Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091117

Docket: A-589-08

Citation: 2009 FCA 330

CORAM: **SHARLOW J.A.**
LAYDEN-STEVENSON J.A.
RYER J.A.

BETWEEN:

HELMUT OBERLANDER

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on October 27, 2009.

Judgment delivered at Ottawa, Ontario, on November 17, 2009.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: RYER J.A.
DISSENTING REASONS BY: SHARLOW J.A.

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] On May 17, 2007, the Governor in Council (GIC), by Order P.C. 2007-801, revoked the citizenship of the appellant, Helmut Oberlander, on the basis that he obtained it by knowingly concealing material circumstances, specifically, that he had been an auxiliary of the Einsatzkommando 10a (Ek 10a) during World War II. Mr. Oberlander sought judicial review of that decision. A Federal Court judge (the application judge) dismissed the application. This appeal is from that judgment.

[2] I conclude that the appeal should be allowed in part and the matter remitted to the GIC for determination with respect to the issue of duress.

Background

[3] Mr. Oberlander's circumstances are extensively documented in decisions of the Federal Court and this Court: *Canada (Minister of Citizenship and Immigration) v. Oberlander*, (2000), 185 F.T.R. 41 (T.D.) (*Oberlander 1*); *Oberlander v. Canada (Attorney General)* (2003), 238 F.T.R. 35 (F.C.) (*Oberlander 2*); *Oberlander v. Canada (Attorney General)*, [2005] 1 F.C.R. 3 (C.A.) (*Oberlander 3*); *Oberlander v. Canada (Attorney General)* (2008), 336 F.T.R. 179 (F.C.) (*Oberlander 4*). For present purposes, a detailed recitation is not required.

[4] Briefly stated, during World War II, the Ek 10a operated behind the German army's front line in the Eastern occupied territories. It was part of a force responsible for killing more than two million people, most of whom were civilians and largely Jewish. It has been characterized as a death squad. From 1941 to 1943, Mr. Oberlander served with the Ek 10a as an interpreter and an auxiliary. In addition to interpreting, he was tasked with finding and protecting food and polishing boots. He lived, ate, travelled and worked full time with the Ek 10a. From 1943 to 1944, he served as an infantryman in the German army.

[5] In 1954, Mr. Oberlander and his wife immigrated to Canada. They had two daughters, one of whom has a mental illness. Mr. Oberlander became a Canadian citizen in 1960. He did not

disclose his wartime experience to Canadian officers when he applied to come to Canada, when he entered Canada, or when he applied for Canadian citizenship.

[6] In 1995, the process under sections 10 and 18 of the *Citizenship Act*, R.S.C. 1985, c. C-29 to revoke Mr. Oberlander's citizenship was initiated. A Reference to the then Federal Court of Canada, Trial Division (the Reference) was heard by Mr. Justice MacKay. The factual findings from the Reference are binding for subsequent purposes in relation to the revocation of citizenship, including this appeal. The penultimate finding was that Mr. Oberlander had falsely represented his background and knowingly concealed information and was granted citizenship on that basis.

[7] After receipt of Justice MacKay's factual findings from the Reference, the Minister of Citizenship and Immigration (the Minister) issued a report to the GIC recommending revocation of Mr. Oberlander's citizenship. The recommendation was accepted and the citizenship was revoked. Mr. Oberlander unsuccessfully applied for judicial review. On appeal to this Court, Mr. Oberlander's appeal was allowed and the Minister was directed to present the GIC with a new report addressing the concerns expressed by the Court. The Minister's failure to address the purpose of the Ek 10a organization, failure to address the issues of complicity and conscription and failure to provide an explanation to support the conclusion that Mr. Oberlander fell within the government's "no safe haven policy" were specifically identified as defects in the Minister's report.

[8] The Minister issued a new report recommending the revocation of citizenship. The GIC accepted the recommendation and again revoked Mr. Oberlander's citizenship. A second

application for judicial review was commenced and dismissed. Mr. Oberlander appeals from that judgment.

Federal Court Decision

[9] At the outset of his reasons, the application judge identified two central issues: whether the GIC erred in finding, first, that there were reasonable grounds to believe Mr. Oberlander was complicit in war crimes or crimes against humanity and as a consequence subject to Canada's "no safe haven" policy and, second, whether the GIC properly considered Mr. Oberlander's personal interests in revoking his citizenship.

[10] The application judge determined that the standard of review with respect to the revocation decision is that of reasonableness. He noted that the Minister's report constitutes the reasons for the GIC decision. He summarized the criteria the GIC relied upon to conclude that the Ek 10a was a limited brutal purpose organization and he arrived at the same conclusion. Regarding complicity, he concluded that the GIC's reasons were adequate and reasonable. With respect to the balancing of Mr. Oberlander's personal interests and the public interest, the application judge concluded that the reasons, although brief, justified the revocation of citizenship on the basis that the public interest outweighed Mr. Oberlander's personal interests.

Standard of Review

[11] On an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is whether the reviewing court identified the appropriate standard of

review and applied it correctly: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 F.C.R. 610 (F.C.A.); *Canada Revenue Agency v. Telfer*, 2009 FCA 23.

[12] The parties agree, and I concur, that the application judge correctly identified the applicable standard of review of the revocation decision as reasonableness.

The Legislative Provisions

[13] The pertinent legislative provisions are as follows:

CITIZENSHIP ACT	***LOI SUR LA CITOYENNETÉ***
PART II LOSS OF CITIZENSHIP	PARTIE II PERTE DE LA CITOYENNETÉ
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, (*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.
Presumption	Présomption
(2) A person shall be deemed to have obtained citizenship by false	(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits

representation or fraud or 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.

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.

PART V
PROCEDURE

PARTIE V
PROCÉDURE

Notice to person in respect of revocation

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

(*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

(*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.

Avis préalable à l'annulation

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

Nature of notice

(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 person at his latest known address.

Nature de l'avis

(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 dernière adresse connue de l'intéressé.

Decision final

(3) A decision of the Court made under subsection (1) is final and,

Caractère définitif de la décision

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

> notwithstanding any other Act of Parliament, no appeal lies therefrom.

The "No Safe Haven" Policy

[14] This Court previously determined in *Oberlander 3* that the policy at the relevant period is as stated in a Public Report entitled Canada's War Crimes Program 2000-2001, the pertinent portions of which are as follows:

> The policy of the Government of Canada is clear. Canada will not become a safe haven for those individuals who have committed war crimes, crimes against humanity or any other reprehensible act during times of conflict.
>
> Over the past several years, the Government of Canada has taken significant measures, both within and outside of our borders, to ensure that appropriate enforcement action is taken against suspected war criminals, regardless of when or where the crimes occurred. These measures include co-operation with international courts, foreign governments and enforcement action by one of the three departments mandated to deliver Canada's War Crimes Program.
>
> Canada is actively involved in supporting the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ITCR) and has ratified both the International Criminal Court Statute (ICC) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts. Canada was the first country to introduce comprehensive legislation incorporating the provisions of the ICC Statute into domestic law. This legislation, *The Crimes Against Humanity and War Crimes Act*, came into force on October 23, 2000.
>
> …
>
> *World War II Cases*
>
> …
>
> The government pursues only those cases for which there is evidence of direct involvement in or complicity of war crimes or crimes against humanity. A person is considered complicit if, while aware of the commission of war crimes or crimes against humanity, the person contributes, directly or indirectly, to their occurrence. Membership in an organization

> responsible for committing the atrocities can be sufficient for complicity if the organization in question is one with a single, brutal purpose, e.g. a death squad. (emphasis in original)

Issue

[15] No issue is taken with the finding that the Ek 10a was a limited brutal purpose organization. The dispute centers on whether Mr. Oberlander could reasonably be found to be complicit in the war crimes perpetrated by this group and whether, if the answer is yes, the issue of duress arises.

The Position of the Parties

[16] Mr. Oberlander argued before the application judge and before this Court that membership in a limited brutal purpose organization is insufficient to establish complicity. More particularly, he contended that *mens rea* must include a shared common purpose as well as knowing and meaningful participation. His more nuanced argument regarding duress was not placed squarely before the application judge.

[17] The Attorney General (AG) asserted that the analysis must be centered on the limited brutal purpose organization because the law, in this context, requires only membership, knowledge and involvement. If these criteria are met, complicity is made out. The AG conceded that the issue of duress is available to overcome or absolve culpability, but maintained that it was not advanced to the GIC. In reply, Mr. Oberlander countered that, although duress was not specifically pleaded, the issue was evident from the record.

Analysis

[18] The jurisprudence teaches that membership in a limited brutal purpose organization creates a presumption of complicity that can be rebutted by evidence that there was no *mens rea* (knowledge of the purpose) or *actus reus* (direct or indirect involvement in the acts). In other words, while membership *per se* is insufficient to establish complicity, it does create a rebuttable factual presumption. See: *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 F.C. 306 (F.C.A.) at 317; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (F.C.A.) at para. 45; *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (F.C.A.) at 440, 442; *Barzargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282 (F.C.A.) at para. 10; *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66 (F.C.A.) at paras. 31, 32; *Harb v. Canada (Minister of Citizenship and Immigration)* (2003), 238 F.T.R. 194, 302 N.R. 178 (F.C.A.) at para. 11; *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.) at para. 6; *Zazai v. Canada (Minister of Citizenship and Immigration)* (2005), 259 D.L.R. (4th) 281, 339 N.R. 201 (F.C.A.) at paras. 15, 16.

[19] The Citizenship and Immigration Manual, ENF 18: *War crimes and crimes against humanity* (Ottawa: Public Works and Government Services Canada) contains ministerial guidelines regarding the factors to be considered in assessing allegations of war crimes (the ministerial guidelines). These ministerial guidelines are compatible and consistent with the jurisprudence.

[20] In the normal course, the Minister bears the onus of establishing the requisite elements of complicity. The burden of proof is more than suspicion but less than the balance of probabilities: *Ramirez*. It may also be referred to as "reasonable grounds to believe": *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100.

[21] In this case, the binding factual findings from the Reference preclude any argument with respect to a lack of knowledge or participation. Justice MacKay found as follows:

- Mr. Oberlander was a member of Ek 10a;
- Mr. Oberlander could not have been unaware of the function of the unit. He acknowledged that at some time while serving with Ek 10a he was aware of its execution of civilians;
- Mr. Oberlander served as an auxiliary with the unit and he lived and travelled with men of the unit. Its purposes he served.

[22] Because these factual findings are binding, the requisite *mens rea* (knowledge) and *actus reus* (in this case indirect participation) are met. The application judge made no error in applying the standard of review when he concluded that the decision with respect to complicity was reasonable.

[23] Regarding the issue of conscription, Mr. Oberlander maintained before this Court that he was conscripted and that his participation in Ek 10a was under duress because the penalty for desertion was execution.

[24] Both the jurisprudence and the ministerial guidelines provide that the justification of duress is available to absolve complicity: *Ramirez*; *Equizabal v. Canada (Minister of Citizenship and Immigration)*, [1994] 3 F.C. 514 (C.A.) (*Equizabal*).

[25] To establish duress, the jurisprudence requires the individual to demonstrate there was imminent physical peril in a situation not brought about voluntarily and that the harm caused was not greater than the harm to which the individual was subjected (*Equizabal*).

[26] The ministerial guidelines similarly require that three conditions be satisfied. Duress may be established where:

- it results from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person;
- the person acts necessarily and reasonably to avoid this threat;
- the person does not intend to cause a greater harm than the one sought to be avoided.

[27] Duress does not negate findings with respect to *mens rea* or *actus reus*. Rather, it operates to excuse the complicity so that the complicit individual is exonerated of culpability.

[28] Confusion has arisen as to where the issue of conscription is to be addressed when the organization in question is one of limited brutal purpose. The issue has been canvassed primarily in the context of organizations that do not meet the requisite threshold for characterization as a limited brutal purpose organization. Consequently, clarification in this respect is required.

[29] In my view, the issue of conscription with respect to a limited brutal purpose organization is properly examined as a factor in relation to justification. The AG does not disagree with this proposition.

[30] Each case will ultimately turn on its facts. The point is, where complicity is made out in relation to a limited brutal purpose organization, the facts may nonetheless give rise to the justification of duress.

[31] Mr. Oberlander acknowledged that he did not "expressly put forward" the issue of duress. However, he claimed to have submitted the requisite evidence upon which it should have been assessed. The AG countered that any such evidence was "neither compelling nor reliable…it was equivocal to non-existent." From the AG's perspective, "it is improper…to now make this assertion for the first time on appeal, when he failed to present any such evidence to the GIC and thus deprive the Minister of the opportunity to address it before the GIC."

[32] In addressing conscription, the GIC stated, "[e]ven if one assumes that Mr. Oberlander was conscripted, that in no way means that he was not complicit in his unit's subsequent brutal actions." Further, "[c]onscription 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."

[33] I do not disagree with those comments and, as I understand the argument, neither does Mr. Oberlander. He contends that the statements are incomplete. He accepts that conscription, in and of

itself, is not conclusive. However, he claims that the prospect of execution upon desertion, in combination with conscription, may be sufficient to found duress. Relying upon the comment in *Ramirez* that "the law does not function at the level of heroism", Mr. Oberlander maintains that the full evidentiary record was not assessed.

[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.

[35] The Minister was a party to the Reference. There, Mr. Oberlander raised factors related to duress. Justice MacKay noted Mr. Oberlander's evidence that he was ordered to work for the Germans, he believed he had no alternative and would have been subject to the harshest penalties had he not gone as ordered (para. 20). Further, Justice MacKay referred to Mr. Oberlander's evidence that he was ordered by local authorities to report to German occupying forces to serve as an interpreter and his evidence that he reported not voluntarily by free choice, but in fear of harm if he refused (para. 191). Although Justice MacKay made no findings in this respect, the GIC cannot claim to be unaware of these assertions.

[36] Mr. Oberlander's submissions to the GIC related that at the age of seventeen he was forcibly taken from his mother's home and conscripted as a civilian interpreter by the SD, the police arm of the SS of the Nazi regime. He asked, "[h]ow can anyone be a member in any capacity of an organization against his will?" He stated that he was in the same situation as the witness Mr. Siderenko, a prisoner of war captured and forced to fight for the Germans. He claimed to have been forced into an infantry unit despite the fact that he had no military training. He maintained that all witnesses, including government witnesses with personal experience, agreed that escape was punishable by death. In his responsive submissions, he referred to voluntariness as a key issue and specifically noted the testimony of the government's witnesses Sidorenko and Hubert that any attempts at escape were punishable by death.

[37] As stated previously, the GIC linked the issue of conscription to the matter of membership in the organization. However, I have concluded that, in a limited brutal purpose organization, conscription is appropriately addressed under the justification of duress. The ministerial guidelines expressly refer to duress and they delineate the requisite conditions to be analysed in relation to it. In my view, the above-noted evidence ought to be addressed notwithstanding there was no specific argument labelled "duress". That the AG does not regard the evidence as compelling or reliable begs the question. It is for the GIC to make that determination. The burden of explanation increases with the relevance of the evidence in question to the disputed facts: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.).

[38] That said, the GIC's observations regarding the absence of evidence or finding that Mr. Oberlander was mistreated after he joined the unit, or that he found its activities abhorrent or that he ever sought to be relieved of his duties are equally relevant.

[39] Undoubtedly, the revocation of Mr. Oberlander's citizenship is a matter for the GIC to determine. However, in view of its serious consequences, it is critical that all relevant issues be considered and analyzed. The process must not only be proper and fair, it must be seen to be so. It is open to the GIC to reject duress as a justification, but it must not ignore it. The clarification that conscription is to be considered in relation to the justification of duress, when dealing with a limited brutal purpose organization, should facilitate the analysis.

[40] With respect to Mr. Oberlander's argument that the consideration of his personal interests was inadequate, the application judge correctly observed that issues related to deportation are irrelevant because deportation constitutes a separate process. Relying upon the reasoning in *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 23, he noted the brevity of the reasons with respect to this issue and determined, despite their brevity, they plainly disclosed why Mr. Oberlander's personal interests did not outweigh the public interest. Therefore, they were reasonable. I am not persuaded that the application judge incorrectly applied the standard of review in relation to this issue.

[41] I would allow the appeal in part. Making the order that ought to have been made, I would remit the matter to the GIC for consideration of the issue of duress. Given the appellant's partial

success, the fact that he did not plead duress before the GIC and did not raise the issue before the application judge, I would not award costs.

"Carolyn Layden-Stevenson
J.A.

"I agree.
C. Michael Ryer J.A."

SHARLOW J.A. (dissenting reasons)

[42] I respectfully disagree with my colleagues' proposed disposition of this appeal.

[43] The record here is equivocal on duress, and there is no reasonable explanation for Mr. Oberlander's failure to assert duress in his submissions to the Minister or the Federal Court. Unlike my colleagues, I am not persuaded that a valid explanation arises from the fact that the jurisprudence on duress in relation to limited brutal purpose organizations has not yet been well developed. I see no basis for concluding that Mr. Oberlander's failure to assert duress until now was anything but a deliberate decision on his part.

[44] In these circumstances, it seems to me that the GIC made no error warranting the intervention of this Court when it did not address the issue of duress. For that reason, I would dismiss this appeal.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-589-08
(APPEAL FROM REASONS FOR JUDGMENT AND JUDGMENT OF THE HONOURABLE MR. JUSTICE PHELAN DATED OCTOBER 27, 2008, NO. T-1158-07)	
STYLE OF CAUSE:	Helmut Oberlander v. The Attorney General of Canada
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 27, 2009
REASONS FOR JUDGMENT BY:	LAYDEN-STEVENSON J.A.
CONCURRED IN BY:	RYER J.A.
DISSENTING REASONS BY:	SHARLOW J.A.
DATED:	November 17, 2009

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