Federal Court  Cour fédérale

Date: 20180605

Docket: T-988-17

Citation: 2018 FC 582

Toronto, Ontario, June 5, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

WILLIAM A. JOHNSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] William A. Johnson, who is self-represented in this proceeding, is an inmate in the custody of Warkworth Institution, a medium security penitentiary in Ontario. Mr. Johnson brings this application under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 for judicial review of a January 6, 2017 decision of the Assistant Commissioner, Policy [ACP], denying his final level grievance.

[2] The key facts underlying Mr. Johnson's application are as follows. In or about August 2015, Warkworth Institution began providing its inmates with powdered milk. This change was made as part of the National Food Menu, an initiative by the Correctional Service of Canada [CSC] to standardize the meals of male offenders residing in federal penitentiaries in a manner consistent with Canada's Food Guide.

[3] In his grievance, Mr. Johnson alleged that he and other inmates were unable to drink powdered milk, and were therefore being denied their daily nutritional intake. Mr. Johnson requested that non-powdered milk be provided. The ACP denied Mr. Johnson's grievance on the basis that the National Food Menu was consistent with Canada's Food Guide, and that Mr. Johnson had provided no details in support of his alleged inability to consume powdered milk.

[4] Mr. Johnson challenges the reasonableness and the correctness of the ACP's decision. He seeks a variety of relief, including (a) an order setting aside the decision denying him non-powdered milk, (b) a declaration that the decision was unreasonable, and invalid for being in violation of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR], as well as sections 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*], (c) a *mandamus* order under the *Federal Courts Act*, as well as an order under section 24(1) of the *Charter*, compelling CSC to provide him with non-powdered milk, and (d) his costs in bringing this application.

[5] I have carefully considered Mr. Johnson's submissions. However, for the reasons that follow, I agree with the Respondent that the decision was both reasonable and procedurally fair. As a result, I am dismissing Mr. Johnson's application.

[6] At the outset, I note the Respondent's argument that the Attorney General of Canada is the appropriate respondent in these proceedings, pursuant to section 23 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 and Rule 303 of the *Federal Courts Rules*, SOR/98-106. I agree, and will order that the style of cause be amended accordingly.

II. Background

[7] In his affidavit sworn in support of this application, Mr. Johnson deposes that he previously had access to non-powdered homogenized 2% milk at Warkworth Institution of which he consumed 2-3 servings each day, including when eating cereal. Mr. Johnson deposes that more recently, non-powdered milk was no longer provided by Warkworth Institution. I note that, from the record, it is evident that this change occurred as a result of the implementation of the National Food Menu. In any event, Mr. Johnson deposes that he could not drink the powdered milk, and was thereby prevented from consuming cereal. Mr. Johnson deposes that he went at that time to see the doctor for assistance, and was told that there was nothing that the doctor could do.

[8] Mr. Johnson then submitted his grievance to the Commissioner of CSC on January 12, 2015. In it, he alleged that Warkworth Institution was only providing its inmates boiled eggs, as opposed to fried, scrambled, and boiled eggs, and that it was denying its inmates

bacon and French fries. With respect to powdered milk, Mr. Johnson alleged that (a) regular milk was provided by other institutions, and that denying Warkworth Institution regular milk was a form of punishment and demeaning, (b) many inmates like Mr. Johnson were unable to drink powdered milk, and were therefore being denied their daily nutritional intake, and (c) that CSC had not consulted with inmates prior to changing the type of milk provided. Mr. Johnson alleged that the "majority of society dislike and/or are unable to drink mixed powdered milk", and requested that non-powdered milk be provided.

[9] The ACP issued his decision resolving Mr. Johnson's grievance on January 6, 2017:

> …in 2014, the Correctional Service of Canada (CSC) developed and implemented a National Food Menu (NFM) in order to standardize the recipes and the portion sizes of the meals provided to all male offenders housed in federal penitentiaries across the country. This is consistent with CSC's legislated obligation as set out in section 83(2)(a) of the *Corrections and Conditional Release Regulations* (*CCCR*), which states:
>
> > The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is
> >
> > (a) adequately clothed and fed;
>
> Consistent with the above legislation, the NFM prescribes the food items and the portions provided for each meal of the day of the week, on a four (4) week cycle with the exception of breakfast, which is on a one (1) week cycle. Once the four (4) week cycle is complete, the meal service then returns to the menu for week 1.
>
> The NFM was developed in conjunction with Regional Dieticians – as well as the recommendations contained in Canada's Good Guide – and provides for the consumption of 2600 kilocalories daily, the recommended energy level according to Health Canada for a male between the ages of thirty-one (31) and fifty (50), the profile of the average male federal offender. This is consistent with CD 880, paragraph 10, which states:
>
> > The meals provided to the inmate population shall meet the appropriate nutrition standards.

> The standardized NFM is compliant with the Service's obligation to ensure that offenders are adequately fed and is consistent with the nutritional recommendations outlined in Canada's Food Guide.

[10] The ACP indicated in his decision that he had confirmed boiled and scrambled eggs were in fact served at Warkworth Institution, and denied that portion of Mr. Johnson's grievance. The ACP further indicated that bacon and French fries were not part of the National Food Menu, and, again, denied that portion of Mr. Johnson's grievance. With respect to Mr. Johnson's grievance as it related to powdered milk, the ACP determined as follows:

> You also grieve that a number of offenders cannot drink the powdered milk served at WI and as such you are being denied your daily nutritional intake. You, however, do not provide any details to support such a claim. As indicated above, the transition to the NFM is compliant with the Service's obligation to ensure that offenders are adequately fed and is consistent with the nutritional recommendations outlined in Canada's Food Guide. If you think you cannot drink the powdered milk for medical reasons, you are encouraged to work with Health Services to explore potential options that would be available to you. This portion of your grievance is **denied**.
>
> You also claim that the required offender consultations were not conducted in accordance with CD-880 and CD-880-1. It has been confirmed that in the development of the NFM, Inmate Committees were consulted. As such this portion of your grievance is **denied**.
>
> [Emphasis in original.]

[11] In his supporting affidavit, Mr. Johnson deposes that on June 1, 2017, subsequent to the ACP's decision, he submitted an "Inmate's Request" to the Chief of Health Services at Warkworth Institution as follows:

> National Headquarters directed me to discuss with the hospital what options is [sic] available to inmates such as myself unable to drink the powdered milk Warkworth switched to. I was previously

> advised that the only choice is what the kitchen can provide, which I am unable to drink. Can the hospital direct the kitchen to provide other suitable milk? If yes, what other milk can it provide?

[12] Mr. Johnson received the following response on June 6, 2017: "I don't believe there is anything else therefore I have directed this request to the dietician."

[13] While the Respondent did not take issue with the inclusion of information post-dating the ACP's decision, I note that, ordinarily, applications for judicial review proceed on the basis of the materials that were before the decision-maker (see *Johnson v Canada (Commissioner of Corrections)*, 2018 FC 529 at para 37 [*Johnson* 2018]).

III. Issues and Standard of Review

[14] Mr. Johnson challenges the ACP's decision in two main ways.

[15] First, he submits that the decision was inconsistent with certain provisions of the CCRA, the CCRR, and the *Charter*. As I explain further below, these issues are reviewable on a reasonableness standard. Mr. Johnson also submits that the ACP ignored certain materials in rendering his decision — again, this issue attracts reasonableness review.

[16] In terms of procedural fairness, Mr. Johnson argues that the ACP's decision gives rise to a reasonable apprehension of bias, both at the personal and institutional level. He also alleges that the delay in rendering the decision amounts to an abuse of process. These issues are reviewable on a standard of correctness.

A. *Reasonableness Issues*

(1) Was the ACP's decision consistent with the provisions of the CCRA and/or the CCRR?

[17] Mr. Johnson submits that, in refusing to provide him with non-powdered milk, the ACP's decision was *ultra vires* sections 3(a), 4(c) and (d), and 74 of the CCRA, which state as follows:

Purpose of correctional system	**But du système correctionnel**
3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders…	3 Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
Principles that guide Service	**Principes de fonctionnement**
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows: (c) the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act;	4 Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants : c) il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux objectifs de la présente loi;

(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;	d) le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;
Inmate input into decisions	**Participation aux décisions**
74 The Service shall provide inmates with the opportunity to contribute to decisions of the Service affecting the inmate population as a whole, or affecting a group within the inmate population, except decisions relating to security matters.	74 Le Service doit permettre aux détenus de participer à ses décisions concernant tout ou partie de la population carcérale, sauf pour les questions de sécurité.

[18] Mr. Johnson further argues that the ACP's decision was *ultra vires* sections 83(1), 83(2)(a), and 101 of the CCRR:

Physical Conditions	**Conditions matérielles**
83 (1) The Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws.	83 (1) Pour assurer un milieu pénitentiaire sain et sécuritaire, le Service doit veiller à ce que chaquée pénitencier soit conforme aux exigences des lois fédérales applicables en matière de santé, de sécurité, d'hygiène et de prévention des incendies et qu'il soit inspecté régulièrement par les responsables de l'application de ces lois.
(2) The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is	(2) Le Service doit prendre toutes les mesures utiles pour que la sécurité de chaque détenu soit garantie et que chaque détenu :

(a) adequately clothed and fed;	a) soit habillé et nourri convenablement;
Religion and Spirituality	**Religion et vie spirituelle**
101 The Service shall ensure that, where practicable, the necessities that are not contraband and that are reasonably required by an inmate for the inmate's religion or spirituality are made available to the inmate, including	101 Dans la mesure du possible, le Service doit veiller à ce que soit mis à la disposition du détenu, exception faite des objets interdits, ce qui est raisonnablement nécessaire pour sa religion ou sa vie spirituelle, y compris :
(a) interfaith chaplaincy services;	a) un service d'aumônerie interconfessionnel;
(b) facilities for the expression of the religion or spirituality;	b) des locaux pour la pratique religieuse ou la vie spirituelle
(c) a special diet as required by the inmate's religious or spiritual tenets; and	c) le régime alimentaire particulier imposé par la religion ou la vie spirituelle du détenu;
(d) the necessities related to special religious or spiritual rites of the inmate.	d) ce qui est nécessaire pour les rites religieux ou spirituels particuliers du détenu.

[19] Mr. Johnson argues that CSC is a creature of statute, and can therefore only do what it is authorized to do by statute, relying on *Tegon Developments Ltd (Egon P Tensfeldt Development Consultants Ltd) v Edmonton (City)*, 1977 ALTASCAD 304 (CanLII) (Supreme Court of Alberta – Appellate Division) at para 17. He submits that, in overstepping its statutory limits, the ACP's decision is void, relying on *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147 (HL). He asks that this Court declare the ACP's decision to be invalid and unlawful under section 18.1(3)(b) of the *Federal Courts Act*.

[20] In his written materials, Mr. Johnson appears at times to be challenging both the ACP's denial of his grievance, as well as CSC's overall implementation of the National Food Menu, which resulted in the provision of powdered milk at federal penitentiaries, including Warkworth Institution. However, at the hearing of this application, I understood Mr. Johnson to have clarified in oral argument that his challenge is limited to the ACP's decision, which only pertains to him. I note that, in any event, such a position is consistent with Mr. Johnson's notice of application, which specifically seeks judicial review of only the ACP's decision. Further, in my view, Mr. Johnson's application is properly premised on his personal inability to consume powdered milk for medical reasons, and not on the invalidity or illegality of the National Food Menu overall, as applicable to the prison population in general. As a result, I will consider Mr. Johnson's arguments as they relate to the ACP's decision.

[21] First, I do not accept Mr. Johnson's submission that this issue raises a jurisdictional question, such that the ACP's decision should be reviewed on a standard of correctness. Rather, the ACP in his decision was simply carrying out his duty in light of the provisions of CSC's home statute, regulations, and directives: the matter is therefore reviewable on a reasonableness standard (see *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 23, 26). Therefore, I must be satisfied that the ACP's decision was justified, transparent, and intelligible, and that it fell within the range of acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In conducting this analysis, I am mindful that the ACP is owed a high degree of deference, as a result of its expertise in inmate and institution management (*McMaster v Canada (Attorney General)*, 2017 FC 25 at para 21 [*McMaster*], aff'd 2018 FCA 37).

[22] With this standard of review in mind, I do not agree with Mr. Johnson that the ACP's decision was unreasonable for being non-compliant with the provisions of the CCRA or CCRR excerpted above. The materials before the ACP confirmed that the National Food Menu conforms with the nutritional requirements of Canada's Food Guide, and that it was developed after consultation with inmate committees. Moreover, as I discuss further in my analysis below, to the extent that Mr. Johnson is unable to personally consume powdered milk for medical reasons, the regulatory scheme contemplates the provision of an allergy diet to inmates with a confirmed diagnosis.

[23] Mr. Johnson submits that, in denying his grievance, the ACP acted perversely and capriciously, such that its decision was without rational or legal justification, and rendered without due regard to certain materials, because the ACP remained wilfully blind to materials in the record proving that he is being denied 2% homogenized milk. Mr. Johnson further alleges that the ACP was aware that there was no alternative to powdered milk, and knew that it would be a waste of time to direct Mr. Johnson to consult with Health Services. He submits that the ACP showed no concern for his food allergy, made no attempt to properly investigate the issues raised, and made no effort to contact Health Services in the course of determining his grievance. He suggests in his written materials that the ACP's decision is a wrongful effort to further punish him, and contends that most of society consumes non-powdered milk. Mr. Johnson further observes that he is not alone in making complaints about the National Food Menu.

[24] Under sections 97(a) and 98(1) of the CCRA, the Commissioner may make rules, designated as “Commissioner’s Directives”, for the management of CSC. Certain provisions of Directives 880 and 880-01 are relevant to the issues Mr. Johnson raises in this application.

[25] First, Directive 880, entitled “Food Services”, provides that inmate meals must meet appropriate nutrition standards. It also provides that an appropriate diet shall be provided to inmates who need a therapeutic diet as part of a treatment regimen approved by the institution’s Health Services in response to a clear and defined diagnosis (see sections 10 and 13, respectively).

[26] Second, sections 7.3 and 7.5 of Directive 880-01, which is entitled “Food Services - Central Feeding”, state respectively that therapeutic diets for inmates shall be available upon authorization by the institutional physician and/ or recommendation by the institutional/regional dietitian, and that allergy diets should only be prescribed as a result of allergy testing or if the inmate can provide written confirmation by a physician of previous testing which had led to the diagnosis of a food allergy.

[27] In light of these Directives, I agree with the Respondent’s argument that the ACP’s decision was reasonable: Mr. Johnson did not submit any evidence, details, or other information of his alleged medical inability to consume powdered milk. In his grievance, Mr. Johnson did not, for instance, specify that his complaint was based on an allergy to powdered milk, and neither did he identify any information substantiating such an allergy. As is clear from Directive 880-01, allergy diets are available following allergy testing or evidence of a diagnosis.

[28] Further, I do not agree with Mr. Johnson's argument that the ACP had a duty to confer with Health Services prior to rendering his decision, when Mr. Johnson provided no details of his alleged allergy.

[29] After all, to the extent that any of Mr. Johnson's rights have not been recognized, it is Mr. Johnson's case to make to the ACP. Although I recognize that enforcing his rights within Warkworth Institution entails certain limitations and delays, the setting does not absolve Mr. Johnson from pursuing the remedies available to him, which, if denied, he can certainly grieve with evidence of same. The problem here was simply a lack of evidence. Even his affidavit placed before this Court in support of his judicial review (which, of course, was not before the ACP) failed to provide any further specifics as to the nature of his medical condition, such as any allergic reaction, or the particulars of any attempts to have his allergy diagnosed.

[30] As a result, I find that the ACP's decision to deny Mr. Johnson's grievance as it related to powdered milk, and to further suggest that he consult with Health Services, was not unreasonable for non-compliance with the CCRA or CCRR.

(2) Did the ACP ignore evidence?

[31] It is not clear to me what information was, in Mr. Johnson's view, ignored by the ACP in denying his grievance. If I understand Mr. Johnson's position correctly, he believes that there is simply no non-powdered milk alternative available for him to access, such that working with Health Services or going through the grievance process is a waste of time, and he requires this Court's intervention.

[32] However, as set out above, the Directives specifically contemplate that allergy diets will be provided where an inmate has a demonstrated need. As a result, I dismiss Mr. Johnson's argument that the ADP's decision was unreasonable for ignoring evidence.

(3) Was the ACP's decision consistent with the values of the *Charter*?

[33] Mr. Johnson argues that his rights under sections 7, 12, and 15 of the *Charter* have been violated, such that the ACP's decision is null and void. He relies on *May v Ferndale Institution*, 2005 SCC 82 [*May*], in which the Supreme Court of Canada held that "[a]dministrative decisions that violate the Charter are null and void for lack of jurisdiction" (at para 77).

[34] In *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], the Supreme Court of Canada clarified the proper analytical approach when this Court judicially reviews the actions of administrative bodies and *Charter* issues are raised — the standard of review is reasonableness, and the question is whether the administrative decision-maker properly balanced the relevant *Charter* values and statutory objectives (at paras 57-58). As I mentioned to the parties during the hearing of this application, this Court recently applied *Doré* in response to an applicant's *Charter* arguments in the context of a final level grievance in *Ewert v Canada (Attorney General)*, 2018 FC 47 as follows:

> [28] It is well established that the *Charter* applies to administrative bodies exercising their delegated powers (see especially *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 598-599, 33 DLR (4th) 174). Indeed, both the CSC in conducting the inmate's transfer, and the SDC in evaluating the related grievance had to act in compliance with the *Charter*, that is, by balancing out its protected values with the objectives pursued by the statutory and regulatory regimes they are enforcing (see generally *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]).

> Unlike what the applicant contends, the role of this Court on judicial review is not to evaluate whether or not the CSC violated the *Charter* in conducting the transfer, but rather whether the SDC gave it sufficient consideration when evaluating the grievance.

[35] Turning to the facts of this case, I find that the provision of powdered milk does not constitute cruel or unusual punishment, such as to even engage the values of section 12 (see generally *Guérin v Canada (Attorney General)*, 2018 FC 94 at para 68).

[36] Similarly, with respect to section 15, as the ACP indicated in his decision, the National Food Menu standardizes inmate meals at a national level — as a result, values under that provision also do not come into play.

[37] Finally, with respect to section 7, I agree with the Respondent that the *Charter* does not protect against trivial limitations of rights (*Cunningham v Canada*, [1993] 2 SCR 143 at 151).

[38] Overall, given the nature of the decision under review and its statutory and factual context, I am satisfied that the ACP properly, if implicitly, balanced *Charter* values in refusing Mr. Johnson's grievance (*Doré* at paras 57-58).

[39] Ultimately, what Mr. Johnson wishes to achieve through this application is an order under section 24(1) of the *Charter* requiring CSC to provide him with 2% homogenized milk, under whatever *Charter* argument might hold water for him. There are two weaknesses to this strategy, and Mr. Johnson's arguments, both written and oral. First, a prerequisite for relief under section 24(1) is a finding of a breach of the *Charter* (see *Vancouver (City) v Ward*, 2010 SCC 27

at para 23). I have explained above that the ACP's decision was reasonable under a *Doré* analysis, and that the *Charter* provisions he relies on were not engaged on the facts of his case.

[40] The second problem with Mr. Johnson's *Charter* submissions, which is inextricably tied to the first, is that has failed to put sufficient facts before this Court to support *Charter* breaches under any of the sections he raises. As Justice McDonald recently held at in *McMaster*:

> [45] Further despite lengthy written and oral submissions, Mr. McMaster failed to plead any material facts to support the alleged Charter violations (see *Mancuso v Canada (National Health and Welfare*, 2015 FCA 227 at para 21).

[41] On the basis of these weaknesses, which are fundamental, I deny Mr. Johnson's request under section 24(1).

[42] Finally, as I have concluded that the ACP's decision was reasonable, I also deny Mr. Johnson's alternative request for a *mandamus* order under the *Federal Courts Act*.

B. *Procedural Fairness Issues*

[43] Mr. Johnson makes two arguments with respect to procedural fairness: (i) reasonable apprehension of bias, and (ii) delay. Both of these issues are, as mentioned above, reviewable on the standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 36).

(1) Reasonable Apprehension of Bias

[44] I will deal first with Mr. Johnson's submission that the ACP's decision discloses a reasonable apprehension of bias. As I understand it, Mr. Johnson's argument on this point has three bases.

[45] First, Mr. Johnson refers the Court to page 11 of the Certified Tribunal Record, which is an internal CSC document bearing the title "Table of Contents". This document lists materials relevant to Mr. Johnson's grievance. It also indicates Mr. Johnson's full name and date of birth, the reference number and code of his grievance along with its priority status, and information relating to Mr. Johnson's sentence, including its commencement date and underlying convictions, and Mr. Johnson's classification as a dangerous offender. In this application, Mr. Johnson submits that the information contained in the "Table of Contents" document relating to his convictions is irrelevant to his grievance, and that its inclusion gives rise to a reasonable apprehension of bias.

[46] The test for a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the ACP would not decide Mr. Johnson's grievance fairly (*Committee for Justice and Liberty et al v Canada (National Energy Board) et al* (1976), [1978] 1 SCR 369 (SCC) at 394). Although in this matter I agree that Mr. Johnson's convictions have no bearing on the substance of his grievance, I am not persuaded that their inclusion in the materials before the ACP gives rise to a reasonable apprehension of bias. Rather, considering the context of Mr. Johnson's grievance, I am satisfied that the information pertaining to his convictions is merely administrative in nature, in the nature of a standard form cover page document that accompanies grievance decisions (see also *Johnson* 2018 at para 36).

[47] Second, Mr. Johnson submits that a reasonable apprehension of bias arises in this case, because, in the grievance procedure, one "bureaucratic hand" washes the other, under an "officious agenda of selective disregard" of the materials before it. On this point, Mr. Johnson relies on the following paragraphs of the Supreme Court of Canada's decision in *May*:

> 63 In contrast, the internal grievance process set out in the CCRA prescribes the review of decisions made by prison authorities by other prison authorities. Thus, in a case where the legality of a Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue. It is also noteworthy that there are no remedies set out in the CCRA and its regulations and no articulated grounds upon which grievances may be reviewed. Lastly, the decisions with respect to grievances are not legally enforceable. In Peiroo, the Ontario Court of Appeal emphasized that Parliament had put in place a complete, comprehensive and expert statutory scheme that provided for a review at least as broad as habeas corpus and no less advantageous. That is clearly not the case in this appeal.
>
> 64 Therefore, in view of the structural weaknesses of the grievance procedure, there is no justification for importing the line

> of reasoning adopted in the immigration law context. In the prison context, Parliament has not yet enacted a comprehensive scheme of review and appeal similar to the immigration scheme. The same conclusion was previously reached in *Idziak* with regard to extradition (pp. 652-53).

[48] I find that the basis underlying the above comments in *May* is not analogous to the circumstances before me. Rather, the reasons set out by Justice Shore in *MacInnes v Mountain Institution*, 2014 FC 212 [*MacInnes*] provide a full answer to Mr. Johnson's argument:

> [26] In the Applicant's submissions, there is also no evidence that the Applicant's grievances will not be fairly considered. The Applicant argues that he would not receive a fair and impartial decision from the internal grievance process as he is questioning the legality of CSC's policies, which are sanctioned by the Commissioner. Citing *May v Ferndale*, 2005 SCC 82, [2005] 3 SCR 809, at paragraph 63, the Applicant argues that where the legality of the Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue.
>
> [27] Based on the evidence, the Court cannot accept the Applicant's contention that the grievance procedure will inevitably result in an unfavourable decision on this basis.
>
> [28] In fact, the Court does not find that the Applicant is questioning the legality of CSC's policies whatsoever; but, rather, the Respondent's interpretation of those policies and the discretionary decision taken thereon…

[49] Here, as in *MacInnes*, I am of the view that Mr. Johnson is not challenging the legality of the National Food Plan, but rather the ACP's specific decision not to provide him personally with 2% homogenized milk notwithstanding his alleged allergy to powdered milk. As a result, the Supreme Court of Canada's comments in *May* are of no assistance to Mr. Johnson. Further, to the extent that Mr. Johnson's bias arguments are based on the ACP's allegedly selective treatment of materials, or failure to comply with statutory obligations, I have disposed of these

arguments above in assessing the reasonableness of the ACP's decision. Again, I note that Mr. Johnson recently made similar arguments before Justice Brown, which were dismissed in *Johnson* 2018 (at para 36).

[50] Finally, Mr. Johnson suggests in his written materials that institutional bias in this case can be inferred from the length of time taken to decide his grievance, which he submits to be a denial of natural justice and procedural fairness owed to him. He refers the Court to sections 4(f) and 90 of the CCRA, which state respectively that correctional decisions must be made in a forthright and fair manner, and that grievance procedures must be fair and expeditious.

[51] To succeed in a claim of institutional bias, Mr. Johnson must demonstrate a reasonable apprehension of bias in a "substantial number of cases" (*R v Lippé* (1990), [1991] 2 SCR 114 (SCC) at 144); *Douglas v Canada (Attorney General)*, 2014 FC 299 at para 153). In this application, Mr. Johnson has simply not adduced sufficient evidence to ground his allegations of institutional bias.

(2) Delay

[52] Mr. Johnson also submits that there was an excessive delay in deciding his grievance, and that this is indicative of a longstanding abuse of power by CSC. Mr. Johnson points to section 12 of Directive 081, which states that decisions determining "routine priority" final grievances must be rendered within 80 working days of receipt by the National Grievance Coordinator. Mr. Johnson argues that CSC routinely violates Directive 081 in order to discourage inmates from seeking justice through the grievance process.

[53] In this case, there was a period of over two years between the date of Mr. Johnson's final grievance and the issuance of the ACP's decision. The Respondent acknowledges that this length of delay is unfortunate, but refers the Court to section 13 of Directive 081, which provides as follows:

> If the Institutional Head/District Director or the Director, Offender Redress, considers that more time is necessary to deal adequately with a complaint or grievance, the grievor must be informed, in a letter dated on or before the due date, of the reason(s) for the delay and of the date by which the decision will be rendered.

[54] Mr. Johnson was provided with letters advising him of the revised due dates in accordance with section 13 of Directive 081, up until the ACP's decision was rendered.

[55] Mr. Johnson appears to raise delay as a two-fold issue. First, he submits that the delay gave rise to a breach of procedural fairness as that term is conventionally understood — this argument is related to his institutional bias argument dealt with above. In response to Mr. Johnson's submissions this point, the Respondent relies on *Wilson v Canada (Attorney General)*, 2012 FC 57 [*Wilson*], in which Justice Mactavish held that the delays in processing the applicant's grievance were regrettable but had not given rise to a breach of procedural fairness, as he had had a full opportunity to access the grievance process (at para 18). Justice Russell also considered delay from this perspective in *James v Canada (Attorney General)*, 2015 FC 965 [*James*] as follows:

> 95 Nor do I think the delay was procedurally unfair in the conventional sense. The Applicant had every opportunity to make her case and all she is saying is that the decision should have been made sooner. The Applicant was given notice of the delays in accordance with the governing directive, but she says the notices did not explain the reasons for the delay or account for extensive periods of time when nothing was being done on the file. I have

> reviewed the steps in the process in the context of what was required on Applicant's file and the other files that the analyst was working on at the time, and I cannot say that the delay was unreasonable in this case.

[56] As in *Wilson* and *James*, I am satisfied that the delay in processing Mr. Johnson's grievance did not result in a breach of procedural fairness, as it did not impair his ability to make his case or access the grievance process. Further, it is clear from the record that many inmates were submitting grievances following the implementation of the National Food Menu. Delays would be understandable as CSC would want to ensure consistency in its responses.

[57] Mr. Johnson also suggests in his materials that the delay in this case evidences an "abuse of power" by CSC — I take this to mean that, in Mr. Johnson's view, the delay was so inordinate as to constitute an abuse of process. To succeed on this point, Mr. Johnson must demonstrate that the delay in processing his grievance resulted in prejudice of sufficient magnitude to offend the public's sense of decency and fairness (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 133 [*Blencoe*]).

[58] On this point, the Respondent relies on *Ewert v Canada (Attorney General)*, 2007 FC 13, in which this Court applied *Blencoe* in the context of a CSC grievance and determined that the delay was not inordinate, given the complexity of the applicant's file (at paras 31-32). Further, I note that in *James*, the applicant's *Blencoe* arguments were dismissed as she had not adduced sufficient evidence of prejudice (at para 94). In this case, I conclude that the delay was not inordinate in the *Blencoe* sense — Mr. Johnson has submitted no evidence that the delay compromised the fairness of his grievance or that he was otherwise prejudiced by it.

[59] As a result, I find that the delay in processing Mr. Johnson's final grievance, while significant, did not give rise to any breach of procedural fairness.

IV. Costs

[60] Both parties to this application seek costs. In particular, in his written materials Mr. Johnson seeks a lump sum award of $500. At the hearing of this application, the Respondent clarified that it seeks costs in the amount of $500 as well.

[61] Under Rule 400(1) of the *Federal Courts Rules*, this Court has full discretionary power to order the amount and allocation of costs in a proceeding. In awarding costs, I may consider any matter that I find relevant, including the result of the proceeding, the parties' conduct, and the importance and complexity of the issues (see Rules 400(3)(a), (c), and (o)). As the Respondent has been fully successful in this application, it is due its costs. However, having regard to all of the circumstances, including Mr. Johnson's limited means, I am satisfied that a lump sum of $250 in favour of the Respondent is appropriate.

V. Conclusion

[62] It is clear that Mr. Johnson is dissatisfied with the CSC grievance process. In his written materials, he refers to it as a "pointless time wasting exercise". Mr. Johnsons also refers to his past successful judicial reviews, and argues that he only has access to effective remedies when he appears before this Court. However, in this case, Mr. Johnson has not persuaded me that the

ACP’s decision was either unreasonable or incorrect. As a result, his application is dismissed, with costs of $250 to the Respondent.

JUDGMENT in T-988-17

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.
2. The style of cause is amended to reflect the Respondent as the "Attorney General of Canada" instead of "The Commissioner of Corrections, as represented by Larry Motiuk, Assistant Commissioner, Policy".
3. Costs are awarded to the Respondent, in the amount of $250.00.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-988-17
STYLE OF CAUSE:	WILLIAM A, JOHNSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 24, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	DINER J.
DATED:	JUNE 5, 2018

APPEARANCES:

William A. Johnson	FOR THE APPLICANT ON HIS OWN BEHALF
Susan Jane Bennett	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT