]</i>
12 June 1997	<i>R v SSHD ex p Venables</i> [1998] AC 407	Chapter 2 s34 “Interpretation of Chapter 1P” provided that “<i>life prisoner</i>” and “<i>life sentence</i>” included DHMP. The House of Lords held that DHMP is different from a mandatory sentence of life imprisonment and contained a “built in” requirement that the offender’s welfare was a relevant consideration throughout the sentence. The court struck down the SSHD’s policy of setting tariffs for DHMP detainees because it: (i) failed to take account of the “welfare principle” in fixing the tariff; (ii) wrongly took account of public outcry in fixing the tariff; and (iii) failed to allow for the possibility of subsequent reduction of the tariff on grounds of exceptional progress in custody.
10 Nov 1997	SSHD Policy statement (Jack Straw)	SSHD announced a policy (following <i>Venables</i>) as to how he would approach reviews of DHMP minimum terms stating (in part): <i>“I shall continue to seek the advice of the trial judge and that of the Lord Chief Justice in deciding what punishment is required in any case of a person convicted under section 53(1) of the Children and Young Persons’s Act 1933. I shall then set an initial tariff with that advice, and the offender’s personal circumstances in mind; I shall continue to invite representations on the prisoner’s behalf and give reasons for decisions.</i>

		<i>Officials in my department will receive annual reports on the progress and development of young people sentenced under section 53(1) whose initial tariff has yet to expire. Where there appears to be a case for considering a reduction in tariff, that will be brought to the attention of ministers.</i> <i>When half of the initial tariff period has expired, I or a minister acting on my behalf will consider a report on the prisoner's progress and development, and invite representations on the question of tariff, with a view to determining whether the tariff period originally set is still appropriate.</i> <i>In complex and difficult cases, I shall seek the assistance of my Rt Hon friend the Secretary of State for Health in securing independent professional advice (that is to say, independent of those already charged with the care of the offender) on the young offender's condition and development. Any request for review of tariff before it expires will be considered on its merits, whether that request is made by or on behalf of the offender or by one of the agencies or individuals responsible for his or her care.</i> <i>In considering requests, inviting representations, and in conducting reviews, I will look for evidence of: significant alteration in the offender's maturity and outlook since the commission of the offence; risks to the offender's continued development that cannot be sufficiently mitigated or removed in the custodial environment; any matter that calls into question the basis of the original decision to set tariff at a particular level (for example about the circumstances of the offence itself or the offender's state of mind at the time); together with any other matter which appears relevant."</i>
16 Dec 1999	<i>T v UK</i> (2000) 30 EHRR 121	The ECtHR held that Article 6 required the exercise of fixing a tariff of DHMP to be performed by the judiciary.
13 Mar 2000	SSHD Policy statement on judicializing of tariffs (Jack Straw)	Secretary of State announced new policy and legislation in response to decision in <i>T v UK</i>: <i>"Given this clear court decision, I am bound to bring forward legislation [...] to provide for tariffs to be set by the trial judge in open court, in the same way as they are currently set for adults subject to discretionary life sentences [...]. I shall announce the proposals in due course. About 250 people, sentenced as juveniles, are currently detained at Her Majesty's pleasure, and fresh cases continue to go through the courts. For new cases, pending the necessary change in the law which I have announced, I shall set any tariffs in line with the recommendation that the Lord Chief Justice makes to me in each case. For existing cases, I propose a fresh review of tariffs in line with the principles in the judgment. I shall be inviting representations from those whose tariffs have not yet expired. Where no representations are received, the tariff will be set in accordance with the original recommendation received by the Lord Chief Justice in that case. [...]. Where existing detainees wish to make representations, they can be made</i>

		<i>to the present Lord Chief Justice, who will then make a recommendation to me. I will then adopt his recommendation on what the tariff should be.”</i>
25 May 2000	Powers of Criminal Courts (Sentencing) Act 2000	Section 90 reaffirmed DHMP as the mandatory sentence for those convicted of murder during childhood: “S90 Offenders who commit murder when under 18: Duty to detain at Her Majesty’s pleasure <i>Where a person convicted of murder appeared to the court to be under 18 at the time of the offence the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty’s pleasure.”</i>
27 July 2000	Lord Chief Justice <i>Practice Statement (Juveniles: Murder Tariff)</i> [2000] 1 WLR 1655	<i>“This practice statement follows the decision of T. v. United Kingdom [...]. There are a large number of people, sentenced as juveniles, currently detained at Her Majesty’s pleasure. The Home Secretary has proposed that I should undertake a fresh review of tariffs for these existing cases. Pending the necessary change in the law, there will also be fresh cases. The Home Secretary announced that until any legislation is enacted, he will set any new tariffs in accordance with my recommendation as to both existing and fresh cases. Before I make a recommendation to the Home Secretary, in both new and existing cases, I shall invite written representations from the detainee’s legal advisers and also from the Director of Public Prosecutions who may include representations on behalf of victim’s families.”</i> <i>I will take as my starting point the existing approach adopted in the case of adults sentenced to a mandatory life sentence. In the case of adults, the usual length of tariff, or punitive term (which means the amount of time actually to be served by a person convicted of murder in order to meet the requirements of retribution and general deterrence), will be a period of 14 years before the possibility of release arises for consideration.</i> <i>In all these cases a term may be increased or reduced to allow for aggravating and mitigating features.”</i> The Statement then set out a non-exhaustive list of examples of features that would normally be considered aggravating or mitigating including “age”. <i>“When making recommendations to the Home Secretary in such cases, I will announce my reasons in open court after taking into account any written representations I receive.”</i>
30 Nov 2000	Criminal Justice and Courts Services Act 2000 enacted	Section 60 inserted a new section 82A into the Powers of Criminal Courts (Sentencing) Act 2000. This provided that all life sentence tariffs imposed after 30 November 2000 would be set by the trial Judge: S82A Determination of Tariffs <i>(1) This section applies if a court passes a life sentence in circumstances where:</i> <i>(a) the sentence is not fixed by law; or</i> <i>(b) the offender was aged under 18 when he committed the offence.</i> <i>(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.</i>

		(3) <i>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.</i> (4) <i>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.</i> (5) <i>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.</i> (6) <i>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.</i> (7) <i>In this section [...] life sentence has the same meaning as in Chapter II of Part II of the Crime (Sentences) Act 1997.</i> By Section 60(2), section 90 PCC(S)A was also amended to make clear that DHMP would be imposed in all cases where a child offender was convicted of an offence for which a mandatory life sentence would be imposed on an adult.
31 May 2002	Lord Chief Justice, Practice Statement (Crime: Life Sentences) [2002] WLR 789)	“Young offenders [...] 20. Section 60 of the Criminal Justice and Court Services Act 2000 brought sentencing procedures for those sentenced to [DHMP] into line with adult offenders sentenced to discretionary and automatic (but not mandatory) life sentences. When imposing the mandatory sentence of [DHMP] on an offender convicted of murder, who was aged under 18 at the time of the offence, the sentencing judge may now order that section 28(5) to (8) of the Crime (Sentences) Act 1997 shall apply to the young offender as soon as he has served that part of the sentence which is specified by the sentencer. A minimum term should be specified in all but the most exceptional circumstances. If a minimum sentence is not fixed the Home Secretary will, in due course, determine the appropriate stage for the early release provisions to apply to the young offender.[...]” 26. <i>The welfare needs of the offender have also to be taken into account: see Children and Young Persons Act 1933, section 44(1). Lord Browne-Wilkinson in R v Secretary of State for the Home Department, Ex p Venables [1998] AC 407, 499 emphasised that the Home Secretary “must at all times be free to take into account as one of the relevant factors the welfare of the child and the desirability of reintegrating the child into society”. [...]</i>

		27. <i>The Home Secretary does not consider that this statement as to his responsibility is relevant now that the minimum term is set by the trial judge. The trial judge can only act on the information before him in taking into account the welfare of the child at the time that he announces the minimum term. It has been suggested that in these circumstances section 44(1) of the 1933 Act requires judges to fix the lowest possible minimum term so as to ensure the Parole Board will consider the case at the correct time if a child happens to make exceptional progress. It is recommended that this suggestion is not followed although it is appreciated that the Home Secretary's view means that apparently exceptional progress by a child while in detention will not influence the date his case is considered by the Parole Board. [...]</i>
25 Nov 2002	<i>R v SSHD Ex p Anderson</i> [2002] UKHL 46	The House of Lords held that, pursuant to Article 6 ECHR the Secretary of State should no longer play a role in fixing a minimum term life imprisonment for adults subject to mandatory life sentences. Applying the decision of the ECtHR in <i>Stafford v UK</i> [2002]35 EHRR 1121, the Court confirmed that in respect of tariff-setting, there was no longer any difference to be discerned between discretionary and mandatory life sentences (and DHMP).
21 Nov 2003	<i>R(Dudson) v SSHD</i> [2003] EWHC 2797 (Admin)	The Divisional Court rejected a complaint that in re-fixing a tariff of DHMP under transitional provisions the Lord Chief Justice had failed to reflect the duty to have regard to the welfare of the offender under s44 CYP A, and that the length of tariffs had to be substantially reduced to reflect the SSHD's policy that there would be no ongoing right of review. The Court found that the possibility of exceptional and unforeseen progress could not be taken into account by a sentencing Judge but was catered for by the existence of an ongoing right to review (as held by the Divisional Court decision in <i>R(Smith)</i> [2003] 1 W.L.R. 2176)
4 April 2005	Criminal Justice Act 2003, (Chapter 7 Part 12) enacted	Section 269 replaced s82A PCC(S)A in relation to child offenders (which continued in amended form in relation to adult discretionary life sentences). Section 269 “Determination of minimum term in relation to mandatory life Sentence” provided: (1) <i>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.</i> (2) <i>The sentence is to be such as the court considers appropriate taking into account</i> (a) <i>the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and</i> (b) <i>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.</i> (4) <i>If the offender was 21 or over when he committed the offence and 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</i>

		<i>order should be made under subsection (2), the court must order that the early release provisions are not to apply to the offender.</i> <i>(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.”</i> Schedule 21 provided starting points for the calculation of the minimum term in respect of both adults and children convicted of murder which could be adjusted to reflect various aggravating and mitigating circumstances of the offence and/or offender. Section 143 provided that the Court would consider culpability and the harm caused in determining the seriousness of the offence. Section 167 created a “Sentencing Guidelines Council” (an earlier form of the Sentencing Council) whose functions included the issuing of sentencing guidelines. By Section 172 courts now had to have regard to any relevant guideline. Section 271 set out a Defendants’ entitlement to appeal against a minimum term fixed by the trial Judge under s269.
28 July 2005	<i>R(Dudson) v SSHD</i> [2006] 1 A.C. 245	House of Lords considered that the procedure by which minimum terms of DHMP imposed prior to 30 November 2000 were refixed according to the transitional provisions announced in response to <i>T v UK</i> was compliant with Article 6. In particular an oral hearing was not required in Dudson’s case.
29 July 2005	<i>R (Smith) v SSHD</i> [2006] 1 A.C. 159	House of Lords re-affirmed that in respect of sentences imposed prior to 30 November 2000, DHMP contained an inherent requirement to ensure that a tariff imposed at the outset remained subject to later review and capable of reduction in light of exceptional progress to as to ensure detention was for no longer than necessary.
2005 - 2022	Policies were introduced to give effect to <u>R(Smith)</u> .	Serving detainees received a letter informing them that <i>inter alia</i> that: <i>“As a serving HMP detainee who has served at least half your present tariff, you are entitled to have your case reviewed and, if it meets the criteria to be forwarded to the High Court so that your tariff may be considered by a High Court judge. The purpose is to consider whether your original tariff is still appropriate in light of the progress you have made while in custody. [...] Reviews are not automatic and you must apply to have your tariff reviewed using the attached form [...] Where a case is referred to the High Court, a Judge will recommend if the tariff should be reduced and if so by how much. The Secretary of State will adopt the judicial recommendation in every case [...]”</i> The process upon receipt of an application was set out including that the Offender Manager would obtain “Tariff Assessment Reports” along with other material, and that a referral would be made to the High Court if PPCS considered that the offender’s application “broadly meets the criteria” – which were set out as follows under the heading “Criteria for Consideration:

		“Any relevant factors will be taken into account but those which are most important are:- • A significant change in maturity and outlook since the offence was committed. • Risks to the detainee’s continued development that cannot be sufficiently mitigated or removed in the custodial environment. In other words, where continued detention would damage a detainee’s prospects of developing or maturing properly; • Anything that casts doubt on the appropriateness of the original tariff, for example new evidence about the circumstances of the offence or the detainee’s mental state at the time.”
1 Dec 2020	Sentencing Act 2020 enacted	This legislation was intended to consolidate existing sentencing provisions within one statutory instrument. Section 259 replaced section 90 PCC(S)A. It has an identical title and applies where a person is convicted of murder, or in respect of “any other offence the sentence for which is fixed by law as life imprisonment”, where the person is under 18 at the time the offence was committed. By ss2 “the court must order the offender to be detained during Her Majesty’s pleasure.” Life sentences referred to in the Act and under Chapter 8 “Effect of Life Sentences” are defined to include DHMP. Section 321 provided for the fixing of a minimum term order and provides (in relevant part) that: (1) <i>Where a court passes a life sentence, it must make an order under this section.</i> (2) <i>The order must be a minimum term order unless the court is required to make a whole life order under subsection (3)[...]</i> (4) <i>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”). [...]</i> Per Section 324 the “early release provisions” in s321 refer to ss 28(5) – (8) C(S) A 1997 Section 322 applies where the court passes a life sentences for an offence which is fixed by law (including DHMP). Minimum term (2) <i>If the court makes a minimum term order, the minimum term must be such part of the offenders’ sentence as the court considers appropriate taking into account –</i> (a) <i>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).</i>

		Determination of seriousness (3) <i>In considering the seriousness of the offence, [...] 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.</i> Duty to give reasons for minimum term order or whole life order (4) <i>Where the court makes a minimum term order or a whole life order, in complying with the duty under section 52(2) to state its reasons for deciding on the order made, the court must in particular— (a) state which of the starting points in Schedule 21 it has chosen and its reasons for doing so, and (b) state its reasons for any departure from that starting point.</i> Schedule 21 continues to provide for starting points and factors of mitigation/aggravation in respect minimum terms for murder
18 Feb 2021	Policy changes by SSJ (Mr Buckland)	The SSJ revised his policy for minimum term reviews to exclude the opportunity reviews for those who had been aged 18 or over at the time of sentence. This policy change purported to operate retrospectively and was introduced in anticipation of s128 of the Police Crime, Courts and Sentencing Act 2022.
28 April 2022	Police Crime Sentencing and Courts Act 2022	S128 received Royal Assent.