Neutral Citation Number: [2024] EWHC 211 (Admin)

Case Number: AC-2022-LON-002470

In The High Court Of Justice
King's Bench Division
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2024

Before :

Lord Justice William Davis
And
Mrs Justice May

- -

Between :

The King (On The Application Of Jesse Quaye)	**Claimant**
- And -	
Secretary Of State For Justice	**Defendant**

- -
- -

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

Hearing dates: 23 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 09 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

LORD JUSTICE WILLIAM DAVIS
and
MRS JUSTICE MAY

LORD JUSTICE WILLIAM DAVIS AND MRS JUSTICE MAY :

Introduction

1. On 10 May 2014 the claimant was at a party in Hemsby, Norfolk. Whilst at the party he participated in the stabbing of a 21 year old man named Connor Barrett. The claimant was born on 15 August 1996 so he was aged 17 at the time of the stabbing. Connor Barrett died from the stab wounds. The claimant and another young person (Ayomindy Bile aged 15) were charged with the murder of Connor Barrett. They were tried in the Crown Court in Norwich. On 20 November 2014 both were convicted. On 16 January 2015 they were sentenced to detention at Her Majesty's Pleasure ("DHMP") pursuant to section 90 of the Powers of Criminal Courts (Sentencing) Act 2000. That form of detention was and is obligatory for any offender aged under 18 at the time the murder was committed. The judge specified a minimum term of 15 years in respect of each offender.

2. In section 128 of the Police, Crime, Sentencing and Courts Act 2022 Parliament legislated in relation to sentences of DHMP. Section 128 inserted section 27A into the Crime (Sentences) Act 1997. Section 27A makes provision for a minimum term review whereby an offender could apply for a reduction in the minimum term imposed at the date of sentence. The statutory right to apply for a review is restricted to those who were under the age of 18 when sentenced. Section 27A came into force on 28 June 2022. Prior to the introduction of section 27A reviews of minimum terms imposed in relation to sentences of DHMP were conducted on a non-statutory basis by reference to departmental policy. Prior to February 2021 this policy permitted a review in relation to any person serving a sentence of DHMP. Thus, when he was sentenced, the Claimant had a right to apply in due course for a review of his minimum term. That right was removed statutorily by section 27A.

3. The claimant now applies pursuant to section 4(2) of the Human Rights Act 1998 for a declaration that section 128 of the 2022 Act together with section 27A(1) and 27A(11) is incompatible with his Convention rights. His primary contention is that the provision is discriminatory and incompatible with Article 14 within the ambit of Article 5. He also submits that the provision is incompatible with Articles 5, 6 and 7.

4. The claimant was given permission by the single judge to pursue the arguments relating to Articles 14, 5 and 6. When the single judge considered the case, the claimant did not raise any argument in respect of Article 7. Since the grant of permission, the claimant has applied for permission to advance the proposition that section 128 violates his Article 7 rights. At the hearing the point was fully argued. We shall deal with the application for permission and (if appropriate) the merits of the argument in due course.

5. At the start of the hearing we were invited to admit further evidence. This fell into three categories: witness statements relating to other DHMP prisoners and their reaction to section 27A and its impact on them; a witness statement from the claimant's solicitor exhibiting a number of decisions of High Court judges in relation to review of the minimum term to be served by DHMP prisoners; a statement from a Dr Delmage, a neuroscientist, about the brain development of young adults after the age of 18. We declined to admit the evidence in respect of other DHMP prisoners. It was and is irrelevant to this claim. No leave was required in relation to review decisions. They are judgments of the High Court and they speak for themselves. We decided to revisit

the issue of Dr Delmage's evidence once we had heard submissions on the substance of the case. We shall return to the issue when it arises in the context of other evidence.

History of DHMP

6. Following the codification of sentencing provisions in 2020, any sentence of DHMP will be imposed pursuant to section 259 of the Sentencing Code 2020. The term "His Majesty's Pleasure" was first used in the Criminal Lunatics Act 1800. That provided that an offender found to be insane was to be "kept in strict custody until His Majesty's Pleasure shall be known". In 1908 the sentence of death was abolished in relation to children and young people. Section 103 of the Children Act 1908 was in these terms:

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

In 1993 this provision was replaced by section 53(1) of the Children and Young Persons Act 1933:

> 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 under such conditions as the Secretary of State may direct.

Neither provision gave express guidance as to the duration of a sentence of DHMP. That was left for the Secretary of State to determine. The practice was for the Secretary of State to obtain the advice of the trial judge and the Lord Chief Justice before fixing the minimum term or tariff before release could be considered.

7. In 1993 two 10 year old boys, Jon Venables and Robert Thompson, murdered a 2 year old boy named James Bulger. The case attracted huge public attention. After their conviction Venables and Thompson were sentenced to DHMP. The trial judge recommended in each case a tariff period of 8 years. The recommendation of the Lord Chief Justice was that the period should be 10 years. There followed a public and press campaign for much longer tariff periods. The Secretary of State fixed the tariff period in each case at 15 years. Venables and Thompson applied to quash the decisions of the Secretary of State.

8. The House of Lords (*R v Secretary of State for the Home Department ex parte Venables* [1998] A.C. 407) determined that a sentence of DHMP was not properly to be equated

with a sentence of life imprisonment imposed on an adult convicted of murder. Rather, a sentence of DHMP required the Secretary of State to consider from time to time whether continued detention was justified. He was entitled to set a provisional and reviewable tariff to reflect punishment and deterrence. However, it was unlawful for him to adopt a policy that the tariff was irreducible irrespective of the progress of the offender. The decision to fix a tariff period of 15 years was quashed as being inconsistent with his duty to keep the offenders' detention under continuous review. The House of Lords also determined that, in the particular circumstances of Venables and Thompson, the Secretary of State had acted unlawfully in taking into account public petitions and expressions of public opinion in the media when fixing the tariff period.

9. Following the decision in the House of Lords the Secretary of State announced a new policy whereby, at the expiry of half of the initial tariff period, he would consider any request for a review of the tariff. The policy provided that, in conducting any review, the Secretary of State would take into account inter alia significant alteration in the offender's maturity and outlook since the commission of the offence, risks to the offender's continued development that could not be sufficiently mitigated or removed in the custodial environment and any matter calling into question the basis of the original decision to set tariff at a particular level.

10. Venables and Thompson took their case to the European Court of Human Rights. One of the issues considered by the court in Strasbourg was whether the setting of the tariff period by the Secretary of State was Convention compliant. It was determined that it was not. The setting of the tariff was a decision as to punishment. The Secretary of State was not an independent and impartial tribunal. Therefore, there had been a breach of the Article 6 rights of the offenders. As a consequence of this judgment (*V v United Kingdom* (2000) 30 EHRR 121) Parliament enacted legislation which made the setting of the minimum term to be served by an offender an entirely judicial exercise. This came into force in November 2000. In relation to those sentenced to DHMP before the legislation came into force, the Secretary of State conducted a fresh review of tariffs in line with the principles set out in the Strasbourg judgment. That involved the Lord Chief Justice making a recommendation in each case and the Secretary of State adopting the recommendation on what the tariff should be.

11. The Secretary of State declined to accept any duty to keep any sentence of DHMP under continuing review. His view was that the decision of the House of Lords in the case of Venables and Thompson applied only where the tariff period had been set by the executive. Under the statutory scheme applicable from November 2000 every tariff was set by a judge. In relation to pre-November 2000 cases, the requirement for independent judicial consideration of the tariff was met by the involvement of the Lord Chief Justice in making a recommendation. The Secretary of State's policy was challenged: *R (Smith) v Home Secretary* [2006] 1 A.C. 159. The Divisional Court declared that the policy was unlawful. The House of Lords dismissed the appeal of the Secretary of State.

12. In the course of his speech Lord Bingham of Cornhill said (at [10] to [12]):

> *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…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….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…*
>
> *….their decisive conclusions [referring to the majority in ex parte Venables]….. rested on the inherent nature of the sentence of HMP detention, not on the identity of the authority setting the minimum term if, varying the sentence as originally conceived and enacted, there was to be a minimum term. The majority would have upheld a requirement of continuing review even if the minimum term had been set judicially, because that was an intrinsic feature of the sentence….*
>
> *….Mr Pannick submits that there is no inherent requirement of continuing review where the detainee is no longer a child or young person….He points out, correctly, that the welfare principle laid down in section 44 of the 1933 Act, as amended by section 72(4) of and Schedule 6 to the Children and Young Persons Act 1969 , applies only to children and young persons. Thus in the respondent's case any duty of continuing review is, in effect, spent. This is not a submission which I can accept. The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation. It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age.*

Lord Bingham recognised that a continuing duty to review progress in the case of those serving a sentence of DHMP was anomalous. No such duty existed in relation to other sentences imposed on young offenders. He concluded that anomalies were inevitable given the way in which sentencing legislation had developed. The sentence of DHMP was expressed in the same form of words first found in the Criminal Lunatics Act 1800. That was a clear indication that those so sentenced were not regarded as fully

responsible. In relation to a child or young person, their culpability for the crime committed by them when under age does not change when they achieve adulthood.

13. The only other speech in the House of Lords was that of Baroness Hale of Richmond. In the course of her speech she reiterated the proposition that it made no difference to the nature of the sentence of DHMP whether the tariff was set by the executive or by the judiciary.

14. The basis upon which a tariff might be reconsidered was said by Lord Bingham in *Smith* to be "*if clear evidence of exceptional and unforeseen progress is reasonably judged to require it*". Following *Smith* the system established by the Secretary of State was as follows: any offender serving a sentence of DHMP was entitled to apply for a review of the minimum term at the halfway point of that term and thereafter at two yearly intervals; when an application was made, a dossier would be prepared by those responsible for the offender in custody; that dossier would be provided to a High Court judge; the judge would make a decision which took the form of a recommendation to the Secretary of State; the Secretary of State always abided by the recommendation of the judge.

15. The criteria for reduction of a minimum term to which an offender subject to a sentence of DHMP were set out by the Secretary of State. Evidence of one or more of the following was required: exceptional progress in prison resulting in a significant alteration in the offender's maturity and outlook since the time of the offence; risk to the offender's continued development should they remain in a custodial environment; any matter calling into question the basis on which the original minimum term was fixed. A judge conducting a reconsideration of the tariff of an offender serving a sentence of DHMP would apply those criteria. In practical terms, the first criterion, namely exceptional progress, almost always was the matter considered by the judge. That was the issue to which the dossier prepared in relation to the offender was directed.

16. Between 2006 and 2021 any offender serving a sentence of DHMP was able to apply for a review of the minimum term in accordance with the system set up in the aftermath of *Smith*. With effect from 18 February 2021 the review policy was changed. The change was said to be "in accordance with case law". Where the sentence of DHMP was imposed on the offender on or after his 18th birthday, the offender would no longer be eligible to apply for a review. Those under the age of 18 at the date of sentence would remain eligible for to apply for a review at the halfway point of their sentence. Those offenders would be eligible to apply for a further review only whilst they remain under the age of 18 at the time of any further application.

17. This change in policy was reflected in the legislative change which is the subject of the Claimant's challenge. Section 27A (insofar as is material) reads as follows:

> *(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……

(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.

Section 27B deals with the power of the High Court to reduce the minimum term. The only criteria referred to in this section are (a) that the relevant young offender's rehabilitation has been exceptional; or (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.

Sentencing children and young people and young adults

18. Although the claim concerns only the sentence of DHMP, the nature of the submissions made on both sides requires us to review some general principles of youth sentencing.

19. In almost all cases the type of custodial sentence which may be imposed on a young person will depend on their age at the date of conviction. Thus, pursuant to section 234 of the Sentencing Code "*a detention and training order is available where a court is dealing with an offender for an offence if—(a) the offender is aged under 18, but at least 12, when convicted….*" The maximum period of a detention and training order is 2 years. Where someone under 18 falls to be sentenced for a grave crime, section 249 of the Sentencing Code permits a longer period of detention. Such a period can be imposed "*where a person under 18 is convicted*" of a relevant offence. Once a court is dealing with a person aged at least 18 but under 21 at the date of conviction, any custodial sentence will be detention in a young offender institution unless the court is required to pass a sentence of custody for life or a sentence of DHMP: see section 262 of the Sentencing Code.

20. The availability of the sentence of DHMP is provided by section 259 of the Sentencing Code:

(1) This section applies where—

> *(a) a court is dealing with a person convicted of—*
>
> *(i) murder, or*
>
> *(ii) any other offence the sentence for which is fixed by law as life imprisonment, and*
>
> *(b) the person appears to the court to have been aged under 18 at the time the offence was committed.*
>
> *(2) The court must sentence the offender to be detained during Her Majesty's pleasure.*
>
> *(3) Subsection (2) applies notwithstanding anything in this or any other Act.*

This is an exception to the general rule in that the type of sentence is dictated by the offender's age at the time of the conviction.

21. These provisions deal with the type of custodial sentence which may be imposed. They are concerned principally with the institution at which the person will be detained. Thus, a child will not be held at the same institution as a person approaching their 21st birthday. Equally, once an offender is 21 the only custodial sentence is one of imprisonment. Save in relation to offenders under 18, the provisions say nothing about the length of the sentence. None has any relevance to the level of culpability of the offender.

22. The Sentencing Council for England and Wales has issued a guideline relating to the sentencing of children and young people. As with any guideline, a court must follow the guideline unless it would be contrary to the interests of justice to do so: section 59 of the Sentencing Code. The proper approach to the sentencing of such offenders was the subject of detailed analysis by the Court of Appeal Criminal Division in *ZA* [2023] EWCA Crim 596 at [55] to [61], a decision to which both of us were party. It is not necessary for us to repeat that analysis for the purposes of this claim.

23. An issue which commonly arises where a young person has committed an offence is the effect of crossing an age threshold between the offence and the date of conviction or sentence. The Children guideline deals with that issue at paragraphs 6.1 to 6.3:

> *6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old)."*
>
> *6.2 In such situations the court should 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 but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:*

> - *the punishment of offenders;*
> - *the reduction of crime (including its reduction by deterrence);*
> - *the reform and rehabilitation of offenders;*
> - *the protection of the public; and*
> - *the making of reparation by offenders to persons affected by their offences.*
>
> *6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.*

It follows that the guideline requires the sentencing judge to consider the culpability of the offender as at the date of the offence rather than the date of sentence. This was emphasised in *Ahmed and others* [2023] 1 WLR 1858. The court in that case was concerned with unconnected offenders who had committed serious sexual offences when under 18 but whose sentences were not imposed until they were adults. Even though some of those offenders were on their sixties, sentencing principle required their culpability to be assessed by reference to their age at the time of the offending. "Whatever may be the offender's age at the time of conviction and sentence, the Children guideline is relevant and must be followed unless the court is satisfied that it would be contrary to the interests of justice to do so": *Ahmed* at [32].

24. The Children guideline does not cover offenders who were aged 18 or older at the time of the offending. However, the position of young adults has been considered frequently by the courts in the context of sentencing. Prior to the coming into force of the revisions to Schedule 21 of the Sentencing Code 2020, the only starting point for a minimum term for any person under the age of 18 convicted of murder was 12 years. This contrasted with much higher starting point which might apply to those aged 18, 19 or older convicted at the same time. In *Peters and others* [2005] 2 Cr App R (S) 101 the Court of Appeal Criminal Division addressed the significant disparity of starting point depending on age. It concluded that rigid application of the starting point for an adult offender in the case of someone aged (say) 19 or 20 would not be appropriate. Lord Justice Judge (as he then was) expressed the position in this way at [11]:

> …..Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday…..

More recently, this principle was repeated by Lord Burnett of Maldon in *Clarke and others* [2018] 1 Cr App R (S) 52 at [5]:

> Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in R v Peters *[2005] 2 Cr App R(S) 101* is an example of its application….Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays….

Thus, in the context of sentencing, the fact that a person has reached the age of 18 does not mean the person is to be treated as a mature adult. In *Clarke and others* the court relied on general experience of life as well as the cited research to justify the conclusion that maturation continues well beyond a person's 18th birthday. The evidence of Dr Delmage to which we referred earlier supports these judicial pronouncements. Equally, it adds nothing to them. Moreover, the evidence is reflected in a departmental memorandum (see below) submitted to the Secretary of State prior to the enactment of section 27A. Formal admission of Dr Delmage's evidence is not necessary.

The background to section 27A

25. In September 2020 the Secretary of State for Justice published a White Paper entitled "A Smarter Approach to Sentencing". The White Paper covered many aspects of sentencing policy. In print form it covered more than 100 pages. Part 5 of the White Paper was entitled "Youth Sentencing". Paragraphs 316 to 326 concerned the amendment of starting points for children and young people convicted of murder. In due course this was reflected in the amendment of Schedule 21 of the Sentencing Code 2020 effected by section 127 of the Police, Crime, Sentencing and Courts Act 2022 whereby the starting points were set on a sliding scale. By way of example we set out the amendment as it affected a 17 year old offender:

Age of offender when offence committed	Starting point supplied by paragraph 3(1) had offender been 18	Starting point supplied by paragraph 4(1) had offender been 18	Starting point supplied by paragraph 5 had offender been 18
17 years	27 years	23 years	14 years

This amendment is of not of immediate relevance to this claim. However, it demonstrates that the legislation assumed that an offender aged 18 was to be treated as an adult when considering what sentence prima facie would be appropriate to reflect their culpability. Thus, by way of example, the amendment assumes that an 18 year old convicted of murder involving a weapon taken to the scene will be subject to a starting point of 25 years. It is only by that route that a 17 year old can be subject to a starting point of 23 years.

26. Paragraphs 327 to 331 concerned "Tariff reviews for murder". It is necessary to set out paragraphs 328 to 331 in full. Both parties rely on different aspects thereof in support of their submissions.

> *328. The existence of reviews is an important part of ensuring that the tariff remains appropriate, as children change and develop as they mature. It is also clear, however, that the existence of the review procedure – particularly the opportunity for continuing reviews after the halfway point – can be extremely distressing for the families of victims. Families are contacted every time an offender applies for a review and are given the opportunity to provide a new Victim Personal Statement, a process which in many cases causes them to relive the circumstances of the crime and feel as though they have to advocate again for justice for their loved one. This difficult process is also unlikely to lead to any benefit for the offender, as subsequent reviews are rarely successful and very few offenders take advantage of the opportunity to apply again.*
>
> *329. This is why we propose to reduce the number of reviews an offender is entitled to after they turn 18. Offenders who are given life sentences for murders committed over the age of 18, or those who commit murders as children but who are not sentenced until they are over 18, are not entitled to reviews, reflecting the fact that adults do not go through the same accelerated development and maturation that children do. Our new system will be based on this principle.*
>
> *330. We propose a new, fairer system that recognises that offenders who were sentenced to DHMP as children but have since turned 18 in custody are now adults and have passed the age where significant development occurs, while still accounting for the fact that they were children and still maturing when the crime was committed and they were sentenced. Under the new system all offenders sentenced when under 18 would receive the opportunity to apply for one tariff review at the halfway point of their sentence. This will allow the High Court to take into account any development or maturation since the crime was committed. However, the offender will only be eligible for subsequent reviews covering the period until they turn 18. This change will make the tariff review policy equitable for all offenders who are given life sentences for crimes they committed as children, regardless of their age when they are sentenced, while also reflecting the fact that adult offenders are not eligible for any reviews.*
>
> *331. Removing eligibility for continuing reviews past the age of 18 will provide more clarity for victims' families and keep them from having to continually revisit the events that led to the loss of their loved one. Continuing reviews provide very little*

> *practical benefit for offenders, and this change will ensure that all offenders who have reached adulthood are treated equally while still offering the opportunity for rehabilitation and making allowances for the process of development and maturation in children.*

The significant propositions which appear from these paragraphs are:

i) The review procedure can be extremely distressing for the families of victims particularly where there are continuing reviews. The distress can be accentuated when the family provides a new Victim Personal Statement.

ii) Offenders sentenced when they are 18 or over should not be entitled to reviews because they do not go through the same accelerated development and maturation process that children do. The new system "will be based on this principle".

iii) Offenders sentenced when under 18 would be eligible for a review at the halfway point of the tariff period. Eligibility for further reviews would cease once offenders reached their 18th birthday.

Section 27A as enacted represented a faithful reflection of the proposals in the White Paper. The Secretary of State accepts that the content of the White Paper is relevant to any consideration of Parliamentary intention and legislative purpose.

27. Following the publication of the White Paper departmental officials provided on 16 October 2020 a memorandum of advice headed "Restricting minimum term reviews for offenders sentenced above 18". This memorandum was not published. It cannot inform us as to the intention of Parliament. However, it contained information about the number of DHMP sentences in the period 2011 to 2019 which is useful and relevant. In that period 224 sentences of DHMP were imposed. The published data did not record the age of each offender at the time of the offence. This may not be surprising since anyone sentenced to DHMP by definition was under 18 at that time. Of the 224 offenders, 140 were 17 or under when they were sentenced (all bar 10 being aged between 15 and 17). 84 were 18 or older. It was thought that there were approximately 188 offenders who had yet reached the expiry of their minimum term and who had been sentenced to DHMP when they were aged 18 or older. This latter number must include those sentenced prior to 2011.

28. The memorandum went on to provide data in relation to the number and outcome of applications for review of the minimum term. 121 applications were received between 2015 and 2019. As at October 2020 100 of those applications had been finalised. 11 of these cases had not been considered by a judge e.g. because it had been withdrawn by the offender. Of the remaining cases, 24 had resulted in a recommendation for a reduction in the minimum term i.e. 24% of all applications concluded. The average reduction was just over 15 months. Data suggested that just under a third of the successful applications were made by offenders who were aged 18 or older at the date of sentence.

29. As well as setting out available data, the memorandum considered two policy options. The first option was to retain the eligibility of any offender sentenced to DHMP to a

review of the minimum term. Reference was made to increasing neuroscientific evidence that young adults continued to mature up to the age of 25. The second option was to remove the eligibility of an offender sentenced at 18 or older to a review. It was noted that court delays outside the control of the offender could mean that they would become ineligible for a review if they happened to pass their 18th birthday prior to sentence should the date of sentence be used to determine eligibility. The departmental officials asked whether there should be an exemption from any statutory restriction on eligibility for a review where an offender turned 18 during trial and before sentence and/or where court delays led the offender being 18 at the date of sentence. The Secretary of State responded to that suggestion. He said that there should be no exemption and that "the fact that they won't be entitled to a review is a matter for the court to take into consideration". He also agreed that the second option should be pursued.

30. The White Paper did not reflect the competing options. Thus, it cannot be said by reference to published material that Parliament legislated with those options in mind. The matters set out in the preceding paragraph may be relevant when we come to consider the submissions made on behalf of the Secretary of State in these proceedings.

31. We were provided with an excerpt from Hansard. This set out the debate during the Committee stage of the Bill which became the Police, Crime, Sentencing and Courts 2022 in relation to DHMP and eligibility for reviews. The response of a Home Office minister formed part of the excerpt with which we were provided. We are satisfied that there is no proper basis for us to take what was said in Parliament into account. The test for the admission of Parliamentary material as explained in *Pepper v Hart* [1993] A.C 593 is:

> " reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

Section 27A is not ambiguous or obscure. Moreover, what was said by the minister provides no indication of the legislative intention of section 27A. The point in issue in this case was not mentioned by him.

The European Convention on Human Rights

32. The primary focus of the claimant's case is Article 14 of the Convention. It states 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.*

Article 14 does not provide a free-standing right. Rather, there must be some discriminatory interference within the ambit of another Convention right. The right with which we are concerned is the "right to liberty and security" in Article 5 of the Convention. The material part for our purposes is:

> *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *a) the lawful detention of a person after conviction by a competent court;….*
>
> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

In the domestic context, in order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements: *Stott v Secretary of State for Justice* [2020] A.C. 51. First, the circumstances must fall within the ambit of a Convention right. It is common ground here that the circumstances fell within Article 5. The claimant argues that they also fell within the ambit of Articles 6 and 8 of the Convention. It is unnecessary for us to rule on that submission. Second, the claimant and the person who has been treated differently must be in analogous situations. The comparator here for the purposes of Article 14 is another offender who committed the offence of murder when aged under 18 but who was sentenced before their 18th birthday. Third, the difference in treatment must have been on the ground of one of the characteristics listed in article 14. Age is a relevant characteristic. Once those elements are established (as they are here), the fourth and final element is whether the differentiation was objectively justified. In the absence of objective justification, there will be a violation of Article 14. The test is whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.

33. The other grounds relied on by the claimant and on which he was granted permission assert that section 27A violates the claimant's substantive Convention rights under Articles 5 and 6. We have set out the relevant part of Article 5. The overall purpose of Article 5 is to ensure that no-one is deprived of their liberty in an arbitrary fashion. The first issue is whether section 27A has changed or re-drawn the nature of the sentence of DHMP. If it has, the fact that those over 18 at the time of sentence no longer have a right to review of the minimum term will mean that their detention cannot be regarded as arbitrary. However, if the concept of the sentence of DHMP was not altered by section 27A so that a key element of the sentence is the right of review, the question is whether removal of that right for someone in the claimant's position generates a risk of arbitrary detention.

34. Article 6 provides a right to a fair trial. The relevant part is as follows:

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…..*

The issue is whether "the determination…of any criminal charge…" includes not only the sentence imposed at the time of conviction but also a later review of the minimum term set at the time of the imposition of the sentence.

35. The claimant first pleaded that section 27A violates his Article 7 rights in June 2023. There is a dispute between the claimant and the Secretary of State as to whether this ground could and should have been advanced earlier so that it could have been considered by the single judge. We shall not address the detail of that dispute. No prejudice has been caused to the Secretary of State by the delay. The new ground does not involve any new evidence or material. We grant permission for the claimant to rely on the ground.

36. Article 7 ensures that there should be no punishment without law. The relevant part reads:

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

When the claimant committed the offence of murder for which he was sentenced to DHMP, any person so sentenced had a right to a review of the minimum term. The operation of section 27A means that he no longer has such a right. The issue is whether, because of that, the claimant now is subject to a heavier penalty than was applicable in 2014.

The claimant's submissions

37. Edward Fitzgerald KC and Pippa Woodrow provided detailed written submissions prior to the hearing. These were developed and amplified in oral submissions. What follows is a relatively brief summary of those submissions. In relation to Article 14, it was argued that, prior to the implementation of section 27A and the change of policy which immediately preceded it, all those who committed an offence of murder when they were under 18 were entitled to review of the minimum term irrespective of their age when they were sentenced. Moreover, the date of the offence and/or of the imposition of the sentence was irrelevant in relation to the right for review. That was the effect of *Smith*. Section 27A did not abolish the sentence of DHMP nor did it change the rationale and nature of the sentence. What the provision did do was to create a sub-group of those convicted of murder committed when they were under 18 and for whom the only sentence was DHMP. That sub-group would be subject to different treatment vis-à-vis review of the minimum term.

38. It was accepted by Mr Fitzgerald that a margin of appreciation must be applied when assessing whether different treatment can be justified. However, he argued that,

because the point at issue was deprivation of liberty, a heightened level of scrutiny of the supposed justification was required. In fact, whatever the level of scrutiny, the differential treatment could not be justified. The White Paper identified two aims of the legislation. First, it was said that a person who was 18 when sentenced was an adult and properly should be sentenced as such. Mr Fitzgerald submitted that this ignored a fundamental proposition i.e. a child offender should not be treated in the same way as an adult. The critical point was the age of the person when they committed the offence. Second, it was said that the review process was extremely distressing for the families of victims. Mr Fitzgerald and Ms Woodrow argued that, although benefiting the families of victims could be a legitimate objective, the provisions of section 27A in respect of an offender in the claimant's position had no reasonable relationship of proportionality to that aim.

39. In relation to Article 5, Mr Fitzgerald argued that the sentence of DHMP involved the setting of a provisional minimum term. Because the sentence had to relate to offending when the person concerned was under 18, it allowed for revision of the minimum term when a fuller assessment of the appropriate length of that term could be made. Because the initial minimum term is provisional, the position is not the same as in relation to a life sentence as explained in *Brown v Parole Board of Scotland* [2018] A.C. 1. In relation to arbitrariness of detention, he drew a parallel with what was said in *R v Offen* [2001] 1 WLR 253 in relation to the automatic life sentence introduced by section 2 of the Crime (Sentences) Act 1997.

40. Mr Fitzgerald characterised the case in relation to Article 6 as "not straightforward". However, he submitted that the review process which had obtained up to 2021 was part of the sentencing process. The removal of any review for offenders aged 18 at the date of sentence meant that an essential step in the setting of the sentence was lost. Mr Fitzgerald relied on *Dudson v Secretary of State for the Home Department* [2006] 1 A.C. 245 to support that proposition.

41. Finally, in respect of Article 7, Mr Fitzgerald argued that the sentence imposed on the claimant in 2015 included a requirement for review of the minimum term. By removing any review, the effect of section 27A was to impose a heavier penalty on the claimant than the one applicable when he committed the offence. This was to be distinguished from changes to the execution or enforcement of a penalty of the kind discussed in *Morgan v Ministry of Justice* [2023] 2 WLR 905.

The response of the Secretary of State

42. Ben Watson KC and Rachel Sullivan responded in writing and orally to the claimant's submissions. Again, we summarise their arguments relatively briefly. In relation to Article 14, Mr Watson emphasised the wide margin of appreciation to be afforded to the legislature, in particular in the context of penal policy: see *SC v Work and Pensions Secretary* [2022] A.C. 223 at [37] [115] and [160]. He argued that, whatever degree of scrutiny is applied to the legislation, the differential treatment was justified. First, there was a bright line to be applied at the age of 18 in relation to sentencing. By the age of 18 a person will have completed the process of accelerated development and maturation. Section 27A reflected that bright line. Someone aged 18 at the date of sentence was an adult to whom different considerations applied. The aim of the legislation was to protect those under the age of 18 at the date of sentence by providing a right of review. What had gone before by reference to *Smith* was of no relevance. Mr

Watson relied on what was said in *Akbar v Secretary of State for Justice* [2021] 4 WLR 94 at [61] to [66]. Second, the legitimate aim of the legislation was the protection of victims' families. There was a balance to be struck between the interests of victims' families and of young offenders. It could not be said that the outcome was disproportionate.

43. In respect of Article 5, Mr Watson observed that there was no challenge to the legality of the claimant's detention or to the length of the minimum term set by the judge when he imposed the sentence of DHMP. That was a full answer to the claimant's case on Article 5. The minimum term set by the judge was not provisional. The high point of the claimant's argument was *Smith*. Even in that case, it was said only that the minimum term "may be provisional". In any event, what was said in *Smith* was prior to Parliament legislating on the issue. The nature of a sentence of DHMP is now defined in section 27A.

44. Mr Watson argued that Article 6 was not engaged. The sentencing process was complete at the point at which the minimum term was set by the judge. There is no authority for the proposition that review of such a term prior to its expiry engages Article 6. There is no reason in principle why Article 6 should be engaged. *Dudson* concerned the setting of the minimum term, not a subsequent review of the term.

45. Finally, Mr Watson relied on *Morgan* to support the submission that Article 7 could not apply to the absence of a review process in relation to the minimum term. This was analogous to changes in early release arrangements. A review was concerned with the manner of execution of the sentence.

Discussion

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

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

48. The first limb of the Secretary of State's justification for the differential treatment of offenders who fall to be sentenced on or after their 18th birthday is that, at the age of

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

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

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

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

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

51. A further objection to the suggestion that achieving the age of 18 before sentence could justify differential treatment comes from analysis of when a review will occur. The evidence in the memorandum of 16 October 2020 is that between 2011 and 2019 the majority of offenders sentenced to DHMP were aged between 15 and 17 at the point of sentence. There is no reason to suppose that this period was unusual in terms of the demographic of those sentenced to DHMP. The evidence corresponds with our experience of such cases, that experience being reasonably wide. The minimum terms imposed on teenage murderers will vary. Until June 2022 the starting point under Schedule 21 of the 2020 Code was 12 years but the minimum term very often would be significantly higher to reflect aggravating factors. Under Schedule 21 as revised by the 2022 Act minimum terms are likely to increase. In any event a minimum term of 15 years (as imposed on the claimant and his co-accused) was commonplace. Therefore, a judge will not be considering a review in the average case until the offender is in his

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

52. Setting the age at the date of sentence as the cut off point for allowing a review of the minimum term is arbitrary. We acknowledge that the same can be said for the identification of the date of conviction as the relevant date for determination of the type of sentence. However, this only determines the type of sentence. As we have explained, the nature of the sentence will be considered by reference to the age of the offender at the time of the offence. That is the point at which it appropriate to assess culpability. The date of sentence can be subject to delay for a variety of reasons. Young offenders will require reports to be prepared before sentence can be imposed. The time taken to prepare such reports will vary. Young people who commit the offence of murder often do so as part of a group. Delays will occur as different members of the group are arrested and charged. A trial of several young people can take a significant time to complete. It will be commonplace in such a case for as long as 12 months to pass between the date of the offence and the date of sentence. The criminal justice system currently is suffering from substantial delays due to a backlog of cases. Whilst cases of homicide involving young people will be given priority, it is not always possible to provide the degree of expedition that would be ideal. The consequence of those factors is that one offender who committed an offence of murder when (for instance) they were just 17 might be sentenced when they were still 17 whereas another offender of the same age who committed a very similar offence might reach his 18th birthday before the date of sentence. The fact that the second offender was 18 at the date of sentence would be random and wholly unconnected with the offender's culpability. Differential treatment resulting from random events cannot be objectively justified.

53. We note that the possibility of an offender reaching their 18th birthday before sentence was raised with the Secretary of State. It was suggested that an exemption could be carved out for such an offender, in particular if the offender had passed 18 due to court delays. The Secretary of State said that this would not be necessary because the court would be able to take into account the fact that the offender would not be entitled to a review. This proposition was not advanced by Mr Watson as justification for the differential treatment. We consider that he was right to ignore this possibility. On the face of it a judge in law would not be entitled to take the lack of a right to a review into

account. Even if that were lawful, what allowance would a judge make for an offender not having the opportunity 7, 8, 10 or more years after sentence to show that he had made exceptional progress? It would be a completely speculative exercise.

54. In oral submissions Mr Watson argued that the legitimate aim so far as offenders was concerned was to protect those under 18 at the point of sentence. That could only have force if the legislation amounted to a fresh start for sentencing those who were under 18 when they committed the offence of murder. It did not. It was concerned only with one aspect of DHMP which in its essentials remained as it had been. We reject the proposition that the principles in *Smith* no longer have any relevance. Those principles continue to govern the sentencing of offenders who were under 18 when they committed the offence of murder. Mr Watson's reliance on *Akbar* is misplaced.

55. For all of those reasons we conclude that the first limb of the Secretary of State's justification for the differential treatment of the claimant and all those in a similar position cannot be sustained. Thus, we turn to the second limb of justification, namely the aim of the protection of victims' families. When a minimum term of a DHMP is reviewed, the victim's family will be informed. They will be given the opportunity to provide a new victim personal statement. It is apparent from the various review decisions with which we have been provided that this opportunity by no means always is taken. That corresponds with our own experience of conducting such reviews. In any event, what is not apparent is the relevance of a victim personal statement to the exercise being conducted by the judge reviewing the minimum term. We note what was said in *Cunliffe v Secretary of State for Justice* [2016] EWHC 984 (Admin) at [40]:

> *I do not understand why it is thought appropriate to invite the submission of an updated victim personal statement when a judge is being asked to consider a review of a minimum term on the grounds that the detainee has made exceptional progress in prison. The judge is not being asked to express a view about the correctness of the original sentence, nor on the degree of risk which the detainee would present if released. If it is indeed possible for a judge conducting a periodic review of the tariff in a DHMP case to be asked to reduce it on the grounds of any matter that calls into question the basis of the trial judge's decision on the minimum term, then different considerations might apply.*

As we have already observed, almost without exception a review of the minimum term will relate to the progress made by the offender, the judge being concerned to determine whether the progress has been exceptional. It is highly unlikely that a victim's family will have anything useful or relevant to say on that issue. Therefore, any justification by reference to the provision of further victim impact statements can be of very limited weight.

56. It is of note that Mr Watson's written submissions barely touched on the protection of the interests of victims' families. In oral submissions he relied on what was set out in the White Paper at paragraphs 328 and 331. It is significant that the White Paper emphasised the distress caused by continuing reviews after the halfway point. For all practical purposes, second and further reviews have been abolished by section 27A. The circumstances in which a further review might be possible are very difficult to

conceive. By reference to section 27A a second review can only take place when 2 years has elapsed since the first review and the offender is still aged under 18. Mr Fitzgerald confirmed to us that the claimant's case does not involve any challenge to the effective removal of second and further reviews. The legitimate aim which can identified both via the White Paper and consideration of the legislation is the abolition of repeated reviews of the minimum term. Whether that was a legitimate aim is not for us to say. What we can say is that the existence of a single review of the minimum term on grounds wholly unconnected with the effect of the offending on the victim's family objectively is of very limited significance to any family of any victim.

57. We take into account that any offender subject to DHMP will be eligible for parole at some point. It is then that families of victims properly will have a significant role to play. In comparison, the effect of a single review of the minimum term will be modest. We are satisfied that, even affording a wide margin of appreciation, the interests of victims did not provide an objective justification for those aged 18 at sentence being deprived of a review. That is not to ignore or to diminish the position of victims' families. Rather, it is to engage in an objective assessment as to how the rights of those families can impact on a particular aspect of an offender's detention.

58. Given our conclusions in relation to Article 14, we are compelled to make a declaration pursuant to section 4(2) of the Human Rights Act 1998 that sections 27A(1) and 27A(11) of the Crime (Sentences) Act 1997 are incompatible with that Convention right. It has not been suggested that the legislation can be read in a way that is compatible with that right. Thus, a declaration of incompatibility is the only course open to us.

59. Notwithstanding our conclusion in relation to Article 14, we shall go on to consider whether the claims of violation of other Convention rights have been made out. Dealing first with Article 5, we have determined that section 27A did not change the essential nature of a sentence of DHMP. An inherent element of that sentence is the requirement of continuing review as set out in *Venables* and *Smith*. It is in that context that the question of arbitrary detention falls to be considered. In our view the removal of any possibility of a reduction of the minimum term via a review does generate a risk of arbitrary detention sufficient to engage the protection of Article 5. Mr Watson's argument – that detention cannot be arbitrary whilst the minimum term is ongoing – fails to engage with the particular review and reduction element of a sentence of DHMP. Mr Fitzgerald was correct to distinguish the sentence of DHMP from an ordinary sentence to which parole provisions apply. The requirement of a continuing review inherent in a sentence of DHMP is unique. Whilst the established system prior to the 2022 Act involved review only at or after the half way point of the minimum term, any offender serving a sentence of DHMP has their progress regularly examined and recorded by the prison authorities so that, on application for review, all relevant material can readily be assembled. We repeat what was said in *Smith*, namely "*as (a child murderer) grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation.*" That is why a distinction must be drawn between a sentence of DHMP and other sentences as discussed in *Morgan*. Removing any possibility of exercising "*a more reliable judgment*" so as to reduce the minimum term will inevitably result in a number of offenders serving longer than lawfully they should. That is established by the evidence within the memorandum of 16 October 2020. Between 2015 and 2019

around 7 offenders sentenced to DHMP after their 18th birthday applied successfully for a reduction of their minimum term. Those offenders would have remained subject to a minimum term longer than necessary best to promote rehabilitation. In the context of an offender serving a sentence for a crime committed when the offender was under 18, that amounts to arbitrary detention.

60. In the course of oral submissions Mr Watson submitted that the manner in which reviews of minimum terms imposed on young offenders serving DHMP had been administered prior to 2021 (the change in policy to which we have referred) and then the 2022 Act was more generous than required by Article 5. This was a reflection of what was said in the memorandum of 16 October 2020: "*The policy that has been in force thus far has been….more generous than what is legally required by case-law*". We do not agree with that statement. There is nothing in *Venables* or *Smith* which would support the proposition. We would regard it as remarkable if successive Secretaries of State since 2006 had been referring for review offenders with no legal right to any review of the minimum term.

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

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

Conclusion

63. For the reasons we have set out above there will be a declaration under section 4 of the Human Rights Act 1998 that sections 27A(1) and 27A(11) of the Crime (Sentences) Act 1997 as inserted by 128 of the Police, Crime, Sentencing and Courts Act 2022 are incompatible with articles 5 and 14 of the European Convention.

64. The claimant in his grounds sought a declaration that sections 27A and 27B in their entirety are incompatible with the Convention. That is not a tenable position. Mr Fitzgerald expressly disavowed any challenge to the provisions in section 27A which effectively prevent more than one review of a DHMP minimum term. His submissions were directed solely to the position of an offender sentenced on or after his 18th birthday. Only subsections (1) and (11) relate directly to such an offender. Section 27B is concerned only with the exercise of the power of review by the High Court. Nothing in that section relates to the matters with which we are concerned.