Federal Court Cour fédérale

Date: 20180507

Docket: T-1590-17

Citation: 2018 FC 488

BETWEEN:

HELMUT OBERLANDER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

Intervener

<u>REASONS FOR ORDER</u>

<u>PHELAN J.</u>

[1] These are the Reasons for my Order of May 1, 2018, dismissing the Applicant's motion that I recuse myself from hearing the judicial review of the Governor in Council's decision to

revoke the Applicant's Canadian citizenship. The sole basis for the motion was a reasonable apprehension of bias.

[2] The recusal motion was directed to be heard in open court the day before the judicial review hearing.

[3] The background to this fourth judicial review is well set out in the pleadings and need not be set out in detail here.

[4] At issue is my 2008 decision in *Oberlander v Canada (Attorney General),* 2008 FC 1200, 336 FTR 179 [the 2008 Decision], dismissing the Applicant's application for judicial review of the second decision by the Governor in Council [GIC] to revoke the Applicant's citizenship. The GIC had determined that the Applicant was complicit in war crimes and crimes against humanity committed by Einsatzgruppen 10a [EK10a], one of the subunits of the security police forces of the Schutzstaffel [SS] and sometimes described as a "killing squad". The GIC based this decision on the prevailing legal test, in which mere membership in a limited, brutal purpose organization was sufficient for complicity. The 2008 Decision found the GIC's conclusion that the Applicant was complicit was reasonable, which was upheld by the Court of Appeal in *Oberlander v Canada (Attorney General),* 2009 FCA 330, 313 DLR (4th) 378, but remitted back to the GIC to deal with the issue of "duress" – an issue raised for the first time before the Court of Appeal and not previously raised before the Federal Court or the GIC.

[5] In 2013 the Supreme Court issued *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*], which changed the test for complicity.

[6] In the decision at issue in this judicial review, the GIC referred to the 2008 Decision which had noted at para 68 that the Applicant contributed to the commission of war crimes and crimes against humanity "even indirectly, by acting as an interpreter".

[7] The GIC determined from the evidence that a sufficient link existed between the Applicant's activities as an interpreter for EK10a and the crimes and criminal purposes of the unit.

[8] The Applicant's claim of a reasonable apprehension of bias stems from the Respondent's argument and the GIC decision in which statements made in the 2008 Decision and by Justice Russell in 2015 in *Oberlander v Canada (Attorney General),* 2015 FC 46, 473 FTR 169 [the 2015 Decision], are characterized as "findings".

[9] The Applicant asserted that he was in the awkward position of having to argue against these "findings" if the Respondent relied on them to justify the GIC's conclusions. In addition, the Applicant contended that my statement in the 2008 Decision concerning complicity "even indirectly, by acting as an interpreter" was my own assertion and not a previous finding of Justice MacKay.

[10] In respect of judicial comments from the 2008 Decision, a judge on judicial review does not make findings of fact. In the 2008 Decision, I analyzed the matter, as mandated by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, in view of the reasonableness of the reasons given by the GIC or "which could have been given".

[11] The Applicant in his Memorandum of Fact and Law on the current judicial review also noted that a reviewing court does not make findings of fact upon which the GIC can rely.

[12] Therefore, the Applicant's concern about having to argue against my "findings" made in the 2008 Decision only arises if one accepts the mischaracterization of my comments. A mischaracterization cannot ground a recusal motion.

[13] When assessing allegations of actual or perceived bias made against a judge, there is a presumption of judicial impartiality and integrity which is strong and cannot be easily rebutted: *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 16, [2013] 2 SCR 357. Nothing has been shown that rebuts this presumption.

[14] Further, the issue in this judicial review is not the same as was canvassed in the 2008 Decision. The current judicial review is directed at complicity in the context of "significant contribution", as set out in *Ezokola,* not "indirect complicity". This judicial review involves a different legal test and an examination of the facts assessed against that test. The conclusions in the 2008 Decision with respect to complicity have been overtaken by *Oberlander v Canada (Attorney General),* 2016 FCA 52, 396 DLR (4th) 155, in which the Federal Court of Appeal

referred the 2015 Decision back for the GIC to assess the facts in light of *Ezokola*'s requirement for a knowing, significant, and voluntary contribution to the EK10a's crimes against humanity to find complicity.

[15] As indicated earlier, the comments in the 2008 Decision and in the 2015 Decision were not findings of fact. The GIC's reliance on these statements as illustrative may be raised by the Applicant in argument at the judicial review.

Moreover and fundamentally, the GIC's decision on "contribution" must be assessed on the facts and on the reasons it gave in its 2017 decision.

[16] The test for a reasonable apprehension of bias is whether a reasonable, informed person having knowledge of the facts and the context of the proceedings would think it more likely than not that a decision-maker would not decide fairly: *Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369 at 394, 68 DLR (3d) 716; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General),* 2015 SCC 25 at paras 20-21, [2015] 2 SCR 282.

[17] It is erroneous to assume that a judge is so insecure or arrogant that criticism of their judgment would evoke resistance to recognizing the possibility of a different conclusion based on a new legal test or that they would be unable to approach the matter with an open mind.

[18] Both the Federal Court of Appeal and the Federal Court have consistently held that prior adjudication, including findings adverse to the person concerned, does not, without more,

disqualify a judge from presiding over subsequent proceedings involving the same person. I adopt the following from the Respondent's submissions:

> As noted by the Federal Court of Appeal in *Collins* [*v Canada*, 2011 FCA 123, 418 NR 196] if a judge was disqualified simply because of a prior adjudication in a matter, "the orderly administration of justice would be jeopardized." Moreover, the following examples undercut the Applicant's motion for recusal:
>
> - The Federal Court of Appeal found there was no merit to the argument that a judge who had previously made negative credibility findings against an applicant might not be impartial when subsequently considering whether the applicant ought to be released from detention;
> - The Federal Court of Appeal found there was no reasonable apprehension of bias where an adjudicator who had made a prior negative credibility finding in an applicant's detention review also considered the applicant's credibility in his refugee claim.
> - This Court held that a Board member should not be disqualified from presiding over an admissibility hearing simply because he previously made findings of credibility;
> - Mr. Justice MacKay did not recuse himself even though he had previously decided, on another matter, that the individual concerned was not credible and was a danger to the public;
> - This Court dismissed an application for disqualification where the applicant alleged the designated judge could not be impartial because he had already disposed of questions that were identical to those being raised in the subsequent detention review and had therefore already formed an opinion;
> - In the context of redeterminations and reconsiderations, the Federal Court of Appeal has stated: "we find it hard to believe that judges or tribunals would declare themselves biased simply because they are being asked to reconsider or redetermine a matter";

> - Federal Court judges routinely seize themselves of applications for leave and for judicial review after having decided stay matters.
>
> [Footnotes omitted.]

[19] Even if the “findings” in the 2008 Decision were wrong – and the Court of Appeal did not subsequently overturn any of those conclusions – those comments regarding complicity are irrelevant to the consideration of the *Ezokola* test, dated by ten years, and inapplicable to this judicial review. The GIC’s conclusion stands or falls on the evidence it considered and the conclusions it reached in relation to the requirements of the *Ezokola* test.

[20] For these reasons, I am of the view that a reasonable person, having knowledge of the background, the facts, the legal issues at stake, the role of a judge in judicial review, and the nature of the comments at issue, would not have a reasonable apprehension of judicial basis.

[21] Therefore, as ordered, this motion must be dismissed with costs.

"Michael L. Phelan"
Judge

Ottawa, Ontario
May 7, 2018

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
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APPEARANCES:

Ronald Poulton Talia Joundi	FOR THE APPLICANT
Angela Marinos Meva Motwani Daniel Engel	FOR THE RESPONDENT
David Matas	FOR THE INTERVENER

SOLICITORS OF RECORD:

Poulton Law Office Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Jackman, Nazami & Associates Barristers & Solicitors Toronto, Ontario	
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

David Matas
Barrister and Solicitor
Winnipeg, Manitoba

FOR THE INTERVENER