

Federal Court



Cour fédérale

Date: 20110929

Docket: T-1769-07

Citation: 2011 FC 1119

Ottawa, Ontario, September 29, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Plaintiff

and

BRANKO ROGAN

Defendant

REASONS FOR ORDER AND ORDER

[1] The Minister of Citizenship and Immigration seeks his costs associated with a reference brought under section 18(1)(b) of the *Citizenship Act*, R.S.C., 1985, c. C 29 (the “*Citizenship Act, 1985*”). The Minister sought a declaration that Branko Rogan obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. Following an eleven day hearing, I granted the declaration sought by the Minister: see *Canada (Minister of Citizenship and Immigration) v Rogan*, 2011 FC 1007, [2011] F.C.J. No. 1221 [“*Rogan*”].

Background

[2] The Minister alleged that Mr. Rogan failed to disclose his activities during the conflict in the former Yugoslavia to immigration officials responsible for selecting applicants to come to Canada. The activities relied upon by the Minister included:

- (i) Mr. Rogan's work in Bileća, Bosnia-Herzegovina, during 1992; and/or
- (ii) Mr. Rogan's position and duties as a reserve police officer and/or police officer and/or military member in Bosnia-Herzegovina during 1992; and/or
- (iii) Mr. Rogan's activities during service at Bileća detention camp in 1992; and/or
- (iv) Mr. Rogan's activities mistreating, assaulting and/or torturing detainees at Bileća detention camp in 1992; and/or
- (v) Other activities in which Mr. Rogan was involved and which would have rendered him inadmissible to Canada at the time of his coming to Canada.

[3] I made the following findings in *Rogan* with respect to Mr. Rogan's actions during the conflict:

418 Mr. Rogan was a reserve police officer working as a guard at both the police station and student dormitory detention facilities in Bileća, Bosnia-Herzegovina in June and July of 1992.

419 Muslim males living in Bileća, including Mr. Pervan, Mr. Bajramovic and the Hadzic brothers, were arrested and detained in the summer of 1992 simply because they were Muslim men living in Bileća. Mr. Rogan would have been aware of this fact.

420 Muslim prisoners, including Messrs. Pervan, Bajramovic and the Hadzic brothers, were held in inhumane conditions, and Mr. Rogan was aware of the inhumanity of the conditions under which the prisoners were being held.

421 At the time that he was working as a prison guard at the detention facilities in Bileća, Mr. Rogan was well aware of the fact that prisoners were being subjected to physical abuse, including beatings.

422 Mr. Rogan was directly involved in the physical abuse of prisoners. He struck Sreco Kljunak in the face, and facilitated and was complicit in the subsequent beating of Mr. Kljunak. Mr. Rogan also beat Asim Catovic, and made statements to Mr. Catovic's son intended to inflict serious psychological pain.

[4] I also found that Mr. Rogan failed to disclose his activities during the conflict in the former Yugoslavia to immigration officials responsible for selecting applicants to come to Canada. In particular, I found that:

424 Mr. Rogan knowingly misrepresented his educational qualifications in his application for permanent residence in order to avoid having to produce supporting documentation to Canadian immigration authorities.

425 Mr. Rogan did not accurately disclose his addresses for the period between 1986 and 1994 on his application for permanent residence. He intentionally concealed the fact that he was living in Bileća between March and July or August of 1992, which had the effect of foreclosing or averting further inquiries by Canadian immigration officials. Mr. Rogan also misrepresented that he was living in New Belgrade between August of 1992 and early 1994, when he was in fact living in Bajmok during most of that period.

426 Mr. Rogan also misrepresented his employment history in his application for permanent residence as it related to where he was living and working prior to June of 1992. This had the effect of foreclosing or averting further inquiries by Canadian immigration officials.

427 Most importantly, Mr. Rogan knowingly concealed his employment as a reserve police officer working as a prison guard in Bileća in June and July of 1992. Disclosure of this information would almost certainly have led to a finding that Mr. Rogan was ineligible for refugee protection and inadmissible to Canada.

428 Mr. Rogan also did not disclose his involvement with the reserve police in answer to the question on the application form regarding membership in organizations, including the military. Even if I accept that the reserve police in Bileća were not technically the military, Mr. Rogan's involvement with the reserve police should

have been disclosed on the application form, either in response to this question or in response to the question dealing with his employment history.

429 Mr. Rogan also did not answer truthfully and knowingly concealed material information in both his application for permanent residence and at his immigration interview in relation to his involvement in crimes against humanity perpetrated against the male Muslim civilian population of Bileća in the summer of 1992.

430 Mr. Rogan clearly understood that the disclosure of his work as a reserve police officer and prison guard in Bileća could have led to difficulties or delays with his application for permanent residence. Taken together, the omissions and inaccuracies in the information provided by Mr. Rogan in his application for permanent residence and at his immigration interview were clearly a calculated attempt on his part to conceal his role with reserve police in Bileća in June and July of 1992, and to foreclose any inquiries by Canadian immigration officials in this regard.

431 As a consequence, I am satisfied that Mr. Rogan obtained his Canadian citizenship by false representation or fraud and by knowingly concealing material circumstances and a declaration to this effect will issue.

[5] Finally, I concluded that Mr. Rogan did not act under duress during the time that he worked as a prison guard in Bileca in the summer of 1992: see *Rogan*, at paras. 406-416.

The Claim for Costs

[6] The Minister has provided a draft Bill of Costs calculated at Column III of Tariff B, claiming \$56,565.60 in fees, inclusive of HST. The Minister further claims \$166,918.67 in disbursements.

[7] It is common ground that the Court has the power to order either party to a reference to pay costs: see *Canada (Minister of Citizenship and Immigration) v Oberlander*, 2008 FC 497, [2008] F.C.J. No. 628, at para. 12.

[8] Mr. Rogan submits that although the Minister may be entitled to his costs as the successful party in these proceedings, costs are at the discretion of the Court and should not be awarded in this case, or alternatively, a greatly reduced order of costs should be made.

[9] In considering Mr. Rogan's submissions, I have also taken into account the provisions of Rule 400 of the *Federal Courts Rules*, S.O.R./98-106.

The Expert Evidence

[10] In support of his contention that the costs sought by the Minister should not be granted, Mr. Rogan argues that the use of an expert witness was not necessary, as the Court could have obtained an appreciation of the history and nature of circumstances in Bileća at the time in question from various publicly available written sources, including factual findings made by the International Criminal Tribunal for the Former Yugoslavia. As a consequence, Mr. Rogan says that although it may have been helpful to have an expert witness testify, Dr. Nielsen did not play a major role in the Minister's case and Mr. Rogan should not be expected to pay for the costs associated with the expert's testimony. I do not accept these submissions.

[11] Dealing first with Mr. Rogan's submission that the Court should have conducted its own historical research, courts can and regularly do conduct *legal* research. However, it is not

appropriate for a court to do its own independent research in relation to the underlying *facts* of a case. Rather courts must decide cases based upon the evidence brought forward by the parties.

[12] Moreover, courts cannot simply rely on factual findings that other tribunals have made on the basis of different evidentiary records. The task for the Court on a reference such as this is to find the facts for itself, based upon the evidence before it.

[13] As I noted at paragraph 43 of *Rogan*, I was greatly assisted by Dr. Nielsen's testimony, which I found to be "invaluable in understanding the roots of the conflict in the former Yugoslavia, and the war in Bosnia-Herzegovina in particular."

[14] Moreover, the Minister asserted that Mr. Rogan did not answer truthfully, and knowingly concealed material information in both his application for permanent residence and at his immigration interview in relation to his involvement in crimes against humanity perpetrated against the male Muslim civilian population of Bileća in the summer of 1992.

[15] In order to determine whether the activities that Mr. Rogan was involved in Bileća in the summer of 1992 met the legal definition of one or more crimes against humanity, it was necessary for the Minister to establish that the acts in question were committed as part of a widespread or systematic attack: see *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 119; and *Rogan* at para. 384. Dr. Nielsen's evidence was critically important on this point: see *Rogan* at para. 396.

[16] Mr. Rogan has not disputed that the amount claimed by the Minister for Dr. Nielsen's testimony was actually incurred, and I am satisfied that the amount claimed is reasonable. Consequently, the Minister shall have \$14,365.64 for the costs associated with Dr. Nielsen's evidence.

The Calling of Unnecessary Evidence

[17] Mr. Rogan also submits that he admitted in a 1998 interview with the RCMP that he had concealed material information from Canadian immigration authorities with respect to his role as a reserve police officer in Bileća. Mr. Rogan notes that he admitted that he was a reserve police officer, that he had not disclosed this fact on his immigration application. He had also admitted that he had not accurately disclosed his education and employment histories on his immigration application.

[18] According to Mr. Rogan, these admissions would have been sufficient to establish that he had obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. As a result, Mr. Rogan argues that the Minister should not be entitled to recover the fees and disbursements associated with the trial, much of which was "unnecessary in terms of proving the stric[t] requirements under s. 10 of the *Citizenship Act*".

[19] In addressing his submission, it is important to have regard to the role of the Federal Court on a reference such as this. As I said in *Rogan*:

13 A reference by the Minister under section 18(1)(b) of the *Citizenship Act*, R.S., 1985, c. C-29 (the "*Citizenship Act*, 1985") is not an action in the conventional sense of the word. Rather, it is "essentially an investigative proceeding used to collect evidence of

facts surrounding the acquisition of citizenship, so as to determine whether it was obtained by fraudulent means": *Canada (Minister of Citizenship and Immigration) v Obodzinsky*, 2002 FCA 518, [2002] F.C.J. No. 1800, at para. 15 [*Obodzinsky*, (FCA)].

14 The task for the Court is to make factual findings as to whether Mr. Rogan obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. Findings made by this Court under section 18(1)(b) of the *Citizenship Act, 1985* are final, and cannot be appealed.

15 Although these reasons follow a hearing at which a great deal of evidence was adduced, the Court's factual findings are not determinative of any legal rights. That is, this decision does not have the effect of revoking Mr. Rogan's Canadian citizenship: *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 S.C.R. 391, [1997] S.C.J. No. 82, at para. 52, citing *Canada (Secretary of State) v Luitjens*, [1992] F.C.J. No. 319, 142 N.R. 173 at 175 [*Luitjens*, (FCA)].

16 These findings may, however, form the basis of a report by the Minister to the Governor in Council requesting the revocation of Mr. Rogan's citizenship. The ultimate decision with respect to the revocation of citizenship rests with the Governor in Council, which is the sole authority empowered to revoke citizenship. A decision by the Governor in Council to revoke an individual's citizenship may be judicially reviewed: *Canada (Minister of Citizenship and Immigration) v Furman*, 2006 FC 993, [2006] F.C.J. No. 1248, at para. 15.

[20] In other words, the role of the Federal Court is to find the necessary facts so as to allow the Governor in Council to decide whether or not to exercise the discretion to revoke an individual's citizenship.

[21] Many factors may play a role in the exercise of that discretion. Amongst other things, these factors include the seriousness and materiality of the misrepresentations; the gravity of the actions of the individual; whether the individual was involved in war crimes or crimes against humanity and the extent of that involvement, including whether the individual was directly involved in such

crimes or was merely complicit in their commission; and whether the individual was acting under duress.

[22] Mr. Rogan continued to deny any involvement in crimes against humanity, repeating such denials in his testimony before this Court. I nevertheless found that Mr. Rogan was not truthful when he denied involvement in crimes against humanity in his answer to questions posed to him during the immigration process. I further found that he knowingly concealed material information regarding his involvement in the crimes against humanity perpetrated against the Muslim population of Bileća in the summer of 1992.

[23] The evidence adduced by the Minister at trial was thus necessary for the Court to be able to make the relevant factual findings.

The Minister's Claim for Legal Fees

[24] The Minister's draft Bill of Costs claims \$56,565.60 in fees, inclusive of HST. The Minister is claiming fees for two counsel. Having carefully reviewed the Bill of Costs, I am satisfied that the amounts claimed for fees are reasonable.

The Minister's Claim for Disbursements

[25] The Minister's draft Bill of Costs also itemizes various disbursements incurred in connection with this matter. The claim for the services of Dr. Nielsen has already been addressed earlier in these reasons. However, I have a number of concerns with respect to other disbursements claimed by the Minister.

[26] First of all, I am not satisfied that daily transcripts were required in this matter. Consequently, the claim for \$7,442.40, \$205.66 and \$2,678.01 for court reporting services are disallowed.

[27] I have not been provided with particulars or supporting receipts for any of the disbursements claimed. Having accepted that the amounts claimed for Dr. Nielsen were reasonable, I am not satisfied that the Minister should be able to claim a further \$21,015.86 for the services of a “Researcher”.

[28] It is also not clear whether all of the expenses, such as those claimed for translation services, were incurred exclusively in relation to this proceeding, or whether some of them may have been associated with a prior investigation of Mr. Rogan which was carried out in conjunction with a possible criminal prosecution.

[29] Moreover, while the Minister only claims fees associated with two counsel, he claims travel expenses for four counsel, two of whom did not appear at the trial. It is not clear what, if any, role these two individuals played in this proceeding. The Minister is only entitled to the reasonable travel expenses for two counsel at the pre-trial and trial stages of this proceeding.

[30] Subject to the above comments, I am satisfied that the Minister is entitled to his reasonable disbursements incurred in relation to this proceeding. If the parties cannot agree as to what is

reasonable having regard to the guidance provided by these reasons, then any disputed disbursements shall be referred for assessment.

ORDER

THIS COURT THEREFORE ORDERS that:

1. The Minister shall have his costs of this matter in accordance with Column III of the table to Tariff B. These costs are fixed in the amount of \$56,565.60, inclusive of HST;
2. The Minister is entitled to reimbursement for the disbursements associated with the testimony of Dr. Nielsen in the amount of \$14,365.64;
3. The Minister is not entitled to reimbursement for the sum of \$21,015.86 for the services of a “Researcher”, or for the costs of daily transcripts;
4. The Minister is entitled to the reasonable travel expenses for two counsel at the pre-trial and trial stages of this proceeding;
5. Subject to the above, the Minister is entitled to reimbursement for his reasonable expenses incurred in relation to this proceeding, but is not entitled to reimbursement for expenses associated with any investigation of Mr. Rogan that preceded the issuance of the Statement of Claim in this Court on October 3, 2007.

6. If the parties cannot agree as to what is reasonable having regard to the guidance provided by these reasons, then any disputed disbursements shall be referred for assessment.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1769-07

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION and BRANKO ROGAN

DATE OF HEARING: N/A - SUBMISSIONS ON COSTS WERE FILED
PURSUANT TO THE REASONS FOR JUDGMENT
AND JUDGMENT OF AUGUST 18, 2011

**REASONS FOR ORDER
AND ORDER:** MACTAVISH, J.

DATED: SEPTEMBER 29, 2011

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