Federal Court Cour fédérale

Date: 20150113

Docket: T-2127-12

Citation: 2015 FC 46

Ottawa, Ontario, January 13, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HELMUT OBERLANDER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of Order in Council PC 2012-1137 [Order in Council], dated September 27, 2012, which revoked Helmut Oberlander's [Applicant or Mr. Oberlander] Canadian citizenship under s. 10 of the *Citizenship Act*, RSC 1985, c C-29 [Act].

II. BACKGROUND

[2] Mr. Oberlander was born on February 15, 1924 in Halbstadt, Ukraine. He obtained his Canadian citizenship on April 19, 1960.

[3] In a letter dated January 27, 1995, Mr. Oberlander received notice of the Minister of Citizenship and Immigration's [Minister] intention to make a report to the Governor in Council [GIC] recommending the revocation of his Canadian citizenship. This process was instigated based on the Minister's allegation that Mr. Oberlander failed to disclose his activities during World War II to Canadian immigration and citizenship officials. At Mr. Oberlander's request, the Minister referred the case to the Federal Court to determine whether he had obtained his Canadian citizenship by false representations, fraud, or by knowingly concealing material circumstances.

[4] In February 2000, Justice MacKay found that Mr. Oberlander had obtained his citizenship by false representation or by knowingly concealing material circumstances within the meaning of s. 18(1) of the Act: *Canada (Minister of Citizenship and Immigration) v Oberlander* (2000), 185 FTR 41 [*Oberlander* (2000)]. Justice MacKay found that Mr. Oberlander had served as an interpreter for Einsatzkommando 10a [Ek 10a], a unit involved in war crimes. This is a final and non-reviewable decision: Act, s. 18(3).

[5] In response to Justice MacKay's decision, the Minister submitted a report to the GIC recommending the revocation of Mr. Oberlander's Canadian citizenship. The GIC revoked Mr. Oberlander's citizenship on July 21, 2001.

[6] Mr. Oberlander sought judicial review of the GIC's decision at the Federal Court. His application was dismissed. On appeal, the Federal Court of Appeal set aside the GIC's decision for failing to consider whether Mr. Oberlander's activities fell within Canada's "no safe haven" policy and for failing to balance Mr. Oberlander's personal interests against the public interest: *Oberlander v Canada (Attorney General)*, 2004 FCA 213 at paras 58-60 [*Oberlander* (2004)]. The matter was sent back to the GIC for redetermination.

[7] The GIC revoked Mr. Oberlander's citizenship again on May 17, 2007.

[8] Mr. Oberlander sought judicial review of the GIC's second decision. Again, his application was dismissed. On appeal, Mr. Oberlander submitted that he was forcibly conscripted into Ek 10a, and that he was under duress throughout his service to Ek 10a. The Court of Appeal held that the GIC's decision was reasonable as regards complicity, but returned the decision for reconsideration of the sole issue of duress, in light of Mr. Oberlander's submission that he was under duress during his time with Ek 10a: *Oberlander v Canada (Attorney General)*, 2009 FCA 330 at paras 22, 41 [*Oberlander* (2009)].

III. DECISION UNDER REVIEW

[9] The reconsideration decision under review consists of the Order in Council and the Report to the Governor General in Council from the Minister of Citizenship and Immigration Concerning the Citizenship of Helmut Oberlander, Supplementary Report and Response to Submissions [Report] [Decision], which reflects the GIC's reasons.

[10] The Report says its analysis as to whether duress can overcome Mr. Oberlander's complicity applies to the definition of duress in immigration law, in the Citizenship and Immigration Operational Manual ENF 18: War Crimes and Crimes Against Humanity, s. 7.4 [Guidelines], and under criminal law. The Report outlines the legal requirements for each of these tests and considers whether Mr. Oberlander has established that he satisfies their requirements.

[11] From the perspective of immigration law, the Report applies the test developed in Federal Court of Appeal jurisprudence. This test has three basic elements (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 89 DLR (4th) 173 (CA) [*Ramirez*]):

> i. A reasonable apprehension of imminent physical peril, depriving the claimant of the freedom to choose right from wrong;
>
> ii. The situation cannot be brought about through the claimant's own acts or be consistent with the claimant's will; and
>
> iii. The harm inflicted must not be in excess of that which would have been directed at the claimant (the "proportionality" requirement).

A failure to establish any one element is enough to dismiss the defence of duress.

[12] The imminent peril issue is concerned with whether the individual faced an "imminent, real, and inevitable threat to his life": *R v Finta*, [1994] 1 SCR 701 at 837 [*Finta*]. The Report says that there is no evidence that Mr. Oberlander faced this type of threat. In reaching this conclusion, the Report considers the following findings of Justice MacKay (Report at para 32):

> i. Mr. Oberlander maintained a continuous, lengthy service for 3-4 years, only surrendering at the end of the war.
>
> ii. Mr. Oberlander voluntarily accepted the award of the War Service Cross Second Class for his service in Ek10a.
>
> iii. Mr. Oberlander voluntarily joined his mother's application for German citizenship.
>
> iv. Mr. Oberlander had numerous opportunities to desert as he was on leave many times and for several weeks on each occasion.
>
> [footnotes omitted]

[13] The Report finds that Mr. Oberlander's failure to desert while on leave or while serving as a solitary guard casts doubt on the credibility of his assertion that he was facing a threat of imminent, real danger: *Equizabal v Canada (Minister of Employment and Immigration)*, [1994] 3 FC 514 (CA) [*Equizabal*].

[14] The second element of the *Ramirez* test is concerned with whether the individual claiming duress is responsible for his or her own predicament. The Report says that, contrary to Mr. Oberlander's submissions, Justice MacKay made no finding as to whether he was conscripted. Even if the Minister were to accept Mr. Oberlander's submissions, conscription is

not conclusive of duress: *Oberlander* (2009), above, at paras 32-33. Mr. Oberlander was promoted and accepted a medal recognizing his service, leading to the conclusion that he was responsible for his actions during the duration of his service, regardless of whether he was conscripted: *Caballero v Canada (Minister of Citizenship and Immigration)* (1996), 122 FTR 291 (TD) [*Caballero*].

[15] The Report points to *The Report of Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. IV, October 1946-April 1949* [*Nuremberg Report*] which found that members of Einsatzgruppen were able to seek transfers, and could ask to be excused from their duties. The Report concludes that the lack of evidence that Mr. Oberlander sought a transfer or a discharge confirms that he was responsible for his own predicament.

[16] Finally, the Report considers the proportionality element. This requires that the potential harm the claimant would have faced by disobeying an order be more serious than the harm to victims caused by the claimant's actions: *Ramirez*, above, at para 40. As Justice MacKay found that Ek 10a was a killing squad, Mr. Oberlander was obligated to show that he feared death to justify his complicity. The Report says that Justice MacKay found Mr. Oberlander's evidence that he joined out of fear of harm or the harshest of penalties to be inconsistent. Justice MacKay made no findings that Mr. Oberlander would have faced death if he had not complied with Ek 10a's orders.

[17] As the Guidelines are based on the *Ramirez* factors, the Report also finds that Mr. Oberlander has not established that he was under duress under the Guidelines' requirements. The Report specifically highlights its finding that Mr. Oberlander had numerous opportunities to desert, given his many periods of leave, and the lack of evidence to establish Mr. Oberlander's assertion that members who disobeyed or tried to desert Ek 10a were executed.

[18] Next, the Report addresses Mr. Oberlander's submissions regarding the defence of duress in criminal law. It advises the GIC to base its decision on immigration law and policy considerations, but says that criminal law can serve as an interpretive aid, if applied with circumspection: *Nagalingam v Canada (Citizenship and Immigration)*, 2008 FCA 153 at para 67.

[19] The criminal law defence of duress is based on the same three elements as immigration law: 1) clear and imminent danger; 2) the absence of any reasonable legal alternative to breaking the law, such as a safe avenue of escape; and 3) proportionality between the harm inflicted and the harm avoided: *R v Ruzic*, 2001 SCC 24 at paras 59-64 [*Ruzic*]; *R v Hibbert*, [1995] 2 SCR 973 [*Hibbert*].

[20] Whether the accused had a safe avenue of escape should be examined from an objective-subjective standard. This requires consideration from the perspective of a similarly-situated reasonable person: *Ruzic*, above, at para 61. The Report addresses Mr. Oberlander's submissions regarding his age, and his belief that he would be killed if he tried to escape (Report at para 65):

> Age should be considered on a spectrum. Mr. Oberlander would be on the more mature end being 18 years old or some months shy of his 18th birthday. According to his own evidence, he showed his maturity by being the only male of the household, having worked

> to support his family and save for his education. In addition, Justice MacKay found that Mr. Oberlander "was comparatively well educated for his time" (thus, lending him to the task of interpretation). Therefore, Mr. Oberlander was not a boy or a child at the time that he joined the Ek10a.
>
> [footnotes omitted]

The Report concludes that Mr. Oberlander's maturity level was such that he could have evaluated the situation and deserted or sought a transfer.

[21] The criminal law also requires a close temporal connection between the threat and the potential infliction of harm: *Ruzic*, above, at para 65. The Report again relies on the fact that Mr. Oberlander went on leave several times to find that there was no close temporal connection between the threat and the potential harm (death for desertion) that Mr. Oberlander feared.

[22] The Report concludes that there is insufficient evidence to establish that Mr. Oberlander served Ek 10a under duress, and the previous determination of his complicity stands. It says the duress analysis has no impact on the Minister's prior balancing of Mr. Oberlander's personal interests with the public interests.

[23] Mr. Oberlander was provided with a draft copy of the Report and invited to make submissions. The final Report describes these submissions as "a repeated attempt to re-litigate all the issues that were already decided by Justice MacKay or to attack decisions made by the Governor in Council that were later confirmed by the Federal Court and the Federal Court of Appeal": Report at para 79.

[24] On the duress issue, Mr. Oberlander submitted that the Report's account of his leaves and absences was wrong. The final Report says that even if this assertion is accepted, it does not change the fact that Mr. Oberlander was alone and armed for a month and so had the opportunity to escape and was not under duress for the entire duration of his service to Ek 10a. The final Report says that Mr. Oberlander's submissions regarding his fear of death for desertion cannot constitute a *carte blanche* excuse for his complicity: *Valle Lopes v Canada (Citizenship and Immigration)*, 2010 FC 403 at para 107 [*Valle Lopes*], aff'd 2012 FCA 25.

[25] The final Report says that the Minister has measured Mr. Oberlander's arguments against the findings of Justice MacKay, and has found that Mr. Oberlander has failed to demonstrate that he was under duress while remaining in the service of Ek 10a. The final Report recommends that Mr. Oberlander be deprived of his Canadian citizenship pursuant to s. 10 of the Act.

IV. <u>ISSUES</u>

[26] The Applicant raises the following issues in this proceeding:

a. Did the GIC err in law in applying the wrong standard for assessing the defence of duress?

b. Did the GIC err in law in ignoring and misstating evidence, such that it made erroneous findings of fact in a perverse and capricious manner?

c. Did the GIC breach principles of procedural fairness in failing to allow the Applicant or counsel an opportunity to comment on rebuttal arguments put forward in its final Report to the GIC?

d. Did the GIC breach principles of procedural fairness, the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*], and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] in rendering a finding on credibility without conducting an interview of the Applicant?

e. Did the GIC err in law in reaching an unreasonable decision?

In an Order dated September 30, 2012, Prothonotary Aalto granted the Applicant's motion to permit the parties to file supplemental memoranda of fact and law addressing a change in the law. The Applicant raised two additional issues in his submissions:

f. Are the issues determined by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*] relevant to the within proceeding, and can they be raised at this stage of the proceeding?

g. Should the decision of the GIC be set aside because its treatment of complicity does not comply with the requirements established by the Supreme Court of Canada in *Ezokola*?

V. STANDARD OF REVIEW

[27] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[28] The Applicant does not address the standard of review applicable to this proceeding. The Respondent submits that the GIC's decision should be reviewed on a standard of reasonableness as it is a discretionary, policy-driven decision made by "the highest political organ of the

Canadian government": *Oberlander v Canada (Attorney General)*, 2003 FC 944 at para 18; *Oberlander v Canada (Attorney General)*, 2008 FC 1200 at para 41.

[29] Issues a. and b. will be reviewed on a standard of reasonableness as the GIC's application of the law to the facts at hand raises a question where "the legal issues cannot be easily separated from the factual issues": *Dunsmuir*, above, at para 51.

[30] Issues c. and d. raise issues of procedural fairness and will be reviewed on a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31

[31] Issue e. requires the review of a decision of the GIC. The Federal Court of Appeal has established that such decisions are reviewed on a standard of reasonableness: *Oberlander* (2004), above, at para 55; *Oberlander* (2009), above, at para 12; *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at paras 83-91 [*Odynsky*].

[32] Issues f. and g. raise questions of law for the Court to determine and no standard of review applies.

[33] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above,

at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

Order in cases of fraud	**Décret en cas de fraude**
10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,	10. (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :
(a) the person ceases to be a citizen, or	a) soit perd sa citoyenneté;
(b) the renunciation of citizenship by the person shall be deemed to have had no effect, as of such date as may be fixed by order of the Governor in Council with respect thereto.	b) soit est réputé ne pas avoir répudié sa citoyenneté.
Presumption	**Présomption**
(2) A person shall be deemed to have obtained citizenship by false representation or fraud or	(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation

by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.	intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.

VII. ARGUMENT

A. *Applicant*

(1) Legal test for the defence of duress

[34] The Applicant agrees that the *Ramirez* test is the correct approach to evaluating duress in immigration law. However, the Applicant says that the Minister erred in his application by evaluating whether the imminent harm feared by the Applicant was established at a standard of certainty. The Minister should have considered whether a reasonable person in the Applicant's position would have perceived an imminent harm.

[35] The Applicant says this failure is in part due to the Minister's belief that the Guidelines are a reflection of the jurisprudence on duress. The Applicant argues that the Guidelines remove the consideration of the reasonable person test, and this has resulted in an improper determination.

[36] The Applicant also says that the criminal law defence of duress should apply to the GIC's determination because the defence is based on the principle of moral blameworthiness in both criminal law and immigration law. The criminal law provides that the elements of duress are evaluated on a modified objective standard; that is, one that considers a similarly-situated reasonable person: *R v Ryan*, 2013 SCC 3 [*Ryan*]. Again, under the criminal law analysis, the Applicant says that the Minister considered whether a threat did or did not exist, rather than what a reasonable person in the Applicant's position would have perceived.

[37] The Applicant says the Minister also erred in his examination of whether the Applicant had a safe avenue of escape. The proper consideration was whether the Applicant could have escaped without undue danger: *Hibbert*, above. The personal circumstances of the accused should be taken into account when making this determination: *Hibbert*, above, at para 62; *Ruzic*, above, at para 40; *R v Arsenault*, 2009 NBPC 44 at para 60. A reasonable course of action to avoid imminent harm does not require heroics: *Ruzic*, above, at para 40.

[38] The Report finds at various points that Mr. Oberlander's periods of leave provided him with an opportunity to desert. The Applicant says that this analysis fails to consider the evidence that the Applicant put forward concerning the reasonableness of his belief that he could not desert or escape from Ek 10a, including (Applicant's Record at 63):

i. Mr. Oberlander was 17 years old and had recently finished grade 10 when he was initially taken by the German forces. He was working in a factory, helping to support his family and saving money for medical school. His father was deceased;

ii. According to a recent understanding of international law principles, forced conscription at age 17 is considered a violation of international human rights principles. The ILO [International Labour Organization] considers it to be a form of child slavery;

iii. Members of Mr. Oberlander's family had been forcibly taken by Stalin's NKVD. The family believed they had been murdered;

iv. Mr. Oberlander was the lone male remaining alive in his immediate family;

v. It was the middle of the Second World War;

vi. Mr. Oberlander was ordered to act as an interpreter for the German forces. His mother was distraught and had nearly fainted when told he had to go. He himself described it as being "kidnapped" by the German forces;

vii. Mr. Oberlander was told of an incident in which a deserting German soldier had been executed. He was informed that if he tried to escape, he would be shot;

viii. The anti-German partisans were known to execute members of the German forces they captured.

The Applicant says that the Minister's failure to consider these submissions shows a misunderstanding of the legal criteria.

(2) Applicant's periods of absence from Ek 10a

[39] The Applicant argues that the Minister improperly relied on his periods of leave to find that he was not always under duress. The Applicant points to four specific references.

[40] First, the Applicant says the only period of time relevant to the issue of complicity, and so also to the issue of duress, is the time during which a person is involved with an organization with a brutal and limited purpose: *Nagamany v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1554. The Minister erred by referring to a period of leave that allegedly took place one month after he left Ek 10a and when he was with a regular combat unit of the German forces. This period of time is irrelevant to the Applicant's complicity in the crimes committed by Ek 10a and whether or not he could have deserted.

[41] Second, the Applicant says that the Minister erred by relying on a period of leave that Justice MacKay said was unlikely to have taken place. Mr. Huebert, a Crown witness, testified that he and Mr. Oberlander drove to Halbstadt on a period of leave in May 1942. Justice MacKay found, "[i]t is unlikely that [Mr. Oberlander] travelled to Halbstadt with Mr. Huebert at least at the time Huebert suggests in May 1942, since this would have been after Mr. Oberlander's mother and family left town": *Oberlander* (2000), above, at para 23. The Minister erred by finding the Applicant's voluntary return from this alleged leave negated the existence of an imminent, real, inevitable harm.

[42] Third, the Applicant says that the Minister erred by misstating the evidence. The Report points to findings by Justice MacKay that Mr. Oberlander had numerous opportunities to desert because he was on leave many times, and, at times, for several weeks. The Applicant says a review of the paragraphs the Minister cites makes clear that Justice MacKay never found that he had numerous opportunities to desert.

[43] Fourth, the Applicant says that the Minister's assertion that the time Mr. Oberlander spent guarding a barge as a solitary soldier meant that he was not under duress during the duration of his service with Ek 10a is both unreasonable and a misunderstanding of the law on duress. The Minister erred by suggesting that the harm feared must be constant to establish duress. In the Applicant's circumstances, the harm would have arisen if he had attempted to escape or desert.

[44] The Applicant argues that desertion punishable by execution satisfies the imminent harm element, as well as the proportionality in the harm inflicted and avoided in the duress analysis: *Canada (Minister of Citizenship and Immigration) v Asghedom*, 2001 FCT 972 [*Asghedom*]. A future harm can satisfy the imminent harm element: *Asghedom*, above; *Ryan*, above. In *Ruzic*, above, the Court found an imminent threat of harm despite the fact that Ms. Ruzic travelled far from her attacker and months had passed between the threat and her criminal act.

[45] The Applicant says that the testimony before Justice MacKay established that the penalty for desertion or disobedience was death. Further, recent reports confirm that approximately twenty thousand German soldiers were executed during World War II for desertion. The fact that desertion was punishable by death clearly establishes the close temporal connection to the harm feared.

[46] Mr. Oberlander was never outside of German-occupied territory during his time with Ek 10a. Leaving his unit on an authorized leave and remaining at his solitary post could not result in execution for desertion. However, if Mr. Oberlander had not returned or had deserted his post, he would have put himself at risk of being executed. This would have placed the Applicant in close temporal connection to the harm threatened. The law does not require heroics, and the Applicant was not required to show that he risked his life to escape the German forces: *Ruzic*, above, at para 40; *Ramirez*, above. The Applicant says the Minister failed to consider where he could have fled to in a Europe largely occupied by German forces.

[47] The Applicant also argues that the Minister is wrong in relying on the *Nuremberg Report*. The *Nuremberg Report* refers to leaders, while the Supreme Court has said that different standards should be applied to individuals of different ranks: *Finta*, above, at para 24. There is no evidence that a person of Mr. Oberlander's rank could have sought a transfer or asked to be discharged. The *Nuremberg Report* cannot be used to establish the reasonableness of Mr. Oberlander's perceptions and has no evidentiary value.

(3) Failure to disclose the final Report

[48] The Applicant says that the Minister's failure to disclose the final Report and provide him with an opportunity to respond is a breach of procedural fairness. The requirements of procedural fairness vary in accordance with a number of factors, including the importance of the decision to the person concerned. Citizenship revocation engages *Charter* rights and other highly important issues: *Odynsky*, above, at para 80.

[49] Procedural fairness requires that a party know the case he or she has to meet and be given a chance to respond to it: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9. The Federal Court of Appeal has held that it is a breach of the duty of fairness not to provide a person subject to the danger opinion process with the Minister's Report and an opportunity to respond: *Canada (Minister of Citizenship and Immigration) v Bhagwandass*, 2001 FCA 49 at para 35.

[50] The Applicant says the final Report contains new legal arguments and case law, to which the Applicant was unable to respond. These include:

- The Minister's explanation that he used the word "rumours" to refer to the fact that an assertion was based on hearsay and little weight should be afforded to it;

- The Minister's claim that the newspaper reports relied on by the Applicant are less reliable evidentiary sources;

- The Minister's use of case law not disclosed to the Applicant for the proposition that there is no authority to establish that the possibility of death for desertion is a *carte blanche* excuse for participation in the commission of atrocities;

- The Minister's use of a case in which the defence of duress was rejected because the perceived threat resulted from a policy of terror that the accused willingly and actively participated in;

- The Minister's claim that the Applicant has changed his position on the age he was conscripted from what he testified to before Justice MacKay, and what he submitted to the Minister;

- The Minister's suggestion that the evidence submitted to the GIC is outside of the existing record and impermissible.

The Applicant argues that as a result of his inability to respond to these new submissions, the GIC's decision is based on the Minister's erroneous submissions.

(4) Oral interview required

[51] The Applicant submits that the Report, and the GIC decision, is based, in part, on a negative credibility assessment of the Applicant. When credibility is in issue, procedural fairness, s. 2(e) of the *Bill of Rights*, and s. 7 of the *Charter* require that an oral interview be held: see *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 213-14; *Baker*, above. The Applicant says that he was denied procedural fairness because he was not provided with an oral interview.

(5) Unreasonable decision

[52] The Applicant submits that the GIC decision is unreasonable for several reasons (Applicant's Record at 81-82):

- It partially relies on facts to find complicity which occurred after the Applicant was a forced conscript with Ek 10a;
- It applies the wrong standard for the assessment of duress;
- It ignores the evidence of government witnesses;
- It appears to suggest that evidence outside the record before Justice MacKay on the reference should be ignored;
- It misunderstands and misstates case law; and
- It refers to the fact of the execution of deserters from the German forces as mere rumour.

B. *Respondent*

(1) Legal test for defence of duress

[53] The Respondent agrees that the legal test for the defence of duress was established by *Ramirez* and confirmed by the Federal Court of Appeal in *Oberlander* (2009), above. The three elements of the test are conjunctive; a failure to meet one of the elements is fatal to establishing the defence of duress: *Belalcazar v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1013 at para 19. The burden of establishing duress lies on the Applicant: *Jimenez v Canada (Citizenship and Immigration)*, 2012 FC 1231 at paras 16, 18-21.

[54] The Respondent points to five errors in the Applicant's submissions regarding the Minister's duress analysis (Respondent's Record at 33-35):

- The Applicant misconstrues the test by focusing exclusively on the imminent peril element of the defence on duress in immigration law, and the safe avenue of escape under criminal law;
- The Federal Court of Appeal has already confirmed that the Guidelines are reflective of its jurisprudence: *Oberlander* (2009), above;
- The Report properly considered the perspective of a similarly-situated reasonable person in Mr. Oberlander's position;
- Despite the Applicant's argument before the Court that the reasonable person consideration is determinative, this was not emphasized in the Applicant's earlier submissions or reply; and
- The Applicant improperly relies on an isolated statement from *Ruzic*: "the law is designed for the common man, not for a community of saints or heroes" (above, at para 40). This ignores the Court's further comments regarding the fortitude and resistance an accused is expected to demonstrate.

Contrary to the Applicant's assertions, the Respondent says that the Report properly analyzed whether the Applicant had established that he met the duress criteria.

[55] The Respondent highlights the Report's consideration of whether Mr. Oberlander faced an imminent threat of harm, focusing on: the length of Mr. Oberlander's service; the fact that he returned from many periods of leave; his time stationed as a solitary guard for three to four weeks; and, the lack of evidence that he was ever mistreated.

[56] The periods of leave were established by the evidence that was before Justice MacKay (*Oberlander* (2000), above, at paras 73, 158) and the Applicant does not dispute his time spent as a solitary guard. The Respondent also says that the evidence shows that some of the time that Mr. Oberlander spent with a regular combat group was in conjunction with Ek 10a. As such, the Applicant is wrong in arguing that the Report considers periods of leave after Mr. Oberlander left

Ek 10a. The Applicant is also wrong in saying Justice MacKay found the leave alleged by Mr. Huebert to have taken place in May 1942 did not take place.

[57] The Applicant provides no evidence to dispute the finding of the *Nuremberg Report* that members of Ek 10a had the ability to ask for transfers. The Respondent says that the Applicant's assertion that he believed he would be killed if he deserted is insufficient to establish imminent peril: *Equizabal*, above. Failure to desert while on leave is indicative of a lack of an imminent threat: *Equizabal*, above. The Respondent also relies on *Valle Lopes*, above, in which the Court upheld the finding that the applicant in that case was not under constant watch and could have escaped, even if it would have placed him in grave danger (at para 108).

[58] The Applicant's reliance on *Asghedom*, above, is improper. In that case, there was no evidence that the applicant had any leave opportunities, and there was documentary evidence showing that the penalty for desertion was death. There is no such evidence to support the Applicant's claim of duress.

[59] Collectively, the evidence invalidates the Applicant's contention that he was in imminent danger.

[60] The Applicant also failed to establish that his time with Ek 10a was inconsistent with his will. The Respondent highlights the following facts as establishing that Mr. Oberlander's service was consistent with his will (Respondent's Record at 41-42):

- There is no conclusive finding that the Applicant was conscripted;

- The Applicant was promoted and received a medal recognizing his service;
- The *Nuremberg Report* says that uncooperative or unwilling individuals could have sought a transfer or a discharge;
- There is no evidence the Applicant ever sought a discharge, or a transfer, or that he considered desertion;
- The Applicant always returned to his duties after his periods of leave;
- There is no evidence that he found Ek 10a's activities abhorrent; and
- The Applicant joined his mother's application for German citizenship.

[61] The Applicant also failed to establish that he met the proportionality element. He has not presented evidence to show that the harm caused to the victims of Ek 10a was less than the possible harm he would have faced. There is no factual foundation for the Applicant's assertion that Ek 10a members faced death if they disobeyed an order or tried to leave.

[62] In response to the Applicant's reliance on the criminal law of duress, the Respondent says that the jurisprudence has held that "proceedings under section 18 of the Citizenship Act must be analysed in the context of principles and policies underlying immigration and citizenship law, and not in the criminal law context": *Canada (Minister of Citizenship and Immigration) v Copeland*, [1998] 2 FC 493, quoted in *Canada (Minister of Citizenship and Immigration) v Oberlander* (1997), 155 DLR (4th) 481 at para 26 (FCTD).

[63] Notwithstanding this direction from the Court, the Applicant does not meet the criminal law test established in *Ryan*, above. The Applicant relies on unsubstantiated evidence to establish a threat. One's subjective belief is not determinative, and the possibility of death for desertion does not excuse the commission of atrocities: *Valle Lopes*, above, at para 107. There also must

be a close temporal connection between the threat and the harm threatened: *Ryan*, above, at paras 66-67. The Applicant asserts that the harm can be future-based, but in *Caballero*, above, the Court rejected the argument that imminent harm could be continuous and lacked a temporal limitation (at paras 30-31). The Applicant cannot meet the proportionality element of the *Ryan* test because there is no evidence of a threat against him: *Arica v Canada (Solicitor General)*, 2005 FC 907 at para 25. The Respondent also disputes the Applicant's contention that the Report failed to consider his personal circumstances. The Report considered Mr. Oberlander's age, level of maturity, and his level of education.

(2) No right to reply to the final Report

[64] The Respondent argues that there was no breach of procedural fairness in the preparation of the Report. The Applicant was provided with a meaningful opportunity to present his case; he was provided with a draft copy of the Report, which contained the Minister's analysis on the issue of duress; he was provided with a meaningful opportunity to reply to the draft copy of the Report; and, the final Report merely addressed the Applicant's reply submissions. The Respondent says there is no duty on the Minister to provide his response to the Applicant's reply submissions. The process requires finality at some point, and the Applicant has not pointed to any case law establishing a right to reply to the Minister's final consideration of his reply submissions.

[65] The Respondent also argues that the Applicant has not established that the final portion of the Report contained new facts or arguments, or came to an unreasonable conclusion.

(3) No right to an oral hearing

[66] The Respondent submits that the Applicant was not entitled to an oral hearing: see. *Baker*, above, at paras 23-27; *Boshra v Canadian Association of Professional Employees*, 2011 FCA 98 at para 15. The Applicant had an oral hearing before the Federal Court, and the Act contemplates a paper process based on a written report produced following the hearing: Act, s. 10(1); *Odynsky*, above. The Applicant is not entitled to an oral hearing before the GIC, nor did he ever request an oral hearing.

[67] The importance of the decision to the Applicant does not entitle him to an oral hearing. A paper process has been held to be sufficient in cases where a risk of torture is alleged: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 113-123; *Lupsa v Canada (Citizenship and Immigration)*, 2007 FC 311 at paras 32-36.

[68] The Respondent also disputes the Applicant's contention that this case turns on credibility. The Respondent says that the GIC did not make an adverse credibility finding against the Applicant, but rather found his evidence unpersuasive. The Applicant had the onus to present evidence showing that the defence of duress applied. The evidence he presented to establish duress was weighed against the evidence which indicated he was not under duress. Evidence from witnesses with a personal interest in the matter, lacking corroboration, or vague evidence may be given less weight: *Ventura v Canada (Citizenship and Immigration)*, 2010 FC 871 at paras 21-23; *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27

[*Ferguson*]; *I.I. v Canada (Citizenship and Immigration)*, 2009 FC 892 at paras 20-21. The Applicant's evidence was reasonably found to be of insufficient probative value.

[69] Finally, the Respondent says that the *Bill of Rights* is of no use to the Applicant as fundamental justice has been held to have the same meaning as natural justice. The Applicant also fails to establish how revoking Canadian citizenship for fraud or misrepresentation engages s. 7 of the *Charter*, never mind how it actually breaches it.

C. *Applicant's Supplementary Written Submissions*

(1) The Court has jurisdiction to hear submissions on a new issue

[70] The Applicant submits that a new issue not previously raised can be argued to take advantage of a change in the law so long as a matter remains in the legal system: *R v Wigman*, [1987] 1 SCR 246 [*Wigman*]; *R v Weir*, 1999 ABCA 275 [*Weir*].

[71] The Applicant says that an important consideration for the Supreme Court of Canada in *Wigman* was the fact that the *Criminal Code*, RSC 1985, c C-46, s. 618 provided that an appeal could be made on any question of law, rather than any question upon which leave was granted. The Applicant says that this wording is similar to the jurisdiction granted to the Federal Court under the *Federal Courts Act*. The Applicant points specifically to s. 18.1(3)(a) and 18.1(4)(c) which respectively allow the Court to order a federal board, commission or other tribunal to do any act it has unlawfully failed or refused to do, and also allow the Court to grant relief if satisfied that the board or tribunal erred in law, whether or not the error appears on the face of

the record. There is no restriction limiting the Federal Court's jurisdiction to only those issues that are referenced in the Applicant's initial submissions.

[72] The Applicant submits that the issue of the revocation of his Canadian citizenship remains a live issue within the judicial system, and this Court has jurisdiction to consider arguments on the change in the law.

(2) The change in law

[73] In *Ramirez*, above, the Court found that complicity in international crimes, such as crimes against peace, war crimes and crimes against humanity, could be established on the basis of personal and knowing participation. Once it was determined that a group had committed international crimes, the assessment would consider whether the person concerned was complicit due to his or her knowledge of the crimes and agreement to their commission. If an organization was found to have a single, brutal purpose, membership alone was sufficient to establish *prima facie* proof of personal and knowing participation. This is the standard that the GIC used in determining that Mr. Oberlander was complicit in Ek 10a's criminal activities: Guidelines, s. 7.2.

[74] The Supreme Court of Canada's recent decision in *Ezokola*, above, overrules this Federal Court of Appeal jurisprudence. The personal and knowing standard was rejected due to the lack of a link to the alleged crime or the criminal purposes of the organization. This test was replaced with a consideration of whether "an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose": *Ezokola*, above, at para 8.

[75] Without deciding whether it provided a full account of Mr. Oberlander's activities with Ek 10a, Justice MacKay accepted Mr. Oberlander's description of his duties. This variously included: cleaning uniforms; working with the kitchen staff; occasionally registering ethnic Germans; dealing with supplies; interpreting for the German officers with local authorities; searching for the graves of German soldiers; organizing local entertainment for German troops; promoting public health matters; and, occasionally, serving as an interpreter during interrogation sessions (*Oberlander* (2000), above, at paras 44-48). Notably, Justice MacKay found that Mr. Oberlander had no involvement in Ek 10a's brutal or criminal activities: *Oberlander* (2000), above, at para 12. The Applicant submits that his involvement strongly suggests that his contributions to Ek 10a were minor in nature.

[76] The GIC has not rendered a determination as to whether Mr. Oberlander's actions constituted a significant contribution to the criminal purpose of Ek 10a. Hence, the decision is in error and must be quashed.

D. *Respondent's Supplementary Written Submissions*

[77] The Respondent argues that the issue is whether a finding made by the GIC in 2007, which was upheld by the Federal Court of Appeal in 2009, may be re-opened in this proceeding to overturn the GIC's 2012 determination regarding duress. The Respondent submits that the Applicant is asking the Court to overturn a decision of the Federal Court of Appeal. This decision was a final determination that the Applicant was complicit in Ek 10a's war crimes and crimes against humanity, and is *res judicata*.

[78] *Res judicata* denies a party the ability to re-litigate an issue unless special circumstances exist. Special circumstances may be established if it is demonstrated that the decision was clearly wrong, or if it would be in the interest of justice to permit the matter to be re-litigated. The Respondent submits that there are no special circumstances in this proceeding to permit the Court to overturn the Federal Court of Appeal's final decision. *Ezokola* does not provide a basis for finding that the GIC's decision on complicity was clearly wrong, and it would not be in the interests of justice to reconsider the matter.

[79] Issue estoppel is a branch of *res judicata* that prevents the re-litigation of constituent issues or material facts that were previously resolved: *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 20 [*Danyluk*]. Issue estoppel applies when three criteria are met (*Danyluk*, above, at para 25): the same question has been decided in previous litigation; the prior judicial decision was final; and, the parties to both proceedings are the same.

[80] The Respondent says that these criteria are met in the present proceedings. The legal question of whether the Applicant was complicit in the actions of Ek 10a was decided by the Federal Court of Appeal: the appeal was allowed only on the issue of duress, upholding the GIC's determination on complicity. The Federal Court of Appeal's decision on complicity was final. A judgment need not dispose of litigation in its entirety to be final. If it disposes of any substantive interlocutory issue, *res judicata* will apply: *Régie des rentes du Québec v Canada Bread Company*, 2013 SCC 46 at para 30 [*Régie des rentes du Québec*]. There is also no doubt that the parties to the litigation are the same.

[81] The Respondent says that *Wigman*, above, is distinguishable from this proceeding. In *Wigman*, the accused was appealing a conviction of attempted murder. The law of attempted murder changed. The matter of whether the accused could be guilty of attempted murder was still before the Court. This cannot be compared to this proceeding where the issue of complicity has been conclusively and finally dealt with in previous litigation concerning a different GIC decision.

[82] In order to qualify as being "in the judicial system," one of three criteria must be met (*R v Sarson*, [1996] 2 SCR 223 at para 27; *R v Thomas*, [1990] 1 SCR 713 [*Thomas*]; *Metro Can Construction Ltd v The Queen*, 2001 FCA 227 at para 5 [*Metro Can Construction*]): an appeal has been launched to the Supreme Court; an application for leave has been made within the time; or, an application for an extension of time is granted based on the criteria that normally apply in such cases. The Respondent says that this proceeding does not fit into any of these situations. The Federal Court of Appeal's decision in relation to complicity was final; it was not appealed to the Supreme Court; and, this issue is no longer in the judicial system.

[83] The Court can hear an issue that is *res judicata* if special circumstances exist: *Danyluk*, above, at para 63; *Giles v Westminster Savings and Credit Union*, 2010 BCCA 282 at para 63. However, neither the Federal Court of Appeal nor the Supreme Court of Canada have ever found evolving jurisprudence to be sufficient to justify relaxing the application of issue estoppel: *Apotex Inc v Merck & Co Inc*, 2002 FCA 210 at para 35 [*Apotex*]; *Régie des rentes du Québec*, above, at paras 24, 30-31, 40; *Metro Can Construction*, above, at para 5.

[84] A change in law may only constitute special circumstances where the change in law renders the decision clearly wrong (*Apotex*, above, at paras 35-36; *Sanofi-Aventis Canada Inc v Pharmascience Inc*, 2007 FC 1057 at para 60, aff'd 2008 FCA 213), or it is in the interests of justice to re-litigate the issue (*Smith Estate v National Money Mart*, 2008 ONCA 746 at para 42 [*Smith Estate*]).

[85] The Respondent submits that the GIC's decision is not clearly wrong, and that the GIC would have reached the same decision under the *Ezokola* analysis. The Respondent says the Applicant's contribution to Ek 10a was not mere association and so is not the type of complicity finding that the Supreme Court sought to rectify with *Ezokola*. *Ezokola* provides that an accused's contribution can be directed to "wider concepts of common design, such as the accomplishment of an organization's purposes" (above, at para 87). The Applicant's assistance in interpreting during interrogation sessions contributed to the identification of the enemies of the German Reich and their consequent execution. This constitutes a significant contribution to Ek 10a's criminal purpose.

[86] The Respondent also submits that re-litigating the issue of the Applicant's complicity is not in the interests of justice. Rather, finality in this proceeding is in the interests of justice.

[87] The only live issue remaining in the legal system is whether the Applicant was under duress during his time with Ek 10a. *Ezokola* did not change the law on duress. The Report, which reflects the GIC's reasons for the 2012 decision, makes no findings on complicity, so there is no need to consider this change in the law.

E. *Applicant's Reply to the Respondent's Supplementary Written Submissions*

[88] The Applicant argues that the issue is not a question of *res judicata*, but rather an issue of whether his matter is still in the judicial system. If the matter is within the system, a change in the law relevant to this application must be considered.

[89] The Applicant says that the issue of duress is directly related to the correctness of a finding of complicity. The proportionality element of the defence is not met as Mr. Oberlander was not directly involved in any crimes, so his actions did not bring any harm to Ek 10a's victims. The Applicant also argues that, contrary to the Respondent's claim, the sessions in which he served as an interpreter did not end in executions. It would be an artificial exercise to consider the defence of duress in relation to a finding of complicity which is based on an understanding of the law that has been overruled.

[90] In *Wigman* and *Weir*, both above, the relevant factor for whether to apply a change in the law was the fact that the cases were still before the courts. In both cases, issues that were finally determined at trial, and not appealed, were permitted to be argued on appeal because the law had changed.

[91] The Applicant is not required to show special circumstances because this is not an issue of *res judicata*. The GIC applied a standard that the Supreme Court has held to be wrong. This is an error in law.

[92] The Applicant also submits that *Ezokola* was not concerned only with complicity by association, but with the level of contribution. Justice MacKay affirmed "that no evidence was presented to the Court about any personal involvement of the respondent in criminal activities or war crimes": *Oberlander* (2000), above, at para 12.

[93] The Applicant says that it is not the Court's role to make a factual finding as to whether Mr. Oberlander was complicit. However, the evidence does not establish that Mr. Oberlander's role was significant to Ek 10a's criminal purposes. There is no finding as to whether Mr. Oberlander's activities as an interpreter significantly contributed to the purpose of Ek 10a. The decision should be returned to the GIC for redetermination.

VIII. ANALYSIS

[94] This application gives rise to three principal areas of concern: *res judicata* (issue estoppel); procedural fairness; and unreasonable decision. Success by the Applicant on any one of these issues will require reconsideration of the Decision. Hence, I will deal with each issue in turn.

A. *Res Judicata – Issue Estoppel*

[95] The Applicant says that following the filing of argument and before the scheduling of the hearing for this application, the Supreme Court of Canada released its decision in *Ezokola*, above, that fundamentally altered the law on complicity for international crimes in the context of an immigration matter. The Applicant also says that the decision in *Ezokola* has a direct bearing

on the GIC finding in this application that the Applicant was complicit in war crimes and crimes against humanity. Therefore, the Applicant asserts that the GIC decision must be set aside because it does not comply with the requirements for complicity as established by the Supreme Court of Canada in *Ezokola*. The Respondent resists this argument by raising *res judicata* (issue estoppel).

[96] On the face of it, it seems to me that issue estoppel does apply in this case. In previous litigation, the Federal Court of Appeal upheld the GIC's determination that the Applicant was complicit. This means that, in so far as the issue of complicity is concerned, all three criteria required for issue estoppel, as set out in *Danyluk*, above, are satisfied: the complicity issue has been decided in previous litigation; the Federal Court of Appeal's decision on the issue of complicity was final; and, the parties to the proceedings are the same.

[97] The Federal Court of Appeal remitted the previous GIC decision on the issue of duress, but this does not prevent its decision from being final in so far as complicity is concerned. The Supreme Court of Canada confirmed in *Régie des rentes du Québec*, above, at para 30, that "[a] judgment need not dispose of the litigation in its entirety to be final. If it disposes of any substantive interlocutory issue, *res judicata* will apply."

[98] The Applicant attempts to resist and distinguish this jurisprudence in several ways. First of all, he says that because the issue of duress is still in the system he is at liberty to re-argue the complicity issue on the basis of the changes in the law he sees in *Ezokola*.

[99] I do not see how this can be, because it would mean that, even though one or more issues (in this case complicity) has been finally determined, there can be no *res judicata* provided any other issue remains in the system for determination by the Court. In my view, *Régie des rentes du Québec*, above, says the opposite. Also, in my view, the Applicant has cited no jurisprudence that supports his position. The Supreme Court of Canada decision in *Wigman,* is distinguishable and has no analogous value for the present situation where the issue of complicity was finally determined by the Federal Court of Appeal. In *Wigman*, the law changed while the appellant had an appeal pending. The issue of whether attempted murder had been proven had not been finally determined and remained alive to be decided on appeal. The Supreme Court said that the new interpretation of the law applied to the appellant's case because "this case arose while avenues of redress from the judgment were still open to the accused – it was still 'in the system'" (above, at 260-261).

[100] Subsequent jurisprudence has held that an appeal is not the only way for a matter to remain in the system. In *Thomas*, above, the Supreme Court of Canada said that a matter could also be in the system if "an application for leave has been made within the time; or an application for an extension of time is granted based on the criteria that normally apply in such cases" (at 716). Most recently in *Régie des rentes du Québec*, above, at para 38, the Supreme Court of Canada said that a case that "has been remitted to a lower court is also a pending case."

[101] In the present case, the Applicant did not appeal the Federal Court of Appeal's decision. He also did not file for an extension for time to appeal. The only way that the Applicant's matter

can be said to be pending is if he can satisfy the Court that the Decision is of the type of remitted decision described in *Régie des rentes du Québec*.

[102] In my view, the matter that was remitted in the present case is distinguishable from the matter that was remitted in *Régie des rentes du Québec*. In *Régie des rentes du Québec*, the matter remitted was the determination of an employer's obligations following the termination of a pension fund. The law changed before the determination was made, and the tribunal was bound to apply the current state of the law. This is distinguishable from the matter that the Federal Court of Appeal remitted to the GIC in the present case. The Federal Court of Appeal explicitly upheld the Federal Court's decision that the GIC's determination on the issue of complicity was reasonable (*Oberlander* (2009), above, at para 22), and remitted the decision on the sole issue of duress (at para 41). The Federal Court of Appeal decision is a final decision regarding the parties' substantive rights and obligations in relation to complicity.

[103] Complicity was not a pending matter to be determined by the GIC. Consequently, in my view, there is no basis for the Applicant to argue that he should be able to take advantage of the change in the law in *Ezokola* because complicity remains in the system. The Federal Court of Appeal remitted this matter on the sole issue of duress. *Ezokola* did not change the law of duress.

[104] My conclusion is that *res judicata* (issue estoppel) applies in this case. But this is not the end of the matter. As the Respondent acknowledges, even where the criteria for issue estoppel are met (as they are here), the Court retains a residual discretion to determine that the doctrine

should not be applied where, taking into account the entirety of the circumstances, this could lead to an injustice: see *Danyluk*, above, at para 63.

[105] This sounds like a very unwieldy discretion to me that, if not confined in some way, could easily undermine the whole doctrine and purpose of *res judicata*. With this in mind, I feel I have to take into account the following guidance and principles when considering the exercise of the discretion in this case:

a. The Supreme Court of Canada and the Federal Court of Appeal have made it clear that the Court's discretion to override the doctrine of *res judicata* must be very limited in application: see *Apotex*, above, at para 48, quoting *GM (Canada) v Naken*, [1983] 1 SCR 72 at 101 [*Naken*];

b. The same cases make it clear that the discretionary override can only occur in the rarest of cases and the "fact that harsh results follow the application of the doctrine has not deterred its application by the courts": see *Apotex*, above, at para 48, quoting *Naken*, above, at 101;

c. The discretion is even further restricted when applied to a final judicial decision, as opposed to a decision of an administrative tribunal: see *Apotex*, above, at paras 45-46; *Danyluk*, above, at para 66;

d. The burden is upon the party seeking to avoid the application of the doctrine to establish special circumstances;

e. Although a change in the law could constitute special circumstances, the Federal Court of Appeal has pointed out that neither the Supreme Court of Canada nor the Federal Court of Appeal has ever found evolving jurisprudence to be sufficient: see *Apotex*, above, at para 35;

f. The Federal Court of Appeal in *Metro Can Construction*, above, at para 5, appears to say that finally determined cases should not be re-opened simply because there has been a change in the law; and

g. A change in the law will not constitute special circumstances unless it is in the interest of justice to re-litigate the issue: *Smith Estate*, above, at para 42.

[106] In my view, the Federal Court of Appeal in *Apotex*, above, did not say that a change in the law could constitute special circumstances if the decision was clearly wrong. Rather, Apotex made an argument that this was a principle of law based on a decision from the Ontario Court of Appeal (*Minott v O'Shanter Development Co* (1999), 42 OR (3d) 321 (ONCA) [*Minott*]). The Federal Court of Appeal said that it would assume, without deciding, that Apotex could rely on this principle but noted that neither the Federal Court of Appeal nor the Supreme Court of Canada had ever said that a change in the law constitutes special circumstances (*Apotex*, above, at paras 35-36). The Federal Court of Appeal conducted a brief analysis and concluded that the change in the law had not rendered the earlier decision clearly wrong.

[107] While the Federal Court of Appeal was willing to entertain Apotex's reliance on *Minott*, I do not think we can say that it confirmed this principle. The Supreme Court of Canada cases actually say the exact opposite. In *Wigman*, the Supreme Court of Canada confirmed its earlier jurisprudence which said that *res judicata* would prevent courts from re-opening cases even when based on constitutionally invalid laws (above, at 257-258):

> […] Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated. Thus a person convicted under *Lajoie* will not be able to reopen his or her case, unless, of course, the conviction is not final. In the *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 757, the Court observed that *res judicata* would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The *res judicata* principle would apply with at least as much force to cases decided on the basis of subsequently overruled case law.

[108] In light of the Supreme Court's emphasis in *Danyluk* and *Régie des rentes du Québec,* both above, on the importance of the finality of judicial decisions, and the guidance in *Danyluk* that the discretion to not apply *res judicata* is very limited in relation to court judgments, it seems unlikely that a simple change of law alone could constitute a sufficient basis for special circumstances, even if the prior decision was clearly wrong.

[109] In terms of the reliance on *Smith Estate*, above, the provincial courts have relaxed *res judicata* much more readily and more liberally than the Federal Courts and the Supreme Court of Canada, as the Federal Court Appeal pointed out in *Apotex*. In my view, the overarching consideration in deciding whether or not to exercise the discretion is whether it is in the interests of justice to do so, and this is not limited to whether there has been a change in law: "As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether the application of issue estoppel in the particular case would work an injustice" (*Danyluk,* above, at para 80).

[110] In my view, these guidelines by no means provide a comprehensive or totally coherent set of principles with which to address the present situation. It seems to me, however, that there is a strong societal interest in preserving a final decision on the merits, and that this interest can only be outweighed in rare cases where the interests of justice require re-litigation. In my view, this is not such a case.

[111] I say this because the Applicant has demonstrated no more than a change in the law. The Applicant has had his claim that he was not complicit fully determined on the merits and

confirmed by the Federal Court of Appeal. The legal system provided the means for the Applicant to challenge this result. The Applicant now says that the finding of complicity was not consistent with international norms and obligations as recognized by the Supreme Court of Canada in *Ezokola*. If non-compliance with international norms and obligations is a plausible argument now, then it was equally plausible when the Federal Court of Appeal found that complicity had been established in this case. The Applicant was free to seek leave to take his case on complicity to the Supreme Court of Canada. The system provided him with the means to demonstrate that the Federal Court of Appeal decision was not in accordance with international norms and to assert his present position before the Supreme Court of Canada. Yet he chose not to appeal on this issue. Hence, he must be taken to have accepted the result. Rather than put his present arguments to the test in the way that the system would have allowed him, the Applicant now comes before the Court and asks that the doctrine of *res judicata* be suspended in his favour. I do not think it can be said that an injustice arises where the Applicant had the opportunity to question and to try to overturn the law on complicity, but chose not to avail himself of that opportunity at an earlier stage in these proceedings.

[112] In addition, in my view, the Applicant has also not established that the decision finding him complicit was "clearly wrong." The previous decision of the GIC on complicity, endorsed by the Federal Court of Appeal, was clearly right on the merits, and even if "wrongness" now has to be measured against the law in *Ezokola*, the Applicant has still not shown the decision in question was "clearly wrong." *Ezokola* removes guilt by mere association. The Supreme Court of Canada ruled that complicity should not be found for "every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which

contributes" (at para 57). Rather, complicity is found for individuals who "intentionally or knowingly contribut[e] to a group's crime or criminal purpose" (at para 61). The Applicant's contribution does not fall into an obviously peripheral category of persons. There is evidence, for instance, to suggest that the Applicant played a role as an interpreter in interrogations that could have resulted in the death of the person interrogated. It is possible to argue and debate how significant that role was (and the issue will arise again when considering duress), but I do not think it can be said that the Applicant clearly cannot be held complicit if *Ezokola* is applied to his situation. There is evidence that the Applicant served as an interpreter during the interrogation by German officers in the SD premises of a woman who, had she been found to be Jewish, would likely have been killed (Report, Supplement C, Tab C, at 893-894, 908-909). The Applicant did more than simply guard a barge. By acting as an interpreter in this way, the Applicant was vital to the purposes of Ek 10a because he assisted in identifying who should be eliminated. We do not know precisely how many times the Applicant acted in this role, but the evidence of Mr. Huebert, Mr. Sidorenko, and Mr. Oberlander himself all appears to suggest that he played an interpretative role in Ek 10a.

[113] In conclusion on this issue, I find that *res judicata* (issue estoppel) does apply in this case and that the Applicant has not established grounds that would allow me to exercise the discretion to override that doctrine and return the matter for reconsideration of the complicity issue.

B. *Procedural Fairness*

[114] The Applicant alleges that procedural fairness was breached in two principal ways. I will deal with each in turn.

(1) Right to Comment on Minister's Final Recommendation

[115] The Applicant says that not allowing him to reply to the Minister's final recommendation to the GIC resulted in procedural unfairness.

[116] The Decision and reasons in this case consist of the Order In Council that revoked the Applicant's citizenship and the reasons contained in the Minister's Report. The record shows that the usual statutory process was followed in arriving at this decision.

[117] Following the Federal Court of Appeal decision in 2009 that upheld the complicity findings of the GIC but returned the matter for reconsideration on the issue of duress, the Applicant was invited to make submissions on duress. He responded by submitting an affidavit and forty-five pages of submissions, on April 21, 2010. The Minister then prepared an eighteen-page "Draft Supplementary Report and Response to Submissions" and, on June 21, 2010, sent it to the Applicant so that he could provide a reply before the Minister submitted his final recommendation to the GIC. The Draft Supplementary Report made it clear that the Minister would recommend that the Applicant's citizenship be revoked but that no final recommendation would be made until the Minister had received and reviewed the Applicant's reply.

[118] On July 7, 2010, the Applicant submitted a thirty-seven-page reply to the Minister's Draft Supplementary Report. The Minister then prepared a "Supplementary Report and Response to Submissions" which took into account the Applicant's reply submissions. This was reviewed by

the GIC which, on September 27, 2012, accepted the Minister's recommendation and revoked the Applicant's Canadian citizenship.

[119] The Applicant now complains that a breach of procedural fairness has occurred because he was not allowed an opportunity to comment upon the Supplementary Report and Response to Submissions that dealt with his reply to the Draft Supplementary Report.

[120] First of all, I see nothing inherently unfair in the process that was followed in this case, and that is followed in other similar cases where citizenship is considered for revocation. It seems to me that the Applicant was given a fair and meaningful opportunity to present his case on duress and to bring forward and comment upon the facts that supported his position. This is precisely what he did. He was told that the final recommendation would be completed after reviewing and considering his reply, and he made his reply submissions knowing that this would occur. He did not ask to see the final recommendation so that he could make further submissions. The Applicant claims that the final Report is an "instrument of advocacy" and should have been disclosed. However, the Applicant's argument has been rejected by this Court and the Federal Court of Appeal: *Oberlander v Canada (Attorney General)*, 2003 FC 944 at paras 13-14, rev'd on other grounds 2004 FCA 213 at paras 34-36. In the present case, the Minister's recommendations constitute the reasons for the Decision, and procedural fairness does not require that final reasons should be presented for possible rebuttal: see *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at para 72; *Al Yamani v Canada (Solicitor General)* (1995), [1996] 1 FC 174 at paras 77-81, 103 FTR 105. If those reasons contain a reviewable error, then the Applicant has the right to bring them to the Court for review.

[121] A review of the process followed in this case leads me to conclude that the Applicant was made fully aware of the case he had to meet and was given a fair and meaningful opportunity to meet that case before a final decision was made.

[122] The Applicant has attempted to show that the final portion of the Minister's Report that dealt with his reply contained new facts, new argument, and "spin" that he was not allowed to address in his own submissions.

[123] In my view, reasons are always an identification, interpretation and weighing of the facts. I agree that procedural unfairness could arise if something material and extrinsic was allowed into the Minister's considerations following the Applicant's reply and which the Applicant could not have anticipated from the draft Report. The Applicant has made strenuous efforts to convince the Court that this indeed occurred. I have carefully reviewed each instance raised by the Applicant against the record and I can find no justification for his allegations of procedural unfairness based upon this ground. I can find no new fact or argument, or misdescription or mischaracterization of evidence that the Applicant did not address, or was not able to address, in his submissions and reply. I will address each of the Applicant's arguments in turn.

Hearsay Issues

[124] The Applicant says that he would have liked to make submissions regarding the Minister's explanation that he meant "hearsay" when he used the word "rumours" in the Report. The Applicant wants to submit that the statements at issue were not hearsay, and he wants to expand on the Minister's definition of hearsay.

[125] The Report says that the word "rumours" was used in pointing out, at paragraph 80, that:

> Mr. Oberlander's fears of being executed were based on hearsay. This is evidenced in Mr. Oberlander's own submissions at paragraphs 23, 60, 67 vii, 75, 81, and from his own affidavit, at paragraphs 19, 22, and 23. The Minister can therefore attribute very little weight to Mr. Oberlander's arguments in these paragraphs.

In footnote 76, the Report defines hearsay as:

> An out-of-court statement offered to prove the truth of its contents is hearsay, or more colloquially termed a "rumour," and is generally unreliable as the third party's evidence is not subject to cross-examination. In 1941, Mr. Oberlander had no first hand evidence that Ek10a members who attempted to desert were being killed. Rather, he bases his present claims to have feared death as the consequence for desertion, on the hearsay statements of others.

[126] The Applicant says that he would have replied by informing the GIC that (Applicant's Record at 76):

> [T]he evidence of the Crown's witnesses before Justice MacKay was taken under oath, in court, was firsthand experience and was not hearsay. Further, the GIC could also have been informed that hearsay evidence is admissible and weighted according to the standard of whether its source is reliable and trustworthy. Surely the Minister would not argue that the evidence of its own witnesses was not reliable and trustworthy? It is hardly rumour.

[127] I think the Report's characterization of the basis for Mr. Oberlander's assertions that he would be executed if he deserted as rumours or hearsay is fair. Based on my reading of the paragraphs that the Minister points to, Mr. Oberlander does not provide any first-hand knowledge or evidence of his belief that he would be executed if he deserted. Rather, his

submissions refer to things that people told him or to excerpts from the transcript of the hearing before Justice MacKay.

[128] These statements are out-of-court statements offered for the truth of their contents. For example, in paragraph 67(vii) of the Applicant's submissions, counsel submits: "[h]e was told of an incident in which a deserting German soldier had been executed. He was informed that if he tried to escape, he would be shot." This statement is offered as evidence that Mr. Oberlander would have been shot if he tried to escape. There is no information provided as to who told him this or in what context. It seems reasonable for the Minister to say that such a vague unqualified statement should be attributed very little weight.

[129] The Applicant also relies on excerpts from the transcript of the hearing before Justice MacKay. For example, at paragraph 23 of his submissions, counsel includes an excerpt from Mr. Sidorenko's testimony:

> Q. From your experience over those many years what do you say would have been the consequence to you had you disobeyed an order from your commander.
>
> A. Well, they would have shot me, that's it.

[130] Again, this is offered as proof that Mr. Oberlander would have been shot had he disobeyed. In my view, the Applicant confuses the issue by claiming that the Minister cannot say that these statements are hearsay because they were made in court. The statements were not made in court for the purposes that the Applicant now seeks to use them. Justice MacKay only decided that the Applicant had obtained his citizenship by false representation or by knowingly

concealing material circumstances within the meaning of s. 18(1) of the Act. The reliability of such statements for the purposes of duress has not been tested.

[131] The Applicant also wishes to educate the GIC that "hearsay evidence is admissible and weighted according to the standard of whether its source is reliable and trustworthy" (Applicant's Record at 76). In my view, this would not add anything to the Minister's definition of hearsay or to his treatment of the statements. It misstates the fact that hearsay statements are presumed inadmissible and must be demonstrated to be reliable *and* necessary: see *R v Baldree*, 2013 SCC 35 at paras 34-36. Further, regardless of the definition of hearsay that the Minister used, the Minister clearly considered the hearsay statements as admissible, and simply gave them less weight because they were based on things that Mr. Oberlander claims he heard from others. The weight to be given to evidence is within the decision-maker's discretion and the Applicant's submission that the statements should be "weighted according to the standard of whether its source is reliable and trustworthy" is the determination that the Minister has already made.

[132] As a final note, the Applicant made extensive submissions regarding the Minister's use of the word "rumours" in his reply to the draft Report. The Applicant, again, pointed to Mr. Sidorenko and Mr. Huebert's testimony (see Report, Reply, Tab H at para 30), made arguments as to the credibility of Mr. Oberlander's statements (see Report, Reply, Tab H at para 63), and attached three news articles. It seems to me that the Applicant has already made arguments going to the trustworthiness and reliability of this evidence.

[133] In my view, there is no merit to the Applicant's argument that the statements he seeks to rely on are not hearsay. The Applicant's desire to advise the GIC that hearsay statements can be admissible is irrelevant because the statements were treated as admissible. The Applicant simply disagrees with the weight they were given.

Journal Articles

[134] The Applicant says he would have liked to make submissions regarding the Minister's treatment of the articles that he included with his reply submissions to the GIC. He says that "[t]he Minister has misunderstood and misconstrued the journals presented and the law cited" (Applicant's Record at 77).

[135] The Applicant submitted three news articles. The first article is from BBC News and reports on the fact that the German parliament revoked the convictions of those convicted of desertion by Nazi military tribunals. It states that "[a]ccording to historians, around 30,000 people were sentenced to death for desertion or treason by Nazi military tribunals during World War II, and some 20,000 were executed."

[136] The second article is from *Jurist*. *Jurist* is a website with legal news stories written and edited by law students who work under the supervision of a law professor. The article says that "[t]he law clears the convictions of an estimated 30,000 convicted German citizens, of which about 20,000 were executed during World War II." The article goes on to say that "[t]he German parliament relied on new research by two military historians that found that most of the offenders were low ranking soldiers."

[137] The third article is from *Spiegel*. *Spiegel* is a German news website. This article reports on a debate in the German parliament about whether to revoke the convictions of those convicted of war treason by the Nazi Military Tribunal. A picture caption reads: "The Nazis executed more than 30,000 Wehrmacht soldiers. Thousands, however, still bear the scarlet letter of conviction – in many cases unjustly." There is also a line regarding a statement from a member of the German parliament: "Korte [a German Left Party parliamentarian] points to the fact that Germany's military courts, which passed down fully 30,000 death penalties during the Third Reich, were one of the most powerful arms of Nazi oppression."

[138] The Minister describes these articles as "internet news printouts referring to the number of soldiers of the German forces executed during WWII" (Report at para 81).

[139] The Report relies on five Federal Court cases to say that the jurisprudence is clear that newspaper articles are less reliable evidence. All five cases were judicial reviews of failed refugee claims. In each of them, the claimant made a procedural fairness argument on the basis that the Refugee Protection Division of the Immigration and Refugee Board [Board] ignored the newspaper articles that they submitted.

[140] In *Pehtereva v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 200 [*Pehtereva*], the Court dismissed the applicant's claim that the tribunal ignored the applicant's documentary evidence. The Board said it had accepted the independent objective documentary evidence over the anecdotal newspaper articles. Justice MacKay said (at para 12): "[e]ven if the newspaper articles submitted by the applicant provided examples indirectly supportive of the

applicant's claim…it is trite law that the weight to be assigned to given documents or other evidence is a matter for the tribunal concerned."

[141] In *Singh v Canada (Citizenship and Immigration)*, 2008 FC 494, at para 18, the Court said:

> […] the Board here simply preferred its own objective and more reliable documentation, to the applicant's evidence consisting mainly of newspaper's reports on sporadic incidents that do not necessarily describe the general situation in the Punjab concerning the disappearance of Sikh militancy.

[142] In *Myle v Canada (Citizenship and Immigration)*, 2007 FC 1073 [*Myle*], the Board did not consider the news articles that the applicant submitted, but other news articles from this source were included in the Board's documents. The Court said that the Board was wrong to say that a source was unreliable when it was a source that the Board had itself relied on.

[143] In *Bermudez v Canada (Citizenship and Immigration)*, 2007 FC 681, the Court cited *Pehtereva*, above, and said it was satisfied that the tribunal properly assessed the objective and subjective facets of the applicant's claim.

[144] In *Agastra v Canada (Citizenship and Immigration)*, 2006 FC 548 [*Agastra*], the Court said (at para 43):

> The Applicant in this case is referring to evidence he submitted in the form of a number of articles, which primarily report on abuses committed by the government in association with the 2004 DP demonstration. The Board addressed the articles submitted by the Applicant by explaining how journalistic articles in Albania are highly politicized and sensationalized and are generally not reliable. On the other hand, the Board referred in detail to sources

> of documentary evidence from the U.S. State Department and the British Home Office that tended to discredit the Applicant's claims. It is trite law that the Board, as a trier of fact, is entitled to prefer some documentary evidence to other evidence, and in this case the Board gave reasons for doing so.

[145] In the present case, the Report says that "[t]he caselaw is clear that newspaper articles are less reliable evidence. There is no presumption of truth and they certainly are not sworn evidence" (at para 82, footnote omitted).

[146] The Applicant says that the Minister misunderstood and misconstrued both the articles and the case law. The Applicant would like to have advised the GIC that the findings of the Court are specific to each case because the articles were "untranslated" or "anecdotal" or "highly politicized and sensationalized." In contrast, the Applicant says the articles that he relies on are from "highly reputable journals" that were reporting on "the German Parliament, statements made from the German Justice Minister and a legal expert for the German Parliament, Norbert Geis."

[147] I do not think there is any merit to the Applicant's complaint that the Minister misunderstood and misconstrued the articles. The articles are printouts from internet news websites. In the course of reporting on the German parliament's decisions and debates regarding whether to revoke convictions handed out by the Nazi Military Tribunal, the articles reference the fact that the Nazis executed a number of German soldiers as punishment for their convictions. The points for which the Applicant would like to rely on them are made in passing, and are not substantiated by any discussion or reference to their sources. I think the Minister described the articles quite fairly.

[148] The fairest summary of the cases may be that the Court's jurisprudence finds it reasonable for the Board to give more weight to objective, independent documentary evidence than to newspaper articles. The one exception is *Myle*, above, where the Court said the Board could not say a source is unreliable if it relies upon it itself. It is not clear why the Report includes this case as it is not applicable to this situation and does not fit in with the other cases cited. However, this is not what the Applicant says he would like to correct and it would not assist his argument.

[149] In my view, the Applicant is wrong in saying that the Court has only said that newspaper articles are less reliable evidence when "not translated," "anecdotal," or "highly politicized and sensationalized." The Applicant does not point to any additional case law, and none of the cases that the Minister cites distinguish these points. In *Pehtereva*, the Court notes that the articles were translated into English. It is clear, though, that the articles were not given less weight because they were translated, but rather because they were anecdotal news reports. The Board preferred the independent, objective reports and the Court found this to be reasonable.

[150] In my view, the Court does not distinguish between anecdotal and non-anecdotal news articles in any of the cases. The argument that the Court only rejects newspaper articles when they are anecdotal would not assist the Applicant anyway. The BBC story that the Applicant submits is an anecdotal account of one person's experience of having his conviction revoked.

[151] In *Agastra*, above, the Court said that it was reasonable for the Board to consider the newspaper articles less reliable because they were highly politicized and sensationalized. I think

this is the only point that the Applicant could have made. He could have submitted to the GIC that, in one of the cases that the Report cites, the articles were said to be unreliable because they were highly politicized and sensationalized. However, this clarification would not change the principle that newspaper articles are typically given less weight than objective, independent documentary evidence. It also would not, in my view, affect the legal principle that a decision-maker is entitled to weigh evidence. I cannot see how the Applicant's procedural fairness rights have been breached by his inability to add this caveat to one of the cases that the Report cites. The Report does not try to claim that the Applicant's submissions are highly politicized and sensationalized; it just relies on the cases to establish a legal principle relating to the evidentiary weight typically given to newspaper articles.

[152] Even if the Court was inclined to look into the weight given to the articles, it seems reasonable for the Report to state that the articles should be given little weight. As the Report points out, the articles discuss soldiers, and the Applicant does not present anything to link their circumstances to those of Einsatzkommanda members. The articles also do not refer to any sources; they state that the number of Nazis executed is "according to historians."

[153] In my view, there is no merit to the Applicant's submission that the Minister misunderstood the articles or the case law. The Applicant wants to make submissions regarding why the newspaper articles in the cases he cites were unreliable and why his articles are reliable, but that does not change the fact that the weight the articles are to be given is for the Minister to decide.

[154] I would also note that the Minister was not raising a new argument. This discussion is an explicit reply to the Applicant's submissions regarding the newspaper articles.

Reliance on Valle Lopes

[155] The Applicant also says that he would have provided a caveat to the Minister's reliance on *Valle Lopes*, above, in the final Report, and he would have advised the GIC that the Minister misunderstood the context of the *Valle Lopes* decision.

[156] The Minister's reliance on *Valle Lopes* is a response to Mr. Oberlander's reply submissions regarding whether he had a safe avenue of escape (Report at para 89):

> Mr. Oberlander's submissions are an argument that the possibility of death for desertion is a *carte blanche* excuse for complicity in the atrocities committed by the Nazis. The Federal Court has dismissed this argument and stated that such allegations must be assessed on the weight and reliability of evidence in support of the allegations before it. In a recent decision of the Federal Court, Justice O'Keefe held that, "[t]he applicant appears to argue that the possibility of death for desertion is a *carte blanche* excuse for participation in the commission of atrocities. I know of no authority in support of this principle. The Board is free to weigh the evidence before it and come to its own conclusion on whether an individual ought to have attempted to leave."

[157] The Applicant claims that a "careful reading of the Lopez [*sic*] decision discloses that the Court's statement was made in relation to evidence that the applicant may have been able to escape from the military and in fact did, when faced with imminent harm" (Applicant's Record at 77).

[158] The "careful reading" that the Applicant refers to appears in the very next paragraph to the one quoted above. Justice O'Keefe says that the Board is free to weigh the evidence as it likes (*Valle Lopes*, above, at para 108):

> While the applicant may disagree with the result, in my view, it was reasonable for the Board to make the determination it did. The Board surmised that while leaving the organization may have put the applicant in grave danger when weighed against the atrocities they were committing, it was the only acceptable course of action. The Board accepted that Battalion 3-16 would likely attempt to hunt down and kill deserters, but it felt that the applicant was not in imminent harm when he was participating in crimes against humanity. He was not under constant watch and a carefully planned desertion could have been executed much earlier. The Board also considered that when the applicant found himself in danger of imminent harm, he was able to escape. It was not unreasonable for the Board to consider these factors. The weight it placed on each factor is not something the Court is entitled to interfere with. Thus, the Board's conclusion stands.

[159] This paragraph does not, in my view, change what Justice O'Keefe said about there being no authorities to support the argument that death for desertion is not a *carte blanche*. Justice O'Keefe found it was reasonable for the Board to hold that the claimant should have tried to escape even though it was likely he would have been hunted down and killed. The Minister did not, in my view, misunderstand the context of the *Valle Lopes* decision by relying on an isolated quotation. However, the Applicant's submission suggests to me that the Applicant may have misunderstood the full context of the decision.

[160] The Report already points out that Justice O'Keefe said that the Board could weigh factors and reach its own conclusion regarding whether a claimant should have tried to escape. Nothing would be added by making a submission to the GIC that provides one of the factors that was reasonable to consider. I think that would actually misrepresent the decision. Justice

O'Keefe says the weight to be given to the factors is for the Board to consider. Singling out one of the factors that Justice O'Keefe mentioned might suggest that he said that particular factor was to be given more weight.

Reliance on Duch

[161] The Applicant also says he should have been allowed to submit a caveat to the Minister's reliance on *Prosecutor v KAING Guek Eav alias Duch* Case File/ Dossier No. 001/18-07-2007/ ECCC/TC, Extraordinary Chambers in the Court of Cambodia [*Duch*]. He argues that his personal circumstances were different from those of the defendant in *Duch*.

[162] The Minister's use of the case follows his reliance on *Valle Lopes* for the proposition that death for desertion is not a *carte blanche* excuse for participation in atrocities (Report at para 90):

> Likewise, the Extraordinary Chambers in the Court of Cambodia (ECCC) found that duress cannot be used as a *carte blanche* excuse. In the recent reasons for decision of the *Duch* case, the ECCC stated that, "[t]he Chamber accepts that towards the end of the existence of S-21, the Accused may have feared that he or his close relatives would be killed if his superiors found his conduct unsatisfactory. Duress cannot however be invoked when the perceived threat results from the implementation of a policy of terror in which he himself has willingly and actively participated.
>
> [footnote omitted]

[163] The Applicant says that his situation is clearly distinguishable from that of Duch. The Applicant says that Duch was a leader who was instrumental in formulating a policy that resulted

in the torture and murder of people. He also says that Duch was not conscripted, nor was he threatened with death if he did not work under these policies.

[164] The Minister relies on *Duch* to establish a point of law. The Applicant would like to make representations distinguishing himself from the defendant in that case but, in my view, this would have no impact upon the point of law for which *Duch* is cited. Further, the Applicant has already made extensive submissions regarding whether or not he was conscripted and whether he was threatened with death. There is nothing in this submission that is not already before the GIC.

The Age Issue

[165] The Applicant complains that "the Minister claims that Mr. Oberlander is only now asserting that he was 17 years old when he was forcibly conscripted as an interpreter and that he maintained before Justice MacKay that he was 18 years old when this occurred" (Applicant's Record at 78).

[166] The Applicant refers to paragraph 101 of the Report:

> Mr. Oberlander's actual age when he joined has been at issue from day 1. While it has been the Minister's position that Mr. Oberlander joined when he was 17 years old, Mr. Oberlander maintained that he was 18 years old. Mr. Oberlander now argues that he was only 17, contrary to his own evidence that he joined in the month of his eighteenth birthday.

[167] In addition, footnote 90 reads: "[a]lthough the minister's evidence [was] that Mr. Oberlander joined the Ek10a some months prior to his eighteenth birthday, the Court made no

finding regarding the timing of the commencement of his service. In any event, Mr. Oberlander was close to his 18th birthday or already 18 when he joined the Nazis."

[168] The Applicant says that he should have been allowed to point out to the GIC that it is disingenuous for the Minister to say that the Applicant stated he joined when he was eighteen. The Applicant's evidence is that he joined in February 1942. His eighteenth birthday was February 15, 1942. The Applicant says that this means he was clearly taken before February 15, 1942 and so was seventeen at the time he was taken.

[169] I do not think there is any substance to this argument. The Applicant wants to submit that he was only seventeen because he was taken between February 1 and February 14, 1942. The Report's language probably is not as clear as it could be. However, the Report does say that the Minister and Mr. Oberlander have disagreed on the date he was recruited; it says that Mr. Oberlander has always said it was in the month of his eighteenth birthday; and, it says: "Mr. Oberlander was close to his 18th birthday or already 18 when he joined the Nazis."

[170] In my view, the Applicant's claim that he must have been taken before February 15 adds nothing to this discussion. The fact that he claims he was taken in February 1942 is already before the GIC. The Applicant's age is related to his maturity and his awareness of what he was doing. I do not see how the disagreement made any difference to the Report's findings on maturity. The Applicant's initial submissions to the Minister went to great pains to stress the fact he was seventeen to strengthen his argument about his immaturity and to enable him to make an

argument that he was a child soldier. In my view, this information is clearly spelled out in the Report.

Submissions Outside the Record

[171] The Applicant says he should have been allowed to make submissions in response to the Minister's suggestion that the Applicant's submissions are outside of the existing record and impermissible.

[172] The Applicant refers to paragraph 106 of the Report:

> The Federal Court of Appeal returned the matter for reconsideration on the limited issue of duress, finding that there was sufficient information in the existing record for the Governor in Council to address the issue, even though this argument was never overtly raised by Mr. Oberlander. This was not an invitation to submit new evidence or appeal the binding and non-reviewable decision of Justice MacKay.

[173] The Applicant wishes to submit that the Federal Court of Appeal did not limit reconsideration to the existing record and that new evidence was permissible.

[174] The Federal Court of Appeal did say that the record contained sufficient evidence to consider the issue (*Oberlander* (2009), above, at para 34):

> The GIC's reasons are silent with respect to Mr. Oberlander's allegation that he would have been executed had he deserted. The question then is whether the record contained sufficient information to oblige the GIC to consider that allegation, along with the evidence of conscription and any other relevant evidence, to determine whether the justification of duress is made out, notwithstanding that duress was not the basis of Mr. Oberlander's

> argument. In my view, there was sufficient evidence in the record to require the GIC to address this issue.

Justice Layden-Stevenson went on to consider the parts of the record that indicated duress should have been considered.

[175] It may be that this is equivocal as to whether or not the reconsideration was limited to the existing record. Regardless, the Minister accepted and considered new submissions and evidence. The Report continues from the paragraph that the Applicant points to (at paras 107-108):

> Mr. Oberlander has adduced new evidence outside the existing record in his affidavit and in his arguments (relying largely on facts taken from isolated portions of the transcripts of the Federal Court hearing before Justice MacKay).
>
> When the Minister measures these arguments against the findings of Justice MacKay, Mr. Oberlander still fails to demonstrate that he was under duress to remain in the service of the Ek10a. The record shows unequivocally that Mr. Oberlander was on leave several times, alone and armed, and he failed to make any attempt to escape, request a transfer, or demonstrate that he found any of the Ek10a's activities abhorrent.

[176] Regardless of whether the Federal Court of Appeal limited the reconsideration to the existing record or not, it is clear that the Minister considered the Applicant's new evidence, submissions and argument.

[177] Further, the Report does not imply anything about the submissions. I can see no suggestion of their impropriety. The Report acknowledges that the current record exists, and when it is considered with Mr. Oberlander's new submissions, Mr. Oberlander has not

established that he was under duress. Nothing would be changed by further argument about what the Federal Court of Appeal said.

(2) Oral Interview

[178] The Applicant's second ground for procedural unfairness is that an oral interview should have been conducted in this case because the "Minister's report, and therefore the GIC decision, is based, at least in part, on a negative credibility assessment of the Applicant" (Applicant's Record at 79). This means, according to the Applicant, that the "Minister and Governor in Council in the within case breached the requirements of procedural fairness, the *Bill of Rights* and the *Charter of Rights and Freedoms* in rendering it [*sic*] decision that the Applicant was not credible without conducting an oral interview" (Applicant's Record at 81).

[179] The onus was upon the Applicant in this case to provide sufficient evidence to establish that he qualified for the defence of duress. The Applicant was fully aware of what this involved and went about providing that evidence. This evidence consisted of the testimony of himself, Mr. Sidorenko, and Mr. Huebert at the oral hearing before Justice MacKay, as well as the Applicant's additional affidavit of April 19, 2010, and various newspaper articles about German soldiers who were convicted of treason and desertion during World War II. Clearly, the Applicant did not feel that he needed an oral interview to make his case because he did not ask for one and there is nothing to suggest that he could not establish duress though the use of previous testimony, affidavit evidence and documentation. The Applicant's only possible ground of complaint is that the decision was based upon credibility, and that this ground requires an oral interview.

[180] Justice MacKay had a number of credibility concerns with the Applicant's evidence and made findings to that effect. Those findings were part of the record before the GIC in the decision that is the subject of this application, and the GIC was obliged to accept those findings and weigh them. But Justice MacKay's credibility findings were made following an oral hearing, and the GIC was not required to revisit them by way of another oral hearing. Justice MacKay found, in general, that the Applicant "demonstrate[d] a pattern of less than full acknowledgement of his wartime role, with no reference to the SD": *Oberlander (2000)*, above, at para 172.

[181] My reading of the decision before me is that it is not, in a material way, based upon credibility. The Minister simply weighed the evidence before him together with the Applicant's submissions and decided that the Applicant had not established sufficient grounds for the defence of duress. In other words, the Minister did not need to test the credibility of the Applicant because what the Applicant submitted was not sufficient to establish duress. Whether or not that was a reasonable conclusion, I will address below. But I cannot say on these facts that an oral interview was required to allow the Applicant to address credibility. It is quite clear that the Applicant felt his evidence was sufficient to establish duress; in my view, this is a disagreement about the weighing process and is not a procedural fairness issue.

[182] While there is some language in the Report that suggests the Applicant's credibility was at issue, the case law is clear that the language used is not determinative as to whether a matter was decided on weight or credibility, and the decision-maker's comments must be read in the context of the decision as a whole. I will highlight which of the Report's comments might suggest credibility concerns, but I think in the context of the Report's many statements regarding

the lack of evidence on key issues, these comments are better seen as suggesting concerns with the probative value of the evidence. I think part of the issue is the Minister's imprecise use of language (as we also see with the Minister's use of the word "rumours" and his explanation that he meant "hearsay"). Likewise, the Minister's statements that suggest he might be making credibility findings generally follow statements in which it is very clear that he has made a decision that there is not enough evidence to support the Applicant's position. At certain points in the Report, the Minister says that even if he did believe Mr. Oberlander's assertions, there is still insufficient evidence. I think this is akin to the situation in *Ferguson*, above, at para 34, where the Court said the result was that "[t]he officer neither believes nor disbelieves that the Applicant is lesbian – he is unconvinced."

[183] In my view, the Decision is based upon the fact that Mr. Oberlander's assertions are not sufficient to establish the defence of duress in light of the fact that he submitted insufficient evidence to support them and in light of the evidence on the record that suggests contrary conclusions to those which he asserts. I am cautious of the warnings in the case law that I need to be alert to decision-makers who try to mask a credibility finding with the language of insufficient evidence (see e.g. *Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at para 14; *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at para 12) but I do not think that is the case here, especially in light of the fact that Mr. Oberlander only submitted excerpts of transcripts and newspaper articles as corroborative evidence for his affidavit.

[184] *Ferguson* remains the leading case for the issue of whether a decision is based upon credibility or the sufficiency of the evidence. The Federal Court of Appeal has not discussed the

distinction since *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, which *Ferguson* was based upon.

[185] In my review of the cases, an important point is that "the Court must look beyond the express wording of the officer's decision to determine whether, in fact, the applicant's credibility was in issue" (*Ferguson*, above, at para 16). After a review of the case law in *Vandifar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 433 at para 28, Justice Scott concluded that "[t]he aforementioned decisions suggest that the context and the wording of the decision are crucial in distinguishing the sufficiency of evidence from credibility issues." After a review of the case law in *Nnabuike Ozomma v Canada (Citizenship and Immigration)*, 2012 FC 1167 at para 52 [*Nnabuike Ozomma*], I concluded:

> I am sure that it is possible to find factual distinctions in each of these cases that had a lot to do with the final determination in each. However, the cases can be reconciled. Officers can only avoid credibility findings and decide applications on the sufficiency of evidence if their decisions show that, credibility aside, what the applicant has to say is not sufficient, on the applicable standard of proof, to show that he or she faces a risk under either section 96 or section 97.

[186] In my view, a full reading of the Report reveals that it was based on the Minister not being satisfied that there was sufficient evidence to support duress. While the Report uses confusing language at times, I think in the context of the Decision as a whole, the Report's conclusions are based upon an insufficiency of evidence.

[187] Throughout the Report, the term "no evidence" comes up repeatedly. For example, in the Report's discussion of whether Mr. Oberlander was under threat of imminent harm, at paragraph

29, the Report says "there is no evidence of an imminent threat of harm over the, at least, one year and a half period when he served with the Ek10a and the years after that when he remained in various capacities with the Nazi regime." The Report also considers the evidence that points to a lack of threat (Mr. Oberlander's periods of leave and time spent as a solitary guard, at paragraphs 30-31), and concludes "from Mr. Oberlander's actions in this situation that there was no imminent, real, and inevitable threat to Mr. Oberlander during this period and, further, he had an opportunity to desert his post." The Report concludes its discussion, at paragraph 33, by saying, "[t]here was no evidence that Mr. Oberlander was mistreated after he joined the Ek10a or that he found the group's activities abhorrent. There was no further evidence that he sought to be relieved of his duties, or that he ever attempted to desert while he was on leave."

[188] In *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 [*Gao*], Justice Kane said that the Officer's use of the words "very little evidence" and "the applicant has submitted very little else" led to a conclusion that the officer was not satisfied that there was enough evidence to establish the claimant's claim. Here, the language seems even clearer than in *Gao* because the Report often concludes that there is no evidence at all to support the Applicant's assertions.

[189] Paragraph 36 of the Report says, "[a] credible evidentiary basis is necessary to establish imminent peril." Because the evidentiary basis that Mr. Oberlander used to establish that he was in imminent peril was his affidavit, this statement could be read to be calling into question the credibility of Mr. Oberlander's affidavit. However, I think in light of the Report's comments about the complete lack of evidence leading up to this, and the conclusion at paragraph 37 ("Mr. Oberlander also failed to support his claim that he would be killed if he deserted and failed to

support the rumours that he heard of the same"), the Report is saying that Mr. Oberlander's assertion does not have a sufficient evidentiary basis. This seems substantiated at paragraph 37 of the Report where it says "there was no finding of fact in Justice MacKay's decision to sustain his claim." I do not think that this suggests that the Minister is either believing or disbelieving Mr. Oberlander's claim, but rather that the Minister is saying that his claim is not enough, in light of the lack of corroborative evidence and the evidence to the contrary, to satisfy the legal standard.

[190] In evaluating whether Mr. Oberlander's actions were consistent with his will, we see the Minister use the language that *Ferguson* and *Nnabuike Ozomma* suggest is indicative of neither believing nor disbelieving Mr. Oberlander, but rather of not being satisfied that relevant facts have been established (Report at para 43): "[e]ven if Mr. Oberlander had been conscripted, he still became responsible for his own predicament for the remainder of his time in the service of the Ek10a" [emphasis added]. In light of Justice MacKay's finding that the evidence as to whether Mr. Oberlander was conscripted was inconsistent, the Report chooses not to believe nor disbelieve Mr. Oberlander's assertion and decides that, credibility aside, what the Applicant has to say is not sufficient. The Report also points to the lack of evidence to corroborate Mr. Oberlander's assertion that his service was against his will (at para 43): "There is no evidence that Mr. Oberlander sought legal or conventional means for release from the Ek10a, such as through transfers let alone desertion to avoid further complicity" [emphasis added].

[191] The Minister also makes findings regarding the lack of evidence under his analysis of the Guidelines:

> [T]here is no credible factual foundation for Mr. Oberlander's assertion that Ek10a members would face death if they disobeyed the order to join the Nazi forces or tried to escape after joining. Mr. Oberlander bases his assertion on testimony taken out of context from isolated portions of the Federal Court hearing transcripts. Again, these isolated statements do not amount to findings of fact. Therefore, Mr. Oberlander does not satisfy the first condition of the policy enumerated above.
>
> [emphasis in original]

Again, given that the factual foundation for the claim is Mr. Oberlander's affidavit, this could be read as calling Mr. Oberlander's credibility into issue. But given the lack of evidence that the Minister refers to earlier, I think this is really a finding that there is no evidence to substantiate Mr. Oberlander's assertions, and Mr. Oberlander's assertions alone do not satisfy the legal standard in light of the contrary evidence.

[192] Paragraph 67 of the Report appears to be a credibility finding: "Mr. Oberlander's submissions concerning his age in relation to his perception that he had no safe escape is not believable because he was not a child when he joined the Nazi regime, and his maturity level was such that he could have evaluated his situation and deserted or asked for a transfer if that is what he wanted" [emphasis added]. However, I do not see this as a credibility finding; the Minister is simply refusing to accept Mr. Oberlander's assertion that he was a child when he became part of the Nazi regime. I am persuaded by the case law that says the language of either credibility or sufficiency is not the determinative factor; rather the language and context of the decision must be considered. I think that here, again, the Minister is really saying that he is not satisfied by the Applicant's assertion given the fact that Justice MacKay made contrary findings regarding Mr. Oberlander's age and maturity level. I also do not think the cases suggest that one isolated

sentence, in a decision filled with findings related to the insufficiency of the evidence, could make this a decision based upon credibility that requires an oral hearing.

[193] The Report's preliminary conclusion (that is, the conclusion of the portion of the Report that was provided to Mr. Oberlander) makes clear that the decision was based on an insufficiency of evidence (paras 73-74):

> A person's simple denial of his/her willing participation in the activities of a limited brutal purpose organization cannot suffice to rebut complicity. An individual's actions can be more revealing than his testimony and the circumstances may be such that it can be inferred that a person shared the objectives of those with whom he/she is collaborating. In Mr. Oberlander's case, the fact that he continuously and voluntarily returned to duty, applied for German citizenship and accepted a military award for superior service, all lead to the inference that he shared the objectives of the Ek10a, a mobile civilian-killing squad during WWII.
>
> The above review of the defence of duress under immigration law, the policy and criminal law demonstrates that Mr. Oberlander does not meet the various requirements of all three regimes. With an insufficient basis to establish the defence of duress, the previous determination of Mr. Oberlander's complicity in the atrocities committed by the Ek10a stands.

[194] Everything discussed above was in the draft Report provided to Mr. Oberlander. He was free to make submissions to the GIC on these points if he felt that his credibility was being questioned. Mr. Oberlander did make some submissions regarding the presumption of truthfulness attached to his affidavits (Report, Reply, Tab H at 7-8):

> Although Justice MacKay did make findings that on isolated and distinct issues such as Mr. Oberlander's purported knowledge of the name of the unit he was in, his evidence was not to be believed, he did not render a general finding that Mr. Oberlander lacked credibility. In fact, much if not most of his evidence was accepted as credible, including his testimony concerning his activities on behalf of Ek 10a. Further, and importantly for the within

> consideration, Justice MacKay made no finding that Mr. Oberlander was lying when he said he was forcibly conscripted, felt as though he were kidnapped by the German forces, or that the government witnesses lied when they testified that the punishment for desertion was death.
>
> Indeed, as Justice MacKay has made no adverse credibility finding against Mr. Oberlander on these important issues, the fact that Mr. Oberlander provided this evidence through sworn testimony both at his revocation reference and in the affidavit provided to the GIC in this proceeding, creates a presumption that the evidence of his conscription and fear of execution are true. The Federal Court jurisprudence is clear on this point. Sworn evidence is presumed true unless rebutted or found to be clearly implausible, given the known circumstances at that time and place. The Minister has not provided any evidence to rebut Mr. Oberlander's sworn statements that he was forcibly conscripted into working as an interpreter for Ek 10 [*sic*] or that he feared being executed for escaping. And the evidence from the Minister's witnesses, and the recent evidence of 20,000 executed by Germany during the war – most for desertion – does not contradict but rather corroborates the plausibility of Mr. Oberlander's sworn statements. <u>As such, this evidence must be accepted as true by the GIC.</u> The principle that sworn testimony from an affiant or witness is presumed true unless evidence is presented to the contrary, emanates from the Federal Court of Appeal in Maldonado v Canada (M.E.I.) [*sic*], [1980] 2 F.C. 302 (C.A.). The GIC is bound, in law, by this decision.
>
> [emphasis in original]

[195] While I do not think the Minister made any determinations as to whether Mr. Oberlander's statements were to be believed or disbelieved, I think the case law suggests that the Minister was free to rely on Justice MacKay's findings regarding Mr. Oberlander's lack of credibility on important issues (see e.g. *Oberlander* (2000), above, at paras 151-152) to conclude that his statements carried little weight and were insufficient on their own to establish the points for which they were submitted. Justice Annis discussed this issue recently in a decision where the applicant complained that an officer erred in relying on the Board's adverse credibility

finding in making a Pre-Removal Risk Assessment [PRRA] determination. Justice Annis wrote (*Bicuku v Canada (Citizenship and Immigration)*, 2014 FC 339):

> [29] Coming back to the issue of the consequences of adopting the RPD's credibility conclusions, the reliance upon a previous adverse credibility finding arises in this matter from the officer's rejection of the applicant's explanation that he tried to live in Montenegro and Bosnia. On this point, he stated the following in his reasons:
>
> > I also note that the applicant left the country on two occasions in 2001 but did not seek protection in either as he stated "there were no long-term data prospects for protection". I note that both Bosnia and Herzegovina and Montenegro provide for the granting of asylum or refugee status. Based on the RPD decision in 2004 where credibility was a determinative issue, lack of accessing state protection or reconciliation and the fact that he went to two separate countries in 2011, after the Kola family began pursuing him, and did not seek protection in either, I give this statement of risk little weight.
> >
> > [Emphasis in original]
>
> [30] While the evidence on state protection was obviously insufficient, I find it problematic that reliance by the officer on the RPD's negative credibility assessment should be considered a criterion to conclude a serious credibility issue arises. Rather, to opposite effect, I conclude that a previous negative credibility finding should be a factor supporting a conclusion that the applicant's statements carried little weight and are insufficient therefore to establish a serious credibility issue.
>
> [31] To a certain extent reliance upon the previous adverse credibility findings in an RPD raises an issue as to whether the applicant should continue to enjoy the benefits from the presumption of truthfulness attaching to his statements as described in cases such as *Maldonado v MEI*, [1980] 2 FC 302 (FCA) at para 5 [*Maldonado*].
>
> [32] The PRRA review is essentially a continuation of the RPD decision on the issue of risk. The officer is required as a first step to carefully review the RPD decision to determine what findings were made on the basis of the evidence that was presented. This is

> for the purpose of determining whether the applicant has met the condition precedent of demonstrating that the evidence led was not already presented to the RPD, before it will even be considered in the PRRA review.
>
> [33] Given this PRRA context, I find it illogical to accept that the RPD's previous negative characterization of the applicant's credibility on the same issue of risk based on the same character of evidence (threat to life in a blood feud over a refusal of marriage) can be ignored such that the applicant is considered on the same credibility plane as any new refugee claimant standing up to testify in an RPD hearing who benefits from the presumption of truthfulness attaching to his or her statements.
>
> [34] If the RPD found the applicant not to be credible in the first instance, it is arguable that that finding should apply concerning similar evidence on the same issues.

[196] I think Justice Annis' comments are equally applicable to Mr. Oberlander's circumstances. Justice MacKay found a lack of credibility in relation to his finding that Mr. Oberlander was a member of Ek 10a and that he had misrepresented his membership. The GIC's decisions on complicity and duress are, to some extent, continuations of Justice MacKay's decision. Whether Mr. Oberlander's affidavit is entitled to the presumption of truthfulness does not need to be decided but the case law suggests that the previous credibility findings support the Minister's findings that Mr. Oberlander's assertions are insufficient to satisfy the legal standard.

[197] The Minister responds to Mr. Oberlander's reply submissions regarding the presumption of truthfulness in the final Report. The response appears under the heading: "Mr. Oberlander is Not Credible regarding his Alleged Fear of Execution" (at para 92):

> At paragraph 16 of his reply, Mr. Oberlander attempts to draw conclusions based on his own credibility and accuses the report of failing to consider the findings of Justice MacKay. On the contrary, the report provides evidence to rebut the presumption of credibility of Mr. Oberlander's fear of execution – that is the

> Nuremberg tribunal case. This was objective evidence to counter the credibility of Mr. Oberlander's statements, plus his own contradictory statements that he was permitted leave on more than one occasion.

[198] This clearly looks like a credibility determination. However, I think the first part of the Report really makes the finding on duress, and the second part of the Report merely responds to Mr. Oberlander's submissions. I do not think that these comments can undo the effect of the first part of the Report which discussed all of the Minister's findings and conclusions based on the evidence and the record. I read these comments as a direct response to Mr. Oberlander's claim that his affidavits must be accepted as truthful and as establishing the points asserted in them. Despite the Minister directly saying that the presumption of credibility has been rebutted, I do not think that the Report as a whole is based upon a lack of credibility. The Report says that Mr. Oberlander's assertions are insufficient in the context of all of the evidence to the contrary. I think this is just another poor choice in language by the Minister. Following the Minister's comment that the credibility of the affidavit has been rebutted, he goes on to reference the evidence that leads to that conclusion. I think what he is really saying is that the evidence leads to the conclusion that the assertion does not satisfy the legal standard of proof. Decisions do not have to be perfect.

[199] Support for this reading can be seen in the Minister's further comments (Report at para 96):

> Mr. Oberlander has not provided comparable documentary evidence to support his alleged fear of death. Nonetheless, <u>even if we accepted that he was conscripted or that he was under duress some of the time</u>, the evidence on record shows that Mr. Oberlander had the means and the opportunity to escape, and that

> he was not under imminent peril when he was on vacation leave or when he was guarding a barge armed and alone.
>
> [Emphasis added]

[200] The Minister is again saying that his conclusions do not rest on whether or not Mr. Oberlander is believed, but on the fact that the evidence presented does not establish the points that it is offered for. The language echoes the *Ferguson* decision: the Minister neither believes nor disbelieves Mr. Oberlander's assertions. This is apparent in the Minister's final conclusion (Report at para 108):

> When the Minister measures these arguments against the findings of Justice MacKay, Mr. Oberlander still fails to demonstrate that he was under duress to remain in the service of the Ek10a. The record shows unequivocally that Mr. Oberlander was on leave several times, that he was guarding a barge for a month without any supervision, alone and armed, and he failed to make any attempt to escape, request a transfer, or demonstrate that he found any of the Ek10a's activities abhorrent.

[201] Even if I am wrong on this point and the Minister does make credibility findings, it is worth noting that the defence of duress is a conjunctive test. A failure to establish any of the three elements is sufficient to obviate the defence. For example, even if the Minister could be said to make a credibility finding in relation to Mr. Oberlander's submissions regarding his fear of execution (Report at para 92), this does not change the fact that the defence of duress remains unavailable to Mr. Oberlander because there is also a finding that Mr. Oberlander's service was consistent with his will. This finding was based on the fact that Mr. Oberlander served with a regular army unit after his time with Ek 10a, his acceptance of a service award, and his citizenship application. These findings are not based on Mr. Oberlander's credibility but rather the evidence on the record.

[202] A reading of the Decision as a whole leads me to the conclusion that it is based on the insufficiency of evidence. I conclude this despite the fact that some sentences suggest that there may be a credibility concerns. In the context of the Decision as a whole and the language surrounding the sentences that I have isolated, it is clear that the Minister was speaking to the insufficiency of the evidence and not Mr. Oberlander's credibility. The bulk of the Report's discussion focuses on the fact that the only evidence for Mr. Oberlander's submissions is found in his affidavit. When weighed against the rest of the record, which suggests a contrary conclusion to Mr. Oberlander's assertions, the Minister is not satisfied that Mr. Oberlander's statements alone establish the facts that they are offered for.

[203] I do not think that the statements I have highlighted above suggest a masked or veiled credibility finding, given that they appear after the Minister has already concluded that there is no evidence to satisfy the elements of the defence of duress. The Minister states very clearly that even if he accepted Mr. Oberlander's statements, they could not establish the facts that they are provided for in light of the whole record.

(3) Conclusion on Procedural Fairness

[204] My conclusion is that the Applicant has not established that procedural unfairness occurred in this case.

C. *Duress – Errors in Law - Unreasonableness*

[205] The Applicant says that the GIC erred in law in considering duress because:

a) It applied the wrong standard for assessing the defence of duress;

b) It ignored and misstated evidence so that it made erroneous findings of fact in a perverse and capricious manner; and,

c) It reached an unreasonable decision.

[206] Generally speaking, my review of the record leads me to conclude that the GIC applied the correct standard in assessing the issue of duress. However, I think there are some problems with the way that the evidence was handled that need to be acknowledged and addressed in order to decide whether the decision is reasonable or whether the matter should be retuned for reconsideration.

(1) Periods of Leave

[207] The Report makes several references to Mr. Oberlander's periods of leave:

> 30. For example, in early May 1942, Mr. Huebert – a witness called by the Crown – recalls that he and Mr. Oberlander had driven some 400 km together from where they were stationed to their respective homes. They were on leave for 14 days after which they returned to their posts together. Justice MacKay found Mr. Huebert's testimony to be credible. The Minister, therefore, concludes that Mr. Oberlander returned to his post voluntarily at this time, negating the existence of an imminent, real, and inevitable threat of harm.
>
> […]
>
> 32. iv. Mr Oberlander had numerous opportunities to desert as he was on leave many times and for several weeks on each occasion. [cited to *Oberlander* (2000) at paras 22, 38, 73 and 158]
>
> […]
>
> 51. …Rather, Justice MacKay's decision points out that Mr. Oberlander was permitted several unescorted lengthy leaves of absence from the Ek10a…

> […]
>
> 55…The record shows that, contrary to Mr. Oberlander's submissions at paragraphs 83 to 86, he had numerous opportunities to escape as he was given multiple leaves for several weeks on each occasion. [also cited to *Oberlander* (2000) at paras 22, 38, 73 and 158]

[208] As the Applicant points out, a review of the paragraphs that the Minister cites from Justice MacKay's decision reveal no findings regarding the leaves that Mr. Oberlander took while serving Ek 10a:

- Paragraph 22 refers to Mr. Huebert's account of the trip that he says he and Mr. Oberlander took during a period of leave (referred to in the Report at para 30). However, in the next paragraph, Justice MacKay says, "[i]t is unlikely that he [Mr. Oberlander] travelled to Halbstadt with Mr. Huebert at least at the time Huebert suggests, in May 1942, since this would have been after Mr. Oberlander's mother and family had left the town." The Minister concludes that "Mr. Oberlander returned to his post voluntarily at this time, negating the existence of an imminent, real, and inevitable threat of harm" (Report at para 30). As Justice MacKay said that it was unlikely that Mr. Oberlander took this leave, I do not think it is possible for the Minister to conclude anything from Mr. Oberlander's alleged return from the leave;

- Paragraph 38 refers to a leave that Mr. Oberlander testified about. The leave took place in April 1944 while Mr. Oberlander was serving with a regular army unit. I agree with the Applicant that a period of leave that took place after his service with Ek 10a cannot lead to any conclusion about whether Mr. Oberlander was under duress while serving Ek 10a;

- Paragraph 73 refers to an investigation that took place in the 1970s regarding Dr. Christmann's involvement with Ek 10a. Mr. Oberlander signed a statement which noted "that he was on leave several times, including one visit to his family in Halbstadt." Justice MacKay accepted the statement as evidence because it was signed and given voluntarily. However, Justice MacKay expressly rejected the parts of the statement that were relevant to his decision. For example, Justice MacKay rejected Mr. Oberlander's claim that he did not know the name of his unit and did not know that the unit was involved in executions (*Oberlander* (2000), above, at paras 153-155);

- Paragraph 158 appears under a section in which Justice MacKay summarizes Mr. Oberlander's evidence and some of its inconsistencies with the documentary evidence and the evidence of the other witnesses. Justice MacKay notes the inconsistency between Mr. Oberlander testifying at the hearing that he never returned to Halbstadt after he was recruited, and his 1970 statement which noted that he went on leave several times and once visited his family in Halbstadt.

[209] In my view, I do not think it could be said that Justice MacKay made any findings that Mr. Oberlander took any periods of leave (except the one that took place while he was with a regular army unit), and he did not make any findings regarding how many leaves he took or the duration of any leaves. The only reference to any duration is Mr. Huebert's recollection that the leave he took with Mr. Oberlander was for fourteen days. Again, Justice MacKay said that this leave was unlikely to have taken place. Further, Justice MacKay made no finding regarding whether Mr. Oberlander had an opportunity to desert.

[210] Apart from what Justice MacKay said about Mr. Oberlander's leaves, however, it seems clear from the Applicant's own evidence in 1970 that he went on leave several times, including on one occasion to see his family in Halbstadt where he had been living at the beginning of the war. Mr. Huebert testified that everyone in the unit had vacation time, and the Applicant himself acknowledges that he returned to Ek 10a after his time in Belarus when the remnants of the unit he had been with were sent to Poland.

[211] The Report also points out that, even if the Applicant did not go on leave many times, he was still alone on the barge in Rostov for up to one month.

[212] Notwithstanding the Minister's mistakes about Justice MacKay's findings, there was still in my view sufficient evidence to support the Minister's contention that the Applicant took periods of leave, returned to Ek 10a voluntarily, and that there were opportunities to desert that were not taken.

(2) Justice MacKay's Findings of Fact

[213] The Report also makes several references to the fact that Justice MacKay did not make certain findings of fact. The Federal Court of Appeal has already discussed the limitations of Justice MacKay's task and his findings of fact (*Oberlander* (2004), above):

> [40] Neither the Report nor the written submissions are meant to question the findings of facts made by the Judge at the end of the reference process. These findings are final and non-reviewable (see subs. 18(3) of the Act). To the extent that the written submissions were a disguised collateral attack against the findings, they were irrelevant and unhelpful. In the case at bar, Mr. Oberlander, the Minister and the Governor in Council must accept as an indisputable fact that Mr. Oberlander had a wartime experience with EK 10a, that he falsely represented his background or knowingly concealed material circumstances when interviewed by a security officer and that he was admitted to Canada for permanent residence and eventually was granted citizenship by false representation (see MacKay J.'s reasons at para. 210). That the Governor in Council has the power, under section 18 of the *Citizenship Act*, to revoke Mr. Oberlander's citizenship is a given, the only question is: was the power to revoke exercised by the Governor in Council in a reviewable way in the circumstances of this case?
>
> [41] The findings of fact, however, must be seen as they are and not as they might have been. Mr. Justice MacKay was not deciding whether Mr. Oberlander came within the ambit of the government's policy to revoke the citizenship of war criminals. Mr. Justice MacKay was not deciding whether Mr. Oberlander was a war criminal within the meaning of Canadian or international law. Mr. Justice MacKay did not find - as he might have - that the EK 10a was an organization with a single, brutal purpose. Mr. Justice MacKay found that no evidence was presented about any personal involvement of Mr. Oberlander in criminal activities or in war crimes.

[214] Despite this warning, the Report attempts to make much of certain findings of fact that Justice MacKay did not make. For example, at paragraph 51, the Report says, "[i]n contrast to

the facts in *Asghedom*, Mr. Justice MacKay made no findings regarding Mr. Oberlander that (1) there was an unavoidable forcible conscription; (2) he had no opportunity to leave until he was released, and (3) any attempt to desert would have resulted in death." I do not think that the Minister can place any weight on Justice MacKay's failure to make findings of fact in relation to matters that were not in issue in the proceeding before him. Justice MacKay noted that the evidence as to whether Mr. Oberlander was or was not conscripted was inconsistent (*Oberlander* (2000), above, at para 20), but he did not make any findings or make any comments on the second and third issues.

[215] The Report later acknowledges the scope and limitations of Justice MacKay's findings in response to Mr. Oberlander's submissions regarding Justice MacKay's comments on conscription (at para 40): "Justice MacKay did not make a finding as to whether he [Mr. Oberlander] was forcibly conscripted as a member of the Ek10a nor did he comment on the credibility of this claim as it did not relate to the determinative issue before him." This response is equally applicable to the Report's attempts to create any significance for Justice MacKay's failure to make certain other findings.

[216] Again, at paragraph 69, the Report says, "[t]here is no finding of fact as to the state of mind, the experiences and the circumstances behind Mr. Oberlander's alleged perception of threat." Justice MacKay was not tasked with making a finding as to Mr. Oberlander's perception of the threat. The GIC was obliged to make the determination as to whether Mr. Oberlander's perception of the threat was such that he cannot be said to have been complicit in the actions of Ek 10a.

[217] However, even if there are no clear findings from Justice MacKay on these issues, it was open to the GIC to assess all of the other evidence. This evidence reveals that even if the Applicant was conscripted, there is no evidence to suggest that what he did with Ek 10a, or his remaining with the unit, was against his will. When he first joined, he was not armed, but he was later given a rifle and, later still, a machine gun. He wore an SD uniform beginning in the summer of 1942. He saved the lives of two German soldiers. He was awarded the War Service Cross Second Class Medal (he denied this when interviewed in 1970). And he later obtained German citizenship by including his name in the letter that went to the SS and police together with others who had proved their loyalty to the German cause in the war, which letter urged that he should be granted German citizenship in accordance with the decree of the Führer.

[218] On the other hand, there was no evidence that the Applicant had been mistreated, that he found Ek 10a's activities and objectives abhorrent, that he ever sought to be relieved of his duties, that he ever contemplated desertion or tried to desert.

(3) The *Nuremberg Report*

[219] The Applicant complains about the Minister's use of the *Nuremberg Report* because it does not distinguish between leaders and lower ranking members (Applicant's Record at 71-72). I share this concern, but the *Nuremberg Report* also deals with people involved in executions:

> One may accuse the Nazi military hierarchy of cruelty, even sadism of [*sic*] one will. But it may not be lightly charged with inefficiency. <u>If any of these Kommando leaders had stated that they were constitutionally unable to perform this cold-blooded slaughter of human beings, it is not unreasonable to assume that they would have been assigned to other duties</u>, not out of sympathy or for humanitarian reasons, but for efficiency's sake alone. In fact,

> Ohlendorf himself declared on this very subject – 'In two and a half years I had sufficient occasion to see how many of my gruppe [group] did not agree to this order in their inner opinion. Thus, I forbade the participation in these executions on the part of some of these men, and I had them sent back to Germany.' Ohlendorf himself could have got out of his execution assignment by refusing cooperation with the army. He testified that the Chief of Staff in the field said to him that if he, Ohlendorf, did not cooperate, he would ask for his dismissal in Berlin. The witness Hartel testified that Thomas, Chief of Einsatgruppe B, declared that all those who could not reconcile their conscience to the Fuehrer Order, that is, people who were too soft, as he said, would be sent back to Germany or assigned to other tasks, and that, in fact, he did send a number of people including commanders back to the Reich.
>
> [Emphasis added]

[220] The Minister relies on this quote for the point that Mr. Oberlander could have sought a discharge (Report at para 46). I think the quoted passage says that those who could not deal with executions could seek to be transferred to another unit and that such requests were typically granted. The problem for the present case is that Justice MacKay said that there was no evidence before him that Mr. Oberlander was involved in any executions, or war crimes, or even aiding and abetting war crimes. I do not think that the *Nuremberg Report* can establish that Mr. Oberlander could have sought a transfer, or rebut his evidence that he could not have sought a transfer, given that it very specifically discusses transfers in relation to execution assignments. There is no evidence that Mr. Oberlander had any execution assignments, and Justice MacKay accepted Mr. Oberlander's evidence that he did not participate in executions. I do not think that this quote can establish that those who served as interpreters or food guards, or whatever other roles Mr. Oberlander held, could ask to be transferred.

[221] Once again, however, based upon the full evidentiary record, I do not think this mistake is sufficient to render the Decision unreasonable. The mistakes found in the Report have to be reviewed in the context of the broader evidentiary record that goes to the issue of duress.

[222] The Report refers to and considers the Applicant's age, his level of maturity, his education, and his own evidence that he had heard rumours he would be killed if he attempted to leave Ek 10a. The Report appears to conclude that the Applicant was a mature seventeen or eighteen year old, and the evidence did not sufficiently establish that he would be killed if he attempted to leave. The conclusion, at paragraph 67, of the Report is that:

> Mr. Oberlander's submissions concerning his age in relation to his perception that he had no safe escape is not believable because he was not a child when he joined the Nazi regime, and his maturity level was such that he could have evaluated his situation and deserted or asked for a transfer if that is what he wanted.

[223] I have already addressed the credibility issue in this passage and my conclusion is that the Minister's point is really that the Applicant did not provide sufficient evidence to establish that he would face harm – whether immediate or later as a consequence – if he either asked to be transferred or deserted. The Applicant would obviously be concerned that, if he deserted, he might be killed, and he faults the Minister for not sufficiently examining where he could go in Europe at the time in order to avoid this consequence. Obviously, some people did manage to escape but I think the important thing about the evidence on this issue is that it reveals no attempt by the Applicant to distance himself from the brutal purpose of Ek 10a. It never seems to have occurred to him to examine the possibility of escape or to ask to be transferred, or to be relieved of his interpretative function or to ask for administrative re-assignment. There may have been danger in any attempt at distancing, but the Applicant provided no convincing evidence that he

even wanted to distance himself. He does not even express remorse. Hence, the Minister may have made mistakes about what Justice MacKay found regarding leave and opportunities to desert, but I cannot see how the Applicant could establish duress when he failed to adduce evidence to show that he even wanted to leave Ek 10a. He stayed with Ek 10a and there is no evidence that he did not want to be there.

[224] There is, in fact, no evidence to support that the Applicant – an interpreter – would have been killed had he attempted to desert. There was no direct evidence from the Applicant, or Mr. Sidorenko or Mr. Huebert that they had seen anyone harmed for disobeying orders or trying to desert, or trying to be transferred elsewhere, or that they had been threatened with death for any of these things. Nor do the newspaper articles tell what would have happened to someone in the Applicant's position. Mr. Sidorenko seems to have actually contemplated leaving Ek 10a (Report, Supplement C, Tab C at 900):

> Q. Did what you saw there upset you?
>
> A. Very much.
>
> Q. Did you think of maybe leaving this unit?
>
> A. Yes. Me and a friend of mine, Georgia were in such a mood that we were ready to leave for the partisans.

In addition, Mr. Sidorenko was interrogated for his suspected involvement in two of his colleagues' attempt to desert. It seems that none of the men involved in this attempted desertion were punished or even reprimanded in any way (Report, Supplement C, Tab C at 901-903, 905-906).

(4) Conclusions on Reasonableness

[225] My reading of the Report is that it correctly identifies the *Ramirez* test for duress and, contrary to what the Applicant alleges, acknowledges that the matter should be examined from the point of view of a reasonable person who is similarly situated to the Applicant. The Report considers the evidence and what it tells us about Applicant's point of view.

[226] The onus was on the Applicant to establish duress and, in the end, he failed to demonstrate a reasonable apprehension of imminent physical peril, that the situation he found himself in was not of his making, or was not consistent with his will, or that he satisfied the proportionality requirement.

[227] For example, the Applicant contends that the Minister failed to consider what would have happened to him if he had deserted. He claims that he would have been captured and executed. There was evidence that deserters could be shot but, on the facts of this case, the Applicant failed to establish that he had made *any* efforts to extricate himself from the predicament or to distance himself from Ek 10a's criminal purpose. There was no evidence that he was mistreated and no evidence that he sought to be relieved of his duties. He served the Nazi cause for three or four years, surrendered at the end of the war, voluntarily accepted an award of the War Service Cross Second Class, and voluntarily joined his mother's application for German citizenship.

[228] As the Respondent points out, the Applicant has never expressed any remorse for being a member of Ek 10a or indicated that he found the activities of the organization abhorrent. There is

no evidence that what he did for the organization was inconsistent with his will. He now asserts that he could not have deserted without being killed but this assertion (not accepted by the Minister) does not establish that, at the material time, he did not willingly contribute to the brutal purpose of Ek 10a. There was, as the Respondent points out, an insufficient factual basis for the Applicant's assertion that Ek 10a members would face death if they disobeyed the request to join or, even if they joined unwillingly, that they would face death for disobedience or desertion. The Applicant did not present any evidence to suggest that he could not have sought a transfer from Ek 10a, a killing squad. This meant that the Applicant also failed to provide evidence to show that the harm caused to victims of the organization was not greater than the harm he faced. The Applicant, in my view, fails to appreciate that this Court has rejected the proposition that the "possibility of death for desertion is a *carte blanche* excuse for participation in the commission of atrocities" (*Valle Lopes*, above, at para 107).

[229] It also seems to me that the Minister reasonably addressed the criminal law aspects of duress in so far as they were applicable to this case. I do not see the Minister requiring the Applicant to demonstrate immediate harm. The "close temporal connection" emphasized in *Ryan,* above, was not demonstrated by the Applicant. And, once again, the Applicant did not establish the proportionality that *Ryan* says is required.

[230] I have examined each of the Applicant's assertions for reviewable error. I can see that some mistakes were made by the Minister and that there is scope for disagreement over the weight given to some of the evidence (or lack thereof), but I cannot say there is a material error in the Decision. Reasons do not need to be perfect. Reasons simply need to be sufficient to

"allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision" (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 46). In my view, the Report satisfies both of these objectives.

[231] The Report discusses someone who has been found complicit and has now begun to emphasize duress, but who has shown no abhorrence for the activities of the organization he served, or that what he did was against his will or satisfied the proportionality requirement. He gave no convincing evidence that he ever gave any real consideration to ways in which he might extricate or distance himself from the brutal purpose of the organization to which he contributed, and whose contribution was acknowledged and rewarded after the war with a War Service Cross. I have carefully examined the record and considered each of the Applicant's submissions, and I can find no reviewable error.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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