

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

President of the King’s Bench Division, Lewis LJ, Cobb J

B E T W E E N:

THE KING
on the application of
JESSE QUAYE

Appellant

- and -

SECRETARY OF STATE FOR JUSTICE

Respondent

RESPONDENT’S WRITTEN CASE

A. INTRODUCTION

1. The Respondent invites the Court to uphold the decision of the Court of Appeal (‘CA’; Dame Victoria Sharp P, Lewis LJ and Cobb J), dated 11 March 2025 [b/p171], allowing the Respondent’s appeal against the decision of the Divisional Court (William Davis LJ and May J) (‘DC’) [b/p196] and dismissing the Appellant’s claim for judicial review.
2. The CA held that s.27A(1) & (11) (‘s.27A’) of the Crime Sentences Act 1997 (‘CSA 1997’) [b/p863] is not incompatible with the European Convention on Human Rights (‘ECHR’) under articles 5, 7, or 14 (read together with article 5) for the purposes of the Human Rights Act 1998 (‘HRA’). Permission to appeal was granted by this Court on 3 November 2025 (Lord Briggs, Lord Burrows and Lord Stephens).
3. The Respondent submits that the decision of the CA was correct for the reasons it gave and invites the Court to dismiss the Appellant’s appeal.

B. PRELIMINARY OBSERVATIONS

Section 27A

4. Section 27A was introduced by Parliament through s.128 of the Police, Crime, Sentencing and Courts Act 2022 (**‘the 2022 Act’**) [b/p863], which received Royal Assent on 28 April 2022. Section 27A came into force on 28 June 2022. Its effect was to restrict the availability of a ‘minimum term review’ in the context of a sentence of ‘Detention at His Majesty’s Pleasure’ (**‘DHMP’**).
5. DHMP is a mandatory life sentence, which must be imposed on any person convicted of murder, if they were under 18 at the time of the offence. When imposing the sentence, the trial judge is required to set the ‘minimum term’ (previously referred to as the tariff).
6. One distinguishing feature of a DHMP sentence had been that although the ‘minimum term’ was set by the trial judge, an application could be made for its reduction from the half-way point of that ‘minimum term’, and at two year intervals until the expiry of their minimum term thereafter¹. Those processes operated as a matter of policy until the policy was changed in February 2021. No challenge was ever made to that change of policy. In any event, section 27A came into force on 28 June 2022. As part of a suite of changes to DHMP sentences which had been foreshadowed in a White Paper published by the Ministry of Justice in September 2020 (*A Smarter Approach to Sentencing* [b/p459]), one effect of s.27A was to preclude any application for a review of the ‘minimum term’ if the offender was aged 18 or over when sentenced.
7. The other changes to the operation of DHMP sentences introduced by ss.127-8 of the 2022 Act included:
 - (i) The reduction of opportunities for a minimum term review for those under 18 when sentenced. If under 18 at the date of sentence, an offender can now apply for a minimum term review after serving half of minimum term, but they could only apply for further reviews after two years from the determination of the last review and if still under 18 on the date the further application is made: s.27A(2) & (4).
 - (ii) Section 27B also, and for the first time, placed the entire minimum term review process on a statutory footing, and so doing: (a) provided that the court would be the sole decision maker - prior to that the court would make a

¹ Any reduction in the minimum term does not necessarily mean that the offender is in fact released, because release is still subject to decision by the Parole Board.

recommendation which the Respondent accepted, and therefore any challenge was against the Respondent; and (b) prescribed matters to be taken into account on such a review by the court: s.27B(4).

- (iii) Section 127 of the 2022 Act ('Starting points for murder committed when under 18') [b/p862] substituted paragraph 6 of Schedule 21 to the Sentencing Code with paragraph 5A, which now provides for a range of 'starting points' by reference to the offender's age (14 or under, 15, 16, 17) and culpability (as defined in paras 3(1), 4(1), & 5 of Schedule 21). The single starting point of 12 years was therefore replaced by a scale of starting points determined by reference to both the offender's age when the offence was committed and the nature of the conduct underlying the conviction. These legislative provisions therefore removed the 'jump' in starting-point from 12 years to 25 years which otherwise existed for those who were aged 17 and 18 at the time of their offending, with the effect that the starting-point in the Appellant's case would now be 23 years: see paras 4(1)(b) & (2), & 5A, Sch 21^[2]:

<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
<i>Age of offender when offence committed</i>	<i>Starting point supplied by paragraph 3(1) had offender been 18</i>	<i>Starting point supplied by paragraph 4(1) had offender been 18</i>	<i>Starting point supplied by paragraph 5 had offender been 18</i>
<i>17</i>	27 years	23 years	14 years
<i>15 or 16</i>	20 years	17 years	10 years
<i>14 or under</i>	15 years	13 years	8 years

DHMP sentences

8. A sentence of DHMP remains unique in two respects: first, it is the only sentence available for murder committed as a child (under 18) whatever the individual's age at the date of conviction and sentence; and secondly, is the only sentence which affords an opportunity (now in statutorily-defined circumstances) to apply for a review of the length of the minimum term imposed by the court at the date of sentence.
9. As to the first, DHMP is the only sentence for any serious offence which is defined by reference to the offender's age at the date the offence was committed, rather than at the date of conviction. The ordinary approach is reflected in the structure of the chapters within Part 10 of the Sentencing Code: chapter 2 concerns offenders aged under 18 at the date of conviction; chapter 3 concerns adults aged under 21 at the date of conviction

² At time of the Appellant's sentence, Schedule 21 of the Criminal Justice Act 2003 applied.

(those aged 18, 19, or 20); and chapter 4 concerns adults (those ‘aged 21 and over’) when convicted. Consistent with that approach, the nomenclature around life sentences is defined by the offender’s age on conviction: ‘detention for life’ if under 18 when convicted (e.g. s.258 [b/p826] & s.258A), and ‘custody for life’ if 18-20 when convicted (e.g. ss.272-6) [b/p832]. The only exception is DHMP sentences. The availability of a DHMP sentence is defined by reference to the offender’s age when the offence was committed: see s.259 within Ch.2 [b/p827].

10. One implication of that aspect of a DHMP sentence is that it may be imposed on a very wide spectrum of offenders: at one end, there are child offenders for whom all the protective features surrounding the sentencing of children are engaged: e.g. an offender aged 10 at the date of the offence, and aged 11 as at the date of sentence; and at the other end, those for whom some of those protective features are not engaged: e.g. an offender who was a child at the date of the offence, but is sentenced as a middle-aged adult: e.g. Stephen Lawrence’s killers, sentenced to DHMP in their mid-30s.

The scope of the article 14 issue

11. The implications of that first aspect when considered alongside the second (the right to a review of the minimum term) demonstrate - the Respondent submits - that the article 14 issue (discrimination on the grounds of age) is a narrow one. There could be no principled objection under article 14 to Parliament legislating to remove the right to apply for a minimum term review in the cases of offenders sentenced as older adults, as the Appellant accepted before the DC. None of the premises of the article 14 challenge (e.g. points surrounding on-going maturation) are relevant in the cases of those sentenced to DHMP as middle-aged adults.
12. Accordingly, and notwithstanding the powerful statements of Lord Bingham in *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159; [2005] UKHL 51 [b/p1246] on the significance of the review process when the review opportunity was operated as a matter of policy by the Secretary of State, there can in principle be no article 14 objection to Parliament placing that review process on a statutory footing and excluding at least ‘older adults’ from it. Indeed, had Parliament accepted the proposed amendment to s.27A and set the cut-off date at ‘26’, there could be no conceivable article 14 issue.
13. The actual (and narrow) issue under article 14 is therefore not whether Parliament could permissibly set a ‘bright line’ within s.27A, but is there sufficient justification for article 14 purposes for setting it at ‘18’ rather than, for example, ‘26’.

Section 27A and the sentencing process

14. Given various features of the DC's judgment (see [47]-[48] in particular **[b/p189]**) and the Appellant's Case (§§6-10) **[b/p7]**, the Respondent would also emphasise at the outset that section 27A made no change to any aspect of the sentencing exercise conducted by the sentencing court in respect of those who commit murder as a child, i.e. under 18.
15. Those who offend as children are properly treated differently from those who offend as adults. That will be reflected in the sentencing exercise when sentencing offenders to DHMP, an exercise which was - and continues to be - undertaken by reference to their age at the date of the offence, which has always been and remains a highly significant aspect of the sentencing exercise. The '*root and branch difference of approach between children and young people*' and adults, which was referred to by the Court of Appeal (William Davis LJ, May J, HHJ Lockhart KC) in *ZA* [2023] 2 Cr App R (S) 45 **[b/p1551]**, §§43, 50-68 (Appellant's Case, §7) is still recognised and implemented at the point of sentence notwithstanding s.27A. To the same effect, as at the point of sentence, child offenders are not treated as '*cut down versions of adult offenders*': see Burnett, LCJ, as His Lordship then was, Holroyde LJ, William Davis LJ in *Ahmed and others* [2003] 1 WLR 1858 **[b/p1260]**, §21 (ibid.). Equally, if the defendant is a child during the trial process, then it will be suitably adapted as article 6 requires: see *Martin v Estonia* (2013) ECHR 493, §92 (Appellant's Case, §8). And if relevant, the 'welfare principle' (s.44, Children and Young Person Act 1933 **[b/p779]**) still applies when the court is dealing with a 'child or young adult', and therefore the court is required still to 'have regard to the welfare of the child or young person'. In short, section 27A made no change to any aspect of the sentencing exercise conducted by the trial judge or sentencing judge for those who commit murder as a child, i.e. under 18.

The broader context of s.27A

16. One change that Parliament did introduce through s.27A was to amend one feature of a sentence of DHMP with respect to one discrete category of offender, namely those who commit murder as a child but who are sentenced as adults: in those circumstances, Parliament legislated to the effect that they should have no mechanism through which to apply for a review of the minimum term set by the sentencing judge.
17. The ECHR compatibility of that amendment falls to be considered in a context where there is no other circumstance in English law where any offender (even an offender who commits extremely serious offences as a child and is then sentenced as a child), has the opportunity to review either a lengthy determinate term of detention, or even a

minimum term pursuant to a sentence of ‘detention for life’ (or ‘custody for life’), i.e. a discretionary life sentence imposed on child offenders for offences including ‘attempted murder’, ‘conspiracy to murder’³. Consistent with that, there is no principle under the ECHR or domestic law that any sentence imposed on an adult in respect of offending committed as a child requires a review of that sentence, or any part of it, while that sentence is being served.

C. SUMMARY OF THE RESPONDENT’S SUBMISSIONS

18. The CA was right to hold that the changes to the availability of minimum term reviews for those sentenced to DHMP made through s.27A reflected a conscious choice by Parliament to legislate on this issue and are compatible with the ECHR.
19. First, the CA was right to distinguish the decisions in *R v Secretary of State for the Home Department ex parte Venables* [1998] AC 407 [b/p1419] and *Smith* [b/p1246]. As Lord Bingham emphasised in *Smith*, the decision there was expressly premised on the fact that the amendments introduced by Parliament through s.82A into the Powers of Criminal Courts (Sentencing) Act 2000 (‘PCCA’)⁴ were not then before the Court: see e.g. *Smith* at [10], [15] [b/p1253, 1256].
20. Second, the CA was right to recognise that Parliament has now legislated (again) through s.27A, and thereby deliberately further amended the DHMP regime. The intended effect of s.27A is clear on its face: to restrict the availability of minimum term reviews. As the CA noted at [89] [b/p150], in light of s.27A the Appellant’s central contention that DHMP sentences contain an inherent duty of continuing review by the Secretary of State faces an insuperable difficulty in circumstances where Parliament has placed the sentence on a statutory footing, and then expressly removed any such duty: “[t]hat requirement must be said to be inherent or implicit in the provisions of section 90 (or section 259) of the relevant statute. But section 27A(11) expressly provides that there is no right to apply for a review of the minimum term except in the circumstances provided by section 27A. Thus, it cannot any longer be a requirement of domestic law that a person aged 18 at the date of sentencing must have an opportunity to apply for a review”.

³ The absence of any substantive difference between the two categories of sentence in this context was recently underlined when Axel Rudakubana, who was originally sentenced aged 18 to ‘custody for life’ for the three murders he committed in Southport when aged 17, had his sentence amended under the slip rule to ‘DHMP’, with exactly the same minimum term applied: 51 years and 190 days.

⁴ Inserted by s.60, Criminal Justice and Court Services Act 2000 [b/p797].

21. Accordingly, the only issue now is whether the legislation is compatible with the rights protected under the ECHR incorporated into domestic law by the HRA, specifically articles 5, 7, and 14 (read together with article 5)⁵.

Article 5, ECHR

22. The CA was right to conclude that s.27A is not incompatible with article 5 for the reasons it gave: [84]-[89] **[b/p149-150]**.
23. The CA correctly held that the detention of an individual serving a sentence of DHMP where the ‘minimum term’ has been set by the sentencing judge raises no issue of article 5 incompatibility during the period they are serving their minimum term. In reaching that conclusion, the CA’s analysis of the relevant domestic and European case-law was unimpeachable: see *Saadi v United Kingdom* (2008) 47 EHRR 17 (GC) **[b/p1784]**, at [80]; *James v United Kingdom* (2012) 56 EHRR 12, at [81]-[82]; and *Brown v Parole Board for Scotland* [2018] AC 1 **[b/p904]**, at [83]. Similarly, the CA’s application of those principles to the facts was correct (see [84]-[85] **[b/p149]**), as was its criticism of the DC’s judgment and analysis on this issue: see [87] & [89] **[b/p150]**.
24. In particular, the CA correctly noted that “*the operation of a sentence of DHMP, imposed pursuant to section 90 of the PCCA, was altered by the provisions of section 82A with effect for sentences imposed on or after 30 November 2000*” (at [87] **[b/p150]**). The key distinction drawn by the CA for article 5 purposes was – correctly – that since 30 November 2000 the ‘tariff’ (now ‘minimum term’) has been set by the sentencing judge “*in accordance with the relevant legislation and relevant case law and sentencing guidelines*” (ibid.). As such, “*It cannot, in our [the CA’s] judgment, be said that detention in accordance with those statutory provisions was arbitrary or unlawful*” (ibid.).

Article 7, ECHR

25. The CA was right to conclude that s.27A is not incompatible with article 7 for the

⁵ In resolving that issue, which is the only issue on this appeal, the Respondent does not accept that the structure proposed by the Appellant assists, namely to ask: “(1) *Are mandatory life sentences 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?*” (Appellant’s Case, §4) **[b/p21]**.

reasons it gave, and right to reject the Appellant’s article 7 cross-appeal: see [92]-[102].

26. The issue under article 7 is whether s.27A amounts to the imposition of a heavier penalty than that which was originally imposed. The CA correctly held it does not. As in *Morgan v Ministry of Justice* [2023] UKSC 14; [2023] 2 WLR 905 [b/p961], where this Court held that the penalty imposed on the appellants were the underlying determinate sentences, the CA was right to hold that Parliament’s removal of reviews for a particular category of offender does not alter the penalty originally imposed, namely DHMP with a minimum term of 15 years. The changes to minimum term reviews go to the execution/enforcement of the sentence, and not the penalty itself. The penalty imposed was, and remains, a sentence of DHMP with a (judicially set) minimum term.
27. The CA was also right to reject the Appellant’s reliance on *Kupinskyy v Ukraine* (5084/18) (2023) 76 EHRR 38 [b/p1767]: see now Appellant’s Case, §96 [b/p56]. As the CA properly identified, *Kupinskyy* involved the substitution of a life sentence with the possibility of parole (a “reducible” life sentence) with a life sentence without such a possibility (an “irreducible” sentence). By contrast, those sentenced to DHMP remain subject to a reducible life sentence. As such, the change effected by s. 27A was properly characterised by the CA as relating to the ‘execution and enforcement’ of the sentence, and therefore outside the scope of article 7: see, in particular, [101]-[103] [b/p155].

Article 14, ECHR

28. The Respondent submits that the CA addressed this issue with care and in detail, and invites this Court to uphold its analysis, reasons and conclusions: see, in particular, [103]-[148] [b/p156-169].
29. As the Respondent has accepted since the grant of permission⁶, the only issue before the CA under article 14 (with article 5) was whether the different treatment of those aged 18 or over at the point of sentence is objectively justified.
30. This requires consideration of the principles set out by this Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 [b/p1170] as to the approach to be adopted when considering the compatibility of primary legislation with the ECHR.

⁶ See the Respondent’s Detailed Grounds of Resistance, dated 17 May 2023, §33; cf. the Appellant’s Case at §40: “It was eventually conceded during the course of litigation below ...”.

31. As accepted by the CA (at [118] **[b/p161]**), it is clear from the *White Paper* that the former procedure for minimum term reviews was seen as distressing to the families of victims. It was open to Parliament to consider that this justified revisiting the availability of minimum term reviews “*seeking to balance the interests of the families of victims with those of offenders*” (CA at [121]) **[b/p161]**.
32. The CA properly applied the approach in *SC* noting correctly that: a wide margin of appreciation is applicable to legislative choices about penal policy (at [122] **[b/p161]**); differential treatment on the grounds of age is not a suspect ground (at [123]); and that the amendment was effected through relatively recent primary legislation, during the passage of which Parliament directly considered the exact issue raised by the Appellant, i.e. where the line should be drawn as to when minimum term reviews should be available, and rejected an amendment seeking to draw that line at the age of 26 rather than 18 (at [124]-[128] **[b/p162-163]**).
33. Further, the CA was also right to accept (at [139] **[b/p165]**) that the aim of alleviating distress to the families of victims was a legitimate one, and that none of the reasons identified by the Appellant (or the DC) were sufficient to cast doubt on the assessment made by Parliament that the legislation strikes a fair balance between the competing interests, and is therefore proportionate (at [142] **[b/p167]**).
34. Accordingly, the Respondent submits that the CA adopted an entirely orthodox approach to the question of margin, especially following the decision in *SC*, given that the background materials and Parliamentary debate demonstrate that Parliament grappled with the issue of whether reviews should be available to those sentenced aged 18 and over, or at a later age (specifically 26) and had rejected that proposition. Indeed, there is no realistic basis to contend that Parliament had ‘failed to understand’ the significance of the amendment it rejected, still less that the CA failed to appreciate there had been such a misunderstanding (Appellant’s Case, §§74-76 **[b/p50]**). The proposed amendment debated and rejected by Parliament was clear on its face, and effectively reflected the Appellant’s position: s.27A would only apply to those aged 26 or over: “*leave out ‘18’ and insert ‘26’*” (CA, at [52]) **[b/p136]**.
35. The Respondent therefore submits the CA was right to conclude that s.27A is not incompatible with article 14 (with article 5) for the reasons it gave.
36. The Court is invited to dismiss the Appellant’s appeal.

D. THE APPELLANT’S CONVICTION AND SENTENCE

The facts

37. At the age of 17 years 9 months, the Appellant (born on 15 August 1996) murdered Connor Barrett on 10 May 2014 at a 21st birthday party in Hemsby, Norfolk. Connor Barrett was 21 years old and had a son who was 3½ years old.
38. At the age of 18 years 3 months, the Appellant was convicted on 20 November 2014 of murder, assault occasioning actual bodily harm, and possession of an offensive weapon (a knife) in a public place.
39. At the age of 18 years 5 months, the Appellant was sentenced on 16 January 2015 by His Honour Judge Holt [b/p433] in the Crown Court sitting at Norwich “*to be detained during Her Majesty’s pleasure*” under s.90 of the Powers of Criminal Courts (Sentencing) Act 2000 (‘PCCA’) [b/p794].
40. At the time of the Appellant’s sentence, the provisions governing his sentence were contained in Chapter 7 of Part 12 of the CJA 2003. Having been convicted of murder committed when he was aged under 18, the sentencing court was required to apply s.269 of the Criminal Justice Act 2003 (‘CJA 2003’), including in particular:
- (i) Subsection (2) which required the Court to fix a minimum term and order that the early release provisions were to apply as soon as that part of the sentence has been served (the equivalent of section 82A of the PCCSA 2000 [b/p797]).
 - (ii) Subsection (3) which required the Court to fix the minimum term as a period which “*the court considers appropriate taking into account ... seriousness*” (and any statutory deductions such as the crediting of periods of remand, and in considering seriousness, the Court had to consider the offender’s culpability and the harm caused by the offence (see section 143 of the CJA 2003);
 - (iii) Subsection (5) which required that, in assessing “*seriousness*” the Court had regard to the “*general principles set out in schedule 21*” and any sentencing guidelines: schedule 21 contained the appropriate starting points for murder which, in the case of an offender who was under 18 at the time they committed the offence was a minimum term of 12 years (see para 6).
41. Accordingly, and as required by 269(2) the sentencing judge set the minimum term at 15 years having regard to the Appellant’s age at the date of his offending and paragraph 7 of Schedule 21 to the CJA 2003. As HHJ Holt explained to the Appellant and his co-defendant Ayomindy Bile, “*That means you will be held in secure custody for at least 15 years, it may be a lot longer, I emphasise that. You will not be released unless and until the Parole Board is satisfied that the risk you pose to the public is manageable in the community*” [b/p445]. As the judge also explained to the Appellant, “*Had this tragic*

event occurred just three months later Jesse Quaye, the minimum starting point for sentence for you would have been 25 years, as you took the knife to the scene and you used that knife” [b/p439].⁷

42. The judge concluded his sentencing remarks with the following observations [b/p444]:

As I’ve said numerous times during these sentencing remarks, this is a truly tragic case and there are no winners. A decent and loving man has had his life taken, leaving his family and friends distraught, a young son’s life devastated and you will spend many years in prison. The one message that must go out from this case is that, if young men don’t carry knives they’re not going to be able to pull them out and use them. If they do they may use them with tragic results. If you use a knife and kill another human being, when convicted you will spend a very long time in prison, even if you’re just a boy, this message has got to be got across to young people. Ayo Bile and Jesse Quaye for the murder of Connor Barrett, you will be detained during Her Majesty’s pleasure for a minimum term of 15 years. That means you will be held in secure custody for at least 15 years, it may be a lot longer, I emphasise that. You will not be released unless and until the Parole Board is satisfied that the risk you pose to the public is manageable in the community.

43. The Appellant’s half-way point in his 15-year tariff fell on 15 March 2022. The effect of s.27A was therefore that shortly after the half-way point in his minimum term, the Appellant was precluded by statute from seeking any review of that minimum term⁸.

E. THE LEGISLATIVE AND POLICY BACKGROUND

44. The changes introduced by s.27A reflect the latest amendments to DHMP sentences made by Parliament and fall to be considered against the legislative and policy background described by the CA in detail at [8]-[52] [b/p118-132], which is not repeated here.
45. For present purposes, the three key periods in that legislative background are: (i) immediately prior to 30 November 2000, when the arrangements were as described and

⁷ At the time of sentence, para 5A of Schedule 21 to the CJA 2003 provided a starting-point of 25 years for those who (when aged 18 or over), “took a knife or other weapon to the scene intending to - (a) commit any offence, or (b) have it available to use as a weapon, and used that knife or other weapon in committing the murder”. Para 7 of Schedule 21 provided, however, that, “If the offender was aged under 18 when he committed the offence, the appropriate starting point, in determining the minimum term, is 12 years”. (The authority referred to in the Judge’s sentencing remarks is *R v Okokono and Anor* [2014] EWCA Crim 2521, at §§88-95 where the Court of Appeal (Hallett LJ, Lewis J, Sir John Royce) upheld minimum terms of 18 years on two under 18s convicted of murder, i.e. where a six year uplift to the 12 year starting-point had been applied.)

⁸ As below, the Respondent’s policy had in any event been revised on 18 February 2021.

considered by this Court (constituted then as the House of Lords) in *Smith* [b/p1246], when the minimum term (or tariff) was fixed by the Secretary of State (having consulted with the trial judge and Lord Chief Justice); (ii) between 30 November 2000 and 27 June 2022, after Parliament amended the arrangements for life sentences, including DHMP, through the insertion of s.82A into the Powers of Criminal Courts (Sentencing) Act 2000 (‘PCCA’) [b/p797]⁹ which required that the trial judge not the Secretary of State set the minimum term; and (iii) from 28 June 2022, after the entry into force of s.128 of the 2022 Act, which inserted ss.27A and 27B into the 1997 Act [b/p863]¹⁰.

Venables and Smith

46. The decisions in *Venables* [b/p1419] and *Smith* [b/p1246] describe the Secretary of State’s role in DHMP sentences prior to the legislative amendments introduced from 30 November 2000. Both decisions were considered in detail in the CA’s judgment at [15]-[25] [b/p120-124], and that account is not repeated here.
47. In summary, the House of Lords held by a majority in *Venables* that having set the tariff in a DHMP case the Secretary of State was under a duty to keep it under review, and that the Secretary of State “*had to consider not only punishment and deterrence but also factors relevant to the welfare of the child in determining whether it was no longer necessary to continue the detention of the offender. The arrangements for parole did not alter the intrinsic nature of a sentence of DHMP*”: CA, [16] [b/p120]. Thereafter, the ECtHR in *V v United Kingdom* (1999) 30 EHRR 121 held that the fixing of a minimum term amounted to a sentencing exercise to which article 6(1) applied and given that the Secretary of State was clearly not an impartial tribunal independent of the executive, the process had violated article 6.
48. In response, the Secretary of State “*proposed a two-pronged approach: a legislative scheme to govern new cases, and an informal ad hoc procedure to govern the cases of [DHMP] detainees sentenced before the legislation would take effect*”: *Smith*, [5] [b/p1252]. As to the new legislative regime, the Secretary of State informed Parliament that legislation would be introduced (which became the Criminal Justice and Court Services Act 2000, that in s.60 inserted s.82A PCCA), “*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*

⁹ Inserted by s.60, Criminal Justice and Court Services Act 2000

¹⁰ Consistent with this analysis, the Respondent would question the utility of the Appellant’s Annex which seeks to summarise the full legislative and policy history of DHMP sentences. The Respondent will nevertheless seek to agree its terms in order to assist the Court, but would aver that the focus here ought properly to be on the legislative amendments (and to a lesser extent the policy approach) since *Smith*.

subject to discretionary life sentences, which apply to any offenders apart from those sentenced to murder”: ibid [b/p1252]. *Smith* itself concerned a case under the informal ad hoc procedure, where the minimum term had been fixed on the recommendation of the Lord Chief Justice: “*it is governed by the informal ad hoc procedure already mentioned and not by the new legislative scheme*” (at [6] [b/p1252]). The issue in *Smith*, as identified by Lord Bingham (with whom Lords Nicholls, Hoffmann and Hope agreed, with Baroness Hale giving a concurring judgment) at [1] was, “*whether a [DHMP sentence] imposed before 30 November 2000 ... imports a requirement that the minimum term to be served by that person be subject to periodic review, even though the length of that term has in effect been fixed by the Lord Chief Justice of England and Wales*”. The House of Lords held that it did: see CA, [18]-[25] [b/p120-124].

Section 82A, PCCA [b/p797]

49. The first set of legislative amendments identified by the CA as being directly relevant to the issues on this appeal arose from the insertion of s.82A into the PCCA, which marks the transition on 30 November 2000 between periods (i) and (ii) above.
50. Section 82A is entitled “*determination of tariffs*”. It was inserted into the PCCA by the Criminal Justice and Court Services Act 2000, section 60(1) [b/p797], and came into force on 30 November 2000. Subsections (1) and (2) provide that where the court passes “*a life sentence*” (which includes DHMP¹¹) the Court must (save when it intends to impose a whole life order) specify a period (known as a ‘tariff’ or ‘minimum term’) and direct that the early release provisions of the CSA 1997 are to apply “*as soon as [the offender] has served the part of his sentence which is specified in the order*”. The minimum term fixed by the court under section 82A may be subject to an appeal to the Court of Appeal: *R v Isa McBean* [2002] 1 Cr App R (S) 98 at [17]. Until that point, the remedy was judicial review of the Secretary of State’s decision (taken with or without the advice of the judiciary): *R (oao Ralph Bulger) v The Secretary of State for the Home Department, The Lord Chief Justice of England and Wales* [2001] EWHC Admin 119 at [17].
51. Accordingly, once section 82A was enacted:
 - (i) The sentencing court fixed the tariff (whereas until that point the tariff was in law fixed by the Secretary of State in accordance with section 28(4) of the CSA 1997) [b/p789];

¹¹ Section 82A(7) defined “*life sentence*” by reference to Chapter 2 of Part 2 of the CSA 1997, which defined DHMP as a “*life sentence*” (see section 34(2)) [b/p792].

- (ii) Except in the case of whole life orders, the early release provisions would apply by operation of a court order directing that those provisions should apply as soon as the offender had served the tariff element (section 82A(2) of the PCCSA 2000) [b/p798];
 - (iii) The offender could then require the Secretary of State to refer his case to the Parole Board and, if the Parole Board directed release, the Secretary of State was required to release him (section 28(5) of the CSA 1997) [b/p789].
52. The implications of the new regime established by s.82A were identified in *Smith* and by the CA.
53. In *Smith*, Lord Bingham described the effect of s.82A as follows (at [6]): “*in brief and simple summary, [s.82A] requires trial judges [imposing DHMP sentences] to specify the minimum term to be served by the detainee before he or she becomes eligible for release, if recommended by the Parole Board, on parole. Thus the judge (not the Secretary of State) fixes the minimum term and the Parole Board (not the Secretary of State) decides whether it is safe to release the detainee*” [b/p1252].
54. The CA explained (at [27]) [b/p125], “*The section proceeded on the basis, therefore, that the court passing the sentence would determine the minimum term to be served having regard to the seriousness of the offence. That term had to be served before the early release provisions in section 28 of the 1997 Act applied. Those provisions imposed a duty on the Secretary of State to release an offender (a) who had served the minimum term fixed by the court and (b) in respect of whom the Parole Board had directed release (see section 28(5) of the 1997 Act). The Parole Board could only give such a direction if it were satisfied that it was no longer necessary that the person be confined for the protection of the public. In such cases, the Secretary of State no longer had a role in determining the minimum term that had to be served: that was fixed by the sentencing court. The Secretary of State did not assess the question of risk once that minimum term had been served: that was for the Parole Board*”.
55. As to the Secretary of State’s role in reviewing the minimum term after the introduction of s.82A, the CA rightly identified that any such role then existed in a changed legislative landscape and had to be approached in conformity with the new legislation.
56. As the CA put it at [40] [b/p130], “*It would be inconsistent with the statutory framework for the Secretary of State to retain a power, or be under a duty, periodically to review the case to determine whether a different and lower (or higher) minimum term is appropriate*”. Equally, “*a question could still arise as to whether the Secretary of State retained a role to modify the minimum term because of circumstances arising after the*

minimum term has been fixed by the court” and “[i]n practice, the Secretary of State did continue to consider whether there were circumstances in which the minimum term should be reduced” [42], although as the CA noted, “[w]ith effect from 18 February 2021, the policy of the Secretary of State was that offenders sentenced to DHMP when aged 18 or over would not be eligible to apply for a review while those under the age of 18 would continue to be eligible for a review” (at [42]).

57. The correctness of the CA’s observations on this point is underscored by the absence of any statutory arrangements for amending the decision of the sentencing court to set the minimum term at a particular level. Such a decision can only be varied by the Court of Appeal Criminal Division, not by administrative action (see *R v Karl David Clue*, unreported, 19 December 1995), nor even by the sentencing court itself, unless it is to correct an error within a specified period (see *R. v Menocal (Frances Kathleen)* [1980] A.C. 598).
58. As such, and as the CA observed, “[t]he precise legal basis upon which the Secretary of State continued to consider applications to review a minimum term fixed by the sentencing judge was not fully considered by the courts”, but “the better view” was - as identified in *Smith* and by the DC - the Secretary of State retained a “general power of executive clemency, a more modern description of the royal prerogative of mercy, usually exercised on compassionate grounds such as grave illness”: CA, [43] [b/p131]. The CA therefore concluded that, “The exercise of a prerogative power to review the minimum term in the light of events after the minimum term was fixed would not necessarily be inconsistent with, or impliedly removed by, the statutory framework created by section 82A of the PCCA and now the Sentencing Act”: *ibid*.
59. Further, and as identified by the CA immediately after considering the position between 30 November 2000 and 27 June 2022, “In any event, as explained below, Parliament has now provided, by virtue of section 27A(1) and (11) of the 1997 Act, that there is no right for an offender serving a sentence of DHMP imposed when he was aged 18 years or older to apply for a review of the minimum term. The continued existence, and certainly exercise, of a power, whether derived from the prerogative or elsewhere, to consider an application to review a minimum term in those circumstances would be inconsistent with the will of Parliament as expressed in section 27A of the 1997 Act as amended”: CA, [43] [b/p131].

White Paper: A Smarter Approach to Sentencing

60. In September 2020, the Ministry of Justice published a White Paper, *A Smarter Approach to Sentencing* [b/p459], which included the following:

Serious offences [b/p475]

Where custody is required for public protection, we think reforms are necessary to improve the coherence of current sentences. We must ensure that courts have the tools they need to pass appropriate sentences which properly reflect the culpability of a child and the seriousness of their offending, and that sentences work fairly. We will legislate to:

[...]

- Ensure age and seriousness of crime is better factored into starting points for murder sentencing, and reduce the number of tariff reviews available into adulthood for murder.*

[...]

Legislative measures proposed: [...] [b/p547]

- Change the minimum term starting points for murder committed as a child to ensure that the seriousness of the offence is taken into account and there is less of a gap between older children and young adults*
- Reduce the opportunities for over 18s who committed murder as a child, to have their minimum term reviewed, to protect the families of victims while maintaining a clear distinction between adults and children.*

61. As to the rationale for the reduction in the availability of tariff reviews for adults, the White Paper explained [b/p554]:

327. Offenders sentenced to DHMP may apply to the High Court for a review of the length of their tariff at the halfway point. The purpose of this review is to determine whether the tariff should be reduced, and for a review to be successful, the child must show exceptional progress in custody. If the application is unsuccessful, the child can continue to apply every subsequent two years until the tariff expiry date.

328. The existence of reviews is an important part of ensuring that the tariff remains appropriate, as children change and develop as they mature. It is also clear, however, that the existence of the review procedure – particularly the opportunity for continuing reviews after the halfway point – can be extremely distressing for the families of victims. Families are contacted every time an offender applies for a review and are given the opportunity to provide a new Victim Personal Statement, a process which in many cases causes them to relive the circumstances of the crime and feel as though they have to advocate again for justice for their loved one. This difficult process is also unlikely to lead to any benefit for the offender, as subsequent reviews are rarely successful and very few offenders take advantage of the opportunity to apply again.

329. This is why we propose to reduce the number of reviews an offender is entitled to after they turn 18. Offenders who are given life sentences for murders committed over the age of 18, or those who commit murders as children but who are not sentenced until they are over 18, are not entitled to reviews, reflecting the fact that adults do not go through the same accelerated development and maturation that children do. Our

new system will be based on this principle.

330. We propose a new, fairer system that recognises that offenders who were sentenced to DHMP as children but have since turned 18 in custody are now adults and have passed the age where significant development occurs, while still accounting for the fact that they were children and still maturing when the crime was committed and they were sentenced. Under the new system all offenders sentenced when under 18 would receive the opportunity to apply for one tariff review at the halfway point of their sentence. This will allow the High Court to take into account any development or maturation since the crime was committed. However, the offender will only be eligible for subsequent reviews covering the period until they turn 18. This change will make the tariff review policy equitable for all offenders who are given life sentences for crimes they committed as children, regardless of their age when they are sentenced, while also reflecting the fact that adult offenders are not eligible for any reviews.

331. Removing eligibility for continuing reviews past the age of 18 will provide more clarity for victims' families and keep them from having to continually revisit the events that led to the loss of their loved one. Continuing reviews provide very little practical benefit for offenders, and this change will ensure that all offenders who have reached adulthood are treated equally while still offering the opportunity for rehabilitation and making allowances for the process of development and maturation in children.

The Secretary of State's change in policy

62. Following the White Paper, from 18 February 2021 the Respondent implemented a revised policy in relation to DHMP prisoners: see the HM Prisons & Probation Service (HMPPS) circular, '*Revision to the existing policy for Minimum Term Reviews for individuals sentenced to [DHMP]*' [b/p586].
63. The HMPPS circular recorded the changes to the eligibility of DHMP prisoners for a minimum term review in the following terms:
 - *DHMP prisoners aged 18 years or over at the point of sentencing are now no longer eligible to apply for a review of their minimum term at the half-way point of their sentence. Previously, all prisoners sentenced to DHMP were invited to apply for a review of their minimum term, regardless of their age at sentencing.*
 - *DHMP prisoners under 18 years at the point of sentencing remain eligible to apply for a review of their minimum tariff at the halfway point of their sentence and will continue to be invited to do so.*
 - *Following an initial review for DHMP prisoners under 18 at the point of sentencing, they will now be eligible to re-apply for a further minimum term review only while they remain under the age of 18 years on the day that the application is made. Eligible prisoners can apply every two years from the date of the High Court Decision or where the Secretary of State first gave notice that the application was rejected until they reach 18 years of age.*

64. As foreshadowed in the circular, the MOJ’s Generic Parole Process Policy Framework (‘GPPPF’) was amended on 13 May 2021 to reflect these changes, including that minimum tariff reviews would now only be available where prisoners were under 18 years of age at the date of sentence: see §§3.2 [b/p587]; 4.1 & 5.2.1.

Parliamentary debate on 10 June 2021

65. On 10 June 2021, Parliament considered an amendment which would have made the cut-off age 26 years instead of 18 [b/p658]. The amendment was rejected. Importantly for the article 14 issue on this appeal, the debate demonstrates that Parliament recognised that - as is clear from the face of the legislation - the provisions would mean that “*those who have reached the age of 18 at the time of sentencing will no longer be entitled to a review of their sentence*” and “*those who are entitled to reviews – in other words those who were sentenced as a child – will be restricted to a single review...*”.
66. Parliament therefore recognised the precise point in issue here, namely that one of the effects of s.27A was that those sentenced at age 18 would no longer be entitled to a review of their sentence. Parliament recognised that the ‘mischief’ or the ‘intention’ was to spare families the trauma of having to revisit the events. Equally, Parliament was informed of the concern that ‘those who commit offences as children should be treated as such’, of the implications of court backlog on delays to sentencing causing a delay to sentence, Lord Bingham’s observations in *Smith*, the effect of a brightline cut-off at 18, and that development continues beyond 18.
67. Parliament nevertheless enacted s.27A in the terms that it did.

Section 27A [b/p863]

68. Section 27A provides:

Sentence of detention during Her Majesty’s pleasure imposed on a person under 18: application for minimum term review

- (1) *This section applies to a person who—*
 (a) *is serving a DHMP sentence, and*
 (b) *was under the age of 18 when sentenced;*
 and such a person is referred to in this section as a ‘relevant young offender’.
- (2) *A relevant young offender may make an application for a minimum term review to the Secretary of State after serving half of the minimum term.*
- (3) *An ‘application for a minimum term review’ is an application made by a relevant young offender for a reduction in the minimum term.*
- (4) *Where a relevant young offender has made an application for a minimum term review under this section, the offender may only make a further such application if—*
 (a) *the period of 2 years beginning with the day on which the previous application was*

determined has expired, and

(b) the offender is under the age of 18 on the day on which the further application is made.

(5) Where the Secretary of State receives an application under this section, the Secretary of State must—

(a) consider the application, and

(b) unless the Secretary of State forms the view that the application is frivolous or vexatious, refer it to the High Court.

(6) Where the Secretary of State decides not to refer the application to the High Court, the Secretary of State must give notice of that decision, and the reasons for it, to the relevant young offender.

(7) If the relevant young offender makes representations or provides further evidence in support of the application before the end of the period of 4 weeks beginning with the day on which the notice under subsection (6) is given, the Secretary of State must consider the representations or evidence and—

(a) if the Secretary of State is no longer of the view mentioned in subsection (5)(b), refer the application to the High Court, or

(b) give notice to the offender confirming the decision not to refer the application.

(8) In this section—

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

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

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

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

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

(9) The table is as follows—

<i>Provision under which DHMP sentence imposed</i>	<i>Provision under which minimum term order made</i>
Section 259 of the Sentencing Code	Section 322 of the Sentencing Code
Section 90 of the Powers of Criminal Courts (Sentencing) Act 2000	Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 or section 269 of the Criminal Justice Act 2003
Section 218 of the Armed Forces Act 2006	Section 269 of the Criminal Justice Act 2003 or section 322 of the Sentencing Code.

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

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

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

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

The Appellant's criticisms of the CA

69. Against that background, the Respondent respectfully submits that many of the Appellant's criticisms of the CA's approach to the legislative and policy context here are misplaced. In particular:-
70. The Appellant's assertion that CA's judgment represents "*a radical departure from the consensus*" (Appellant's Case, §22), in particular in its approach to the effect of the amendments introduced from 30 November 2000, both understates the implications of s.82A and overstates the terms of the CA's decision.
71. Not only did section 82A [b/p797] expressly amend DHMP sentences, the proposition that it removed any duty on the Secretary of State to review minimum terms which would from then be set by the court was expressly recognised (and left unresolved) by the House of Lords in *Smith*. The submission for the Secretary of State in *Smith* was precisely that, "*no such duty obtains in the case of [DHMP] detainees covered by section 82A*" (and it would therefore be anomalous to recognise such a duty for those covered by the ad hoc arrangements). The House of Lords in *Smith* did not resolve that submission either way: "*But whether an anomalous distinction exists between pre- and post-30 November 2000 [DHMP] detainees depends on the interpretation of section 82A, an issue not now before the House*": *Smith*, at [15] [b/p1256] (cf. Appellant's Case, §16 [b/p26]).
72. To speak therefore of "*a consensus*" in the period after *Smith* to the effect that section 82A had had no effect on the duty identified in *Smith* is a significant overstatement. Moreover, the CA recognised both the ongoing practice of the Secretary of State's accepting applications to review the minimum term, and the absence of any authoritative statement from the courts as to how that sat in conformity with the legislative regime established by section 82A (at [43]) [b/p131].
73. The CA was also right to emphasise the implications of the changes made to DHMP sentences by section 82A, and the cumulative impact of those amendments on the actual operation of the sentence. As the CA explained (and as was recognised in *Smith* at [6] [b/p1252]), "*From 30 November 2000, the court fixed the minimum term that the offender must serve, having regard to the seriousness of the offence. The executive, in the form of the Secretary of State, did not determine that issue. Further, once that period had expired, it was for the Parole Board to determine if the offender could be released on licence and managed in the community. If so, the Secretary of State had to release the offender. If not, he could not. The role of the Secretary of State, as explained above, was to determine whether as a matter of clemency the minimum term should be reduced*

by reason of events occurring after sentence, principally the progress that the offender had made”: at [131] **[b/p163]**, and see too [27] **[b/p123]**.

74. Further and in any event, for the purposes of these proceedings Parliament has on any view now intervened: whatever the basis of the Secretary of State’s ongoing exercise of the prerogative power to review a DHMP minimum term after the introduction of s.82A, following the enactment of s.27A there could be no assertion of the same power now in circumstances expressly prohibited by s.27A. As such, it is difficult to see (as the CA recognised at [89] **[b/p150]**) how references to an ongoing “*inherent duty of ongoing review*” in all DHMP sentences can be sustained: Parliament expressly removed any such duty in the circumstances specified in s.27A.
75. For these reasons, the Appellant’s attempt to suggest that ‘if Parliament had altered the nature of DHMP it would have said so in clearer terms’ (Appellant’s Case, §§35-36 **[b/p35-36]**) is flawed:-
76. First, the intended effect of section 27A(11) is clear on its face: to restrict the availability of minimum term reviews to offenders who were under 18 at the date of their sentence. Contrary to the suggestion that there is a lack of certainty (Appellant’s Case at [38] **[b/p37]**), an offender serving DHMP knows what his minimum term is; he knows whether he has a right to seek a review of that minimum term; and he knows that he will have his suitability for parole considered once his minimum term expires.
77. Secondly, the amendment did not engage “*fundamental rights*”, since there is no “*right*” to any executive review of any sentence (or any component of it). In any event, insofar as it is suggested that the language could have been clearer, it is difficult to see how that could be so, given the terms of section 27A and in particular section 27A(11) **[b/p865]**.
78. Thirdly, section 27A is more than a “*side wind*” (Appellant’s Case, §36 **[b/p36]**). Section 27A was directly and unambiguously confronting the very thing which the Appellant says distinguishes DHMP from other sentences, viz. the availability of a review of sentence.
79. Fourthly, the Appellant’s position (Appellant’s Case, §39 **[b/p37]**) is that section 27A does not remove the right of review, merely the opportunity to exercise the right. This is not a coherent analysis. Parliament cannot be taken to have legislated on the basis that it was leaving a “*right*” in place but denying a person the opportunity to exercise that right. Rather, section 27A contains a complete code which governs the availability of minimum term reviews for persons serving DHMP.

80. The CA was therefore correct to hold at [131] **[b/p163]** that the DC had fallen into error in accepting the Appellant’s analysis on these issues.

F. ARTICLE 5, ECHR

81. Article 5 ECHR provides that: “*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court ...*”

82. The relevant principles for present purposes are as follows:-

83. The lawfulness of detention and whether it was imposed pursuant to a procedure “*prescribed by law*” includes “*the obligation to conform to the substantive and procedural rules of national law*”: *Saadi v United Kingdom* (2008) 47 EHRR 17 at [67] **[b/p1806]**. Detention must not have the quality of arbitrariness (*ibid*). While the ECtHR has not laid down any global definition of arbitrariness, one general principle is that detention will be arbitrary if it involves “*an element of bad faith or deception on the part of the authorities*”: *Saadi* at [69] **[b/p1806]**.

84. Both the order to detain and the execution of the detention must “*genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of article 5(1)*”: *Saadi* at [69] **[b/p1807]**.

85. In the case of lawful detention after conviction, “*as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the court under article 5(1)*”: *Saadi* at [71] **[b/p1807]**. However, “*where a decision not to release...was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary*”: *James v UK* at [195].

86. As Lord Reed observed in *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] AC 1 at [2] **[b/p912]**, the “*essential aim*” of article 5 is “*to confer protection against arbitrary or unjustified deprivation of liberty*”. Consistent with that, no issue can arise under Article 5 before the expiry of a prisoner’s tariff or minimum term because until that point the deprivation of a prisoner’s liberty is pursuant to the punishment part of the court’s sentence of imprisonment: see, for example, the ECtHR’s admissibility decision in *Kaiyam v United Kingdom* (2016) 62 EHRR SE13, at [67] **[b/p1733]**.

Following *Kaiyam*, in *Brown* the Supreme Court confirmed that, “*the European court’s approach reflects the logic of locating the obligation in article 5.1(a): it is only after the tariff has expired that any question can arise whether the continued detention is arbitrary, and therefore not ‘lawful’ within the meaning of article 5.1(a)*”, per Lord Reed JSC, at [39] [b/p925].

Submissions

87. Against that background, the detention of the Appellant pursuant to the minimum term fixed by the trial judge is compatible with article 5. As the CA correctly held at [84]-[85] [b/p149]: “*the sentence of DHMP and, in particular, the fixing of the minimum term, was lawful as a matter of national law and was imposed following the procedure prescribed by law. Section 82A of the PCCA required the sentencing judge to fix the minimum term that Mr Quaye would serve in detention. The sentencing judge did so, following the procedure laid down by law, which included the obtaining of relevant reports, the fixing of the starting point by reference to legislation, and the identification of aggravating and mitigating features*”; and further, “*the sentence reflected the purpose of fixing a minimum term having regard to the seriousness of the offence, measured by the harm caused and Mr Quaye’s culpability, assessed in the light of the relevant legal framework. That included assessing his culpability in the light of his maturity and understanding as at the time that he committed the offence. That process involved a finding of guilt and the imposition of a sentence commensurate with the gravity of the offence and the culpability of the offender. That is not arbitrary. As recognised in Saadi, the ‘decision to impose a sentence of detention and the length of that sentence are matters for the national authorities’ (para 71)*”.
88. The CA was also correct to reject the DC’s conclusion that section 27A of the CSA 1997 was incompatible with article 5. The DC’s conclusion was premised on its view that “*an inherent requirement of [a DHMP] sentence was a continuing review of whether detention as justified*”: CA, [86] [b/p149]. As the CA explained, that failed to take account of the alterations to DHMP sentences made, first, by s.82A and then by s.27A.
89. As to s.82A, after the introduction of that amendment the legal basis on which the Secretary of State continued to have any role with respect to the minimum term now set by the sentencing court was as an act of clemency: see above, and CA, [43] [b/p131]. But in article 5 terms, “[t]he absence of an opportunity whereby an offender could apply to the Secretary of State seeking, as an act of clemency, a reduction of the minimum term by reference to events occurring after sentence (essentially, exceptional progress in prison) does not render detention pursuant to the sentence imposed under section 90

of the PCCA (or section 259 of the Sentencing Act) arbitrary or unlawful”: CA, [87] [b/p150].

90. Further and alternatively, as the CA held, “*if (contrary to our view) it was inherent in a sentence of DHMP that there be a continuing review of whether the minimum term continued to be justified*” it might have been expected that Parliament would have provided for such reviews, which it did not: CA, [89] [b/p150]. And critically, any such requirement for continued review: “*must be said to be inherent or implicit in the provisions of section 90 (or section 259) of the relevant statute. But section 27A(11) expressly provides that there is no right to apply for a review of the minimum term except in the circumstances provided by section 27A. Thus, it cannot any longer be a requirement of domestic law that a person aged 18 at the date of sentencing must have an opportunity to apply for a review. The risk of arbitrariness cannot then be said to flow from any inconsistency between the sentence as provided for by section 90 (or section 259) of the relevant statute and the later Act. The later Act removes that element from the sentencing process. The case law of the European court does not require that an offender sentenced to a particular sentence must have the opportunity to apply for a review of that sentence. It is not, easy, therefore, to ascertain on what basis it is said that section 27A(1) and (11) is incompatible with article 5 of the Convention*”: *ibid.*
91. The further criticisms of the Appellant that s.27A is contrary to article 5 because in principle subjecting a ‘child offender’ to a sentence where there is no possibility of later review is *prima facie* arbitrary fails to grapple with either the scope of the circumstances where a sentence of DHMP may be imposed (e.g. on middle-aged adults), or those circumstances where an offender may receive ‘custody for life’ or ‘detention for life’ for offences committed as a child with no possibility of the minimum term being reviewed. The first category demonstrates that there can be no principled objection including by reference to article 5 to some offenders (e.g. those sentenced in middle-age) to Parliament’s legislating to remove the opportunity for a review of the minimum term set by the sentencing court. The second demonstrates that there is no article 5 obligation to include a process of review of a life sentence imposed on a child offender, even if sentenced as a child to a ‘detention for life’ or as a young adult to ‘custody for life’
92. The CA was therefore right to hold that, “*The case law of the European court does not require that an offender sentenced to a particular sentence must have the opportunity to apply for a review of that sentence. It is not easy, therefore, to ascertain on what basis it is said that sections 27A(1) and (11) is incompatible with article 5 of the Convention*” (at [89]) [b/p150].

G. ARTICLE 7, ECHR

93. The DC declined to consider the article 7 issue, and the CA rightly rejected the Appellant’s cross-appeal.
94. Article 7 ECHR provides: “*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*”.
95. Under article 7, ‘penalty’ is an autonomous Convention concept: *Del Rio Prada v Spain* (42750/09) (2014) EHRR 37 at [81] [b/p1640]. The ECtHR has “*drawn a distinction between a measure that constitutes in substance a ‘penalty’ and a measure that concerns the ‘execution’ or ‘enforcement’ of the ‘penalty’*. In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the ‘penalty’ within the meaning of art.7”*: Del Rio Prada*, at [83] [b/p1640].
96. This Court recently considered article 7 in the context of a change to the proportion of sentence required to be served by those convicted of terrorist offences in Northern Ireland, where provisions which had mandated release at the halfway point were amended to a requirement for referral to the Parole Commissioners (rather than automatic release) after serving two thirds of the sentence: *Morgan v Ministry of Justice* [2023] UKSC 14; [2023] 2 WLR 905 [b/p961]. Having conducted a detailed review of the Strasbourg and domestic authorities, the Court held unanimously that, “*there is an important qualification to the autonomous concept of a penalty. Measures representing the execution or enforcement of a penalty do not fall within the scope of the autonomous concept. Accordingly, retroactive changes to the execution or enforcement of a penalty, whilst a person is serving a sentence, do not fall within the prohibition enshrined in article 7(1) of the ECHR*” (at [82]) [b/p987].
97. In *Morgan*, the Court held that the penalties imposed on the appellants were the underlying determinate sentences, and that the changes to the early release provisions of those sentences did not fall to be categorised as penalties themselves. As a result, article 7 did not apply. The Court observed that “*the court in performing that task does not amend the term of the sentence of imprisonment which has been fixed by the court...rather, the court’s task is part of a regime by which prisoners are to be released on licence before serving the full term of the sentence imposed. Accordingly, the court’s task is as to the manner of execution of the sentence which it has imposed*” (at [18])

[b/p975]. As the Court noted, the ECtHR has held that issues relating to release policies, the manner of their implementation and the reasoning behind them, fall within the power of contracting states to determine their own criminal policy: at [90] [b/p990], citing *Kafkaris v Cyprus* (21906/04); (2009) 49 EHRR 35 [b/p1702]. The Court went on to observe that, “*it would be surprising if article 7(1) of the ECHR prohibited the legislature from making changes in relation to the manner of execution or enforcement of a sentence when faced, as here, with what it considered to be compelling policy reasons supporting the change*” (at [97] [b/p992]). Accordingly, the court held that, “*just because there is judicial involvement in a measure which relates to the execution or enforcement of a penalty does not change the measure to one in which a penalty is fixed*” (at [109] [b/p994]).

98. Similarly, in *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) [b/p1128] the Divisional Court (Fulford LJ, Garnham J) noted that “*in the absence of a fundamental change of the sort described in Del Rio Prada ..., a redefinition of the penalty itself, the principle is clear; an amendment by the legislature to the arrangements for early release raises no issue under article 7 ... it does not amount to the imposition of a heavier penalty than that applicable at the time the offence was committed*” (at [105] [b/p1154]).
99. Moreover, the fact that changes to release arrangements may mean that a prisoner spends longer in prison than might otherwise have been the case does not mean that they engage article 7 for that reason: see *Hogben v United Kingdom* (Application 11653/85) (1986) [b/p1668], cited in *Morgan* at [85] [b/p988], where the ECtHR rejected a claim that changes to parole arrangements meaning that a prisoner sentenced to life imprisonment served a substantially longer time in prison than he might otherwise have was incompatible with article 7: “*the ‘penalty’ for purposes of article 7.1 must be considered to be life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years’ imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the ‘penalty’ which remains that of life imprisonment. Accordingly, it cannot be said that the “penalty” imposed is a heavier one than that imposed by the trial judge*”.

Submissions

100. Parliament’s removal of reviews for a particular category of offender does not alter the penalty originally imposed on the Appellant, namely DHMP with a minimum term of

15 years. The changes to minimum term reviews go to the execution/enforcement of the sentence, and not the penalty itself. The removal of the ability of those sentenced to DHMP to apply for a minimum term review has not redefined the underlying ‘penalty’ within the meaning of the Convention. The penalty imposed was, and remains, a sentence of DHMP with a minimum term fixed by the sentencing Court.

101. Unlike *Kupinsky v Ukraine* (5084/18) (2023) 76 EHRR 38 [b/p1767], which involved the substitution of a life sentence with the possibility of parole (a ‘reducible’ life sentence) for a life sentence without such a possibility (an ‘irreducible’ sentence), those sentenced to DHMP remain subject to a reducible life sentence where the minimum term is fixed by the sentencing court. The change effected by s.27A is to remove the possibility to apply for parole at an earlier stage, by means of a review of the minimum term. It is therefore analogous to the changes considered in *Morgan and Khan*, where the courts held that the provisions on early release were measures relating to the enforcement/execution of a sentence. There is, the Respondent respectfully submits, no principled basis for distinguishing that position here.
102. Further and as the CA correctly held, “[t]he arrangements in place until February 2021 permitted applications to be made to the Secretary of State seeking a reduction, as an act of clemency, in the minimum term. Decisions refusing such applications did not extend the minimum term fixed by the court. If an application were granted, and the minimum term were reduced, the applicant would be able to apply earlier to the Parole Board for release on licence than would otherwise have been the case. Further, the application was to be determined by reference to matters occurring after sentence, essentially, exceptional progress in prison. The arrangements did not involve determination of the appropriate minimum term reflecting the seriousness of the offence; that was the responsibility of the court that sentenced the offender. The arrangements, therefore, were concerned with the manner of execution or enforcement of the sentence, including the minimum term, fixed by the court and did not fall within article 7(1) of the Convention. Similarly, the arrangements made by sections 27A and 27B by which a court could reduce the minimum term having regard, in particular, to whether the offender’s rehabilitation has been exceptional or whether continued detention or imprisonment for the remainder of the minimum term would give rise to a serious risk to the welfare or continued rehabilitation of the offender, concern the manner of execution or enforcement of the penalty fixed by the sentencing court. For those reasons, neither the withdrawal of the arrangements by the Secretary of State in February 2021, nor the statutory provisions enacted in 2022 providing for a limited ability for certain offenders to apply for a reduction in the minimum terms, fall within the scope of article 7(1) of the Convention” (at [102] [b/p155]).

H. ARTICLE 14, ECHR

Introduction

103. Article 14 provides that “*the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”.
104. A complaint of discrimination under article 14 requires four elements to be established:
- (i) The circumstances must fall within the ambit of one of the rights protected by the Convention;
 - (ii) There must be a difference in treatment;
 - (iii) The relevant difference must be on the ground of one of the characteristics listed in article 14 (including ‘other status’); and
 - (iv) The differential treatment is not objectively justified.
105. In *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831, Lady Black JSC observed that when applying this test (at [8]):
- “It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173. He observed that once the first two elements are satisfied: ‘the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court’s scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.’”*
106. What requires to be justified is the difference in treatment arising from the impugned provision: *A v Criminal Injuries Compensation Authority* [2021] UKSC 27, [2021] 1 WLR 3746 at [80].

107. In the present case the only issue is ‘justification’. The Respondent has accepted since the grant of permission that the relevant provisions are ‘within the ambit’ of article 5 for the purposes of article 14 (*R(Clift) v SSHD* [2007] 1 AC 481 at [13]), and that in this context the difference in treatment on the grounds of age amounts to ‘other status’ for the purpose of article 14. As such, the ‘comparator’ for article 14 purposes is: An offender who committed murder under 18, and remained under 18 at the date of sentence (in respect of whom Parliament has provided that he may apply for a minimum term review), as compared with an offender who committed murder under 18, and had attained the age of 18 at the date of sentence (in respect of whom Parliament has provided that he may not apply for a minimum term review).

The standard of review

108. As to the test to be applied when considering whether differential treatment is justified, the DC correctly held at [46] of its judgment that a “*wide margin of appreciation*” applies here, akin to the ECtHR’s “*manifestly without reasonable foundation*” test, citing *R(SC) v Secretary of State for Work and Pensions* [2022] AC 223, [160] [b/p1232]. That approach was correct: see too the CA, at [122]-[128] [b/p161-162]. Having regard to the decision of the ECtHR in *Clift v United Kingdom* [2010] ECHR 7205/07 [b/p1582] this is a ‘prison and penal policy’ case rather than an ‘arbitrary detention’ case: see *Clift* at [73] [b/p1604], and *Stott v UK* (Application 26104/19) (2023) [b/p1818], at [96] [b/p1843], [107]-[108] [b/p1845]. It is also an area where Parliament has legislated, and recently, and in circumstances where it gave express consideration to the issue on this appeal, and rejected it: “*That is a legislative choice to which the courts should give appropriate weight which, normally, will be substantial in fields including social policy and penal policy*”: CA, at [128] [b/p163], citing *SC* at [115(2)] [b/p1218], [146] [b/p1228]& [161] [b/p1232].
109. As to the factors relied on by the Appellant as serving “*to heighten the intensity of review*” (Appellant’s Case, §43) [b/p38], the Respondent submits they were not “*erroneously ignored / dismissed*” by the CA, rather they were considered with care and the CA accepted that they would have to be “*borne in mind when assessing the proportionality of the legislation*”; see CA, [141] [b/p166].

Parliamentary intent and the use of Parliamentary materials

110. The leading authority on the use of Parliamentary materials is *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [163]-[185] [b/p1233-1239]. Of particular relevance to the present appeal, the judgment of Lord Reed emphasised the need for judicial restraint when considering Parliamentary procedures:

“It follows that it is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament. That principle was affirmed by this court in R (Buckinghamshire County Council) v Secretary of State for Transport [2014] UKSC 3; [2014] 1 WLR 324, in my own judgment at para 110 and in the judgment of Lord Neuberger and Lord Mance at paras 203-206, where they observed (at para 206) that “[s]crutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (ie condemning) Parliament’s internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone” (at [165] [b/p1234]).

111. The will of Parliament finds its expression solely in the legislation which it enacts (at [167]) [b/p1234]. No reasons are given by Parliament, and *“the decisions which Parliament takes are not necessarily capable of being rationalised in any event”* ([168] [b/p1234]; and see too [169]-[172] [b/p1235]). Lord Reed cautioned that as a consequence *“considerable care”* has to be taken when using Parliamentary materials in connection with the Human Rights Act (at [173] [b/p1235]). However, such materials may be relevant when considering the purpose which a statutory provision seeks to achieve (at [173] [b/p1235]) and the question of proportionality (at [174] [b/p1236]).
112. The degree of respect which courts will show to primary legislation will depend on the circumstances, including *“whether Parliament can be taken to have made its own judgment of the issues which are relevant to the court’s assessment. If so, the court will be more inclined to accept Parliament’s decision, out of respect for democratic decision-making on questions of political controversy”* (at [180] [b/p1238]). See too, in particular, [182]-[184] [b/p1238-1239]: *“In order to decide [the question of compatibility with Convention rights] the courts usually need to decide whether the legislation strikes a reasonable balance between competing interests, or, where the legislation is challenged as discriminatory, whether the difference in treatment has a reasonable justification. If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court’s assessment, because of the respect which the court will accord to the view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation”*. The Respondent notes too the

caveats identified at [183]-[184] **[b/p1239]**, as to going no further than “*ascertaining whether matters relevant to compatibility were raised during the legislative process*”, and that “*trawling through debates should not, therefore, be necessary, and is unlikely to be appropriate: a high level review of whether a topic was raised before parliament, whether in debate or otherwise, should suffice*”, and “*the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility*”.

113. See too, the Divisional Court’s recent decision in *R(ALR and others) v Chancellor of the Exchequer* [2026] 1 WLR 10 **[b/p1018]** concerning the article 14 compatibility of legislation removing the exemption from VAT relating to the provision of education by private schools, including its Annex B at §§36-49 **[b/p1035-1039]**.

Submissions

The legal principles

114. The Respondent submits that the CA’s analysis of the ‘appropriate approach’ following this Court’s decision in *SC* was unimpeachable, and not repeated here: CA, [111]-[117] **[b/p157-160]**.
115. Contrary to the Appellant’s submission, the CA did not “*apply the wrong test*” by failing to recognise that the test of ‘within the ambit’ under article 14 does not require a substantive violation of an ECHR right (cf. Appellant’s Case, at §54 **[b/p42]**, and query §40 **[b/p37]**; and CA at [108] **[b/p157]**).
116. The CA was also correct that the DC had erred in refusing to consider the Hansard material on *Pepper v Hart* grounds (CA, at [126] **[b/p162]**; cf. Appellant’s Case, at §§71-80 **[b/p49-52]**, which suggests the CA’s approach was wrong without addressing the *Pepper v Hart* issue).

The application to the facts

Justification generally

117. The aims of the legislation are clear and can be determined from the face of the provisions: “*Those who were aged 18 or over when sentenced, and who begin their sentence as adults, do not have the opportunity to apply for a review (section 27A(1) and (11)). Those who are serving a sentence of DHMP and were under 18 when sentenced may make an application for the minimum term to be reviewed after serving half of the minimum term fixed by the court (section 27A(1) and (2))*”: CA, [119] **[b/p161]**.

118. As such, the legislation aims to reduce the opportunities for those sentenced to DHMP to apply for a review of their minimum term: *“It does so by drawing a distinction between those who begin their sentence as adults and who will not have an opportunity to apply for a review. An exception is made for those who begin their sentence when they are children, that is those who are aged between 10 and 17 when sentenced. They will have an opportunity to apply for a review in order to demonstrate, in particular, that whilst serving the first half of their minimum term (part of which at least will be during their childhood) their rehabilitation is exceptional or they face a serious risk to continued progress or welfare which cannot be significantly mitigated. They will only have the opportunity to make a further review if they are still under 18 at the time when a further application can be made and, by definition, any progress in those circumstances, will have occurred when they were children”*: CA, [120] [b/p161].
119. Parliament has expressly (and therefore deliberately) amended DHMP sentences in a single but important way relevant to this appeal: by declaring the circumstances in which an application for review of the minimum term will, and will not, be available to certain offenders having regard to their age. In other respects, the sentence of DHMP remains unchanged: it is the mandatory sentence to be imposed on those who commit murder under 18 whenever convicted or sentenced; the minimum term starting-points are different from those who commit murder as adults (see Schedule 21); and the sentencing exercise will consider the offender’s age at the date of the offence and all that flows from that, as well as their circumstances at the date of sentence.
120. The Appellant’s general characterisation / criticisms of this legislative measure are misplaced. In particular:-
121. First, differentiation on the grounds of age at the date of sentence is neither “*arbitrary*” still less “*capricious*” (cf. Appellant’s Case, §47 [b/p40]). It is instead the rational approach. Differentiating by reference to age at the date of conviction rather than sentence would be irrational: the minimum term is set at the date of sentence, if therefore there is to be differentiation as to the availability of a review of that minimum term on the grounds of age, then age at the date of sentence is the relevant age.
122. Secondly, there is no principled objection to the drawing of ‘bright lines’ in this context: *Clift v United Kingdom* [2010] ECHR 7205/07, at §76 [b/p1605]; *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin); [2020] 1 WLR 3932 [b/p1128] (cf. Appellant’s Case, §§49-50 [b/p40-41]).
123. Thirdly, the amendments do not ‘treat those in R’s position as fully developed adult offenders to whom welfare principles, rehabilitative considerations and the

differentiated approach otherwise relevant to people who offend in childhood simply do not apply’ (Appellant’s Case, §§51-52 [b/p41-42]). The same sentencing exercise is undertaken by reference to the age of the offender when the offence was committed with the starting-point statutorily defined by reference to that age, together with the circumstances of the offender as at the date of sentence, including to the extent relevant the ‘welfare principle’ (cf. those sentenced in their 30s or older). In other words, the full panoply of protections for those who offend in childhood continue to apply, save the right to apply for a minimum term review at the half-way stage, thus - in that respect - placing the cohort in the same position as those sentenced to ‘detention for life’ and/or ‘custody for life’.

124. Fourthly, there is no article 5 right to any review of a sentence imposed for offences committed as a child, and the Appellant does not suggest that such a review is required for other offences which in substance may be of equal seriousness (cf. Appellant’s Case, §§53, 57 [b/p42, 44])¹².
125. Fifthly, the fact that the legislation has ‘removed a right’ previously enjoyed is legally irrelevant under article 14: see by analogy *R (Akbar) v Secretary of State for Justice* [2021] 4 WLR 94 at [61]-[66] [b/p1008] - the sole question is whether the arrangements now in place are objectively justified (cf. Appellant’s Case, §§55-56 [b/p43]).
126. Finally, the legislation reflects Parliament’s conclusion as to where the balance should lie as between: (a) The interests of offenders who commit murder as children who might wish to have as many opportunities as possible to review a minimum term; and, (b) The interests of victims’ families who, as Parliament was informed, constitute a group that is negatively affected by the process of reviewing minimum terms.
127. The proper starting point as recognised by the CA is therefore that, “*The aims that the legislation seeks to achieve are, therefore, legitimate ones, seeking to balance the interests of the families of victims with those of offenders. The means adopted involve distinctions based on the age at the time when the offender begins their sentence*” (at [121] [b/p161]). As such, the “*next question is whether there is a reasonable relationship of proportionality between the aims and the means employed*”: *ibid*.

Proportionality

¹² See for example ‘detention for life’ imposed on a child aged under 18 at the date of conviction (and potentially sentence) under ss.250 & 258, Sentencing Code, following conviction for a Sch. 19 offence including ‘soliciting murder’ and ‘conspiracy to murder’, as well as attempted murder, s.18 wounding with intent.

128. Two considerations frame the assessment of proportionality here. First, the basis of the discrimination here is ‘age’, which it agreed is not a ‘suspect’ ground: see Appellant’s Case at [43] [b/p38]; CA, [123] [b/p162]. Secondly, this case is concerned with the field of policy identified as “*economic and social policy, national security, penal policy and matters raising sensitive moral and ethical choices*” (SC at [161] [b/p1232]). As such the view of Parliament in legislating in this field is, for the purposes of article 14, entitled to weight and usually “*substantial weight*”: CA, [122] [b/p161-162].

129. Importantly here too, the article 14 challenge here is directed at primary legislation enacted by Parliament. As the Court of Appeal noted at [124] [b/p162]:

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

130. Further, Parliament here expressly considered an amendment that would have permitted persons under the age of 26 to have the opportunity to apply for a review. Parliament rejected that proposal and instead passed legislation based on the age of 18. As the Court of Appeal noted, the fact that Parliament “*expressly considered an amendment which would have provided for persons who were under the age of 26 to have the opportunity to apply for a review. Parliament debated the issue of whether the appropriate age for allowing an offender to apply for a review should be under 26 or under 18. It voted against the amendment. The legislation provided that only those under 18 when sentenced should have an opportunity to apply for a review. The fact that Parliament has made its own judgment on the issue of the appropriate age for allowing offenders to apply for a review is a very powerful factor indicating that the appropriate balance has been struck*” (at [125] [b/p161]; see too [128] [b/p162])¹³.

¹³ The Appellant’s complaint about the CA’s consideration of the amendment before Parliament (see Appellant’s Case at §74 [b/p50]) should be rejected. The Appellant’s approach falls foul of what Lord Reed said in SC at 112 [b/p1217]: “*Trawling through debates should not, therefore be necessary, and is unlikely to be appropriate: a high level review of whether a topic was raised before Parliament, whether in debate or otherwise should suffice*”. Here it is apparent from a high level review of the

The interests of victims' families

131. The White Paper expressly identified that “*the existence of the review procedure*” could be “*extremely distressing*”, particularly “*the opportunity for continuing reviews after the halfway point*” (§328 [b/p555]). As such, the White Paper did not assert that only ‘repeated reviews’ caused such distress¹⁴ (cf. Appellant’s Case, §63 [b/p47]). The Appellant’s other criticisms of ‘the interests of victims’ families’ limb are misplaced. The detrimental impact of reviews on victims’ families is obvious, and therefore reducing the number of cases where such a review might occur is a legitimate aim, even if “*the rehabilitation of child offenders cannot be presumed to be contrary to the interests of victims in every case*” (Appellant’s Case, §67) [b/p48].
132. The CA was therefore right to hold (at [139] [b/p165-166]) that, “*It is clear from the background material that the existence of a review could be extremely distressing to victims’ families. We can well understand that. The family will have experienced the murder of a member of their own family. They will have seen the court fix the minimum term that the offender must serve before he can be considered for release on licence. That will be based on the harm caused and the culpability of the offender. If that offender applies to have that minimum term reduced, with a view to seeking parole and being released on licence earlier, then as already mentioned, and in fairness to the family so it seems to us, they will need to be informed of that. It is easy to imagine the distress to a victim’s family that that would cause. The aim of alleviating that distress by eliminating or reducing the number of cases where such a review might occur is a legitimate one.*”

Maturation

133. In relation to maturation, the White Paper recognised correctly that, “*the underlying purpose of a tariff / minimum order review does not apply with the same force to adults - although adults may change their outlook, further develop, etc. ‘adults do not go through the same accelerated development and maturation that children do’*: White Paper, §329 [b/p555].
134. In those circumstances, Parliament was entitled to draw the line as to when minimum

Parliamentary process that Parliament expressly decided on the age of 18 years at sentence as being the appropriate ‘bright line’ and rejected a proposal that the age should be 26 years. Subsection (8) made clear that the scheme would apply to those already sentenced to DHMP, which would have been obvious Parliament. (The Appellant’s Case at §75 [b/p50] also fails to reflect that by the time the matter was debated in Parliament, the Respondent’s policy was as set out in the White Paper.)

¹⁴ “*It is also clear, however, that the existence of the review procedure – particularly the opportunity for continuing reviews after the halfway point – can be extremely distressing for the families of victims*” (§328).

term reviews should be available. The question of where such a line should be drawn involves a social and political judgment which Parliament is best placed to take. In this case, Parliament’s decision to draw the line at the most widely recognised and deeply-embedded delineation between childhood and adulthood, the age of 18, is defensible on any standard of review, but particularly here given the wide margin of appreciation that must be afforded in this context.

135. It is of note that it was not suggested to Parliament that individuals do not continue to advance in maturity after the age of 18 (cf. Appellant’s Case, §59 [b/p45]). On the contrary Parliament was told that adults do mature after the age of 18, hence the underlying purpose of a minimum term review applies with some force but not “*the same force*” as children. The fact that some offenders who were at least 18 at the time of sentence have been able to secure a reduction in their minimum term (cf Appellant’s Case at §21 [b/p28]) is consistent with that.
136. The DC had rejected Parliament’s approach to this issue on two bases:
- (i) First, on the basis that “*No evidence was provided for this proposition*”: judgment, §50 [b/p190]. But in the context of an HRA challenge to the compatibility of legislation (cf. a challenge to departmental policy / decision-making) it was wrong in principle for the DC to ‘hold against’ Parliament an absence of ‘evidence’ to support the approach it has legislated for. To do so fails to recognise that “*Parliamentary methods of resolving disputes are very different from judicial methods, aimed at the production of decisions arrived at by an independent and transparent process of reasoning*” (SC at [169] [b/p1235]). In any event the case law supports the view that adults and children exhibit varying speeds of development (see below).
 - (ii) Second, on the basis that the proposition was “*expressly abjured in Peters and Clarke*” (at §50) [b/p190]. Each of those cases was however concerned with a different question: the implications of the age of an offender on their culpability; and neither case ‘expressly abjured’ an approach to human maturation which, on the one hand, identifies a continuation of development beyond the age of 18, while also acknowledging that generally the period of ‘accelerated development and maturation’ occurs as a child (0-17, or even 10-17), rather than as an adult (18+, or even 18-24). Nothing in *Peters* or *Clarke* (or the summary of the 2018 Lancet article rehearsed in the judgment, at [24]) expressly contradicts the second limb of that proposition.
137. The DC’s reliance on these cases also reflected its elision of the issues of culpability at

age of sentence with issues of availability of minimum term reviews. Having considered the scenario of two offenders who were each aged 17 when they committed an offence, but one had turned 18 by the date of sentence, the DC concluded, “*The fact that the second offender was 18 at the date of sentence would be random and wholly unconnected with the offender’s culpability. Differential treatment resulting from random events cannot be objectively justified*” (§52) [b/p191].

138. The CA correctly identified this as erroneous at [135] [b/p164]:

“Questions of culpability are considered when the minimum term is fixed by the court. The court must impose a sentence of DHMP in the case of murder where the offender was 18 at the time of the offence. It must determine the appropriate minimum term, having regard to the seriousness of the offence which includes the culpability of the offender and the harm done. In assessing culpability, it will necessarily consider the maturity of the offender at the time when he committed the offence. That is true of all offenders, whatever their age. Whether an offender is aged 12, or 15, or 17, the court will consider his culpability at the time that he committed the offence. The same is true if the offender was aged 18, 20 or 25 at the time he committed a murder. The court will, in the light of the case law, assess his culpability as at the time of the offence. Furthermore, sentencing in cases of murder takes place within the framework of Schedule 21 to the relevant statute which fixes starting points for murder in the case of adults and children (as at the date of the commission of the offence) and provides for adjustments taking account of aggravating and mitigating factors (which specifically include the age of the offender).”

139. Ultimately, the fact that change and maturation may not (as a matter of neurological development) have concluded by the age of 18 does not mean it was not open to Parliament to draw a bright line distinction at the age of 18. There is clear objective justification for such a delineation in this context: Parliament was entitled to approach the issue on the basis that “*adult do not go through the same accelerated development and maturation that children do*” and therefore that the underlying purpose of a tariff / minimum order review does not apply with the same force to adults; and on the basis that tariff reviews have significant implications for the families of the offender’s victims – as again reflected in the White Paper. Parliament was alive to the debate surrounding maturation and the effect of drawing the ‘bright line’ at 18 in this context, and enacted s.27A in the terms that it did.

Fair balance

140. The Respondent submits the CA was correct to conclude that s.27A pursues a legitimate

aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. As the CA held (at [142] [b/p167]):

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

Conclusion

141. The Court is therefore invited to dismiss the Appellant's appeal.

11 May 2026

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