Federal Court of Appeal  Cour d'appel fédérale

Date: 20160215

Docket: A-51-15

Citation: 2016 FCA 52

CORAM: **DAWSON J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

HELMUT OBERLANDER

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on February 1, 2016.

Judgment delivered at Ottawa, Ontario, on February 15, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

I. Introduction

[1] In 1995, proceedings were commenced to revoke the appellant's Canadian citizenship on the ground that he obtained such citizenship on the basis of making a false representation, acting in a fraudulent manner or by knowingly concealing material circumstances. Since then, the

revocation proceeding has been both contested and protracted, as illustrated by the following brief history of the proceeding:

i) In 2000, Justice MacKay of the Federal Court issued thoughtful and comprehensive reasons in which he concluded that the appellant obtained his Canadian citizenship by making a false representation or by knowingly concealing material circumstances ([2000] F.C.J. No. 229, 185 F.T.R. 41). In the course of his reasons, Justice MacKay made findings of fact as to the nature of the appellant's wartime service during World War II.

ii) Following this decision, in 2001, the Governor in Council revoked the appellant's citizenship. Subsequently, this Court set aside the decision of the Governor in Council and remitted the matter back to the Governor in Council for a new determination (2004 FCA 213, [2005] 1 F.C.R. 3).

iii) In 2007, after reconsidering the matter, the Governor in Council again revoked the appellant's citizenship. Thereafter, this Court upheld the finding of the Federal Court that the decision of the Governor in Council that the appellant had been complicit in war crimes perpetrated by the Einsatzkommando 10a (Ek 10a) during World War II was reasonable. However, a majority of this Court found that the Governor in Council was obliged to consider the issue of duress. Thus, the Court allowed the appellant's appeal from the decision of the Federal Court in part and remitted the matter to the Governor in Council for consideration of the issue of duress (2009 FCA 330, [2010] 4 F.C.R. 395, at paragraphs 2 and 41).

iv) Following the decision of the majority of this Court, in 2012 the Governor in Council considered whether the appellant's assertion of duress was sufficient to excuse his complicity in the activities of Ek 10a. The Governor in Council decided the defence of duress had not been established and therefore it once again revoked the appellant's citizenship.

[2] The appellant brought an application in the Federal Court for judicial review of this third decision revoking his citizenship. For reasons cited as 2015 FC 46, a judge of the Federal Court dismissed the application for judicial review. This is an appeal from that decision.

II. The Context in which this Appeal Arises

[3] At this point it is helpful to explain the very unique circumstances before the Court on this appeal.

[4] As explained above, in its second decision revoking the appellant's citizenship in 2007, the Governor in Council found that the appellant was complicit in war crimes committed by the Ek 10a. In rendering this decision, the Governor in Council relied upon the legal test for complicity articulated by this Court in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C.R. 306, 135 N.R. 390. There, this Court held that "no one can 'commit' international crimes without personal and knowing participation" (*Ramirez*, page 317). When considering what degree of complicity is required in order to be an accomplice or abettor, this Court concluded that "mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status"

(*Ramirez*, page 317). This said, the Court added the following caveat: "[i]t seems apparent, however, that where an organization is principally directed to a limited, brutal purpose […] mere membership may by necessity involve personal and knowing participation in persecutorial acts" (*Ramirez*, page 317). Thus, complicity through association rested "on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it" (*Ramirez*, page 318).

[5] Applying this jurisprudence in its second decision, the Governor in Council asked whether "there was evidence permitting a finding that Mr. Oberlander could be suspected of being complicit in the activities of a brutal purpose organization". The Governor in Council went on to find that the appellant was a member of Ek 10a and that through such membership he "could be suspected of being complicit in the activities of a limited brutal purpose organization".

[6] In upholding the Governor in Council's finding of complicity, this Court also applied *Ramirez*, stating the law to be that membership in a limited brutal purpose organization creates a presumption of complicity which can be rebutted by evidence that there was no knowledge of the organization's purpose or no direct or indirect involvement in its acts (2009 FCA 330, at paragraph 18). Based on findings of fact made by Justice MacKay, the Court found the appellant had not rebutted the presumption of complicity: the appellant had knowledge of the functions of Ek 10a and had indirectly served its purpose (2009 FCA 330, at paragraphs 21 and 22).

[7] Subsequent to the decision of the Governor in Council finding the appellant to have been complicit in the activities of Ek 10a, and the decision of this Court upholding the reasonableness

of the Governor in Council's decision on complicity, the Supreme Court of Canada found it necessary to re-articulate the test relevant to determinations of complicity: *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678. In the view of the Supreme Court, while international law recognizes a broad concept of complicity, "individuals will not be held liable for crimes committed by a group simply because they are associated with that group, or because they passively acquiesced to the group's criminal purpose" (*Ezokola*, at paragraph 68). Thus, to be complicit, "there must be serious reasons for considering" that the person concerned "voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose" (*Ezokola*, at paragraph 84).

III. The Decision of the Federal Court

[8] In dismissing the appellant's application for judicial review, the Federal Court made four key findings.

[9] First, the Federal Court found that with respect to the issue of complicity, all of the pre-conditions for issue estoppel were met: the complicity issue was previously decided by this Court; the decision of this Court was final; and, the parties to the proceedings were the same (reasons, paragraph 96).

[10] Second, the Federal Court found the appellant did not establish grounds that would allow it to exercise its discretion to return the issue of complicity for reconsideration (reasons, paragraph 113).

[11] Next, the Federal Court found the process was procedurally fair to the appellant (reasons, paragraph 204).

[12] Finally, the Federal Court found the decision of the Governor in Council in respect of duress was reasonable (reasons, paragraph 231).

IV. The Issue on Appeal

[13] While the appellant challenges each of the above findings of the Federal Court, in my view, one issue is determinative: did the Federal Court err in principle by concluding that the appellant had not established grounds sufficient to allow it to exercise its discretion to remit the issue of complicity for redetermination?

V. Standard of Review

[14] The decision of the Federal Court as to the exercise of its discretion is one that should be afforded deference. However, this Court may intervene if the discretion is exercised on the basis of an erroneous principle (*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, at paragraph 95; citing *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at paragraph 54).

VI. Application of the Standard of Review

[15] The Federal Court's analysis of the issue of the exercise of discretion is found in paragraphs 104 to 113 of its reasons. The Court began by acknowledging that even where the criteria for issue estoppel are met, "the Court retains a residual discretion to determine that the

doctrine should not be applied where, taking into account the entirety of the circumstances, this could lead to an injustice" (reasons, paragraph 104).

[16] After discussing the principles said to apply to the exercise of discretion, the Court correctly noted that the overarching consideration is whether the interests of justice require the exercise of discretion. Citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paragraph 80, the Court noted that it was required to "stand back and, taking into account the entirety of the circumstances, consider whether the application of issue estoppel in the particular case would work an injustice" (reasons, paragraph 109).

[17] The Court then gave two reasons why the interests of justice did not require relitigation of the complicity issue. First, the appellant failed to challenge this Court's application of *Ramirez* when it upheld the decision that found him to have been complicit in war crimes. The Federal Court found no injustice arose when the appellant chose not to avail himself of that opportunity (reasons, paragraph 111). Second, the appellant failed to establish that the decision finding him complicit was "clearly wrong" (reasons, paragraph 112).

[18] In my respectful view, missing from the Federal Court's analysis was consideration of the impact of maintaining the previous finding of complicity in circumstances where that finding was directly related to the current determination of duress.

[19] The link between duress and complicity is well-settled at law. This is so because the defence of duress requires proportionality between the harm threatened against the person

concerned and the harm inflicted by that person – whether directly or through complicity (see, for example, *Ramirez* at pages 327 and 328; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at paragraphs 53 to 55, 70 to 74).

[20] In the decision under review, the Governor in Council considered the requirement of proportionality, noting that:

i) The potential harm the appellant would have faced by attempting to protest or disobey an order must be more serious than the harm to the victims brought about by the appellant's actions (reasons, paragraph 47).

ii) Justice MacKay found that the Ek 10a was a killing squad. Thus, the appellant was required to show that he feared death in order to justify his complicity in the actions of the killing squad (reasons, paragraph 48).

iii) The record did not support a conclusion that the appellant faced a risk of execution. "To suggest that an unsubstantiated risk of harm is no less than the atrocities of the Nazi regime is abhorrent" (reasons, paragraph 56).

[21] As explained above, in *Ezokola* the Supreme Court renounced a test for complicity that had "inappropriately shifted its focus towards the criminal activities of the group and away from the individual's contribution to that criminal activity" (*Ezokola*, paragraph 79). As the Court noted, "a concept of complicity that leaves any room for guilt by association or passive acquiescence violates two fundamental criminal law principles" (*Ezokola*, paragraph 81).

[22] In this circumstance, I am satisfied that the application of issue estoppel worked an injustice to the appellant such that the Federal Court erred in principle in applying the doctrine. The appellant was entitled to a determination of the extent to which he made a significant and knowing contribution to the crime or criminal purpose of the Ek 10a. Only then could a reasonable determination be made as to whether whatever harm he faced was more serious than the harm inflicted on others through his complicity.

VII. Conclusion

[23] For these reasons, I would allow the appeal and set aside the judgment of the Federal Court, with costs both in this Court and the Federal Court. Pronouncing the judgment that should have been made, I would remit the issues of complicity and duress to the Governor in Council for redetermination in accordance with the law.

"Eleanor R. Dawson"

J.A.

"I agree.
D. G. Near J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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