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

Case No: 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**

PRESS SUMMARY

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are publicly available.

In this summary references to paragraphs of the judgment are given in square brackets: [xx]

1. This claim for judicial review challenged the legality of section 27A of the Crime (Sentences) Act 1997 (inserted by section 128 of the Police Crime Sentencing and Courts Act 2022) which came into force on 28 June 2022. The challenge was to those parts of section 27A which removed the right of certain offenders convicted of murder to seek a review and reduction of the custodial element of their sentence. The court upheld the claim and made a declaration of incompatibility under section 4 of the Human Rights Act 1998.

2. The Claimant is now an adult but was aged 17 when he participated in the murder of a 21 year old man named Connor Barrett on 10 May 2014. He was convicted at trial and on 16 January 2015 he was sentenced to Detention at His Majesty's Pleasure (DHMP) with a minimum term of 15 years. The Claimant had turned 18 by the date of his sentence.

3. Under section 259 of the Sentencing Act 2020 (formerly section 90 of the Powers of Criminal Courts (Sentencing) Act 2000) DHMP is the mandatory sentence for any person convicted of a murder committed when they were under 18. When passing sentence the trial judge will set a minimum term (also known as the tariff), being the time which the offender is expected to serve before being considered for release.

4. The Divisional Court (that is the High Court when more than one judge is sitting, in this case Lord Justice William Davis and Mrs Justice May) reviewed the history of a sentence of DHMP (at [6]-[17]), together with the relevant principles of youth sentencing (at [18]-[24]). In a significant decision in 2006 (*R(Smith) v Home Secretary* [2006] 1 AC 159) the House of Lords emphasised that it is *"an important and distinguishing feature of the sentence of [DHMP] 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"*. After the decision of the House of Lords in *Smith*, a system was established by departmental policy whereby an offender subject to a sentence of DHMP could apply, once they had reached the halfway point of their minimum term, for judicial reconsideration of the length of that term. In practice the criterion most often relied on by applicants seeking a reduction in their minimum term was that of exceptional progress. If unsuccessful upon first application the offender was entitled to renew it at two-yearly intervals thereafter.

5. In September 2020 the Secretary of State for Justice published a White Paper entitled "A Smarter Approach to Sentencing". Paragraphs 327 to 331 in Part 5 of the White Paper dealt with "Tariff reviews for murder" and included these significant propositions [26]:

   (1) the review procedure can be extremely distressing for families of victims, particularly where there are continuing reviews;
   (2) 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.
   (3) Offenders sentenced when under 18 would be eligible for review at the hallway point of the tariff period. Eligibility for further reviews would cease once offenders reached their 18th birthday.

6. With effect from 18 February 2021 the review policy was changed: where the sentence of DHMP had been imposed upon an offender on or after their 18th birthday they would no longer be entitled to apply for a review. Those aged under 18 at sentence would continue to be able to apply at the halfway point of their sentence, but would be eligible to apply for a further review only whilst they remained under the age of 18 at the time of any further application. These changes in the review policy were subsequently given legislative force in the enactment of section 27A, which

reflected and adopted the proposals in the White Paper. The Secretary of State accepted that the content of the White Paper is relevant to the court's consideration of Parliamentary intention and legislative purpose [26].

7. As at the date of his sentence in January 2015, the Claimant had a right to seek a review of his 15-year minimum term at the halfway point under the policy then in force. By the time he became eligible to apply, however, the policy had changed, as subsequently confirmed by the enactment of section 27A. Because he had been aged 18 at sentence the Claimant was unable to make any application for a review of his minimum term.

8. The Claimant sought a declaration pursuant to section 4 of the Human Rights Act 1998 that section 27A was incompatible with his Convention rights, upon one or more of the grounds outlined below:
   (1) The provisions of section 27A unfairly discriminate against the Claimant on the grounds of age, in breach of Article 14 with Article 5 of the European Convention on Human Rights ("ECHR") (Ground 1).
   (2) The same provisions violate his substantive rights under (i) Article 5, (ii) Article 6 and (iii) Article 7 of the ECHR (Grounds 2,3 and 4 respectively)

   The Divisional Court considered each of the above grounds.

9. As to Ground 1 it was accepted by the Secretary of State that the circumstances fell within the ambit of Article 5 and that the relevant comparator was another offender who committed murder when a child but was sentenced before their 18th birthday. It was also common ground that age is a relevant characteristic for the purposes of Article 14. The issue for the court was whether the difference in treatment between the claimant and a relevant comparator was objectively justified, the test being whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim were appropriate and not disproportionate in their adverse impact.

10. The court accepted that a wide margin of appreciation should be applied when considering the legislature's intention and objective justification for differential treatment. The court decided that, even allowing this wide margin, there was no objective justification for the difference in treatment. Section 27A had to be assessed having regard to the essential nature of a sentence of DHMP, which Parliament had left unchanged [47].

11. The first justification advanced by the Secretary of State was that age 18 should be treated as a bright line for the purpose of sentence, on the basis that an adult of 18 will not be subject to the same accelerated development and maturation as a child. The court considered that this was unsustainable: first, whilst the age of an offender at the date of conviction will determine the type of custodial sentence to be imposed, the mere fact that a person has reached their 18th birthday will not determine whether a custodial sentence should be imposed and if so of what length. This is made explicit in the case of murder by the statutory requirement to impose a sentence of DHMP upon an offender who has committed the offence whilst a child [48]. The White Paper appeared to conflate offenders who committed offences over the age of 18 and those who committed murders as children, an approach which fails to reflect established sentencing practice [49]. Further, it is now widely recognised that young adults will continue to mature after their 18th birthday, as departmental officials had themselves acknowledged in an internal memorandum at the time of the White Paper [50]. An analysis of when reviews will occur suggests that most will be when the offender is in their mid to late twenties, so that a judge asked to review the minimum term will rarely be concerned with development and maturation between the date of the offence and the offender's 18th birthday, they will reach a view as to whether the minimum term should be reduced based on what has occurred over the entirety of the offender's

time in custody to-date; accordingly there is no logic in distinguishing between offenders aged 18 at the date of sentence and those under 18 at that point [51]. Finally, the date of sentence can be subject to delay for a variety of reasons that are wholly unconnected to the culpability of the offender, such as court delays, time taken to prepare reports for sentence or lengthy trials where many defendants are charged and tried together. Differential treatment resulting from random events cannot be objectively justified [52].

12. The second justification concerned the aim of protecting families of victims. When a minimum term is reviewed, the family of the deceased will be informed and given the opportunity to provide a new victim personal statement. The court considered that, where the review concerns whether or not the offender has made exceptional progress in custody, the views of the victim's family are unlikely to be relevant [55]. Families will properly have a significant role to play at the point when an offender becomes eligible for parole, in comparison with which the effect of a single review at the halfway point can only be of minimal weight. The court emphasised that this was not to ignore or diminish the interests of the families, but to engage in an objective assessment as to how those interests could impact on a particular aspect of an offender's detention, namely a review at the halfway point of the minimum term [57].

13. In relation to Ground 2, the court determined that section 27A directly violated the Claimant's rights under Article 5 (whose aim is to protect against arbitrary detention). The requirement of a continuing review inherent in a sentence of DHMP is unique and distinguishes that sentence from an ordinary sentence to which parole provisions apply. The removal of any possibility of reduction of the minimum term through a review creates a risk of arbitrary detention; it will inevitably result in a number of offenders serving longer than they lawfully should. An examination of the department's own figures between 2015 and 2019 showed that around 7 offenders sentenced to DHMP after their 18th birthday applied successfully for a reduction in their minimum term. Under section 27A, those offenders would have remained subject to a longer minimum term that was necessary. [59]

14. The court dismissed Ground 3, finding no violation of Article 6 [61].

15. As to Ground 4, the court held that, since Article 7 could only have been engaged if section 27A had changed the nature of a sentence of DHMP, and as the court had found it had not, then the matter was academic; it declined to reach a conclusion on this ground [62].

16. In conclusion:

- Grounds 1 and 2 succeeded.
- Ground 3 failed.
- The court declined to reach a view on Ground 4, regarding it as academic.

By way of remedy the Divisional Court has made a declaration under section 4 of the Human Rights Act 1998 that sub-sections 27A(1) and 27A(11) of the Crime (Sentences) Act 1997 are incompatible with articles 5 and 14 of the European Convention on Human Rights.