

[2019] PBRA 12

Application for Reconsideration by Bailey

Application

1. This is an application by Bailey (the Applicant) for reconsideration of a decision made by a panel of the Parole Board on the 29 July 2019. The application is made by his solicitors on the basis that the decision by the panel not to release the Applicant (but to make a recommendation for the Applicant to be moved to open conditions) was procedurally unfair as set out in written submissions dated the 14 August 2019.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis that the decision is (a) irrational or that it is (b) procedurally unfair. It is the latter ground upon which the Applicant seeks to rely.

Background

3. In September 2000 the applicant was sentenced, after trial, to a number of concurrent life terms for a series of robberies committed between November 1997 and February 1999, on his own and in possession of an imitation firearm.
4. In 2018 a panel of the Parole Board directed the Applicant's release on licence. In February 2019 he was recalled as a result of an incident caught in part on the CCTV of the hostel in which he was then living. He said he could not remember the incident, which included smashing up another resident's room, but he did not deny that he must have done this, admitting that shortly before the incident he had relapsed into drug and alcohol misuse.

Request for Reconsideration

5. In pursuing this application and the contention that the Board's decision is "*procedurally unfair*" his solicitors rely on a number of matters which have, they submit, been given little or no consideration, or is misunderstood, leading to the conclusion that the decision made was "*flawed*".

Current parole review

6. On the basis of the recall reports the Applicant's risk was deemed to have escalated to the point of being unmanageable not only because of the incident evidenced by CCTV but also because no alternative accommodation could be found for him.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

7. The post recall report suggested the incident was coincident with the anniversary of the death of the Applicant's brother might have led to what was said to be "out of character" behaviour. Around the end of January 2019, preparatory work with the Applicant's forensic social worker around historical difficulties in managing emotions had begun, with the compilation of a timeline to be used as the basis for counselling. The Applicant told his OS that composing the timeline with the social worker in meetings held in a café in public had contributed to the sudden relapse into misusing alcohol and taking drugs.
8. On a full risk of harm analysis, the Applicant's most recent assessment of risks and their origin indicated that he presented as a high risk of serious harm to public, based on the very rapid decline in his behaviour leading to recall, although assessments for risk of re-offending were put as "low" and medium.
9. The dossier represents the primary material upon which the panel came to consider the Applicant's case. However, it is but part of the material on which that decision would come to be made because of course the panel heard from both his Offender Supervisor (OS) and his Offender Manager (OM), who both continued to support release, and most importantly it heard from the Applicant himself. Appropriately, in a case where there was important evidence from a psychiatrist to consider, the three member panel included a psychiatrist member of the Board.
10. The panel correctly set out in its decision letter dated the 29 July 2019 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.
11. The fact that Rule 28 of the Parole Board Rules 2019 uses the same wording for the exercise of Judicial Review as used in the High Court indicates that the same test for the assessment of "procedural unfairness" (as for "irrationality") as would be applied in the High Court should be applied here (and should be applied without qualification). In summary an applicant seeking to complain of procedural unfairness under Rule 28 must satisfy the reviewer that express procedures laid down by law were not followed in the making of the relevant decision; and/or that they were not given a fair hearing; and/or they were not properly informed of the case against them; and/or they were prevented from putting their case properly; and/or that the panel was not impartial.
12. These issues (which focus on how the decision was made) are entirely separate to the issue of "irrationality" which focusses on the actual decision made, for which the test is "whether the ... 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". For such a conclusion, the Applicant's legal representatives have not sought to argue.

Discussion

13. None of the submissions made identify any procedural irregularity by reference to the Parole Board Rules. The decision letter makes clear that the three principal witnesses most able to assist the panel on the issue of risk were present and gave



evidence, the most important of these being the Applicant. Although it was intended that the prison psychiatrist should give evidence to the panel, he was unavailable and the Applicant agreed that the hearing should proceed without him.

14. Absent such a strictly procedural issue it is obviously more difficult to identify the basis for, and thus to advance, a claim to "*procedural irregularity*". It also seems to me to be important that care is taken not to confuse a submission or submissions to the effect that undue emphasis has been placed by a panel in its decision making on something which to others may be less important or even irrelevant or is not directly supported by the evidence - all of which matters would conceivably be of more relevance to a complaint of irrationality rather than with procedural irregularity (if they could be sustained).
15. Turning to the specific matters raised, the first complaint is that the OM's evidence - that she had not seen the relevant CCTV "*due to other individuals being present*" - is said to undermine the concession in her evidence that if someone *had been* in the room during the incident there might have been a *risk* of violence to that person. It is said that this confirms there were other individuals present at the time of the incident and the Applicant was not violent to any of them.
16. For my part I am not sure this is necessarily the right interpretation of what the OM said and whether all she meant was that she was not then able to watch the CCTV because of the presence of others - rather than an explanation of what it showed. However, the alternative proposition is that the supposition of a member of the panel that the Applicant *might* have caused violence to someone is questionable given there are other possibilities for what might have happened if someone had been there, and this seemingly *was* "*crucial to their assessment of risk*". I am not sure that such a complaint can in fact be sustained either in terms of it not being a matter relevant to the issues the panel had to consider or that a reading of the whole of the narrative within this section of the report identifies that the panel's concern about what might have happened had someone been present was *crucial* in the way described. It is difficult to conclude that the panel was not entitled to review reasonable possibilities and take them into account in assessing risk.
17. The next issue taken is that in making the observation that the Applicant had not received work addressing his difficulties in managing emotions since his release from prison, which is factually correct, the panel in some way placed undue emphasis on this and misunderstood what had actually been undertaken with the Applicant at that stage. All that was being done by the panel in the passage referred to was to summarise what the psychiatrist had said in his report, in the course of reviewing all the evidence it had heard. However, the part of the summary of the Applicant's OM's evidence, dealt with two paragraphs earlier shows that the panel had correctly understood that the work which had been undertaken with the Applicant in February 2019 had not proceeded to in depth work. It is also clear from the submissions made, and from the contents of the decision letter itself, that any complaints about where that timeline work was undertaken were rehearsed with both the professional witnesses in the course of their evidence. The specific complaints made here cannot be sustained.



18. The next criticism is that the panel concluded that there were no warning signs that risk was escalating when the OM suggested that the relapse was attributable to the work he had been doing with the social worker. These submissions seem to me to confuse a possible *explanation* for the relapse with whether there was a *warning* that it might be about to happen, and I consider on that with which I have been provided that the panel was entitled to conclude that there had been no warning signs given of what subsequently and suddenly occurred.
19. The remainder of the passage complains of points that are clearly valuable to the Applicant's case but which the panel in its discretion may not have valued as much. What is clear, though, is that the panel were made fully aware of them. The fact that not every point made on the Applicant's behalf may have been addressed in the decision letter does not mean either that the point was not considered or, more importantly, that there has been some procedural unfairness.
20. The penultimate complaint relates to a qualification which the panel appears to have made regarding the Applicant's acceptance of responsibility for the incident that triggered his recall. On the evidence as summarised by the panel in the decision letter I am not persuaded that this is a conclusion they could not reasonably have reached, but even I were so persuaded that would not amount to "*procedural unfairness*". In fact, I consider that because the Applicant could only venture an explanation for *why* he had relapsed, rather than giving an explanation as to *why* he *then* behaved as he did, I do not consider a conclusion that the Applicant accepted *limited* responsibility for his behaviour is an observation the panel were not entitled to reach. The concept of responsibility is something which goes further than not disputing one's actions.
21. The final particularised complaint is that the panel misrepresented the evidence that was given about the work, and made an assumption for which there was no evidence about what work the Applicant had done. However, even if the latter is correct, and might have been something that the panel should have explored, I do not think this affects the overall concern expressed by the panel, which clearly guided their decision not to release the Applicant, concerning "*the fragility of [his] emotional management skills*". If it be the case that the Applicant had not discussed the details of this at any time throughout his sentence, this would not undermine the concerns of the panel. Indeed, it might potentially reinforce them.
22. The final general complaint is that the decision of the panel was effectively against the weight of the evidence. Whilst I agree that on the face of the contents of the dossier that there was a strong case for release, and a different panel might have reached a different conclusion about it, ultimately the panel was not confident that the circumstances of the relapse were completely explained by an exceptional set of circumstances (as suggested by and for the Applicant), or that they did not reveal underlying difficulties arising from past experiences which have not been adequately addressed, or that the Applicant yet possesses the personal mechanisms necessary to be drug free and to control impulses that have a connection with his risk factors. To some extent such a conclusion was supported by the fact that following recall it was intended some further work should be carried out which has never happened. The suddenness of relapse was also reasonably capable of reinforcing the concern that because of past unwillingness



to be open with others, the Applicant was unable to share his difficulties with anyone before things went wrong. In the circumstances, the panel was entitled to come to the conclusion it did on the evidence that was before it.

Decision

23. For the reasons I have given, I do not consider that the decision was procedurally unfair (or indeed illogical) and accordingly the application for reconsideration is refused.

Martin Beddoe
12 September 2019



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885



INVESTORS
IN PEOPLE | Bronze