**Challenging Parole Decisions in England and Wales: Reconsideration and Set Aside**

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* **Introductory remarks:** Criminal justice reform can often be triggered by a single traumatic event. This was true of parole in England and Wales when, late in 2017, the Parole Board made a decision, subsequently held unlawful by the Divisional Court, to direct the release of the so-called ‘Black cab rapist’, John Worboys.[[1]](#footnote-1) Once news of that decision entered the public domain there was an immediate strong negative reaction across the political parties and in the media. The Government responded by introducing a raft of measures designed to restore public and political confidence in parole through greater accountability and transparency. One of the most important of these reforms was the creation in 2019 of a reconsideration mechanism which allowed the Board to take a second look at provisional parole decisions after they had been made. The goal was to fill the space between the Board’s complaints procedures, which do not permit challenges to its decisions, and judicial review which enables parole decisions to be quashed but is slow and relatively costly to use. In 2022 the reconsideration mechanism was supplemented by a sister scheme which permitted final parole decisions to be set aside. By the end of December 2023 judgments on 1,000 reconsideration and set aside applications ̶ 889 of the former and 111 of the latter ̶ had either been issued or (in a few cases) were imminent. More than 800 of these judgments have now been published. The time is therefore ripe for a comprehensive review of the way the two schemes have operated. This paper considers the fruits of the author’s analysis ̶ the first of its kind ̶ of all published reconsideration and set aside decisions as of the beginning of May 2024, as well as a small number of unpublished decisions about which information was provided to the author by the Board.
* **Coverage:** The paper offers a window not just onto how the two review mechanisms are working but onto parole decision-making generally. It is divided into three main sections. The first explores reconsideration. It looks at the scheme’s structure; how applications are assessed; the historical precedents; the way the scheme has been used in practice; what is in scope and what is not; the grounds presented; and the relationship with judicial review. The second section deals with set aside. It mirrors some of the analysis in the first section and compares set aside with reconsideration. The final section asks whether the two mechanisms have achieved what was wanted from them. It concludes that they are serving an important function and ought to be allowed to continue to mature.
* **The nature of parole:** It is worth explaining some of the key elements of the parole system in England and Wales. Roughly speaking, parole is a process through which, in virtue of a discretionary decision taken in their favour, prisoners may be released from custody in circumstances in which, unless that decision is taken, they will stay confined for the remainder of the custodial component of their sentence. In the case of indeterminate sentences this means until their death. The Board’s primary role in this process is to assess whether eligible prisoners still represent a risk to the public. Operating as what is in effect a court of public protection the Board has a statutory duty (as interpreted by the courts) not to direct a prisoner’s release unless there is no more than a minimal risk that the prisoner will cause serious harm to the public if returned to the community.[[2]](#footnote-2) In other words, the Board’s ‘top priority’ is to ‘keep the public safe’.[[3]](#footnote-3) The main focus of parole in England and Wales is on offenders who have either been given an indeterminate or an extended determinate sentence of imprisonment.
* **General structure of the reconsideration scheme:** The revised Parole Board Rules stipulate that parole decisions which are eligible for reconsideration will remain provisional for 21 days. If no application for reconsideration is received during this period, the decision becomes final. Although prisoners should not be released while the application window is open, preparations for their release can be put in train. Should a prisoner be released in error, the Board’s reconsideration jurisdiction falls away. Applications for reconsideration may be made by either of the two parties to a parole case: the prisoner (who must make his/her application directly to the Board) or the Secretary of State. Victims and other third parties only have indirect access to reconsideration. They can write to the Public Protection Casework Section (PPCS) of HM Prison and Probation Service (HMPPS) explaining why they think a decision should be reconsidered. After that, PPCS will assess whether there are grounds to make an application to the Board. It also assesses other provisional release decisions on behalf of the Justice Secretary to see if there is an arguable case for their reconsideration. For victims, the upside of this process is that there is no need to engage legal representation which might be necessary if they were to make an application for judicial review. The downside is that they have no standing of their own to apply. In this, the reconsideration mechanism has much in common with the longstanding Attorney’s General’s Reference Scheme for unduly lenient sentences, where the power of referral also sits with a Minister.
* **Legal challenge:** The legality of reconsideration was challenged unsuccessfully in a judicial review brought by Neil Huxtable, a prisoner serving an indeterminate sentence for public protection (IPP).[[4]](#footnote-4)
* **Assessing reconsideration applications:** The legal test for assessing applications is that used by the Administrative Court for judicial review of tribunal decisions. There is thus a high bar for success. By adopting judicial review standards, the Government rejected a more-readily-met merits test although it left the door open for such a test to be considered in the future. The justification for this approach was to keep the Board’s workload at manageable levels even though it situated reconsideration as a distant cousin to other, more comprehensive, appeal processes, such as those available for sentencing decisions. But, unlike sentencing appeals and judicial review, and as a form of *quid pro quo*, there is no leave requirement for reconsideration applications. Nor is there any other significant incentive for prisoners to think twice before applying. Under the Parole Board Rules 2019, Rule 28(1), the scheme was initially limited to irrationality and procedural unfairness. However, in response to a judicial review case, *R (Dickins)* v *Parole Board*,[[5]](#footnote-5) error of law was added as a third ground by the Parole Board (Amendment) Rules 2022.[[6]](#footnote-6)
* **Has the scheme been successful?** The evidence gathered for this paper suggests that reconsideration, which is backed by the Board, has delivered much of what was expected of it. It was recognised that the scheme would need to be manageable and proportionate. For this reason, the threshold criteria were, rightly, set high. Inevitably, that has meant more applicants use the scheme (in the hope that their cases will be reconsidered) than succeed. Yet the annual grant rate is now approaching 25 per cent which indicates that a previously unmet legal need is being addressed. The main concern is that the mechanism is not as ‘properly protected and distinct’ as the Government had suggested it should be. As we have seen, it was proposed that applications should be reviewed by ‘a separate division’ of the Board[[7]](#footnote-7) but, as things stand, RAP decision-makers are not ringfenced solely for reconsideration work and most also sit on first-instance panels. The danger is that, over time, this will lead to loss of confidence in their ability to make robust decisions regarding their close colleagues. It is arguable that this is less of a risk for judicial members, who are more used to wearing different hats, than for independent members. If so, that provides a further reason to allocate judicial members to RAPs more frequently, and perhaps exclusively.
* **Set aside:** In a statutory change to the *functus* rules, the authority to create the new set aside mechanism was introduced by section 133 of the Police, Crime, Sentencing and Courts Act 2022. But the power itself and the procedures to support it originate from a new Rule 28(A) which was inserted into the Parole Board Rules 2019 by the Parole Board (Amendment) Rules 2022. Coming into force on 21 July 2022, by the end of 2023 111 set aside applications had been submitted to the Board. Most related to male prisoners, with just three (2.7%) involving female prisoners. The goal behind the change was to enhance public protection by creating a way for parole decisions to be retaken when new evidence came to light which suggested prisoners were more dangerous than the Board had assessed them to be.[[8]](#footnote-8)
1. Stephen Shute, ‘Taking Risks, Losing Trust: Worboys and the Culture of the Parole Board’ [2023] Crim LR 26. [↑](#footnote-ref-1)
2. See now Victims and Prisoners Bill. [↑](#footnote-ref-2)
3. *Parole Board Strategy and Business Plan 2023-25*. [↑](#footnote-ref-3)
4. *R (Huxtable)* v *Justice Secretary* [2021] 1 WLR 1569; *R (Huxtable)* v *Justice Secretary* [2022] 1 WLR 813 *per* Haddon-Cave LJ. [↑](#footnote-ref-4)
5. *R (Dickins)* v *Parole Board* [2021] 1 WLR 4126 *per* Stacey J. [↑](#footnote-ref-5)
6. SI 2022/717. [↑](#footnote-ref-6)
7. *Reconsideration of Parole Board decisions* Cm 9612 (2018) 3. [↑](#footnote-ref-7)
8. *Police, Crime, Sentencing and Courts Act 2022: parole and licence conditions factsheet.* [↑](#footnote-ref-8)