

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 7 February 2022

**Before :**

**MRS JUSTICE MAY**

**IN THE MATTER OF AMIR ANTAR**

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**APPROVED JUDGMENT**

**Decision upon a Reference under section 273 of the Criminal  
Justice Act 2003**

**Mrs Justice May :**

1. This is a reference by the Home Secretary under section 273 of the Criminal Justice Act 2003 (“the 2003 Act”) of the case of Amir Antar (“AA”), a transferred life prisoner within the meaning of the 2003 Act, for the determination of the minimum term which he is required to serve, after which the early release provisions referred to in section 321(4) of the Sentencing Act 2020 (replacing 269(2) of the 2003 Act) will apply.
2. For the purposes of this decision I have been provided with the following documents:
  - (1) The Judgment of the Senior Judges’ Court dated 21 April 2016.
  - (2) A psychiatric report prepared by Dr McInerny dated 14 June 2016.

- (3) Sentencing remarks of the Senior Judges' Court dated 27 June 2016.
  - (4) Additional information from HMP Dhekelia.
  - (5) The Warrant of Commitment to Prison on a Conviction dated 27 June 2016.
  - (6) Appellate court judgment dated 24 November 2016.
  - (7) Repatriation warrant dated 9 May 2018.
  - (8) A letter dated 5 November 2021 from the Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia, Cyprus ("the SBAs"), responding to a request for information made by the Registrar of Criminal Appeals at the Royal Courts of Justice, London.
3. There have been no written representations filed on behalf of AA; having asked for further enquiries to be made I have been informed that he does not wish to be represented, or to make any representations himself for the court to consider, when reaching a decision in his case. Accordingly and because of the issues raised by AA's case, I requested assistance from an amicus. I am very grateful for the written submissions received from Paul Jarvis, acting as Advocate to the Court.

## **Background**

4. The SBAs are a British Overseas Area on the island of Cyprus, having been retained by the British under the 1960 treaty that granted independence to the Crown colony of Cyprus. The retained areas include British military bases and installations. The Administrator of the SBAs, who is also Commander British Forces Cyprus, has all the executive and legislative authority of the governor of a UK overseas territory. This includes the power to enact legislation and to maintain law and order.
5. The Courts in the SBAs comprise the Resident Judge's Court, staffed by a single judge resident in Cyprus, and the Senior Judges' Court, comprising a panel of (usually

three) visiting judges from England and Wales. The Senior Judges' Court ordinarily deals with appeals from the Resident Judge's Court, any matters involving Human Rights issues and Judicial Reviews and the more serious criminal cases brought under the Criminal Code of the SBAs ("the Criminal Code"). The Criminal Code was first promulgated on 16 August 1960 by the Administrator and has been amended many times since. When sitting on criminal cases the three judges of the Senior Judges' Court act as a tribunal of law and fact, there is no jury of lay persons to determine the facts, as in the Crown Courts of England and Wales.

6. On 21 April 2016, after a trial before the Senior Judge's Court ("the SBAs Court"). AA was convicted of the premeditated murder of his mother, contrary to section 203 together with section 204 of the Criminal Code.
7. The facts of the offending are set out in the sentencing judgment of the SBAs Court dated 27 June 2016 from which the following summary is taken.
8. AA's family were Kurdish refugees who arrived in Cyprus from Iran in 2001. At the time of the offence AA was aged 22 and was living with his parents and three brothers (then aged 28, 20 and 11) in accommodation at Victoria Coach Park, Dhekelia. He had graduated from Greek-Cypriot school and was attending the Uclan University in Pyla as a student of Oil and Gas. A fourth brother, the eldest, was living in Nicosia. As refugees, the family were subject to restrictions on work and travel.
9. During the evening of 29 August 2015 the family were at home together. Shortly after midnight Dalil, the oldest of the brothers still at home, saw AA and their mother, Yasmin Murat Mansour, sitting on the steps of a nearby property, talking. It was dark. Dalil joined them briefly before leaving, he later told police that his mother and AA were both calm. When Dalil returned at 0020, he saw AA standing on top of their mother, trying to lift her by her head. AA told him in Kurdish that a dog had bitten her. Dalil ran to alert his father. The youngest brother also saw AA holding his

mother, trying to lift her. AA came over to him, hugged him and told him not to be afraid. AA then left the scene. Dalil and his father initially tried to put the Mrs Mansour into the car to take her to hospital but soon realised that she was dead and the police were called. When they arrived they found a pool of blood by the car.

10. AA was seen briefly at a nightclub at Ormidia beach, some way from Victoria Coach Park, at 0230 in the early hours of 30 August 2015. Later the same day, around 1830, police located him behind a primary school in Ormidia, where he was arrested. He was asked if he had any weapon on him, to which AA responded that he had, taking out a clasp knife and putting it on the ground as instructed. The clasp knife was later examined. Attempts had been made to clean it but blood was found on the inside, with DNA matching that of AA's mother. Spots of her blood were also found on AA's clothing.
11. A forensic pathologist, Professor Spiliopoulou, examined the scene where the body was found, as well as the body itself. She dismissed any suggestion of a dog bite, concluding as follows:

*“...it is my opinion that the death of JASMIN MURAY MANSOUR is the result of multiple traumatic injuries of the neck, caused by a knife. The injuries were received when she was outside the car and the throat was cut when the victim was kneeling or in a prone position...Before these “final” injuries, she received a blunt force injury on the head and mechanical obstruction of the nose and mouth (smothering). There are signs of manual strangulation....Based on all the injuries that the victim had it is evident that she fought with the assailant and I believe that the duration of the whole incident from the blow to the head up to death was about five to ten minutes. The woman lost most of her blood outside the vehicle, where the blood pool was found. The death was almost immediate after the throat was cut”*

12. Professor Spilopoulou observed stab and incised (cut) wounds to the neck and body, made by a sharp blade with an irregular edge. The clasp knife found on AA had such an edge. The court noted that the final cut to the deceased's neck nearly severed the head from the body. Professor Spiliopoulou explained that such a cut would have

required a sharp knife using moderate or significant speed, but that once the tip has penetrated, relatively little pressure would have been required to pull the knife across.

13. When AA was examined by Dr Sakeliadies after his arrest, he was found to have a large number of day old abrasions to his head, neck, left shoulder elbow and hand, right elbow, wrist and hand, and left knee. Dr Sakeliades' opinion was that the number and distribution of these injuries was inconsistent with their having been sustained in an accident. His expert view was that they were more consistent with a fight with the deceased and contact with a rough surface such as the area around the pool of blood.
14. AA did not give evidence at trial, instead providing an unsworn statement to the SBAs Court. In it he said that he had had an excellent relationship with his mother and he denied killing her. He said he had seen his mother lying on the ground covered in blood and had picked up his knife from a pool of blood and put it into his pocket before leaving. He had later gone into the sea to clean the blood from him, at which point the knife must have been washed as well.
15. Having heard all the evidence the SBAs Court concluded that AA had killed his mother by a series of unlawful acts. He struck her to her head, then took her by the throat, strangling her. Finally he attacked her with a clasp knife found in his possession on arrest, inflicting multiple stab or incised knife wounds, the last of which all but severed her head from her body. The SBAs Court went on to find that the killing was intentional, referring to the prolonged nature of the attack and to the opportunities which AA had had to stop, instead of which he had taken out the knife, using both hands to unclasp it before moving to the final, fatal part of the attack.
16. In passing sentence, the SBAs Court observed that a life sentence was the only one permitted by law. The judges went on to note the discretion given by section 203 of the Criminal Code to make a recommendation regarding the minimum term to be

served before a prisoner may be considered for release on licence and expressed themselves to be “in no doubt” that they ought to exercise that discretion in AA’s case. They referred to their considerable joint experience in the criminal justice system in England and Wales as well as in the SBAs and to the fact that they heard and considered all the evidence at trial, concluding as follows:

“[w]e accordingly regard a recommendation as an obligation in this case. In deciding the minimum term, we have considered the practice and procedure of the Republic of Cyprus and the United Kingdom courts”.

17. The SBAs Court had before it a detailed report from a consultant forensic psychiatrist, Dr McInerney (which I have also seen and considered) but, referring to Dr McInerney’s observation that it was difficult to draw any conclusions as to future risk given AA’s inability to discuss the killing, they decided that it did not assist with what AA’s motivation might have been when he murdered his mother.
18. The SBAs Court went on to list the matters which it considered aggravated the offence and which were particularly material when setting the minimum term:

“(a) the very fact of a son killing his mother;

(b) the use of a weapon

(c) that this was a sustained attack of great ferocity, lasting 5 to 10 minutes;

(d) During the course of the attack, almost until her death, the victim must have been aware of this murderous attack upon her – the court can only imagine her physical suffering and mental anguish.”

By way of mitigation the SBAs Court noted AA’s youth, his personal situation as a refugee and his previous good character. The judges went on to impose the mandatory life sentence with a recommendation that AA serve a minimum term of 16 years before being eligible to be released on licence.

19. AA subsequently sought unsuccessfully to appeal his conviction, his appeal being dismissed in November 2016.

20. AA was found guilty of Premeditated Murder under sections 203 together with 204 of that Code. The relevant parts of these sections provide as follows:

***“Premeditated murder***

*203.—(1) Any person who with premeditation by an unlawful act or omission causes the death of another person is guilty of the felony of premeditated murder.*

*(2) Any person convicted of premeditated murder shall be sentenced to imprisonment for life:*

*Provided that –*

*On sentencing any person convicted of premeditated murder to imprisonment for life, the Court may at the same time declare the period which it recommends to the Administrator as the minimum period which in its view should elapse before the Administrator orders the release of that person on licence under section 11 of the Prison Discipline Ordinance (c)*

***Premeditation***

*204. Premeditation is established by evidence proving whether expressly or by implication an intention to cause the death of any person, whether such person is the person actually killed or not, formed before the act or omission causing the death is committed and existing at the time of its commission.”*

21. The reference to section 11 of the Prison Discipline Ordinance must be read as a reference to section 10 of the Prisons Ordinance 1971, the relevant part of which provides that:

*“the Administrator may at any time if he thinks fit release on licence a person serving a term of imprisonment subject to compliance with such conditions, if any...as the Administrator may from time to time determine.”*

22. In response to a request for further information from the Registrar of Criminal Appeals as to the approach which the Administrator was likely to have taken (but for the transfer) in AA’s case, the current Administrator, Major General Rob Thomson CBE DSO indicated as follows, by letter dated 2 November 2021:

*“The relevant sentencing regime that would have applied to [AA] had he remained in the [SBAs] would be a combination of the following:*

*a) The sentence of the court...in particular the court’s declaration at paragraph 6 “that the minimum period which in our view should elapse before the Administrator considers your release on licence is one of 16 years” ....*

*b) The “Administrator’s Guidelines for Grant of Release on Licence under Section 10 of the Prisons Ordinance 1971” [a copy of which was attached]. By paragraph 5 of these guidelines “where a prisoner is sentenced to life imprisonment and the court has recommended that the prisoner serve a minimum term before consideration for release under licence, applications are considered only*

*where the prisoner has served that term”. I would not therefore expect any recommendation by the Administrator’s Early Release Advisory Panel until [AA] has served the 16-year minimum period”*

23. The Guidelines referred to in Major General Thomson’s response give details of the membership of, and procedure adopted by, the Administrator’s Early Release Advisory Panel (“the Administrator’s Panel”). An overview of the Administrator’s Panel’s approach is given at para 8 of the Guidelines as follows:

*“The Panel assesses a prisoner’s suitability for early release and may recommend early release only if it considers the risk of reoffending to be low. The Panel also considers the prisoner’s conduct during his sentence, but good conduct and industry alone would not normally be sufficient for the Panel to recommend a grant of early release.”*

It is apparent from this overview, taken together with other details set out in the Guidelines, that the Administrator’s Panel operates in a similar way to the Parole Board of England Wales in assessing whether or not a prisoner serving a life sentence may be released, taking a risk-based approach. However there is one very important respect in which the approach appears to differ, seen at paragraph 9 of the Guidelines which records that:

*“The Panel has regard to the fact that it is difficult to impose enforceable licence conditions on a prisoner granted early release, so its recommendation is made on the assumption that there is no possibility of recall.”*

24. AA was born on 8 May 1994 and was accordingly aged 21 at the date of the offence, 22 at conviction and sentence. He had been in custody for 300 days before he was sentenced. He began his life sentence in HMP Dhekelia, but was subsequently transferred to HMP Wandsworth, London, by an order made under the Colonial Prisoners Removal Act 1884, dated 7 May 2018. A note from HMP Dhakelia accompanying the transfer provides the following observations about AA whilst serving his sentence there, and the reasons for AA’s removal to prison in the UK:

*“Antar came to the Sovereign Base Areas as an illegal immigrant in 1998 together with his mother, father and 3 siblings. It is believed that they travelled from Iraq. Following their arrival his family together with other*

*illegal immigrants sought asylum. Antar continued his education and can speak reasonable English, Greek and his mother language Arabic.*

*Following his conviction Antar's family have left the area and he has received very few visits within prison.*

*Within HMP Dhekelia there have been concerns about Mr Antar's health and well-being and the risk of self-harm. He underwent various psychiatric assessments, and he has been offered regular support from a community mental health team. Mr Antar is a bright young man and the consensus is that, whilst there is an absolute requirement for him to be housed in adequate long-term facilities, it has always been felt that this move must be secured as quickly as possible for his own health and well-being. Psychiatric assessments confirmed certain key requirements which may not be easily supportable because of the limitations and size of HMP Dhekelia, including a need to encourage integration with others to prevent isolation and to address an associated increase in risk of self-harm. This is very difficult to achieve within HMP Dhekelia due to the small population size and limited social interaction that this provides.*

*This has been supported by recent inspections from HMIP, European Commission for the Prevention of Torture, and the Overseas Territories Prison Advisor who have all said that HMP Dhekelia is not suitable for the housing of long term prisoners.*

*There is no current dedicated prison medical service and mental health support is not available at HMP Dhekelia.*

*Whilst in H.M Prison Dhekelia Antar's behaviour towards other prisoners and staff has been good. He is a quiet and often withdrawn individual who has isolated himself from other prisoners."*

## **The legal framework**

25. AA's case was referred to this court by the Secretary of State under the provisions of Section 273 of the 2003 Act, by letter from Her Majesty's Prison and Probation Service dated 11 January 2018. For reasons which are not entirely clear, there has been a considerable delay following that referral, which may be explained in part by attempts to establish whether AA was seeking to instruct a representative or to make any representations to the court, thereafter to instruct an amicus to assist the court; it has also been necessary to make enquiries made of the Administrator's Office about the approach to early release of prisoners on a life sentence in the SBAs.
26. In any event, the referral was made before the enactment of the Sentencing Act 2020 ("the 2020 Act"). Since the coming into force of the 2020 Act, section 273 of the 2003 Act has been amended to refer to relevant provisions of the 2020 Act. As the

amendments consequent upon the 2020 Act have introduced no material change to the approach which the court is obliged to adopt when considering the setting of a minimum term, I set out below the up-to-date version of section 273 and the provisions of the 2020 Act to which that section (now) refers.

***“273 Life prisoners transferred to England and Wales***

*(1) The Secretary of State must refer the case of any transferred life prisoner to the High Court for the making of one or more relevant orders.*

*(2) In subsection (1) “transferred life prisoner” means a person—*

*(a) on whom a court in a country or territory outside the British Islands has imposed one or more sentences of imprisonment or detention for an indeterminate period, and*

*(b) who has been transferred to England and Wales after the commencement of this section in pursuance of—*

*(i) an order made by the Secretary of State under section 2 of the Colonial Prisoners Removal Act 1884 (c. 31), or*

*(ii) a warrant issued by the Secretary of State under the Repatriation of Prisoners Act 1984 (c. 47),*

*there to serve his sentence or sentences or the remainder of his sentence or sentences.*

*(3) In subsection (1) “a relevant order” means a minimum term order or a whole life order under section 321 of the Sentencing Code.”*

10. Section 321 of the 2020 Act provides that a court must make a minimum term order unless it is required to make a whole life order. Under subsection (4) a minimum term order

*“is an order that the early release provisions (see section 324) are to apply to the offender as soon as the offender has served the part of the sentence which is specified in the order in accordance with section 322 or 323 (“the minimum term”)”*

11. Section 322 of the 2020 Act sets out the matters to which the court must have regard when setting a minimum term:

***“322 Mandatory life sentences: further provision***

*(1) This section applies where a court passes a life sentence for an offence the sentence for which is fixed by law.*

*Minimum term*

*(2) If the court makes a minimum term order, the minimum term must be such part of the offender’s sentence as the court considers appropriate taking into account-*

*(a) the seriousness of-*

*(i) the offence, or*

*(ii) the combination of the offence and any one or more offences associated with it, and*

*(b) the effect that the following would have if the court had sentenced the offender to a term of imprisonment-*

*(i) section 240Z of the Criminal Justice Act 2003 (crediting periods of remand in custody); and*

*(ii) section 240A of that Act (crediting periods on bail subject to certain restrictions);*

*including the effect of any declaration that the court would have made under section 325 or 327 (specifying periods of remand on bail subject to certain restrictions or in custody pending extradition)*

*Determination of seriousness*

*(3) In considering the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, under-*

*(a) Section 321(3) (determining whether to make a whole life order), or*

*(b) Subsection (2) (determining the minimum term),*

*the court must have regard to-*

*(i) the general principles set out in Schedule 21, and*

*(ii) any sentencing guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Schedule 21.*

*Duty to give reasons for minimum term or whole life order*

*(4) Where the court makes a minimum term order or a whole life order, in complying with the duty under section 52(2) to state its reasons for deciding on the order made, the court must in particular-*

*(a) state which of the starting points in Schedule 21 it has chosen and its reasons for doing so, and*

*(b) state its reasons for any departure from that starting point.”*

(emphasis by underlining added)

27. Further guidance relating to the setting of a minimum term is to be found at section VII of the Criminal Practice Direction at M3, the relevant parts of which provide that:

*In setting the minimum term, the court must set the term it considers appropriate taking into account the seriousness of the offence. In considering the seriousness of the offence, the court must have regard to the general principles set out in Schedule 21 of the [2003/2020] Act as amended and any guidelines relating to offences in general which are relevant to the case and not incompatible with the provisions of Schedule 21. Although it is necessary to have regard to such guidance, it is always permissible not to apply the guidance if a judge considers there are reasons for not following it. It is always necessary to have regard to the need to do justice in the particular case. However if a court departs from any of the starting points given in Schedule 21, the court is under a duty to state its reasons for doing so (Section 270(2)(b) of the Act).”*

28. The effect of these provisions taken together is as follows:

- (1) In respect of an offence which engages a mandatory sentence of life imprisonment, unless the court decides that the seriousness of the offending is such that it requires a whole life order, it must set a minimum term to be served before the early release provisions apply.
- (2) The minimum term must be that which the sentencing court “considers appropriate”. In determining what is appropriate the court must take into account the seriousness of the offence, also any period of time already served on remand or (in an extradition case) whilst waiting to be extradited, or whilst on bail with relevant restrictions.
- (3) The court is not precluded by section 322 of the 2020 Act from taking into account other factors which may be relevant in determining what the appropriate

minimum term should be, although the Court of Appeal has held that certain factors are not relevant, such as the need to protect the public: *R v Jones & Ors* [2005] EWCA Crim 3115.

- (4) In assessing seriousness, the court must have particular regard to the general principles in Schedule 21 of the 2020 Act, and to the starting points which are there set out. The court is not obliged to follow the starting points if there are reasons for not doing so, but if the court does depart from them then it must explain its reasons for so doing.
- (5) The touchstone as to what amounts to an appropriate minimum term will always be the need to do justice on the facts of each particular case.

*Schedule 21 to the 2020 Act (formerly Schedule 21 to the 2003 Act) (“Schedule 21”)*

29. Paragraphs 2 to 5 of Schedule 21 set out “starting points” for the setting of minimum terms in murder cases, depending on the age of the offender and factual matters affecting the seriousness of the particular case. Paragraph 4 of Schedule 21 is of particular relevance to AA’s offence:

*“4(1)If—*

- (a) ...*
- (b) the offence falls within sub-paragraph (2), and*
- (c) the offender was aged 18 or over when the offence was committed,*
- (d) the offence was committed on or after 2 March 2010,*

*the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.*

*(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—*

- (a) commit any offence, or*
- (b) have it available to use as a weapon,*

*and used that knife or other weapon in committing the murder.*

30. Having set out starting points commensurate with the varying degrees of seriousness of offences of murder, Schedule 21 goes on to specify (non-exhaustive) lists of aggravating and mitigating factors which the court is required to take into account (at paragraphs 9 and 10 of Schedule 21). Aggravating factors include “*mental or physical suffering inflicted on the victim before death*”; mitigating factors include the age of the offender and “*any mental disorder...which lowered the offender’s degree of culpability*”.

### **Applying Schedule 21 to AA’s case**

31. The finding of the SBAs Court was that AA had the knife in his possession when he went outside to speak with his mother. The judges concluded that he must have taken it from his pocket, then used two hands to hold it and pull out the blade before using it to inflict several wounds before the final one that killed his victim. However beyond being satisfied that AA’s had the knife in his possession, the SBAs Court made no finding about why he had it with him when met his mother and was speaking with her outside. AA himself did not give evidence, his (unsworn) statement produced in advance of his trial merely stated that it was his knife, which he said he picked up from the ground at the scene after his mother had been attacked.
32. The Criminal Code has no equivalent of Schedule 21, accordingly the judges of the Senior Court were not obliged to focus on this aspect of the evidence for the purposes of sentence. Nevertheless, given the nature of the weapon - a clasp knife - and the readiness with which AA appears to have pulled it out at the scene, it is not difficult to conclude that the requirements of paragraph 4 of Schedule 21 would have been met to the necessary (criminal) standard, giving a starting point of 25 years.
33. Having established the starting point, a court in this jurisdiction would then have been obliged under Schedule 21 to consider a (non-exhaustive) list of aggravating and mitigating features. The medical evidence suggested that AA struck his mother over

the head and partially strangled her before stabbing and cutting her several times. As the sentencing Court pointed out, AA's mother must have suffered grievously in the 5 or 10 minutes of the attack before she became unconscious. Moreover her suffering would have been particularly acute given that it was her own child who was attacking her.

34. Mitigating features identified in paragraph 10 of Schedule 21 include the age of the offender. AA was just 21 when he attacked and killed his mother, still a young man, though adult. Had AA's intention been to inflict serious injury rather than to kill then such a lesser intention would have afforded him further mitigation but as he was convicted of premeditated murder under the Criminal Code the SBAs Court was clearly satisfied that he intended to kill his mother.
35. As I have already observed, the lists of aggravating and mitigating features set out in Schedule 21 are not intended to be exhaustive. A court here would also have had in mind, as did the SBAs Court, AA's personal and family circumstances as long-term refugees in Dhekelia, with all the restrictions and uncertainties attendant on that status. Moreover whilst Dr McNerney identified no formal mental disorder, he did conclude that AA demonstrated an "unusual personality of probable schizoid type" whom others had described as "a loner".
36. Balancing the aggravating and mitigating features would in my view have resulted in a sentence of 23 years (less the 300 days spent on remand) if AA had been tried and sentenced in the Crown Courts of England and Wales.
37. It is immediately apparent that there is a substantial discrepancy between the recommendation as to minimum term made by the SBAs Court and the minimum term which AA might otherwise have been required to serve had he been tried and sentenced here.

38. I turn to consider whether existing law or principle affords any assistance in determining what approach I should take in the light of this discrepancy.

### **Convention on the Transfer of Sentenced Persons**

39. AA was transferred pursuant to the provisions of the Colonial Prisoners Removal Act 1884 (“the 1884 Act”). Warrants for the transfer of prisoners may also be issued under the Repatriation of Prisoners Act 1984. This statute was enacted to give effect to the UK’s obligations under the Council of Europe’s Convention on the Transfer of Sentenced Persons (“the Convention”). The Convention does not apply to the transfer of prisoners to the UK from the SBAs but its provisions are worthy of note.
40. The purpose of the Convention was to facilitate and regularise the transfer of prisoners serving a sentence in Country A to be returned home to Country B to serve out their sentence there. Its provisions stipulate that where a transfer occurs, the responsibility of Country B is either to enforce the sentence passed in Country A, by adapting it if necessary (Article 9.1(a), taken together with Article 10), or to convert that sentence to one that is compatible with the justice system in Country B (Article 9.1(b), taken together with Article 11).
41. The distinction between adapting or converting a foreign sentence was considered by the House of Lords in *R v Secretary of State for the Home Department, ex p. Read* [1989] AC 1014. Their Lordships noted that, in ratifying the Convention, the UK elected not to apply the conversion procedure for which provision was made in Article 9.1(b). It follows that the UK will act to implement a sentence passed in another Convention country by continuing enforcement of, and where necessary adapting, the sentence passed by the foreign court. Importantly, enforcement is subject to Article 10.2 which provides that:

*“If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a*

*court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.*” (emphasis added)

42. The Court of Appeal in *R v Hull* [2011] EWCA Crim 1261 considered how Articles 9(1)(a) and Article 10.2 of the Convention were to be applied in the case of a transferred life prisoner from the Republic of Ireland. Kenneth Parker J had set a minimum term of 18 years pursuant to section 273 of the 2003 Act which Mr Hull sought to appeal.
43. The court discussed the status of a mandatory life sentence in the Republic of Ireland (at [16]-[17]), before reviewing the provisions of the 2003 Act which determined the approach to setting a minimum term here (now covered by sections 321 and 322 of the 2020 Act set out at paragraphs [10] and [11] above). The court next considered the approach of the Parole Board in Ireland compared to that of the Parole Board in England and Wales. On behalf of Mr Hull it was argued that as life prisoners in Ireland were entitled to a review by the Parole Board there after 7 years, then in order to achieve parity the High Court here should have set a minimum term of 7 years.
44. Having determined that it had jurisdiction to consider an appeal against the minimum term imposed by order of Kenneth Parker J, the court went on to consider the process by which he had reached the recommended term of 18 years. The court noted (at [41]) that both Kenneth Parker J and Stanley Burnton J in an earlier case under the Convention (*Abdur Khan* [2006] EWHC 2826) had proceeded on the mistaken understanding that the foreign sentence was to be converted (ie that Articles 9(1)(b) and 11 applied), before going on to consider how the process of

enforcement/adaptation under Articles 9(1)(a) and 10 would operate on the facts of the case before them.

45. At [44] the court set out passages from the Explanatory Report to the Convention, in which the Council of Europe explained the meaning of the terms used in Article 10.

Referring to the House of Lords case of *Read*, the court noted that:

“...Adaptation did not mean conversion to UK sentencing practice. It is to be noted that the House of Lords was not dealing with an indeterminate sentence in which the systems for the setting of the custodial term were incompatible. The point at issue in *Read*’s appeal was whether a process of adaptation to the law of the administering state included a power to impose sentencing practice in England and Wales for offences of a similar kind. Their Lordships held that it did not. The sentence imposed in Spain had to be respected and the limit of the power available to the Secretary of State waxes the reduction, expressly required by Article 10.2, of the sentence to the maximum permissible under the law of England and Wales.

46. It was not, therefore, the function of the High Court in Mr Hull’s case simply to convert his life sentence as though it had been imposed in England and Wales. Its function was to *adapt* his sentence for the purpose of its *enforcement* in England and Wales. We recognise that the maximum term in both countries was “whole life”. On the other hand, in neither country is it likely that the custodial element of the penalty would be for life, although in both countries the custodial part of the penalty *could* result in custody for life....

48. It is, we conclude, necessary to give purposive effect to Article 10 of the Convention. While as a matter of law the sentence lasts for life in both countries, its “legal nature and duration” comprises elements both of custody and release on licence within the community. It is, in our view, not possible to ignore the difference between the two systems in their assessment of the period to be served in custody. The task of the administering state under Article 10.2 is, when adapting a sentence, as far as possible to bring correspondence between the “punishment” which would have been imposed in the sentencing state and (the remainder of) the sentence to be served in the administering state. That will require a reasoned judgment as to the likely duration of the custodial element of the sentence had the sentence been served in the sentencing state. To decide otherwise would require us to ignore the reality that in both countries a sentence of life imprisonment does not usually mean custody for life”

46. At [51] the court in *Hull* observed that there were three possible options when setting a minimum term upon the transfer of a life prisoner from the Republic of Ireland: (i) to impose a whole of life order, (ii) to determine the minimum term solely by reference to Schedules 21 or 22 of the 2003 Act (now Schedule 21 of 2020 Act) or (iii)

by seeking to adapt the sentence “to achieve correspondence with the punishment as it would have been enforced in the Republic of Ireland”. The court concluded that the first of these options would not achieve that result and, while the second one might do so, the third certainly would.

47. As it was probable that, if Mr Hull had remained in the Republic of Ireland, he would have been released after 18 years, the Court upheld the minimum term set by Kenneth Parker J, before observing as follows at [55]:

“...It seems to this court that where transfers are made of mandatory life prisoners either from Republic of Ireland or from any other Convention country with a similar statutory regime, the High Court will be assisted by the best possible information from the sentencing country as to the likely date of release of the prisoner in that country.”

48. *Re Akgun* [2014] EWHC 2849 was another Convention case. Mr Akgun was convicted of murder in Germany in 2010 and sentenced to life imprisonment. Under the German Criminal Code his first review would have taken place 15 years post-sentence, but information from Germany indicated was that it was highly improbable he would have been released before he had served 20 years in custody. In 2013 Mr Akgun was transferred to the UK. Applying Schedule 21 of the 2003 Act Griffiths Williams J held that the starting point for the minimum term would have been 25 years. However, applying *Hull*, and in order to ensure correspondence with the sentence imposed in Germany in accordance with the Convention, Griffiths Williams J set the appropriate minimum term at 20 years less time spent on remand in custody.

49. In *Re McNally* [2015] EWHC 3613, the prisoner had been convicted of murder in Germany in 2009 and sentenced to life imprisonment. Unfortunately neither *Hull*, *Khan* nor *Akgun* were drawn to the attention of Mitting J for the purposes of setting the minimum term, nor were the terms of the Convention. Instead the judge applied the terms of Schedule 21 and set a minimum term of 30 years.

50. Following *Hull*, the approach to setting a minimum term in a case to which the Convention applies appears to be as follows:

(1) The High Court should be provided with as much information as possible about the sentencing regime in the transferring state, so that the court can understand and attempt to estimate how long the prisoner would have remained in prison there before being released on licence if the transfer had not taken place

(2) Where the Convention applies, the High Court is bound by the legal nature and duration of the sentence passed in the transferring state but may adapt that sentence to ensure that it is compatible with the laws of England and Wales, under Articles 9(1)(a) and 10 of the Convention. In practice, this means that the minimum term set here should be the length that corresponds as closely as possible to the period of time the prisoner would have remained in custody in the transferring state before being released on licence, had the transfer not occurred. That will be so even if the strict application of Schedule 21 would have led the High Court to impose a longer minimum term. The explanation for this is that the High Court must ensure, so far as possible, that the UK complies with its international obligations under the Convention.

51. The case of *Douglas* [2019] EWHC 3018 is of particular interest since the transfer in that case was not covered by the terms of the Convention. In 2016 Mr Douglas was convicted of murder by the court in Grand Cayman and sentenced to life imprisonment with a minimum term of 34 years. Grand Cayman was not a party to the Convention, accordingly Mr Douglas' transfer to prison in the UK in 2018 was made pursuant to the 1884 Act. Unlike the cases of *Hull* and *Akgun*, the High Court here did not have to estimate the likely earliest date upon which Mr Douglas would have been released in Grand Cayman because that was known. As appears from the

judgment, the regulations applicable to the setting of life sentences in the Cayman were similar to the provisions of Schedule 21.

52. In setting the minimum term upon Mr Douglas' transfer to the UK, William Davis J (as he then was) held that if he had been sentencing him here, the minimum term would have been 34 years. He was prepared to make a modest reduction to reflect the fact that Mr Douglas was now serving his sentence far from home and accordingly he set the minimum term at 31 years less time spent on remand in custody.
53. At [13]-[14] of the judgement in *Douglas*, William Davis J discussed the case of *Khan*. The Court of Appeal decision in *Hull* does not appear to have been drawn to his attention. He held that his task was "to engage afresh in the exercise of setting the minimum term" (at [17]), which is what he proceeded to do. However it was not necessary in that case to consider the effect of any discrepancy between the appropriate minimum term, applying Schedule 21, and the length of time the prisoner would have served abroad before being released, had he remained in prison there.
54. Where the Convention does not apply, the duty of the High Court is to set an appropriate minimum term. This is achieved by taking into account the seriousness of the offence in accordance with the provisions of Schedule 21 but I consider that it will also be appropriate to take account of the period of time which the transferring prisoner would have remained in prison in the transferring country or territory before being released on licence if the transfer had not taken place. Otherwise, an undesirable disparity could develop as between Convention and non-Convention cases.
55. In a non-Convention case such as that of AA, therefore, I agree with Mr Jarvis' suggestion made in his written advice as to the correct approach which the High Court should adopt when setting the minimum term for a transferring life prisoner as follows:

- (1) The court should consider first how long the prisoner is likely to have served in prison in the transferring country or territory before being released on licence, had (s)he not been transferred. I add that, if the necessary information is not sent with the prisoner at the time of transfer then the prisoner's representatives, or, if he or she has none, the court here, should attempt to obtain that information (as the Registrar has done at my request in the case of AA).
- (2) Next, taking into account the seriousness of the case and applying Schedule 21, the High Court should consider what minimum term it would have passed, had the prisoner been convicted and sentenced here. In doing so, the judge should be careful to guard against acting as a form of appeal court from the findings of the sentencing court in the transferring country.
- (3) If there is no difference, or no significant difference, between the overseas minimum term and the minimum term which the court here would have passed applying Schedule 21, then the High Court should set the minimum term accordingly, taking into account any time served in custody on remand in the transferring country, also (if applicable) any increased disadvantage to the prisoner consequent on the transfer as referred to in (5) below.
- (4) If there is a significant difference between the overseas minimum term and the term arrived at by application of Schedule 21, then the High Court may take the former into account in deciding whether to reduce the latter so as to arrive at an "appropriate" minimum term, in the interests of justice.
- (5) The interests of justice may in any event require that the court take into account (i) the fact that a prisoner may have been transferred without their consent and/or (ii) that they will now be serving a sentence far from home, friends and family, with consequential difficulties in maintaining contact.

## Setting the minimum term in AA's case

56. In the case of AA I start by considering how long AA is likely to have served in prison in the SBAs before being released on licence. Further information obtained from the Administrator in the SBAs (recorded at paragraphs [22] and [23] above) suggests that AA would have remained in prison in the SBAs for at least 16 years before his case would have been considered by the Administrator's Panel. As noted above, whilst the approach of the Administrator's Panel is in most respects similar to that of the Parole Board of England and Wales, there is one difference which seems to me to be significant in this context. Prisoners released on parole in England and Wales will generally be subject to a risk management plan approved by the Parole Board under which strict licence conditions can be imposed and monitored, with any breach resulting in swift recall to custody; by contrast it appears that the Administrator's Panel will only release a prisoner upon being satisfied that there is no risk of recall, since licence conditions cannot in practice be monitored there. I infer from this that the Administrator's Panel is likely to err on the side of caution, adding to the delay before any early release is likely to be approved.
57. Had AA been convicted and sentenced here he would have received a minimum term of 23 years (less time on remand), applying the provisions of Schedule 21. The difference between this and the 16-year term recommended by the Senior Court is a highly relevant factor when considering the "appropriate" minimum term which AA should serve here before being considered for release. However I also consider that the term which I set should reflect the difference in approach to release conditions as between the Administrator's Panel in the SBAs and the Parole Board. Finally I note that AA's family appear to have moved away and lost contact with him before his transfer, and that AA himself sought to come to the UK to serve the remainder of his sentence here, so that no discount for distance (such as that allowed in *Douglas*) is called for in his case.

## **Conclusion**

58. Taking all this into account, in my view the appropriate minimum term in AA's case is one of 19 years, less the 300 days which he spent on remand in the SBAs, ie 18years 65 days. This term is to be calculated from the date upon which AA's sentence commenced in the SBAs, namely 27 June 2016.