

Setting Aside a Decision Guidance

August 2022 (v1.0)

Document History

| Document version | Date of Issue | Revision description |
|------------------|---------------|--|
| 1.0 | 11.08.2022 | New guidance following publication of the Parole Board Rules 2019 (as amended) |
| | | |
| | | |
| | | |
| | | |

CONTENTS

| | | |
|---|---|----|
| 1 | Introduction..... | 4 |
| | <i>Overview of Process</i> | 5 |
| 2 | Eligibility | 6 |
| 3 | Final decisions..... | 6 |
| | <i>Decision Table</i> | 8 |
| 4 | Grounds for setting aside | 11 |
| 5 | Time limits | 11 |
| 6 | Setting aside decisions | 13 |
| 7 | Publication..... | 14 |
| | Annex A rule 28A setting aside a decision | 15 |

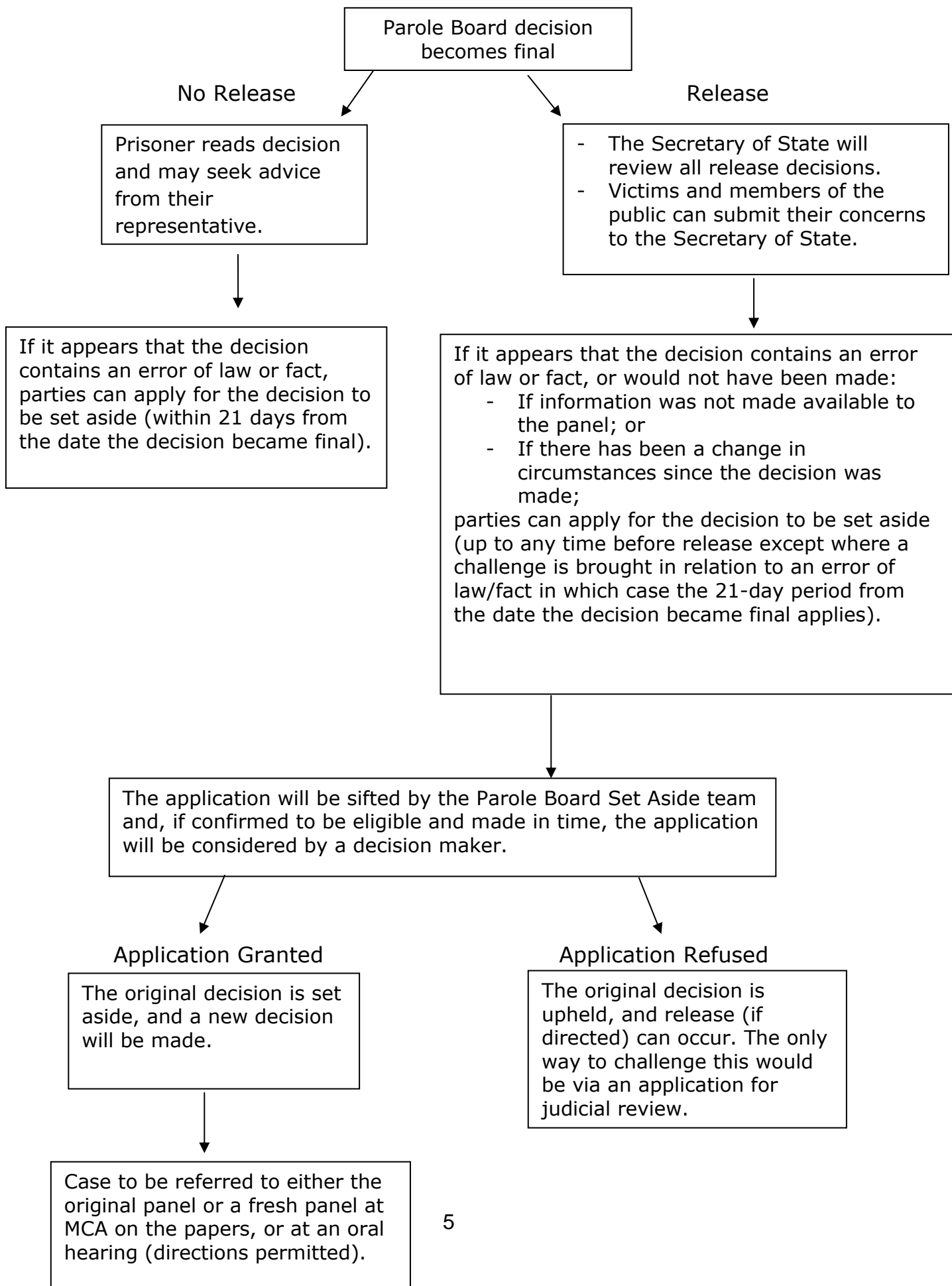
1 Introduction

- 1.1 Following the commencement of section 133 of the Police, Crime, Sentencing and Courts Act 2022 on 28 June 2022, the Board now has the power to set aside a decision (where the criteria and tests have been met). This power is set out in more detail in rule 28A of the Parole Board Rules 2019¹ implemented on 21 July 2022 (see Annex A).
- 1.2 For eligible cases, it allows either party to the proceedings to make an application for a parole decision to be set aside if:
 - It is considered that there has been an error of law or fact; or
 - For release decisions, where new information has come to light that was available at the time but not shared with the panel, or there has been a change in circumstances after the decision was made.
- 1.3 The decision under challenge must be a final decision² and relate to whether the prisoner should be released or not released. A decision regarding a recommendation for open conditions or any other advice is **not eligible for the set aside process**.
- 1.4 Only the parties to the proceedings (Secretary of State and the prisoner) can make an application to set aside a final decision. Victims can only request that the Secretary of State make an application for the decision to be set aside.
- 1.5 The Parole Board can also apply to set aside a decision on its own initiative if one of the circumstances (set out at 1.2 above) is met. Both parties will have the opportunity to make representations where the Board initiates the set aside process. The decision-making process will follow the same process as outlined below.
- 1.6 A process map is set out on the next page.

¹ As amended by the Parole Board (Amendment) Rules 2022

² Not a provisional decision subject to a request for an oral hearing or an application for reconsideration

Overview of Process



2 Eligibility

- 2.1 For a decision to be eligible for the set aside process, the decision must meet the eligibility criteria (detailed below). Unless the relevant eligibility criteria is met, the application will be ineligible.

Decisions

- 2.2 The following decisions **are eligible** for an application to set aside:

- 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.

- 2.3 Recommendations about **transfer to open conditions cannot be set aside**. Only a decision relating to release is eligible for the set aside process. If the Secretary of State referral relates to both release and open conditions, only the decision relating to release would be eligible.

- 2.4 Other **ineligible decisions** include:

- Decisions declining to direct an oral hearing;
- Advice cases;
- Decisions about the termination of an IPP licence; 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 licence conditions).

- 2.5 For a decision to be eligible for the setting aside process it must be a final decision. A final decision can be set aside by a decision maker (set out in 2.6 below) if it is in the interests of justice to do so.

- 2.6 A decision maker will either be a panel appointed under Rule 5(4A) of the Rules, or the original panel who made the decision under challenge if it is delegated to them.

3 Final 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.
- 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;
 - Becomes final if it is not eligible for reconsideration; or
 - Becomes final if an in-time application for reconsideration is made and then refused.

Decisions on the papers under rule 21

- 3.4 If a decision is made following a direction that the case be considered on the papers (under rule 21), the decision is provisional only if it is eligible for reconsideration (namely, a decision about release). If it is not eligible or there is no application for reconsideration received within the 21-day window, the decision is final. The decision also becomes final if an in-time application for reconsideration is made and then rejected.

Decisions at oral hearing stage

- 3.5 Where the panel has considered a case at an oral hearing, their 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 decision then becomes final and a set aside application can be made.
- 3.7 A decision table is set out on the next page.

Decision Table

| Rule | Decision | Time frame | Eligibility |
|-------------|--------------------------------|---|---|
| 19(1)(a) | MCA Decision to release (only) | Provisional subject to 21-day reconsideration window if it is eligible (Rule 19(4)) Decision is final if it is not eligible (Rule 19(5)) | Application to set aside can be made once this decision is final. |
| 19(1)(b) | MCA Decision to refuse release | Provisional subject to: 28 days to request an oral hearing (Rule 20(2)). Possible scenarios: a. If no application for an oral hearing is 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 is 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 is eligible for reconsideration, the decision remains provisional subject to the 21-day reconsideration window (Rule 20(6)(a) and 28) | Application to set aside can be made once this decision is final. |

| Rule | Decision | Time frame | Eligibility |
|-------------|--|--|---|
| 19(1)(c) | MCA decision to direct an OH | Move to next stage decision | Not eligible for set aside |
| 19(2)(a) | MCA Decision – Recommendation to transfer to open conditions | Final: no provision | Not eligible for set aside |
| 19(2)(b) | MCA decision – refuse to recommend transfer to open conditions | Final: no provision | Not eligible for set aside |
| 19(7) | MCA decision: give advice | Final: no provision | Not eligible for set aside |
| 20(5) | Grant of an application for an oral hearing | Move to next stage decision | Not eligible for set aside |
| 20(5) | Refusal of an application for an oral hearing | Decision under rule 19(1)(b) provisional 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 set aside (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)) | Application to set aside can be made once this decision is final. |
| 21(7)(b) | Release directed on papers post MCA | Provisional subject to 21-day reconsideration window if eligible (rule 21(8)) Decision is final if not (rule 21(9)) | Application to set aside can be made once this decision is final. |
| 21(10)(a) | Open conditions recommended on papers post MCA | Final: Rule 21(11) | Not eligible for set aside |
| 21(10)(b) | Open condition not recommended on papers post MCA | Final: Rule 21(11) | Not eligible for set aside |
| 21(11) | Decision on papers post MCA: advice | Final: Rule 21(11) | Not eligible for set aside |

| Rule | Decision | Time frame | Eligibility |
|-------------|--|---|---|
| 25(1)(b) | Oral Hearing – Release refused (only) | Provisional subject to 21-day reconsideration window if eligible (Rule 25(2)) Decision final if not (Rule 25(3)) | Application to set aside can be made once this decision is final. |
| 25(1)(a) | Oral Hearing – Release directed (only) | Provisional subject to 21-day reconsideration window if eligible (Rule 25(2)) Decision final if not (Rule 25(3)) | Application to set aside can be made once this decision is final. |
| 25(4)(a) | Oral Hearing – open conditions recommended | Final: Rule 25(5) | Not eligible for set aside. |
| 25(4)(b) | Oral Hearing – Open conditions not recommended | Final: Rule 25(5) | Not eligible for set aside |
| 25(5) | Oral hearing - advice | Final: Rule 25(5) | Not eligible for set aside |
| 28(8) | Reconsideration application refused | Provisional decision becomes final: Rule 28(8) | Application to set aside can be made once this decision is final. |
| 31(6)(a) | IPP licence – licence terminated | Final ³ | Not eligible for set aside |
| 31(6)(b) | IPP licence – licence amended | Final | Not eligible for set aside |
| 31(6)(c) | IPP licence – application refused | Final ⁴ | Not eligible for set aside |
| 31(6A) | IPP licence – unconditional release directed | Final ⁵ | Not eligible for set aside |

Note – whilst recommendations about open conditions are not eligible to be set aside, 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.

³ This decision will be provisional subject to reconsideration as of 1 September 2022

⁴ This decision will be provisional subject to reconsideration as of 1 September 2022

⁵ This decision will be provisional subject to reconsideration as of 1 September 2022

4 Grounds for setting aside

- 4.1 The grounds for the setting aside process are split into two categories depending on what the decision to be challenged relates to (i.e. a release or no release decision).

Release decision

- 4.2 If the decision under challenge is a release decision, there are three grounds upon which a setting aside application can be made. These are:
- a) **An Error of Law or Fact:** That the direction for release would not have been made but for an error of law or fact;
 - b) **New information:** That the direction for release would not have been made if information that was not available to the panel when the direction was made had been available; and/or
 - c) **Change in circumstances:** That the direction for release would not have been made if the change in circumstances relating to the prisoner had occurred before the direction was given.

No release decision

- 4.3 If the decision under challenge is a no release decision, there is one ground upon which a setting aside application can be made. This is:
- a) **An Error of Law or Fact:** That a decision made by a panel not to direct the release of a prisoner would not have been made but for an error of law or fact.
- 4.4 Once an application for setting aside is received, the other party will have 7 days to submit representations in response to that application. The 7-day period commences from the date the other party is served with the setting aside application. If the Board makes an application on its own initiative, both parties will have 7 days to submit representations.

5 Time limits

- 5.1 As mentioned above, in cases where the application to set aside a release/no release decision relates to there having been an error of law or fact, the time limit for filing an application is 21 days after the decision under challenge becomes final.
- 5.2 The time limit for challenging a release decision on the basis of there being new information, or where there has been a change in circumstances, is any time up until the point of release. An application for a decision to be set aside cannot be made where the prisoner has already been released.

Amending time limits

- 5.3 Panels can utilise the power set in Rule 9 to extend or reduce the time set by Rule 28A for submitting an application to set aside a decision. Rule 9 of the Parole Board Rules 2019 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. Case specific advice is available via the Practice Advisor.

Extension and reduction requests

- 5.4 **Requests to extend or reduce the time limit can only be made where the 21-day period applies - namely on a challenge concerning an error of law/fact.** Any extension/reduction request must be received within the 21-day period. Any such request received after the 21-day period will not be considered.
- 5.5 Requests that are received within the 21-day window will be sent 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. Any correspondence relating to extension or reduction requests should be copied to the Setting Aside inbox at settingaside@paroleboard.gov.uk.
- 5.6 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?
- 5.7 In relation to requests to extend the time limit from the Secretary of State, the prisoner will continue to be detained for as long as it takes to determine the application to set aside the decision under challenge, and so any extension of the time limit will prolong their detention. Currently, the practice is that extension requests which are granted are set for a period of up to 7 days.

- 5.8 However, the period of extension to which a panel may grant an application is purely at their discretion. Therefore, a period longer than the 7 days may be granted. Please note, for those prisoners serving a determinate sentence, they cannot be held beyond their Sentence Expiry Date.
- 5.9 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, and identify any potential grounds to request that the Secretary of State make an application to set aside the decision. 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 setting aside, or victims have indicated that they do not want to (or otherwise have no objection).
- 5.10 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 to consider.
- 5.11 All parties are to be informed of the extension/reduction decision where applicable.

6 Setting aside decisions

- 6.1 If an application to set aside a decision has been refused, the decision under challenge remains final. The only way in which to challenge that decision would be via judicial review.
- 6.2 If an application to set aside a decision has been granted, the decision-maker can direct:
- a) a further oral hearing or that a decision is to be made on the papers;
and
 - b) a decision is to be made by a new panel or the original panel.
- 6.3 Where an application to set aside a decision to release has been granted by the decision-maker on the ground that there is new information or a change in circumstances, the setting aside panel can refer the matter back to the original panel. The setting aside panel can direct that the original panel consider the new information and make a new decision in relation to that information.

7 Publication

- 7.1 In line with the Board's transparency agenda, all setting aside decisions will be published onto BAILII⁶.

Details and redaction

- 7.2 Before decisions are published onto BAILII, they will be redacted so that there is as little identifiable information contained within the decision as possible (e.g. redacting prison numbers, first names etc).

- 7.3 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.

- 7.4 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.
- 7.5 We may redact names in the case of a vulnerable prisoner, such as a child, or a prisoner who is transgender.
- 7.6 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 redactions to the text are required, the setting aside 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.
- 7.7 Please note, the author of the decision will have their name published at the end of the decision.

Decisions to set aside

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

⁶ [BAILII - The Parole Board for England and Wales](#)

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

Rule 28A Setting aside final decisions

- (1) *The Board may set aside a final decision made under rule 19(1)(a) or (b), 21(7) or 25(1) –*
- (a) on application by a party; or*
 - (b) on initiation by the Board Chair.*
- (2) *An application or initiation under paragraph (1)(a) or (b) must be considered on the papers by a decision maker.*
- (3) *A final decision may be set aside under paragraph (1) by a decision maker if–*
- (a) it is in the interests of justice to do so; and*
 - (b) one or more of the conditions in paragraph (4) are satisfied.*
- (4) *The conditions are–*
- (a) the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of law or fact;*
 - (b) the decision maker is satisfied that a direction given by the Board for the release of a prisoner would not have been given if–*
 - (i) information that was not available to the Board when the direction was given had been so available, or*
 - (ii) a change in circumstances relating to the prisoner that occurred after the direction was given, had occurred before it was given.*
- (5) *An application or initiation to set aside a decision under paragraph (1)(a) or (b) must be made–*
- (a) within 21 days of the decision; or*
 - (b) if the application or initiation relies on a condition in paragraph (4)(b), before the prisoner is released.*
- (6) *Where an application is made under paragraph (1)(a)–*
- (a) the party who made the application must serve the application and any representations in support upon the Board and the other party;*
 - (b) the Secretary of State must serve all relevant information and reports upon the Board and the other party; and*
 - (c) the other party may make any representations in reply, and those representations must be provided to the Board and the party who made the application within 7 days of service of the application.*
- (7) *Where an initiation is made under paragraph (1)(b)–*
- (a) the Board must notify both parties of the initiation by the Board chair and serve any reasons in support of the initiation upon the parties;*
 - (b) the Secretary of State must serve all relevant information and reports upon the Board and the other party; and*
 - (c) the parties may make any representations in reply, and those representations must be provided to the Board and the other party within 7 days of service of the initiation.*

(8) Where the decision maker directs that a final decision should be set aside, they must also direct that the case should be–

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

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

(9) The decision of the decision maker under paragraph (3) must include the reasons for that decision.

(10) Any requirement on the Secretary of State to give effect to a Parole Board direction to release a prisoner under Chapter 2 of Part 2 of the 1997 Act or Chapter 6 of Part 12 of the 2003 Act, is suspended when an application is made under paragraph (1)(a) or (b), pending the decision under paragraph (3).

(11) In this rule, “decision maker” means–

(a) a panel appointed under rule 5(4A) to consider the application; unless

(b) one or more grounds of the application related to paragraph (4)(b) of this rule apply and the panel appointed under rule 5(4A) delegates the role of decision maker to the chair of the panel who made the decision which is sought to be set aside.