

[2023] PBRA 211

## Application for Reconsideration by Griggs

### Application

1. This is an application (the Application) by Griggs (the Applicant) for reconsideration of a decision of a single member panel (the Panel) dated 8 November 2023 not to direct release (the Decision). The Decision followed on from a Member Case Assessment made on 6 November 2023 in circumstances outlined below.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.
3. I have considered the Application on the papers. These consist of the Applicant's dossier now running to 648 pages (including the index and the Decision and written representations to the Panel from the Applicant's legal representatives; the dossier at the time of the Decision consisted of 626 pages). I have also considered further detailed representations from the same legal representatives dated 29 November 2023 in support of the Application (the Representations). In an email dated 4 December 2023 the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) indicated that it did not wish to offer any representations in response to the Application.

### Background

4. The Applicant is now aged 59. He was sentenced to life imprisonment with a minimum tariff of 3 years, following a jury trial consequent on a not guilty plea, on 2 May 2003, in respect of a robbery committed in November 2001 (the index offence) when aged 37 (he was aged 38 when sentenced). His tariff expiry date was 2 May 2006. Following a parole board hearing he was first released on 8 August 2018 (having by then served a little over 15 years in custody) but recalled on 14 April 2022 following poor behaviour and non-compliance with his licence conditions. The Applicant was returned to custody on 19 April 2022.
5. As carefully noted by the Panel, the Applicant had, by the time he was sentenced for the index offence, a long history of recorded offences starting at the age of 15, amounting in the region of 72 convictions/TICs/and cautions including convictions for dishonesty, theft, forgery, using a false instrument, conspiracy to commit robbery, robbery, burglary, assault, grievous bodily harm, wounding, possession of



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firearms and shotguns, reckless driving, driving under the influence of alcohol, taking a conveyance without authority and drugs related matters.

6. The index offence involved the entry of a city-centre jewellery shop wearing a balaclava and carrying a knife during which the Applicant assaulted the shop manager, threatened others in the shop and stole jewellery valued at £3850. As noted by the Trial Judge and as recorded by the Panel, the index offence demonstrated a continuation of a pattern of serious offending indicating a continuing risk of serious harm to the public despite previous, significant, court interventions.
7. Following his release in 2018, the Applicant continued the pattern of offending: he was convicted in May 2021 and again in June 2022 for offences of driving with excess alcohol and on the latter occasion also of driving whilst disqualified. He had also tested positive for cocaine in November 2021. In September 2021 he was involved in an incident of alleged domestic violence with his ex-partner to which the police were called.
8. Following his recall, the PPCS referred the matter to the Parole Board in the usual way under s32 Crime (Sentences) Act 1997 on 10 May 2022.
9. It then emerged that the Applicant was the subject of an active and ongoing police complex investigation into the disappearance of an individual which subsequently turned into a murder enquiry in connection with which (as noted by the Panel) the police consider the Applicant to be "*the main Key suspect*".
10. Having regard to the ongoing police investigation, hearings of the Applicant's review by the Parole Board were adjourned on three occasions in March, May, and October 2023, in each case to enable further information to be provided as to the progress of the continuing police investigation. In Panel Chair Directions in March 2023, for example, it was clear that the Panel clearly understood and appreciated the seriousness and potential sensitivities of the ongoing investigations, as well as the potential impact on the Applicant (in terms of risk assessment) when it directed that "*the police should provide, so far as possible, any information relating to the enquiry that may assist the Panel in obtaining a full picture of risks that [the Applicant] may present in the community*".
11. It further appeared that although the Applicant has been interviewed by the police in relation to this line of enquiry, he has, so far, at no stage been charged with any offence in connection with it. Little information came from the police beyond a general indication of the background to the investigation including the provision of information on the lines previously summarised, an indication that the purpose of the investigation was to secure evidence, that the investigation was complex involving specialist teams, and that as information came to light, further investigations might be necessary, and that the Applicant remained a suspect. Indications were also given that the time estimate for conclusion of the enquiries was initially by the end of February 2024, then by March 2024, and later seemingly extended to April 2024, but with no guarantee of conclusion even by then. There was no express suggestion that information could not be provided on grounds of sensitivity or security (implicitly referring to rule 17 of the Parole Board Rules), rather that the provision of further or more detailed information was declined for



operational reasons to maintain the integrity of the investigation. All of this was duly noted by the Panel in the Decision.

12. Faced with this impasse, as is apparent from the Decision, the Panel considered it was inappropriate to adjourn the matter still further, proposed to conclude the matter on the papers and invited representations in that respect. The Respondent made no representations. The Applicant's legal representatives objected to a determination on the papers and requested the matter should be adjourned to the next available date after March 2024 and that in the meantime the Panel should request further information from the police on the status of the enquiry and the Applicant's specific involvement. It could, it was submitted on his behalf, be inferred that there was currently, on the basis of the material supplied, no evidence linking the Applicant with the disappearance of the individual in question.
13. Whilst no oral hearing was specifically requested it seems reasonable, in my judgment, to infer or assume that since the Applicant was objecting to a determination on the papers, his request for an adjournment to March 2024 was on the basis there would or should then be an oral hearing.
14. The Panel (consisting, as mentioned, of a single member) declined to accede to the Applicant's representations. It was noted that the referral to the Parole Board had been made on 10 May 2022, that there had been the previous adjournments mentioned above, that the complex enquiry was not likely to be concluded for a minimum of a further 5 months (i.e. to April 2024), and even that time estimate could not be guaranteed, and that the Panel owed a responsibility to review the Applicant's case in a timely manner. The Community Offender Manager was aware of the investigation but had to base her assessment solely on the basis of the Applicant's progress in custody. The Panel further noted that the outcome of the investigations into a suspected murder were so serious as to remain relevant to, and potentially capable of impacting on any assessment of risk as regards the Applicant. Accordingly, it was accepted that the Panel was obliged to enquire into it but was not yet able to receive the results of the ongoing enquiry and hence was not in a position to make any findings of fact with regard to the Applicant's involvement in and with investigation. That position would not, the Panel further concluded, be assisted by taking evidence solely from the Applicant, given the status of the police investigation.
15. In these circumstances the Panel did not consider it would be appropriate to adjourn the case further and directed the case should be decided on the papers in accordance with rule 21(4)(a) of the Parole Board Rules.
16. The Panel then concluded its review on the papers. It conducted a detailed analysis of the risk assessment relevant to the Applicant's past, present and future. It noted his convictions indicated an entrenched pattern of aggressive and violent offending in the past, a willing to be reckless of the safety of others. It noted a lack of information regarding work he may have completed in custody, that his risk of reoffending had not lowered, that he still disregarded external controls and had developed few, if any, internal controls. The Panel could see little or no change in his attitudes contributing to his offending behaviour. His risk assessment included presenting in the community as a high level of risk of serious harm to the public and to known adults and while, pending the outcome of the ongoing police enquiry,



the risk assessment could not be fully determined, the Panel accepted the assessed levels of risk as being the minimum levels he would now present and could not, therefore, be satisfied that the risk management plan proposed would be suited to the risks he currently presented as set out in the dossier.

17. In conclusion, therefore, the Panel concluded that the Applicant's recall had been appropriate *"because there was a clear, and well evidenced breach of licence conditions which the Panel concluded was an intentional breach"* and that because of the seriousness of the police investigation, its outcome could present a very significant impact on the Panel's assessment of risk which the Panel would be bound to consider. Accordingly on the basis of the information to hand, and with issues of risk unresolved, the Panel could not be satisfied that it was no longer necessary for the Applicant to be confined for the protection of the public and therefore there would be no direction for his release.
18. Nevertheless, the Panel also recommended that the Secretary of State should continue to monitor the case and consider its re-referral should circumstances change. Directions to assist a future panel as to likely relevant information were also appended, including a fresh assessment in light of changes to circumstances.

### **Request for reconsideration**

19. The application for reconsideration was received on 29 November 2023.
20. The stated grounds for seeking a reconsideration are as follows: irrationality, procedural unfairness, and error of law. In substance:
  - a. As to irrationality: the Parole Board (i.e. the Panel) acted irrationally in that it failed to press the police to provide a full picture of the investigation. If there had been any objection to this course from the police, then rule 17 (providing for withholding of information in prescribed circumstances) could have been invoked.
  - b. As to procedural unfairness: the Board acted unfairly in failing to press the police for the full picture, failing to convene an oral hearing to enable the Applicant to give his response to the matters subject to the police investigations and to address the risk factors, and thus failed to obtain and acquaint itself with all relevant material and information sufficient to discharge its duties in a proper manner under s 239 Criminal Justice Act 2003 (CJA 2003) or the Parole Board Rules.
  - c. As to error of law: The failures set out above amounted to an error of law (in that the Board misdirected itself in failing to discharge its duties as mentioned by not pressing the police for the full picture).
21. It will be readily appreciated that these three grounds overlap and essentially concern the alleged failure of the Panel to seek, obtain and ascertain the fullest details of the on-going police enquiries as regards the Applicant's alleged involvement (if any) in the disappearance and possible murder referred to above and his response thereto.
22. The Representations were set out in a lengthy and helpful document. In them, without wishing any discourtesy, the Applicant's legal advisors submitted, in



substance, that the Applicant was now suitable for release, that the Panel erred in law in that it failed in its basic duty to take reasonable steps to acquaint itself with relevant material to enable it to weigh all such material by anxious and rigorous scrutiny, that it was unwilling to scrutinise the police when in fairness it should have done, and made no effort to inquire what established facts arising out of the investigation affected the risk, that there should have been an oral hearing to allow the Applicant to be questioned on the entire spectrum of his risk factors and his response to the investigation. If material so obtained was objected to by the police or Secretary of State it could have been the subject of a rule 17 application, but this was never invoked. Such failures, it is submitted, resulted in an irrational decision, and proceeded on a flawed and unfair basis being tainted by insufficient inquiry, following the failure of the police to provide "a full picture".

### Current parole review

23. The Panel hearing was the Applicant's first review following recall. I have, since it forms an important part of the background to this case, summarised events and conclusions with regard to this review above.

### The Relevant Legal Framework

24. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an Imprisonment for Public Protection licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
25. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)) (relevant to this case as a life sentence), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)), and serious terrorism sentences (rule 28(2)(d)).
26. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.
27. Parole Board panel hearings, although acting judicially and independent of the executive, and whether oral or on paper, are essentially inquisitorial in nature. The task of the panel is to carry out a risk assessment and determine the level of risk of the prisoner in question. A direction for release will not be given unless the panel is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (see, for example, in relation to life sentence prisoners s 28(6) of the Crime (Sentences) Act 1997). The effect, of course, which must always be borne in mind, is the impact of a decision to refuse release on the prisoner, namely that the prisoner will remain confined in custody under the sentence of the court unless the Board directs his release.



28. In carrying out its duties, the Board has a wide panoply of powers. For example, by s 239(3) and (4) of the CJA 2003 the Board must consider any documents provided to it by the Secretary of State and also any other oral or written information. Under rule 24 of the Parole Board Rules, a panel may produce or receive any document or information whether or not it would be admissible in a court of law (see rule 24(6)). Further, no person is compelled to give any evidence or produce any document which they could not be compelled to give or produce on the trial of an action (see rule 24(7)).
29. Under rule 6 a panel may give directions in particular relating to the service of information or reports, the submission of evidence, or the attendance of witnesses (see rule 4(3)). Such power does not extend to a direction relating to withholding information which is governed by rule 17 (see rule 6(4)). Under rule 17 the Secretary of State or any third party authorised by the Secretary of State may apply to withhold information from the prisoner, or from the prisoner and their representatives in prescribed circumstances. It will be noted that the Board does not have the power itself to initiate such an application. Moreover, as was noted in **Pearce [2023] UKSC 13** the Board's powers to gather information (noted above) are limited. Whilst it retains a residual power to ask the High Court to issue a witness summons (not a procedure used lightly or often), it lacks compulsive powers (see paras. 13, 76).
30. In **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. The Court did not decide that there should always be an oral hearing but said there should if fairness to the prisoner required one. An oral hearing was likely to be necessary where there was any doubt about whether to direct one, where there was a dispute on the facts, where the panel needed to see and hear from the prisoner in order properly to assess risk and where necessary to allow the prisoner properly to put his case. The prisoner had a legitimate interest in being able to participate in a decision with important implications for him. It was not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.
31. **Pearce** further emphasised the necessity of bearing in mind the potential injustice to, and impact on the prisoner of refusing release (see above). At para 75, the Court said this in the context of dealing with allegations:
- "In [carrying out its assessment of risk] the Board must as a matter of procedural fairness give the prisoner the opportunity to challenge the relevant evidence or information. If the allegation is a disputed issue of fact which is likely to be material to the outcome of the risk assessment or if issues of explanation or mitigation of accepted facts are likely to arise, the Board may, if it is reasonably practicable to do so, in compliance with its duty of procedural fairness, have to hold an oral hearing to receive oral evidence and allow cross-examination and oral submissions, before reaching a conclusion as to the truth of the allegation ..."* [my emphasis]
32. In short, bearing the above in mind, the panel has to do its best on the material before it, to evaluate and assess the relevant risks. These are, indeed, matters which involve difficult and anxious judgment.



*Irrationality*

33. In **R (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."*

34. This test was set out by 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 Parole 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'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.
35. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

*Procedural unfairness*

36. I have referred above to some aspects of the requirements for procedural fairness. More generally, 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.
37. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:
- (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.
38. The overriding objective is, of course, to ensure that the Applicant's case was dealt with justly.

*Other*

39. Of particular relevance in this case is the principle that omitting to put information before a panel is not necessarily a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before



the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

40. It will, however, be appreciated from the foregoing that in this case the Applicant is arguing that information was and should have been made available unless properly withheld following an application under rule 17 or should at least have had an opportunity at an oral hearing to enable his response to the risk factors and the police investigations and enquiries to be considered.

### The reply on behalf of the Respondent

41. I have mentioned above that the PPCS on behalf of the Respondent declined to submit representations in response to the Application.

### Discussion

42. Part of the problem for the Panel, in this case, was that thus far the police investigations had resulted in no specific allegations or charges against the Applicant. At its highest, the material and information supplied by the police indicated why the police believed the Applicant to be a suspect and that he remained the main key suspect. The purpose of the enquiry was to secure evidence. So far, no charges have been made or laid against the Applicant. The provision of further information was declined on the basis of operational reasons (above).
43. As the Panel rightly noted there was no obligation on the police to supply details of the ongoing investigation. Short of considering applying to the High Court for a witness summons, the Panel had no powers to compel the production of further information. I do not, therefore, accept the Applicant's submissions so far as suggesting the Panel should have scrutinised the police and required them to provide further material. He had not been charged, no specific allegations had been made against him and, according to the police, no evidence had materialised linking the Applicant to the disappearance of the individual in question. Nor could the Panel of its own motion have initiated a rule 17 application. Indeed, the Panel had, far from being unwilling, by repeated requests and adjournments over a lengthy period, done, in my judgment, all that it reasonably could do to ascertain the state of the police enquiries. In short, the Panel did its best to obtain a "full picture" over a lengthy period. In my judgment there was nothing unfair, irrational, or amounting to an error in law of the steps taken by the Panel to ascertain, as far as possible, the fullest picture it could obtain in the circumstances.
44. In these circumstances, the Panel, again rightly in my judgment, considered the need to decide what was to be done with the current review in fairness to the Applicant. Matters could not go on indefinitely, particularly bearing in mind the time scale given by the police for conclusion of their enquiries could not be guaranteed as having concluded by March 2024. It proposed dealing with the matter on paper,





but rightly, again, gave the Applicant the opportunity of making representations on the matter (which opportunity was taken – above).

45. As it seems to me, the real issues in this case are whether, in the circumstances then prevailing, the Panel should either have adjourned the matter as asked to beyond March 2024, or directed an oral hearing there and then.
46. The Panel rightly had in mind the fact that the investigation appeared to involve a generalised allegation of murder was so serious in respect of which the Applicant was the key suspect as to remain relevant to his assessment of risk. The Panel also noted that it was not possible to say whether or not evidence to support a charge existed. It plainly had in mind that no such allegation had been made against the Applicant. Indeed, it was a central part of the Applicant’s representations that there was no evidence linking him with the disappearance of the individual in question.
47. Clearly no further, significant information, was going to be obtained at that stage. Attendance of the police could not be compelled, nor could they be forced to divulge further information which the Panel did not already have. There was nothing then to indicate that further information was then available; on the contrary, it was not. Moreover, the Applicant’s presence and evidence was considered unlikely to assist in this respect. The Panel had well in mind the potential injustice to the Applicant in continued adjournments, as well as the potential impact on him of the conclusions of the police enquiries whenever that happened. In these circumstances I find nothing irrational or unfair in the Panel resolving that a decision had to be made on the material before it but bearing in mind the potential impact of the police investigation on the Applicant’s risk assessment. Matters had been adjourned long enough.
48. A much more difficult and anxious judgment, to my mind, was whether an oral hearing should then and there have been directed. It is clear that the Panel had copious material before it as to the circumstances giving rise to the Applicant’s recall, as well as his long history of offending and his current present behaviour and attitudes, as previously set out.
49. On the basis of the material before it, the Panel concluded as follows:

*“On the basis of the information to hand, and with the issues of risk unresolved the Panel could not be satisfied that it is no longer necessary for [the Applicant] to be confined for the protection of the public, and therefore, for the purposes of public protection the panel made no direction for his release.”*

50. It is difficult to see that there was anything unfair or irrational about the decision of the Panel not to release the Applicant based on the material before it. The Panel found the recall was appropriate, accepted the assessed levels of risk as being the minimum levels that the Applicant would now present. There was more than enough material to justify that conclusion and the decision not to release.
51. Further, as noted, the Panel expressly considered that the position would not be assisted by taking evidence solely from the Applicant, given the status of the police investigation. From the focus of the Applicant’s representative’s submissions in



support of the Application one cannot but help thinking it was hoped that an oral hearing might present the opportunity for a fishing expedition, to ascertain the nature, extent, and outcome of the police enquiries thus far. Given the Panel's conclusions as to risk assessment based on the material it had, it is difficult to see how an unfavourable outcome of the police investigations from the Applicant's point of view could only have resulted in, at the very least, an increased or heightened level of risk assessment. A favourable conclusion would simply leave the Panel to do the best it could in the light of a decision not to charge the Applicant. It would still have to carry out the risk evaluation exercise, albeit when the result was known, undoubtedly at that stage with the benefit of hearing from the Applicant.

52. Nothing in **Osborn** or **Pearce** compels the direction of an oral hearing in every case (see above, paras. 30-31). It is a question of judgment in all the circumstances of the case. Other panels might have, particularly in light of **Osborn** and **Pearce** have directed an oral hearing, but, in my judgment, given the material already to hand in the dossier, the lack of further information coming from the police to assist such an imminent oral hearing, and given that the Applicant was given ample opportunity of making representations, the decision by this Panel to proceed on the papers and to reach the conclusion it did was not so irrational, unfair or unreasonable as to say it was wrong. The Panel bore in mind the unconcluded police investigations, the need for a timely review of the Applicant's case, and the potential impact of those investigations on the Applicant and did the best it could. The Panel also did its best to preserve the position for the Applicant by carefully recommending that the Secretary of State should continue to monitor the case and consider re-referral should circumstances change.

## Decision

53. Accordingly, for the reasons set out above, the application for reconsideration is therefore refused.

**HH Roger Kaye KC**  
**19 December 2023**

