Federal Court  Cour fédérale

Date: 20180927

Docket: T-1590-17

Citation: 2018 FC 947

BETWEEN:

HELMUT OBERLANDER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

Intervener

REASONS FOR JUDGMENT

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PHELAN J.

I. Introduction

[1] The Governor in Council [GIC] revoked Mr. Oberlander's citizenship because of the nature of his involvement in the activities of a Nazi Schutzstaffell [SS] killing squad - Einsatzkommando 10a [Ek10a]. He had previously been found to have significantly misrepresented his wartime activities when he and his wife applied to enter Canada. He failed to disclose his service as an interpreter with this SS killing squad.

[2] This is the judicial review of that GIC decision – and the fourth attempt by Canada to strip Oberlander of his citizenship. The GIC concluded that Oberlander voluntarily made a knowing and significant contribution to the crimes and criminal purpose of this SS killing squad.

[3] In the previous Federal Court of Appeal decision – *Oberlander v Canada (Attorney General)*, 2016 FCA 52, [2016] 4 FCR 55 [FCA-3], that Court remitted the matter back to the GIC for redetermination on the issue of complicity under the framework of *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*] and if found complicit, to reassess his defence of duress. The Court of Appeal directed (at para 22):

> 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 Ek10a.

In so doing, the earlier decisions on complicity by virtue of membership are superseded. This is a new analytical framework.

[4] It is uncontested that Oberlander obtained his Canadian citizenship by false representation or by knowingly concealing material circumstances by failing to disclose involvement in the SS at the time of his immigration screening. There is no doubt that to have done so would have resulted in the rejection of his citizenship application.

[5] This type of material misrepresentation, as found by Justice MacKay in *Canada (Minister of Citizenship and Immigration) v Oberlander* (2000), 185 FTR 41 (FCTD), 95 ACWS (3d) 614 [MacKay Decision], allowed the GIC to revoke Oberlander's citizenship pursuant to s 10 of the *Citizenship Act*, RSC 1985, c C-29.

[6] At issue and a limitation on the GIC's power of revocation, throughout the Oberlander saga, is Canada's policy to pursue the revocation of citizenship for World War II matters in only those cases for which there is evidence of complicity in war crimes or crimes against humanity [the Policy].

[7] In the decision at issue in this case, the GIC found that the Applicant was sufficiently complicit (as those words are now interpreted pursuant to the Supreme Court of Canada decision in *Ezokola*), and that the defence of duress was not engaged.

[8] The relevant legislation is set forth in Appendix A to these Reasons.

II. Factual Background

[9] The basic facts of this matter have been canvassed in the four previous GIC decisions. For ease of reference, Appendix B to these Reasons is a factual and procedural history. Many of the critical facts are found in the MacKay Decision.

A. *The Applicant*

[10] Oberlander was born on February 15, 1924, to a family of German ethnicity in Halbstadt, Ukraine. He was not a German citizen until later in World War II. He is now 94 years old.

[11] He was a member of a mobile killing squad known as Ek10a serving as an interpreter and an auxiliary starting in 1941 or 1942 and ending in 1943 or 1944. Ek10a was one of the squads of the Einsatzgruppen which was operated by the SS and responsible for the execution of more than two million people (primarily Jewish) who were considered "unacceptable" to Nazi Germany. The Applicant's duties included interpreting for the security police force of the SS – the Sicherheitsdienst [SD] – which was found to be a criminal organization in 1946 by the International Military Tribunal and by Article II of Control Council Law No 10.

[12] No evidence was led that indicated the Applicant directly participated in the atrocities committed by Ek10a but he was aware that these atrocities were being committed.

[13] In 1943 or 1944, Oberlander became an infantryman in the German army. In part because of his service in the SS, he, his mother, and sister were granted German citizenship in April 1944.

[14] In 1952, Oberlander and his wife applied to immigrate to Canada. Security screening of such applicants included an interview in 1953 by a security officer who asked questions about the Applicant's background, his origins in the Ukraine, how he came to Germany, his previous addresses and, importantly, his military and other service during the wartime.

[15] Critically, had Oberlander answered the security officer's questions truthfully by including his service as an interpreter with Ek10a, his application would have been rejected on security grounds.

[16] Absent truthful responses, Oberlander's application to immigrate was approved and he was admitted to Canada in 1954 as a permanent resident. He obtained Canadian citizenship on April 19, 1960, having made false representation and knowingly concealing material circumstances.

[17] In 1970, the Applicant was interviewed by a German consular official in Toronto in relation to a German trial against one of the wartime commanders of Ek10a. This resulted in a signed statement from the Applicant regarding his wartime experience. In 1995, RCMP officers commenced an investigation regarding the Applicant's involvement in war crimes. Two days later, the process of revoking the Applicant's citizenship began.

[18] The Applicant has two daughters, both born in Canada, one of whom is challenged and requires family support. His wife passed away in 2013.

[19] The Applicant had worked in building development in the Kitchener-Waterloo area and is reputed to have made a significant contribution to the local community. Oberlander's life since arriving in Canada has been beyond reproach. He is in his 90s with significant health issues.

B. *The Law of Citizenship Revocation*

[20] The revocation of citizenship in this case requires consideration of statute, policy, and jurisprudence. A summary of those considerations follows.

[21] Subsection 10(1) of the *Citizenship Act*, as it read on May 27, 2015 (the relevant date, as explained below), states that a person ceases to be a citizen where the GIC is satisfied, on report from the Minister, that citizenship was obtained by false representation, fraud, or by knowingly concealing material circumstances.

[22] Subsection 10(2) provides the presumption that citizenship is deemed to have been obtained by false representation, fraud, or knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence on the basis of such actions and subsequently obtained citizenship.

[23] Section 18, a procedural provision, provides the person concerned with the opportunity to have the matter referred to the Federal Court as a "reference" prior to the Minister's report. Subsection 18(3) makes that reference decision final and not subject to further appeal.

[24] The *Strengthening Canadian Citizenship Act*, SC 2014, c 22, amended the *Citizenship Act* in a manner that resulted in ss 10 and 18 being combined into the new s 10. Amongst other changes, the decision-maker changed from the GIC to the Minister. These amendments came into force by Order in Council PC 2015-0626 on May 28, 2015.

[25] As is clear from the procedural history, three of the attempts to revoke the Applicant's citizenship clearly occurred under the old regime, prior to the above amendments.

[26] Due to the transitional provisions in ss 32 and 33 of the *Strengthening Canadian Citizenship Act*, the most recent decision and the subject of this judicial review also proceeds under the old regime. Sections 32 and 33 provide that ongoing matters – where the Minister was already entitled to make or had made a report, or where an order had been set aside and referred back for redetermination by the Federal Court – are to be determined by the GIC in accordance with s 10 as it read immediately before the day the amended s 10 came into force: May 27, 2015. This is the case at hand.

[27] Once the GIC is satisfied that citizenship has been obtained through false representation, fraud, or by knowingly concealing material circumstances in a manner consistent with ss 10 and 18, the Policy, regarding the revocation of citizenship of war criminals in World War II, must be

met. The relevant portion of the Policy, from the public report entitled *Canada's War Crimes Program 2000-2001*, is 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.
>
> …
>
> **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]

[28] Although policy guidelines are not binding, the Federal Court of Appeal in *Oberlander v Canada (Attorney General)*, 2004 FCA 213, [2005] 1 FCR 3 [FCA-1] found at para 30 that since the GIC opted in this case to adopt guidelines and to apply them to the case, it had to put its mind to determining whether the Applicant came within the scope of the Policy. This required a determination of the Applicant's complicity.

[29] Prior to 2013, the jurisprudence provided that membership in a limited brutal purpose organization created a factual presumption of complicity that could be rebutted by evidence that there was no knowledge of or involvement in the acts: *Oberlander v Canada (Attorney General)*,

2009 FCA 330, [2010] 4 FCR 395 [FCA-2] at para 18. The Policy was consistent with this jurisprudence.

[30] In the s 18 reference decision in this case, the MacKay Decision, Justice MacKay was tasked with making findings of fact relevant to s 10. Justice MacKay found that the Applicant had obtained his Canadian citizenship by false representation or by knowingly concealing material circumstances, and that he had been a member of Ek10a.

[31] In 2013, the Supreme Court of Canada subsequently changed the test for complicity in *Ezokola*. The Court in *Ezokola* set the new test for complicity at para 29, requiring that there be "serious reasons for considering that he or she voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime." The following factors guide this analysis (para 91):

> (i) the size and nature of the organization;
>
> (ii) the part of the organization with which the refugee claimant was most directly concerned;
>
> (iii) the refugee claimant's duties and activities within the organization;
>
> (iv) the refugee claimant's position or rank in the organization;
>
> (v) the length of time the refugee claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and
>
> (vi) the method by which the refugee claimant was recruited and the refugee claimant's opportunity to leave the organization.

[32] Membership in a single, brutal purpose organization is no longer sufficient for a determination of complicity. As the MacKay Decision found that the Applicant had obtained citizenship through false representation or by knowingly concealing material circumstances, the statutory requirements in the *Citizenship Act* for revocation have been conclusively satisfied. The only live issue remains whether the Applicant was complicit with Ek10a's crimes pursuant to the Policy in a manner consistent with the law in *Ezokola*.

C. *Procedural History – Summary*

(1) The First Decision: Order in Council PC 2001-1227

[33] On January 27, 1995, pursuant to ss 10(1) and 18(1) of the *Citizenship Act*, the Minister gave notice to the Applicant of his intention to make a report to the GIC recommending that the Applicant's citizenship be revoked on the grounds that he had been admitted to Canada for permanent residence and had obtained citizenship by false representations, fraud, or knowingly concealing material circumstances.

[34] At the Applicant's request, and as provided by s 18 of the *Citizenship Act*, the case was referred to the Federal Court. The case then met with many procedural disputes. It was joined with two other similar matters in an attempt to resolve these preliminary issues.

[35] Due to issues of the apparent compromise of judicial independence, these joined cases were stayed until the stays were lifted by the Federal Court of Appeal, a decision upheld by the

Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391, 151 DLR (4th) 119 [*Tobiass*].

[36] The Federal Court reference went forward. In the MacKay Decision, Justice MacKay decided that the Applicant had obtained his Canadian citizenship by false representation or by knowingly concealing material circumstances within the meaning of s 18(1) of the *Citizenship Act*. The MacKay Decision, pursuant to s 18(3), is final and not subject to appeal.

[37] Following the MacKay Decision, the Minister considered submissions from the Applicant, then sent a report to the GIC recommending that the Applicant's Canadian citizenship be revoked. On July 12, 2001, the GIC decided that the Applicant had obtained citizenship by false representation, fraud, or knowingly concealing material circumstances and revoked his citizenship pursuant to s 10 of the *Citizenship Act*. Order in Council PC 2001-1227 was issued revoking the Applicant's citizenship.

[38] The Applicant sought judicial review of this decision. In *Oberlander v Attorney General (Canada)*, 2003 FC 944, 238 FTR 35 [FC-1], Justice Martineau dismissed the application. The Federal Court of Appeal in FCA-1 set aside Justice Martineau's decision and remitted the matter back to the GIC with direction to explicitly consider the Applicant's personal interests and whether the case fell within the Policy.

[39] Meanwhile, the Applicant had sought an order in the Federal Court to stay deportation proceedings that had been commenced under the *Immigration Act*, RSC 1985, c F-7, pending

resolution of the judicial review application. This motion was denied: *Oberlander v Canada (Citizenship and Immigration)*, 2002 FCT 771 (FCTD), 116 ACWS (3d) 12, aff'd 2003 FCA 134.

(2) The Second Decision: Order in Council PC 2007-801

[40] The GIC reviewed the Minister's new report, which included submissions from the Applicant as well as the Department of Justice, but made the same recommendation to revoke the Applicant's citizenship. On May 17, 2007, the GIC decided for a second time to revoke the Applicant's Canadian citizenship. Order in Council PC 2007-801 was issued to this effect.

[41] The Applicant again sought judicial review of this decision, and in *Oberlander v Attorney General (Canada)*, 2008 FC 1200, [2009] 3 FCR 358 [FC-2], I dismissed his application. The Federal Court of Appeal in FCA-2 allowed the appeal on a new ground of duress not previously raised and remitted the matter back to the GIC for determination of the defence of duress.

(3) The Third Decision: Order in Council PC 2012-1137

[42] The Applicant provided further submissions on the issue of duress, and the Minister prepared a supplementary report which still recommended that the Applicant's citizenship be revoked. On September 27, 2012, the GIC decided to revoke the Applicant's citizenship for the third time and issued Order in Council PC 2012-1137.

[43] The Applicant again sought judicial review of this decision. Justice Russell in *Oberlander v Attorney General (Canada)*, 2015 FC 46, [2016] 1 FCR 56 [FC-3] dismissed this application. The Federal Court of Appeal in FCA-3 remitted the matter back to the GIC for redetermination on the issue of complicity under the new framework set out in *Ezokola*, and, if it was found that he was complicit, to reassess his defence of duress. The Attorney General of Canada's application for leave to appeal to the Supreme Court of Canada was dismissed on July 7, 2016.

(4) The Fourth (and Present) Decision: Order in Council PC 2017-793

[44] The GIC undertook to re-evaluate the matter in light of the new test for complicity and the defence of duress. The Minister completed a draft version of the report to the GIC, and provided it to the Applicant, who provided 95 pages of submissions in response. The Minister revised the draft report in consideration of these submissions, but recommended again that the GIC revoke the Applicant's citizenship. The final report [the Report] is 94 pages long, and forms the majority of the reasons for the decision at issue.

(5) The Minister's Report

[45] Since the finding of misrepresentation in the MacKay Decision was binding, the GIC now had to conclude whether the Applicant was complicit in war crimes or crimes against humanity in a manner consistent with *Ezokola*.

[46] Since some of the elements required by *Ezokola* were not put before Justice MacKay in 1998, the assessment of complicity was supplemented by all of the Applicant's prior sworn statements, affidavits, memoranda of facts and law, and his Court testimony.

[47] The Applicant argued as if the MacKay decision was the only critical evidence against the Applicant. Counsel particularly noted Justice MacKay's comment that there was no evidence of the Applicant committing the war crimes of Ek10a.

[48] However, the materials in support of the Report consisted of more than the MacKay Decision. They included an expert report by Manfred Messerschmitt outlining the role of the Einsatzgruppen, including the role of support personnel such as drivers, radio operators and interpreters. He outlined in detail such matters as organizational structure, the "cleansing actions" directed at Bolsheviks and Jews; the route of Ek10a's operations in the summer and fall of 1941; and the function of interpreters.

[49] The record also consisted of materials from the Nuremberg War Crimes trials regarding the conduct of the Einsatzgruppen.

[50] Justice MacKay found many inconsistencies and improbabilities in the Applicant's evidence and a pattern of minimizing his wartime role, which gave rise to serious doubts regarding reliability. The transcripts of government witnesses were also examined since Justice MacKay noted they were credible witnesses who had assisted the Court.

[51] Pursuant to *Ezokola*, the Report stated that "an individual will be found inadmissible for complicity in international crimes if there are serious reasons for considering that he voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime." [Emphasis by the Minister.] The factors from *Ezokola* were then each considered.

[52] The following paragraphs summarize the key elements of the Report's assessment of each of the factors from *Ezokola*. The Report substantially constitutes the reasons for the decision.

(a) *The Size and Nature of the Organization*

[53] The Applicant was a member of a limited, brutal purpose organization. The relatively small size of Ek10a gave grounds for believing that the Applicant likely knew of and contributed to the crimes or facilitated the criminal purpose of Ek10a. This was consistent with the policy in the Citizenship and Immigration Manual, ENF 18: *War crimes and crimes against humanity* (Ottawa: Public Works and Government Services Canada) [Manual].

(b) *The Part of the Organization with which the Applicant was most directly concerned*

[54] The Applicant was a member of Ek10a as an unpaid auxiliary interpreter who lived, ate, and travelled with Ek10a, and had a uniform but no rank.

(c) *The Applicant's Duties and Activities within the Organization*

[55] The Applicant described various mundane tasks he fulfilled in addition to interpreting, but he was also issued a weapon. His description of his duties as an interpreter was inconsistent, but Justice MacKay noted that he admitted to serving as an interpreter in occasional interrogation sessions where German officers questioned those detained who were suspected of anti-German sentiments or activities.

[56] A witness in the MacKay reference, Mr. Sidorenko, observed the Applicant's involvement in two interrogations, one of a woman suspected of being Jewish who was then released, and his own for allegedly helping a prisoner escape. He implied that if the outcome were different he would have been shot, leading to the inference that the Applicant participated in interrogation sessions that could result in death of the person detained.

[57] The Applicant took particular exception to the story of the woman suspected of being a Jew on the basis that no wrong was committed when she was determined not to be Jewish. The Applicant's position ignores the consequence if she had been found to be Jewish (execution) and the role played by interpreters in making that type of determination with those types of consequences.

[58] Justice MacKay found that the Applicant's role later expanded to include questioning detained persons and those without valid explanation for their presence or activities. Justice MacKay also found that the Applicant had served as an interpreter for many months.

[59] The Applicant's denials of involvement in Ek10a's crimes were insufficient to negate the common purpose and shared objectives that could be inferred from the Applicant's duties and activities, which corresponded with Justice MacKay's finding that "Oberlander served the purpose of his unit, the Ek10a." There was a sufficient link between the Applicant's day-to-day participation as an interpreter and the crimes and criminal purpose of Ek10a.

[60] The Report considered the record and reliable public information to determine the usual participation of interpreters in the crimes of Ek10a. As noted earlier, Justice MacKay found there was no evidence that the Applicant participated in any atrocities, but noted that he admitted to serving as an interpreter during occasional interrogations of detained individuals, and found his evidence not credible and evasive. Expert evidence on interpreters suggested that they were generally present at executions, conveyed orders to victims, or participated during interrogations.

[61] Justice MacKay made no finding on the inconsistencies in the evidence regarding the timing of the Applicant's service. The Applicant's testimony, with which Justice MacKay had reliability and credibility concerns, the witnesses Mr. Huebert and Mr. Sidorenko, who Justice MacKay found more persuasive, and historical accounts of Ek10a's activities were considered in the Report to construct the most plausible timeline to consider the Applicant's duties in the context of Ek10a's activities as a killing squad:

- the Applicant started to serve as an interpreter with the Ek10a in early October 1941 at the age of 17, and the same day he was asked to report to headquarters, he departed for either Mariupol or Melitopol. During that time, there were 2,000 victims of Ek10a in Melitopol;

- the Applicant arrived in Taganrog in mid to late October 1941 and stayed until at least July 1942, where there were roughly 1,500 victims in that period;
- the Applicant arrived in Rostov in early July 1942 and stayed for four weeks, where there were around 2,000 victims;
- the Applicant arrived in Krasnodar in early August 1942 and left by the end of the month, where there were around 7,000 victims during that time; and
- the Applicant arrived in Novorossiysk in late August 1942 and stayed until the end of February 1943, where prisoners were executed after interrogations and also Jewish people were executed with or without interrogation.

(d) *The Applicant's Position or Rank in the Organization*

[62] The Applicant was an auxiliary interpreter with Ek10a, and not part of the upper hierarchy of his unit, but an interpreter for interrogations is more likely to have knowledge of his organization's crimes or criminal purpose than many foot soldiers. As an interpreter, he would have had some control over the decisions made by his superiors to send a prisoner to his death through the power to translate whatever information he wanted.

(e) *The Length of Time the Applicant was in the Organization, particularly after acquiring Knowledge of the Group's Crime or Criminal Purpose*

[63] The Applicant served as an auxiliary interpreter with the Ek10a from roughly October 1941 to late 1943. Only October 1941 to February 1943 was considered for the complicity analysis in the Report, during which Ek10a killed at least 91,678 people.

(f) *Knowledge*

[64] Based on Justice MacKay's findings, the size and limited, brutal purpose of Ek10a, the Applicant's role as an interpreter, and his knowledge of the group's crimes or criminal purpose, the Applicant was found to have made his contribution knowingly.

(g) *Significant Contribution*

[65] International jurisprudence suggested that admitted involvement as an interpreter in occasional interrogations could amount to serving as a step towards the realization of the group's crime or criminal purpose:

- *United States v Osidach*, 513 F Supp 51 at 96-99 (ED Pa 1981) - an interpreter during interrogations from 1942 to 1944 was found to have facilitated the persecution of civilians as the necessary link between the Germans and the Jewish people while aware of the overarching criminal purpose.
- The Report of Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Nuremberg, October 1946 - April 1949, Volume IV [*Radetzky*] - it was noted in regards to an interpreter in a unit similar to Ek10a that providing interpretive services during interrogations, while aware that it might result in execution based on what was said, was conduct of a culpable nature as it served a step towards the realization of the group's purpose.
- *Miranda Alvarado v Gonzales*, 449 F (3d) 915 (9th Cir 2006) - interpreting during interrogations was found to have contributed to the crimes to a sufficient degree to establish complicity.

- *Zhang Jian Xie v INS*, 434 F (3d) 136 at 142-143 (2d Cir 2006) - an individual was found to have made a significant contribution for only occasional involvement after transporting women to hospitals for forced abortion three to five times.

[66] The Applicant's work as an interpreter facilitated the screening process for executions and served an important step towards the realization of Ek10a's criminal purpose. Given Ek10a's unique nature, there was no other purpose to interpretation during interrogation other than to fulfill the group's deadly mandate. The Applicant's occasional involvement as an interpreter in interrogation of those suspected of anti-German sentiments and activities contributed significantly to Ek10a's crimes or criminal purpose.

(h) *Voluntariness/Duress*

[67] Justice MacKay observed that the Applicant believed that he had no alternative and that he would have been subject to the harshest penalties if he had not done as ordered by Ek10a. However, this was not a finding of fact. The only evidence of conscription was the Applicant's testimony that he needed to register with the German occupying forces as an Ethnic German, which was unrelated to conscription as an interpreter. Since conscription was not a barrier to complicity, the issue of conscription was considered moot in the Report.

[68] As noted, if the Applicant knew nothing and did only mundane activities, it was unclear why he claimed to have been under duress.

[69] The test for duress drew on the tests from immigration law in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA), 89 DLR (4th) 173 [*Ramirez*], criminal common law in *R v Ryan*, 2013 SCC 3, [2013] 1 SCR 14, international law in Article 31(d) of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) [*Rome Statute*], and the policy set out in the Manual.

(i) *Imminent Physical Peril*

[70] There was insufficient evidence to establish a threat of death or bodily harm, explicit or implicit, imminent, past, or future, or that such apprehension was reasonable. The Applicant's statements about fear of death were not substantiated by other evidence on the record.

(j) *No Safe Avenue for Escape*

[71] The Applicant had a safe opportunity for escape during his posting in Rostov when he was a solitary guard armed with a rifle protecting a barge for three to four weeks. There was no imminent, real, or inevitable threat during that time. There may have also been an opportunity for escape while he was home on leave. The Military Tribunal in *Radetzky* also noted that there was the opportunity in the Einsatzgruppen to ask for a transfer or to be excused from participating without immediate peril.

[72] A reasonable person in the same situation as the Applicant with the same personal characteristics and experience would have concluded that a safe avenue for escape existed. Whether he was 17 or 18 years old when he started, he had shown his maturity by supporting his

family, and stayed with the Ek10a until he was 20, which allowed for him to consider desertion or transfer. His continued service was therefore not involuntary.

(k) *Proportionality*

[73] The harm inflicted by the Applicant must not be greater than the harm threatened against the Applicant. There were at least 10,000 victims of the Ek10a's large scale executions in the locations where the Applicant was working as an interpreter, but the Applicant failed to establish an imminent physical threat for leaving Ek10a. The harm faced by the victims far outweighed the fear of harm alleged.

[74] The Applicant benefited from receiving a War Service Cross and German citizenship, which were both voluntary, as was his service after any alleged conscription. Duress was therefore not established.

[75] The Report concluded that the Applicant served the members of Ek10a voluntarily, significantly, and knowingly in accordance with the *Ezokola* factors and the Policy.

(l) *Personal Interests*

[76] Revocation of citizenship would render the Applicant stateless, but Article 8, subparagraph 2(b) of the *Convention on the Reduction of Statelessness*, 4 December 1954, 989 UNTS 175 (entered into force 13 December 1975) allows for the deprivation of nationality where it has been gained through misrepresentation or fraud.

[77] The Applicant's personal circumstances in Canada were compelling, but did not outweigh the importance of preserving the integrity of Canadian citizenship from deceit and recognition of Canada's obligation to ensure that there is no safe haven for those involved in mass atrocities. It was noted that the Applicant has not acknowledged the seriousness of his misrepresentation in gaining citizenship, nor has he expressed any remorse for having served with the Ek10a despite its atrocities.

(m) *The Applicant's Submissions*

[78] The Minister responded to the Applicant's submissions in detail. A number of changes were made to the Report as a result of those submissions.

(6) Impugned Decision

[79] Order in Council PC 2017-793, dated June 20, 2017, states that the GIC, on the Report from the Minister, is satisfied that the Applicant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances pursuant to s 10(2) of the *Citizenship Act* as it read on May 27, 2015. The Order in Council then states as follows:

> Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to section 10 of the *Citizenship Act*, as it read on May 27, 2015, fixes the date of this Order as the date on which the [Applicant] ceases to be a Canadian citizen.

III. Issues

[80] The issues which the Court concludes must be addressed are:

1. Is the decision to revoke the Applicant's citizenship an abuse of process?
2. Was there a breach of procedural fairness?
3. Was the correct standard of proof applied?
4. Was the decision to revoke the Applicant's citizenship reasonable?

(The Applicant abandoned the issue of whether the leave requirements of the *Citizenship Act* violated the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to *Canada Act 1982* (UK), 1982, c 11 or the *Canadian Bill of Rights*, SC 1960, c 44.)

IV. Standard of Review

[81] The parties and I agree that the standard of review for the GIC's decision to revoke citizenship is the standard of reasonableness: *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at para 85, [2012] 2 FCR 312 [*Odynsky*]; *Montoya v Canada (Attorney General)*, 2016 FC 827 at para 21, 269 ACWS (3d) 227 [*Montoya*]. The issue between the parties is the appropriate level of deference to be awarded the GIC in these circumstances.

[82] The Respondent highlights that a decision by the GIC implicates "the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government", that "exercises its discretion to decide on a different platform, based on polycentric considerations and a balancing of individual and public interests": *Odynsky* at para 78; *Prophet River First Nation v Canada (Attorney General)*, 2015 FC 1030 at para 46 [*Prophet River FC*], aff'd 2017 FCA 15 [*Prophet River FCA*]. Considerable deference is owed to a decision of the

GIC, since it is a result of "a highly discretionary, policy-based and fact driven process": *Prophet River FCA* at para 30; *Prophet River FC* at para 46.

[83] The Intervener similarly emphasizes that the individual rights at stake must be balanced with "elements of general policy" in determining whether to revoke citizenship, and the GIC is free to make a determination on general policy as long as it does not conflict with the *Citizenship Act* or its purposes: *Odynsky* at para 86 and 81, citing FC-1 at para 18. The highly deferential standard that was used to uphold the decision of the GIC not to revoke citizenship in *Odynsky* should not be altered now that the decision is to revoke citizenship.

[84] The Applicant submits that the GIC is not engaging in a polycentric decision-making process, but is instead called upon to apply the facts to the legal definition of complicity in *Ezokola*. Additionally, this decision has been sent back three times for reconsideration due to the GIC's mistakes. The lowest level of deference is appropriate.

[85] The Intervener argues, to the contrary, that the presumption of regularity of administrative procedures, absent evidence to the contrary, indicates that after four tries the GIC should be presumed to get the law right: *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4 at para 33, [2001] 1 SCR 221. That decision does not necessarily support the Intervener's argument.

[86] The Applicant further notes that in *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 36-37, 281 ACWS (3d) 472 [*Vavilov*], the Federal Court of Appeal noted

that when significant interests were at stake, or on issues of statutory interpretation in the immigration context, the reasonableness standard has been applied "in a more exacting way".

[87] I find that considerable deference is owed to the GIC's decision due to the polycentric nature of the specific issue being addressed. Reasonableness assessed in an exacting way is an appropriate standard when examining facts and the application of law to those facts.

[88] Although the Applicant's individual interests are high, which in *Vavilov* indicated that the reasonableness standard should be approached in a more exacting way, statutory interpretation is not at issue in this case. The MacKay Decision conclusively found that the Applicant obtained citizenship through false representation or by knowingly concealing material circumstances pursuant to s 10 of the *Citizenship Act*.

[89] Once the *Citizenship Act* requirements for revocation have been met, the GIC must weigh the Policy, the Applicant's personal interests, and the public interest to determine whether citizenship should be revoked. As stated by the Respondent, this is a polycentric balancing.

[90] What is at issue is whether the Applicant's citizenship should be revoked in light of the Policy, which requires that only those cases be pursued where the individual was complicit in war crimes or crimes against humanity. This assessment requires an application of the legal framework of complicity in *Ezokola*. In addition, if it is determined that the Applicant was complicit, and the Policy was satisfied, the Applicant's personal interests and the public interest

must also be considered. As noted in *Montoya* at para 21, the GIC's decision involves broad discretion and a delicate balancing of policy and personal and public interests.

[91] Reasonableness in the context of a revocation of citizenship by the GIC was also comprehensively described by Justice Stratas in *Odynsky*, which provides considerable guidance in this case:

> [85] Under the standard of reasonableness, our task is not to find facts, reweigh them, or substitute our decision for the Governor in Council. Rather, our task is to ask ourselves whether the decision of the Governor in Council fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. (See *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190.)
>
> [86] In assessing what range of defensible outcomes was available to the Governor in Council, we must be mindful of the Governor in Council's task and what it involved. In this case, the Governor in Council's task was to consider the record presented to it in the form of the Minister's report and to consider whether citizenship revocation was warranted in the circumstances. Subsection 10(1) does not provide any specific criteria or formula for the Governor in Council to follow in carrying out this task. It leaves the Governor in Council free to act on the basis of policy, but those policies cannot conflict with the Act or its purposes: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385.
>
> [87] In this case, the Government of Canada has developed war crimes policy. None of the parties in this Court suggests that it was inappropriate or should not have been applied to these cases. Accordingly, in these cases, if the Governor in Council measured the facts contained in the Minister's report against the war crimes policy of the Government of Canada and reached a rationally defensible result in its decisions under subsection 10(1) of the Act, they should be regarded as reasonable. Put another way, in the circumstances of these cases, a rationally defensible application of a previously announced, unchallenged policy should be taken as a badge of reasonableness under *Dunsmuir*.
>
> …

> [90] Another way of measuring the Governor in Council's decisions against the deferential standard of review of reasonableness is to review the submissions of the parties that were contained in the reports the Minister sent to the Governor in Council. These submissions reveal sharp divisions on the weight to be given to certain facts, how the policy should be applied to those facts, and how the Governor in Council should exercise its discretion. These are cases where, in the words of the Supreme Court in *Dunsmuir*, *supra* at paragraph 47, the questions for decision "do not lend themselves to one specific, particular result" but instead "give rise to a number of possible, reasonable conclusions."
>
> [91] Under the deferential standard of review of reasonableness, it is not our job to reweigh the evidence that the Governor in Council weighed, grapple with interpretative issues concerning the war crimes policy, and then replace the Governor in Council's discretionary, fact-based conclusions with our own conclusions. …

[92] This "reasonableness standard", as described by Justice Stratas, admits that there could be more than one reasonable result. This is not a case where there could only be one reasonable answer.

[93] The Court's task is not to conclude which of the different reasonable views is the most reasonable but whether the GIC's view can withstand the scrutiny of being within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[94] In many respects the Applicant is asking the Court to reweigh evidence, to accept one person as more credible than another and to even question findings of Justice MacKay. This is not the Court's role in this type of review.

[95] In considering the reasonableness of the GIC decision, the Court must examine it in context against the backdrop of the record that was before Cabinet. Some findings may appear stronger than others but the decision must be considered as a whole, not piecemeal.

[96] I would also note that the matters of procedural fairness are reviewed on the standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Montoya* at para 20.

[97] Closely allied to the Standard of Review is the standard of proof which governs the GIC decision. At page 8 of the Decision, the GIC quoted the correct test from *Ezokola*:

> … an individual will be found inadmissible for complicity in international crimes if there are serious reasons for considering that he voluntarily made a knowing and significant contribution to the crime or criminal purpose of the group alleged to have committed the crime.
>
> [Emphasis in original]

[98] For the reasons which follow, the Court concludes that the GIC decision is reasonable and ought not to be disturbed.

V. Analysis

A. *Issue 1: Is the decision to revoke the Applicant's citizenship an abuse of process?*

[99] In arguing that the GIC decision was an abuse of process, the Applicant raised the issues of delay in continuing to attempt to strip Oberlander of his citizenship; improper behaviour of the government in changing from criminal proceedings to citizenship revocation; bad faith in

misstating facts and law; and the making of credibility findings without providing Oberlander a fair hearing (an issue also argued under breach of procedural fairness).

(1) Re: Delay

[100] Since these proceedings began with the Notice of Revocation in 1995, the length of these proceedings has been largely due to the Applicant's successful procedural steps:

- when judicial independence appeared to have been compromised in 1996, the Applicant successfully took the case to the Supreme Court of Canada in *Tobiass*, but the remedy was not the stay that the Applicant sought, and the reference to Justice MacKay went forward;
- as a result of the findings in the MacKay Decision in 2000, the first revocation was issued in 2001, which the Applicant successfully had set aside in FCA-1 in 2004 which was remitted back to the GIC;
- the second revocation was issued in 2007, which the Applicant successfully had set aside in FCA-2 in 2009 on new grounds not argued before the GIC or the Federal Court and remitted back to the GIC;
- the third revocation was issued in 2012, which the Applicant successfully had set aside in FCA-3 in 2016 and remitted back to the GIC, and this fourth revocation was issued in 2017.

[101] The Applicant relies on *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516, 204 ACWS (3d) 602 [*Beltran*]. It was important that there was no justification for the government keeping information on the applicant "up its sleeve" for 22 years, and it was

explicitly noted that the applicant had misrepresented nothing (paras 53, 42). Justice Harrington found at para 51 that had the government proceeded when it first learned of Mr. Beltran's involvement in the questionable organization, he would have been in a much better position to lead evidence.

[102] The present case is clearly distinguishable from *Beltran*. The Notice of Revocation was issued two days after the RCMP commenced an investigation against the Applicant. Since that point, the longest delays that are attributable to the GIC are the 3-year periods following FCA-1 and FCA-2 when the GIC was reconsidering the revocation. Under the circumstances this is not an unreasonable delay.

[103] In *Yamani v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482 at para 32, 314 NR 347, the Federal Court of Appeal noted that successive proceedings initiated by Mr. Yamani's applications for judicial review had led to a number of lengthy proceedings that were disturbing, but found that it did not amount to abuse of process as none of the previous applications had completely resolved the allegations against him:

> … While the appellant is entitled to invoke the rights available to him, the success he achieved in his previous applications for judicial review did not completely resolve the allegations against him. Rather, in each case, the matter was remitted for reconsideration. The mere fact that multiple proceedings may be required to fully resolve a matter does not necessarily constitute an abuse of process.

[104] In *Al Omani v Canada*, 2017 FC 786 at para 69, Justice Roy similarly noted at para 69 that "[i]t is difficult to see how seizing the Court on judicial review by the Plaintiffs can be an abuse of process of the Court by the Defendant."

[105] The Applicant is 94, but he has been ably defended in written submissions by his counsel, and the GIC's decision did not require him to orally defend himself in a manner that made the delay prejudicial to him. The record as relied on by the Minister in preparing the Report and the GIC in making the decision was largely formed by the MacKay Decision, evidence in that proceeding, the Applicant's submissions in response to the Report, and other documentary and affidavit evidence. The Applicant's ability to present his case has therefore not been significantly prejudicially impacted between the first revocation decision and the fourth revocation decision.

(2) Re: Improper Behaviour and Bad Faith

[106] Any improper behaviour on the part of the government that was addressed in the *Tobiass* decision is, in my view, irrelevant to the GIC's decision or this judicial review. This occurred prior to any of the four revocation decisions, and is not relevant to an abuse of process in the decision at issue in this case.

[107] The choice on the part of the Respondent not to pursue a finding that the Applicant personally participated in executions at the time of the MacKay Decision proceeding was not a misrepresentation before the Supreme Court of Canada. The Respondent did not need to prove direct participation in war crimes or crimes against humanity, as it was sufficient to determine complicity according to the Policy and the law at the time by merely proving membership in a single, brutal purpose organization like Ek10a. Justice MacKay found that the Applicant was a member of Ek10a.

[108] To follow the Applicant's suggestion of misrepresentation before the Supreme Court of Canada, one would have to conclude that Crown counsel including Ian Binnie (later Mr. Justice Binnie of that court) participated in a misrepresentation. There is no evidence to support such a suggestion and it ought not to have been made.

[109] There is insufficient evidence that the decision not to pursue direct participation by the Applicant in the MacKay Decision proceeding was misconduct, and again there is no connection between the decision not to pursue a finding of direct participation in 1998 before Justice MacKay and the present 2017 decision to revoke citizenship that would suggest an abuse of process.

[110] Finally, the draft report was provided to the Applicant to allow him to know the case to meet and for him to provide submissions. He did provide those submissions. The final version of the Report was revised in response to those submissions prior to being given to the GIC for a decision, and a section of the Report outlines in detail the Minister's response to the Applicant's submissions, what changes were made, and why.

[111] The Minister was transparent in what was altered about the Report, and explained when it disagreed with the Applicant's submissions. It is clear from the Report in general and that section of the Report in particular that there was no bad faith on the part of the Minister.

(3) Re: Credibility

[112] As will be discussed below in Issue 2, the GIC decision was procedurally fair. The Minister's Report does not contain any new credibility determinations. Instead, the Minister relied on credibility determinations made by Justice MacKay and weighed the evidence on the record to determine what was more likely and more plausible to have occurred.

[113] The Report was not a credibility determination but was a weighing of the evidence exercise in which more weight was attached to evidence against Oberlander. It was a weighing which the GIC and the Minister were entitled to conduct.

(4) Re: Abuse of Process

[114] An abuse of process is only found in "extremely rare" and "the clearest of cases" when the Court is satisfied that the fairness of the administrative process has been so compromised that the damage to the public interest outweighs the harm to the public interest if the proceedings were halted: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 120, [2000] 2 SCR 307, citing L'Heureux-Dubé, J in *R v Power*, [1994] 1 SCR 601 at 616.

[115] The GIC's decision to revoke the Applicant's citizenship for a fourth time does not meet the high threshold necessary for a finding that an abuse of process has occurred.

[116] I also do not find, as argued by the Intervener, that the Applicant's behaviour rises to the level of abuse of process. He has successfully taken advantage of legal steps available to him,

and was granted the remedy he sought in FCA-3 for the GIC to reconsider the revocation decision.

[117] It was open to the GIC to reconsider the case in accordance with the directions of the Federal Court of Appeal and decide to revoke the Applicant's citizenship. The Applicant may dislike the result, but it was not an abuse of process for the GIC to decide to revoke his citizenship for a fourth time.

B. *Issue 2: Was there a breach of procedural fairness?*

[118] The Applicant submits that since citizenship revocation engages highly important interests, an accordingly high degree of procedural rights and protections are appropriate.

[119] The Applicant contends that because credibility findings were made, he was entitled to an oral hearing before the GIC. He also argues that the Report was an "advocacy piece" and an effort in the final version to sanitize errors while misstating fact and law.

[120] The Applicant also asserts that the GIC had to issue reasons independent of the Report (an argument rejected in FCA-1) and involves the suggestion of Star Chamber type proceedings.

[121] For the reasons set out below, I do not find that there has been a breach of procedural fairness.

[122] In regards to the Intervener's argument for minimal procedural rights, I agree with the Applicant that the rights and privileges of an individual are directly affected in the present case in a way that they were not in *Odynsky*, where the appellant was not directly affected by the GIC decision. I would find, therefore, that the content of the duty of fairness should not be comparable with *Odynsky*.

[123] I note, however, that the Federal Court of Appeal also noted at para 95 that no objective standards and criteria were imposed in the context of a decision under s 10 of the *Citizenship Act*. Instead the GIC was empowered to exercise a broad discretion guided by the Policy. This indicates that the content of procedural fairness is lower than that argued for by the Applicant.

(1) Re: Oral Hearing

[124] I find that procedural fairness did not require an oral hearing.

[125] The circumstances of this case are unique. There was a full oral hearing before Justice MacKay that resulted in all the findings of facts necessary to ground a citizenship revocation on the law as it stood at the time. Any credibility findings in this case were the ones made by Justice MacKay.

[126] Since then, the law of complicity changed, and more than membership in Ek10a was required to demonstrate complicity. Justice MacKay chose not to make a finding of fact regarding the Applicant's description of his duties or the timeline of his service with Ek10a. The

defence of duress was not squarely raised before Justice MacKay, so no findings were made on that point, either.

[127] The Applicant submits that he is unable to be questioned due to his age and failing memory. It is perhaps unsurprising that the Minister chose to proceed without an oral hearing – and without any fresh determinations of credibility – to favour a weighing of the evidence on the record to determine plausibility.

[128] The Applicant's plea for an oral hearing in which he cannot participate rings hollow.

[129] The Report examined all the evidence that went to complicity and duress. The evidence was from several sources and often contradictory. The Applicant's own testimony had often been inconsistent. Also considered were the credibility findings made by Justice MacKay regarding the Applicant, which the jurisprudence suggests is permissible. In FC-3, overturned on appeal on the separate issue of discretion in issue estoppel without comment on this point, Justice Russell noted as follows at paras 195-196:

> … I think the case law suggests that the Minister was free to rely on Justice MacKay's findings regarding Mr. Oberlander's lack of credibility on important issues (see e.g. *Oberlander* (2000), above, at paras 151-152) to conclude that his statements carried little weight and were insufficient on their own to establish the points for which they were submitted.
>
> …
>
> … Justice MacKay found a lack of credibility in relation to his finding that Mr. Oberlander was a member of Ek 10a and that he had misrepresented his membership. The GIC's decisions on complicity and duress are, to some extent, continuations of Justice MacKay's decision. Whether Mr. Oberlander's affidavit is entitled to the presumption of truthfulness does not need to be decided but

> the case law suggests that the previous credibility findings support the Minister's findings that Mr. Oberlander's assertions are insufficient to satisfy the legal standard.

[130] As noted in *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 26, 170 ACWS (3d) 397 [*Ferguson*], "[i]t is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible." At para 27, Justice Zinn provided the following example:

> Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

[131] In this case, the Minister examined the record, including the statements of the Applicant. Taking into consideration the credibility findings made by Justice MacKay regarding the Applicant's testimony (see para 186 of these Reasons), the Minister assessed what was more likely to have occurred. A significant consideration was whether corroboration with witness accounts or documentary evidence was possible. I do not take the Minister's use of the word "plausible" to mean credible. I take it to mean "more likely to have occurred" or an assessment on the balance of probabilities.

[132] Justice Zinn also stated as follows at para 34 of *Ferguson*:

> It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian – he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence – the statement of counsel – but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view, that determination does not bring into question the Applicant's credibility.

This is the case in the Report as well. The Minister refrains from any independent findings of the Applicant's credibility, but considers Justice MacKay's credibility findings along with the other evidence available.

(2) Re: Right to Reply

[133] The Applicant had a reasonable opportunity to participate in a meaningful manner in the decision-making process and did so.

[134] There is no legal basis for the Applicant's assertion of a right to reply to the Minister's Report prior to its submission to the GIC.

[135] The Applicant argued that there were "21 additional pages of comment" that neither the Applicant nor his counsel had seen, but the Applicant did not point to anything in those 21 pages that was new or an extrinsic fact or argument. From a reading of those pages of the Report, one does not see any new facts or arguments. An exception to this may be the Minister's response to the new materials provided by the Applicant. For the most part, this distinguishes articles

submitted by the Applicant and addresses the affidavit of the Applicant's daughter, Irene Rooney. None of this response is extrinsic, but instead is mostly repetitive of statements made elsewhere in the Report.

[136] It is worth noting that, as much as the Applicant objects to the fact the Report is revised due to his submissions, the Federal Court of Appeal commented negatively in FCA-1 that the Minister's final report was not revised to take the Applicant's submissions into consideration, and merely referenced their existence and had them attached. This contributed at para 58 of FCA-1 to the first revocation decision being found unreasonable. In regards to the fourth revocation decision that is currently at issue, the Minister was clearly obligated to revise the Report to respond to the Applicant's submissions. It is difficult to see why the Applicant objects to that for which he asked.

[137] Examining the whole of the context of these proceedings and its history, I cannot find anything unfair in not submitting a draft of the amended Report to the Applicant before it went to the GIC. The Applicant had fully exercised his rights to comment on the Report and at some point the process must end. In the final analysis, the Report as the reason for decision must stand on its own merits.

(3) Re: Prosecutor's Brief

[138] The rejection of the Applicant's argument about the Report being an advocacy piece or "prosecutor's brief" in FCA-1 applies with equal force to the current argument. This argument was rejected again, albeit more briefly, in FC-3 at para 120. In this case, a draft version of the

Report was provided to the Applicant for comment, and it was revised to incorporate and respond to those submissions before it was provided to the GIC. The Report is not so substantially changed in the current context so as to make the statement of the law in FCA-1 inapplicable.

[139] The Report comprehensively considers and weighs the evidence on the record and the Applicant's submissions in making the recommendation to the GIC to revoke the Applicant's citizenship. It cannot be properly characterized as an instrument of advocacy.

[140] In *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 126, [2002] 1 SCR 3, the Supreme Court of Canada stated that reasons must "articulate and rationally sustain a finding", articulate the basis for the decision, and come from the person making the decision. In the case at hand, Order in Council PC 2017-793 from the GIC stated in brief the basis for the decision, stated that the Report was concurred with, and the Report provided an articulate and rationally sustained finding expressing in detail the basis for the decision.

[141] Finally, the Report is the type of recommendation that, when agreed with, normally forms the reasons for the decision, which is supported by recent jurisprudence in addition to that cited by the Respondent: *Gladman v Canada (Attorney General)*, 2017 FCA 109 at para 21 [not cited by the parties], *Phipps v Canada Post Corp*, 2016 FCA 117 at para 6, 265 ACWS (3d) 993 [not cited by the parties], citing *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37, [2006] 3 FCR 392.

[142] I find that there was no obligation for the GIC to issue independent reasons.

(4) Re: Star Chamber

[143] There was no breach of procedural fairness in failing to disclose the composition of the GIC.

[144] *Khadr v Canada (Attorney General)*, 2006 FC 727, [2007] 2 FCR 218 [*Khadr*], involved the disclosure, well into litigation, that the true decision maker was not the Passport Office, but the Minister. It was noted at para 121 that the "clandestine decision-making was never explained either as to its necessity or how it accords with the principles of procedural fairness." The Court then found as follows:

> [122] Knowing who the decision-maker is or may be is an important aspect of the rules of natural justice and procedural fairness.
>
> [123] It is an aspect of the principles of natural justice and fairness that one know the case one must meet. As one is entitled to notice of a proceeding, one is entitled to know who will decide and the basis on which the decision can be made.
>
> [124] Justice MacKay in *Brink's Canada Ltd. v. Canada (Human Rights Commission)* (T.D.), [1996] 2 F.C. 113, [1996] F.C.J. No. 27 (QL) confirmed that knowing who the decision-maker will be and the procedures to be followed are aspects of the principles of fairness. He also held that a change in who is the decision-maker without any prior indication that such an event could happen would be a violation of the fairness principle.

[145] This case is distinguishable from *Khadr*. It is not contested that the decision maker in this case is the GIC. There is no clandestine third party in the wings who is pulling the strings. The Applicant knew who the decision maker was and the basis on which the decision was made.

[146] Although there was no claim of Cabinet confidence as provided for in the *Canada Evidence Act*, RSC 1985, c C-5, the Applicant knew that the GIC was the decision maker and there was no requirement that the Applicant know the composition of the GIC.

[147] The Applicant, however, provided no substantive submissions or legal basis for alleging a bias when the GIC reconsiders a matter sent back on judicial review. The GIC is the decision maker required by the *Citizenship Act*, and there was no requirement when it was sent back in FCA-3 "to the Governor in Council for redetermination in accordance with the law" that the GIC be constituted in a specific manner. There is no basis for the Applicant's current submissions that the involvement of the Ministers would cause a reasonable, informed person, viewing the matter realistically and practically, to have a reasonable apprehension of bias on the part of the GIC due to its composition of Ministers: *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at para 40, 68 DLR (3d) 716 [not cited by the parties].

C. *Issue 3: Was the correct standard of proof applied?*

[148] As indicated earlier under the discussion of Standard of Review, the correct standard of proof was articulated and applied.

[149] The Applicant's reliance on the standard of proof as set out in *Ramirez* is misplaced. The Supreme Court of Canada in *Ezokola* explicitly replaced the test for complicity in *Ramirez* with the significant contribution test. *Ezokola* is the proper authority for the standard of proof, and it rephrases the standard.

[150] The Report distinguishes between the standard of proof required by *Ezokola* and the lesser standard of proof required by the Policy, and importantly the Minister found the Applicant complicit on both standards.

[151] The Supreme Court in *Ezokola* described the evidentiary standard of proof as "serious reasons for considering":

> [101] Ultimately, the above contribution-based test for complicity is subject to the unique evidentiary standard contained in art. 1F(a) of the *Refugee Convention*. To recall, the Board does not make determinations of guilt. Its exclusion decisions are therefore not based on proof beyond a reasonable doubt nor on the general civil standard of the balance of probabilities. Rather, art. 1F(a) directs it to decide whether there are "serious reasons for considering" that an individual has committed war crimes, crimes against humanity or crimes against peace. For guidance on applying the evidentiary standard, we agree with Lord Brown J.S.C.'s reasons in *J.S.*, at para. 39:
>
> > It would not, I think, be helpful to expatiate upon article 1F's reference to there being "serious reasons for considering" the asylum seeker to have committed a war crime. Clearly the tribunal in *Gurung*'s case [2003] Imm AR 115 (at the end of para 109) was right to highlight "the lower standard of proof applicable in exclusion clause cases" — lower than that applicable in actual war crimes trials. That said, "serious reasons for considering" obviously imports a higher test for exclusion than would, say, an expression like "reasonable grounds for suspecting". "Considering" approximates rather to "believing" than to "suspecting". I am inclined to agree with what Sedley LJ said in *Al-Sirri v Secretary of State for the Home Department* [2009] Imm AR 624, para 33:
> >
> > > "[The phrase used] sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says."

> [102] In our view, this unique evidentiary standard is appropriate to the role of the Board and the realities of an exclusion decision addressed above. The unique evidentiary standard does not, however, justify a relaxed application of fundamental criminal law principles in order to make room for complicity by association.

[152] The standard of "serious reasons for considering" is therefore more than suspicion, but less than the civil standard of the balance of probabilities. It appears to be close to the "reasonable grounds to believe" from *Ramirez*, but the Supreme Court in *Ezokola* cautions against attempting to paraphrase "serious reasons for considering".

[153] The Minister in the Report at page 8 states the Policy as follows:

> The policy of the Canadian Government is unequivocal: Canada is not and will not become a safe haven to **suspected** perpetrators of war crimes, crimes against humanity or genocide regardless of when or where they occurred.
>
> For World War II matters, the government has publicly stated that it will pursue only those cases for which **there is evidence** of direct involvement or complicity in war crimes or crimes against humanity. A person may be considered complicit if the person is aware of the commission of war crimes or crimes against humanity and contributes directly or indirectly to their occurrence.
>
> [Emphasis added]

[154] This appears to delineate that the standard of proof required by the Policy is at the level of suspicion based on there being evidence of complicity. It is worth noting that this does not quote exactly the version of the Policy in earlier decisions in this matter, which is as follows and does not refer to "suspicion":

> The government pursues <u>only</u> 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.
>
> [Emphasis in original]

[155] As highlighted by the Intervener, this Policy only requires there to be evidence of complicity. The Minister and the GIC appear to have interpreted this Policy to require the standard of proof for complicity at the level of "reasonable grounds for suspecting" for the purposes of the Policy. However, the Minister and the GIC were directed by the Court of Appeal to apply the *Ezokola* test and the validity of the decision must be assessed against that standard.

[156] The Report shows a clear acknowledgement that the standard of proof the Minister applies from the Policy is different, and lower, than that in *Ezokola*. At page 5, the Minister states as follows:

> The Government must apply its own WWII war crimes Policy to the facts in the present case. Ultimately, the Governor in Council must . . . decide for itself if Oberlander could, at a minimum, be suspected of being complicit in war crimes or crimes against humanity during his war time experience.
>
> In addition and as the Minister will explain in more detail later, since the *Ezokola* decision . . . [i]n order to find complicity, the GIC must now determine that the individual voluntarily made a knowing and significant contribution to the crimes or the criminal purpose of his organization.

[157] The Minister in the Report at page 8 clearly states the correct standard of proof in *Ezokola*: "an individual will be found inadmissible for complicity in international crimes if there are serious reasons for considering that he <u>voluntarily</u> made a <u>knowing</u> and <u>significant contribution</u> to the crime or criminal purpose of the group" [emphasis in original].

[158] In the conclusion on complicity at page 67 of the Report, the Minister explicitly acknowledges that the Policy and *Ezokola* employ two different standards of proof, and that both are met:

> Based on all of the above, the Minister finds Oberlander complicit in accordance with the *Ezokola* factors and accounting for the defence of duress. The Minister also finds that the lesser requirements of the Policy have been met, as he finds that Oberlander can be suspected of being complicit in war crimes or crimes against humanity during his time with the Ek10a.

[159] The Policy therefore appears to require some evidence (reasonable grounds to suspect) that the standard of complicity in *Ezokola* (serious reasons for considering) is met. The issue of whether it was permissible for the GIC to find the Applicant complicit on the lower standard of the Policy, if the standard in *Ezokola* was not met, does not need to be determined, because in this case, the GIC found the Applicant met the *Ezokola* standard.

[160] The Report considers the Applicant's complicity in detail from pages 13-67. It is clear from the Report that the Minister considered all the factors and aspects from the test in *Ezokola* and found that there were "serious reasons for considering" that the Applicant met the significant contribution test.

D. *Issue 4: Was the decision to revoke the Applicant's citizenship reasonable?*

[161] In FCA-3, the GIC was instructed to reconsider complicity and duress. The reasons, contained in the Order in Council and the Report, disclose that the GIC reasonably found serious grounds for considering that the Applicant voluntarily, knowingly, and significantly contributed to the crime or criminal purpose of Ek10a and the defence of duress was not made out.

(1) The Report

[162] As Justice Stratas stated in *Odynsky* at para 85, on the standard of reasonableness the task is to determine if the GIC's decision fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Report is incredibly straightforward and considers every finding in comprehensive detail. The Minister in the Report, and the GIC in adopting it as the reasons, considered the application of the Policy and the law and weighed it against the Applicant's personal interests and the public interest. I find that the Report is justifiable, transparent, and intelligible pursuant to *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

The reasonableness of the decision is made clear by the fact that many of the Applicant's submissions in response to the Report are addressed in the Report, either in the section on complicity or the section responding to the Applicant's submissions.

(2) Re: Complicity

[163] The Applicant clearly would have preferred that the evidence had been weighed differently and for the GIC to have reached a different conclusion on whether the Applicant made a voluntary, knowing, and significant contribution. This Court's role, however, is not to reweigh the evidence. There was an evidentiary basis in the Report for all of the conclusions regarding complicity. There was evidence to the contrary, particularly in the Applicant's testimony, but as the Respondent points out, Justice MacKay had credibility concerns with that testimony, and as Justice Russell stated in FC-3, described under Issue 3 above, this was acceptable for the GIC to consider. It was not unreasonable for the Report to assign weight

accordingly, and to weigh the testimony of the witnesses and the documentary evidence against Oberlander more heavily.

[164] The GIC looked at all the relevant factors including Oberlander's age, his role in the killing squads, his length of service, his location of service and what criminal activities were being conducted by Ek10a at these locations, his likely knowledge, his joining of Ek10a and his opportunity to leave.

[165] The GIC looked beyond the MacKay Decision and beyond mere membership. It looked at the role and purpose of Ek10a, particularly as found in the Nuremberg Trials Report. The GIC took into account the factors of conscription (not a determinative factor), Oberlander's linkage between the victims and the persecutors, Oberlander's work with Ek10a in the field and presence at interrogations – a fact which Oberlander conceded in a factum filed at the Federal Court of Appeal. The GIC also inferred that many of the victims were Jewish, an inference open to it to make. In the MacKay Decision, Oberlander acknowledged knowing about the killing of Jews.

[166] The GIC found that Oberlander was involved with Ek10a while "knowing" what Ek10a did. The GIC reasonably concluded that given the length of time he was with the unit, he could not have been unaware.

[167] I find that the Report's conclusion that the Applicant was complicit pursuant to the test in *Ezokola* and the Policy fell within a range of possible, acceptable outcomes which are defensible

in respect of the facts and law. The following highlights some of the issues supporting the reasonableness of the GIC's Decision.

(3) Re: Age

[168] *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 FCR 487, and *Canada (Minister of Citizenship and Immigration) v Maan*, 2005 FC 1682 at para 17, 145 ACWS (3d) 46, cited by the Respondent, demonstrate that knowledge and mental capacity, rather than age, is determinative. The GIC is not the International Criminal Court; Article 26 of the *Rome Statute*, which limits the jurisdiction of the International Criminal Court over minors, does not apply.

[169] The Minister in the Report at pages 57-59 considered the Applicant's age, maturity level, and education, and found that even if he was 17 when he joined Ek10a, he was not a young boy or child. The Minister also noted that he stayed with the unit until the age of 20, during which he could have "assessed the viability of desertion, requested a transfer or otherwise left the Ek10a (e.g., to serve in an ordinary army unit)." I find nothing unreasonable in this assessment.

(4) Re: Significant Contribution

[170] The Report did explain why there was a sufficient link between the Applicant's activities and the Ek10a's crimes:

- the Report considered the size of the unit and the findings from the MacKay Decision at paras 27, 53, and 74 that the Applicant "could not have been

unaware" of the Ek10a's crimes and found it implausible that he could have "remained ignorant of the executions of Jews and others, as a major activity of the men with whom he served";

- the Report considered the vital role played by interpreters in the Ek10a, and there was expert evidence in the record that interpreters "were often witnesses to maltreatment; they were present at executions; here, they conveyed orders to the victims before the executions (remove clothes, hand over valuables)";
- the Report considered the correspondence between the Applicant's travels through Eastern Europe and the crimes against humanity committed by the Ek10a during this time as described in para 193 of the MacKay Decision;
- the Report considered that the Applicant spent almost two years serving the Ek10a before becoming a regular soldier; and
- the Report noted other decisions involving interpreters which, although they were not determinative of the outcome of the case, bolstered the conclusion that interpreters can make a significant contribution to an organization.

[171] The Applicant asserts that every duty considered in the Report needed to be linked to a war crime or a crime against humanity. This demonstrates a misunderstanding of the *Ezokola* test. At para 8, the Supreme Court clarifies that a link to a particular crime is not necessary for complicity, as long as there is a link between the individual and the criminal purpose of the group. The link is established when there is a voluntary, knowing, and significant contribution to the group's crime or criminal purpose, which is what the Report considers.

[172] The Applicant spends a significant portion of his written and oral submissions taking issue with facts drawn from the MacKay Decision that are used to determine the link between the Applicant's service as an interpreter and the criminal purposes of the Ek10a. The Intervener highlights that, contrary to the proper approach to judicial review of this decision set out in *Odynsky* under the Standard of Review heading above, the Applicant approaches the decision of the GIC as if this were an appeal from a war crimes trial court.

[173] As mentioned earlier, I agree that the Applicant often loses sight of the role of this Court and asks for the evidence to be reweighed and for the GIC's discretionary, fact-based conclusions to be replaced with this Court's view.

[174] The Applicant attempts to contradict findings in the MacKay Decision by claiming that they have been misinterpreted, and that the Applicant's underlying testimony must be consulted to properly understand them. The Federal Court of Appeal in FCA-1 at para 40 stated that "[t]o the extent that the written submissions were a disguised collateral attack against the findings, they were irrelevant and unhelpful." The same is true here.

[175] An example of this approach is how the Applicant contests Justice MacKay's finding that he admitted to interpreting in occasional interrogation sessions. In addressing the Applicant's submissions in response to the draft version of the Report, the Minister states as follows in the Report at page 74:

> Justice MacKay found [the Applicant] to have admitted his involvement as an interpreter in occasional interrogation sessions when German officers questioned those detained as suspected of anti-German sentiments or activities. Although he takes issue with

> this finding and denies there was any such admission today, it was based on a submission made by the lawyer who represented him at the reference case and in subsequent proceedings. Justice MacKay also had the benefit of making his findings in light of all of the evidence and submissions before him. Even if one takes this admission out of the question, there is enough information on the record to suggest that he acted in the capacity of interpreter throughout his service and that interrogation sessions he participated in could have led to the death of the individuals being interrogated by the Nazis. There is also more general evidence with respect to the duties of Einsatzgruppen interpreters which supports their important role.

[176] There was nothing unreasonable in how the Report considered complicity based on the Applicant's activities as an interpreter.

[177] The Applicant disagrees with how the Minister assessed the record to make a finding regarding the start of the Applicant's service with Ek10a. I see nothing unreasonable in how the Report lays out why a start date of October 1941 is more plausible than February 1942, and as stated in Issue 2 above, I do not find this to be a veiled credibility finding. These submissions by the Applicant amount to asking that the evidence be reweighed.

[178] I agree with the Respondent that it was reasonable to find that the Applicant significantly contributed to the Ek10a's crimes or criminal purposes. Although it is not legally binding, I find Justice Russell's statement in FC-3 at para 112 to be demonstrative that this finding was within a range of reasonable outcomes:

> In addition, in my view, the Applicant has also not established that the decision finding him complicit was "clearly wrong." … *Ezokola* removes guilt by mere association. The Supreme Court of Canada ruled that complicity should not be found for "every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which

> contributes" (at para 57). Rather, complicity is found for individuals who "intentionally or knowingly contribut[e] to a group's crime or criminal purpose" (at para 61). The Applicant's contribution does not fall into an obviously peripheral category of persons. There is evidence, for instance, to suggest that the Applicant played a role as an interpreter in interrogations that could have resulted in the death of the person interrogated. It is possible to argue and debate how significant that role was (and the issue will arise again when considering duress), but I do not think it can be said that the Applicant clearly cannot be held complicit if *Ezokola* is applied to his situation. There is evidence that the Applicant served as an interpreter during the interrogation by German officers in the SD premises of a woman who, had she been found to be Jewish, would likely have been killed (Report, Supplement C, Tab C, at 893-894, 908-909). The Applicant did more than simply guard a barge. By acting as an interpreter in this way, the Applicant was vital to the purposes of Ek 10a because he assisted in identifying who should be eliminated. We do not know precisely how many times the Applicant acted in this role, but the evidence of Mr. Huebert, Mr. Sidorenko, and Mr. Oberlander himself all appears to suggest that he played an interpretative role in Ek 10a.

(5) Re: Duress

[179] I agree with the Applicant that whether or not the Applicant was conscripted is not "moot", as it was described in the Report, but was relevant to determining the voluntariness of his membership in Ek10a. The Minister was correct in noting, however, that whether or not he was conscripted is not determinative of voluntariness, as once part of the unit he could have stayed by choice. As highlighted by the Respondent, this was acknowledged by the Applicant in FCA-2.

[180] The Minister concluded that there was no risk to the Applicant of imminent physical peril, despite his submissions to the contrary. There was documentary evidence to support this. I see nothing unreasonable in the Minister's analysis on this point.

[181] The Minister does note at page 52 that the Applicant's "own statements about fear of death are not satisfactorily substantiated by the other evidence on the record, including Mr. Sidorenko's 1998 testimony." The Applicant asserts that regardless of Mr. Sidorenko, it was reasonable for him to believe that he would have been executed for attempting to desert, particularly due to his age.

[182] The Minister did not find, however, that the Applicant's belief in imminent peril was reasonable. Instead, the Minister concluded in the next line at page 52 that there was "insufficient evidence to establish a likelihood of imminent physical peril in this case." Specifically, at page 53, the Minister found that the Applicant had "failed to demonstrate that he was under such a threat, whether explicit or implicit, imminent, past or future, or that his apprehension was reasonable."

[183] The Report, at pages 57-59, gives extensive consideration to the impact of the Applicant's age and maturity in relation to whether there was a safe avenue of escape, so the impact of his age on the reasonableness of his perception did not go unexamined, even if it was not addressed at this stage of the test.

[184] I also find the Minister's conclusion that the Applicant had a safe avenue of escape, which he did not pursue, reasonable. He was left alone with a weapon guarding a barge for several weeks, and may have also visited home on leave. A different finding may have been possible on the evidence, but the determination that this was an opportunity for escape that the

Applicant did not take, which reflected negatively on his argument that his service was involuntary, was reasonable.

[185] As pointed out by the Respondent, a decision on duress is contextual and involves the weighing of facts. It is not the place of this Court to reweigh the evidence. I would find that the consideration of the defence of duress was reasonable.

(6) Re: Credibility

[186] Justice MacKay had credibility concerns with the Applicant's evidence on more than one key issue. Some of these concerns are set out below:

- "Mr. Oberlander claims not to have known the unit's designation until he was interviewed by a German consular officer in 1970 in Toronto, in relation to a trial then underway in Munich of Dr. Christmann, one of the wartime commanders of Ek 10a. I find Mr. Oberlander's ignorance of the name of the unit with which he served for one and a half years or more, **to be implausible**, as I explain in assessing his evidence. . . He claims not to have witnessed any of these killing activities and not to have been involved in any, but he could not have been unaware of this function of the unit. Indeed, he acknowledged that at some time while serving with Ek 10a he was aware of its execution of civilians" (paras 26-27).
- "I accept Mr. Oberlander's description of his work within Ek 10a **without determining**, since there is no need to do so, **whether it is a full and fair**

description of his activities from the time he was taken as an interpreter at Halbstadt until he left Belarus for Poland, in late 1943 or early 1944" (para 48).

- "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" (para 53).
- "Both the statement of 1970 and the evidence in this proceeding . . . are similar in one respect. That is, the **professed longtime ignorance** of Mr. Oberlander in the 1970 statement, during his service with Ek 10a in the war years, about the atrocities committed by men of the unit with which he served. In the statement of 1970 he professed to know nothing of the execution of Jews or physically or mentally disabled people by his unit. **He acknowledged in cross-examination that he did come to know of the executions** of civilians by the unit probably when they were at Krasnodar. While he took no part he acknowledged that he knew of executions of civilians after interrogation by his unit, he knew of the activities for "re-settlement" of Jews, and he knew the work of an advance unit of

Ek 10a that "arrived first in the city [Novorossiysk] which looked after the settlement of the Jews, before the main unit arrived" " (para 74).

- "Perhaps it is not surprising that with the passage of time from the events of World War II, now up to 60 years ago and with advancing age, **his recollection of those events has not been consistent. His recollections, as revealed in his testimony, are selective**.

  I conclude, after careful review of the record, that **his testimony is not credible** at least in regard to the process of interviews that he had at Karlsruhe on August 14, 1953. In the final analysis **I simply do not believe his evidence** on this key issue. I so conclude because there are **many inconsistencies or implausibilities in his recollection of past events and circumstances on different occasions and because I conclude that on some other occasions he has avoided revealing his involvement in events.** I review a number of the **major inconsistencies and implausibilities** and the occasions that give rise, in my view, to **serious doubt about the reliability of his evidence** on the key issue in this case" (paras 150-152).

- "It is **highly implausible**, even if there were no unit identification on vehicles or paraphernalia of the unit, that Mr. Oberlander did not know before 1970 of the unit's name as Ek 10a or Sk 10a.

  It is **implausible** also that he did not recall the names of the commanders of the unit with which he served, for a year and a half by his admission, or about two years as the Minister contends, until he was asked about those names when interviewed by German authorities, in 1970" (para 155-156).

- "The **certainty** with which he now recalls that the application form he completed contained no request for detailed information of his addresses and of his military service through the war years, the **certainty** with which he recalls submitting the certificate of the Holz battalion to examining officers to obtain his discharge from the POW camp in Hannover, the **certainty** with which he now recalls he had no questions asked about his military service at Karlsruhe, these **all contrast with much uncertainty** about other events or situations" (para 169).
- "I find that his evidence as it concerns the process followed in Karlsruhe and his recollection that he was interviewed by only one immigration officer who asked no questions about his wartime service, is **not credible**.

  Documents . . . describing his wartime service which he signed as his own in Toronto in 1970, in my opinion, **demonstrate a pattern of less than full acknowledgement of his wartime role**, with no reference to the SD, which he now acknowledges he served, but only as an interpreter" (paras 171-172).
- "Considering his evidence as a whole **I do not find that**, in this hearing, his evidence about his interview at Karlsruhe **is reliable.** . . . At all events I do not believe Mr. Oberlander's evidence at the hearing that he was not asked any questions about his wartime years" (para 174).
- "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" (para 197).

- "I find Mr. Oberlander's evidence that he was not asked any questions about his wartime experience is **not credible**" (para 206).

  [Emphasis added]

[187] While not all of the statements relied on by the Respondent are clear credibility findings, it would be accurate to say that Justice MacKay noted multiple times that the Applicant's testimony was unreliable, not credible, or minimized his wartime role. It was reasonable for the GIC to take cognizance of Justice MacKay's concerns.

VI. Conclusion

[188] The Report found that the requirements for complicity in *Ezokola*, and the lesser standard required by the Policy (see Issue 3), were met. The Report also properly considered the finding in the MacKay Decision that the Applicant had obtained citizenship through false representation or by knowingly concealing material circumstances, and weighed the Applicant's personal interests and the public's interests in making the decision. As stated above, I would find the GIC's decision to revoke the Applicant's citizenship was reasonable.

[189] Therefore, this judicial review will be dismissed with costs to the Respondent. No costs will be awarded the Intervener.

"Michael L. Phelan"
Judge

Ottawa, Ontario
September 27, 2018

Appendix A

Strengthening Canadian Citizenship Act, SC 2014, c 22

Reports under former section 10	**Rapport établi sous le régime de la version antérieure de l'article 10**
32. If, immediately before the day on which section 8 comes into force, the Minister, within the meaning of the *Citizenship Act*, was entitled to make or had made a report referred to in section 10 of that Act, as that section 10 read immediately before that day, the matter is to be dealt with and disposed of in accordance with that Act, as it read immediately before that day.	**32.** Si, à l'entrée en vigueur de l'article 8, le ministre, au sens de la *Loi sur la citoyenneté*, pouvait établir ou avait établi un rapport visé à l'article 10 de cette loi, dans sa version antérieure à cette entrée en vigueur, l'affaire se poursuit sous le régime de cette loi, dans sa version antérieure à cette entrée en vigueur.
Judicial review – subsection 10(1)	**Révision judiciaire — paragraphe 10(1)**
33. If a matter is the subject of an order that is made under subsection 10(1) of the *Citizenship Act* before the day on which section 8 comes into force or as a result of the application of section 32 or subsection 40(1) and that is set aside by the Federal Court and referred back for determination, the matter is to be determined by the Governor in Council in accordance with that subsection 10(1) as it read immediately before that day.	**33.** Toute question visée par un décret pris au titre du paragraphe 10(1) de la *Loi sur la citoyenneté* — soit avant la date d'entrée en vigueur de l'article 8, soit par application de l'article 32 ou du paragraphe 40(1) — et infirmé et renvoyé par la Cour fédérale pour jugement est jugée par le gouverneur en conseil conformément à ce paragraphe 10(1), dans sa version antérieure à la date d'entrée en vigueur de l'article 8.

Citizenship Act, RSC 1985, c C-29

As it read on May 27, 2015, prior to the *Strengthening Canadian Citizenship Act*, SC 2014, c 22

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,	**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) the person ceases to be a citizen, or	**a)** soit perd sa citoyenneté;
(b) the renunciation of citizenship by the person shall be deemed to have had no effect,	**b)** soit est réputé ne pas avoir répudié sa citoyenneté.
as of such date as may be fixed by order of the Governor in Council with respect thereto.	
Presumption	**Présomption**
(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material	**(2)** Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois

circumstances and, because of that admission, the person subsequently obtained citizenship.

moyens.

…

[…]

Notice to person in respect of revocation

Avis préalable à l'annulation

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

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

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

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

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

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

Nature of notice

Nature de l'avis

(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

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

address.

Decision final

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

l’intéressé.

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.

Appendix B

February 15, 1924	Helmut Oberlander [the Applicant] is born in Halbstadt, Ukraine.
October 1941 or February 1942	The Applicant starts serving as an interpreter for Einsatzkommando 10a [Ek10a].
Late 1943 or 1944	The Applicant becomes an infantryman in the German army.
April 5, 1944	The Applicant obtains German citizenship.
April 1952	The Applicant and his wife apply to immigrate to Canada.
August 14, 1953	The Applicant is interviewed by a security officer who questions him regarding his wartime service. He does not disclose service with Ek10a.
May 13, 1954	The Applicant is admitted to Canada for permanent residence.
April 19, 1960	The Applicant obtains Canadian citizenship.
June 24, 1970	The Applicant is interviewed by the German consulate in relation to a German trial against one of the commanders of Ek10a.
January 25, 1995	The RCMP commences an investigation against the Applicant.
January 27, 1995	The Notice of Revocation is issued to the Applicant pursuant to s 18 of the *Citizenship Act,* RSC 1985, c C-29.
July 4, 1996	The Applicant's case, together with two other similar matters it is joined with, is stayed due to the appearance that judicial independence had been compromised: *Canada (Citizenship & Immigration) v Tobiass*, [1996] 2 FC 729.
January 14, 1997	The Federal Court of Appeal removes the stay: *Canada (Citizenship & Immigration) v Tobiass*, [1997] 1 FC 828 (CA).
June 26, 1997	The Supreme Court of Canada finds the appearance of judicial independence has been compromised, but a stay is not the appropriate remedy: *Canada (Citizenship & Immigration) v Tobiass*, [1997] 3 SCR 391.
February 28, 2000	Justice MacKay releases the reference decision pursuant to s 18(1) of the *Citizenship Act* and finds that the Applicant obtained citizenship through false representation or knowingly concealing material

	circumstances: *Canada (Citizenship and Immigration) v Oberlander* (2000), 185 FTR 41 (FCTD) [MacKay Decision].
July 12, 2001	The Governor in Council [GIC] issues Order in Council PC 2001-1227 to revoke the Applicant's citizenship for the first time.
June 3, 2002	The Applicant's motion for an order staying deportation proceedings is dismissed: *Oberlander v Canada (Citizenship and Immigration)*, 2002 FCT 771 (FCTD).
March 13, 2003	The Federal Court of Appeal affirms the Federal Court's dismissal of the Applicant's motion for an order staying deportation proceedings: *Oberlander v Canada (Citizenship and Immigration)*, 2003 FCA 134.
August 1, 2003	The Applicant's application for judicial review of Order in Council PC 2001-1227 is dismissed: *Oberlander v Attorney General (Canada)*, 2003 FC 944 [FC-1].
January 6, 2004	The Applicant is granted a motion staying deportation proceedings pending disposition of an application quashing Order in Council PC 2001-1227 in the Ontario Superior Court of Justice: *Oberlander v Canada (Attorney General)* (2004), 69 OR (3d) 187 (Sup Ct J) [the Superior Court Decision].
April 7, 2004	The Respondent is granted leave to appeal the Superior Court Decision as there is good reason to doubt its correctness (but such an appeal appears to have never been pursued): *Oberlander v Canada (AG)*, 2004 CarswellOnt 1515 (WL Can) (Sup Ct J).
May 31, 2004	The Federal Court of Appeal sets aside Order in Council PC 2001-1227 and remits the matter back to the GIC with direction to consider the Applicant's personal interest and whether the case fell within the Government of Canada's policy regarding revocation due to WWII war crimes or crimes against humanity: *Oberlander v Attorney General (Canada)*, 2004 FCA 213 [FCA-1].
May 17, 2007	The GIC issues Order in Council PC 2007-801 to revoke the Applicant's citizenship a second time.
October 27, 2008	The Applicant's application for judicial review of Order in Council PC 2007-801 is dismissed: *Oberlander v Attorney General (Canada)*, 2008 FC 1200 [FC-2].

November 17, 2009	The Federal Court of Appeal sets aside Order in Council PC 2007-801 and remits the matter back to the GIC with direction to consider the defence of duress: *Oberlander v Attorney General (Canada)*, 2009 FCA 330 [FCA-2].
September 27, 2012	The GIC issues Order in Council PC 2012-1137 to revoke the Applicant's citizenship a third time.
July 19, 2013	The Supreme Court of Canada sets out a new framework for determining complicity in *Ezokola v Canada (Citizenship & Immigration)*, 2013 SCC 40 [*Ezokola*].
January 13, 2015	The Applicant's application for judicial review of Order in Council PC 2012-1137 is dismissed: *Oberlander v Attorney General (Canada)*, 2015 FC 46 [FC-3].
February 15, 2016	The Federal Court of Appeal sets aside PC 2012-1137 and remits the matter back to the GIC with direction to consider the issue of complicity under the new legal framework in *Ezokola*: *Oberlander v Attorney General (Canada)*, 2016 FCA 52 [FCA-3].
July 7, 2016	The Respondent's application for leave to appeal FCA-3 to the Supreme Court of Canada is dismissed.
June 20, 2017	The GIC issues Order in Council PC 2017-793 to revoke the Applicant's citizenship a fourth time, which is the decision at issue in this case.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1590-17
STYLE OF CAUSE:	HELMUT OBERLANDER v THE ATTORNEY GENERAL OF CANADA AND LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 2, 2018
REASONS FOR JUDGMENT:	PHELAN J.
DATED:	SEPTEMBER 27, 2018

APPEARANCES:

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