[2019] PBRA 47

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Application for Reconsideration by Lomax

Application

1. This is an application by Lomax (the Applicant) for reconsideration of a decision of an oral panel hearing dated the 30 September 2019 not to direct his release or recommend open conditions.

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 (b) it is procedurally unfair.

Background

3. On 19 February 2019, the Applicant was sentenced to Imprisonment for Public Protection with a minimum period to serve of two years for the offence of having a firearm with intent to commit an indictable offence. That minimum period expired on 19 February 2011.

Request for Reconsideration

4. The application for reconsideration was received on the 15 October 2019. The grounds for saying that the decision was irrational are that *"It is unclear from the decision letter as to whether the Panel have followed their own guidance on allegations and whether a finding of fact was made; it is unclear as to whether a formal finding of fact was made as to the Section 4 Public Order offence or the suggestion of criminal damage"*.

5. The grounds for alleging that the decision was procedurally unfair were *"that there are a number of errors contained within the decision letter which amount to procedural unfairness; that the Parole Board have failed to properly consider and apply the evidence; there is no specific reference by the Panel in their decision letter as to how they believe the legal threshold has been met (balance of probabilities); the Panel disregarded/failed to consider the new evidence that was provided at the oral hearing and failed to give proper consideration to that evidence in their conclusion; that the panel made an error in their decision letter by referring to an adjudication as not known when in fact it was set out in the dossier."*

Current parole review

6. The hearing originally commenced on the 9 January 2019 but was adjourned to await the outcome of a police investigation and, later, for the professional witnesses to update their reports.

7. The panel consisted of three members including a psychologist. It heard evidence from the Applicant's Offender Supervisor (OS) from June 2018, a previous Offender Supervisor, a forensic Psychologist for the Prison Service, a Clinical Psychologist, instructed by the Applicant's solicitors, the Offender Manager (OM) from May 2019 and the Applicant.

The Relevant Law

8. No authorities have been cited on behalf of the Applicant, but I bear in mind the decision of the Court of Appeal in **Oyston [2000] PLR 45**, where in his judgment at paragraph 47 Lord Bingham said: "It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."

Discussion

9. The solicitors for the Applicant have set out the grounds for reconsideration in rather more detail in their written representations. I will try to deal with the various points in the order they are set out in those representations. The basis for the allegation of irrationality depends on an incident where the Applicant's activities whilst on licence were captured by CCTV. That evidence was viewed by the panel and all the parties.

10. I think it is conceded that the footage shows the Applicant in a drunken state and throwing a punch at a man but missing him. What is denied is the footage established that the Applicant kicked a car door or demanded £5 from the occupants of the car.

11. The incident appears in the decision letter and forms part of a narrative explaining the circumstances leading to the Applicant's recall: including the ATM incident and finally failing to return to the approved premises on the 15 May 2019, which precipitated the revocation of his licence. The clinical psychologist, in her first report having read the prosecution papers said that the account "showed an unprovoked, aggressive attack on the part of the Applicant."

12. In the decision letter, the panel recorded *"as to the ATM incident, you accept you swung a punch at a man and chased him. Your recollection is hazy but you think you had exchange words beforehand."* Additionally, the panel said *"you agree that*

at the ATM you were drunk and aimed a punch at a stranger for no apparent reason and without any provocation. This is an example of your life risk factors of alcohol and violence being played out."

13. It seems to me quite clear that what was accepted by the Applicant was sufficient for the panel to decide that this was a significant piece of behaviour. The matters in dispute scarcely add anything to the essential problem revealed by the way he had behaved on that occasion. The solicitors make further references to this incident throughout the written representations, but I take the view I have dealt with this point sufficiently.

14. Turning to the allegation of procedural unfairness, the solicitors allege that a number of errors occur within the decision letter. The decision letter sets out no less than 14 risk factors which are said to be currently live. The solicitors take issue with two of them: problems with the Applicant's relationship and his failure to take medication for ADHD.

15. In my judgement, the solicitors have not made out that their allegations that the panel was in error when it identified the relationship problem as a current risk factor. The relationship referred to is with a young woman who is now the mother of the Applicant's Child. The clinical psychologist in her report dated the 8 September 2019, recorded that the Applicant told her that he had received a letter from his partner terminating the relationship. He said he had continued to correspond with her. They met on the 6 June 2019 and he told the psychologist that the relationship was continuing, although his partner was struggling with the uncertainty of his sentence.

16. He spoke positively about the relationship when he gave evidence before the panel but agreed he had prioritised the relationship over his obligations at the designated accommodation. The point is made in the papers that the Applicant's ability to manage this relationship and a young baby is untested in the community. The clinical psychologist's assessment of risk items records the history of problems with relationships as present and of high relevance. She records the distress and the stresses the Applicant is feeling in relation to this relationship.

17. To my mind, it is incorrect to suggest that there is no evidence from which an experienced panel (including a psychologist) could not infer that this relationship had potential to affect, for good or bad, the Applicant's future behaviour and had to be considered as a live issue.

18. As far as medication is concerned, I proceed on the basis that this is an error on the part of the panel. The error may have extended to stating that a psychiatrist prescribed medication for ADHD in June 2018; it is plain that ADHD had been identified by the clinical psychologist in April 2019 and that she prescribed medication, the Applicant was compliant and cooperated with titration and the medication appears to be effective.

19. The panel took the view that the visible warning signs of increased risk would be relapse to alcohol and disengagement. The panel did not mention medication either as a warning sign or as a protective factor.

20. Later in the decision letter the panel appeared to accept the medication was effective and remarked that the Applicant's presentation was much more settled than at a previous hearing but agreed with the psychologists who said that there were still behaviours linked to his risk factors that could not be attributable to ADHD.

21. It seems that the early reference to a failure to take medication was an aberration but one which was not thereafter considered in the decision-making process. The panel also did not seek to place any significance on its (mistaken) view the Applicant had been taking the medication since 2018.

22. It is also submitted that the panel failed to state in the decision letter that it had to decide the case on the balance of probabilities. The panel set out fully, and in my view, correctly, the test it had to apply: this is to be found in the fourth and fifth paragraphs of the introduction. The words "on the balance of probabilities" do not appear. However, this is the universal standard of proof in civil cases and bearing in mind what Lord Bingham said in **Oyston**, I do not find the absence of those words to be fatal to the validity of the decision. It would be different if the language of the decision letter suggested a lesser standard had been applied but I see no evidence of that and the solicitors do not allege that a lesser standard had in fact been applied.

23. It is also said that the panel failed to take into account properly the evidence of the OS. It is alleged the panel *"have chosen to completely omit (evidence at the hearing going further than the evidence in the OS's statement) in their decision letter inspiring little faith in the decision-making process."* The use of the word "chosen" suggests the panel intentionally omitted the evidence which is a very serious allegation to make.

24. What the decision letter said is *"that the previous OS, the present OS and your OM were broadly in agreement with the release to [designated accommodation] once you have shown a settled period of 4 – 6 months positive behaviour in prison. The clinical psychologist would support release to a [designated accommodation] now, provided it was backed by robust supported risk management plan. The prison psychologist felt you should complete the outstanding treatment in custody. Nobody saw the benefits a return to open conditions for the third time."* Plainly the further evidence of the OS is not referred to in that paragraph.

25. However, in the summary of the evidence, this passage appears *"The OS said the previous prison did not work out for you, although you felt contact with your son was helpful. She said there was no more offence focused work to be done in custody. She supported release to [designated accommodation]. She did not think drugs were your main 'go to' in prison, but she did not think your declared resolution to abstain from drugs in the community was realistic. The OS said you were doing well in the Unit before you moved. She would be happy for you to return there. Your movements were less impulsive since you have been on your ADHD medication."*

26. That passage appears to indicate that the OS was supporting release without the need for a further period of testing in closed conditions. In those circumstances, the panel not only considered her most recent evidence but also recorded it in the decision letter.

27. The last point surrounds what appears to be an innocuous sentence in the decision letter: *"in November 2018 a SIM card was sent into you. An adjudication was heard in January 2019, but the result was not known."* The complaint is that the decision letter does not record the Applicant's mitigation nor does it record that the adjudication was in fact heard on the 4 January 2019. Apparently, the Applicant pleaded guilty to the allegation and the adjudication was proven. Beyond recording the incident in that single sentence, no weight appears to have been placed on the matter apart perhaps from the fact it was some slight evidence of poor behaviour since recall. I struggle to see how the complaint made by the Applicant could have had any significant effect on the decision-making process.

28. Errors of fact are always capable of rendering a decision irrational but that will always be a fact specific question. The meaning of "irrational" in Rule 28(1)(a), is that the decision in question must be so outrageous as to defy logic, accepted moral standards or one at which no sensible person could have arrived.

29. As is well known, in considering the assessment of the decision, due deference is to be given to the expertise of the Parole Board in making decisions relating to parole and it will have to be borne in mind in the case of oral hearings that the panel members saw, heard and assessed the evidence of the witnesses before them.

30. A sensible reading of the decision letter reveals that the panel was impressed with the opinion of the prison psychologist. The panel concentrated its attention on the Applicant's conduct on licence and since his return to custody, particularly evidence of "impulsive and ill considered" behaviour.

31. The panel noted that on licence, the Applicant swiftly absented himself from the designated accommodation, turned to alcohol and was drunk and violent on the 29 April 2019. Following recall, the Applicant displayed both impulsivity and returned to substance misuse. The panel accepted the evidence of the prison psychologist that five pieces of core risk reduction work remained outstanding, which ideally ought to be done before release. It is also clear that the panel took the view that recent, poor prison behaviour and a lack of motivation did not justify either release or an adjournment to test the Applicant's ability to lead stable life.

32. Those were the salient features of the decision-making process. Other matters were and remained subsidiary. The points raised by the Applicant do not alter the significance of those salient features. The panel was entitled to come to the conclusion it did.

Decision

33. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

James Orrell
31 October 2019

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