Federal Court  Cour fédérale

Date: 20220922

Docket: T-586-20

Citation: 2022 FC 1319

Toronto, Ontario, September 22, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

SHAWN AMOS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a self-represented litigant, is a first-time offender that is currently serving a life sentence in a maximum-security penitentiary. He seeks judicial review of a May 4, 2020 decision [Decision] made by the Special Advisor [SA] to the Commissioner of the Correctional Service of Canada [CSC] in response to a grievance relating to his re-assessment and referral into the Integrated Correctional Program Model Sex Offender Program [ICPM-SOP]. The referral arose following changes made to the sex offender referral guidelines and CSC's directives.

[2] At the heart of the Applicant's arguments on his grievance and before this Court is his disagreement with the referral and the implications of placement into a sex offender correctional program when he has never been convicted of a sexual offence. He argues that he was not properly consulted about the referral; nor was he provided with all of the information relating to his designation into the ICPM-SOP and that certain information and tools used were unreliable. He further asserts that the relevant directives of the CSC are unconstitutional and that the referral is contrary to his rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] For the reasons that follow, I find the Decision unreasonable as it lacks sufficient transparency and justification and has not fully grappled with the issues raised in the Applicant's grievance. The application is therefore granted and will be referred back for redetermination.

[4] With respect to the Applicant's non-*Charter* constitutional challenges to the CSC's directives, these arguments were not raised during this grievance and do not form part of the SA's Decision. Accordingly, such issues are not properly before the Court and will not be considered.

I. Background

[5] The Applicant was arrested and charged with sexual assault twice, but was never convicted of this offence. He is currently serving a life sentence for first-degree murder.

[6] The Applicant began serving his sentence in 2009. In his initial Correctional Plan, he was classified as a maximum-security inmate with a high need for intervention. He was referred to an evaluation for a specialized sex offender assessment, but was not placed in the sexual offenders' treatment program because he had not been convicted of a sexual offence and therefore did not, at the time, meet the National Program Guidelines. The assessor recommended that the issue be revisited if further information suggesting sexually inappropriate behaviour was received.

[7] On January 23, 2017, a number of Commissioner's Directives and Guidelines relating to the administration of correctional program streams were changed, including those affecting sex offender assessments. The updated provisions removed the requirement that an inmate be convicted of a sexual offence before being assessed for a referral to the ICPM-SOP. The updated directive also implemented the use of the assessment tools, static factor Static 99R and dynamic risk factor Stable-2007, instead of a specialized sex offender assessment, to determine when to make a referral to sex offender programming.

[8] In early 2018, the Applicant found out he was being referred to the ICPM-SOP and that his Correctional Plan would be updated. Shortly thereafter, upon transfer for other reasons to another institution, he was referred to the ICPM-SOP.

[9] The referral was reviewed in 2019. The reviewer determined that the Static 99R and Stable-2007 assessment tools had not been completed prior to referral as required. The

assessment tools were subsequently completed and confirmed that Mr. Amos met the criteria for the ICPM-SOP.

[10] In May 2018, Mr. Amos filed a Notice of Application (Federal Court File No T-998-18) seeking judicial review of his transfer and the referral. On May 14, 2019, Prothonotary Aylen, as she then was, struck the application on the basis that the internal grievance process had not been exhausted.

[11] Mr. Amos filed a final grievance on November 23, 2018. In the grievance, he argued that his referral was not appropriate as his index offence was unrelated to the referral allegations. He also argued procedural unfairness on the basis that that he had not been consulted in the development of his revised Correctional Plan and had not been shown how he met the criteria warranting a referral to the ICPM-SOP. He further asserted that the information used to make the referral was unreliable and that the referral violated his rights under the *Charter*.

[12] The grievance was upheld in part. The SA found that Mr. Amos was sufficiently consulted about the referral. However, the SA agreed that the proper procedure was not followed because the Static 99R and Stable-2007 assessments were not completed before the referral was made. The SA noted that the Static 99R and Stable-2007 assessments were subsequently completed and supported the referral. As such, the SA concluded that Mr. Amos was appropriately referred to the ICPM-SOP. No further action was therefore ordered.

II. Issues and Standard of Review

[13] Judicial review is not a merits determination, but is a review of the decision actually made by the decision-maker, both in terms of its reasoning and the outcome: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 82-83. The focus for the Court is on the decision that is under review and the issues raised before that decision-maker. The Court should not consider new issues that could have been, but were not raised before the decision-maker: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers'*] at paras 21-26; *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 71; *Canada (Attorney General) v Valcom Consulting Group Inc*, 2019 FCA 1 at para 36. The reason for the rule includes the risk of prejudice to the responding party, and the potential to deny the reviewing court an adequate evidentiary record and the consideration of a specialized tribunal: *Albert Teachers*' at paras 24-26.

[14] The Applicant raises a number of issues on this judicial review that the Respondent asserts extend beyond the Decision and issues that were before the SA. This includes a request to challenge the constitutionality of the relevant provision of Commissioner's Directive 705-5, Supplementary Assessments [CD 705-5], which sets out the criteria for referring an individual for assessment into the ICPM-SOP, and the CSC's jurisdiction to implement that provision.

[15] As stated in *R v Conway*, 2010 SCC 22 [*Conway*] at paragraph 79: "an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction."

[16] In *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, the Federal Court of Appeal commented on the importance of constitutional arguments being raised before administrative tribunals. As stated at paragraph 43 of that decision:

> The approach of placing the constitutional issues before the Board at first instance respects the fundamental difference between an administrative decision-maker and a reviewing court: here, the Board and this Court. Parliament has assigned the responsibility of determining the merits of factual and legal issues – including the merits of constitutional issues – to the Board, not this Court. Evidentiary records are built before the Board, not this Court. As a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it. See generally *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297.

[17] With the exception of a *Charter* argument, which was raised, but was not considered by the SA, the constitutional arguments raised now were not part of the grievance relating to this Decision, and the Court does not have a full record and consideration of the SA on these issues. In my view, such issues accordingly cannot be considered on this judicial review.

[18] I note that a review of the Applicant's record indicates that these constitutional arguments were the subject of a separate complaint and grievance filed by the Applicant after the decision in T-998-18. That grievance appears to be deferred pending the decision on this application. It would seem to be available to the Applicant to have the constitutional issues dealt with through the grievance process pending the Applicant's reactivation of that file if he so chooses.

[19] In my view, the following issues are properly before the Court on this judicial review:

1. Did the SA err in finding the Applicant had been consulted in association with his Amended Correctional Plan?

2. Did the SA err in determining that the referral into the ICPM-SOP was proper and that the process associated with the referral had been remedied?

3. Was there a breach of procedural fairness?

4. Should the *Charter* arguments be considered now, and/or should they have been considered by the SA?

[20] The standard of review for the substance of a CSC grievance decision is reasonableness: *Henry v Canada (Attorney General)*, 2021 FC 31 at para 19; *Vavilov* at paras 16-17 and 25. A reasonable decision is one "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 83, 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[21] The standard of review for procedural fairness is best described as correctness, although strictly speaking no standard of review applies: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CP Rail*] at paras 54-55. A court assessing procedural fairness must determine whether the procedure followed was fair and just having regard to all of the circumstances, with a sharp focus on the nature of the substantive rights involved and the consequences for the individual: *CP Rail* at para 54. The question is whether the applicant knew the case they had to meet and had a full and fair chance to respond: *CP Rail* at para 56.

III. Relevant Guidelines and Directives

[22] CD 705-5, the National Correctional Program Referral Guidelines 726-2 [GL 726-2], and the National Correctional Program Management Guidelines 726-3 [GL 726-3] provide a framework for offender referral to national correctional programs that address the offender's risk and needs.

[23] To meet the requirements for referral to ICPM-SOP, the first part of the framework requires the individual to satisfy the definition of a "sex offender" as defined by the criteria set out in section 10 of CD 705-5. Once that criteria is satisfied, the second part of the framework requires the individual to be assessed in accordance with the assessment tools set out in GL-762-2 and to meet the assessment scores set out in that guideline.

[24] In 2017, modifications were made to the referral criteria. One of the effects was that it was no longer a requirement that an offender be convicted of a sexual offence for a sex offender assessment to be conducted for the purpose of program referral.

[25] The terms "sexual offences" and "sexual offender" are defined in GL 762-3 as follows:

> a. **"sexual offences"**: current offences is a sexual offence or sexually motivated offence; has a history of sexual offences or sexually motivated offences; has an admission of guilt for a sexually motivated offence without conviction; or when the CSC has reliable and accurate information that an offender has committed crimes of a sexual nature, whether or not these have resulted in a conviction.
>
> b. **"sex offender"**: a person who meets the sexual offence definition pursuant to CD 705-5.

[26] The referral criteria set out in paragraphs 10(b) and (d) of CD 705-5 reads:

> 10. Sex offender assessments will be completed prior to the correctional program referral being finalized, unless otherwise indicated in Guidelines 726-3 – National Correctional Program Management Guidelines, when one or more of the following criteria are met:
>
> [...]
>
> b. history of sexual offences or sexually motivated offences
>
> [...]
>
> d. CSC has reliable information that an offender has committed crimes of a sexual nature, whether or not these have resulted in a conviction.

[27] GL 762-2 was also updated on February 5, 2018 to implement the use of the Static 99R and Stable-2007 assessment tools to evaluate when to make a referral to the ICPM-SOP. The relevant provision of GL 762-2 states:

> 32. In order to be considered an appropriate candidate for participation in a moderate intensity correctional program, the offender must:
>
> [...]
>
> b. for men's sex offender programs:
>
> i. score 1 to 17 on the CRI and level III or IVa on the Static-99R and Stable-2007 combined, or
>
> ii. in cases where the Static-99R is not applicable, score 1 to 17 on the CRI and 12 or higher on the Stable-2007.

[28] Static-99R is a ten-item actuarial assessment instrument designed to assist in the estimation of sexual recidivism for sex offenders. Stable-2007 assesses 13 stable risk factors that

have been shown to correlate with sexual recidivism: significant social influences, capacity for relationship stability, emotional identification with children, hostility toward women, general social rejection, lack of concern for others, impulsivity, poor problem-solving skills, negative emotionality, sex drive and preoccupations, sex as coping, deviant sexual preference, and cooperation with supervision (Affidavit of Petrina Lemieux, Regional Program Manager, Regional Headquarters, CSC, paras 11-13).

IV. Analysis

A. *Did the SA err in finding the Applicant had been consulted in association with his Amended Correctional Plan?*

[29] Subsection 15.1(2) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] provides that an offender's correctional plan "is to be maintained in consultation with the offender in order to ensure that they receive the most effective programs at the appropriate time in their sentence to rehabilitate them and prepare them for reintegration into the community, on release, as a law-abiding citizen".

[30] In the Decision, the SA acknowledges subsection 15.1(2) of the CCRA and its requirement that the Correctional Plan be maintained in consultation with the offender. The SA references documentation on the Applicant's file indicating that his Institutional Parole Officer

met with him on May 24, 2018 to discuss the referral to the ICPM-SOP. On the basis of this meeting, the SA concludes that the duty to consult was met. As stated in the Decision:

> There is documentation on file that your Institutional Parole Officer at Kent Institution met with you on 2018-05-24 to discuss the referral to the ICPM-SO. Though you disagreed with the decision, you were still consulted about the referral and, as such, this portion of your grievance is **denied**.

[31] There are no formal guidelines in the CCRA, its regulations or directives, as to how consultation should occur.

[32] The Applicant argues that he was not sufficiently consulted about the changes to his Correctional Plan as he was not advised of the criteria used to make the referral and was not given the opportunity to provide input as to the referral decision.

[33] The Respondent argues that the level of procedural fairness owed to the Applicant was at the low end of the spectrum. The SA's Decision was reasonable as the meeting with the Applicant's Parole Officer was sufficient to meet the CSC's procedural fairness obligations.

[34] As recognized by the Supreme Court, procedural fairness is a variable concept to be decided in the specific context of each case: *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 682; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 21-22. In *Baker*, the Supreme Court identified five factors that govern what degree of procedural rights the duty of fairness requires in a given set of circumstances (at paras 22-28): a) the nature of the decision being made and the process followed in making it; b) the nature of the statutory scheme; c) the importance of the decision to the affected individual; d)

the legitimate expectations of the person challenging the decision; and e) the procedural choices made by the decision-maker.

[35] In *Sweet v Canada (Attorney General)*, 2005 FCA 51 [*Sweet*], the Federal Court of Appeal considered the right of a prisoner to be heard prior to his discharge from correctional programming. The Court held that the level of procedural fairness owed to the inmate, and participation required, was low as the decision was administrative in nature rather than disciplinary (at paras 29 and 33).

[36] Similarly, here, the nature of the decision made and the statutory scheme, both favour a low level of procedural fairness.

[37] The referral into the ICPM-SOP was aimed at targeting the specific programming needs of the Applicant and was administrative in nature. The purpose of the referral was not to sanction or punish the Applicant in a manner akin to a disciplinary decision. Further, as noted by the Respondent, the implications of the ICPM-SOP do not affect the Applicant's criminal record, sentencing, or his ability to obtain a conditional release.

[38] There is no obligation under the CCRA for the CSC to provide an applicant with formal reasons for a referral into programming or an opportunity to make written representations before a referral is made. Instead, the statutory scheme provides the applicant with the ability to seek review of the programming decision through the grievance mechanism, which provisions the

Applicant exercised in this case. This includes an opportunity to submit a written complaint, raise issues relevant to the decision, and make representations during the grievance process.

[39] The Respondent acknowledges that Mr. Amos would have legitimate expectations that he would be consulted in the development of his Correctional Plan. However, it argues this does not extend to the right to review or veto the referral. I agree with the Respondent, that a requirement for consultation is not synonymous with mutual agreement and cannot have this meaning in this context. The role of the CSC under the CCRA is to determine the most effective programming for offenders following the guidelines set out in their directives. The ability to exercise this role would be fruitless if a veto effect were in place for decisions relating to programming.

[40] However, consultation nonetheless reasonably contemplates that the changes to a correctional plan will be meaningfully discussed with the inmate such that the offender understands the basis for his program change and the reason why CSC believes the program change will allow the offender to receive the most effective programs for rehabilitation (s 15.1(2) CCRA).

[41] The Applicant argues that his labelling as a participant in sex offender programming will create a stigma within the institution. The referral therefore held great importance to him. I agree that this raises a valid concern with respect to the specific programming at issue in this case and imposes a greater need for Mr. Amos to understand why he was being referred into the ICMP-SOP.

[42] There is no dispute that Mr. Amos had a discussion with his Parole Officer about the change to the ICMP-SOP stream prior to the programming change being implemented into his Correctional Plan. The memo to file indicates that the Parole Officer spoke to Mr. Amos about his stream change and how he met the change under policy.

[43] At the time of that meeting, Mr. Amos had also already been advised by letter of the change to his program stream and that the change in program stream was made on the basis of Mr. Amos satisfying paragraphs 10(b) and (d) of CD 705-5.

[44] However, the problem with the SA's analysis is that it does not take into consideration the fact that a proper referral had not been made at the time of the Applicant's discussion with his Parole Officer as the mandatory assessment required for referral into the ICMP-SOP had not yet taken place. Consideration was not given to whether a meaningful consultation could have taken place during the discussion with the Parole Officer in this context.

[45] While the Decision refers to the subsequent completion of the Static 99R and Stable-2007 assessments, there is no discussion as to how the information relating to those assessments and their timing was communicated to the Applicant.

[46] In my view, the failure to consider these circumstances in the context of subsection 15.1(2) renders this aspect of the Decision incomplete and constitutes a reviewable error.

B. *Did the SA err in determining that the referral into the ICPM-SOP was proper and that the process associated with the referral had been remedied?*

[47] In the Decision, the SA states that "a review of file information and previous charges had been completed and it was deemed that, based on [the Applicant's] past behavior and charges, that [he] would be moved from the Multi-Target Program Stream to the Sex Offender Program Stream."

[48] The SA notes that the ICPM-SOP referral guidelines were changed and that they are now based on the results of the "Statistical Information on Recidivism Scale – Revised (SIR-R1)" as well as the Static-99R and Stable-2007 assessments. They acknowledge that under GL 726-3, the Correctional Program Officer should normally conduct sex offender assessments before the correctional program referral is finalized. The SA goes on to state that:

> It was determined that, in accordance with paragraph 3 of GL 726-2, *National Correctional Program Referral Guidelines* (2018-02-05), you required a Static 99R and a Stable 2007 assessment score in order to accurately determine your programming needs. It should have been completed prior to a referral to a main correctional program and should have been conducted by the Correctional Program Officer. The referral process for switching from the Multi-Target Program Stream to the Sex Offender Program Stream required a documented set of procedures that were not exercised in accordance with policy at Kent Institution and as such, this portion of your grievance is upheld.
>
> [...]
>
> However, a Memorandum was added to your file on 2019-04-04 by the Acting Regional Program Manager in the Ontario Region in order to include more information, and justification, regarding the eligibility for the Sex Offender Program Stream. It was determined that when the process was initiated by our CMT at Kent Institution, the specialized sex offender assessments had not been included prior to referring you to the ICPM-SO. As such, on 2019-04-04, steps were taken to ensure that the Static 99R and a Stable 2007 were completed and assessed. The Acting Regional Program

> Manager in the Ontario Region concluded that you met the criteria under the updated program referral guidelines and you were appropriately referred to the Sex Offender Program Stream.

[49] The Respondent argues that it was reasonable for the SA to find that the procedure as a whole was fair and that the Applicant met the criteria required for referral into the ICPM-SOP. Each level of a grievance procedure under the CCRA and the *Corrections and Conditional Release Regulations*, SOR/92-620 is a *de novo* review: *Lauzon v Canada (Attorney General)*, 2019 FC 245 at para 62; *Spidel v Canada (Attorney General)*, 2012 FCA 26 at para 6; *Hall v Canada (Attorney General)*, 2013 FC 933 at para 35. The Federal Court of Appeal has held that *de novo* reviews can cure a prior procedural fairness defect: *Higgins v Canada (Attorney General)*, 2018 FCA 49 at para 17. Although the assessment tools were not used prior to the referral being made or implemented, the assessment was subsequently completed and confirmed that the criteria for the referral had been met.

[50] I accept this principle; however, the Decision does not evaluate how it was determined that the criteria had been met on more than a superficial level.

[51] As stated in *Vavilov* at paragraphs 127-128:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[52] I agree with the Applicant that it was not enough for the SA to simply state that it was "deemed" based on his past behaviour and charges, that he should be moved to the ICPM-SOP, without considering why it was determined that his behaviour and past charges were sufficient to satisfy the meaning of paragraphs 10 (b) and (d) of CD 705-5 and whether the rationale used was justified.

[53] Similarly, it was not enough for the SA to simply state that "[t]he Acting Regional Program Manager [ARPO] in the Ontario Region concluded that you met the criteria under the updated program referral guidelines" without providing some consideration of how the Static 99R and Stable 2007 assessments were determined and what information was used for them. This is particularly so in view of the Applicant's challenge as to how he met the criteria for referral, his argument regarding the reliability of the information used, and the fact that this subsequent step was taken after the Applicant had already met with his Parole Officer to be advised that he was being transferred to the ICPM-SOP.

[54] In *May v Ferndale Institution*, 2005 SCC 82 [*May*], the Supreme Court concluded that the failure to disclose the scoring matrix of an assessment tool was a failure to disclose relevant information constituting a breach of procedural fairness (at paras 116-120). In this case, the SA has not grappled with the issue of whether the Applicant was provided with a sufficient understanding of how the scores on the Static 99R and Stable 2007 were obtained.

[55] In my view, the failure of the SA to tackle these central arguments indicates a lack of transparency and justification that renders the Decision unreasonable.

C. *Was there a breach of procedural fairness?*

[56] The Applicant argues that CSC failed to comply with its disclosure obligations because it did not advise him of the amendments to the definition of a sex offender in CD 705-5, or disclose the legal and factual basis for the referral.

[57] The Respondent argues that no disclosure obligations applied prior to the grievance and that all relevant information relating to the Decision was subsequently provided to Mr. Amos during the grievance process.

[58] As set out earlier, there is no entitlement to make representations or receive reasons arising from the creation or maintenance of a correctional plan. The disclosure obligations set out in subsection 27(1) and (2) of the CCRA are only engaged when an offender is entitled to

make representations or receive reasons for a decision. In this case, this would have applied to the grievance process:

Information to be given to offenders	**Communication de renseignements au délinquant**
27 (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.	**27 (1)** Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.
Idem	**Idem**
(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.	**(2)** Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

[59] There is no basis to suggest that Mr. Amos was not provided with the information that the SA considered in making the Decision. Whether further information should have been

considered in the Decision (and as a result provided to the Applicant) is discussed in my analysis above.

[60] Mr. Amos further argues that CSC breached section 24 of the CCRA by relying on police records to establish that he was a sexual offender. He asserts that such a finding is inconsistent with the *Criminal Code*. He further asserts that the Static 99R and Stable-2007 factors were unreliable and have not been demonstrated to apply to his specific circumstances, relying on an academic report (Barsky, Rachel & Blanchard, Adam J.E., "Preventing Parole: The Effect of Innocence Claims on Parole Eligibility" dated October 2018 [Barsky Report]) and *Ewert v Canada*, 2018 SCC 30 [*Ewert*]. Mr. Amos contends that the use of these tools violates his residual liberty interests. While it is questionable whether these arguments extend beyond the purview of appropriate procedural fairness arguments for the purposes of this judicial review I do not, in any event, find these arguments persuasive.

[61] Subsection 24(1) of the CCRA requires CSC to take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date, and complete as possible. The purpose of subsection 24(1) is to ensure that CSC does not rely on inaccurate information and that any error or omission in that information is corrected: *Charalambous v Canada (Attorney General),* 2015 FC 1045 [*Charalambous*] at para 7, aff'd 2016 FCA 177. However, this does not require CSC to reinvestigate information and charges obtained from reliable sources (such as police forces) where the information is being used for an administrative purpose: *Tehrankari v Canada (Attorney General),* 2012 FC 332 at para 35; *Ewert* at paras 119-121.

[62] In *Charalambous*, the Court explicitly found that CSC may rely on an incident report stating primary facts relating to a dismissed charge, provided it is acknowledged that there was no conviction (at para 15). Such facts were considered to be appropriate for reliance to classify an offender as a "sexual offender" for administrative placement and transfer decisions. As stated by the Court in *Charalambous* at paragraph 16:

> [16] I find that the Commissioner did not act unreasonably in noting that information drawn from the trial judge's comments, Royal Canadian Mounted Police reports and stayed charges were relevant pieces of information that should be considered in the administration of the applicant's sentence, and that references to his sexual misconduct were relevant and would not be altered. The Commissioner did not rely on inaccurate information in so doing and the Service did not make any undue reference in characterizing the applicant as a "sexual offender" for the purposes of placement decisions or transfer requests. It is important to remember that these types of administrative decisions are different in nature from criminal or disciplinary proceedings commanding a higher burden of proof. While subsection 24(1) of the Act does oblige the Service to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible", as stated by Justice Mosley in *Tehrankari v Canada (Attorney General*), 2012 FC 332 at para 35 [*Tehrankari #2*], "that does not mean that CSC must reinvestigate information obtained from reliable sources such as provincial ministries, police forces and the Courts".

[63] In this case, there has been no suggestion that CSC relied on information from Mr. Amos's police records to suggest that he was convicted of a sexual offence. Rather, the file materials indicate that CSC explicitly acknowledged otherwise. Nor has any information been used for a purpose other than the administrative referral. There has been no breach of subsection 24(1) of the CCRA.

[64] Further, while CSC's obligation under subsection 24(1) of the CCRA extends to ensuring the reliability of the results of assessment tools used in correctional decisions in some circumstances (*Ewert* at paras 31, 40, 45), in my view, the Barsky Report is insufficient to demonstrate that the tools used in this case, are unreliable. The Barsky Report focuses on the impact of an inmate's claims of innocence on their chances of receiving parole and other aspects of their incarceration. It also discusses actuarial risk assessment tools, and notes concerns regarding the weaker predictive accuracy of these tools for Indigenous offenders that may extend to other cultural and ethnic groups. There are no definitive comments on Static 99R that would render the tool unreliable in this context.

[65] The Applicant's arguments are insufficient to establish a breach of subsection 24(1) of the CCRA.

D. *Did the SA err by not considering the Applicant's Charter argument?*

[66] As discussed previously, it is my view that the non-*Charter* constitutional arguments do not properly arise from the judicial review of this grievance. However, such finding does not similarly apply to the Applicant's *Charter* arguments.

[67] The Applicant's *Charter* arguments were squarely raised in the Applicant's grievance presentation as acknowledged by the Respondent in their written materials (para 32). While the Applicant seeks to argue these issues again at first instance on this judicial review, it is not the role of the Court to conduct a merits based analysis of these issues.

[68] Rather, it was the obligation of the SA to address this central argument in its reasons on the grievance (*Conway*, above).

[69] The failure of the SA to address the *Charter* issues is a material omission that constitutes a further reviewable error.

V. Conclusion

[70] For all of these reasons, the application for judicial review is granted and the matter shall be referred back for redetermination in accordance with these reasons.

[71] The Applicant has requested costs for the application. However, as he was self-represented, costs shall be limited to reimbursement for his filing fees in association with the application.

JUDGMENT IN T-586-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the decision of the Special Advisor is set aside and the matter is referred back for redetermination in accordance with these reasons.

2. The Applicant shall be awarded reimbursement of his filing costs in association with the application.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-586-20
STYLE OF CAUSE:	SHAWN AMOS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 23, 2022
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	SEPTEMBER 22, 2022

APPEARANCES:

Shawn Amos	FOR THE APPLICANT (ON HIS OWN BEHALF)
Blake Van Santen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT