



Ministry
of Justice

Applicability of the Secretary of State Referral Power

The power of the Secretary of State to direct the referral of certain release decisions of the Parole Board to the High Court

1. This policy applies to offenders who meet the following statutory criteria found in section 32ZAA(2) of the Crime (Sentences) Act 1997 and section 256AZBA(2) of the Criminal Justice Act 2003:
 - a) Their index offence is in one of the following categories: murder, rape, causing or allowing the death of a child, and terrorism or terrorism-connected offences (“top tier”);
 - b) Their index offence or other circumstances relating to the offender have features that mean, if released, it would be likely to undermine public confidence in the parole system; and
 - c) The Secretary of State considers that the High Court might not be satisfied that the release test (that it is no longer necessary for the protection of the public that the offender remain confined) has been met.
2. If an offender meets these three criteria, then their case will be referred to the High Court. The High Court will then make their own decision as to whether the release test has been met and will decide whether the prisoner can be released or must remain in custody.

3. The referral power applies irrespective of the age of the offender.
4. Referral of a top tier case is a discretion that will be considered on a case-by-case basis. The threshold for meeting the above statutory tests is high, with cases therefore expected to be referred in rare and exceptional circumstances.
5. This policy sets out what would be required to satisfy those tests, that is: (1) what features and characteristics of a top tier case would meet the public confidence limb of the test; and (2) how the Secretary of State may consider that the High Court might reach a different conclusion on the release test being satisfied.
6. The features and characteristics set out in this policy are not exhaustive, and other exceptional cases may be referred where the offender is convicted of one of the top tier offences.

The categories of index offence (statutory criteria)

7. The categories of index offence – murder, rape, certain terrorism offences, terrorism-connected offences and causing or allowing the death of a child - are set out in the legislation and are strict statutory criteria. They were selected for the scope of this power because they were found in the Root and Branch review of the Parole System¹ to be the offences that present the most serious and concerning risk to the public, requiring the highest level of scrutiny and a more precautionary approach to determining suitability for release.
8. A prisoner must be serving a sentence for a top tier offence and the Parole Board's release direction must relate to that top tier offence/sentence for the prisoner to be eligible for the referral. Where the sentence or licence end date for a top tier offence has already passed, the prisoner will not be eligible (unless the prisoner is serving another sentence for another top tier offence and the release decision relates to that later sentence).

Features that particularly affect public confidence in the parole system (statutory and policy criteria)

9. The features of the index offence that have been judged to affect public confidence are different for each category of offence in the top tier and are set out below. These criteria have been selected because potential reoffending by offenders who have committed offences of this nature is a significant cause for concern for the public, to the extent a second look at a release decision may be necessary. These features seek to identify the most serious and extreme examples of those offences which set those cases apart as most likely to undermine public confidence if release has been directed. If one of these features is present in an offender's index offence, they will be considered to have met the public confidence limb of the test and will

¹ [Root and Branch Review of the Parole System - GOV.UK.](#)

then proceed to be assessed against the second limb of the test set out in paragraph 1(c).

Murder

Note: a case must only meet one of the list in (a)-(f) or fall into (g).

- a) There were multiple victims of the index offence, and the offence involved substantial premeditation, planning or abduction.
- b) The victim was under the age of 16 or otherwise vulnerable, and the offence involved substantial premeditation, planning or abduction.
 - i. A vulnerable victim is someone aged 16 or over whose ability to protect themselves from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.²*
- c) The victim(s) was a prison or police officer, with the offence committed during the course of their duty.
- d) The victim was a police, prison, or probation officer or someone who previously worked in one of these roles, and the offence was motivated, either fully or partly, by something the victim did while carrying out their duties.
- e) The index offence was committed to advance an ideological, political, religious or racial cause.
- f) The murder was sexually motivated or involved sexual conduct.
- g) Exceptional cases that do not fall into the above criteria (a-f).

Rape

Note: a case must only meet one of the list in (a)-(b) or fall into (c).

- a) The offender has been convicted of rape against three or more adult victims (whether on one occasion or across a longer period of time).
- b) The offender has been convicted of rape against two or more victims under 16 or vulnerable (whether on one occasion or across a longer period of time).
- c) Exceptional cases that do not fall into the above criteria (a-b).

² See section 5 of the Domestic Violence, Crime and Victims Act 2004.

Terrorism or terrorism-connected offences

- a) Serving a sentence for a terrorism or terrorism-connected offence involving the preparation, facilitation or intention to commit terrorist activities which, if carried through, could have led to loss of life.
- b) Exceptional cases that do not fall into the above criteria (a).

Causing or allowing the death of a child

- a) Exceptional cases.

Characteristics relating to the offender

10. There are certain characteristics relating to an offender, such as serial offending records or substantial relevant but unproven allegations, that have been judged to affect public confidence. The list below is not an exhaustive list and may not apply in every case.
- a) Other allegations against the offender (past or present).
 - b) A significant number of charges lying on file.
 - c) Other similar convictions that fall short of the top tier index offence but raise similar issues of risk to the top tier offence.
11. Characteristics such as these relating to an offender's risk will be taken into account in assessing whether the public confidence test has been met.

Where the High Court might not be satisfied that the release test has been met

12. The second limb of the statutory test that must be met for the referral power to apply is that the Secretary of State considers that the High Court might not be satisfied that the release test has been met. The policy to be applied for this limb is a high bar, reflecting that this power is not intended to be regularly used.
13. The reconsideration mechanism is available to ask the Parole Board to review a provisional release decision for irrationality, errors of law or procedure. In cases where there are legal flaws in a decision, the Secretary of State would likely apply for reconsideration rather than referral (though there may be cases where referral is considered more appropriate).
14. In order to refer a case, the Secretary of State must have reason to believe that the Parole Board has reached the 'wrong' conclusion on the risk of a prisoner, to the extent that the release test is not met. To meet the second limb, there must be

sufficient objective evidence of the Secretary of State finding a difference of view on the prisoner's risk which could lead to a different conclusion on the release test, indicated or supported by a number of features of the decision. The Secretary of State will look at the whole bundle of evidence and the Parole Board's release decision, taking into account things such as the assessed risk of harm of the prisoner, the arguments made on risk reduction and the sufficiency of the risk management plan.

Policy constraints

15. The following is a list of circumstances which, either alone or in combination, will not be considered to meet the threshold for a referral to the High Court, without there being other, wider evidence that the release test may not have been met:

- a) Dissatisfaction with the original sentence or tariff handed down by the court.
- b) Viewing the referral as a substitute process for failure to secure a conviction for other offences or to 'remedy' the original sentence.
- c) The notoriety, media coverage, public campaign or public profile of an offender.
- d) Views or representations about the offender by victims.

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