Court File No.

FEDERAL COURT

BETWEEN:

ABDI ISMAIL

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION pursuant to Section 18.1 of the *Federal Courts Act*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at a sitting of the Federal Court in Kingston, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATE: _____ 2023

Issued By:

(Registry Office)

Address of Local office: Federal Court
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TO: Mr. Stephen Zap
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Decision maker

Attorney General of Canada
c/o Deputy Attorney General of Canada
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Respondent

APPLICATION

1. This is an Application for judicial review of the 15 December 2022 decision of Independent Chairperson Stephen Zap of the Warkworth Institution Disciplinary Court (the "Chair") finding the Applicant guilty of the disciplinary offence of "fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55", contrary to paragraph 40(l) of the *Corrections and Conditional Release Act* (the "*CCRA*"), and imposing a $40 fine.

The Decision Under Review:

1. The Applicant had been randomly selected to provide a sample for urinalysis pursuant to section 54(b) of the *CCRA*. This demand was made on 5 April 2022 (during the period of Ramadan, which ran through the month of April in the year 2022). The trial took place on 15 December 2022, and the Chair issued his decision orally at the conclusion of the trial.
2. There were only two witnesses at trial: Officer Jeff Wellman (the urinalysis collector for Warkworth Institution) and the Applicant. Their evidence was not contradictory, there were no adverse credibility findings made, and all of their evidence was accepted by the Chair.
3. The evidence established the following: on the morning of 5 April 2022, the Applicant was summoned to the Admissions and Discharge area ("A&D") and, shortly after he arrived, at around 9:00 a.m., was asked to provide a urine sample. The Applicant testified that difficulty arose because he had just urinated that morning, immediately prior to attending A&D (he did not know that he was

going to be asked to provide a sample). Under the governing Commissioner's Directive (*CD 566-10: Urinalysis Testing* at s. 48), prisoners subject to a urinalysis demand are permitted to drink a certain amount of water in order to ensure that they are able to comply with the demand. The Applicant is a devoted Muslim and was unable to drink the water that was offered to him because he was fasting for Ramadan in accordance with his religious faith.

4. Nonetheless, the Applicant remained at A&D for approximately 45-60 minutes and made efforts to produce urine. The Applicant testified that he was exhausted and hungry from his fasting, so he decided to leave A&D once it became apparent that he would be unable to produce any urine. The Applicant did not stay at A&D for the maximum allowable timeframe of two hours because it was clear to him that without consuming any water, he would not be able to produce any urine.
5. At no point in time was <u>any</u> form of accommodation offered to the Applicant to provide a sample at a later date or time. In fact, there was no evidence that such an accommodation was even contemplated. The Applicant stated that he informed Officer Wellman of his fasting for religious purposes (Officer Wellman could not recall if this was discussed) and that he would have been agreeable to such accommodations had they been offered. Mr. Ismail's evidence was that he actually suggested to the officer that he could come back in the afternoon to try again and that Officer Wellman refused this suggestion.
6. Applicant's counsel submitted that the charge should be dismissed because the Applicant's religious observance required accommodation. Additionally, the

Applicant's counsel submitted that the Applicant's failure to provide a urine sample was not voluntary, relying on the binding Federal Court of Appeal authority of *Ayotte v. Canada (Attorney General),* 2003 FCA 429 (CanLII) at para 18.

7. Before issuing his decision, the Chair read into the record a memo from Regional Chaplain Michael Taylor. This memo confirmed that the period of fasting for Ramadan is during the daylight hours and that many people find it difficult to produce urine while fasting. The memo suggested that a possible alternate arrangement for Muslim inmates who are given a urinalysis demand during Ramadan would be to allow them to provide during "off-hours" (fasting for Ramadan is only required from sunrise until sunset and so inmates would be able to consume liquids if given the opportunity to provide a sample in the evenings).
8. In the Chair's decision, he explicitly stated that he believed and accepted the Applicant's evidence, accepting that the Applicant was physically unable to produce at the time of the demand and that he was denied accommodations to provide at a different date or time. Nonetheless, the Chair decided to convict the Applicant.
9. The Chair's reasoning in support of this incongruous and legally untenable conclusion is unclear. He stated that he would have "had concerns" about a valid refusal if the Applicant had simply left A&D right away and that he would have "dismissed the charge without reservation" if the Applicant had stayed at A&D for the entire maximum allowable timeframe of two hours. However, because the

Applicant chose to stay at A&D and make efforts to provide for a duration of less than two hours, the Chair erroneously held that the offence was made out.

10. Before imposing a sanction, Applicant's counsel made submissions that the administrative consequence of having already been put on Drug Strategy needed to be taken into account in the determination of the appropriate sanction. The Chair explicitly rejected this assertion, effectively ignoring the clear and directly on-point requirements of Section 34 of the *Corrections and Conditional Release Regulations* (the *"CCRR"*).

11. This is the relevant portion of the Chair's ruling (emphasis added):

> **Independent Chairperson Zap**: In this particular set of circumstances, I agree with counsel, partially, with respect to the *actus reus* where Mr. Ismail was physically incapable of providing a urine test and claims that he was not physically able to do so. In other words, his actions were involuntary and he cannot be found guilty of the offence if I find there was no *actus reus*.
>
> Every case turns on its individual facts. Here, we have no dispute that Mr. Ismail was given a demand, the inmate showed up at A&D, he attended, he indicated he was unable to provide. There was a dispute as to whether or not it was for Ramadan or not. I take it at face value that I believe Mr. Ismail may have told the officer, this was again back in April, he does dozens of urinalysis testing every month and again were talking something that occurred over eight months ago. That being said, the difference in this particular case is somewhat unique. Here you have Mr. Ismail attending, claiming I cannot urinate, I had urinated earlier today, I am fasting. I accept what Mr. Ismail says.
>
> But, what he did was a little bit different. He remained. He remained for half an hour. And then said well I was uncomfortable, I was exhausted, I was hungry, although he did indicate that he last had something to eat just before sunrise which would have been 6:30ish and this demand was at 9:00am. Let me confirm the exact date. The charge was 9:00am and the demand was actually at 7:35 so literally about an hour afterwards, hour and a half, he shows up. So it's roughly about two hours since he has last had something to eat. Two and a half hours to be precise.
>
> So Mr. Ismail decided to remain. He remained for half an hour and then decided I'm going to leave. To his credit, he didn't drink, he didn't break his fast so that obviously gives confirmation of his religious beliefs and

kudos to Mr. Ismail. But, what I do have difficulty with and what I'm struggling with, is why Mr. Ismail didn't just show up and say I can't urinate, I'm fasting, there's no way I can drink any water, I'm going to leave right away. And if he did that, I would have some concerns about a refusal.

If he had remained the entire two hours and said I can't urinate, I can't drink water, I'm not going to break my fast, I would dismiss the charge. Without reservation, I would dismiss the charge. He remained the entire two hours, can't consume water, no one is going to compel him to break his fast. But Mr. Ismail decided to on his own volition, I've got other things to do, I'm uncomfortable, I'm exhausted, I'm hungry, I'm not going to hang around for another hour and a half. That in and of itself sir, I find is a voluntary act. That in and of itself sir, I find unequivocally that you failed to provide a urine sample when demanded. As such, there will be a finding of guilt. Suggestions for sanction on the part of the institution?

Institutional Advisor: I would do a $40 fine, $25 imposed and $15 suspended for 60 days.

Independent Chairperson Zap: This is a refusal. It's not an early guilty plea. This matter was originally scheduled for hearing in October. November didn't get reached because the officer was unavailable and was peremptory on the institution.

Applicant's Counsel: I would just like to make some quick comments about sentencing.

Independent Chairperson Zap: I am just sort of going through why it was taking so long. I would like to hear some submissions with respect to sanctions and your client's ability to pay, as to his employment.

Applicant's counsel: Yes, so I would just request that a larger amount be suspended in this case. Firstly, Mr. Ismail does have a limited ability to pay, as he is not currently working at the institution. I would also just like to highlight that –

Independent Chairperson Zap: I'm sorry, I'm going to interrupt, is he level D?

Applicant: Yup.

Independent Chairperson Zap: Okay, since you're unemployed, okay.

Applicant's Counsel: I would also like to highlight that Mr. Ismail has already suffered some repercussions because of this incident, having been put on drug strategy already due to this charge.

Independent Chairperson Zap: Okay. The administrative remedies, unfortunately, it's akin to let's say being charged with impaired driving, before any conviction your license is suspended under the Highway Traffic Act so that's a similar thing so I can't take that into account. But I will take into account his inability to pay the fine. I'm going to impose something a little bit different than both recommendations. There's going to be a 40 dollar fine, 20 is going to be imposed, 20 suspended but it's going to be for 90 days sir.

Hopefully whenever Ramadan is next year, in April, we are going to have some type of potential strategy. A list of Muslim inmates who are orthodox, who practice their religion. It's one thing to say I'm Muslim and don't practice but individuals who do practice, it would be nice to have some type of process in place. That way, you go down, you say to the officer, here's proof I'm fasting and maybe even a note from, there's an eye-man here in the institution? Mr. Ismail?

Applicant: So you're finding me guilty?

Independent Chairperson Zap: Is there an eye-man in the institution?

Applicant: Sir, I just want to know something.

Independent Chairperson Zap: No, no, no, I am not going to discuss sanctions.

Applicant: Because he didn't keep up with his part of the job, he gets let go but because I didn't stay the full two hours, I get found guilty?

Independent Chairperson Zap: Discuss that with your counsel sir. Again, my question is, is there an eye-man in the institution? Here?

Applicant: What is an "eye-man"? Are you talking about an "Imam"?

Independent Chairperson Zap: Yes, an Imam.

Applicant: Yes, there is one.

Independent Chairperson Zap: There is one in the institution? Okay, perfect.

THE APPLICATION IS FOR:

1. An Order setting aside the Applicant's 15 December 2022 conviction;

2. An Order in the nature of *mandamus* requiring the Independent Chairperson to dismiss the Applicant's disciplinary charge;
3. An Order that all references to the Applicant's charge and conviction be removed from the Applicant's correctional files and any fines collected by the Correctional Service be returned to the Applicant;
4. An order that all administrative consequences of the charge and/or conviction be reversed and that the Applicant be entitled to back pay for any loss of wages that followed from these administrative consequences;
5. Direction be provided to the Correctional Service of Canada regarding the requirement to accommodate the religious observance of Muslim prisoners during the month of Ramadan by allowing for the provision and collection of urine samples at an alternate time when individuals are permitted to consume water;
6. The Applicant's costs of this Application;
7. Such other relief as may seem just.

THE GROUNDS FOR THE APPLICATION ARE:

1. There are three grounds for this Application:

   (1) The decision is unreasonable as the Chair's findings of fact were legally incompatible with a finding of guilt. There is simply no lawful way to arrive at a conviction once one accepts (as the Chair accepted in his decision) that the Applicant "was not physically able" to provide a sample.

   (2) The Chair violated procedural fairness by unreasonably refusing to dismiss the matter despite evidence that the urinalysis procedure was not conducted in accordance with the relevant Commissioner's Directive. Specifically, the

Chair failed to consider that the Institution unlawfully refused to accommodate the Applicant's religious observance, as mandated by the Commissioner's Directive, by requiring him to provide a urine sample during fasting hours.

(3) The Chair failed to follow the mandatory statutory recipe for imposing a sanction by refusing to consider measures already taken by the Service in connection with the offence before the disposition of the disciplinary charge; rather the Chair specifically and erroneously held that he was not permitted to consider such measures and refused to do so.

(1) The decision is unreasonable as the Chair's findings of fact were legally incompatible with a finding of guilt

2. It is a basic principle of penal law that involuntary conduct is not culpable. When a prisoner's failure to provide a urine sample is not voluntary, it is not culpable under the *CCRA*. Parliament has not authorized prison authorities to discipline prisoners for conduct over which they have no control.
3. It was accepted by the Chair that the Applicant was physically unable to provide a sample at the time of the demand and that he was not drinking any liquids because of his religious fasting. Nonetheless, the Chair proceeded to find the Applicant guilty on the grounds that he stayed at the A&D area for approximately thirty minutes[1] before deciding to leave. The Chair's illogical and legally untenable reasoning in support of this finding was that he would have dismissed the charge if the Applicant had left immediately or if he had waited for the maximum allowable timeframe of two hours.

[1] Although the Applicant's evidence was that he remained at A&D for "45-60 minutes", the Chair's decision repeatedly refers to the time that the Applicant remained at A&D as being "half an hour".

4. In finding the Applicant guilty on this basis, the Chair departed from the binding authority of the Federal Court of Appeal's ruling in *Ayotte v. Canada (Attorney General),* 2003 FCA 429 (CanLII) at para 18, which holds a failure to provide a urine sample must be voluntary, or else the disciplinary offence will not be made out.[2] The Chair misinterpreted this legal principle by finding that because the Applicant's decision to leave A&D after 30 minutes was a voluntary decision, he was satisfied that the *actus reus* of the offence was made out. However, a charge under s. 40(l) of the *CCRA* is not a charge for leaving A&D early and the voluntariness of the act of leaving the area is irrelevant. Such a decision from the Chair is contrary to the *CCRA*, contrary to binding jurisprudence from the Federal Courts, as well as contrary to the most basic principles of penal law.

(2) The Chair violated procedural fairness by unreasonably refusing to dismiss the matter despite evidence that the urinalysis procedure was not conducted in accordance with the relevant Commissioner's Directive

5. Section 40(l) of the *CCRA* states:

> **40** An inmate commits a disciplinary offence who
>
> …
>
> **(l)** fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55 ….

6. Paragraph 54(b) of the *CCRA* authorizes the collection of randomly demanded urinalysis samples, in accordance with the applicable Commissioner's Directive:

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[2] This principle has also been applied and followed in the case of *Cyr v. Canada (Attorney General)*, 2011 FC 213 (CanLII) at para. 19 (in which Justice de Montigny held that evidence such as that accepted by the Chair in the case "would have negated the *actus reus* of the offence in that he was unable, despite reasonable efforts, to provide the requested urine sample.").

> **54** Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis
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> …
>
> **(b)** as part of a prescribed random selection urinalysis program, conducted without individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for; …

7. Section 14 of *Commissioner's Directive 566-10: "Urinalysis Testing" ("CD 566-10")* specifically contemplates the situation where an inmate is unable to provide due to religious reasons and states that alternate arrangements such as skipping the inmate's name until he/she becomes able to provide a sample can be made:

> **14** Alternate arrangements can be made where an inmate's religious obligations (such as fasting) would impede his/her ability to provide a sample. The inmate's name may be skipped until he/she becomes able to provide a sample.

8. As can be seen from these provisions, s. 40(l) of the *CCRA* incorporates by reference the requirements of s. 54(b) of the *CCRA*, which itself incorporates by reference the requirements of *CD 566-10*, including the institution's obligation to provide alternate arrangements for inmates that are fasting for religious purposes (in accordance with the Correctional Service of Canada's human rights obligations under the *Canadian Human Rights Act*). Accordingly, the requirements of *CD 566-10* are not merely a matter of policy, but a legislative requirement that is essential for conviction in the context of a refusal allegation. Where this legislative requirement is not met, a refusal to provide is not culpable.

9. In other words, it is an essential element of an offence under s. 40(l) of the *CCRA* that the demand be lawful, and a lawful demand requires that the institution provide alternate arrangements for inmates who are fasting for religious purposes. Accordingly, this is not merely a matter of natural justice or

correctional policy, but a legislative procedural fairness requirement that is incorporated into the *actus reus* of the offence itself.

10. The random urinalysis demand made to the Applicant was during a fasting period of Ramadan and the Applicant made every available effort to notify the collecting officer of his fasting. However, the Applicant's religious observance was not accommodated. The Applicant was not provided with the opportunity to have his name skipped so that he could provide his sample at a later date, nor was any other accommodation made for him.
11. The Chair's decision provides no reasoning explaining why he is finding the Applicant guilty despite evidence that the proper procedures were not even considered, much less followed. The Chair seems to accept that these concerns are legitimate, discussing possible ways to avoid a similar situation in the future (the Chair suggests a list being made available with the names of inmates who are practicing Muslims), however he finds the Applicant guilty anyways.

(3) The Chair failed to follow the mandatory statutory recipe for imposing a sanction

12. Prior to imposing the $40 fine (with $20 imposed and $20 suspended for 90 days), the Chair did not follow the mandatory legislative recipe for the imposition of a sanction set out in section 34 of the *CCRR*. Specifically, subsection 34(f) states the following:

> **34** Before imposing a sanction described in section 44 of the Act, the person conducting a hearing of a disciplinary offence shall consider
>
> …

> **(f)** any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge; and …

13. Applicant's counsel submitted to the Chair that the Applicant had already suffered consequences because of this incident (having been put on Drug Strategy – a procedure that has significant consequences for an individual's employment, correctional record and liberty interests – because of the alleged refusal). The Chair erroneously held that he was unable to give consideration to such circumstances by attempting to draw an analogy to a person's driver's license being suspended before their Court date (a situation which bears no resemblance to the prison disciplinary context).

Provisions Relied Upon:

1. The Applicant relies on the following statutory provisions and rules:

   Corrections and Conditional Release Act sections 38-44, 54-56;

   Corrections and Conditional Release Regulations sections 24-41, 60-71;

   Commissioner's Directive No. 566-10: "Urinalysis Testing";

   Commissioner's Directive No. 580: "Discipline of Inmates".

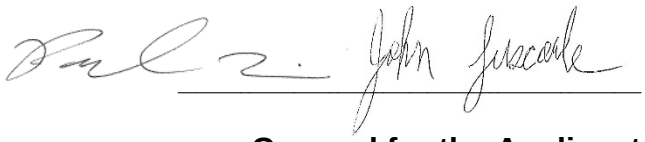
This Application will be Supported by the Following Material:

1. The Certified Tribunal Record;
2. Affidavit of Applicant or representative (if necessary, depending on the completeness of the Certified Tribunal Record);
3. Transcript of the Disciplinary Court hearing.

Request for Material in the Possession of the Tribunal

1. Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests the Certified Tribunal Record, which should include all of the documentary evidence that was presented at the hearing before the Chair of the Warkworth Institution Disciplinary Court, as well as an electronic file of the audio recordings of all Disciplinary Court appearances in relation to this matter.

DATE: 9 January 2023



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