Federal Court  Cour fédérale

Date: 20081027

Docket: T-1158-07

Citation: 2008 FC 1200

Ottawa, Ontario, October 27, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HELMUT OBERLANDER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a further decision in the continuing dispute between Oberlander and the Government of Canada with respect to the revocation of his citizenship. The particular matter before the Court is the judicial review of Order P.C. 2007-801 by the Governor in Council (Cabinet) dated May 17, 2007, revoking the Applicant's citizenship on the basis that he obtained it by knowingly concealing material circumstances, i.e. the fact that he had been an auxiliary of the Einsatzkommando 10a (EK 10a), a Nazi death squad, during World War II where he served as an interpreter.

[2] This is the second attempt by the Government of Canada to revoke Oberlander's citizenship as a result of his misrepresentations in obtaining that citizenship. The first attempt was ultimately quashed by the Court of Appeal in *Oberlander v. Canada (A.G.)*, 2004 FCA 213 ("Oberlander/2004"), pertinent details of which will be discussed further.

[3] There are two central issues in this judicial review. The first is whether the Cabinet erred in finding that there were reasonable grounds to believe Oberlander was complicit in war crimes or crimes against humanity and as a consequence, was subject to Canada's "no safe haven" policy for such individuals. The second issue is whether the Cabinet properly considered Oberlander's personal interests in its revocation of citizenship.

II. FACTS

[4] The Court need only summarize the most important circumstances of Oberlander's case as the whole of his circumstances have been set out fully in Mr. Justice MacKay's decision (*Canada (Minister of Citizenship and Immigration) v. Oberlander* (2000), 185 F.T.R. 41 (F.C.T.D.)) in which Justice MacKay found Oberlander to have made knowing concealment of his Nazi death squad past.

[5] On January 27, 1995, pursuant to s. 18(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act), the Minister of Citizenship and Immigration (the Minister) gave notice of his intention to make a report to the Cabinet recommending that Oberlander's citizenship be revoked. The Notice alleged that Oberlander had been admitted to Canada as a permanent resident and ultimately obtained Canadian citizenship by false pretences or fraud or by knowingly concealing material

circumstances “in that he failed to divulge to Canadian immigration and citizenship officials his membership in the German Sicherheitspolizei und SD and Einsatzkommando 10a (EK 10a) during the Second World War and his participation in the execution of civilians during that period of time”. Oberlander requested that the Minister refer the matter to the Court pursuant to section 18(1) of the Act.

[6] The reference case was heard by Justice MacKay, who rendered his determination on February 28, 2000. In accordance with s. 18(3) of the Act and as confirmed by the Federal Court of Appeal in “Oberlander/2004”, Justice MacKay’s factual findings are final and non-reviewable. As the Court of Appeal noted at paragraph 40, Oberlander, the Minister, and the Cabinet must accept as indisputable facts that Oberlander had 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 representations.

[7] The facts relevant to the present application are as follows:

a. The Applicant was born in Halbstadt (a.k.a. Molochansk), Ukraine in 1924. He and his family were Volksdeutsch (ethnic Germans) whose ancestors settled in Halbstadt some 250 years ago.

b. He completed secondary school in 1941 (when he was 17 years old) and was fluent in German and Russian. In September or the beginning of

October of that year when German troops arrived in Halbstadt, he and his family were freed from a holding camp where they had been detained by Russians. He was later directed to assist in registration of Volksdeutsch in the area and to assist in repairing buildings and roads in the town. In late 1941 or early 1942, he was ordered by local authorities to report to German occupying forces to serve as an interpreter. The Applicant maintains that he did so not by free choice, but out of fear of harm if he refused.

c. He was assigned to EK 10a (a.k.a. Sonderkommando 10a), a police unit of the Sicherheitspolizei (Sipo) and Sicherheitsdienst (SD). Both organizations were security police forces of the Schutzstaffell (SS), which directed their operations from Berlin.

d. EK 10a was one of the squads of Einsatzgruppe D (EG D), which in turn was one of four Einsatzgruppen, designated A, B, C and D. These were special police task forces operating behind the German army's front line in the eastern occupied territories in the years 1941-1944 to further the objectives of Nazi Germany. One of their roles was to operate as mobile killing units and it is estimated that the Einsatzgruppen and the Security Police were responsible for the execution of over 2 million people,

mostly civilians (Jews, Communists, Roma, disabled, and other so-called “undesirables”).

e. Reports from EG D show that by mid-December 1941 more than 55,000 people had been killed and by April 1942 more than 91,000. EK 10a, by its own reports to police headquarters in Germany, had carried out substantial execution activities, in Melitopol, Berdjansk, Mariupol and Taganrog, and then in the summer and fall of 1942 at Rostov and Krasnodar, and in the area of Novorossiysk, among other places. By the time there was a change of commanders of EK 10a in August 1942, its operational area, extending east to Rostov, was said to be "free of Jews". Only later did EK 10a move south from Rostov to Krasnodar, where large scale executions were committed, and then on to Novorossiysk. While the unit was at Krasnodar it is reported by a post-war German judicial inquiry that some 7,000 civilians were executed.

f. The SS and the SD were declared to be criminal organizations in 1946, by decision of the International Military Tribunal and Article II of *Control Council Law No. 10*. In subsequent trials before the Nuremberg Military Tribunals in 1949, the former commander of EG D was convicted of war crimes, crimes against humanity, and membership in a criminal organization, the SS.

g. EK 10a included some members from other German police forces and a number of auxiliary personnel, including interpreters, drivers, and guards, from among Volksdeutsch and Russian POWs.

h. Oberlander was not officially a member of the SD or Sipo, though he wore the uniform of the SD from the summer of 1942 until EK 10a was merged with army units in late 1943 or 1944. In some documents, he is described as "SS-mann", but that description and the uniform were not determinative of formal membership in the SD or the SS, as he was not a German citizen at the time, a circumstance which would have precluded him from formal SD or Sipo membership.

i. He was, however, a member of EK 10a, serving as an auxiliary and as an interpreter for the SD from the time he was ordered to report until the remnants of that unit were absorbed in a regular army unit in late 1943 or 1944, after which he served as an infantryman.

j. Oberlander was moved with EK 10a through eastern Ukraine to Melitopol, Mariupol, and Taganrog, thence to Rostov and south to Krasnodar and Novorossiysk. There, the unit (including Oberlander) was engaged in anti-partisan missions, as it later was in the Crimea, Belarus,

Poland and Yugoslavia. He was moved later to Torgau, a town south of Berlin, to help guard the capital. As the war was ending, he and others moved west to surrender to American forces and then marched westward again, to Hannover, where he was held in a British POW camp from May to July, 1945.

k. There is no evidence that Oberlander participated in any of the atrocities committed against civilians by EK 10a. However, Justice MacKay found that Oberlander's claims that he did not know the name of the unit until 1970 and that he only came to know of EK 10a action against Jews when he was at Krasnodar and Novorossiysk in the fall of 1942 were not credible. Justice MacKay held that the Applicant was aware of the nature of EK 10a and its activities during his service.

l. Oberlander's registration form, provided for under the law of 5 March 1946 (regarding Liberation from National Socialism and Militarism adopted by the Allied Control Council for Germany), contains, in response to a question about "Membership in the Wehrmacht [Armed Forces], police formations, Reich Labour Service..." and "Exact designation or formation", the entry "Infantry Regiment 159" and states his highest rank attained as "O.Gefr.", indicating (according to translation) about the rank of lance corporal.

m. Oberlander was released from the POW camp to be engaged in farm labour and a certificate of discharge from the German army was completed. Thereafter he continued to reside in then-West Germany at Hannover and later at Korntal, where he was reunited with his family and where he met and married his wife in 1950.

n. The couple immigrated to Canada on 13 May 1954 and became citizens on 12 April 1960. They have two daughters, one of whom suffers from a mental illness and is dependent on her parents.

o. Over the years since coming to Canada, Oberlander's work in commercial, apartment and housing development has apparently made a major contribution to the Kitchener-Waterloo region.

[8] Following the reference case heard by Justice MacKay, the Cabinet continued its efforts to revoke Oberlander's citizenship. In so doing, the Minister sent a formal report to the Cabinet recommending the revocation of his citizenship. The Cabinet concluded that the citizenship should be revoked.

[9] On judicial review, this Court confirmed the Cabinet's decision and denied judicial review. (*Oberlander v. Canada (A.G.)*, 2003 FC 944)

[10] The Applicant appealed this first judicial review decision to the Federal Court of Appeal, which allowed the appeal and granted judicial review. Since the subsequent Order in Council is a response, in part, to the Court of Appeal's decision, it is important to note the basis upon which the Court of Appeal concluded that the initial decision by the Cabinet was in error. The concluding words of the Court are significant in that they set the background for the subsequent Order in Council which is under judicial review in this proceeding. The Court of Appeal's judgment also touches upon the nature of the process of the second Cabinet decision and has relevance to the issues of bias alleged by the Applicant. The concluding words of the Court, at paragraph 61, are as follows:

> I would allow the appeal with costs here and below, set aside the decision of the Federal Court, allow the application for judicial review, set aside the decision of the Governor in Council and remit the matter back to the Governor in Council for a new determination. In practice, this order means that the Minister of Citizenship and Immigration, should she decide to again seek the revocation of the citizenship of Mr. Oberlander, is expected to present the Governor in Council with a new Report which will address the concerns expressed by the Court in these reasons.

[11] The Court of Appeal noted a number of matters relevant to this judicial review:

a. The Court of Appeal noted that while Justice MacKay did not find Oberlander credible on certain issues (many of those issues related to Oberlander's knowledge and participation in the activities of EK 10a), Justice MacKay did not make any finding of non-credibility with respect to Oberlander's claim that he had been conscripted. Justice MacKay did not find that EK 10a had a single and brutal

purpose. That is a matter which the Court of Appeal ultimately held is an issue for the Cabinet to decide.

b. The Court of Appeal noted that it was open to the Cabinet not to establish policy guidelines and perhaps not to follow them. However, once the Cabinet opted to adopt guidelines and to apply them to this case, the Cabinet was required to put its mind to determining whether Oberlander came within the scope of the "no safe haven" policy.

c. The Court also concluded that the report by the Minister constitutes part of the reasons of the Cabinet in deciding the basis for the revocation of Oberlander's citizenship.

d. In conducting the standard of review analysis at the time, prior to the *Dunsmuir* decision (*Dunsmuir v. New Brunswick*, 2008 SCC 9), the Court concluded that the case was complicated by the fact that there were two standards of review in play. In respect of the determination that a person might be a "suspected war criminal" within the Policy, the standard of review was reasonableness *simpliciter* whereas the Cabinet's weighing of personal interests and the public interest would have attracted a standard of patent unreasonableness.

[12] The Court of Appeal, with respect to Oberlander being suspected of war crimes, said as follows at paragraph 59:

> The Minister's report does refer to the "no safe haven" policy but does not analyse why it is that Mr. Oberlander fits within the policy which, the report fails to mention, applies <u>only</u> to suspected war criminals. In face of the express finding by Mr. Justice MacKay that

> no evidence was presented about any personal involvement of Mr. Oberlander in war crimes, one would expect the Governor in Council to at least explain why, in its view, a policy which, by its very -- and underlined -- words applied only to suspected war criminals, applied to someone who served only as an interpreter in the German army. I note that neither the Minister in her report nor the reviewing Judge even refer to the fact that Mr. Oberlander had asserted that he had not joined the German army voluntarily and that Mr. Justice MacKay has not made a definite finding as to whether Mr. Oberlander had been conscripted or not.

[13] On the issue of the reasonableness of weighing private interest and public interest, the Court of Appeal concluded as follows at paragraph 60:

> The Governor in Council could not reasonably come to the conclusion that the policy applied to Mr. Oberlander without first forming an opinion as to whether there was evidence permitting a finding (not made by the reference Judge) that Mr. Oberlander could be suspected of being complicit in the activities of an organization with a single, brutal purpose. The reviewing Judge took upon himself to decide what the Governor in Council had omitted to examine and decide, that EK 10a was an organization with a single, brutal purpose and that Mr. Oberlander was complicit in the organization's activities. The decision of the Governor in Council in that regard cannot be supplemented by that of the reviewing Judge. The decision of the Governor in Council is not reasonable as it fails to make the appropriate findings and relate them to the person whose citizenship was at issue.

[14] Given the clear indication by the Court of Appeal of the defects in the initial report and conclusions of the Cabinet, it is important to analyse the nature of the second report which forms the basis of the Cabinet's decision to again revoke the citizenship of Oberlander.

A. *Minister's Report*

[15] The Minister's report, having set out the legislative scheme of the Act, deals directly with the findings of Justice MacKay. Those findings include a description of the Einsatzgruppe D (EG D) and their structure and function. EK 10a was part of Einsatzgruppe D. Justice MacKay noted that "among their roles they operated as mobile killing units and it is estimated that the Einsatzgruppen and the Security Police were responsible for the execution of more than 2 million people, mostly civilians, primarily Jews and communists, and also Gypsies, handicapped and others considered unacceptable for Nazi Germany's interests".

[16] Justice MacKay noted, and the Minister's report found, that EK 10a carried out numerous atrocities against many thousands of civilians including repeated mass shootings of children, women and men as well as gassings. Nevertheless, Justice MacKay had concluded that there was no evidence that Oberlander participated in any of the atrocities committed against civilians by EK 10a. However, Justice MacKay did find that Oberlander, despite his protestations, must have been aware of those atrocities.

[17] The Minister's report goes on to capture the summary of facts made by Justice MacKay. The pertinent summary of facts has been set out in paragraph 7 of these Reasons.

[18] The Minister's report then goes on to discuss the citizenship revocation policy for World War II cases. The Minister's report specifically noted that the policy in regard to complicity in war crimes was as follows:

> For World War II matters, the government has publicly stated that it will pursue only those cases for which there is evidence of direct

> involvement or complicity in war crimes or crimes against humanity. A person may be considered complicit if the person is aware of the commission of war crimes or crimes against humanity and contributes directly or indirectly to their occurrence. In addition, membership in an organization responsible for committing the atrocities can be sufficient to establish complicity if the organization in question is one with a limited brutal purpose, such as a death squad.
>
> [Emphasis added]

[19] The Minister then noted that in the Federal Court of Appeal's decision, the Court had held that the Cabinet could not reasonably come to the conclusion that the World War II citizenship revocation policy applied to Oberlander without first forming an opinion as to whether there was evidence permitting a finding that Oberlander could be suspected of being complicit in the activities of a limited and brutal purpose organization. It is perhaps telling that the Court of Appeal and the Cabinet have used the words "could be suspected of being complicit" as opposed to requiring a finding of actual complicity.

I note that the Court of Appeal refers to a "single brutal purpose organization" while the Minister's report tends to refer to a "limited brutal purpose organization". In the context of this case, I see no significant difference between the two descriptions. An SS death squad fits both.

[20] The report goes on to examine, in establishing the criteria that may be applicable to this consideration of complicity, the Citizenship and Immigration Manual Chapter ENF 18 (War Crimes and Crimes Against Humanity). The Minister's report then sets out the findings that show EK 10a was a limited and brutal purpose organization. Those factors are the following:

a. EK 10a operated as a mobile civilian-killing unit.

b. It is estimated that the Einsatzgruppen and the Security Policy were responsible for the execution of more than two million people, mostly civilians, primarily Jews and communist, and also Gypsies, handicapped and others considered unacceptable for Nazi Germany's interests.

c. The five EK units of Einsatzgruppen D, to which EK 10a belonged, executed 55,000 civilians between June 1941 and mid-December 1941, another 46,000 by April 1942, and many more thereafter.

d. By August 1942, EK 10a had executed so many thousands of Jews that its operational area was declared *Judenrein* (Jew-free).

e. Thereafter, EK10a moved south from Rostove to Krasnodar and carried out further mass executions in this new operational area, e.g. murdering 7,000 civilians in Krasnodar.

f. As noted above, Mr. Justice MacKay referred to the Einsatzgruppen judgment of the Nuremberg Tribunal, which, he remarked, "describes in graphic terms the enormity of the crimes committed by the Einsatzgruppen A, B, C and D". The introductory paragraph of that Nuremberg Opinion and Judgment, found at *Trial of the Major War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. IV, October 1946 – April 1949 (Case No. 9, The "Einsatzgruppen Case" United States of America v. Otto Ohlendorf, et al.) at p. 414, reads:

> When the German armies, without any declaration of war, crossed the Polish frontier and smashed into Russia, there moved with and behind them a unique organization known as the Einsatzgruppen. As

> an instrument of terror in the museum of horror, it would be difficult to find an entry to surpass the Einsatzgruppen in its blood-freezing potentialities. No writer of murder fiction, no dramatist steeped in macabre lore, can ever expect to conjure up from his imagination a plot which will shock sensibilities as much as the stark drama of these sinister bands.

In the same judgment, the Nuremberg Tribunal also wrote that:

> Although the principal accusation is murder and unhappily man has been killing man ever since the days of Cain, the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses such credible limits that believability must be bolstered with assurance a hundred times repeated.

and:

> If what the prosecution maintains is true [the Tribunal found that in fact it was], we have here participation in a crime of such unprecedented brutality and of such inconceivable savagery that the mind rebels against its own thought, image and the imagination staggers in the contemplation of a human degradation beyond the power of language to adequately portray. The crime did not exclude the immolation of women and children, heretofore regarded as the special object of solicitude even on the part of an implacable and primitive foe.

B. *Complicity*

[21] On the issue of complicity, the Minister referred to the Citizenship and Immigration Manual. In respect of whether an individual's involvement with a limited and brutal purpose organization constitutes complicity, the Minister noted that active or formal membership in the organization responsible for committing the atrocities is not required.

> In order to establish involvement, one or more of the following elements must be present:
>
> a. Person has devoted themselves full time or almost full time to the activities of the organization;
>
> b. Person is associated with the members of the organization (the longer the period of time, the stronger the involvement); **or**
>
> c. Person joins voluntarily and remains in the group to add their personal efforts to the group's cause.

The quote from the policy also indicates that the person must have knowledge of the limited and brutal purpose of the organization and that that knowledge may be inferred from the types of activities the organization is involved with. The policy does note that while it may be presumed that a person who is involved with an organization is aware of the brutal nature of this organization, that presumption is rebuttable. There is no reference made to the rebuttable presumption of "shared common purpose".

[22] As noted in paragraph 47 et seq. of these Reasons, the policy is not required to follow established case law. In any event, the policy (and the Minister's report) is consistent with the law set forth in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 309.

[23] Having outlined the criteria to be followed, the Minister then concluded, based on the findings from Justice MacKay, that Oberlander was complicit in the activities of EK 10a:

> Membership
>
> a. Mr. Justice MacKay conclusively found that Mr. Oberlander was a member of EK 10a. (Membership usually suffices to establish complicity in a limited brutal purpose organization.)
>
> Involvement
>
> b. Mr. Oberlander asserted that he had not joined EK 10a voluntarily. As the Federal Court of Appeal noted, "Mr. Justice MacKay has not made a definite finding as to whether Mr. Oberlander had been conscripted or not".
>
> c. Mr. Justice MacKay conclusively found, however, that Mr. Oberlander served full time with Ek 10a for at least 1.5 years.
>
> d. Mr. Justice MacKay also found that during that time, Mr. Oberlander lived, ate and travelled with Ek 10a, serving it, and its members and its purposes.
>
> Knowledge
>
> ▪ Mr. Justice MacKay conclusively found that at the time Mr. Oberlander was a member of Ek 10a, he had been well aware of its brutal purpose and murderous activities.
>
> The above findings would support a conclusion that Helmut Oberlander falls within the scope of the Government's revocation policy, and in particular that there was evidence permitting a finding that Mr. Oberlander could be suspected of being complicit in the activities of a limited brutal purpose organization.

[24] The Minister's report responds to the submissions by Oberlander's counsel that the Government's policy was only to seek revocation in respect of persons who had participated directly in war crimes and that it was necessary to find direct criminal conduct before Oberlander could be subject to citizenship revocation. The Minister noted that the long-standing and public policy of the Government of Canada was to seek denaturalization not only in cases where there was evidence of direct involvement in war crimes but in cases where there is "evidence of complicity in such crimes".

[25] It is noteworthy that in the discussion of complicity and the requirements for a finding of having grounds to suspect a person's complicity, the Minister referred not only to Canadian and international law on this issue but also the departmental policy manual and the Government's own policy in respect of the annual reports of Canada's war crimes programs. (See comments in paragraphs 21 and 47.)

[26] The Minister, in coming to the conclusion with respect to Oberlander's complicity, noted Justice MacKay's conclusions that Oberlander was a member of EK 10a and that the unit, to Oberlander's own knowledge, carried out systemic and widespread wartime mass murders of civilians on racial and political grounds. The Minister also noted that Justice MacKay found that, whether or not Oberlander had been conscripted, he served with EK 10a, lived and travelled with the unit, and served its purposes. Those purposes were the commission of war crimes, and particularly heinous ones at that.

[27] The Minister then concluded that Oberlander was aware of the commission of war crimes, and, by helping EK 10a to function, contributed indirectly to their occurrence. These conclusions were found to flow directly from the finding of Justice MacKay; those findings also made it clear that any reference to the absence of evidence that Oberlander participated in any of these atrocities addressed not the issue of complicity but the issue of direct participation.

[28] The Minister then further concluded that the findings of Justice MacKay make it clear that EK 10a, during the time Oberlander was a member, was a limited and brutal purpose organization, and in particular was a death squad.

[29] On the issue of Oberlander's voluntary participation in EK 10a, an issue directly related to the shared common purpose of the organization, while Justice MacKay made no definite finding as to whether Oberlander had been conscripted or not, the Federal Court of Appeal had indicated that this point had to be addressed by the Minister. Addressing that issue, the Minister concluded that complicity could be shown if one or more of the following elements are present:

(a) the person has devoted themselves full-time or almost full-time to the activities of the organization;

(b) the person is associated with the members of the organization (the longer the period of time, the stronger the involvement); or

(c) the person joins voluntarily and remains in the group to add their personal efforts to the cause.

[30] Both elements (a) and (b) are clearly and conclusively established by Justice MacKay's findings.

[31] The Minister then specifically addressed the issue of conscription, and concluded that

> Conscription is not a barrier to complicity. If that were so, no draftee could ever be found complicit in his unit's activities. Such a position is untenable.

[32] The Minister specifically rejected as inapt the analogical reference of Oberlander's counsel to forced labour by concentration camp inmates. The Minister's report ultimately concludes with a finding that there was ample evidence in the form of Justice MacKay's final and binding findings of fact to meet the tests set out by the Federal Court of Appeal, that Oberlander could be suspected of being complicit (and in fact was complicit) in the activities of a limited and brutal purpose organization. That finding concludes the Minister's attempt at addressing the criticisms of the Court of Appeal in its first revocation matter.

[33] The Minister's report then turns to the issue of personal interests considerations, which involves weighing Oberlander's personal interests in maintaining his citizenship against the public interest in its revocation.

C. *Personal Interests Considerations*

[34] The Minister, having referred to the written submissions made, noted that both the Department of Justice and Oberlander's counsel agreed that the sole issue is whether citizenship

should be revoked and further that the issue of possible subsequent deportation is irrelevant. It was also noted that revocation does not necessarily result in deportation.

A deportation depends on a host of post-revocation decisions, some of which are discretionary, others of which are adjudicative, and one of which involves the Governor in Council. Therefore, those aspects of the personal interests submissions made which relate to the impact of deportation of both Oberlander and his family are not germane. From this I take it that such issues as the dependence of a family member on Oberlander were not considered relevant as that was an issue related to the effects of deportation.

[35] The Minister then addressed the personal interests considerations raised on behalf of Oberlander, which include those related to the length of time (now 51 years) that he has spent in the country and his irreproachable life during that period. The Minister concluded as follows:

> As favourable, even "overwhelmingly favourable", as these considerations may be to Mr. Oberlander, they are plainly outweighed by the powerful and vital public interest in revoking the citizenship of a person who hid his membership in a Nazi death squad in order to be admitted to Canada.
>
> To fail to revoke citizenship in such circumstances would debase the valuable privilege of Canadian citizenship and would seriously infringe the fundamental principle that Canada must not be a safe haven for persons who have been complicit in war crimes or other reprehensible acts during times of conflict, regardless of time or place.
>
> …
>
> I conclude that the personal interests considerations raised by Mr. Oberlander are strongly outweighed by the seriousness of the deceit regarding his particular wartime service, by which deceit he gained

> admission to Canada and Canadian citizenship, and by the public interest in revoking that citizenship

[36] On the basis of all of the above, the Minister's recommendation was for the revocation of citizenship and the Cabinet adopted that recommendation.

III. ISSUES

[37] Against this report and decision of the Cabinet, the Applicant has raised the following issues:

1. Did the Cabinet err in its finding of complicity?
2. Did the Cabinet err in ignoring or failing to consider relevant factors in balancing the Applicant's personal interests and the public interest?
3. Did the Cabinet err in relying on the alleged flawed Minister's report and in doing so, raise a reasonable apprehension of bias?

IV. ANALYSIS

A. *Standard of Review*

[38] In "Oberlander/2004", the Court of Appeal conducted a "pragmatic and functional" analysis to determine the standard of review. It concluded that in respect of the issue of finding that a person is a suspected war criminal, the standard is reasonableness *simpliciter*. On the balancing of personal interest and public interest, the standard was patent unreasonableness.

[39] In this post-*Dunsmuir* era, the Court is to determine whether the standard of review is correctness or reasonableness. As held in *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, cited with approval by the Federal Court of Appeal in *Pharmascience Inc. v. Canada (A.G.)*, 2008 FCA 258, a court, when examining reasonableness, must do so in the context of the particular dispute.

> [21] The "revised system" established in *Dunsmuir* was designed in part to make the approach to judicial review of administrative decisions "simpler and more workable" (para. 45). An analysis of the varying degrees of deference to be accorded to the tribunal within the reasonableness standard, as submitted by the appellant, fails to comply with this objective.
>
> [22] My conclusion does not signal that factors such as the nature and mandate of the decision-maker and the nature of the question being decided are to be ignored. Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account. Where, for example, the decision-maker is a minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad. In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.

[40] *Dunsmuir* requires that existing jurisprudence be examined to determine if the "degree of deference" to be accorded a particular type of question has already been determined. In "Oberlander/2004", the Court of Appeal determined the standard of review. More deference is owed to the weighing of interests, less deference is owed in respect of a complicity finding.

[41] I have also considered the factors listed by the Supreme Court at paragraphs 55 and 64 of *Dunsmuir*. It is important to note that in this present case, there is no privative clause, the nature of the question is one of the application of a policy established at the highest level of the executive; the Cabinet and the Minister have the expertise and duty with respect to citizenship revocation, the issue of complicity is a matter of mixed law, fact and policy, and the issue of balancing of interests is highly discretionary and largely policy driven. Considering all of these factors, the standard of review is reasonableness with a greater range of reasonable decisions in the case of the weighing of interests than in respect of the issue of complicity.

[42] I note in passing that at paragraph 64 of *Dunsmuir*, the Supreme Court recognizes that the reasonableness standard may be applicable to certain issues of law where the tribunal has developed particular expertise in the application of a general rule in relation to a specific statutory context or where the question of law does not rise to the level of "central importance to the legal system and is not outside the decision maker's specialized area of expertise".

[43] As the Court of Appeal noted in "Oberlander/2004", the Cabinet need not have a policy on revocation, but if it does and purports to follow it, it must follow it properly. The Court of Appeal recognized that what is primarily at issue here is a matter of policy and its application. In my view, this conclusion solidifies the standard of review of reasonableness, both specifically and as to the decision as a whole, with recognition accorded to the function of the Cabinet in policy making and application.

B. *Error in Complicity Conclusions*

[44] The Applicant's principal contention is that the Cabinet erred in law in its complicity conclusions. The Applicant contends that these errors arise from an expansive definition of complicity in the "no safe haven" policy, and from the failure to consider evidence that rebuts the presumption of "shared common purpose".

[45] The Applicant's basic position, both in its Memorandum and its oral argument, was that the issue of complicity in the "no safe haven" policy is a question of law to be decided on the basis of correctness.

[46] With great respect to the forceful arguments of counsel, I cannot agree. The Applicant's submissions would turn this matter into a trial of whether Oberlander was in fact complicit in war crimes, whereas the matter before the Cabinet was the application of its policy.

[47] As the Court of Appeal noted in "Oberlander/2004", the Cabinet was engaged in the application of its policy. In setting that policy, the Cabinet was entitled to embrace some, all, or none of the existing law on complicity. It is noteworthy that it set forth its position on what constitutes complicity.

> For World War II matters, the government has publicly stated that it will pursue only those cases for which there is evidence of direct involvement or complicity in war crimes or crimes against humanity. A person may be considered complicit if the person is aware of the commission of war crimes or crimes against humanity and contributes directly or indirectly to their occurrence. In addition, membership in an organization responsible for committing the

> atrocities can be sufficient to establish complicity if the organization in question is one of a limited brutal purpose, such as a death squad.
>
> [Emphasis added]

[48] The policy refers to the existence of "evidence of complicity". The Court of Appeal described the policy as requiring a finding that "Mr. Oberlander could be suspected of being complicit in the activities of an organization with a single, brutal purpose" [emphasis added]. It is against this policy criterion that Oberlander's activities must be assessed. The issue of complicity is the complicity established by the policy, whatever else domestic or international law may hold.

[49] There is no issue with the finding that EK 10a was a limited and brutal purpose organization – it is difficult to conceive of a better example of that dubious accolade. It is hard to imagine that one could reach any other conclusion with respect to EK 10a, given that their sole function was as a mobile killing unit of innocent civilians. One would not have thought that that conclusion could be at all challengeable. The Respondent relies on *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (F.C.A.), to establish that, if the organization has a limited and brutal purpose, membership, together with knowledge of its criminal purposes and acts, is sufficient to demonstrate complicity.

[50] The Respondent concedes that there are several rebuttable presumptions involved, but focuses its submissions on the basis that the only one in issue in this case is "knowledge" (or in Oberlander's case his lack of knowledge). However, even if the Respondent was correct that it was open to the Cabinet to accept only "knowledge" as a rebuttable presumption, that is not what

occurred. Because of this, the consideration of “shared common purpose” must be examined as well.

[51] The Applicant contends that the Cabinet erred by ignoring the right to the rebuttable presumption of “shared common purpose” and ignored the evidence on this issue. In my view, the Cabinet had the right to establish as a matter of policy what it accepted as sufficient evidence to suspect a person of being complicit in war crimes and what rebuttable presumptions it would allow. Moreover, it did not ignore the evidence raised to rebut the finding that Oberlander shared a common purpose with EK 10a.

[52] The Applicant seems to rest this part of his case on the basis that in law there are at least two rebuttable presumptions arising from membership in a limited and brutal purpose organization; (1) that the person did not share the common purpose of the organization (i.e. established by efforts to transfer out of the organization) or (2) the person had no knowledge of the actions of the organization. The Applicant relies on the fact that the Minister’s report refers directly to “knowledge” but makes no reference to “shared common purpose”.

[53] Despite the absence of reference to “shared common purpose”, the Minister’s report does address the principal elements of the presumption as raised by the Applicant. In addition, the extensive reference to Justice MacKay’s judgment shows that the Minister, and Cabinet, were well aware of all aspects of the “shared common purpose” issue.

[54] To the extent that the Cabinet had to address this rebuttable presumption, it is not fatal that it does not refer directly to the presumption so long as it deals with the substance in the context of what is raised by the Applicant. The legality of the Cabinet's conclusion cannot rise or fall on some formalistic evaluation which does not mirror real substance.

[55] As a rebuttable presumption, it is incumbent on the Applicant to so rebut. The Minister's procedure was to provide the Applicant with a copy of the draft report and invite submissions to address any parts in contention. In that regard, reference must be made to the Applicant's submissions to the Minister's draft report.

[56] A considerable part of those submissions attacked the findings of Justice MacKay and the alleged error of the Cabinet in relying on the Minister's report of Justice MacKay's findings. Given that the findings are non-reviewable, significant portions of those submissions were of little assistance.

[57] While the Applicant does not address the rebuttable presumption of "shared common purpose" by name, he does address the presumption in substance. On that issue, a fair reading of the submissions is (a) that Oberlander was conscripted against his will; and (b) that Oberlander had no personal involvement in the criminal activities or war crimes.

[58] On the issue of conscription, the Minister specifically addressed the criteria for establishing involvement in a limited and brutal purpose organization. As referred to earlier in paragraph 21, the

Minister indicated that voluntarily joining was only one aspect of involvement and that involvement could be established by a person devoting themselves virtually full-time to the organization and the person was associated with the organization (the longer the period of time, the stronger the involvement).

[59] The Minister specifically addressed the rebuttal evidence of conscription. Aside from noting earlier that Justice MacKay neither found for nor denied that Oberlander was conscripted, the Minister held that:

> Conscription is not a barrier to complicity. If that were so, no draftee could ever be found complicit in his unit's activities. Such a position is untenable.

[60] In respect of conscription, the Minister had reached the conclusion that conscription itself was not a conclusive factor. The Minister's reasons refer specifically to the fact that Oberlander had not been mistreated after he joined EK 10a, that there is no evidence Oberlander found EK 10a's activities abhorrent, nor was there evidence he even sought to be relieved of his duties.

[61] Earlier in the report, the Minister acknowledged Oberlander's lack of personal involvement in committing the atrocities.

[62] For these reasons, it cannot be fairly said that the Minister ignored the evidence used by the Applicant in an effort to rebut the presumption that Oberlander shared a common purpose with the organization he served.

[63] Other issues which may be relevant to rebut the presumption, such as his youth and limited formal education, were not particularly stressed by the Applicant. The Minister clearly considered the submissions made, and addressed the ones which the Applicant emphasized. The Minister was not required to give reasons for each and every factor or point raised by Oberlander.

[64] In *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, an extradition case, the Supreme Court of Canada addressed the issue of the adequacy of reasons and outlined the basic duty in the provision of reasons. Paragraph 46 of the decision reads:

> As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's *Cotroni* analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

[65] In my view, the Minister’s reasons meet the criteria laid down by the Supreme Court of Canada in *Lake* even where they do not specifically address every submission made. Oberlander can understand why the decision was made and this Court can assess the validity of the decision.

[66] The end result of the Minister's complicity analysis was a finding that Oberlander could be suspected of being complicit in the activities of a limited and brutal purpose organization. The Minister went further, and need not have, to find complicity. Since the Minister addressed all the relevant aspects of the "suspicion of complicity" (a lower standard than actual complicity), the issue is whether the conclusion, as adopted by the Cabinet, is reasonable.

[67] At paragraph 47 of *Dunsmuir*, the Court lays out some guidance as to what is the reasonableness standard and how it is applied.

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[68] From this perspective, the Cabinet's decision can be said to be reasonable because:

1. there was justification;
2. it was made in a transparent manner;
3. the reasons are intelligible; and

4. the results fall within a range of possible acceptable outcomes that are defensible on the facts and law.

There was a clear justification for the conclusions. As found by Justice MacKay, Oberlander was aware of the war crimes and crimes against humanity. Oberlander contributed to their commission, even indirectly, by acting as an interpreter. Finally, he was a member of EK 10a, as found by Justice MacKay, and EK 10a was an organization with a limited and brutal purpose. Indeed, its purpose was the very epitome of brutal.

[69] I find no real suggestion that there is any lack of transparency in the reasons or in the process. The Applicant had notice of the Minister's intention to submit a report as well as the opportunity to make submissions prior to the submission of the report. He had already had a full trial on the critical facts which form the underpinnings for that report. The Applicant was also well aware of the Government's "no safe haven" policy, which had been in existence for a considerable period of time.

[70] It is also possible, in terms of the intelligibility of the decision, to understand the line of reasoning in the Minister's report which led to the conclusion of complicity (and the balancing of interests which will be addressed later) even if the decision was less expansive on certain points than the Applicant would have liked.

[71] As indicated in *Lake*, above, notwithstanding the brevity or lack of apparent detail in the reasons, as long as those reasons make it clear that the submissions made by a party were taken into

account and there is a basis for understanding why those submissions were rejected, the decision is sufficiently intelligible. For the reasons earlier stated, it was evident that the Minister took account of the rebuttable presumptions and considered the key points raised, and there is a basis for understanding why those matters were rejected.

[72] Having concluded that conscription was not determinative, and in addition to the factors referred to in paragraph 63, the Minister put emphasis on the fact that Oberlander devoted himself full-time to his activities within EK 10a, and that those activities assisted the main work of EK 10a of which Oberlander had knowledge, a knowledge which Oberlander had denied, and the denial of which was found not to be credible by Justice MacKay.

[73] The conclusion is inescapable that notwithstanding the Applicant's submissions, the presumption of complicity had not been rebutted and certainly had not been sufficiently rebutted to remove grounds for suspecting that Oberlander had been complicit in war crimes.

[74] With respect to the question of whether the result falls within "a range of possible acceptable outcomes that are defensible on the facts and law", the facts as established before Justice MacKay provided the strongest reasons for the defensibility of the result. While Justice MacKay was not required to make a finding of complicity (and had he done so his conclusion would likely have been *ultra vires*), his findings form an evidentiary basis upon which a reasonable person could reach the conclusion that the Minister reached.

[75] While some may find the conclusions harsh, given the role of Oberlander within EK 10a and no doubt somewhat influenced by his personal circumstances now, that does not in any way lessen the reasonableness of the Minister's conclusions. Those conclusions are defensible on the facts as established by Justice MacKay, on the law to the extent that it is applicable, and on the "no safe haven" policy of the War Crimes and Crimes Against Humanity Program of the Government of Canada.

C. *Balancing of Interests*

[76] In "Oberlander /2004" the Court of Appeal was particularly concerned that the Cabinet had not engaged in a fair balance of interests. The Cabinet was mindful of that concern, as is evident from the report itself.

[77] It is clear from the portion of the report concerning the balancing of interests that issues relating to the impact of deportation are properly considered irrelevant. The issue of deportation is subject to a number of other factors referred to earlier in this decision at paragraph 34.

[78] In considering the personal interests versus the public interest, that discussion is found at page 13 of the report:

> The pertinent personal interests considerations raised on behalf of Mr. Oberlander are the length of time (now 51 years) that he has spent in this country and his "irreproachable life in Canada", as the Federal Court of Appeal put it, during that period. His submissions and letters of support describe his generosity to his family and community and how he has been notably hardworking and productive.

> As favourable, even "overwhelmingly favourable", as these considerations may be to Mr. Oberlander, they are plainly outweighed by the powerful and vital public interest in revoking the citizenship of a person who hid his membership in a Nazi death squad in order to be admitted to Canada.
>
> To fail to revoke citizenship … would debase the valuable privilege of Canadian citizenship and would seriously infringe the fundamental principle that Canada must not be a safe haven for persons who have been complicit in war crimes …

[79] Although brief, the reasons given by the Minister plainly disclose why the submissions in respect of personal interests were rejected. The overwhelming policy consideration, as found by the Minister, is that Canada must enforce its "no safe haven" policy in respect of those who through their deceit gained Canadian citizenship by virtue of hiding the fact of their involvement in war crimes.

[80] Those reasons of the Minister can be said to be reasonable on the same grounds as in respect of the issue of complicity. There is justification rendered in a transparent manner, the reasons are intelligible, and the conclusion falls within a range of possible acceptable outcomes.

[81] The Applicant contends that the personal interests analysis was simply lip-service consisting of five lines on page 13 out of a 22-page report. Particularly, it is alleged that the Minister ignored the circumstances of the mentally ill daughter, the age of Oberlander and his spouse, the impacts on his family, and the Government's inaction for 25 years in dealing with Oberlander.

[82] With respect, the age of Oberlander and his spouse is clearly wrapped into the consideration of the length of time of his irreproachable life in Canada of 51 years. The existence of a mentally ill daughter and the impacts on his family are matters more appropriate to consideration on deportation and may well form the basis for some deferral or permanent stay in Canada – an issue not relevant to this consideration as discussed in paragraph 34 above.

[83] As to the allegation that Canada has shown so little action against Oberlander for 25 years, while it may be truly troubling, both from a public perspective as well as from the perspective of Oberlander's own interest, there is no statute of limitations on war crimes or on citizenship revocation. Any lapses by the Government would not, in and of itself, give rise to a right to retain a citizenship which was otherwise falsely obtained.

[84] Although the reasons are brief, those reasons plainly disclose why the submissions were rejected and as a matter of policy, the Cabinet considered the very important public interest in the enforcement of the "no safe haven" policy.

[85] While again the consequences may seem to some to be unjust (a view which this Court does not necessarily share), it is not for the Court to impose its views of the relative importance of Oberlander's personal situation versus that of the enforcement of the "no safe haven" policy even on events which occurred more than 50 years ago.

[86] The Court therefore concludes that the Minister's analysis or the balancing of interests meets the standard of reasonableness appropriate to these circumstances.

D. *Bias*

[87] The Applicant has raised the issue of bias in this context in part because the Cabinet relied upon the Minister's report; alleging that the Minister was clearly dedicated to depriving Oberlander of his citizenship. It is the Applicant's contention that the result of that process was inevitable. The Applicant further contends that any relief which this Court may grant by way of a referral back for a further consideration will likewise be tainted with inevitability.

[88] Given the Court's finding on the reasonableness of the decision by the Cabinet, and therefore of the Minister's report, it is difficult to see how this process has been tainted by bias or by reasonable apprehension of bias. This is particularly so given the findings by the Court of Appeal, which invited the very process engaged in.

[89] The Act creates a particular path for the conduct of revocation proceedings, and to the extent that one may be concerned that a referral back to the Minister has a certain element of inevitability, any reasonable apprehension of bias or other infirmity has been sanctioned by the legislative framework. The only alternative would be to stay proceedings against Oberlander, an Order which the Court of Appeal findings did not invite.

[90] The Applicant contends that the Court ought to exercise its discretion to grant judicial review. To the extent that there is a residual discretion in this Court to grant judicial review (a proposition which I doubt, given my findings that the Cabinet's decision is reasonable and legally sustainable), I would not be prepared to exercise that discretion. What is at issue here is whether a person who hid his involvement in a Nazi death squad and therefore gained the benefits of Canadian citizenship on which he launched a productive life, should be deprived of his ill-gotten citizenship. While Oberlander's personal circumstances may be personally compelling, and the factors of time and good works are on his side; the importance of preserving the integrity of Canadian citizenship from deceit and a recognition of Canada's obligation to ensure that there is no safe haven for those involved in horrendous historical events inclines me to reject any exercise of discretion to grant a judicial review in this instance.

V. CONCLUSIONS

[91] For these reasons, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

ANNEX

Citizenship Act, R.S., 1985, c. C-29

7. A person who is a citizen shall not cease to be a citizen except in accordance with this Part.

7. Le citoyen ne peut perdre sa citoyenneté que dans les cas prévus à la présente partie.

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,

(*a*) the person ceases to be a citizen, or

(*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.

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) soit perd sa citoyenneté;

b) soit est réputé ne pas avoir répudié sa citoyenneté.

(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent

(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à

residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.

titre de résident permanent obtenue par l'un de ces trois moyens.

18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

18. (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée :

(*a*) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

a) l'intéressé n'a pas, dans les trente jours suivant la date d'expédition de l'avis, demandé le renvoi de l'affaire devant la Cour;

(*b*) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

b) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels.

(2) The notice referred to in subsection (1) shall state that the person in respect of whom the report is to be made may, within thirty days after the day on which the notice is sent to him, request that the Minister refer the case to the Court, and such notice is sufficient if it is sent by registered mail to the

(2) L'avis prévu au paragraphe (1) doit spécifier la faculté qu'a l'intéressé, dans les trente jours suivant sa date d'expédition, de demander au ministre le renvoi de l'affaire devant la Cour. La communication de l'avis peut se faire par courrier recommandé envoyé à la

person at his latest known address.

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

dernière adresse connue de l’intéressé.

(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d’appel.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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