Date: 20040531

Docket: A-294-03

Citation: 2004 FCA 213

CORAM: **DÉCARY J.A.**
SEXTON J.A.
MALONE J.A.

BETWEEN:

HELMUT OBERLANDER

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on May 19,2004.

Judgment delivered at Ottawa, Ontario, on May 31, 2004.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: SEXTON J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This is an appeal from the decision of a judge of the Federal Court dismissing Mr. Oberlander's application for judicial review of the Governor in Council's decision to revoke his citizenship. The latter was revoked on the grounds that Mr. Oberlander had obtained it by false representation or fraud or by knowingly concealing material circumstances, namely the fact that he was a member of the German

Einsatzkommando 10A (EK 10a) during World War II. The decision is reported at (2003), 238 F.T.R. 35 (F.C.T.D.).

[2] Mr. Oberlander challenges the Governor in Council's decision on both procedural fairness and substantive grounds. With respect to procedural fairness, he argues that the Governor in Council did not fulfill its duty to provide reasons for the decision to revoke his citizenship. Substantively, he says the Governor in Council's decision was unreasonable and must be set aside on the ground that it failed to consider relevant factors, such as government policy and Mr. Oberlander's personal circumstances.

Facts

[3] I need only summarize here the most salient circumstances of Mr. Oberlander's case as an extensive review of the whole circumstances has been made in a decision rendered by Mr. Justice MacKay which can be found at [2000] F.C.J. No. 229 (Q.L.) (F.C.T.D.).

[4] Mr. Oberlander was born in the Ukraine in 1924. He immigrated to Canada with his wife on May 13, 1954. They became citizens on April 12, 1960. They have two daughters, one of whom suffers from a mental illness and is dependent on her parents.

[5] On January 27, 1995, pursuant to subsection 18(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act), the Minister of Citizenship and Immigration (the Minister) gave notice of her intention to

make a report to the Governor in Council recommending that Mr. Oberlander's citizenship be revoked. The notice alleged that Mr. Oberlander had been admitted to Canada as a permanent resident and ultimately obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances, "in that [he] failed to divulge to Canadian immigration and citizenship officials [his] membership in the German *Sicherheitspolizei und SD* and *Einsatzkommando 10A* (EK 10a) during the Second World War and his participation in the executions of civilians during that period of time" (A.B. vol 2, p. 222).

[6] In accordance with paragraph 18(1)(*b*) of the Act, Mr. Oberlander requested that the Minister refer his case to the Federal Court to determine whether he obtained citizenship by false representation or fraud or by knowingly concealing material circumstances. On May 10, 1995, the Minister, in accord with Rule 920 of the *Federal Court Rules*, served and filed a summary of facts and evidence on which the Minister intended to rely in these proceedings (A.B. vol 2, p. 228ff).

[7] The reference was heard by Mr. Justice MacKay in August, September and December 1998. In his reasons dated February 28, 2000, he notes at the outset:

> 11. The applicant does allege, as the basis for her concern, in the Notice of Revocation, that material circumstances were concealed by the respondent's failure "to divulge to Canadian immigration and citizenship officials your membership in the German Sicherheitspolizei und SD and Einsatzkommando 10 A during the Second World War and your participation in the executions of civilians during that period of time". The portion of that allegation concerning the respondent's "participation in the execution of civilians", is not reflected in any of the facts alleged in the Minister's Summary of Facts and Evidence.

> 12. That Summary, which must be taken to include all of the facts the applicant hopes to establish by evidence in this case, does not include any reference to personal commission by the respondent of atrocities or war crimes or his personal involvement in "the execution of civilians" or in criminal activities. Nor does it include any reference to his involvement in aiding and abetting others in the commission of criminal activities, in any sense comparable to "aiding and abetting" as those terms are used in s. 21 of the Criminal Code for Canada, R.S.C. 1985, c. C-46. Thus, in my view the Minister does not seek to establish by evidence that Mr. Oberlander was personally involved in the commission of atrocities or war crimes or criminal activities, or in aiding and abetting, in any criminal sense, others engaged in criminal activities. I affirm for the record that no evidence was presented to the Court about any personal involvement of the respondent in criminal activities or war crimes.
>
> 13. The Minister's Summary of Facts and Evidence does include reference to allegations that the respondent joined the Sicherheitspolizei und SD and Einsatzkommando 10A ("Ek 10a") in or about October 1941, that he served with it in German-occupied eastern territories from 1941 to 1943 or 1944, and during that time the unit he served with was involved in criminal killing of civilians. This is the basis of the Minister's concern about false representation, or fraud or failing to disclose material circumstances, that is, Mr. Oberlander's association with a certain German police unit that participated in criminal killing of civilians in World War II. That association is specified as "membership", in the Notice of Revocation and as repeated in the Minister's Summary of Facts and Evidence, in S.S. organizations and in a unite, Ek 10a, known to have been engaged in criminal killing activity.
>
> [Footnotes omitted]

He also observes, at para. 46, that auxiliary interpreters such as Mr. Oberlander were not present when Jews were being marched or trucked off or slaughtered.

[8] MacKay J. found that the evidence with respect to the conscription or non-conscription of Mr. Oberlander in the German army was "not consistent" (para. 20), and he expressed the view that the "differences about the timing and the circumstances of [Mr. Oberlander's] commencing services as an interpreter are not significant for the ultimate issue" (para. 24). However, in "a summary of his findings of fact on the evidence here adduced" (para. 188), he finds the following at paras. 190 and 191:

> 190. In 1941, at 17 years of age, he had completed secondary school and he was fluent in German and Russian. In September or the beginning of October when German troops arrived at Halbstadt, he and his family were freed from a holding camp where they had been detained by Russians. He was later directed to assist in registration of Volksdeutsch in the area and to assist in repairing buildings and roads in the town.
>
> 191. In October 1941, or as Mr. Oberlander states in February 1942, he was ordered by local authorities to report to German occupying forces to serve as an interpreter. He did so, not voluntarily by free choice, but in fear of harm if he refused.

While MacKay J. did not find Mr. Oberlander credible on certain issues, he did not make any finding of non-credibility with respect to his claim that he had been conscripted.

[9] Mr. Justice MacKay eventually went on to find the following:

> [53] While he was not a member of the SS, or of its special security forces, the Sicherheitspolizei and SD, Mr. Oberlander was an interpreter, an auxiliary, serving the SD or others within a police unit, that is, Ek 10a, that was under the control of the SS. He says that he was not paid, but he was supplied a uniform by the summer of 1942, he lived, ate and travelled with the unit serving it and its members, even if that were by routine chores and as an interpreter. Whether he later served with other Einsatzkommando units, as was suggested from reference to his field post number appearing in the 1944 naturalization documents from Litzmannstadt, need not be determined. The evidence and his description of his role as an interpreter does not include any activity directly involved with Ek 10a's worst and most heinous operations. In his testimony Mr. Oberlander denied that he was ever a member of the SS, that he ever participated in execution of civilians or anyone, or that he assisted in such activity or that he was even present at executions or deportations. Yet Mr. Oberlander, by his testimony, acknowledges that he served as an interpreter with the SD, that the police unit was referred to as SD, and that after serving for some time he did know of its executions of civilians and others. He knew also its “re-settlement” practice for Jews, though he professes not to have understood the meaning of the latter as executions, until later, at Krasnodar. In all the circumstances, it is not plausible that he remained ignorant of the executions of Jews and others, as a major activity of the men with whom he served, until he was in Krasnodar.
>
> [54] In my opinion, the circumstances preclude any conclusion other than that Mr. Oberlander was a member of Ek 10a in any reasonable interpretation of the word “member”. While there were formal requirements for membership in the SS, in the Sicherheitspolizei, and in the SD, there is no evidence of any such requirement for membership in Ek 10a, whether in its police elements or its auxiliaries, except selection to serve its purposes. Mr. Oberlander was selected, he served as an auxiliary with the unit and he lived and travelled with men of the

unit. Its purposes he served, even if that service were not willingly given. Ek 10a, a police formation, was a unit under direction of the SS, from Berlin. Throughout his testimony he referred to the group he served with as “the unit”. I find that while serving he belonged with the Ek 10a unit as a member. That is among allegations of the Minister in the Notice of Revocation and in the Summary of Facts and Evidence presented by the Minister in May 1995, which outlined the case upon which the notice was based.

...

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

[193] Ek 10a was one of the squads of Einsatzgruppe D (“EG D”), which in turn was one of four Einsatzgruppen, designated A, B, C and D. These were special police task forces operating behind the German army's front line in the eastern occupied territories in the years 1941-1944, to further the objectives of Nazi Germany. Among their roles they operated as mobile killing units and it is estimated that the Einsatzgruppen and the Security Police were responsible for the execution of more than two million people, mostly civilians, primarily Jews and communists, and also Gypsies, handicapped and others considered unacceptable for Nazi Germany's interests. The SS and the SD, largely because of their activities in eastern occupied territories, were declared to be criminal organizations in 1946, by decision of the International Military Tribunal and Article II of Control Council Law No. 10. In subsequent trials before the Nuremberg Military Tribunals in 1949 the former commander of EG D, Ohlendorf, was convicted of war crimes, crimes against humanity, and membership in a criminal organization, the SS.

[194] The respondent was not a member of the SD or Sipo, though he wore the uniform of the SD from the summer of 1942 until Ek 10a was merged with army units in late 1943 or 1944. In some documents of that era Mr. Oberlander is described as “SS-mann”, but that description and the uniform are not determinative of formal membership in the SD or the SS. German citizenship requirements precluded membership in the SD or Sipo.

[195] He was, however, a member of Ek 10a, as the applicant Minister alleged in the Notice of Revocation. He served as an auxiliary, as an interpreter for the SD, as he admits, from the time he was ordered to report until the remnants of that unit were absorbed in a regular army unit in late 1943 or 1944. He then continued, not as an interpreter, but as an infantryman.

[196] With Ek 10a he was moved through eastern Ukraine to Melitipol, Mariapol, and Taganrog, thence to Rostov and south to Krasnodar and Novorossiysk. There the unit, and the respondent, were engaged in anti-partisan

> missions, as they later were in the Crimea and in Belarus, and as he was, still later, in Poland and Yugoslavia.
>
> [197] There is no evidence that the respondent participated in any of the atrocities committed against civilians by Ek 10a. His testimony that he did not know the name of the unit until 1970 is not credible, i.e., it is not worthy of belief, nor is his claim that he only came to know of Ek 10a action against Jews, that is, their "resettlement", which he learned meant execution, when he was at Krasnodar and Novorossiysk in the fall of 1942.
>
> [Footnotes omitted]

[10] While finding that EK 10a had carried out substantial execution activities (para. 32), Mr. Justice MacKay made no finding as to whether EK 10a was an organization with one single, brutal purpose, e.g. a death squad, a finding which the reviewing Judge will take upon himself to make at para. 23 of his reasons. More on this later.

[11] In the end, Mr. Justice MacKay found "on the balance of probabilities, that clearance [when entering Canada] would only have issued if Mr. Oberlander misrepresented or did not disclose his wartime experience with Ek 10a" (para. 210). As a result, Mr. Oberlander had been admitted to Canada in 1954 "on the basis of a visa obtained by reason of false representation or by knowingly concealing material circumstances" (para. 211). The Minister could therefore make a report under section 10, the condition set out in paragraph 18(1)(*b*) of the *Citizenship Act* having been met.

[12] The Minister, on March 6, 2000, invited Mr. Oberlander to make written submissions as to why revocation should not proceed (A.B. vol. 1, p. 108).

[13] On May 11, 2000, Mr. Oberlander's then solicitor, Mr. Hafemann, filed written submissions (A.B. vol. 1, p. 70). These submissions, essentially, were directed at the findings of facts made by Mr. Justice MacKay. No submission was made with respect to the applicability to Mr. Oberlander of the government's policy on revocation of citizenship of war criminals nor with respect to compassionate or humanitarian considerations.

[14] On April 30, 2001, the Minister sent to Mr. Oberlander the text of the report she intended to submit to the Governor in Council and invited him to make further submissions (A.B. vol. 2, p. 353). The Minister informed him that "any such submission ... will be attached to [her] report before it is presented to the Governor in Council."

[15] On May 24, 2001, Mr. Hafemann, counsel for Mr. Oberlander, filed lengthy supplementary submissions which, in addition to repeated criticism of Mr. Justice MacKay's findings, included submissions with respect to "humanitarian and other considerations" (A.B. vol. 1, p. 130) and an express reference, in their conclusion, to the inapplicability to Mr. Oberlander of Canada's War Crimes Program in view of the absence of any evidence against Mr. Oberlander "with respect to his involvement directly or indirectly in war crimes or crimes against humanity" (A.B. vol. 1, pp. 134, 135). Canada's War Crimes Program is outlined at para. 28 of these reasons.

[16] On May 29, 2001, Mr. Hafemann filed submissions prepared by members of Mr. Oberlander's family (A.B. vol. 1, p. 159ff). These submissions emphasized Mr. Oberlander's reputation, life and work since his arrival in Canada, the needs of his family, especially of his daughter who was suffering from serious mental health problems due to a chemical brain imbalance, and community support as evidenced by a petition signed by over 12,000 persons.

[17] On July 4, 2001, the Minister informed Mr. Oberlander that she had sent a formal Report to the Governor in Council recommending the revocation of his Canadian citizenship (A.B. vol. 2, p. 354). Attached to the Report were the submissions filed on May 11, 2000 as well as those filed on May 24, 2001 and May 29, 2001. It appears from the arguments made at the hearing of the appeal that this final Report was similar to the draft report sent to Mr. Oberlander on April 30, 2001, except for the reference to, and inclusion of, the additional submissions filed on May 24 and 29, 2001. In other words, the Minister did not prepare a new report to take into account the new submissions; she simply attached to her Report, without comment, the newly filed submissions.

[18] On July 12, 2001, the Governor in Council revoked Mr. Oberlander's citizenship by Order in Council P.C. 2001-1227 which reads as follows:

> Whereas the Minister of Citizenship and Immigration has given the notice required under section 18 of the *Citizenship Act* to the person referred to in the annexed schedule of the Minister's intention to make a report under section 10 of the Act and that person has requested that the Minister refer the matter to the Federal Court of Canada - Trial Division (the "Court") and the Minister has referred the matter to the Court;

> Whereas the Court has decided that that person was admitted to Canada for permanent residence in the circumstances described in subsection 10(2) of that Act, namely by false representation or fraud or by knowingly concealing material circumstances, and, because of that admission, that person subsequently obtained Canadian citizenship;
>
> Whereas the Court has decided that that person has obtained citizenship under that Act by false representation or fraud or by knowingly concealing material circumstances;
>
> Whereas the Governor in Council, on a report from the Minister of Citizenship and Immigration, is satisfied that the person referred to in the annexed schedule was admitted to Canada for permanent residence in the circumstances described in subsection 10(2) of the Act, namely by false representation or fraud or by knowingly concealing material circumstances;
>
> And whereas the Governor in Council, on a report from the Minister of Citizenship and Immigration, is satisfied that the person referred to in the annexed schedule has obtained citizenship under that Act by false representation or fraud or by knowingly concealing material circumstances;
>
> Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to section 10 of the *Citizenship Act*, hereby declares that the person referred to in the annexed schedule ceases to be a Canadian citizen as of the date of this Order.

[19] A new counsel, Ms. Jackman, and Mr. Hafemann then brought an application for judicial review of the Governor in Council's decision to revoke Mr. Oberlander's citizenship on the following grounds. First, the Governor in Council failed to provide adequate reasons for its decision. Second, the Governor in Council did not consider that it had the discretion to decline to revoke Mr. Oberlander's citizenship once the Federal Court found that he obtained his citizenship by false representation. Third, the Governor in Council did not consider the Government's clear policy guidelines indicating that proceedings for citizenship revocation would only be initiated against persons

who were actually involved in war crimes against humanity. Finally, the Governor in Council's decision was unreasonable.

Decision below

[20] The Federal Court Judge found that the standard of review of the Governor in Council's decision was patent unreasonableness, placing a great deal of emphasis on the fact that the decision was being made by the highest political organ of the Canadian government.

[21] The learned Judge found that it was not necessary for him to decide whether or not the Governor in Council had a duty to provide reasons for its revocation decision because the Order in Council and the Minister's Report, upon which the Order was expressly based, could be taken as the Minister's reasons.

[22] He also found, at para. 16, that the Governor in Council considered that it had the discretion not to revoke Mr. Oberlander's citizenship, noting that the Minister's Report expressly provides that: "[i]n deciding whether to revoke citizenship, the Governor in Council should consider the government's 'no safe haven' policy, the findings of the Trial Judge in the reference and any submissions made by Mr. Oberlander."

[23] He further found, at para. 17, that there was no obligation on the Governor in Council to mention all the elements it considered before reaching its decision. He added that "[t]he fact that peripheral elements are not mentioned in the impugned order is no proof that they were not considered or that they were arbitrarily discarded."

[24] Finally, he referred, at para. 23, to the government's policy that it would only pursue citizenship revocation where a person personally committed war crimes or was complicit in the commission of the crimes. He noted that the policy provided that:

> 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 the 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.

Given that Mr. Oberlander was an interpreter for an extended period with EK 10a, a mobile killing squad, it was reasonably open to the Governor in Council, the Judge said, to consider that Mr. Oberlander was complicit in the squad's activities as a support person and information provider. He accordingly found that Mr. Oberlander fell squarely within the ambit of the policy guidelines. In any case, he added, policy guidelines are not binding and do not create substantive rights.

Relevant legislation and statutory scheme

[25] I reproduce here sections 10 and 18 of the *Citizenship Act*:

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,	**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

is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,

(*a*) the person ceases to be a citizen, or

(*b*) the renunciation of citizsenship by the person shall be deemed to have had no effect,

as of such date as may be fixed by order of the Governor in Council with respect thereto.

conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :

a) soit perd sa citoyenneté;

b) soit est réputé ne pas avoir répudié sa citoyenneté.

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

(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de fait essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.

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

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

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

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

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

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

(2) The notice referred to in

subsection (1) shall state that the person in respect of whom the report is to be made may, within thirty days after the day on which the notice is sent to him, request that the Minister refer the case to the Court, and such notice is sufficient if it is sent by registered mail to the person at his latest known address.	(2) L'avis prévu au paragraphe (1) doit spécifier la faculté qu'a l'intéressé, dans les trente jours suivant sa date d'expédition, de demander au ministre le renvoi de l'affaire devant la Cour. La communication de l'avis peut se faire par courrier recommandé envoyé à la dernière adresse connue de l'intéressé.
(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.	(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

[26] According to section 10 of the Act, where the Minister has made the requisite report recommending revocation, the Governor in Council may revoke a person's citizenship if it is satisfied that the person obtained citizenship by "false representation or fraud or by knowingly concealing material circumstances." Importantly, the Act does not in any way limit the kinds of false representations that justify revocation, other than that there must be a causal connection between the representation and the obtaining of citizenship. As a result, as Ms. Jackman states in her factum: "Revocation may be based on lying about the number of children one has, or whether one was married at the time of landing."

[27] According to section 18 of the Act, before the Minister is able to recommend that a person's citizenship be revoked, she must first notify the citizen of her intention to do this and provide the citizen with an opportunity to request that the matter be referred to the Federal Court, whose finding is final and cannot be appealed.

The Government of Canada's policy with respect to revocation of citizenship of war criminals

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

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

> atrocities can be sufficient for complicity if the organization in question is one with a single, brutal purpose, e.g. a death squad.
>
> [A.B. vol. 2, pp. 311, 312 (underline in the original)]

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

> It is the policy of the Government of Canada that this country will not offer safe haven to those individuals who have committed a war crime, a crime against humanity or any other reprehensible act during times of conflict, regardless of when or where these crimes occurred. Furthermore, it is the position of the government that revocation of citizenship and deportation is an appropriate remedy against an individual, who, while aware of the commission of war crimes or crimes against humanity, contributes directly or indirectly to their occurrence.
>
> (A.B., vol. 1, p. 41)

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

Issues

[31] There are two broad issues on this appeal. The first concerns issues of procedural fairness and the second involves substantive review of the Governor in Council's decision.

1. Did the Governor in Council have a duty to provide reasons? If yes, do the Order in Council and the Report of the Minister constitute the reasons of the Governor in Council?
2. What is the standard of review of the Governor in Council's decision? Does the decision withstand scrutiny based on that standard of review?

[32] It is well established that the standard of appellate review, i.e. the standard applicable to this Court's review of the decision of the Judge of the Federal Court, is one of correctness regarding the determination of the standard of review to be applied to the decision of the Governor in Council. With respect to the other aspects of the Judge's decision, this Court may intervene where there is a "palpable and overriding error" (see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 43; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 5, 8, 10 and 25).

[33] It is also well established that the standard of review of the Judge's decision regarding procedural fairness and the duty to provide reasons is correctness (see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] S.C.R. 221, Binnie J. at para. 65).

Procedural fairness – Duty to provide reasons

[34] I need not decide here whether there is an implied duty on the Governor in Council to give reasons of its own. Counsel for both parties recognize that the Governor in Council's reasons may well

be reflected in the report of the Minister and the real issue in this regard is whether the report is of such a nature as to constitute a "prosecutor's brief" which, according to *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3 at para. 16, does not qualify as "a statement of reasons for decisions."

[35] As noted by the reviewing Judge in para. 13, "[w]here a decision is specifically based on the grounds set out in the Minister's report, and there is no evidence otherwise, the reasons for the determination of the Governor General in Council are those of the Minister: *Al Yamani v. Canada (Solicitor General)*, [1996] 1 F.C. 174 at 220 (T.D.)." In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 44, L'Heureux-Dubé J. explained that accepting documents such as the Minister's Report here

> is part of the flexibility that is necessary ... when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways.

[36] Section 10 of the *Citizenship Act* requires the Minister to prepare "a report". In the absence of any mandatory formula which the Minister should adopt, a wide latitude should be given to her. The prosecutor's brief in *Suresh* – the content of which is not described in the reasons for judgment – should not be taken out of its statutory and factual context, even more so since the principal reason why it was not accepted was that it was not articulate nor rational. The reviewing Judge was correct in finding that the Report of the Minister was part of the reasons of the Governor in Council.

Reviewability of the Governor in Council's decision

[37] The Attorney General of Canada, despite forcefully arguing the political nature in general of decisions made by the Governor in Council and their non-justiciability as a matter of principle, nevertheless recognizes in his memorandum of fact and law that a Governor in Council's decision in citizenship revocation cases is reviewable in a court of law, albeit on the standard of patent unreasonableness. He states, at para. 41 of his memorandum, "that Parliament intented to grant the GIC a broad discretion in making a decision pursuant to section 10 of the [Citizenship] Act, reviewable only in circumstances where the GIC makes a patently unreasonable decision."

[38] The Attorney General adds, however, at para. 44, that "[a]lthough authority vested in the GIC is not beyond review, it is neither a duty nor a right of the courts to investigate or to question the motives, which impel the GIC to pass orders-in-council." He relies for that statement on *Attorney General of Canada v. Inuit Tapirisat et al*, [1980] 2 S.C.R. 735 at 748, and *Thorne's Hardware Ltd. et al v. The Queen et al*, [1983] 1 S.C.R. 106 at 112. Though invited by counsel for the appellant to revisit this principle established in a pre-Charter era, I decline to do so for the simple reason that neither the policy nor the motives of the Governor in Council are being questioned in the present case.

[39] This is an appropriate moment to examine what objectives the Minister is seeking in preparing her Report for the Governor in Council and what objectives the citizen concerned should be seeking when preparing his written submissions to the Minister.

[40] Neither the Report nor the written submissions are meant to question the findings of facts made by the Judge at the end of the reference process. These findings are final and non-reviewable (see subs. 18(3) of the Act). To the extent that the written submissions were a disguised collateral attack against the findings, they were irrelevant and unhelpful. In the case at bar, Mr. Oberlander, the Minister and the Governor in Council must accept as an indisputable fact that Mr. Oberlander had a wartime experience with EK 10a, that he falsely represented his background or knowingly concealed material circumstances when interviewed by a security officer and that he was admitted to Canada for permanent residence and eventually was granted citizenship by false representation (see MacKay J.'s reasons at para. 210). That the Governor in Council has the power, under section 18 of the *Citizenship Act*, to revoke Mr. Oberlander's citizenship is a given, the only question is: was the power to revoke exercised by the Governor in Council in a reviewable way in the circumstances of this case?

[41] The findings of fact, however, must be seen as they are and not as they might have been. Mr. Justice MacKay was not deciding whether Mr. Oberlander came within the ambit of the government's policy to revoke the citizenship of war criminals. Mr. Justice MacKay was not deciding whether Mr. Oberlander was a war criminal within the meaning of Canadian or international law. Mr. Justice MacKay did not find – as he might have – that the EK 10a was an organization with a single, brutal

purpose. Mr. Justice MacKay found that no evidence was presented about any personal involvement of Mr. Oberlander in criminal activities or in war crimes.

[42] The Attorney General of Canada acknowledged, in his factum and at the hearing, that "[w]hen considering a report by the Minister to revoke a person's citizenship, the Governor in Council must be satisfied that the statutory criteria for revocation have been met. In addition, the Governor in Council may engage in a delicate balancing of the individual's personal interests, the public interest, as well as a consideration of any relevant program policy objectives" (para. 60). I assume, for the purposes of this appeal, that this acknowledgment is well-founded. The Minister herself had acknowledged in her Report, at p. 41, that "[i]n deciding whether to revoke citizenship, the Governor in Council should consider the government's 'no safe haven policy', the findings of the Trial Judge in the reference and any submissions made by Mr. Oberlander."

[43] The statutory criteria, here, have been met. It is the balancing of interests which, it is argued by Mr. Oberlander, has either not occurred or, if it did occur, has been done in such a way as to be unreasonable.

Standard of review

[44] In *Suresh*, *supra*, at para. 34, the Supreme Court of Canada stated "that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion." It

explained, at para. 36, that to the extent the Court reviewed the Minister's decision in *Baker*, "its decision was based on the ministerial delegate's failure to comply with self-imposed ministerial guidelines..." (emphasis in the original) and, at para. 37, that "*Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors." And it concluded, at para. 41, that

> in reviewing ministerial decisions to deport under the Act, courts must accord deference to those decisions. If the Minister has considered the correct factors, the courts should not reweigh them. Provided the s. 53(1)(*b*) decision is not patently unreasonable – unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures – it should be upheld. At the same time, the courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.

[45] The Supreme Court, in *Suresh*, acknowledged that the pragmatic and functional approach should be applied to determine the standard of review even of discretionary decisions, as was done in *Baker*, but seems, at para. 35, to suggest a result-oriented approach when it added that it would be only in "special situations where even traditionally discretionary decisions will best be reviewed according to a standard other than the deferential standard which was universally applied in the past to ministerial decisions." My perception that *Suresh* has qualified the perhaps too general approach taken in *Baker* may be confirmed by the fact that the Court in *Suresh* determined the standard of review applicable without formally following the four-factor approach dictated in *Pushpanatan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. It based its conclusion essentially

on the fact that the question of whether there is a substantial risk of torture is "in large part a fact-driven inquiry" and possesses "a negligible legal dimension" (at para. 39).

[46] More recently, in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 24, the Supreme Court of Canada reiterated that "[t]he wisdom of past administrative law jurisprudence need not be wholly discarded," but was careful to note the comment of Binnie J. in *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281 at para 54 that even "the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness."

[47] I understand from these esoteric formulations that the pragmatical and functional approach dictates the journey even where ministerial discretionary decisions are at issue, but that one should not be surprised if, in all but a few special occasions, the end result – a high degree of deference – will be the same as if the former approach had been followed.

[48] Another difficulty peculiar to the present case is that the two grounds of attack urged by the appellant may be – and are in my view – governed by different standards of review. The weighing of personal interests and public interests may well attract a standard of patent unreasonableness, while the determination that a person might be a suspected war criminal within the ambit of the war criminals policy may well attract a standard of reasonableness simpliciter.

[49] I will now examine the four factors outlined in *Pushpanatan* and *Dr. Q.*

[50] The first factor – the absence of a privative clause – suggests neither deference nor a high standard of scrutiny because there is neither a privative clause nor a statutory right of appeal (see *Pushpanatan*, *supra*, at para. 30).

[51] The second factor – the expertise of the tribunal relative to that of the reviewing court on the issue in question – militates *prima facie* in favour of a high degree of deference. The Governor in Council is given a wide degree of latitude or discretion regarding whether or not to revoke citizenship and the legislation provides little guidance in exercising this discretion. The very fact that Parliament chose the Governor in Council as the decision-maker also suggests a legislative intent that it acts as a vehicle for the expression of government policy (*Suresh*, *supra*, para. 31; *Mount Sinai*, *supra*, para. 58; *Baker*, *supra*, para. 59).

[52] However, where, as here, the Governor in Council deliberately applies a self-imposed policy and where that policy is predicated on legal concepts of war crimes and complicity, its expertise in the application of the policy is not apparent and its decision in that regard is entitled to lesser deference.

[53] The third factor – the purpose of the legislation and the provision in particular – suggests a highly deferential standard of scrutiny. The discretion of the Governor in Council is subject to no

statutory limits. Any type of misrepresentation can, in theory, lead to the revocation of one's citizenship. In practice, however, in view of the policy adopted and followed by the government, the discretion has been curtailed with respect to misrepresentations made by suspected war criminals. Furthermore, the provision is meant to apply to an individual who stands to lose his citizenship and to become a stateless person. This warrants a less deferential standard.

[54] The fourth factor – the nature of the question, law, fact, or mixed law and fact – suggests a high standard of deference where the question is one of balancing private and public interests or where the findings of fact at the end of the reference process are such as to easily qualify the person as a suspected war criminal under the policy. Where, however, there are no such findings and where the Governor in Council is expected to make his own findings, complex legal issues are likely to arise, which invite less deference. That the policy is predicated on concepts of criminal and international law can be seen from its very wording which refers to international courts and conventions (see para. 28, *supra*) and from the reference in the Attorney General's factum, at para. 66, to decisions of this Court that have examined the concepts of "war crimes" and "complicity" in the context of international refugee law. The Governor in Council is not, of course, deciding as a matter of law whether a person is a war criminal, but it cannot apply the war criminals policy to a person unless it first satisfies itself, to use the very words of the policy, that "there is evidence of direct involvement in or complicity of war crimes or crimes against humanity" (*supra*, para. 28).

[55] The case at bar resembles *Suresh* to the extent that the Governor in Council is dealing with a self-imposed government policy, but it cannot be said here that there is a negligible legal dimension in determining whether a person falls within the ambit of the war criminals policy. A Canadian citizen ought not, in my view, be declared stateless and be stigmatised as a suspected war criminal by a decision which would be reviewed on a standard affording greater deference than on the standard of reasonableness simpliciter.

Application of the standard of review

[56] I agree with the reviewing Judge that there was no obligation on the Governor in Council to mention all the elements it considered before reaching its decision and that the fact that peripheral elements are not mentioned is no proof that they were not considered or that they were arbitrarily discarded. I also agree that a reviewing court should not enter into a re-weighing of the evidence and the factors submitted by the parties.

Mr. Oberlander's personal interests

[57] The reviewing Judge was clearly wrong in finding that Mr. Oberlander's interests are "peripheral elements" and I fail to see any evidence or indication that they were considered at all. In her Report prepared without consideration of the additional submissions filed by Mr. Oberlander, the Minister states that "Mr. Oberlander raised no humanitarian or compassionate considerations in his submissions" (A.B. vol. 1, p. 41). (I hasten to observe that the words "humanitarian and

compassionate considerations" do not appear in the *Citizenship Act* and are inappropriate as they invite comparison, and confusion, with these words as they are used and have been interpreted in other statutory instruments. I much prefer the words "personal interests" used by the Attorney General in his written and oral submissions.)

[58] The Minister, of course, is wrong, to the extent that submissions were eventually made in that regard. It is true that the additional submissions were attached to the Report and that one must generally assume that a decision-maker has examined all the evidence and documentation. But where the personal interests considerations are so overwhelmingly favourable to the person concerned as they are here – fifty years of irreproachable life in Canada – one should expect the decision-maker to at least formally recognize the existence of those interests. It is apparent at the face of the record that there was no balancing of the personal interests of Mr. Oberlander and of the public interest. The decision in that regard is patently unreasonable.

The War Crimes Program

[59] The Minister's Report does refer to the "no safe haven" policy but does not analyse why it is that Mr. Oberlander fits within the policy which, the Report fails to mention, applies only to suspected war criminals. In face of the express finding by Mr. Justice MacKay that no evidence was presented about any personal involvement of Mr. Oberlander in war crimes, one would expect the Governor in

Council to at least explain why, in its view, a policy which, by its very – and underlined – words applied only to suspected war criminals, applied to someone who served only as an interpreter in the German army. I note that neither the Minister in her report nor the reviewing Judge even refer to the fact that Mr. Oberlander had asserted that he had not joined the German army voluntarily and that Mr. Justice MacKay has not made a definite finding as to whether Mr. Oberlander had been conscripted or not.

[60] The Governor in Council could not reasonably come to the conclusion that the policy applied to Mr. Oberlander without first forming an opinion as to whether there was evidence permitting a finding (not made by the Reference Judge) that Mr. Oberlander could be suspected of being complicit in the activities of an organization with a single, brutal purpose. The reviewing Judge took upon himself to decide what the Governor in Council had omitted to examine and decide, that EK 10a was an organization with a single, brutal purpose and that Mr. Oberlander was complicit in the organization's activities. The decision of the Governor in Council in that regard cannot be supplemented by that of the reviewing Judge. The decision of the Governor in Council is not reasonable as it fails to make the appropriate findings and relate them to the person whose citizenship was at issue.

Conclusion

[61] I would allow the appeal with costs here and below, set aside the decision of the Federal Court, allow the application for judicial review, set aside the decision of the Governor in Council and remit the matter back to the Governor in Council for a new determination. In practice, this Order

means that the Minister of Citizenship and Immigration, should she decide to again seek the revocation of the citizenship of Mr. Oberlander, is expected to present the Governor in Council with a new Report which will address the concerns expressed by the Court in these reasons.

"Robert Décary"

J.A.

"I agree.
J. Edgar Sexton, J.A."

"I agree.
B. Malone, J.A."