

Guidance on Reconsideration Mechanism

September 2022 (v2.0)

Document History

Document version	Date of Issue	Revision description
1.0	November 2021	
2.0	September 2022	The guidance was updated to reflect the changes following: <ul style="list-style-type: none">• The Police, Crime, Sentencing and Courts Act 2022• The Parole Board Rules 2019 (as amended).

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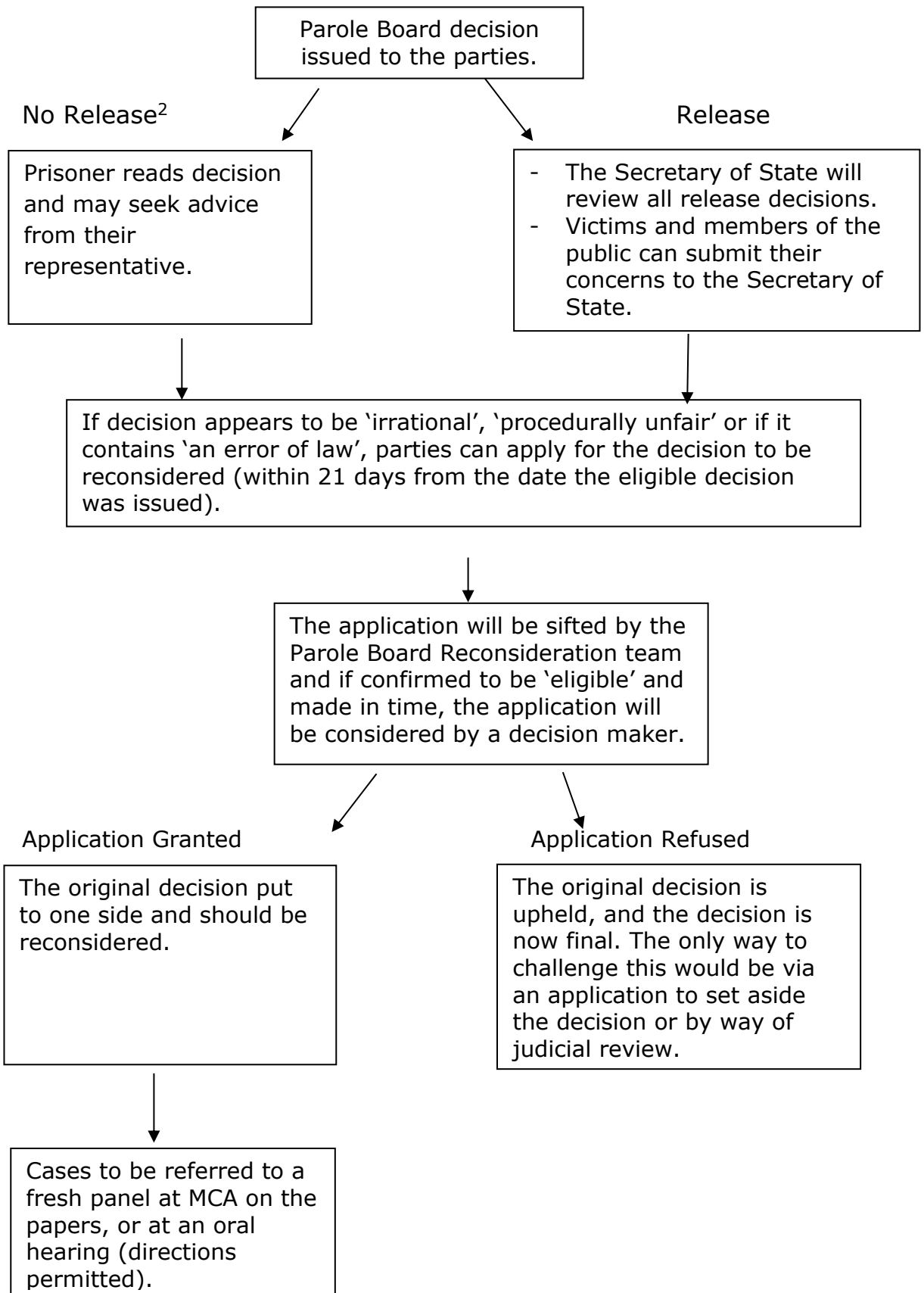
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1. Introduction

- 1.1 The Reconsideration Mechanism was introduced on 22 July 2019 and subsequently amended on 21 July 2022. It applies to release decisions in eligible cases¹ made on or after that date (22 July 2019) and Indeterminate Public Protection (IPP) licence termination decisions made on or after 1 September 2022. It is provided for under rule 28 of the Parole Board Rules 2019 (as amended) (“the Rules”) (see Annex A).
- 1.2 In eligible cases, it allows either party to the proceedings to make an application for a parole decision to be reconsidered if it is considered that the decision was irrational, contained an error of law and/or was made in a procedurally unfair way.
- 1.3 The decision under challenge must relate to whether the prisoner should be released or not released or the decision on whether to terminate an IPP licence. A decision regarding a recommendation for open conditions is not eligible for reconsideration.
- 1.4 Only the parties to the proceedings (Secretary of State and the prisoner) can apply for reconsideration. Victims can only request that the Secretary of State make an application for the decision to be reconsidered.
- 1.5 A process map is set out on the next page.

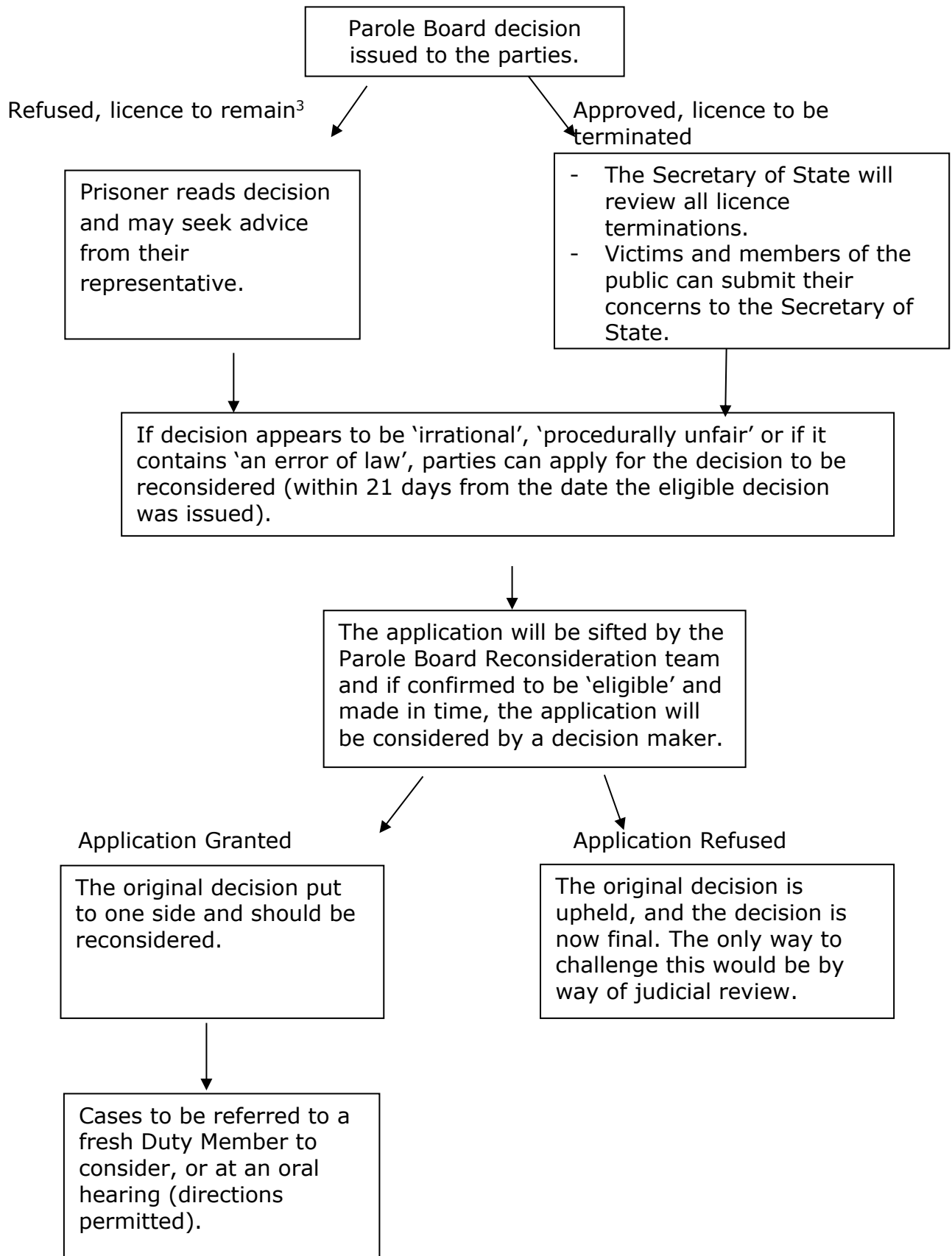
¹ Life sentences, IPP, EDS, SPOCs and a number of historic sentences with an indefinite element, as noted in paragraph 2 of this guidance.

**Overview of the reconsideration process
For release or no release decisions.**



² Once any time to request an oral hearing under rule 20, if relevant, has expired

**Overview of the reconsideration process
for IPP licence terminations.**



³ Once any time to request an oral hearing under rule 20, if relevant, has expired

2. Eligibility

2.1 For a decision to be eligible for reconsideration, the prisoner must be serving an eligible sentence type (detailed below) and the decision must meet the eligibility criteria (also detailed below). Unless both limbs of the eligibility criteria are met, the application will be ineligible.

Sentence Types

2.2 Decisions are eligible for reconsideration only where a prisoner is serving:

- (a) An indeterminate sentence;
- (b) An extended sentence;
- (c) A determinate sentence subject to initial release by the Board under Chapter 6 Part 12 of the Criminal Justice Act 2003 ('the 2003 Act');
- (d) A serious terrorism sentence.

These would include:

- All types of life sentence;
- Imprisonment for Public Protection (IPP);
- Extended Determinate Sentences (EDS);
- Sentences for Offenders of Particular Concern (SOPC) – imposed for certain child sexual and terrorism offences, with Parole Board release between the half-way and end of custodial part of sentence⁴;
- Discretionary Conditional Release (DCR) – former long-term sentences under the Criminal Justice Act 1991 where the prisoner remains subject to Parole Board release between the half-way and two-thirds point;
- Sentences for terrorism or terrorism-related crime to which the Terrorist Offenders (Restriction of Early Release) Act 2020 applies; and
- Old legacy extended sentences – Extended Public Protection (EPP) sentences and former 'section 85' (issued under Powers of Criminal Courts (Sentencing) Act 2000) extended sentences (ESP).

Decisions

2.3 The following decisions **are eligible** for reconsideration:

- Rule 19(1)(a) – the prisoner is suitable for release;
- Rule 19(1)(b) – the prisoner is unsuitable for release;
- Rule 21 (7) – where a direction is made that the case should be decided on the papers and the decision is to release or not release;
- Rule 25(1) – where the case has been heard at an oral hearing and the decision is to release or not to release;

⁴ Following the enactment of the Police, Crime, Sentencing and Courts Act 2022, section 131, those sentenced on or after 28th June 2022 are parole eligible when at the two-thirds point of their custodial period.

- Rule 31(6)(a) – where a decision has been made to terminate an IPP licence (whether on the papers or following an oral hearing);
 - Rule 31(6)(c) - where a decision has been made to dismiss a reference to terminate an IPP licence;
 - Rule 31(6A) – where a decision has been made on a reference to terminate an IPP licence where the prisoner is in prison having been recalled under section 32 of the 1997 Act.
- 2.4 Recommendations about transfer to **open conditions are not eligible** for reconsideration. Only decisions relating to release and the termination of an IPP licence are eligible for reconsideration. If the Secretary of State referral relates to both release and open conditions, only the decision relating to release would be eligible.
- 2.5 Other **ineligible decisions** include:
- Decisions declining to direct an oral hearing (rule 20);
 - Advice cases;
 - Decisions about the re-release of recalled prisoners serving a Standard Determinate Sentence (SDS); and
 - Any other decisions that are not about the release of the prisoner (e.g., about setting directions for the conduct of the review or about setting or varying licence conditions).

3. Provisional Decisions

Decisions at MCA stage

- 3.1 Where the panel makes a no release decision on the papers under rule 19(1)(b), the decision is provisional, and the prisoner has 28 days to request (under rule 20) for their case to be considered at an oral hearing.
- 3.2 If no rule 20 application for an oral hearing has been made within the 28-day window, the decision remains provisional for a further 21 days if the decision is eligible for reconsideration, and a reconsideration application can be made at this point. If the decision is not eligible for reconsideration, the decision becomes final at the end of the 28-day window. If no application for reconsideration is made within the 21-day time frame, the decision becomes final.
- 3.3 Where an application for an oral hearing under rule 20 has been submitted by a prisoner, which results in a refusal to direct an oral hearing, the decision about release:
- Remains provisional for a period of 21 days if it is eligible for reconsideration; or
 - Becomes final if it is not eligible for reconsideration.

Decisions on the papers under rule 21

- 3.4 Any decision made following a direction that the case be considered on the papers under rule 21 is only provisional if it is eligible for reconsideration. If

it is not eligible, the decision is final. If the decision is eligible for reconsideration, the decision becomes final if no application for reconsideration is received within the 21-day window.

Decisions at oral hearing stage

- 3.5 Where the panel has considered a case at an oral hearing, the decision about release under rule 25 remains provisional for a period of 21 days if the decision is eligible for reconsideration. If it is not eligible, the decision is final. The decision also becomes final if no application for reconsideration is received within the 21-day window.
- 3.6 If an application for reconsideration is made in an eligible case, the decision remains provisional until the application is determined. If reconsideration is directed, the case goes back to the stage it was at when the decision being reconsidered was made. If the application is rejected, the original decision then becomes final.

Decisions on References to Terminate an IPP Licence

- 3.7 Where the panel have made a decision on a reference for an individual's licence to be terminated, either on the papers or following an oral hearing, their decision remains provisional for a period of 21 days if the decision is eligible for reconsideration. The decision becomes final if no application for reconsideration is received within the 21-day window.
- 3.8 If an application for reconsideration is made in an eligible case, the decision remains provisional until the application is determined. If reconsideration is directed, the case goes back to the stage it was when the decision being reconsidered was made. If the application is rejected, the original decision then becomes final.
- 3.9 A decision table is set out on the next page

Reconsideration Decision Table

Rule	Decision	Time frame	Eligibility
19(1)(a)	MCA decision to release (only)	<p>Provisional subject to 21-day reconsideration window if it is eligible (rule 19(4))</p> <p>Decision is final if it is not eligible (rule 19(5))</p>	<p>If it meets the sentence eligibility criteria, then the decision will be provisional for a further 21 days</p>
19(1)(b)	MCA decision to refuse release	<p>Provisional subject to: 28 days to request an oral hearing (rule 20(2)).</p> <p>Possible scenarios:</p> <ol style="list-style-type: none"> a. If no application for an oral hearing received and is not eligible for reconsideration, the decision becomes final (rule 20(6)(b)) b. If no application for an oral hearing received and is eligible for reconsideration, the decision remains provisional subject to the 21-day reconsideration window (rule 20(6)(a)) c. If an application for an oral hearing made and refused and is not eligible for reconsideration, the decision becomes final (rule 20(6)(b)) d. If an application for an oral hearing is made and refused and it is also eligible for reconsideration, the decision remains provisional subject to 21-day reconsideration window (rule 20(6)(a) and 28) 	<p>Only the release element of the decision would be eligible for reconsideration (in addition to the sentence type). A decision about open conditions or declining an oral hearing do not fall within the scope for reconsideration.</p> <p>Scenarios:</p> <ol style="list-style-type: none"> a. Not eligible for reconsideration b. Eligible for reconsideration c. Not eligible for reconsideration d. Eligible for reconsideration

Rule	Decision	Time frame	Eligibility
19(1)(c)	MCA decision to direct an OH	Move to next stage decision	Not eligible for reconsideration
19(2)(a)	MCA decision – Recommendation to transfer to open conditions	Final: no provision	Not eligible for reconsideration.
19(2)(b)	MCA decision – refuse to recommend transfer to open conditions	Final: no provision	Not eligible for reconsideration
19(7)	MCA decision: give advice	Final: no provision	Not eligible for reconsideration
20(5)	Grant of an application for an oral hearing	Move to next stage decision	Not eligible for reconsideration.
20(5)	Refusal of an application for an oral hearing	Decisions under rule 19(1)(b) are provisional and are subject to 21-day reconsideration window if eligible (rule 20(3)(a)) Decision is final if not eligible (rule 20(3)(b))	Not eligible for reconsideration (but please note 19(1)(b) above).
21(7)(a)	Release refused on papers post MCA	Provisional subject to 21-day reconsideration window if eligible (rule 21(8)) Decision is final if not eligible (rule 21(9))	If it meets the sentence eligibility criteria, then the decision will be provisional for a further 21 days
21(7)(b)	Release granted on papers post MCA	Provisional subject to 21-day reconsideration window if eligible (rule 21(8)) Decision is final if not: (rule 21(9))	If it meets the sentence eligibility criteria, then the decision will be provisional for a further 21 days
21(10)(a)	Open conditions recommended on papers post MCA	Final: rule 21(11)	Not eligible for reconsideration
21(10)(b)	Open condition not recommended on papers post MCA	Final: rule 21(11)	Not eligible for reconsideration
21(11)	Decision on papers post MCA: advice	Final: rule 21(11)	Not eligible for reconsideration

Rule	Decision	Time frame	Eligibility
25(1)(b)	Oral Hearing – Refused release (only)	Provisional subject to 21-day reconsideration window if eligible (rule 25(2)) Decision final if not (rule 25(3))	Must meet the eligibility requirement for sentence type to be eligible for reconsideration.
25(1)(a)	Oral Hearing – Release granted (only)	Provisional subject to 21-day reconsideration window if eligible (rule 25(2)) Decision final if not (rule 25(3))	Must meet the eligibility requirement for sentence type to be eligible for reconsideration.
25(4)(a)	Oral Hearing – open conditions recommended	Final: rule 25(5)	Not eligible for reconsideration.
25(4)(b)	Oral Hearing – Open conditions not recommended	Final: rule 25(5)	Not eligible for reconsideration
25(5)	Oral hearing - advice	Final: rule 25(5)	Not eligible for reconsideration
31(6)(a)	IPP licence – terminate licence	Provisional subject to 21-day reconsideration window (rule 31(7A))	Eligible for reconsideration
31(6)(b)	IPP licence – amend licence	Final (no provision)	Not eligible for reconsideration
31(6)(c)	IPP licence – dismiss application	Provisional subject to 21-day reconsideration window: (rule 31(7A))	Eligible for reconsideration
31(6A)	IPP licence – decision when prisoner has been recalled	Provisional subject to 21-day reconsideration window: (rule 31(7A))	Eligible for reconsideration

Note – whilst recommendations about open conditions are not eligible to be reconsidered, where panels first make a decision about release as required by the terms of the referral, that component of the decision is eligible to be set aside.

4. Grounds for Reconsideration

- 4.1 There are three grounds upon which a decision can be challenged by way of reconsideration: an error of law, irrationality and/or procedural unfairness. These grounds are intended to mirror the grounds for judicial review.

Error of law

- 4.2 A decision may contain an error of law. For example, the decision maker may have acted without or outside their jurisdiction, tried to use a power they did not have, or acted in a way which is inconsistent with wider case law. The decision in the case would also have not been made if it were not for the error of law.

Irrationality

- 4.3 In deciding on 'irrationality' the Board has adopted the test in the *DSD* case. In *R (On the application of DSD and others)-v- The Parole Board* [2018] EWHC 694 (Admin) the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para 116:

'the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it: see Lord Diplock in CCSU-v-Minister for the Civil Service [1985] AC 374.'

The Divisional Court in *DSD* went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing "irrationality".

- 4.4 As rule 28 uses the same wording as is used in this judgment, this demonstrates that the same test should be applied within reconsideration applications.

- 4.5 Irrationality can also include a failure to give adequate reasons. What amounts to adequate reasons can vary, in the case of *Oyston 2000 EWCA Crim 3552* the LCJ Lord Bingham said:

"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."

Procedural Unfairness

- 4.5 There is no single definitive judicial definition of 'procedural unfairness', however the one that the Board has decided to adopt is as follows:

Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

In summary an applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that:

- (a) express procedures laid down by law were not followed in the making of the relevant decision;*
- (b) they were not given a fair hearing;*
- (c) they were not properly informed of the case against them;*
- (d) they were prevented from putting their case properly;*
and/or
- (e) the panel was not impartial.*

This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

It is important to distinguish between procedural unfairness and a procedural irregularity. Procedural irregularities of one kind or another are not uncommon. A procedural irregularity may or may not result in procedural unfairness. It will not do so if it is insignificant or if the panel's decision would clearly have been the same if the irregularity had not occurred.

- 4.6 This does not include one party having forgotten/omitted to put information before the panel. There may be instances where this occurs following a release decision being made (i.e., the Secretary of State may respond to say that they failed to highlight a particular issue due to an administrative mistake).

5. Time Limits

- 5.1 As mentioned above, the time limit for filing an application for reconsideration is 21 days after the decision under challenge has been issued to the parties.

Amending Time Limits

- 5.2 A panel chair or duty member can utilise the power set in rule 9 to extend or reduce the time set by rule 28 for submitting an application for reconsideration. Rule 9 states:

Time limits

'A panel chair or duty member may alter any of the time limits prescribed by or under these Rules where it is necessary to do so for the effective management of the case, in the interests of justice or for such other purpose as the panel chair or duty member considers appropriate.'

This should only be done in very exceptional cases. The starting point will be that the time frame set out in statute should be followed unless there is a very good reason not to. Both parties should be allowed to comment on any proposal to extend or reduce the time frame.

Extension and Reduction Requests

- 5.3 Requests to extend or reduce the time limit must be received within the 21-day period. Any such applications received after the 21-day period will not be considered as the decision will have become final.
- 5.4 Requests may be made at the time of the oral hearing, after the hearing but before the provisional decision has been issued, or after the provisional decision has been issued to both parties (but within the 21-day time period). Requests that are made either at the time of the oral hearing or before the provisional decision has been issued will be considered by the panel chair. Requests that are received after the provisional decision has been issued will be put to a duty member who will need to consider the request on the day that it is received or, failing that, resubmitted the following day by the secretariat to the next available duty member (see paras 5.13.1-5.13.17 of the Parole Board Duty Member Activities guidance for further information). Any correspondence relating to extension or reduction requests should be copied to the reconsideration team reconsideration@paroleboard.gov.uk
- 5.5 The principal considerations are:
- Does the request evidence exceptional circumstances?
 - Would refusing the request be unfair or result in unreasonable disadvantage to the requesting party?
 - Would granting the request be unfair or result in unreasonable disadvantage to the other party?
 - Would granting the request be unfair or result in unreasonable disadvantage to the victim?
- 5.6 In relation to requests from the Secretary of State to extend the time limit, the prisoner will continue to be detained for as long as it takes to determine the application for reconsideration, and so any extension of the time limit will prolong their detention. Currently, the practice is that extension requests (which are granted) are granted for a period of up to 7 days. However, the period of extension to which a panel chair/duty member may grant an application is purely in their discretion. Therefore, a period longer than the 7 days may be granted.
- 5.7 When considering a request from the prisoner to reduce the time limit, the position of the victim must always be taken into account. The 21 days is set out by the Rules with the intention of giving the victim enough time to obtain a Parole Board Decision Summary, consider it, identify any potential grounds of irrationality or procedural unfairness, and ask the Secretary of State to make an application for reconsideration. The Secretary of State will also need time to consider whether to make an application. Reducing the time limit may have the effect of disenfranchising the victim. This will always act as a factor against reducing the time limit except in cases where

there are no victims who might want to consider reconsideration, or victims have indicated that they do not want to (or otherwise have no objection).

- 5.8 Upon receipt of an extension/reduction request, the other party will be provided with the opportunity to submit representations in response to the application. A tight timeframe will be provided (usually one day) to ensure that the application is dealt with efficiently, and any representations received will be put before the requisite panel chair/duty member to consider.
- 5.9 All parties are to be informed of the extension/reduction decision where applicable.

6 Publication

- 6.1 In line with the Board's transparency agenda, all reconsideration decisions will be published onto BAILII⁵.

Details and redaction

- 6.2 Before decisions are published onto BAILII, they will be redacted so that there is as little identifiable information contained within the decision letter as possible (e.g. redacting prison numbers, first names etc).
- 6.3 It will not be necessary to completely redact names or gender references as:
- (1) These are not sensitive personal data;
 - (2) They are matters of public record; and
 - (3) They may be used as cross-references in other decisions.

Therefore, the prisoner's surname will be published in the heading of the published decision letter.

- 6.4 Decisions will be published under the name that the prisoner was convicted under. We will not publish any subsequent change of name unless specifically requested to do so.
- 6.5 We may redact names in the case of a vulnerable prisoner, such as a child, or a prisoner who is transgender.
- 6.6 There will be no changes made to the text of the decision unless there is a clear risk to the prisoner or any other person. In the event it is decided that we redact the text, the Reconsideration Team will liaise with the author of the decision to find suitable alternative wording/phrases. The decision will then only be published once the author has approved the changes.
- 6.7 Please note, the author of the decision will have their name published at the end of the decision.

Reconsideration Grants

⁵ BAILII - The Parole Board for England and Wales

6.8 Granted application decisions will only be made public once the substantive case has been concluded (ie, following the new hearing/new decision). This is so that members selected to form the new panel in granted applications will not have sight of the reconsideration decision as per the possible directions of the case.

ANNEX A: RULE 28 OF THE PAROLE BOARD RULES 2019 (as amended)

Rule 28: Reconsideration of decisions

28.—(1) Subject to paragraph (2), where a decision has been made under rule 19(1)(a) or (b), 21(7), 25(1) or 31(6)(a) or (c), or (6A), a party may apply to the Board for the case to be reconsidered on the grounds that the decision—

(za) contains an error of law;

(a) is irrational; or

(b) is procedurally unfair.

(2) Decisions are eligible for reconsideration only where the prisoner is serving—

(a) an indeterminate sentence;

(b) an extended sentence;

(c) a determinate sentence subject to initial release by the Board under Chapter 6 of Part 12 of the 2003 Act;

(d) a serious terrorism sentence.

(3) An application for a provisional decision to be reconsidered under paragraph (1) must be made and served on the other party no later than 21 days after the decision under rules 19(8), 21(12), 25(6) or 31(7) is provided to the parties.

(4) Where a party makes an application under paragraph (3), the other party may make representations, and those representations must be provided to the Board and the party who made the application within 7 days of service of the application.

(5) Where an application made under paragraph (3) is received by the Board, the application must be considered on the papers by an assessment panel.

(6) After assessing the application under paragraph (5), the assessment panel must—

(a) direct that the provisional decision should be reconsidered, or

(b) dismiss the application.

(7) The assessment panel may direct that the provisional decision should be reconsidered under paragraph (6)(a) only if it has identified a ground for reconsideration under paragraph (1).

(8) Where the assessment panel dismiss the application under paragraph (6)(b), the provisional decision becomes final.

(9) Where the assessment panel directs that the provisional decision should be reconsidered under paragraph (6)(a), the assessment panel must direct that the case should be—

(a) reconsidered on the papers by the previous panel or a new panel appointed under rule 5(1), or

(b) reconsidered at an oral hearing by the previous panel or a new panel appointed under rule 5(2).

(10) The decision of the assessment panel must include the reasons for that decision or advice.