Federal Court  Cour fédérale

Date: 20211007

Docket: T-1328-20

Citation: 2021 FC 1049

Ottawa, Ontario, October 7, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JAFFET LOWE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Jaffet Lowe, seeks judicial review of a decision of the Parole Board of Canada Appeal Division [AD]. In April 2020, following his parole hearing, the Parole Board of Canada [Board] imposed a special condition on the Applicant's statutory release, requiring him to report all intimate sexual and non-sexual relationships and friendships with women. The Applicant appealed the imposition of this condition to the AD, which upheld this aspect of the

Board's decision. The Applicant challenges the AD's decision, arguing this condition is unreasonable and further alleging that the process by which the Board shared information with him in advance of his parole hearing was procedurally unfair.

[2] As explained in more detail below, this application is dismissed, because the AD did not err in concluding that the hearing process conducted by the Board was procedurally fair, and the AD reasonably concluded that the Board's imposition of the impugned special condition was itself reasonable.

II. **Background**

[3] The Applicant has recently been incarcerated at Warkworth Institution [Warkworth], serving a sentence of 4 years, 3 months and 25 days for two counts of Possession of a Prohibited/Restricted Firearm with Ammunition and one count of Possession of a Weapon Contrary to a Prohibition Order.

[4] The Applicant's statutory release date was August 14, 2020. On November 5, 2019, the Applicant applied for full parole. In preparation for his parole hearing before the Board, the Correctional Service of Canada [CSC] prepared an Assessment for Decision [A4D] that recommended the Board deny the Applicant full parole and impose special conditions on his statutory release. Among the recommended special conditions was a requirement for the Applicant to report all intimate sexual and non-sexual relationships and friendships with women to his parole officer [the Reporting Relationships Condition].

[5] On April 23, 2020, the Applicant appeared before the Board for his parole hearing. As a result of the COVID-19 pandemic, the hearing was conducted virtually, with the participation of the Applicant's counsel [referred to in the relevant materials and therefore in these Reasons as his Assistant].

[6] In its resulting decision dated April 23, 2020 [the Board Decision], the Board denied the Applicant full parole and imposed the special conditions on his statutory release as recommended in the A4D, including the Reporting Relationships Condition. The Board also imposed additional conditions that were not recommended in the A4D, including requiring the Applicant to provide documented financial information to his parole supervisor on an established timeline.

[7] On July 20, 2020, the Applicant appealed the Board Decision to the AD, alleging three errors. First, he argued that the Board breached its duty of procedural fairness by failing to provide the Applicant and his Assistant with all relevant information upon which the Board would base its decision. The Applicant asserted that he and his Assistant received only the A4D and his criminal record, as a result of which he was unable to properly prepare for the hearing or comment on the information in an informed manner.

[8] Second, the Applicant argued that the Reporting Relationships Condition is unreasonable, because the Board did not come to the least restrictive determination consistent with the protection of society, as required by subsection 101(c) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. The Applicant also submitted that the Board failed to

comply with s. 7.1 of the Decision Making Policy Manual for Board Members [Policy Manual], requiring the Board to show a clear link between a condition imposed on an offender and the probability of re-offending and to relate any imposed condition to the offender's risk factors, identified need, or inappropriate behaviour. The Applicant asserted that his record included only two instances of assault involving the same woman, which occurred in 2012 and 2013, and that he therefore has no cogent history of abusing or taking advantage of women.

[9] Finally, the Applicant argued that the condition to provide financial disclosure was based on erroneous or incomplete information, because he had not been convicted of financial offences or of being supported by the proceeds of crime.

III. **Decision under Review**

[10] In its decision dated September 11, 2020 [the AD Decision], the AD allowed one ground of appeal but dismissed the others.

[11] On the issue of procedural fairness, the AD found that the Board had complied with its requirement under subsection 141(1) of the *CCRA* to provide information to the offender in writing at least 15 days prior to the hearing. The AD noted that, at the hearing, the Board referred to Procedural Safeguard Declarations and Information Sharing Updates signed by the Applicant, indicating that he had received the documents in his file. Additionally, the AD noted that, under subsection 141(1), the Board is obliged to disclose information to the offender, not to the offender's assistant. The AD therefore found there was no breach of procedural fairness.

[12] The AD also found that the Board's decision to impose the Reporting Relationships Condition was reasonable. The AD reviewed the evidence before the Board that led it to adopt this condition, including the fact that the Applicant's Correctional Plan dated January 29, 2020 [Correctional Plan] described him as being at moderate risk for future spousal violence. His Criminal Profile dated May 1, 2018, identified prior convictions in 2012 and 2013 for assault in the context of an intimate relationship, indicating that he had "grabbed, slapped, choked, and punched" his intimate partner during the relationship. The AD further noted that the Board is not required to refer to every piece of information supporting its conclusion and that it is presumed to have weighed all information unless proven otherwise. The AD concluded that the Board weighed relevant and reliable information concerning the Applicant's violence and threats of violence in the context of a domestic relationship and that it was reasonable for the Board to impose the Reporting Relationships Condition to protect society and facilitate the Applicant's successful reintegration into society.

[13] However, on the issue of financial disclosure, the AD ordered a review of that special condition, because it was not recommended in the A4D, reasoning that where the Board imposes a special condition that was not previously recommended, it must give the offender the opportunity to be heard. Here, the AD found that the Board did not afford the Applicant such an opportunity. The AD therefore ordered a new in-office review with respect to the financial disclosure condition.

[14] In this application for judicial review, the Applicant challenges the AD's dismissal of his grounds of appeal other than in relation to the financial disclosure condition.

IV. **Issues and Standard of Review**

[15] The Applicant's arguments raise the following issues for the Court's consideration:

A. Did the AD err in finding that the Board met its duty of procedural fairness in the manner in which it performed its obligation to disclose the information on which it based the Board Decision?

B. Did the AD err in its finding that the Reporting Relationships Condition, imposed in the Board Decision, was reasonable?

[16] The Respondent also raised two additional, preliminary issues, in its Memorandum of Fact and Law:

A. Is the issue of procedural fairness properly before the Court, given that the Applicant did not raise it at the first available opportunity?

B. Should the Court afford no weight to the affidavit sworn by the legal assistant to the Applicant's counsel, filed in support of this application, because it includes hearsay, opinion, legal argument and evidence that was not before the Board?

[17] At the hearing of this application, I asked the Respondent's counsel whether the first of the issues raised by the Respondent would be better framed as whether failure to raise a procedural fairness argument at the first available opportunity represents an impediment to success on that argument, as opposed to a preliminary issue that prevents the argument from

properly being before the Court. Referencing the authority on which the Respondent relies (*Abraham v Canada (Attorney General)*, 2016 FC 390 [*Abraham*] at para 23), the Respondent's counsel agreed with this articulation of the issue. In light of this, I will consider the Respondent's argument, surrounding failure to raise the procedural fairness argument at the first opportunity, when analyzing the merits of the procedural fairness issue in the Analysis below.

[18] In relation to the affidavit sworn by Colleen Carriere, the legal assistant to the Applicant's counsel, I note that the Respondent does not challenge the admissibility of the affidavit. Rather, the Respondent's arguments go to the weight that should be given to the evidence therein. Again, I will not address those arguments as a preliminary issue but, to the extent necessary to determine the outcome of the main issues in this application, will consider them in the Analysis below.

[19] The parties agree, and I concur, that the standard of reasonableness, as explained by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], is the appropriate standard of review to apply to the AD's finding that the imposition of the Reporting Relationships Condition was reasonable. The Respondent also refers to authority that, when reviewing a decision of the AD, the Court should focus its attention on whether the Board's decision is itself lawful (see *Maldonado v Canada (Attorney General)*, 2019 FC 1393 [*Maldonado*] at para 18). I accept this authority, as well as the Respondent's submission that the Board and the AD are to receive considerable deference (see *Maldonado* at para 18).

[20] The Applicant makes no submissions about the appropriate standard to apply to issues of procedural fairness. The Respondent submits that, while procedural fairness does not technically invite the application of a standard, when asking whether the procedure was fair the Court is engaged in an exercise closely analogous to a correctness review (see *Canadian Pacific Railway v Canada (Transportation Agency)*, 2021 FCA 69, at para 46). Again, I concur with this submission.

V. **Analysis**

A. *Did the AD err in finding that the Board met its duty of procedural fairness in the manner in which it performed its obligation to disclose the information on which it based the Board Decision?*

[21] The Applicant refers the Court to subsection 101(b) of the *CCRA*, which provides that the principles guiding the Board in achieving the purpose of conditional release include timely exchange of relevant information with offenders. As the Respondent notes, subsection 141(1) of the *CCRA* provides specifically as follows:

Corrections and Conditional Release Act	***Loi sur le système correctionnel et la mise en liberté sous condition***
Disclosure to offender	Délai de communication
141 (1) At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information	**141 (1)** Au moins quinze jours avant la date fixée pour l'examen de son cas, la Commission fait parvenir au délinquant, dans la langue officielle de son choix, les documents contenant l'information

that is to be considered in the review of the case or a summary of that information.	pertinente, ou un résumé de celle-ci.

[22] In the AD Decision, the AD relies on subsection 141(1) and notes that, at the beginning of the hearing before the Board, the hearing officer referred to Procedural Safeguard Declarations dated March 9, 20 and 26, 2020 [PSDs], which indicated that all information, or a summary thereof, being considered by the Board was provided to the Applicant in writing at least 15 days in advance of the hearing date. In support of its position in this application, the Respondent filed an affidavit of the Applicant's Parole Officer, Judy Cotnam [the Parole Officer], dated April 1, 2021, which explained that she provided the Applicant with the documents to be considered at his hearing before the Board and completed the PSDs.

[23] I do not understand the Applicant to be contesting this evidence. Rather, his argument is that he was denied procedural fairness, because steps were not taken to facilitate the provision of the relevant material to his Assistant. The Applicant acknowledges that the strict requirement of subsection 141(1) was for the Board to provide the relevant materials to the Applicant and that it was the Applicant's responsibility to transmit the material to his Assistant. However, he argues that the unprecedented circumstances created by the COVID-19 pandemic impeded communication between the Applicant and his Assistant and called for flexibility on the part of the Parole Officer and the Board in facilitating the Assistant's access to the relevant material.

[24] Most of the facts relevant to this argument can be derived from the affidavits of the Parole Officer and Ms. Carriere. The Parole Officer explains the following:

A. Offenders can share the documents received in connection with their Board hearings with their assistants by mail via Canada Post. Materials necessary for mailing these materials, such as envelopes and postage, are available for purchase at Warkworth's canteen, and arrangements can be made at Warkworth to mail materials via overnight or express post;

B. It is the Parole Officer's practice that, on each occasion she provides an offender with copies of documents that are to be considered by the Board, she informs the offender that it is their responsibility to provide their assistant with those documents. She recalls that, each time she provided the Applicant with documents to be considered at his hearing, she informed him that it was his responsibility to provide those documents to his assistant;

C. When the Parole Officer shared documents with the Applicant on March 9 and 20, 2020, the Applicant had not yet secured an assistant. On March 26, 2020, when the Parole Officer shared the last set of documents with the Applicant, he advised that he had secured his Assistant for his Board hearing;

D. The Assistant's office first contacted Warkworth about the Applicant's Board hearing by email on April 17, 2020. On April 21, 2020, the Parole Officer spoke with the Applicant regarding his readiness for the upcoming hearing on April 23, 2020, and spoke with the Assistant over the phone. The Parole Officer attached to her affidavit a copy of her Caseworker Record Log notes, recorded shortly after those interactions, which capture her recollection of these events as follows:

> On today's date, this writer went to U4 and met with Offender Lowe outside in order to allow for proper social distancing. Lowe indicated that he was prepared to proceed with his hearing on Thursday. I inquired if his lawyer was prepared and he commented that he doesn't have any paperwork. Lowe was reminded that he was clearly told that it was his responsibility to provide his paperwork to his lawyer last month. He noted that he didn't have an envelope and postage and that it was impossible for him to send it out during COVID and he accused this writer of refusing to assist. I indicated that I had received a different version of information from his lawyer's office. Lowe then claimed he had sent the package out but had sent it to the wrong address. When challenged about this, Lowe reverted back to his original stance that he couldn't send it out and that I had refused. When asked why he would lie about this he commented that he didn't know what I wanted from him and he repeatedly asked if we were done. He then returned back inside.
>
> Offender Lowe has a PBC hearing on Thursday of this week and he failed to provide any documentation to his lawyer and blamed this writer for not sending it despite being clearly and consistently advised that it was his responsibility to ensure his lawyer has the necessary information. This writer contacted Lowe's lawyer's office and spoke with the assistant who noted they required the Assessment for Decision and Lowe's criminal record. He then indictaed [sic] they needed all documentation provided to PBC. I explained that Lowe had been clearly directed to send documentation but he had chosen not to. I explained I would be willing to send a copy of the A4D and the 2 addenda to accompany it along with the CPIC query report of his criminal record but I did not have the time to recomplete information sharing and forward it to the lawyer when Lowe simply failed to follow through on his responsibility.
>
> I noted I would look into the court date for his institutional charge and forward that information as well.
>
> An email was sent with the report and criminal record shortly after the phone call.

[25] The Parole Officer's affidavit evidence includes a copy of her email to the Assistant's office on April 21, 2020, attaching the A4D and addenda as well as the CPIC query report of the Applicant's criminal record.

[26] Ms. Carriere's affidavit also speaks to the issue with the Parole Officer surrounding information sharing. Her evidence includes statements to the following effect:

A. The Applicant was unable to provide the documents to his counsel. The Parole Officer provided a copy of the Applicant's criminal record and A4D to his Assistant by email;

B. The Applicant requested assistance from his Parole Officer to send to the Assistant the material that was going to be placed before the Board. The Applicant was refused any assistance and told to do it himself. He could not mail the material as he did not have access to a means of doing so. Nor was there time for the material to be received; and

C. As Warkworth was often on lockdown due to restrictions resulting from COVID-19, the Assistant was unable to attend Warkworth to pick up the required material.

[27] In response to Ms. Carriere's evidence as to the effect of the lockdown at Warkworth, the Parole Officer's affidavit states as follows:

A. Due to COVID-19 restrictions, in-person visits were suspended at Warkworth on March 13, 2020; and

B. The Parole Officer has no recollection of the Assistant or his legal assistant requesting to pick up documents from Warkworth. The Parole

> Officer cannot confirm whether arrangements could have been made for the Assistant to pick up the Applicant's documents at that time.

[28] As previously noted, the Respondent submits that no weight should be given to Ms. Carriere's evidence about the Applicant's efforts to share documents with his Assistant, as she has no personal knowledge of those events. The Respondent emphasizes not only that this evidence is uncorroborated hearsay but also that Ms. Carriere does not specify which information set out in her affidavit she received from whom.

[29] I concur with the Respondent's concerns. Ms. Carriere states in her affidavit that she has reviewed the file and taken information from the Applicant or from the Assistant. However, when providing substantive evidence later in the affidavit, she does not identify the source of particular elements of this evidence. The imprecision with which the affidavit is constructed does raise concerns about the weight that should be given to the evidence therein.

[30] However, Ms. Carriere has identified that one of the sources of the evidence in her affidavit is information provided by the Assistant, and it is reasonable to infer that he was the source of the information that he was unable to attend Warkworth to pick up the Applicant's material. Also, there is actually very little conflict between this evidence and that of the Parole Officer on this point. The Parole Officer states only that she has no recollection of the Assistant or his legal assistant requesting to pick up documents from Warkworth and that she cannot confirm whether arrangements could have been made for the Assistant to pick up the Applicant's documents. The Parole Officer also confirms that in person-visits were suspended at Warkworth

on March 13, 2020. Accordingly, notwithstanding the deficiencies in Ms. Carriere's affidavit, I accept the evidence that, due to restrictions resulting from COVID-19, the Assistant was unable to attend Warkworth to obtain copies of the Applicant's documents.

[31] There is a greater degree of conflict in the evidence surrounding the Applicant's ability to transmit the documents to his Assistant by mail. The Parole Officer deposes that materials necessary for offenders to mail documents to their assistant, such as envelopes and postage, are available for purchase at Warkworth's canteen, and arrangements can be made at Warkworth to mail materials via overnight or express post. She also deposes that she recalls that, each time she provided the Applicant with documents to be considered at his hearing, she informed him that it was his responsibility to provide those documents to his assistant. In contrast, Ms. Carriere's affidavit states that the Applicant was refused any assistance with sending his documents to the Assistant, that he was told to do it himself, and that he could not mail material as he did not have access to a means of doing so or time for the material to be received.

[32] The Parole Officer's evidence on this point is far more precise than that of Ms. Carriere. Even inferring that Ms. Carriere received the information in this portion of her affidavit from the Applicant, her evidence provides no explanation as to why the Applicant did not consider himself to have access to a means of mailing the material to his Assistant or time for the material to be received. This evidence is inconsistent with the Parole Officer's explanation surrounding offenders' access to mail services and the fact that the Applicant had secured his Assistant and received all relevant documents by March 26, 2020, which was four weeks before his April 23, 2020 hearing. Also, the Parole Officer's notes of her April 21, 2020 meeting with the Applicant

reflect that he gave inconsistent explanations of his inability to forward his materials to his Assistant. For these reasons, where the evidence of the Parole Officer and Ms. Carriere conflict on this subject, I accept that of the Parole Officer.

[33] The other factual point that is significant to the outcome of the procedural fairness issue is whether the procedural fairness concern was raised with the Board. As the Respondent submits, *Abraham* explains the significance of this point as follows (at para 23):

> 23 Regardless, the applicant was issued, within the time frame set out in section 141 of the Act, a summary of the information contained in the report on the incident of November 23, 2013. At the hearing before the Board, neither the applicant nor his counsel made any objections with regard to the sufficiency of this summary or to the fact that he had not been provided with a copy of the report itself. In my opinion, the respondent is right in saying that the applicant should have raised this objection at the first opportunity, which he failed to do. This was, in my opinion, a fatal mistake on his part (*Hudon v. Canada (Procureur général)*, 2001 FCT 1313, at paragraph 29, 214 FTR 193 [*Hudon*]).

[34] The Applicant submits that, during the hearing before the Board, the Board was made aware of what the Applicant argues to be a deficiency in the information in the hands of the Applicant and his Assistant. The transcript of the hearing reveals two occasions on which the Assistant advised the Board that he had a copy of the Applicant's criminal record and the A4D but was unable to get any other documents. However, on neither of these occasions does the Applicant or the Assistant raise this point as representing a procedural fairness concern. Neither the Applicant nor his Assistant requested an adjournment or any other type of procedural accommodation to allow the Assistant additional time to obtain documents. Rather, the Applicant

stated that he had received copies of all the information to be considered by the Board during the hearing and that he was ready to proceed with the hearing.

[35] I agree with the Respondent's position that the Applicant's procedural fairness argument must fail for this reason alone. However, independent of this point, I would not conclude that the Applicant was deprived of procedural fairness on the facts of this matter. Consistent with the AD's analysis, the Board's disclosure obligation, as prescribed by subsection 141(1) of the *CCRA*, is to the Applicant, not his Assistant, and that obligation was met. I would not rule out the possibility that, as argued by the Applicant, there could be particular circumstances in which common law principles of procedural fairness may require further steps to facilitate the provision of documentation to an offender's counsel or other assistant. However, those circumstances do not arise in this case. Notwithstanding the effects of the COVID-19 pandemic preventing the Assistant from attending Warkworth in person, the evidence demonstrates that the Applicant received the relevant materials, had secured his Assistant, and had access to mail services, all in sufficient time to provide those materials to his Assistant.

[36] Moreover, the Parole Officer took the additional step of providing the A4D and the Applicant's criminal record to his Assistant. As I will explain in analyzing the next issue below, the A4D recommended the Reporting Relationships Condition and supported this recommendation by reference to past convictions for assaults that were domestic in nature. The Applicant has not convincingly identified any of the additional material that was disclosed to the Applicant, but not provided to his Assistant, that would have had a material impact on the outcome of the hearing before the Board. As explained in *Abraham*, in order for the Court to

intervene, the alleged breach of procedural fairness must have had a material impact on the outcome (at para 18).

[37] I therefore find no reviewable error surrounding the procedural fairness of the hearing before the Board or the AD's analysis of that issue.

B. *Did the AD err in its finding that the Reporting Relationships Condition, imposed in the Board Decision, was reasonable?*

[38] As will be canvassed below, the Applicant advances a number of arguments in support of his position that it was unreasonable for the Board to impose the Reporting Relationships Condition and for the AD to uphold the Board Decision in that regard. In summary, the Applicant submits that, against the legal backdrop of the requirements of the *CCRA* and the Policy Manual and the factual backdrop of the Applicant's history, the Board Decision and AD Decision fail to consider certain relevant information and to articulate reasoning that justifies the imposition of the Reporting Relationships Condition. Factually, he emphasizes the fact that his convictions for assault involving domestic violence (involving only one individual) date to 2012 and 2013, as well as evidence that he is now in a long term and stable relationship without any incidents of such violence, and components of his CSC file which reflect him being a low risk for such violence.

[39] The Applicant relies upon subsections 7(a) and (b) of the Policy Manual, which prescribe, as follows, certain decision-making criteria to be taken into account by the Board when imposing a special condition in connection with an offender's statutory release:

Decision-Making Criteria and Process	**Critères et processus décisionnels**
7. A special condition may be imposed when the condition is considered reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender or reasonable and necessary in order to protect the victim. When imposing a special condition, Board members will:	7. Une condition spéciale peut être imposée lorsqu'elle est jugée raisonnable et nécessaire pour protéger la société et favoriser la réinsertion sociale du délinquant ou raisonnable et nécessaire pour protéger la victime. Lorsqu'ils imposent une condition spéciale, les commissaires :
a. establish a clear link between the condition and the probability of re-offending if the condition is violated;	a. établissent un lien clair entre la condition imposée et la probabilité de récidive si la condition n'est pas respectée;
b. relate the condition to the offender's risk factors, to an identified need or to behaviour that is inappropriate or unacceptable;	b. montrent comment la condition est liée aux facteurs de risque, à un besoin identifié chez le délinquant ou à un comportement qui est inapproprié ou inacceptable;

[40] Taking into account those provisions, the Applicant refers to the Court to the emphasis in *Vavilov* (at para 81) upon the necessity for a tribunal's reasons to demonstrate justification, transparency and intelligibility in administrative decision-making. Against the backdrop of the stability of his current relationship and other positive indications in his CSC file, the Applicant argues that the Board Decision and AD Decision do not establish a link between the 2012 and 2013 convictions for assault involving domestic violence and the current risk of the Applicant re-offending. Similarly, he submits that those decisions do not articulate why, in the context of

other information currently available, those historical convictions translate into a need for the Reporting Relationship Condition. I therefore turn to consideration of the reasoning in those decisions.

[41] In deciding to impose the Reporting Relationships Condition, the Board noted that this was one of the special conditions recommended by CSC and observed that the Applicant had been violent and used the threat of violence in the context of a domestic relationship. The Board therefore concluded that it was in the interest of protecting any future partners, and to ensure that they are informed of the Applicant's offence history, that the Reporting Relationships Condition be imposed. In reviewing this reasoning in the Board Decision, the AD referred to the violence and threats of violence in the Applicant's domestic relationship for which he was convicted of assault in 2012 and 2013, as well as the opinion expressed by CSC in the Correctional Plan that he presented with a moderate risk for future spousal violence. The AD concluded that it was reasonable for the Board to determine that, as the Applicant had assaulted a previous intimate partner as part of his offence cycle, there were risk-relevant concerns related to his domestic relationships.

[42] Simply put, both tribunals reasoned that, as a result of the Applicant's convictions related to domestic violence in 2012 and 2013, and CSC's current assessment of the risk for future domestic violence, the imposition of the Reporting Relationships Condition, as recommended by CSC, was necessary to protect society and to facilitate the Applicant's successful reintegration. I find no lack of intelligibility in this reasoning.

[43] The Applicant's arguments amount to a submission that the Board Decision, and the AD Decision upholding it, are unreasonable because they failed to grapple expressly with the question of whether more positive elements of the Applicant's relationship history and CSC file militated against imposing the impugned condition. The Respondent submits that, in so arguing, the Applicant is asking the Court to reweigh the evidence. The Applicant replies that he is arguing not that the tribunals should have weighed the evidence differently, but rather that the evidence was ignored, which is a reviewable error.

[44] In considering these submissions, I take into account the Respondent's reliance on the administrative law principle explained, as follows, in *Barr v Canada (Attorney General)*, 2018 FC 217 [*Barr*] at para 45:

> 45 It is a well-recognized principle of administrative law that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (Fed. C.A.) (QL) at para 1). The Applicant has not advanced any argument or pointed to any evidence that would rebut this presumption. Even if the Board had failed to mention a particular piece of evidence, it does not mean that it was ignored and a decision-maker is not required to refer to each and every piece of evidence supporting its conclusions (see *Newfoundland Nurses* at para 16).

[45] The Applicant takes issue with the Respondent's reliance on this principle, as he submits that it would be a very rare case in which a party that appeared before a tribunal was able to adduce evidence to rebut the presumption that all information before the tribunal was considered. The Applicant argues that he cannot be expected to adduce evidence to prove a negative.

[46] In my view, the Applicant's submission demonstrates a misunderstanding of the principle articulated in *Barr*. I do not understand *Barr* to suggest that, in order to rebut the presumption, a party must adduce direct evidence, such as a statement by the tribunal that certain information before it was not considered. Rather, the presumption can be rebutted in the manner explained by this Court in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53, 157 FTR 35 [*Cepeda-Gutierrez*] at paras 16-17:

> 16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> 17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[47] I also accept the Respondent's submission that, in conducting reasonableness review, a tribunal's reasons should be considered in the context of the history of the proceeding, including the parties' particular submissions to the tribunal (see *Vavilov* at para 94). In this case, the Applicant's submissions to the Board did not raise any concerns about the Reporting Relationships Condition. Indeed, the hearing transcript reveals that the Assistant stated in his submissions to the Board that the proposed special conditions were reasonable and that he understood the Applicant would agree to them. On appeal to the AD, the Applicant did take issue with the Reporting Relationships Condition, the relevant paragraph of the Applicant's submissions to the AD reading as follows:

> The record does not demonstrate that Mr. Lowe is a concern where women are concerned. In his record there is only one assault that involves a woman and that occurred in 2012. There is one reference to Mr. Lowe squeezing the hand of a woman he was with at a party when he became upset, but nothing in the record supports a more serious assault and no charges were referred let alone convictions regarding this incident. There is no cogent history of Mr. Lowe abusing or taking advantage of females. There is simply no evidence that Mr. Lowe is a concern to women and the board has overreached in imposing that he report any relationship with female friends. This condition is then overly restrictive without a clear purpose in mind and the board has not established a clear link between the condition and the probability of re-offending if the condition is violated.

[48] The Applicant's argument before the Court that evidence was ignored relates principally to his positive relationships subsequent to the relationship that gave rise to the 2012 and 2013 convictions, in particular his current relationship which has now lasted approximately five years, and an assessment in his CSC file that he is at a low risk to reoffend in relation to domestic violence.

[49] Turning first to the Applicant's current relationship, I note that he seeks to rely on a statement by his current intimate partner, set out in an email to the Applicant's Assistant dated December 17, 2020, and attached as an exhibit to Ms. Carriere's affidavit. As the Respondent correctly argues, this statement was not before the Board when it made its decision on April 23, 2020, and therefore does not form part of the record to be taken into account by the Court in conducting its reasonableness review.

[50] However, the record before the Board does include a statement, contained in an email from the Applicant's partner dated May 8, 2019, which is supportive of the Applicant's request for parole and does not refer to any experiences with domestic violence. Also, the A4D, which sets out CSC's appraisal for purposes of the Applicant's hearing before the Board, expressly notes that the Applicant appears to be in a stable relationship and that his partner has adamantly denied any harm perpetrated by him. Because of the history of domestic violence, the A4D expressly states that, notwithstanding the current relationship without indications of domestic violence, the Reporting Relationships Condition is recommended.

[51] It would be difficult to credibly argue that the Board or the AD overlooked the A4D, as it is one of the principal documents to be considered by the tribunals in making their decisions and is the document that sets out the proposed special conditions. Moreover, applying *Cepeda-Gutierrez*, the existence of the Applicant's current stable relationship does not squarely contradict the tribunals' findings so as to support a conclusion that the evidence was overlooked. I also note that the Applicant's submissions to the tribunals do not expressly invoke his current relationship to support his position that the impugned condition is unwarranted. I find that the

absence of an express reference to the evidence of this relationship in the tribunals' decisions does not support a conclusion that this evidence was overlooked.

[52] The assessment that the Applicant is at a low risk to reoffend in relation to domestic violence is found in a Spousal Assault Risk Assessment [SARA] prepared in April 2018. As the Applicant notes, this document describes his "imminent risk of violence towards a partner" as low. However, as noted by the Respondent, the SARA document also includes a comment that details surrounding the Applicant's convictions for assault involving domestic violence in 2012 and 2013 were not available prior to the SARA scoring and that the police reports regarding the assaults were outstanding at the time of writing.

[53] Further, as noted in the AD Decision, the Correctional Plan states CSC's assessment, based on the Applicant's history of domestic violence, that he presents a moderate risk for future spousal abuse. The Applicant submits that this represents simply the opinion of the CSC officer authoring the Correctional Plan, perhaps improperly motivated by the Applicant's failure to engage in correctional programing directed at domestic violence. However, this submission invites the Court to weigh the evidence in a manner that is not its role in judicial review.

[54] Again, the Applicant's submissions to the AD do not invoke the evidence in the SARA to support his position that the impugned condition is unwarranted. In that context and the context of the other evidence canvassed above, and applying *Cepeda-Gutierrez*, the record does not support a conclusion that the SARA was overlooked.

[55] Finally, the Applicant submits that the impugned decisions are unreasonable because the imposition of the Reporting Relationships Condition is inconsistent with the guiding principle, prescribed by subsection 101(c) of the *CCRA*, that the Board make the least restrictive determination that is consistent with the protection of society.

[56] I find little merit to this submission. As the Respondent argues, the principle of requiring the least restrictive determination is subject to the paramount consideration of the protection of society (see *Ouelette v Canada (Attorney General)*, 2013 FCA 54 at para 62). The AD expressly concluded that, having considered reliable information concerning the Applicant's violence and threats of violence in the context of a domestic relationship, it was reasonable to conclude that the Reporting Relationships Condition was necessary to protect society and facilitate the Applicant's successful reintegration. I find nothing unreasonable in this analysis.

VI. **Conclusion**

[57] Having considered the Applicant's arguments and having found no reviewable error, this application for judicial review must be dismissed. As the Respondent has not claimed costs, no costs will be awarded against the Applicant.

JUDGMENT IN T-1328-20

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, without costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE AT OTTAWA, ONTARIO
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