



[2026] UKSC 34
On appeal from: [2025] EWCA Civ 226

JUDGMENT

**R (on the application of Quaye) (Appellant) v
Secretary of State for Justice (Respondent)**

before

**Lord Sales, Deputy President
Lord Briggs
Lord Hamblen
Lord Stephens
Lady Simler**

**JUDGMENT GIVEN ON
22 September 2026**

Heard on 22 and 23 June 2026

Appellant

Edward Fitzgerald KC
Pippa Woodrow
(Instructed by Bhatt Murphy Solicitors)

Respondent

Ben Watson KC
Will Hays
(Instructed by Government Legal Department)

LORD STEPHENS AND LADY SIMLER (with whom Lord Sales, Lord Briggs and Lord Hamblen agree):

1. Introduction

1. The issues on this appeal concern the mandatory sentence of detention during His Majesty's pleasure (also known as "DHMP") imposed on those persons who are children at the date upon which they commit the offence of murder. Until 1908, persons who committed murder when they were children were liable to be sentenced to death. The death penalty for a child murderer was abolished by the Children Act 1908, which provided, instead, for such an offender to be sentenced to detention during His Majesty's pleasure. A sentence of detention during His Majesty's pleasure is a sentence of detention for an indeterminate period (as long as is considered necessary) in a place determined by the Secretary of State, and under lifelong licence subject to recall thereafter. As enacted in the Children Act 1908 it was for the Secretary of State (then the Secretary of State for the Home Department) to decide whether and when to release the offender on licence, either conditionally or unconditionally. It was "an important and distinctive feature of the sentence of [detention during His Majesty's pleasure] that the detainee should be subject to continuing review [by the Secretary of State] so that the detainee may be released if and when it is judged appropriate to do so": see *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51; [2006] 1 AC 159 ("*Smith*") at para 10. Furthermore, as the murder was committed when the offender was a child it was recognised that they were not fully mature when committing the crime and should not be punished as if they were. The reviews to be carried out by the Secretary of State included assessing the offender's maturation and development whilst in detention so that "a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation": *Smith* at para 12.

2. In respect of a sentence of detention during His Majesty's pleasure as originally enacted in the Children Act 1908, there was no judicial involvement in setting a minimum term or tariff to reflect the seriousness of the offence and the elements of retribution and deterrence. Rather, the duration of a person's detention was wholly within the discretion of the Secretary of State. In exercising that discretion, a policy evolved under which the Secretary of State fixed the tariff, now described as a minimum term, to be served before the offender was considered for release on licence. The Secretary of State's discretion to fix a minimum term also meant that the Secretary of State or their successor could in the exercise of discretion either increase or decrease the minimum term. Furthermore, in considering whether to release the offender it was also wholly within the discretion of the Secretary of State to assess whether the risk which the offender posed to the public was manageable in the community. Whilst appropriate in 1908, such a sentence is incompatible with article 6(1) of the European Convention on Human Rights ("ECHR"). Article 6(1) guarantees, amongst other matters, that "in the determination of ... any criminal charge" there shall be "a fair ... hearing ... by an independent and impartial tribunal". As criminal proceedings include the determination of a sentence, the Secretary

of State's involvement in fixing the minimum term for a sentence of detention during His Majesty's pleasure is incompatible with article 6(1) ECHR. The Secretary of State is not independent of the executive: see *V v United Kingdom* (1999) 30 EHRR 121.

3. Since 1908 there have been substantial legislative changes to the sentence of detention during His Majesty's pleasure which we analyse in greater detail below. The sentence of detention during His Majesty's pleasure has, in incremental stages since 1908, been "judicialised": see *R v Secretary of State for the Home Department, Ex p Venables and Thompson* [1998] AC 407 ("*Venables and Thompson*") at p 493 D. In so far as relevant on this appeal fundamental changes were made to the sentence by the enactment of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 which came into force on 30 November 2000: see section 60(1) and section 80(3)(b) of the Criminal Justice and Court Services Act 2000. Since 30 November 2000 it has been a statutory requirement that the minimum term is fixed by the trial judge as part of the sentence and that the offender's risk on release after expiry of the minimum term is subsequently assessed by the Parole Board, to whom the Secretary of State is bound to refer the case. The Secretary of State is bound to release the person if the Parole Board so directs. Since 30 November 2000, and subject only to one exception (see paras 4–7 below), the Secretary of State no longer plays any decision-making role in relation to the duration of detention of the offender. Rather, the Secretary of State implements the court's decision as to the minimum term and implements the Parole Board's decision to direct the release of the detainee on licence. Therefore, it is said that since 30 November 2000 it is no longer an inherent requirement of the sentence of detention during His Majesty's pleasure that there be a continuing review by the Secretary of State as to whether detention remains justified.

4. After 30 November 2000, and despite the lack of any legislative power in section 82A to alter the minimum term fixed by the court, the Secretary of State (now the Secretary of State for Justice) operated a policy, as an act of clemency in the exercise of the prerogative, under which the minimum term set by the court could be reduced. The policy which is relevant on this appeal was issued by the Ministry of Justice, National Offender Management Service on 12 April 2010 (and remained in place until February 2021) (we refer to it below as "the Policy"). Under the Policy detainees whose minimum terms had not expired were entitled to periodic reviews of progress in custody with the possibility of reduction in the minimum term to be served before early release could be considered. The purpose of the review was to determine whether the existing minimum term was still appropriate in light of the detainee's progress in custody. Detainees became eligible for a review once they reached the halfway point of their then current minimum term. A review was not automatic. Once the halfway point was reached, the detainee would be contacted and invited to apply for a review. If the case was thought to merit a review, it would be reviewed to determine whether the minimum term should be reduced to reflect the detainee's exceptional progress in custody. The Policy, based on an act of clemency, was the only exception to the position that as from 30 November 2000 the Secretary of State no longer played any decision-making role in relation to the duration of detention of a person subject to a sentence of detention during His Majesty's pleasure.

5. On 10 May 2014 (after the changes made with effect from 30 November 2000), Jesse Quaye (then aged 17 years and nine months), and Ayomindy Bile (then aged 15), murdered Connor Barrett. On 20 November 2014, the date upon which they were both convicted, Mr Quaye was aged 18 years and three months and Mr Bile was still 15 years old. They were sentenced on 16 January 2015 to detention during His Majesty's pleasure pursuant to section 90 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge specified that they must serve a minimum term of 15 years in detention before they would be eligible to apply to the Parole Board for release on licence. At the date upon which Mr Quaye was sentenced he was aged 18 years and five months.

6. The Secretary of State's Policy was in place on the date on which Mr Quaye committed the offence of murder. Under the Policy when Mr Quaye reached the halfway point of his minimum term, on 15 March 2022, he would have been entitled to apply for a review of his minimum term. However, by March 2022 he was no longer entitled to do so as two things had occurred between 16 January 2015, the date upon which he was sentenced, and the date upon which or shortly after which he reached the halfway point of his minimum term.

7. First, with effect from 18 February 2021 a revised policy for those sentenced to detention during Her Majesty's pleasure was implemented by a published Prison and Probation Service circular entitled "Revision to the existing policy for Minimum Term Reviews for individuals sentenced to Detention at Her Majesty's Pleasure (DHMP)" (the "Revised Policy"). By virtue of this revision the Secretary of State's policy of reviewing the minimum term no longer applied to an offender, such as Mr Quaye, who was over 18 when sentenced. In accordance with the Revised Policy, Mr Quaye was not therefore eligible to apply for a review when he had served half his minimum term, but Mr Bile was still eligible. No challenge has been made to this change of policy.

8. Second, Parliament had intervened by enacting section 128(1) of the Police, Crime, Sentencing and Courts Act 2022. Section 128(1) inserted sections 27A and 27B into the Crime (Sentences) Act 1997 ("the 1997 Act"). Sections 27A and 27B took effect on 28 June 2022. Section 27A(1) read with section 27A(11) provides that only persons who were under 18 at the time when the sentence of detention during His Majesty's pleasure was imposed can apply for a minimum term review. Persons who were aged 18 or more at the date of sentence, such as Mr Quaye, could not apply for a review of their minimum term. However, Mr Bile, who was sentenced when he was under 18, could still apply for a minimum term review.

9. On 8 September 2022, Mr Quaye commenced these proceedings in which he applied for judicial review of sections 27A and 27B of the 1997 Act, as amended, seeking declarations pursuant to section 4 of the Human Rights Act 1998 ("the HRA") that those provisions were incompatible with several articles of the ECHR. The relevant articles on this appeal are articles 5, 7, and 14 ECHR.

10. Mr Quaye claimed that the absence of a right of review in his case amounted to a breach of article 5 ECHR (the right to liberty and security) as it amounted to arbitrary detention. Alternatively, he claimed that the legislative provisions involved imposing a heavier penalty on him than that which was imposed at the time when he committed the offence and so constituted a breach of article 7(1) ECHR (no punishment without law). He further claimed that the absence of a right of review gave rise to unlawful discrimination on the grounds of age contrary to article 14 ECHR (prohibition of discrimination) read with article 5 ECHR.

11. The Divisional Court (Davis LJ and May J) in a reserved judgment handed down on 9 February 2024 ([2024] EWHC 211 (Admin); [2024] 1 WLR 3303) held that the removal of the possibility of a reduction in the minimum term gave rise to a risk of arbitrary detention and would “inevitably result in a number of offenders serving longer than lawfully they should” (see para 59 of its judgment). It concluded that that was incompatible with article 5 ECHR. The Divisional Court considered that it was not necessary to reach a conclusion on whether the provisions were incompatible with article 7 ECHR. It also held, however, that the absence of the possibility for those aged 18 when sentenced to apply for a review of the minimum term amounted to unlawful discrimination contrary to article 14 ECHR, read with article 5 ECHR. It granted declarations that section 27A(1) and (11) of the 1997 Act were incompatible with articles 5 and 14 ECHR.

12. Before the Divisional Court Mr Quaye also claimed that the provisions involved a breach of article 6 ECHR which guaranteed a right to a fair trial. However, the Divisional Court dismissed this claim, and it has not been further pursued.

13. The Secretary of State’s appeal was heard by the Court of Appeal (Dame Victoria Sharp P, Lewis LJ, and Cobb J) on 11 and 12 February 2025 and allowed in a comprehensive judgment delivered on 11 March 2025: [2025] EWCA Civ 226; [2025] 1 WLR 2682. The Divisional Court’s declarations of incompatibility were quashed. Mr Quaye’s cross appeal relying on article 7 ECHR was dismissed. In brief summary, the Court of Appeal held that: (a) section 27A did not engage article 5 or 7 ECHR; and (b) although article 14 ECHR was engaged, the differential treatment complained of between child offenders subject to detention during His Majesty’s pleasure was objectively justified.

14. Mr Quaye now appeals to this court.

2. Factual background

15. The factual background to the case was agreed between the parties and is set out fully in the Court of Appeal's judgment at paras 53 to 59. We gratefully repeat that account.

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

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

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

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

20. The sentencing judge began by identifying the appropriate starting point for murder under Schedule 21 of the Criminal Justice Act 2003. That was 12 years in the case of a person, such as Mr Quaye, who was under 18 years of age at the time that the murder was committed. The judge noted that had Mr Quaye been three months older and an adult, the starting point would have been 25 years' custody. The sentencing judge considered the aggravating features. He considered that the taking of knives to the party and the use of knives were aggravating features justifying increasing the starting point. The fact that the murder took place at a residential home and in front of the victim's family, including his younger brother who watched his brother die, were aggravating factors. The mitigating factors were that Mr Quaye did not have any relevant previous convictions (although, on the evidence, he was involved in a gang culture which involved carrying knives). The sentencing judge accepted that Mr Quaye did not intend to kill Mr Barrett

(he intended to cause grievous bodily harm) which was a mitigating factor. The sentencing judge noted from the psychologist's report and the pre-sentence report that Mr Quaye did not accept his guilt and did not accept the verdict of the jury. The reports referred to Mr Quaye's difficult background and that his partner was expecting his first child at the end of the month in which he was sentenced.

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

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

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

3. Evolution of the sentence of detention during His Majesty's pleasure

23. In considering the evolution of the sentence of detention during His Majesty's pleasure it is necessary to consider: (a) the legislative changes; (b) successive Secretaries of State's policy statements; (c) the judgments of the House of Lords in *Venables and Thompson* and *Smith*; (d) the Government's white paper entitled "A Smarter Approach to Sentencing", dated 16 September 2020; and (e) the judgment of the European Court of Human Rights ("the Strasbourg court") in *V v United Kingdom*.

(a) The legislative provisions between 1908 and 2000

24. As we have indicated the death penalty for persons who committed murder when they were children was abolished by the Children Act 1908, which provided instead, for

children to be detained during His Majesty's pleasure. Sections 103 and 105 of the Children Act 1908, as originally enacted, provided:

“103. Abolition of death sentence in case of children and young persons

Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the court shall sentence the child or young person to be detained during His Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody.

...

105. Provisions as to discharge of children and young persons detained in accordance with directions of Secretary of State—

(1) A person in detention pursuant to the directions of the Secretary of State under the last two foregoing sections of this Act may, at any time, be discharged by the Secretary of State on licence.

(2) A licence may be in such form and may contain such conditions as the Secretary of State may direct.

(3) A licence may at any time be revoked or varied by the Secretary of State, and where a licence has been revoked the person to whom the licence related shall return to such place as the Secretary of State may direct, and if he fails to do so may be apprehended without warrant and taken to that place.”

Under these sections the decision as to whether and if so when a person was to be released on licence was wholly within the discretion of the Secretary of State. If the Secretary of State discharged the person from detention, then the Secretary of State determined the form of the licence and the conditions contained in it. It was for the Secretary of State to revoke or vary the licence. There was no judicial involvement in determining: (a) a

minimum term to reflect the seriousness of the offence and the elements of retribution and deterrence; (b) whether the person's detention continued to be justified; (c) whether the person ought to be released; (d) the licence conditions upon which the person should be released; and (e) the revocation or variation of a licence.

25. Sections 103 and 105 of the Children Act 1908 were replaced in materially similar terms by section 53 of the Children and Young Persons Act 1933. Section 53 provided:

“(1) Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in lieu thereof the court shall sentence him to be detained during His Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct.

(2) Where a child or young person is convicted on indictment of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence; and where such a sentence has been passed the child or young person shall, during that period, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the Secretary of State may direct.

(3) A person detained pursuant to the directions of the Secretary of State under this section shall, while so detained, be deemed to be in legal custody.

(4) Any person so detained as aforesaid may, at any time, be discharged by the Secretary of State on licence.

Such a licence may be in such form and may contain such conditions as the Secretary of State may direct, and may at any time be revoked or varied by the Secretary of State.

Where a licence has been revoked the person to whom the licence related shall return to such place as the Secretary of

State may direct, and if he fails to do so may be apprehended without warrant and taken to that place.”

In relation to the sentence of detention during His Majesty’s pleasure, the decision as to whether and when a person serving such a sentence was to be released on licence remained wholly within the discretion of the Secretary of State. By virtue of section 53(2) a court could impose a discretionary sentence of detention for life for the offences of attempted murder, manslaughter, or wounding with intent to do grievous bodily harm.

26. The Children and Young Persons Act 1933 also enacted the welfare principle for every court in dealing with a child or young person. Section 44 (as subsequently amended and which remains in force) provides:

“Every court in dealing with a child or young person who is brought before it, either as ... an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.”

It is clear from this statutory direction that in dealing with children (whether by sentencing or otherwise) a court is bound to take into account the welfare of the child. In *Venables and Thompson* at p 496 D, Lord Browne-Wilkinson recorded that Mr Pannick for the Secretary of State felt unable to contend that the Secretary of State in exercising his discretion in relation to child offenders was not under the same duty. We observe that Mr Pannick’s concession was made in the context of a sentence of detention during His Majesty’s pleasure passed before the changes enacted by Parliament in section 82A of the Powers of Criminal Courts (Sentencing) Act 2000.

27. Section 16 of the Criminal Justice Act 1948 substituted for section 53(1) of the Children and Young Persons Act 1933 the following subsection:

“(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years; but in lieu thereof the court shall sentence him to be detained during His Majesty’s pleasure; and if so sentenced he shall be liable to be detained in such place and under such conditions as the Secretary of State may direct.”

The amendment did not alter the position that the decision as to whether and when a person serving a detention during His Majesty's pleasure was to be released on licence remained wholly within the discretion of the Secretary of State.

28. The death penalty for adults was abolished by the Murder (Abolition of Death Penalty) Act 1965. It provided that no person would suffer death for murder and that a person (other than a child) convicted of murder was to be sentenced to imprisonment for life. The decision as to whether and when to release adult offenders was a decision for the Secretary of State. The Murder (Abolition of Death Penalty) Act 1965 also made provision in relation to those persons who committed murder when under the age of eighteen years. Section 1(5) substituted a replacement version of section 53(1) of Children and Young Persons Act 1933 into that Act. The replacement version was in force on 16 January 2015, the date upon which Mr Quaye and Mr Bile were sentenced. The replacement version provided:

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

Though there were subsequent amendments to section 53 made by section 16 of the Criminal Justice and Public Order Act 1994 and section 44 of the 1997 Act, the only amendment made by the Murder (Abolition of Death Penalty) Act 1965 was to replace the wording of section 53(1). None of the amendments to section 53 altered the position that the decision as to whether and when a person serving a sentence of detention during His Majesty's pleasure was to be released on licence remained wholly within the discretion of the Secretary of State.

29. In 1967 a restriction was imposed by Parliament on the discretion of the Secretary of State to release on licence a person subject to detention during His Majesty's pleasure. The restriction was contained in section 61 of the Criminal Justice Act 1967. Section 61(1), in so far as relevant, provided:

“The Secretary of State may, if recommended to do so by the Parole Board, release on licence ... a person detained under section 53 of the Children and Young Persons Act 1933 (young

offenders convicted of grave crimes), but shall not do so in the case of a person sentenced ... to detention during Her Majesty's pleasure ... except after consultation with the Lord Chief Justice of England together with the trial judge if available."

By virtue of section 61(1) the Secretary of State could only release the person if there was a recommendation by the Parole Board and after consultation with the Lord Chief Justice of England together with the trial judge if available. However, before the Parole Board could make any such recommendation, the Secretary of State had to have referred the case to the Board for its advice. Therefore, the release of a person detained during His Majesty's pleasure was wholly dependent on, first, the Secretary of State exercising a discretion whether or not to refer the case to the Parole Board and, second, the Secretary of State deciding whether or not to adopt any recommendation made by the Parole Board that the detained person should be released. Similarly, the obligation to consult with the Lord Chief Justice of England and with the trial judge if available only arose if the Secretary of State was contemplating the release of the person. Furthermore, it was for the Secretary of State to decide on the appropriate response to the consultation process. In short, section 61 maintained the earlier approach that the decision as to whether and when a person sentenced to detention during His Majesty's pleasure was to be released remained wholly within the discretion of the Secretary of State.

30. Whilst section 61(1) of the Criminal Justice Act 1967 maintained the discretion of the Secretary of State as to whether and when to release on licence a person sentenced to detention during His Majesty's pleasure, it did make changes to the ability to revoke a person's licence. Under section 62 once the Secretary of State had released a detainee on licence, apart from in cases of emergency, the Secretary of State could revoke that licence so as to recall the former detainee only upon the recommendation of the Parole Board. If the detainee was recalled, the detainee had a right to have their case considered by the Board and, if the Board so recommended, to be released by the Secretary of State on licence.

31. Sections 61 and 62 of the Criminal Justice Act 1967 were replaced by Part II of the Criminal Justice Act 1991. For present purposes it is sufficient to state that after the Criminal Justice Act 1991 the effect of a sentence of detention during His Majesty's pleasure was that: (a) the child offender was to be detained for an indefinite period, the duration of which was wholly within the discretion of the Secretary of State; and (b) when the Secretary of State, on the recommendation of the Parole Board, released the detainee on licence, the detainee was liable to be recalled throughout their life but such recall was subject to the decision of the Parole Board and not within the discretion of the Secretary of State.

(b) The Secretary of State's policies prior to the judgment of the House of Lords in Venables and Thompson

32. Over the years, successive Secretaries of State have adopted a minimum term policy in exercising discretion whether to release adults who have been sentenced to life imprisonment. This was first publicly announced in Parliament by Mr Leon Brittan on 30 November 1983 (Hansard (HC Debates), cols 505–507: written answer). There were further statements to Parliament made on 16 July 1991 by Dame Angela Rumbold (Hansard (HC Debates), cols 311–312) and on 27 July 1993 by Mr Michael Howard, the Secretary of State, (Hansard (HC Debates), cols 861–864: written answer). The content of those policies was set out by Lord Browne-Wilkinson in his speech in *Venables and Thompson*: see pp 492 G to 494 G. For the purposes of this appeal, it is sufficient to state that the statement of 27 July 1993 also applied to persons detained during His Majesty's Pleasure under section 53(1) of the Children and Young Persons Act 1933 and that the detainee's behaviour after the commission of the offence could be taken into account in justifying changing the review date (ie changing the minimum term).

33. The policy announced on 27 July 1993 in relation to persons detained during His Majesty's Pleasure had changed by the date that it came to be applied to Mr Venables and to Mr Thompson. Lord Browne-Wilkinson in his speech in *Venables and Thompson*, at p 495 E–F, stated that it had been made clear from the evidence and in submissions that, in making any change to the minimum term period, the Secretary of State would only have regard to matters relevant to the circumstances of the commission of the crime or the applicant's state of mind when the offence was committed. The Secretary of State would not in any circumstances vary the minimum term period by reason of events occurring after the commission of the crime. Under this policy, as applied by the Secretary of State to Mr Venables and to Mr Thompson, the way in which they matured or behaved after sentence was imposed was irrelevant: however they developed, the minimum term remained fixed at the minimum set by the Secretary of State.

(c) The judgment of the House of Lords in Venables and Thompson delivered on 12 June 1997

34. The case of *Venables and Thompson* concerned two ten-year-old boys who murdered a two-year-old child. The trial judge recommended a minimum term of eight years' detention; the Lord Chief Justice recommended a minimum term of ten years. The Secretary of State determined that the minimum period that each of the offenders must serve in prison before release on licence would be 15 years. As we have indicated under the policy then applied by the Secretary of State, the way in which Mr Venables or Mr Thompson matured or behaved after the sentence of detention during His Majesty's pleasure was imposed was considered by the Secretary of State to be irrelevant when considering whether to reduce the minimum term. However they developed, the minimum term would remain fixed at a minimum of 15 years.

35. The House of Lords, by a majority, held that the progress of the detainee in custody may call for the minimum term to be varied downwards. The policy adopted by the Secretary of State whereby the minimum term would in no circumstances be varied by reason of matters occurring subsequently to the commission of the offence was unlawful and contrary to the requirement of section 44(1) of the Children and Young Persons Act 1933 that the welfare of the child be taken into account. Accordingly, the decision of the Secretary of State in pursuance of that unlawful policy to fix a minimum term of 15 years in the cases of the applicants had been inconsistent with his duty to keep their detention under continuous review and should be quashed.

(d) The Secretary of State's policy after the judgment of the House of Lords in Venables and Thompson

36. On 10 November 1997, following the decision in *Venables and Thompson*, the Secretary of State announced the policy which he would in future adopt after the initial fixing of the minimum term, to give effect to the judgment (Hansard (HC Debates), 10 November 1997, written answers, cols 421–422). Under that policy when half of the initial minimum term period had expired, the Secretary of State or a minister acting on the Secretary of State's behalf would consider a report on the prisoner's progress and development, and invite representations on the question of minimum term, with a view to determining whether the minimum term originally set was still appropriate.

(e) The decision of the Strasbourg court in V v United Kingdom

37. In *V v United Kingdom* (1999) 30 EHRR 121 the Strasbourg court unanimously held, affirming a decision reached by the Commission with a single dissentient vote, that the procedure adopted to fix the minimum term to be served by the child applicant had violated his rights under article 6 ECHR. The court held (in paras 109, 111, and 114 of its judgment) that the fixing of a minimum term was part of the proceedings and amounted to a sentencing exercise; that article 6(1) was therefore applicable; that that article guaranteed a fair hearing by an impartial tribunal independent of the executive; and that the Secretary of State was clearly not independent of the executive.

(f) The Secretary of State's policy after the decision in V v United Kingdom

38. The decision in *V v United Kingdom* prompted the Secretary of State to revise the procedure adopted to fix the minimum terms of children and young persons sentenced to detention during His Majesty's pleasure on conviction of murder. He informed the House of Commons of his new policy in that regard on 13 March 2000 (Hansard (HC Debates), cols 22–23). The Secretary of State proposed a two-pronged response: a legislative scheme to govern new cases under which the minimum term would be set by the trial judge in open court (section 82A of the Powers of Criminal Courts (Sentencing) Act

2000), and an informal ad hoc procedure to govern the cases of HMP detainees sentenced before the legislation would take effect under which the Secretary of State would set any minimum terms in line with the recommendation of the Lord Chief Justice.

(g) The judgment of the House of Lords in Smith delivered on 28 July 2005

39. In *Smith*, the House of Lords had to consider a sentence of detention during His Majesty's pleasure imposed before 30 November 2000, that is a sentence where the minimum term was fixed by the Secretary of State in accordance with the policy announced in Parliament on 13 March 2000. In *Smith* the Secretary of State had consulted the trial judge who recommended a minimum term of 16 years and the Lord Chief Justice who recommended a minimum term of 14 years. The Secretary of State fixed a minimum term of 15 years. The House considered whether it was necessary for the Secretary of State to keep the minimum term under review given its approach of treating the minimum term as in effect fixed by the recommendation of the Lord Chief Justice (see para 1 per Lord Bingham).

40. Lord Bingham, at para 10, identified the propositions established by the House of Lords in *Venables and Thompson* in the following terms:

“... I shall summarise the propositions which, in my judgment, are clearly established by these opinions. (1) Section 103 of the Children Act 1908 introduced, and section 53(1) substantially re-enacted, provision for detention during His Majesty's pleasure as a special sentence devised to reflect the reduced responsibility and special needs of those committing murder as children or young persons. It was a sentence which was expressly differentiated from the sentence which the law required to be passed on those committing murder as adults, in that it required account to be taken of the detainee's welfare: see the opinion of Lord Browne-Wilkinson [1998] AC 407, 496A–E, 498B–500B; that of Lord Steyn, at pp 518G–H, 520H–522C, 524D–G; that of Lord Hope of Craighead, at pp 529F–530E, 532A–B, 534E–535A. That the majority opinion is to be so understood is confirmed by Lord Lloyd of Berwick, dissenting, at p 513H. (2) It has been an important and distinctive feature of the sentence of HMP detention that the detainee should be subject to continuing review so that the detainee may be released if and when it is judged appropriate to do so: see Lord Browne-Wilkinson, at pp 499H–500F, 502H–503A; Lord Steyn, at pp 522H–523B; Lord Hope, at pp 532A–E, G, 534E–535A, 535B–C. (3) The Murder (Abolition of Death Penalty) Act 1965, which in effect amended section

53(1), confirmed the existence of that feature and the Criminal Justice Act 1991 did not remove it: see Lord Browne-Wilkinson, at pp 500F–502F; Lord Steyn, at pp 522C–H, 523B–524D; Lord Hope, at pp 529G–532A, 534C–E. (4) While there is or may be no objection in principle to the fixing of a minimum term to be served by an HMP detainee before the grant of parole, such term may only be provisional, since the progress of the detainee in custody, reported through continuing review of the detainee’s progress, may call for it to be varied downwards: see Lord Browne-Wilkinson, at p 500E; Lord Steyn, at pp 518F, 520A–B; Lord Hope, at pp 535F–536G. These propositions point towards the correctness of the respondent’s submission and the conclusions reached by the courts below. For if (as was held) the sentence of HMP detention under section 53(1) imports a duty of continuing review and the Acts of 1965 and 1991 have not removed that feature, and if (as is clear) section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 does not affect the respondent’s sentence because it was imposed before 30 November 2000, the respondent remains subject to a sentence which imports a duty of continuing review and the Secretary of State cannot absolve himself from that duty by indicating that he will not perform it.”

We would observe that in *Smith* the House of Lords in summarising the speeches in *Venables and Thompson* stated that it was an important and distinctive feature of the sentence of detention during His Majesty’s pleasure that the detainee should be subject to continuing review so that the detainee may be released if and when it was judged appropriate to do so. This important and distinctive feature remained inherent in the sentence even though the minimum term was in effect set by the Lord Chief Justice. The House decided that the minimum term remained “subject to continuing review for reconsideration of the minimum term imposed if clear evidence of exceptional and unforeseen progress is reasonably judged to require it”: see para 17. However, as Mr Smith had been sentenced prior to 30 November 2000 the House did not need to consider whether this important and distinctive feature was affected by the enactment of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 and did not do so (see para 15F and para 26).

(h) Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000

41. Section 90 of the Powers of Criminal Courts (Sentencing) Act 2000 replaced the earlier provisions (dealing with detention at His Majesty’s pleasure), re-stating that where a person convicted of murder appeared to the court to be under 18 at the time the offence was committed, the court should order him or her to be detained during His Majesty’s

pleasure. Section 82A was inserted into the Powers of Criminal Courts (Sentencing) Act 2000 by section 60(1) of the Criminal Justice and Court Services Act 2000 and came into force on 30 November 2000. As originally enacted, it provided:

“82A.— Determination of tariffs.

(1) This section applies if a court passes a life sentence in circumstances where—

(a) the sentence is not fixed by law; or

(b) the offender was aged under 18 when he committed the offence.

(2) The court shall, unless it makes an order under subsection (4) below, order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this section as the ‘early release provisions’) shall apply to the offender as soon as he has served the part of his sentence which is specified in the order.

(3) The part of his sentence shall be such as the court considers appropriate taking into account—

(a) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it;

(b) the effect of any direction which it would have given under section 87 below (crediting periods of remand in custody) if it had sentenced him to a term of imprisonment; and

(c) the early release provisions as compared with sections 33(2) and 35(1) of the Criminal Justice Act 1991.

(4) If the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or

more offences associated with it, no order should be made under subsection (2) above, the court shall order that, subject to subsection (5) below, the early release provisions shall not apply to the offender.

(5) If, in a case where an order under subsection (4) above is in force, the offender was aged under 18 when he committed the offence, the Secretary of State shall at the appropriate stage direct that the early release provisions shall apply to the offender as soon as he has served the part of his sentence which is specified in the direction.

(6) The appropriate stage, for the purposes of subsection (5) above, is when the Secretary of State has formed the opinion, having regard to any factors determined by him to be relevant for the purpose, that it is appropriate for him to give the direction.

(7) In this section—

‘court’ includes a court-martial;

‘life sentence’ has the same meaning as in Chapter II of Part II of the Crime (Sentences) Act 1997.”

42. Accordingly, section 82A applied (see subsections (1) and (2)) where the court passed “a life sentence” which included detention during His Majesty’s pleasure. In such a case, the court was required (save when it intended to impose a whole life order because of the seriousness of the offence or offences) to specify a period (known as a “tariff” or “minimum term”) and direct that the “early release provisions” in section 28(5)–(8) of the 1997 Act are to apply “as soon as [the offender] has served the part of his sentence which is specified in the order”. In other words, this provision gave power to the court to assess and fix the minimum term to be served by the offender, and the minimum term so fixed was a sentence imposed by the court. As such, the minimum term fixed by the court under section 82A was subject to an appeal against sentence to the Court of Appeal: *R v McBean* [2001] EWCA Crim 1891; [2002] 1 Cr App R (S) 98 at para 17.

43. Further, once section 82A was in force:

(i) The sentence of detention at His Majesty's pleasure became a life sentence with a minimum term fixed by the court to reflect, among other things, the seriousness of the offending whereas until that point the sentence was at His Majesty's pleasure and the Secretary of State had to decide how long the offender should serve (in accordance with section 28(4) of the 1997 Act) and the sentence carried with it a discretion to be exercised by the Secretary of State to release early on the advice or recommendation of a judge).

(ii) Except in the case of a whole life order imposed by the court, the early release provisions in section 28(5)–(8) of the 1997 Act applied by operation of a court order directing that those provisions should apply (section 82A(2) of the Powers of Criminal Courts (Sentencing) Act 2000). This meant that, as a matter of statute, an offender sentenced to detention at His Majesty's pleasure became a "life prisoner" to whom section 28 applied and had to serve the whole of his or her minimum term before early release could be considered.

(iii) Once he or she had served the whole of the minimum term of their sentence, the offender could require the Secretary of State to refer their case to the Parole Board for consideration of whether it was no longer necessary for the protection of the public that the offender should be confined. If so satisfied, and the Parole Board directed early release under section 28, the Secretary of State was under a duty to release the offender on licence.

44. Provisions governing the effect of life sentences imposed on or after 18 December 2003 were contained in Chapter 7 of Part 12 of the Criminal Justice Act 2003. These provisions applied to a sentence of detention during His Majesty's pleasure (section 277). Section 269 of the Criminal Justice Act 2003 reproduced in materially similar terms the provisions of section 82A concerning the court's powers to determine the minimum term of a life sentence to be served and to direct that the early release provisions should apply. In addition, section 269(5) provided that in considering the seriousness of an offence (or offences) for the purposes of determining the minimum term, the court was required to consider "(a) the general principles set out in Schedule 21, and (b) any guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21".

45. The relevant sentencing provisions are now contained in the Sentencing Act 2020 ("the Sentencing Act"). Section 259 replaced section 90 of the Powers of Criminal Courts (Sentencing) Act 2000 and provides that the court must order that an offender who appears to have been aged under 18 at the time that he committed an offence of murder is detained during His Majesty's pleasure. Provisions governing the effect of life sentences are included in Chapter 8 of Part 10. Life sentences are defined to include sentences of life imprisonment (in the case of an adult), detention for life (imposed on a

child pursuant to sections 250 and 258) and detention at His Majesty's pleasure (section 324 of the Sentencing Act).

46. Since the enactment of section 82A, and in brief summary, a court considering the seriousness of an offence of murder committed by a child, for the purposes of determining the minimum term to be served, has had to (and continues to) consider the following: (a) the offender's culpability and the harm which the offence caused (section 143 of the Criminal Justice Act 2003); (b) applying the welfare principle in section 44 of the Children and Young Persons Act 1933; (c) applying any relevant sentencing guideline (section 269(5) above, and subsequently, section 120 of the Coroners and Justice Act 2009 and section 59 of Sentencing Act); (d) fixing the minimum term judged necessary to meet the seriousness of the offence and the requirements of retribution and general deterrence; (e) leaving out of account the risk posed by the offender which is a matter for the Parole Board to consider when determining whether, and if so when, the offender is to be released on licence; (f) taking 12 years as a starting point for fixing the minimum term if the offender was aged under 18 when he committed the offence of murder: see paragraph 7 of Schedule 21 of the Criminal Justice Act 2003 ("Schedule 21"); (g) taking into account mitigating and aggravating factors including those set out in Schedule 21 to increase and/or reduce the starting point; and (h) finalising the minimum term in the light of those aggravating and mitigating features.

47. These sentencing principles ensure that sentencing in England and Wales is structured, consistent, and transparent. They also support public confidence in the criminal justice system by standardising sentencing practices across different courts for the offence of murder committed by those under the age of 18.

48. A question on this appeal is whether the important and distinctive feature of continuing review of the minimum term remained inherent in a sentence of detention at His Majesty's pleasure after the enactment of section 82A. As we will explain, although on the face of it section 82A fundamentally altered the nature of the sentence of detention at His Majesty's pleasure as identified above, it is not necessary to answer that question given the policies adopted by the Secretary of State after 30 November 2000 (including the Policy) and the later enactment of sections 27A and 27B of the 1997 Act.

(i) The Government's white paper entitled "A Smarter Approach to Sentencing", dated 16 September 2020

49. The Government published a white paper entitled "A Smarter Approach to Sentencing" on 16 September 2020 ("the White Paper"). Section 6 of the White Paper dealt with tariff reviews for murders committed by children as follows:

"Tariff reviews for murder

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."

50. The statement in para 329 that offenders who "commit murders as children but who are not sentenced until they are over 18, are not entitled to reviews" was wrong at the time it was written. In September 2020, when the White Paper was presented to Parliament, the Secretary of State's Policy was in place (applications for a minimum term review from those over and under 18 when sentenced were invited). The inaccuracy was drawn to the attention of the Secretary of State in a submission dated 16 October 2020. The Policy was changed with effect from 18 February 2021 as we have explained above. With effect from 18 February 2021, the Revised Policy of the Secretary of State was that offenders sentenced to detention at His Majesty's pleasure 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 to apply for a review.

(j) Sections 27A and 27B of the 1997 Act

51. The material provisions of section 27A are:

"27A Sentence of detention during Her Majesty's pleasure imposed on a person under 18: application for minimum term review

(1) This section applies to a person who—

(a) is serving a DHMP sentence, and

(b) was under the age of 18 when sentenced; and such a person is referred to in this section as a ‘relevant young offender’.

(2) A relevant young offender may make an application for a minimum term review to the Secretary of State after serving half of the minimum term.

(3) An ‘application for a minimum term review’ is an application made by a relevant young offender for a reduction in the minimum term.

(4) Where a relevant young offender has made an application for a minimum term review under this section, the offender may only make a further such application if—

(a) the period of 2 years beginning with the day on which the previous application was determined has expired, and

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

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

(a) consider the application, and

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

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

...

(8) In this section—

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

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

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

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

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

...

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

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

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

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

52. Section 27B deals with the exercise of the power by the High Court to reduce the minimum term. It provides:

“27B Power of High Court to reduce minimum term

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

(2) The court may—

(a) make a reduction order in relation to relevant young offender, or

(b) confirm the minimum term in respect of the offender’s DHMP sentence,

and a decision of the court under this subsection is final.

(3) A reduction order is an order that the relevant young offender’s minimum term is to be reduced to such part of the offender’s DHMP sentence as the court considers appropriate and is specified in the reduction order.

(4) In deciding whether to make a reduction order, the court must, in particular, take into account any evidence—

(a) that the relevant young offender’s rehabilitation has been exceptional;

(b) that the continued detention or imprisonment of the offender for the remainder of the minimum term is likely to give rise to a serious risk to the welfare or continued rehabilitation of the offender which cannot be eliminated or mitigated to a significant degree.

(5) In this section ‘DHMP sentence’, ‘minimum term’ and ‘relevant young offender’ have the same meaning as in section 27A.”

53. It is appropriate at this point to make several observations in relation to sections 27A and 27B.

54. First, section 27A clearly provides that the only persons who may make an application for a minimum term review are persons who were under the age of 18 when sentenced to detention at His Majesty’s pleasure: section 27A(1)(b) and (2).

55. Secondly, section 27A(11) excludes the right for any other person to request a minimum term review.

56. Thirdly, the review and any reduction of the minimum term is to be determined by the High Court and not by the Secretary of State. Judicialisation of the reduction in the minimum term removed the last vestige of the Secretary of State’s decision-making role in relation to the duration of detention of persons subject to a sentence of detention during His Majesty’s pleasure.

57. Limited transitional provision was made in relation to these changes by section 128(3) and (4) of the Police, Crime, Sentencing and Courts Act 2022. This provides for “pre-commencement applications” which are defined as applications “by a relevant young offender for a review of the minimum term that was made to the Secretary of State before the day on which [section 27A] comes into force” (subsection (4)). Section 128(3) provides:

“(3) A pre-commencement application—

(a) is to be treated for the purposes of subsection (4) of section 27A of the Crime (Sentences) Act 1997 as if it was made under that section if, at the time the relevant young offender made the application, they had served at least half of the minimum term;

(b) if not determined before the day on which this section comes into force, is to be dealt with in the manner in which it would have been dealt with immediately before this section comes into force.”

4. Article 5 ECHR

58. The Divisional Court held, at para 59, that “section 27A did not change the essential nature of a sentence of DHMP” adding that “[a]n inherent element of that sentence is the requirement of continuing review as set out in *Venables* [1998] AC 407 and *Smith* [2006] 1 AC 159”. The Divisional Court stated that the requirement of a continuing review inherent in a sentence of DHMP is “unique” and reasoned that “removing any possibility of exercising ‘a more reliable judgment’ [by way of a review] so as to reduce the minimum term will inevitably result in a number of offenders serving longer than lawfully they should”.

59. The Divisional Court’s starting point was that section 27A did not change the essential nature of a sentence of detention during His Majesty’s pleasure and that an inherent element of the sentence was the requirement of continuing review. We disagree with that starting point which ignores the evolution of the sentence of detention during His Majesty’s pleasure which we have set out above and also ignores the effect of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000.

60. Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 fundamentally changed the sentence of detention during His Majesty’s pleasure and sections 27A and 27B of the 1997 Act removed any potential for reducing the minimum term outside the terms of section 27A. After section 82A was enacted, it is difficult to see how there could have been any inherent requirement for a continuing review of the minimum term fixed by the court to be conducted in exercise of prerogative powers by the Secretary of State. On the face of it, the legislation had occupied the field. Nonetheless, the Secretary of State adopted a policy, based on clemency, of reviewing the minimum term for these detainees, though with effect from 18 February 2021, the Revised Policy did not apply to those who were over 18 when sentenced. Since then, Parliament intervened further with the enactment of section 27A of the 1997 Act as amended, to put the Revised Policy on an entirely statutory footing (providing that those under the age 18 when sentenced can apply for a minimum term review which unless frivolous or vexatious will be heard and determined by the High Court, but by section 27A(11) the right for any other person to request a review of the minimum term is excluded). Therefore, those aged 18 and over when sentenced cannot request or obtain a minimum term review. Since Parliament has occupied the field in the section 27A scheme (if not before in enacting section 82A), the scope for a continuing review of the minimum term through the exercise of the prerogative (or as an act of clemency) has been excluded. The Secretary of State cannot any longer, consistently with the section 27A scheme, rely on an act of clemency to review the minimum terms determined by the court for those aged 18 and over when sentenced to detention at His Majesty’s pleasure.

61. Therefore, the position under domestic law is clear. First, section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 did change the essential nature of a

sentence of detention during His Majesty's pleasure as discussed above. Furthermore, the final vestige of the Secretary of State's decision-making role in relation to the duration of detention was removed by sections 27A and 27B of the 1997 Act. Secondly, section 27A expressly stipulates that there is no right to a minimum term review other than that conferred by section 27A which is limited to those under 18 when sentenced, and accordingly, for those aged 18 and over when sentenced, there is no right to apply for a review of the minimum term. Since 2022 the scheme for sentencing persons who commit murder as children to detention at His Majesty's pleasure is an entirely statutory one.

62. The only remaining question under this heading is whether by excluding any opportunity to review the minimum term for those aged 18 and over when sentenced to detention at His Majesty's pleasure, section 27A(11) gives rise to a risk of arbitrary detention under article 5 ECHR.

63. Article 5(1) ECHR, in so far as relevant, provides:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person following conviction by a competent court ...”

Further exceptions are set out in the other sub-paragraphs (b) to (f) of article 5(1). For instance, there is an exception in article 5(1)(b) in relation to “the lawful arrest or detention of a person for non-compliance with the lawful order of a court”.

64. The focus of the argument on behalf of Mr Quaye is that his detention, although lawful in terms of domestic law, is arbitrary and thus contrary to article 5 ECHR. It is submitted that denying detainees any possibility of a review, and thus the possibility of a reduction in the minimum term fixed at trial, generates a risk of unnecessary or excessive (and thus arbitrary) detention. We would observe that in effect it is being suggested that the jurisprudence of the Strasbourg court requires all indeterminate sentences of children to be subject to review. For instance, discretionary life sentences imposed on children would need to be subject to periodic review to ensure that they have not become excessive since they were imposed. There is no Strasbourg jurisprudence supporting this submission. A Grand Chamber of the Strasbourg court, in *Saadi v United Kingdom* (2008) 47 EHRR 17 considered what might render a sentence arbitrary. It stated, at para 68, that:

“While the court has not previously formulated a global definition as to what types of conduct on the part of the

authorities might constitute ‘arbitrariness’ for the purposes of article 5(1), key principles have been developed on a case-by-case basis ...”

Thereafter, the Strasbourg court set out some of the key principles. It stated, at para 69, that:

“One general principle established in the case law is that detention will be ‘arbitrary’ where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant subparagraph of article 5(1). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.”

However, the Strasbourg court made clear its approach to arbitrariness in cases of detention under article 5(1)(a). It stated at para 71:

“The court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under article 5(1)(a), where, in the absence of bad faith or one of the other grounds set out at para 69 above, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the court under article 5(1).”

65. *Saadi v United Kingdom* is not authority for a principle that a minimum term imposed on an offender to meet the seriousness of the offence and the requirements of retribution and general deterrence, which is causally connected with a lawful conviction, will be arbitrary if not subject to review. Rather, the length of the minimum term is a matter for the national authorities rather than for the Strasbourg court.

66. The Strasbourg court considered the principles in relation to article 5(1)(a) in *James v United Kingdom* (2012) 56 EHRR 12. This was a case dealing with indeterminate sentences of imprisonment for public protection under which the offender had to serve a fixed minimum term but could be imprisoned thereafter until the Parole Board was satisfied that the particular offender no longer presented a risk to the public. The particular issue concerned the absence of courses during the period after the expiry of the minimum

term which would assist the offender in addressing the risk of his re-offending. The Strasbourg court stated, at para 189:

“The court has also made it clear that the word ‘after’ in sub-paragraph (a) does not simply mean that the detention must follow the conviction in point of time: in addition, the detention must result from, follow and depend upon or occur by virtue of the conviction. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue.”

The Strasbourg court went on to observe that:

“... with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong. Indeed, as the court has previously indicated, the causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with *the objectives of the initial decision by the sentencing court* or on an assessment that was unreasonable in terms of those objectives.” (Emphasis added.)

67. It is obvious on this appeal that: (a) there is a sufficient causal connection between the conviction and the imposition of the minimum term on Mr Quaye; and (b) the objective of the initial decision by the sentencing court in imposing a minimum term on Mr Quaye was to meet the seriousness of the offence and the requirements of retribution and general deterrence, while paying due regard to his welfare. Furthermore, no principle is established in *James v United Kingdom* that a minimum term (imposed to meet the seriousness of the offence and the requirements of retribution and general deterrence) will be arbitrary if not subject to review.

68. In conclusion, fixing the minimum term was lawful as a matter of national law. It was fixed in accordance with section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 and the relevant sentencing principles: see para 46 above. In sentencing Mr Quaye, the judge followed the procedure laid down by law, which included the obtaining of relevant reports, the fixing of the starting point by reference to legislation, having regard to the seriousness of the offence, measured by the harm caused and Mr Quaye’s culpability. The assessment of his culpability was undertaken in the light of his maturity and understanding as at the time that he committed the offence. The sentencing judge also took into account the welfare principle and identified aggravating and mitigating factors. The Court of Appeal held, at para 85, that fixing the minimum term was “not arbitrary”.

We agree. Furthermore, as recognised by the Strasbourg court in *Saadi v United Kingdom* the “decision to impose a sentence of detention and the length of that sentence are matters for the national authorities”. The length of the minimum term was for the sentencing judge. It was open to Mr Quaye to appeal if he considered that the minimum term was excessive.

69. The Court of Appeal concluded, at para 87, that:

“It cannot, in our judgment, be said that detention in accordance with those statutory provisions was arbitrary or unlawful. The absence of an opportunity whereby an offender could apply to the Secretary of State seeking, as an act of clemency, a reduction of the minimum term by reference to events occurring after sentence (essentially, exceptional progress in prison) does not render detention pursuant to the sentence imposed under section 90 of the [Powers of Criminal Courts (Sentencing) Act 2000] (or section 259 of the Sentencing Act [2020]) arbitrary or unlawful.”

We agree and would dismiss Mr Quaye’s ground of appeal relying on article 5 ECHR.

5. Does section 27A unlawfully discriminate against the appellant?

70. Mr Quaye challenges the Court of Appeal’s decision allowing the appeal from the decision of the Divisional Court under this head and holding that section 27A is not incompatible with article 5 read with article 14 ECHR.

71. Article 14 is not a free-standing right but requires other Convention rights to be secured without unlawful discrimination “on any ground” specified in article 14 which provides as follows:

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

72. The ground relied on by Mr Quaye in this case is the ground of age which is accepted to be an “other status” for this purpose. His case is that section 27A unlawfully discriminates against him (and other offenders sentenced when aged 18 or over for murder

committed as a child) because they are not entitled to seek a minimum term review before the early release provisions come into play, as now provided for by section 27A.

73. It is not necessary to show a breach of another Convention right to establish an article 14 discrimination claim. Rather the requirement that an allegation of breach of article 14 must relate to the “enjoyment of the rights and freedoms” in the Convention has been interpreted as meaning that the complaint must fall within the ambit or subject matter of another Convention right. Mr Quaye’s discrimination claim relies on the right to liberty and security in article 5(1) ECHR, and in particular, the risk of arbitrary detention. There is no dispute that section 27A falls within the ambit of article 5 so that article 14 is engaged.

74. For discrimination to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Here, there is no dispute that an offender who commits an offence of murder whilst a child but is sentenced when aged 18 or over is in an analogous position to a child offender sentenced for the same offence when under the age of 18 (and indeed, a direct comparison is available in this case between the appellant and his co-defendant whose position is otherwise materially the same).

75. It follows that section 27A gives rise to differential treatment on the ground of age at the date of sentencing. But such a difference of treatment is only unlawfully discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. It is for the contracting state to demonstrate objective and reasonable justification. Whether it has done so here is the real question that remains to be resolved.

76. There are two preliminary questions to be considered. The first is about the role of this court in dealing with this aspect of the appeal, and whether we are to conduct a fresh assessment of proportionality or simply review the assessment of proportionality conducted below to determine whether it was arrived at on a proper legal basis and the conclusion reached was reasonable: *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30; [2026] AC 607, paras 142–165. Where a question concerning the Convention compatibility and proportionality of general rules set out in legislation is raised, it is the proper function of the appellate court to determine the question of proportionality for itself without deferring to the assessment made by the lower court, even if that court has directed itself correctly and its decision cannot be said to be unreasonable. Mr Watson KC accepts that this is the case here and we are satisfied that the proportionality assessment called for in the present case clearly involves a situation of this type requiring us to conduct a fresh proportionality assessment in this case.

77. The second preliminary question concerns the appropriate standard of review.

(a) The appropriate standard of review

78. Contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The higher the margin of appreciation is, the lower the intensity of review is to be applied by the courts to the impugned decision. The scope of the margin varies according to the circumstances, the subject matter and the background: see *Clift v United Kingdom* (“*Clift*”) (Application No 7205/07) *The Times*, 13 July 2010, para 73). There may be a “wide variety of factors” which, depending on the circumstances might “tend to heighten or lower the intensity of review” (see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 at paras 142 and 158 (Lord Reed PSC)).

79. Like the courts below, we consider that there is a wide margin of appreciation or low intensity of review to be applied in the circumstances of this case (see the judgments of the Divisional Court, para 46 and the Court of Appeal, paras 122–128). In our judgment there are five broad factors that lead to this conclusion.

80. First, the discrimination is on the ground of age and, as indicated above, age is not a “suspect” ground (*R (SC)*, para 114) and nor is there any basis for calling for a heightened intensity of review based on age in this case.

81. Nonetheless, Mr Fitzgerald KC submits that by removing the opportunity for minimum term reviews for offenders aged 18 when sentenced, section 27A ignores a fundamental welfare principle that applies in this context, namely that child offenders should not be treated in the same way as adult offenders, the critical point being age at the date of commission of the offence. Since as he submits, minimum term reviews are the means by which the welfare of child offenders is respected in the context of mandatory indefinite sentences, his case is that these considerations continue to have relevance notwithstanding that a child offender may have attained majority during the criminal justice process. He relies on *R (SC)* where the court specifically identified the “best interests of children” as a factor that may require greater intensity of review given the greater needs and vulnerability of young people, even where there is no suspect ground on which the alleged discrimination is based (para 158).

82. We do not accept this argument. Although section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 fundamentally changed the nature of a sentence of detention at His Majesty’s pleasure as we have described, section 27A of the 1997 Act made limited changes only, again as we have explained above. In any event, the sentence still remains a sentence of detention to be imposed on an offender convicted of murder who was under the age of 18 at the time of the offence, no matter the offender’s age at

the date of conviction and sentence; and the welfare principle (described above, paras 26 and 46) together with all other sentencing principles relating to children (see the summary at para 46 above) remain to be applied.

83. The age of criminal responsibility, that is the age at which a person may be found guilty of a criminal offence, is ten (there being a conclusive presumption that a child below that age cannot be guilty of an offence: section 50 of the Children and Young Persons Act 1933 as amended). The age at which a person becomes an adult is currently 18 and was formerly 21 (see section 1 of the Family Law Reform Act 1969). Children convicted of criminal offences are treated differently from adults when it comes to sentencing, because their lack of maturity is recognised as likely to have the consequence that they are less culpable than an adult would be or because reformatory measures may be more effective in their cases: see *V v United Kingdom* (1999) 30 EHRR 121. A judge tasked with sentencing a child or young person is therefore required to follow well-established principles which have essentially been codified in guidance given to sentencing courts, first in November 2009, in the “Overarching Principles—Sentencing Youths” definitive guideline issued by the Sentencing Guidelines Council; and subsequently in 2017, in guidance given by the Sentencing Council on Sentencing Children and Young People (“the Guideline”) which must be followed unless it would be contrary to the interests of justice to do so (section 59 of the Sentencing Act). In short, the sentencing judge must have regard to the aim of preventing offending by children and young people, to the welfare of the child or young person (paras 1.1 and 1.11 of the Guideline) and to the fact that children and young people are not fully developed and have not attained full maturity which can impact on their decision making and risk taking behaviour (para 1.5 of the Guideline); must consider the need to avoid criminalising children and young people unnecessarily (para 1.4 of the Guideline) and that the impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult as any sentence will seem longer due to their young age, and penal interventions may interfere with a child or young person’s education and should be considered by a court at sentencing (para 1.8 of the Guideline).

84. More specifically, section 4 of the Guideline sets out the central elements when sentencing a person aged under 18. In relation to age and maturity, para 4.9 of the Guideline notes that the consideration of age is different when sentencing children and young persons as compared with adults, and that even in response to children and young persons, the response of the courts is likely to be very different depending on whether the child or young person is at the lower end, or in the middle, or towards the top of the age bracket. Section 6 deals with an offender who crosses a particular age threshold between commission and sentencing for the offence, such as a person who was a child or young person at the time of commission of the offence, but who is an adult at the date of sentencing, which can result in the maximum sentence on the date of conviction being greater than that available on the date on which the offence was committed (primarily when the offender turns 12, 15 or 18). In those circumstances, the Guideline requires the sentencing court to “take as its starting point the sentence likely to have been imposed on

the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence ...” (para 6.2).

85. It follows that the general approach to age in the criminal justice context is that the age of an offender at the date of conviction will in almost all cases determine the broad approach to sentencing (with detention at His Majesty’s pleasure being an exception to that general approach). It will also determine the type of custodial sentence (be it detention and training, detention, imprisonment or some other order) to be imposed (assuming that only a custodial sentence will be appropriate). In terms of the institution in which the offender will serve his or her sentence, a child will not be held at the same institution as a person approaching their 21st birthday; and once an offender is 21 the only custodial sentence available is one of imprisonment.

86. So far as sentence length is concerned, the critical factor is the seriousness of the offending. The sentencing judge must consider the culpability of the offender as at the date of the offence rather than the date of conviction or sentence: para 6.2 of the Guideline and inevitably the offender’s age will be highly relevant in determining his or her culpability.

87. These, rather than minimum term reviews, are the means by which the welfare of child offenders is respected in the criminal justice system. They apply as much to sentences of detention during His Majesty’s pleasure imposed on a child offender since the enactment of the section 27A scheme as before. Unlike section 82A, section 27A made no change to any aspect of the sentencing exercise for those who commit murder as a child and are sentenced to detention at His Majesty’s pleasure by the sentencing court. These offenders, whether under or over 18 at the date of sentence, continue to be treated differently from those who offend as adults in the respects summarised above. The only change made by section 27A is to exclude the opportunity to apply for a minimum term review for those sentenced to detention during His Majesty’s pleasure when aged 18 and therefore sentenced as adults. It follows that section 27A respects the well-established distinction drawn between children and adults in the criminal justice system. It draws a bright line in relation only to minimum term reviews for offenders aged 18 and over at the date of sentence, the age recognised in criminal law for treating a person as an adult.

88. The second factor indicating a low intensity of review is the fact that section 27A is a provision of primary legislation enacted by Parliament. As such, it reflected a conscious legislative choice to amend the detention during His Majesty’s pleasure regime by providing by virtue of section 27A(1) and (11) of the 1997 Act, that there is no right for an offender serving a sentence of detention during His Majesty’s pleasure imposed when aged 18 years or older to apply for a review of the minimum term. In addition, the legislation was enacted relatively recently in 2022.

89. Thirdly, section 27A concerns an aspect of prison and penal policy that arises in the context of the administration of justice and the criminal justice system. It goes well beyond the individual factual circumstances of a particular offender's case and calls for a judgement to be made balancing the interests of the families of victims on the one hand (and the extent to which they should be involved in the criminal justice process) and those of offenders on the other, together with how these issues impact on society as a whole. The judgement is one of social policy, involving questions of moral and political judgement, which is the province of the legislature and in relation to which the margin of appreciation is wide: see *In re JR123* [2025] UKSC 8; [2025] AC 1256, para 49; and further *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746, para 83; *R (SC)* paras 115(2), 118, 129(2) and 159.

90. We do not accept Mr Fitzgerald's submission that this case is concerned not with penal policy but with a measure concerned with deprivation of liberty and arbitrary detention. In support of this submission, he emphasises what was said in *Clift* (para 62) about "the fundamental importance of the guarantees contained in article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities". He also submits that the intensity of review is further heightened by the complaint of arbitrary detention both because the effect of the differential treatment is arbitrary, and because the absence of an effective review mechanism for the appellant's cohort risks arbitrary detention. Since protection from arbitrariness is at the core of the protection afforded by article 5, he submits that although in principle a wide margin of appreciation applies in questions of prisoner and penal policy, the court must nonetheless exercise close scrutiny where, as here, there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful: *Clift*, para 73.

91. The concern about arbitrary detention raised in *Clift* has no application to the present case. *Clift* concerned the lawfulness of continued detention following a recommendation to release from the Parole Board for a small group of prisoners (those serving sentences of 15 years or more) who, in addition to obtaining a positive recommendation from the Parole Board, had to secure the approval of the Secretary of State (paras 67–68 and 77). The applicant in *Clift* was in an analogous position to the other groups of prisoners identified in that case since the methods and means of assessing and addressing risk were in principle the same for all categories of prisoners (para 67) and accordingly, absent objective justification, the scheme would run counter to the need to protect individuals from arbitrary detention. The problem ultimately identified by the Strasbourg court in this regard was that any distinction in treatment between the applicant and the other groups of prisoners identified could only be justified where it actually achieved the legitimate aim pursued, and that had not been established. Rather, as the Strasbourg court held (para 77), the "differential treatment of prisoners serving fifteen years or more, whose release continued to be dependent on the decision of the Secretary of State, had become an indefensible anomaly, as the assessment of the risk presented by any individual prisoner, in the application of publicly promulgated criteria, was a task which was at the relevant time recognised to have no political content and one to which the Secretary of State could not, and did not claim to, bring any superior expertise".

92. The Strasbourg court's conclusions about arbitrary detention in *Clift* were directly linked to factual assessments of the risk posed by a prisoner eligible for early release. By contrast, the present case is not concerned with factual assessments of risk posed by early release and the resulting potential for arbitrary continued detention for those to whom a requirement for approval by the Secretary of State was required even after the Parole Board recommended release in their case. The question here is quite different and raises wider policy and fair balance considerations that are simply not linked to the arbitrariness of an offender's detention or the facts of their detention but are concerned with a penal policy question about the circumstances in which a minimum term review should be available to offenders sentenced to detention during His Majesty's pleasure. The points of distinction drawn by the Strasbourg court in *Stott v United Kingdom* (2023) 78 EHRR 29, para 102, between that case and *Clift* are pertinent here. Moreover, we have explained (above paras 64–69) why the removal of an opportunity to apply for review of the minimum term for Mr Quaye's cohort does not itself result in arbitrary detention.

93. The fourth factor is that there is nothing to suggest any consensus across contracting states that offenders who commit murder as children and are sentenced to indefinite detention with a minimum term should in all cases have the right to apply for a minimum term review without any age cut-off. As this court has made clear, where there is no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider: *In re JR123*, para 50; *R (SC)*, paras 115(3) and 129(3).

94. The fifth factor is that the legislation reflects Parliament's conclusion as to where the balance should lie as between 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, the interests of victims' families who, as Parliament was informed, constitute a group that is negatively affected by the process of reviewing minimum terms and might wish for finality in relation to the sentencing of the offender who killed their family member. The need to strike a balance between the interests of families of victims and those of offenders is an important feature of section 27A and in general, there is "a wide margin if the state is required to strike a balance between competing private and public interests or Convention rights": *In re JR123*, para 54.

95. It follows that the factors relied on by the appellant as serving "to heighten the intensity of review" were not "erroneously ignored and/or dismissed" by the Court of Appeal. Rather, these points were considered but found not to have the effect contended for. The result as we have indicated is that when assessing the proportionality of this legislation the margin is wide.

(b) Whether the legislation has a legitimate aim

96. Against that background, we turn to consider the question of objective justification. What must be justified is the difference in treatment arising from the impugned provision: *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746 at para 80. The test to be adopted is the well-established test set out in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700.

97. The aim or purpose of legislation is primarily to be deduced from the terms of the legislation itself, but it is common ground that a published white paper is admissible material in identifying the mischief to be addressed by the legislation and therefore its aim or rationale. The aim of the section 27A scheme is clear from its terms: those aged 18 or over when sentenced to detention at His Majesty's pleasure cannot apply for a minimum term review (section 27A(1) and (11)), while those already serving a sentence of detention during His Majesty's pleasure and aged under 18 when sentenced may make an application for a minimum term review after serving half the minimum term fixed by the court (section 27A(1) and (2)). In other words, the aim is to remove or reduce the opportunities for these offenders to apply for a minimum term review.

98. The reason for this is expressly identified in the White Paper (discussed at paras 49–50 above). 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 to feel as though they should advocate again for justice for their family member. A fair reading of this document shows that the concern was not limited to reducing the number of continuing reviews but was about removing the right to apply for a review altogether in certain situations because, as para 328 makes clear, the very “existence of the review procedure” could be “extremely distressing”, and this was also the case where there was “the opportunity for continuing reviews after the halfway point” (see also para 329, set out above at para 49).

99. This was a consideration Parliament was entitled to regard as powerful. It was downplayed by the Divisional Court and in the submissions made by Mr Fitzgerald. The *Code of Practice for Victims of Crime in England and Wales* (presented to Parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004) introduced guidance, including at para 7.9 about the use of Victim Personal Statements in parole hearings or tariff (minimum term) review hearings. The code says, “You can ask that your original Victim Personal Statement be used at tariff review hearings and at Parole Board hearings. However, you are entitled to write a new Victim Personal Statement for these hearings, where you are able explain how the crime continues to affect you and/or your family, and the impact that any outcome at one of these hearings may have on you. ...” (para 7.9). This no doubt explains why families of victims are contacted every time an offender applies for a review and are given the opportunity to provide a new statement.

100. We regard it as obvious and inevitable that the existence of a review process is liable to be extremely distressing to victims' families. As the Court of Appeal observed (para 139), 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 being considered for release on licence. That will be based on the seriousness of the offence, in other words 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 the family must, as a matter of fairness, be informed of that, with the consequent distress to the victim's family that will cause. The Victim Personal Statement is an integral part of the minimum term review, but whether or not the Victim Personal Statement itself has an impact on the outcome of the minimum term review is unlikely to affect the nature of the families' engagement with that process, nor is it likely to diminish their experience of distress. We do not therefore agree with the Divisional Court (para 57) that the fact that families of victims have a more significant role at the Parole Board stage than in minimum term reviews means the effect upon them of a single review of the minimum term will be modest. We would have thought that the possibility of a reduction in the minimum term to be served by the offender in consequence of a minimum term review will be at least of equal if not greater concern to the family.

101. It follows in our view that the aim of alleviating that distress by reducing the opportunities for offenders to apply for a review of their minimum term is a legitimate aim.

(c) The means adopted

102. The means by which the aim was achieved involved enacting primary legislation providing for a bright line cut-off at age 18 when sentenced. For offenders in this group, who began or begin their sentences as 18-year-old adults, they are no longer eligible to apply for a review (though there are limited transitional provisions introduced by section 128(3) and (4) of the Police, Crime, Sentencing and Courts Act 2022, discussed at para 57 above). Those who are (or were) under 18 when sentenced, ie aged 10 to 17, continue to have at least one opportunity to apply for a review (and possibly, but likely only in rare cases, a second review if still children when the time for applying for a second review arose). The review considers whether their progress in detention and any serious risk to that progress justifies reducing the minimum term.

103. There is no principled objection to the drawing of bright lines in this context: see *Clift*, para 76. It is also relevant to note that a minimum term review is not available to any other adult offender aged 18 or older. So, the default position is that no review is available for adult offenders in the criminal justice system rather than the other way around. The bright line drawn at age 18 is to be viewed in that context.

104. We also note that no such review is available for child offenders convicted of other serious offences. For example, detention for life is imposed on a child aged under 18 at the date of conviction (and potentially therefore sentence) under sections 250 and 258 of the Sentencing Act, following conviction for a Schedule 19 offence including soliciting murder, conspiracy to commit murder, as well as attempted murder and section 18 wounding with intent, but there is no opportunity for any kind of minimum term review for these offenders. Mr Quaye cannot (and does not) suggest that such a review is required by article 5 for offences which may in substance be equally serious, even when committed by children.

105. Moreover, drawing a bright line distinction based on being 18 at the date of conviction or sentence is a recognised feature of sentencing and the criminal justice system. As we have explained above, in almost all cases, the type of custodial sentence which may be imposed on a young person depends on their age at the date of conviction: see for example, section 234 of the Sentencing Act which provides for a “detention and training order” for offenders “aged under 18, but at least 12, when convicted ...”; section 262 of the Sentencing Act which provides that any custodial sentence for offenders aged at least 18 but under 21 at the date of conviction is detention in a young offender institution unless the court is required to pass a sentence of custody for life or a sentence of detention during His Majesty’s pleasure; and “custody for life” available for offenders aged 18–20 when convicted: sections 272–276 of the Sentencing Act. The only exception is the sentence of detention during His Majesty’s pleasure in section 259 of the Sentencing Act, where the availability of the type of sentence (DHMP) is dictated by the offender’s age at the date when the offence was committed.

106. Further, the Guideline must be followed when sentencing children or young people, again as we have explained above.

107. It follows that differentiation in the criminal justice system on the grounds of age is neither “arbitrary” nor capricious. Rather, it is the rational approach. Differentiating by reference to age at the date of sentence is likewise rational: the minimum term is set at the date of sentence, and accordingly, if 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 obviously relevant age.

108. The effect of the section 27A scheme is plainly not, as Mr Quaye suggests, to “treat those [in the appellant’s position] as akin to fully developed adult offenders, to whom welfare principles, rehabilitative considerations and the differentiated approach otherwise relevant to child offenders simply do not apply”. To repeat, section 27A made no change to the sentencing process undertaken by the court in these cases; the full panoply of protection for child offenders continues to apply, save only for the right to request a minimum term review at the halfway stage. The court adopts precisely the same approach to sentencing by reference to the age of the offender at the date of commission of the

offence with the starting point statutorily defined by reference to that age, together with the circumstances of the offender at the date of sentence, and including where relevant, due consideration of the welfare principle. Their reduced culpability as child offenders subject to the mandatory sentence of detention during His Majesty's pleasure is reflected in the length of the minimum term that is fixed by the court by reference principally to the seriousness of the offence (in other words, the culpability of the offender and the harm caused).

109. We acknowledge that the clear purpose of the minimum term review is to cater for maturation and development. Moreover, as the Secretary of State correctly accepts, a child's entry into adulthood is not a single event at 18 but rather a process of maturation and neurological development lasting into the 20s, and even in some cases longer. The White Paper addressed this, making clear that the underlying purpose of a minimum term review does not apply with the same force to adults, because, in general, "adults do not go through the same accelerated development and maturation that children do": para 329. Plainly, that purpose is most necessary where the child offender is sentenced at age 10 or 11 and will change and develop significantly post sentencing so that all the protective features surrounding the sentencing of children are engaged and the availability of a review provides important protection. It is least necessary when the child offender is an adult at the date of sentence when some of those protective features are not engaged at all: for example, an offender who was a child at the date of the offence but is sentenced as a middle-aged adult. The killers of Stephen Lawrence are an example: they were under 18 when they killed him but were sentenced to DHMP in their mid-30s and had no need for a review.

110. It is difficult to see any objection in principle to removing the minimum term review for young adults once it is accepted (as we have explained above, paras 60–61) that section 82A made fundamental changes to the sentence, and that, together with the changes introduced by the section 27A scheme, mean that there is no longer anything intrinsic in a sentence of detention during His Majesty's pleasure that imports a duty to have a continuing review of the minimum term. The question is not therefore about whether to set a bright line at all but becomes whether it is right to set the bright line at 18 or whether an older age (catering for further maturation) is appropriate.

111. In our judgment the thrust of the change introduced by section 27A is consistent with the underlying rationale for detention during His Majesty's pleasure and it was permissible for Parliament to proceed on the basis that the underlying purpose of a minimum term review does not apply with the same force to those aged 18 or over (adults) who do not continue to go through the same accelerated process of development as children do. This is not a proposition that had to be supported by evidence (as the Divisional Court suggested, para 50). As this court made clear in *R (SC)*, "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" (para 169)). The will of Parliament finds its expression solely in the legislation

which it enacts (para 167). No reasons are given by Parliament, and “the decisions which Parliament takes are not necessarily capable of being rationalised in any event” (para 168).

112. Moreover, the cases of *R v Peters* [2005] EWCA Crim 605; [2005] 2 Cr App R (S) 101 and *R v Clarke (Morgan)* [2018] EWCA Crim 185; [2018] 1 Cr App R (S) 52 (relied on by the Divisional Court) were concerned with a different question, namely the impact of the age of the offender on his or her culpability. Neither case contradicts an approach to maturation which identifies that there is ongoing development beyond the age of 18, while at the same time recognising that, in general, the period of accelerated development and maturation occurs as a child (aged 0–17, or even 10–17), rather than as an adult (18–25). It is also important to ensure that the question of culpability at age of sentence is not confused with the availability of a minimum term review. The two are different. Culpability is considered when the minimum term is fixed. In assessing culpability, the sentencing court necessarily considers the maturity of the offender at the date of commission of the offence. That is true of all offenders, whatever their age at the date of the offence. Furthermore, sentencing in cases of murder takes place within the framework of Schedule 21 which fixes starting points for murder in the case of adults and children (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.

113. We were referred in the course of argument to *Hansard*. But this was simply to show that Parliament made its own judgement on the appropriate age at which to draw the line for making available a minimum term review in cases of detention during His Majesty’s pleasure. That is appropriate. Where it can be inferred that Parliament formed a judgement that a particular legislative provision 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: see *R (SC)*, para 180. But, as Lord Reed explained, it is important to go no further than “ascertaining whether matters relevant to compatibility were raised during the legislative process”, and “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”. Equally, courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility (see *R (SC)*, paras 183–184).

114. The section 27A scheme involved differentiating between two groups: those aged 18 when sentenced and those who were still children at that point. The very terms of the legislation required Parliament to determine if age at date of sentence was an appropriate differentiating feature and whether that would strike the right balance between the interests of victims’ families and those of offenders. It is also significant that Parliament expressly considered an amendment to the legislation which would have provided for the cut-off to be age 26 (rather than 18) for the opportunity to apply for a review. The

amendment was considered and rejected on 10 June 2021. Since the terms of the legislation itself made clear that those who had reached the age of 18 at the time of sentencing would no longer be entitled to a review while those who were entitled to reviews because sentenced as a child, would be restricted to a single review, it can fairly be said that Parliament confronted the precise point in issue in this appeal. Moreover, during the debate points of concern were raised that “those who commit an offence as a child should be treated as a child by the criminal justice system, irrespective of whether they turn 18 by the time they are sentenced”; as to the implications of court backlogs causing delays to sentence; as to the effect of a brightline cut-off at age 18 when sentenced; and that maturation continues beyond 18. Parliament nevertheless enacted section 27A in the terms that it did.

115. Accordingly, the proper starting point for the proportionality assessment is that section 27A pursues the legitimate aim of seeking to balance the interests of families of victims with those of offenders. The means adopted were to draw a bright line distinction based on the age at the time when the offender begins their sentence. There is a rational connection between the aim and the means adopted, which is no more intrusive than it needs to be. It reflects a legislative choice made by Parliament in an area of prison and penal policy that is pre-eminently for Parliament. It also reflected Parliament’s balancing of the competing interests of victims’ families and offenders. The adoption and application of the section 27A scheme should be accorded a wide margin of respect for all the reasons we have given above. The remaining question is whether a fair balance has been achieved (ie whether there is a reasonable relationship of proportionality between the aims and the means employed).

(d) Retrospectivity as a feature of article 14

116. There is a further feature of the section 27A scheme that Mr Fitzgerald submits should be considered as part of the proportionality assessment, namely its asserted retrospective effect. He submits that section 27A operates retrospectively and that the unfairness of the retrospective impact on child offenders who have already made exceptional progress to rehabilitate is relevant to the assessment of proportionality. As Mr Fitzgerald put it, even if section 27A has fundamentally altered the nature of detention during His Majesty’s pleasure, those in Mr Quaye’s position still had a legitimate expectation of an opportunity for a minimum term review. His expectations were reasonably conditioned by the universal practice and operation of the criminal justice system which proceeded on the basis that the minimum term element of detention during His Majesty’s pleasure was reducible, and that detainees would be able to apply for review if their progress was sufficiently exceptional. Accordingly, he submits that weighty justification is required given that rights are being retrospectively removed, particularly where the rights denied were (and/or remain) an inherent feature of the special sentence to which Mr Quaye remains subject. There can be no more obvious injustice than to retrospectively increase the harshness of the measure originally imposed on child

offenders, in breach of the settled expectations of those sentenced before the introduction of section 27A.

117. Once again, we do not accept Mr Fitzgerald’s argument. First, it is significant that with effect from 18 February 2021 the Revised Policy for detention during His Majesty’s pleasure prisoners was implemented by the published Prison and Probation Service circular entitled “Revision to the existing policy for Minimum Term Reviews for individuals sentenced to [detention during His Majesty’s Pleasure]”. This explained that “from 18 February 2021, Public Protection Group (PPG) are introducing the following changes to the Minimum Term Review policy, for prisoners ... These changes affect the eligibility criteria for prisoners that will be invited to apply for such a review at the halfway point of their sentence”. The changes were set out as follows:

- “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 halfway 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.”

This meant that the cohort of offenders aged 18 when sentenced to detention during His Majesty’s pleasure lost their opportunity to apply for a minimum term review on and from 18 February 2021. Thereafter, those affected by the introduction of the Revised Policy lost nothing by virtue of the enactment of section 27A.

118. We also note in this regard that, while it is true as Mr Fitzgerald submits, that the White Paper (in common with advice provided to the Secretary of State during the legislative process) wrongly stated (see para 329) that there was no existing legal entitlement to minimum term reviews for those sentenced when aged 18 or over, by the time the legislation was introduced in Parliament as the Police, Crime, Sentencing and Courts Bill on 9 March 2021, the Revised Policy was in place and meant that para 329 of the White Paper accurately reflected the position so that Parliament was not misled. The Revised Policy also meant that the changes made by section 27A were not as significant as they perhaps otherwise might have been and simply put the policy change (ie removing minimum term reviews for those aged 18 or over when sentenced) on a legislative footing.

119. Secondly, and in any event, Mr Quaye and his cohort were not losing a substantive legal right, still less any fundamental right, since there is no “right” to an executive review of any sentence (or any component of it). Rather, they lost an opportunity to apply for executive review under a policy that was liable to and did change.

120. Thirdly, Parliament made express provision to cater to an extent for those who had as a matter of fact reached the halfway point in their detention during His Majesty’s pleasure sentence and received a letter offering them an opportunity to apply for a minimum term review. Section 128(3) of the Police, Crime, Sentencing and Courts Act 2022 addressed the question of retrospectivity by making limited transitional provision for this cohort. Although Mr Quaye had reached the halfway point of his sentence, he had not received a letter offering him the opportunity to apply and had made no application for a minimum term review. He had received no direct promise of an opportunity to apply for a review. In short, he had no right to a review. His expectation (legitimate or not) can only have been of an opportunity to apply for a review under an existing policy (the Policy) that could change in future and did in fact change in February 2021 (leading to the Revised Policy).

121. Against that background, we recognise the thrust of the submission made by Mr Fitzgerald to this extent only: on the offender side of the balance, we understand that it may feel harsh or unfair to remove a benefit that a person expects to have; and that effect may seem harsher than where the benefit is removed for future cases only. We accept that this is relevant to the fair balance assessment but consider that it carries little weight. The critical point is that Parliament considered the fair balance and given the wide margin of appreciation to be accorded in this case, its judgement that the legislation achieved a fair balance is to be respected.

122. As for the further arguments raised by Mr Quaye in relation to fair balance, his repeated reference to a continuing “inherent duty of ongoing review” in all detention during His Majesty’s pleasure sentences is unsustainable for the reasons we have given above. Section 27A is not simply a “side wind” as Mr Quaye suggests. Section 27A(11) expressly provides that “there is no right for any person who is serving a DHMP sentence

to request a review of the minimum term other than that conferred by this section”. Accordingly, the legislation unambiguously removes the availability of a minimum term review, and thus any such duty, save as conferred by section 27A. The intended effect of section 27A is clear on its face: it is a complete code that governs the availability of minimum term reviews for offenders serving sentences of detention during His Majesty’s pleasure. The legislation has replaced the power previously exercised under the prerogative and has in that sense occupied the ground. Further, it restricts that availability by conferring a right to seek a review only on offenders who were under 18 at the date of sentence.

123. This does not give rise to uncertainty. An offender serving detention during His Majesty’s pleasure knows what his or her minimum term is; the offender knows whether they are eligible to seek a review of the minimum term; and in any event, knows that his or her suitability for release on licence will be considered once the minimum term fixed by the court has been served. Thus, for example, Mr Quaye was told by the judge that he would be “detained at Her Majesty’s pleasure for a minimum of 15 years. That means you will be held in secure custody for at least 15 years, it may be a lot longer I emphasise that. You will not be released unless and until the Parole Board is satisfied that the risk you pose to the public is manageable in the community”. The expectation of offenders will be conditioned by the minimum term fixed by the court at sentencing and the direction that the early release provisions apply, not by reference to the possibility of requesting a minimum term review based on events occurring after the sentence has been fixed by the court.

(e) Proportionality/fair balance

124. The assessment of proportionality in this case ultimately depends on whether Parliament made the right judgement. Just as in *R (SC)*, this question cannot be answered by a process of legal reasoning because there are no legal standards by which a court can decide where the balance should be struck between the interests of victims’ families and the interests of offenders sentenced to detention during His Majesty’s pleasure. Parliament is in a better position than the courts to reflect a collective sense of what is fair in this context and to assess where the balance of fairness lies (see to this effect *R (SC)*, para 208). It follows that the court should be slow to substitute its own view for the political judgement of Parliament in this respect.

125. Balancing the effect on Mr Quaye of being deprived of the opportunity (under a policy liable to change and which had by then already changed) to request a minimum term review against the importance of the legitimate aim in section 27A of reducing the distress of victims’ families by reducing the opportunities for offenders sentenced to detention during His Majesty’s pleasure to seek reviews of the minimum term fixed by the court, we are satisfied that the former is outweighed by the latter. None of the reasons given by the Divisional Court, or advanced on behalf of Mr Quaye, cast any doubt on the

assessment made by Parliament that the legislation strikes a fair balance between the rights of offenders in the same cohort as Mr Quaye, the rights and freedoms of others and the interest of the general community. Adoption and application of the regime established by section 27A falls well within the margin of appreciation which is applicable in this context.

126. For all these reasons we would dismiss this ground of appeal.

6. Article 7—retrospective harshening of the appellant’s sentence

127. Article 7(1) 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.”

128. Mr Quaye contends that the change in the law removing the opportunity for his cohort to apply for a minimum term review in order to reduce the tariff imposed by the sentencing judge amounts to the imposition of a harsher penalty within the meaning of the second sentence of article 7(1) than was originally imposed in his case. The Court of Appeal (paras 101–102) did not consider that there was any merit in this aspect of Mr Quaye’s judicial review challenge to the section 27A scheme. We agree with that conclusion for the reasons that follow.

129. Mr Quaye’s argument depends on the availability of a minimum term review being properly treated as modifying the penalty imposed on him for the index offence. The concept of “penalty” in article 7 of the Convention is autonomous in scope. Moreover, the established Strasbourg jurisprudence draws a clear distinction between a measure that constitutes in substance a “penalty” and a measure that concerns the “execution” or “enforcement” of a “penalty”; article 7 applies only to the former (see *Kafkaris v Cyprus* (2008) 49 EHRR 35, para 142, and *Del Río Prada v Spain* (2013) 58 EHRR 37, para 83).

130. In the early case of *Hogben v United Kingdom* (1986) 46 DR 231 the complainant was a convicted prisoner who, as a result of a change in the policy on release on parole, had to serve a substantially longer time in prison than he would otherwise have done. In its decision declaring the application inadmissible, the European Commission of Human Rights reasoned that the applicant’s sentence for the offence of murder committed during

a robbery was life imprisonment and that meant the “penalty” for purposes of article 7(1) was that of life imprisonment. It continued:

“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.”

131. Similarly, in *Uttley v United Kingdom* (Application No 36946/03) (unreported) 29 November 2005 the essence of the complaint was that a change in the regime for early release, brought about by intervening legislation (enacted in 1991), had the effect of imposing on the applicant (when he was convicted in 1995) a further “penalty” over and above the “penalty” applicable at the time when he committed the offences (before 1983). Relying on *Hogben* the Strasbourg court held:

“Although ... the licence conditions imposed on the applicant on his release after eight years can be considered as ‘onerous’ in the sense that they inevitably limited his freedom of action, they did not form part of the ‘penalty’ within the meaning of article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.

Accordingly, the application to the applicant of the post-1991 ... regime for early release was not part of the ‘penalty’ imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no ‘heavier’ penalty was applied than the one applicable when the offences were committed.”

132. This line of reasoning was confirmed in *Kafkaris* (cited above) where changes to the prison legislation had deprived prisoners serving life sentences (including the applicant) of the right to remissions of sentence. The Grand Chamber held (para 151):

“[A]s regards the fact that as a consequence of the change in the prison law ... the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the court notes that this matter relates to the execution of the sentence as opposed to the ‘penalty’ imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant’s imprisonment effectively harsher, these changes cannot be construed as imposing a heavier ‘penalty’ than that imposed by the trial court ... In this connection, the court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member states in determining their own criminal policy ... Accordingly, there has not been a violation of article 7 of the Convention in this regard.”

133. Nonetheless, the Grand Chamber also acknowledged (*Kafkaris*, para 142) that in practice the distinction between a measure that constitutes a “penalty” and a measure that concerns the “execution” or “enforcement” of the “penalty” may not always be clear cut (see also *Del Río Prada*, para 85, to similar effect). The court explained that the wording of the second sentence of article 7(1) means that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a “criminal offence”. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Del Río Prada*, paras 81–82). In other words, as the Grand Chamber explained in *Del Río Prada* (para 90):

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

134. This court considered article 7(1) in *Morgan v Ministry of Justice* [2023] UKSC 14; [2024] AC 130. In *Morgan*, at the time of sentencing, a court imposing a determinate sentence was required by statute to specify a period (referred to as the custodial period) at the end of which the offender was to be released on licence. The custodial period was not to exceed one half of the term of the sentence, and it meant the offender would be released automatically on licence after serving one half of the sentence in custody. The provisions governing early release (that is release before the end of the term of the

sentence) were subsequently amended for specified terrorist offences so that an offender would only be released after serving two-thirds of the sentence (and only after referral to the Parole Commissioners). The Supreme Court reviewed the case law of the Strasbourg court and concluded that changes in the regime governing the point at which an offender serving a determinate sentence might be released on licence, including those which meant that an offender might serve more of the determinate sentence in custody rather than on licence, involved the execution or enforcement of a penalty, not the penalty itself (which was the determinate sentence imposed by the court). Accordingly, they did not fall within article 7(1) of the Convention. The Supreme 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” (para 18).

135. Mr Fitzgerald submits that the legislative amendment by section 27A of a judicially imposed sentence, six years after its imposition, is retrospective and has the effect of subjecting Mr Quaye to a harsher sentence because the tariff originally fixed provisionally and capable of later reduction on review, has now been rendered immutable and the right to a review has been altogether removed. By virtue of section 27A, Mr Quaye’s sentence has been substantially transformed from a sentence of detention during His Majesty’s pleasure to an adult mandatory life sentence in all but name. He relies on *Del Río Prada* and *Kupinsky v Ukraine* (2022) 76 EHRR 38 as support for these submissions.

136. The facts of *Del Río Prada* (described as “quite extraordinary” in the joint partly dissenting opinion of Judges Mahoney and Vehabovic, at para OIII-10) involved an offender sentenced in eight separate sets of criminal proceedings to sentences for terrorist offences, including a number of murders, amounting to over 3,000 years’ imprisonment. Under laws in force at the time, the overall maximum time to be served was 30 years’ imprisonment. Further, there was a right to remission of sentence in exchange for work done. The offender had become entitled to 3,282 days remission (about nine years) in respect of work she had undertaken, and it was understood that those days would reduce the maximum sentence of 30 years. A subsequent change in the case law led to the 3,282 days only being capable of reducing the individual sentences as they were being served which meant, given the combined length of the individual sentences, that the 3,282 days remission would have no practical effect in reducing her sentence.

137. The Grand Chamber (by a majority) held that the practice of the Spanish courts had been to treat the maximum sentence as a “new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention should be applied” (para 99). Moreover, “days of remission of sentence already granted were deemed to have been served and formed part of the prisoner’s legally acquired rights” (para 101). The court set out the Spanish Prison Regulations (at para 26), and stated “the Spanish

legislature considered those rules to be part of substantive criminal law, that is to say of the provisions which affected the actual fixing of the sentence, not just its execution” (para 102). Consequently, the “penalty imposed on the applicant thus amounted to a maximum of thirty years’ imprisonment, and any remissions of sentence for work done in detention would be deducted from that maximum penalty” (para 103). On those facts, it held:

“108. That being so, although the court agrees with the Government that arrangements for granting adjustments of sentence as such fall outside the scope of article 7, it considers that the way in which the provisions of the Criminal Code of 1973 were applied in the present case went beyond mere prison policy.

109. Regard being had to the foregoing and to Spanish law in general, the court considers that the recourse in the present case to the new approach to the application of remissions of sentence for work done in detention introduced by the ‘Parot doctrine’ cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant as the Government have argued. This measure taken by the court that convicted the applicant also led to the redefinition of the scope of the ‘penalty’ imposed. As a result of the ‘Parot doctrine’, the maximum term of thirty years’ imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a thirty-year sentence to which no such remissions would effectively be applied.

110. The measure in issue accordingly falls within the scope of the last sentence of article 7(1) of the Convention.”

138. It is clear, accordingly, that the Grand Chamber’s decision turned on the unusual facts of that case, where, as a matter of substantive legal right conferred by the legislature, the maximum 30-year sentence became a new, independent sentence to which there was a right to remission of sentence for work done in detention to be applied. In other words, the law defined the maximum sentence to which the early release rights would apply. The penalty included both. The law then changed and that meant there was a redefining of the scope of the penalty (see para 109 cited above). However, the decision neither alters nor undermines the well-established distinction drawn by the authorities cited above, between penalty and the means of enforcing it; nor the principle that where the nature and purpose of a measure relate exclusively to a change in the regime for early release, this does not form part of the “penalty” within the meaning of article 7 (as the Strasbourg court

confirmed in *Abedin v United Kingdom* (2019) 72 EHRR SE6, para 36; see too *Morgan* paras 94–96 per Lord Stephens JSC).

139. Similarly, the decision in *Kupinsky v Ukraine* does not assist Mr Quaye. The applicant in that case was sentenced in Hungary to life imprisonment for murder with the possibility of release on parole after serving 20 years of imprisonment. Having been deported to Ukraine, the Ukrainian courts recognised that sentence. However, some years later, the district court refused his application for release on parole noting that he was serving his sentence under Ukrainian law which did not provide for release on parole for life prisoners. The Strasbourg court upheld his complaint. It first reiterated the principle established by its case law that a distinction is drawn between a measure that constitutes in substance a “penalty” and a measure that concerns the execution of a penalty, and stating that whether the case concerns a change in the regime for release on parole within the country or as the result of a transfer of prisoners, such a regime relates to the execution of a sentence and thus excludes the application of article 7 (para 47). However, it found this case to be different because the applicant’s penalty had been converted by the change in regime from one allowing release on parole to one that involved no availability of parole at all. As the Strasbourg court described it:

“the applicant’s sentence imposed as a result of the conversion is irreducible under current Ukrainian law ... Thus, the principal difference between the present case and previous ones concerning the transfer of prisoners ... is that those cases concerned the terms for granting parole in the state to which the prisoner was transferred, while in the present case there is an issue of unavailability of parole as a matter of law.” (para 51)

140. The court noted that the relevant Hungarian legislation differentiated between reducible and irreducible life sentences, providing for both; and that the applicant had been sentenced to a reducible life sentence. It then held:

“56. The court therefore concludes that by converting the applicant’s original reducible life sentence to one that was irreducible under Ukrainian law, the domestic courts in the particular circumstances of the present case went beyond mere measures of enforcement and changed the scope of the applicant’s penalty. Article 7 is therefore applicable in the present case.”

141. *Kupinsky* is entirely consistent with the established approach. A reducible sentence was originally imposed on the applicant. That reducibility was part of his sentence. That changed and the sentence became irreducible. Mr Quaye’s case is

different. His “previously reducible sentence” has not been rendered irreducible and thus substantively changed. Unlike *Kupinsky*, Mr Quaye and all those sentenced to detention during His Majesty’s pleasure remain subject to a reducible indefinite (or life) sentence with a minimum term fixed by the sentencing court.

142. Applying the principles governing article 7(1) to the present case, the penalty imposed on Mr Quaye following his conviction for murder was a sentence of detention during His Majesty’s pleasure. This is an indefinite or life sentence. When imposing this sentence, the sentencing court determines the minimum term to be served in detention reflecting the seriousness (both culpability of the offender and the extent of the harm caused) of the offence, in accordance with the relevant statutory provisions and case law. The term so fixed gives rise to the possibility of early release on licence once the minimum term has been served and if the Parole Board considers the offender safe to release. The “penalty” for article 7(1) purposes is indefinite detention with a minimum term to be served in detention as determined by the court, and the possibility of early release on licence thereafter. Parliament’s removal of reviews for a category of offender has not altered or redefined the penalty originally imposed by the sentencing court.

143. It follows that section 27A is not a measure which “relates to a change in the penalty imposed” and therefore comes within the test for the application of article 7(1) formulated in *Del Río Prada* (para 109) and in *Morgan* (para 104(ii)). Rather, the section 27A scheme relates exclusively to a change in the regime for early release on licence which does not form part of the “penalty” within the meaning of article 7(1). The Policy (in place until February 2021) permitted applications to be made to the Secretary of State seeking a reduction in the minimum term, as an exercise of the prerogative or an act of clemency. A successful application leading to a reduction in the minimum term enabled the offender to apply earlier than otherwise possible to the Parole Board for release on licence. This was not part of the substantive sentencing process. The substance was early release. The application depended on matters occurring after sentence, namely the extent and nature of the offender’s rehabilitation and progress in prison. A minimum term review simply accelerated consideration of early release by the Parole Board. Section 27A(11) removed (or put on a statutory footing the earlier removal of) the opportunity to seek a minimum term review to secure release on licence at an earlier stage if the Parole Board agreed. These features reinforce the inevitable conclusion that the review arrangements had nothing to do with determination of the appropriate minimum term but were concerned with the manner of execution or enforcement of the sentence, including enforcement of the minimum term assessed and fixed by the court at sentencing. Although the changes might have rendered Mr Quaye’s imprisonment harsher, that is a long way from saying that they imposed a heavier “penalty” than that imposed by the sentencing court.

144. This is also the answer to Mr Quaye’s argument based on what was said in *Del Río Prada* (para 91) about the requirement of foreseeability in article 7(1). There is and can be no dispute that the sentence of detention during His Majesty’s pleasure with a

minimum term of 15 years and the possibility of early release was a penalty that met the qualitative requirements of accessibility and foreseeability. The Strasbourg court has made clear that changes to the execution or enforcement of a penalty do not fall within the scope of article 7(1) of the Convention and that contracting states are free to determine their own criminal policy in respect of such changes. Put another way, where, as here, a measure relates to the execution or enforcement of a penalty, the measure does not fall within the concept of “law” in article 7(1). As such, a measure relating to the execution or enforcement of a penalty is not subject to the qualitative requirements under article 7 including foreseeability: see *Morgan*, para 104.

7. Conclusion

145. For all these reasons, sections 27A and 27B of the 1997 Act are compatible with articles 5, 7 and 14 read with article 5 of the ECHR. The provisions do not involve arbitrary or unlawful detention contrary to article 5. Nor do they have the effect of imposing a heavier penalty than the one that was applicable at the date of commission of the offence contrary to article 7. The difference in treatment provided for by section 27A is objectively justified. Accordingly, we would dismiss the appeal.