Date: 20080417

Docket: T-866-95

Citation: 2008 FC 497

Vancouver, British Columbia, April 17, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HELMUT OBERLANDER

Respondent

Docket: T-1505-01
A-294-03

BETWEEN:

HELMUT OBERLANDER

Applicant (Appellant)

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] These reasons deal with motions for orders fixing costs brought by both parties in two distinct but closely related proceedings in this Court. The first of those proceedings was a reference made under section 18 of the *Citizenship Act*. Following the decision of Justice MacKay on that reference both parties made applications to him for costs orders which were by consent adjourned *sine die* pending the completion of revocation proceedings before the Governor in Council and the judicial review thereof. Justice MacKay having now retired, and no costs order having been made by him, each party now seeks an Order for its costs of the reference from me.

[2] Mr. Oberlander also seeks certain extra-judicial costs allegedly incurred by him in the period following Justice MacKay's decision and culminating in the Governor in Council's decision to revoke his citizenship.

[3] Finally, following the revocation decision by the Governor in Council, Mr. Oberlander brought judicial review proceedings which were dismissed by a judge of this Court but later allowed by the Federal Court of Appeal “with costs here and below” and I am now asked to fix the amount of such costs. The Court of Appeal referred the matter back to the Governor in Council and, although I have no evidence to that effect, I am informed that the latter has again decided to revoke Mr. Oberlander's citizenship and that a judicial review application against that decision is again pending in this Court.

The decision on the reference

[4] Justice MacKay made it abundantly clear that in his view he could make no finding that Mr. Oberlander was directly involved in any war crimes and that, in addition, he was not involved as an accomplice in the criminal law sense with any such crimes:

> 10 The purpose of this proceeding is to determine whether or not, as set out in the Notice of Reference, "the Respondent was admitted to Canada for permanent residence and obtained Canadian citizenship by false representations or by fraud or by knowingly concealing material circumstances". That determination, when made, is one of fact, based on the evidence adduced in this reference. It is not subject to appeal.
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> 11 The applicant does allege, as the basis for her concern, in the Notice of Revocation, that material circumstances were concealed by the respondent's failure "to divulge to Canadian immigration and citizenship officials your membership in the German Sicherheitspolizei und SD and Einsatzkommando 10 A during the Second World War and your participation in the executions of civilians during that period of time". The portion of that allegation concerning the respondent's "participation in the execution of civilians", is not reflected in any of the facts alleged in the Minister's Summary of Facts and Evidence.
>
> 12 That Summary, which must be taken to include all of the facts the applicant hopes to establish by evidence in this case, does not include any reference to personal commission by the respondent of atrocities or war crimes or his personal involvement in "the execution of civilians" or in criminal activities. Nor does it include any reference to his involvement in aiding and abetting others in the commission of criminal activities, in any sense comparable to "aiding and abetting" as those terms are used in s. 21 of the *Criminal Code* for Canada, R.S.C. 1985, c. C-46. Thus, in my view the Minister does not seek to establish by evidence that Mr. Oberlander was personally involved in the commission of atrocities or war crimes or criminal activities, or in aiding and abetting, in any criminal sense, others engaged in criminal activities. I affirm for the record that no evidence was presented to the Court about any personal involvement of the respondent in criminal activities or war crimes.

> 13 The Minister's Summary of Facts and Evidence does include reference to allegations that the respondent joined the Sicherheitspolizei and SD and Einsatzkommando 10A ("Ek 10a") in or about October 1941, that he served with it in German-occupied eastern territories from 1941 to 1943 or 1944, and during that time the unit he served with was involved in criminal killing of civilians. This is the basis of the Minister's concern about false representation, or fraud or failing to disclose material circumstances, that is, Mr. Oberlander's association with a certain German police unit that participated in criminal killing of civilians in World War II. That association is specified as "membership", in the Notice of Revocation and as repeated in the Minister's Summary of Facts and Evidence, in S.S. organizations and in a unit, Ek 10a, known to have been engaged in criminal killing activity.
>
> [Footnotes omitted]

[5] Critically, Justice MacKay found that Mr. Oberlander, although not properly described as a "member" of the SS or SD, was not credible in his denial of membership in the unit to which he was specifically alleged to have been associated, Ek 10a:

> 52 By Dr. Messerschmidt's testimony it was not possible for Mr. Oberlander to be a member of the SS, or of the Sicherheitspolizei, or of the SD. Only citizens of Germany, not Volksdeutsche as Mr. Oberlander was until 1944, could be members of the SS or its internal organizations. Even though they wore SD uniforms and were referred to as SS-men and were subject to SS police jurisdiction and control, indigenous interpreters drawn from ethnic German communities in the Ukraine were not members of the Sicherheitspolizei and SD. The term SS-Mann was apparently used generally as a description to include one who was a member of the SS in a formal sense or one who was not a member but an auxiliary, with the equivalent rank of private, serving with an SS unit.
>
> 53 While he was not a member of the SS, or of its special security forces, the Sicherheitspolizei and SD, Mr. Oberlander was an interpreter, an auxiliary, serving the SD or others within a police unit, that is, Ek 10a, that was under the control of the SS. He says that he was not paid, but he was supplied a uniform by the summer of 1942, he lived, ate and travelled with the unit serving it and its members, even if that were by routine chores and as an interpreter. Whether he

> later served with other Einsatzkommando units, as was suggested from reference to his field post number appearing in the 1944 naturalization documents from Litzmannstadt, need not be determined. The evidence and his description of his role as an interpreter does not include any activity directly involved with Ek 10a's worst and most heinous operations. In his testimony Mr. Oberlander denied that he was ever a member of the SS, that he ever participated in execution of civilians or anyone, or that he assisted in such activity or that he was even present at executions or deportations. Yet Mr. Oberlander, by his testimony, acknowledges that he served as an interpreter with the SD, that the police unit was referred to as SD, and that after serving for some time he did know of its executions of civilians and others. He knew also its "re-settlement" practice for Jews, though he professes not to have understood the meaning of the latter as executions, until later, at Krasnodar. In all the circumstances, it is not plausible that he remained ignorant of the executions of Jews and others, as a major activity of the men with whom he served, until he was in Krasnodar.
>
> 54 In my opinion, the circumstances preclude any conclusion other than that Mr. Oberlander was a member of Ek 10a in any reasonable interpretation of the word "member" While there were formal requirements for membership in the SS, in the Sicherheitspolizei, and in the SD, there is no evidence of any such requirement for membership in Ek 10a, whether in its police elements or its auxiliaries, except selection to serve its purposes. Mr. Oberlander was selected, he served as an auxiliary with the unit and he lived and travelled with men of the unit. Its purposes he served, even if that service were not willingly given. Ek 10a, a police formation, was a unit under direction of the SS, from Berlin. Throughout his testimony he referred to the group he served with as "the unit". I find that while serving he belonged with the Ek 10a unit as a member. That is among allegations of the Minister in the Notice of Revocation and in the Summary of Facts and Evidence presented by the Minister in May 1995, which outlined the case upon which the notice was based.
>
> [Footnotes omitted]

[6] Finally, Justice MacKay summarized his findings of fact as follows:

Summary of findings of fact

189 The respondent, Helmut Oberlander, was born at Halbstadt (a.k.a. Molochansk), Ukraine, on February 15, 1924. He and his family were Volksdeutsch whose forbears settled at Halbstadt some 250 years ago.

190 In 1941, at 17 years of age, he had completed secondary school and he was fluent in German and Russian. In September or the beginning of October when German troops arrived at 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.

191 In October 1941, or as Mr. Oberlander states in February 1942, he was ordered by local authorities to report to German occupying forces to serve as an interpreter. He did so, he says, not voluntarily by free choice, but in fear of harm if he refused.

192 He was assigned to Einsatzkommando 10a ("Ek 10a"), sometimes also known as Sonderkommando 10a, a German police unit of the Sicherheitspolizei (Sipo) and Sicherheitsdienst (SD). Both those organizations were security police forces of the Schutzstaffell (SS), which directed their operations from Berlin. The kommando unit included some members from other German police forces and a number of auxiliary personnel, including interpreters, drivers, and guards, from among Volksdeutsch or Russian prisoners of war.

193 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. 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 two million people, mostly civilians, primarily Jews and communists, and also Gypsies, handicapped and others considered unacceptable for Nazi Germany's interests. The SS and the SD, largely because of their activities in eastern occupied territories, 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, Ohlendorf, was convicted of war crimes, crimes against humanity, and membership in a criminal organization, the SS.

194 The respondent was not 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 of that era Mr. Oberlander is described as “SS-mann”, but that description and the uniform are not determinative of formal membership in the SD or the SS. German citizenship requirements precluded membership in the SD or Sipo.

195 He was, however, a member of Ek 10a, as the applicant Minister alleged in the Notice of Revocation. He served as an auxiliary, as an interpreter for the SD, as he admits, 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. He then continued, not as an interpreter, but as an infantryman.

196 With Ek 10a he was moved through eastern Ukraine to Melitipol, Mariapol, and Taganrog, thence to Rostov and south to Krasnodar and Novorossiysk. There the unit, and the respondent, were engaged in anti-partisan missions, as they later were in the Crimea and in Belarus, and as he was, still later, in Poland and Yugoslavia.

197 There is no evidence that the respondent participated in any of the atrocities committed against civilians by Ek 10a. His testimony that he did not know the name of the unit until 1970 is not credible, i.e., it is not worthy of belief, nor is his claim that he only came to know of Ek 10a action against Jews, that is, their “resettlement”, which he learned meant execution, when he was at Krasnodar and Novorossiysk in the fall of 1942.

198 From Belarus, in late 1943 or early 1944, the respondent moved with German forces south to Poland where he was wounded. He became a naturalized German citizen, with his mother and his sister, at Litzmannstadt, in April 1944. From Poland later that year the army group he was then with moved to Yugoslavia and he was there engaged in anti-partisan activities. With Russian troops advancing he was moved to Torgau, a town south of Berlin, to assist in defence of the German 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 in a British P.O.W. camp from May to July, 1945.

199 He was released from that camp to be engaged in farm labour and on his release a certificate of discharge was completed indicating his discharge from the German army. 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 and Mrs. Oberlander met and were married in 1950.

200 Mr. Oberlander and his wife applied to be accepted as immigrants to Canada in April 1952. The application, completed by Mr. Oberlander, was made by completing an O.S.8 form which at that time included no specific request for information about activities of the applicant through the years of World War II.

201 When they made application to immigrate there was an established process for considering applicants and I find that this was established at Karlsruhe, the centre for Canadian immigration in West Germany, at the times relevant for their application. That process required, after receipt of an application form, that there be security screening by an R.C.M.P. officer, medical examination by a doctor, and examination by a visa (immigration) officer to ensure that all requirements of the then applicable *Immigration Act* were met, including security screening, health requirements and the civil requirements and then current labour market categories for immigrants.

202 Security screening in 1952-53 began with the security officer circulating to police and intelligence sources information drawn from the application of an individual, seeking any information available about the individual. When responses were received the applicant was invited to Karlsruhe to be interviewed, bringing designated documents, including x-rays, passport, and military discharge certificates.

203 The established process provided that applicants appearing for interview would be first seen in a face to face interview by the security officer whose principal attention was directed to the background and experience of the applicant, his or her origin, former addresses, employment and military or other service over a decade and including the years of World War II. If that detail was not provided by the application form it would be sought at the interview, since the security officer's task was to assess whether or not the applicant should be rejected in accord with criteria established, originally by the R.C.M.P. and later modified by the Security Panel,

a group of senior public servants, which coordinated security practices and provided support to a committee of Cabinet at Ottawa.

204 At the conclusion of an interview the decision of the security officer was marked on the application file as “passed” or “not passed” stage B. If he had any doubt whether the applicant was among those who should be rejected the security officer rejected him or her, in the interests of Canada. That decision was final, not subject to review by a visa officer or anyone else. No reasons were given. The applicant was not informed of that decision. He or she was passed on for medical examination and then for interview by the visa officer, who alone advised the applicant whether or not he was considered to have met requirements for immigration, and, if not, no further explanation was offered that would reflect the security officer's decision.

205 Only the visa officer could issue to successful applicants a visa for presentation to a port of entry officer in Canada, to be admitted for landing. Visa officers did not process a file, or interview an applicant until after the security officer had completed his assessment.

206 I find Mr. Oberlander's evidence that he was not asked any questions about his wartime experience is not credible. Evidence of Mrs. Oberlander supportive of Mr. Oberlander on this key issue, I do not consider of any weight because it is not from an independent witness. Evidence of Mr. Bufe, that he was not asked about his wartime service at Karlsruhe in 1952, I do not consider of any weight since, in my view, it is not reliable.

207 I find on the balance of probabilities that the established process at Karlsruhe for dealing with applicants for immigration to Canada was in operation on August 14, 1953 when Mr. and Mrs. Oberlander appeared for interview in relation to their application. I find that he was interviewed by a security officer and on the balance of probabilities he was asked questions about his background, including questions concerning his origin in the Ukraine, which was evident from his passport, how he came to Germany, his previous addresses and his military or other service in the war years, questions which were key to the security officer's decision.

208 He was required to answer truthfully questions put to him. I find that if Mr. Oberlander had answered questions truthfully, including his experience as an interpreter with Ek 10a for the SD, an

organization determined in 1946 to be criminal, his application would have been rejected, either because he would have been perceived to be a member of the SD, even if he were not, or because he would have been perceived as a collaborator. Either perception was a reason for rejection on security grounds. If the security officer had any doubt about whether he should be rejected Mr. Oberlander would have been rejected and he would not have passed stage B. That decision was not subject to review.

209 That did not happen. He was not rejected, rather he was interviewed by a visa officer who approved his application, and later in February 1954 he was issued a visa. Using that he was admitted to Canada in May 1954 as a landed immigrant.

210 I find no visa would have issued unless a security officer had indicated, following his interview with Mr. Oberlander that he had "passed stage B", i.e. that he was cleared for security purposes. I find, on the balance of probabilities that clearance would only have issued if Mr. Oberlander misrepresented or did not disclose his wartime experience with Ek 10a. I find, on the balance of probabilities, that he falsely represented his background or knowingly concealed material circumstances when interviewed by a security officer. Thus, I find that thereafter he was admitted to Canada for permanent residence on the basis of the visa issued at Karlsruhe, and that admission was gained by false representation or knowingly concealing material circumstances.

Conclusion

211 This Court finds, on the balance of probabilities, weighing the evidence carefully, that the respondent Helmut Oberlander, was admitted to Canada for permanent residence in 1954 on the basis of a visa obtained by reason of false representation or by knowingly concealing material circumstances. Subsequently he was granted citizenship in 1960.

212 I find that Mr. Oberlander was not lawfully admitted to Canada for permanent residence and thus he was not landed and did not thereafter acquire Canadian domicile, all pursuant to the *Immigration Act* as it applied when he came to Canada. Subsequently he obtained citizenship in 1960 when he prepresented, falsely, that he had acquired Canadian domicile. Thus he obtained Canadian citizenship by false representation.

[Footnotes omitted]

[7] I have no authority, even were I minded to do so (which I am not) to review those findings. They are final and not subject to appeal or review.

The decision of the Court of Appeal

[8] Speaking for a unanimous Court of Appeal Justice Décary summarized the findings of Justice MacKay and examined the government's policy regarding the revocation of citizenship of suspected war criminals. In this latter regard he said:

> 28 The policy of the Canadian government has been to seek the revocation of the citizenship of suspected war criminals. Canada's policy has been published annually, since the decision to take action against such persons was taken. The policy at the relevant period is as stated in a Public Report entitled *Canada's War Crimes Program 2000-2001*:
>
> 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 (ICTR) 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.

[Underline in the original]

29 In her report to the Governor in Council, the Minister described the policy in the following terms:

It is the policy of the Government of Canada that this country will not offer safe haven to those individuals who have committed a war crime, a crime against humanity or any other reprehensible act during times of conflict, regardless of when or where these crimes occurred. Furthermore, it is the position of the government that revocation of citizenship and deportation is an appropriate remedy against an individual, who, while aware of the commission of war crimes or crimes against humanity, contributes directly or indirectly to their occurrence.

30 It is common ground that policy guidelines are not binding and do not create legitimate expectations of substantive rights. It was open to the Governor in Council not to establish guidelines and, perhaps, not to follow them. However, the Governor in Council, having opted in this case to adopt guidelines and to apply them to the case, must then put its mind to determining whether Mr. Oberlander comes within their scope. This duty is indeed recognized in the case at bar by the Attorney General of Canada at para. 67 of his factum where he states: “The Governor in Council was required to consider whether Oberlander fell within the ambit of government policy.”

[References omitted]

[9] The following comments by Justice Décary on the relationship of Justice MacKay's findings and the Minister's report, including Mr. Oberlander's written submissions, to the Governor in Council and the latter's decision which was then under review are of particular importance to us here:

> 40 Neither the Report nor the written submissions are meant to question the findings of facts made by the Judge at the end of the reference process. These findings are final and non-reviewable (see subs. 18(3) of the Act). To the extent that the written submissions were a disguised collateral attack against the findings, they were irrelevant and unhelpful. In the case at bar, Mr. Oberlander, the Minister and the Governor in Council must accept as an indisputable fact that Mr. Oberlander had a wartime experience with EK 10a, that he falsely represented his background or knowingly concealed material circumstances when interviewed by a security officer and that he was admitted to Canada for permanent residence and eventually was granted citizenship by false representation (see MacKay J.'s reasons at para. 210). That the Governor in Council has the power, under section 18 of the *Citizenship Act*, to revoke Mr. Oberlander's citizenship is a given, the only question is: was the power to revoke exercised by the Governor in Council in a reviewable way in the circumstances of this case?
>
> 41 The findings of fact, however, must be seen as they are and not as they might have been. Mr. Justice MacKay was not deciding whether Mr. Oberlander came within the ambit of the government's policy to revoke the citizenship of war criminals. Mr. Justice MacKay was not deciding whether Mr. Oberlander was a war criminal within the meaning of Canadian or international law. Mr. Justice MacKay did not find -- as he might have -- that the EK 10a was an organization with a single, brutal purpose. Mr. Justice MacKay found that no evidence was presented about any personal involvement of Mr. Oberlander in criminal activities or in war crimes.
>
> 42 The Attorney General of Canada acknowledged, in his factum and at the hearing, that "[w]hen considering a report by the Minister to revoke a person's citizenship, the Governor in Council must be satisfied that the statutory criteria for revocation have been met. In addition, the Governor in Council may engage in a delicate balancing of the individual's personal interests, the public interest, as well as a

> consideration of any relevant program policy objectives" (para. 60). I assume, for the purposes of this appeal, that this acknowledgment is well-founded. The Minister herself had acknowledged in her Report, at p. 41, that "[i]n deciding whether to revoke citizenship, the Governor in Council should consider the government's 'no safe haven policy', the findings of the Trial Judge in the reference and any submissions made by Mr. Oberlander."
>
> 43 The statutory criteria, here, have been met. It is the balancing of interests which, it is argued by Mr. Oberlander, has either not occurred or, if it did occur, has been done in such a way as to be unreasonable.

[10] After a discussion on the applicable standards of review for both the decision of the judge of this Court and the Governor in Council, Justice Décary concluded as follows:

> 57 The reviewing Judge was clearly wrong in finding that Mr. Oberlander's interests are "peripheral elements" and I fail to see any evidence or indication that they were considered at all. In her Report prepared without consideration of the additional submissions filed by Mr. Oberlander, the Minister states that "Mr. Oberlander raised no humanitarian or compassionate considerations in his submissions" (A.B. vol. 1, p. 41). (I hasten to observe that the words "humanitarian and compassionate considerations" do not appear in the *Citizenship Act* and are inappropriate as they invite comparison, and confusion, with these words as they are used and have been interpreted in other statutory instruments. I much prefer the words "personal interests" used by the Attorney General in his written and oral submissions.)
>
> 58 The Minister, of course, is wrong, to the extent that submissions were eventually made in that regard. It is true that the additional submissions were attached to the Report and that one must generally assume that a decision-maker has examined all the evidence and documentation. But where the personal interests considerations are so overwhelmingly favourable to the person concerned as they are here -- fifty years of irreproachable life in Canada -- one should expect the decision-maker to at least formally recognize the existence of those interests. It is apparent at the face of the record that there was no balancing of the personal interests of Mr. Oberlander and of the public interest. The decision in that regard is patently unreasonable.

The War Crimes Program

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 only 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.

[Underline in the original]

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.

Conclusion

61 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] If I correctly understand this judgment, the Court of Appeal decided to set aside the decision of the Governor in Council for two reasons: first, that no proper consideration had been given to Mr. Oberlander's “personal interests”; and second, that, Justice MacKay having specifically denied Mr. Oberlander's complicity in war crimes in the criminal sense of that term, there was no finding by him and no material upon which the Governor in Council could make the necessary finding that Mr. Oberlander fell within the terms of the government's war crimes policy. Such a finding, if I understand the Court's reasons properly, would have in turn required a finding that Ek 10a was a unit with a “single brutal purpose” so as to bring Mr. Oberlander within that policy's extended definition of the word “complicit”.

Costs on the reference

[12] It is common ground that this Court has power to order either party to a reference to pay costs. Rule 169 makes references under section 18 of the *Citizenship Act* analagous to ordinary actions in the Court which, in turn, brings into play Rules 400 and following relating to costs awards in such actions. Each party also invokes in its favour the general rule that costs should “follow the event” i.e. that success in the proceeding will normally bring with it an order for costs. In addition Mr. Oberlander argues that the Order of the Court of Appeal should be read to include costs of the reference before Justice MacKay as well as those of the judicial review proceedings both in this Court and in the Court of Appeal.

[13] Dealing first with the last point: it is my view that the mention of “here and below” in the Order of the Court of Appeal is necessarily restricted to the judicial review application in both courts. The Court of Appeal was not in any sense sitting in review or appeal of Justice MacKay's decision and, in fact, was careful in the passages cited above to emphasize the final and determining character of his findings. Counsel argues that if Justice MacKay had actually done as he was asked to do and made a costs Order in favour of the government that Order would necessarily have had to be set aside along with the Order of the Court of Appeal setting aside the Governor in Council's order revoking citizenship. I am not at all sure of the correctness of that assertion. A costs Order is normally viewed as a mere incident or corollary of the judgment to which it relates and the final nature of the latter should, I would think, carry over to the former as well.

[14] I find some support for this view in the following passage from the judgment of the Supreme Court of Canada in the case of *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391:

> 56 Although the issue does not arise here, there is a great deal of force to the argument that s. 18(1) of the *Citizenship Act* encompasses not only the ultimate decision as to whether citizenship was obtained by false pretences, but also those decisions made during the course of a s. 18 reference which are related to this determination. This would encompass all the interlocutory decisions which the court is empowered to make in the context of a s. 18 reference (see, for instance, s. 46 of the *Federal Court Act* and Rules 5, 450-455, 461, 477, 900-920, 1714 and 1715 of the *Federal Court Rules*, C.R.C., c. 663).

[15] In any event, since Justice MacKay did not make any costs Order it is not necessary that I decide if any such Order, if made, would be subject to appeal or review; it is also neither seemly nor

desirable that I do so since I would be in effect commenting indirectly on the appealability or reviewability of my own present decision.

[16] This brings me to the assertion, made by each party, that they enjoyed success on the reference before Justice MacKay and therefore should benefit from an award of costs against the other. Mr. Oberlander says that he was successful because he had to defend himself from an accusation of being a war criminal and was found by Justice MacKay not to be one. I do not agree. The extracts quoted earlier from Justice MacKay's decision are enough to show first, that there was no direct allegation of war crimes against which Mr. Oberlander had to defend himself, and second, that there was no evidence of such criminality. Mr. Oberlander's further submission that proceedings on the reference were rendered unnecessarily lengthy by allegations which the government could not prove is also without merit. Most of the allegations were in fact found proven by Justice MacKay and since Mr. Oberlander had put the government to the strict proof even of allegations which he could easily have admitted he cannot now complain that the trial was longer than it should have been.

[17] There is far more substance to the Crown's argument that it should receive costs because it succeeded on the reference. Clearly, Justice MacKay rejected much of Mr. Oberlander's evidence as being implausible or incredible. He also made an unequivocal finding on the critical fact that citizenship had been obtained by false representation or concealment of material facts. However, I cannot overlook the fact, even though it was not and could not be known to Justice MacKay at the time of his decision, that the Court of Appeal found that decision to have been ineffective for the

only purpose for which it could have been sought, namely the revocation of Mr. Oberlander's citizenship. In my view, when a court is called upon, as I am, to make a determination based upon facts which have long since passed into history, it must not blind itself to subsequent events which colour or even change entirely the interpretation of such facts. To take two very different examples, that is the case with the death or unexpected total recovery of an injured plaintiff or the reversal of a long-standing rule of law by the ultimate appellate court. Lawyers and judges do themselves no favour by closing their eyes to reality and insisting on the validity of demonstrably untrue legal fictions. That is what I would call the government's present claim that it was the clear winner on the reference. Justice MacKay being no longer able to act, I must exercise my own discretion in the matter of costs on the facts and the record as they are now.

[18] The brutal fact is that we now know that Justice MacKay's decision could not, as it stood and without more, form the basis of a revocation decision by the Governor in Council. He made a specific and unchallengeable decision that Mr. Oberlander had not been shown to be an accomplice in the sense of the criminal law of Canada. He made no finding that Mr. Oberlander was or had been “complicit” in war crimes in the sense (possibly different, but that decision is not mine to make) attributed to that word by the war crimes policy. Furthermore, he did not find, although as Justice Décary said “he might have” that his unit, Ek 10a, was an organization with a “single brutal purpose”. If the government is to be successful in achieving the revocation of Mr. Oberlander's citizenship on the remit by the Court of Appeal to the Governor in Council the latter will have to make such a finding on its own; as I understand it, that could only be on the introduction of new materials which are not to be found within the four corners of Justice MacKay's decision. I do not

have to decide whether it is open to the government to place new evidence before the Governor in Council.

[19] I conclude from the foregoing that even though the government may be considered to have enjoyed some success on the reference to Justice MacKay, that success was incomplete and the victory, if it was one, may ultimately turn out to have been only pyrrhic. This is not a case of merely partial success, calling for the application of the doctrine enunciated in the *Sunrise Co. v. Lake Winnipeg (The)* (F.C.A.), [1988] F.C.J. No. 1009; rather it is a case of a victory which is contingent upon an eventuality which, even if it should come to pass, will require something more to have been done by the "victor".

[20] From the materials before me I have concluded that an appropriate award based on Column III of Tariff B, including disbursements, if the Crown had enjoyed unmitigated success, would be in a lump sum of $95,000. That is the amount requested by the Crown. In the circumstances and because the Crown's success has now been found by the Court of Appeal to have been incomplete, I would reduce that award by one half to $47,500.

Mr. Oberlander's extra-judicial expenses

[21] These are legal fees paid and other expenses incurred by Mr. Oberlander for services rendered in the period from the issuance of Justice MacKay's decision down to and including the order of the Governor in Council to revoke citizenship based on that decision. They include such matters as the making of representations to the government as to why his personal situation and

interests should militate against the revocation of his citizenship. No authority has been cited for a power for me to order the payment of such fees and I know of none. I would not allow anything under this head.

Costs on the judicial review application and the appeal to the Court of Appeal

[22] A bill of costs has been submitted for some $47,000 allegedly based on Tariff B. In my view many of the items claimed do not relate to the legal proceedings connected with the judicial review application but with other matters such as applications to stay deportation orders and the like. Government counsel has indicated, however, that they consider that a sum of $40,000 “all in” would not be unreasonable and, while I think that the figure is generous and probably higher than what would be obtained on any regular assessment of party and party costs, I would give effect to this concession and make an order accordingly.

Costs of these motions

[23] Since success has been divided, I would make no order for the costs of these motions. Also, although technically the parties in the two sets of proceedings are different, as reflected in the differing styles of cause, I consider that in each case the party truly adverse in interest to Mr. Oberlander is the Government of Canada so that there is no impediment to compensation or set-off being effected between the two awards.

ORDER

THIS COURT ORDERS that:

1. Mr. Oberlander shall pay Canada's costs on the reference before Justice MacKay which are hereby fixed and assessed in the lump sum of $47,500 inclusive of all disbursements and taxes.

2. Canada shall pay Mr. Oberlander's costs on the judicial review proceedings in this Court and in the Federal Court of Appeal which are hereby fixed and assessed in the lump sum of $40,000 inclusive of all disbursements and taxes.

3. No other order as to costs.

"James K. Hugessen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-866-95
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. HELMUT OBERLANDER
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 3, 2008
REASONS FOR ORDER AND ORDER:	HUGESSEN J.
DATED:	APRIL 17, 2008

APPEARANCES:

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