Federal Court  Cour fédérale

Date: 20231220

Docket: T-1862-17

Citation: 2023 FC 1660

Ottawa, Ontario, December 20, 2023

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Plaintiffs

and

BOŽO JOZEPOVIĆ

Defendant

REASONS FOR JUDGMENT

I. Context/Background

[1] Bosnia and Herzegovina is a country located in the Balkan Peninsula in south-eastern Europe, which was once part of Yugoslavia. It borders on other former Yugoslav Republics of Croatia, Serbia and Montenegro and has a small 12-mile seacoast on the Adriatic Sea. The part of Bosnia and Herzegovina, where the events, which are the subject of this court action, unfolded

is largely mountainous and isolated. Immediately prior to the disintegration of the Yugoslav state in 1991/1992, the total population of Bosnia and Herzegovina was approximately 4.4 million, of which approximately 43.7% were Bosniaks (Muslim), 31.3% were Serbian (Orthodox) and 17.3% were Croat (Catholic). Unlike the other former Yugolav states, no one ethnic group constituted a majority in Bosnia and Herzegovina.

[2] I pause here to note that the evidence before me is that inside the eventual state of Bosnia and Herzegovina there were many Bosniaks who were allied with Croats, particularly at the beginning of what would become a civil war inside Bosnia and Herzegovina. Similarly, as hostilities developed, there were other alliances created. This was not surprising, given the integration of the three major ethnic groups. It is also important to note that each of the ethnic groups in the future Bosnia and Herzegovina could rely upon a well-trained military populace given the Yugoslav Army's long-standing policy of "all-people's defense". That is, all able-bodied male citizens of the age of majority were expected to undergo military training and be at the ready in the case of any attack upon the then Yugoslavia. In addition, a more basic training had already begun in high school, which included both men and women. Non-active duty men in the former Yugoslavia were organized into Territorial Defense Units, built on a local basis for use in wartime emergencies. This provided the post-Yugoslav nations with a ready reservoir of experienced military men and women, assigned to local units.

[3] On January 15, 1992, the European Union recognized the independence of Croatia and Slovenia in their pre-civil war borders. It is noteworthy that Croatia had fought a bloody civil war, which, in large measure, pitted Croatians (Catholics) against Serbians (Orthodox), the latter

of whom were supported, in large measure, by the Yugoslav state. As Yugoslavia was now a shrinking state, the Croatians (Catholics) and the Bosniaks (Muslims) were united in their desire not to be part of a larger Serbian (Orthodox) controlled state, which would include Bosnia and Herzegovina. A referendum for Bosnian and Herzegovinian independence was held on February 29 and March 1, 1992. Of the total votes cast, 99.44 % favoured independence. Approximately 1/3 of the electorate did not vote. It is widely assumed that those who did not vote were of Serbian (Orthodox) ethnicity, who are said to have boycotted the referendum. The European Union recognized the independence of Bosnia and Herzegovina on April 7, 1992. Prior to the declaration of independence, widespread fighting occurred throughout the territory of what would become the Bosnia and Herzegovina nation, as Serb forces (largely Orthodox) battled Bosniak (largely Muslim) and Croat (largely Catholic) forces. Following the independence votes in Croatia, Slovenia and Bosnia and Herzegovina, the successor state of what was once Yugoslavia, became the State Union of Serbia and Montenegro (referred to herein as Serbia). With the creation of the state of Bosnia and Herzegovina, the stage was then set for civil war inside that country. Serbia would continue its efforts to exert control inside Bosnia and Herzegovina through the ethnic Serbian population and Croatia would seek to exert control through the ethnic Croatian population. There is little doubt that certain groups in both Croatia and Serbia had designs on expanding their respective boundaries to include parts of what had recently become Bosnia and Herzegovina. Others, particularly some leaders of Croatian ethnicity inside Bosnia and Herzegovina, were less inclined to dismantle the Bosnian state.

[4] From this point onward in these reasons, I will refer to the differing warring factions inside Bosnia-Herzegovina by their actual titles. The Bosnian-Herzegovinian Army would be

known as the ABiH (the Army of the Republic of Bosnia and Herzegovina). The ABiH was considered the national military. It was composed largely of Muslims, although there were some people of Croatian (Catholic) ethnicity within their ranks. The ethnic Croatians inside Bosnia-Herzegovina, organized the Croatian Defence Council (the *Hvatsko vijeće obrane* or HVO) to combat the Serbs (Orthodox). Importantly, the HVO was not only an army. HVO was in effect a government structure, with a President and other civic officials, which operated parallel with Bosnian and Herzegvonian authorities in governing many municipalities in Bosnia and Herzegovina, particularly those having Croat majorities. While the parties refer largely to the HVO as an army, it is clear the "army" was only part of the governing organism of the larger Croatian Defence Council, which, in many cases, was allied with the Bosnian and Herzegovinian state. This is in part reflected in the fact that, after the war ended, both HVO personnel and ABiH personnel are entitled to veterans' benefits from the state of Bosnia and Herzegovina. There were some Bosniaks (Muslims) in the HVO, particularly at the start of the conflict in Bosnia and Herzegovina, as both Bosniaks and Croatians (Catholics) fought a common enemy, the Serbs. The ethnic Serbs in Bosnia-Herzegovina fought under the name VRS (*Vojska Republike Srpske*).

[5] In the spring of 1992, the civil war inside Bosnia-Herzegovina began in earnest. That war pitted the HVO (largely Croatians) and the ABiH (largely Bosniaks) against the VRS (Serbs). Immediately after the recognition of Bosnian-Herzegovinian independence, the VRS set up in Bosnia and Herzegovina and the removal of the non-Serb population began. A pattern emerged of terror, detention, killing and expulsion leading to the creation of 2.6 million refugees or displaced persons – well over one-half the population of Bosnia-Herzegovina – within the first

three months of fighting. The early months of the war greatly favoured the VRS (Serbs), who were supported by the military from the former Yugoslav state.

[6] By October of 1992, the front lines of the civil war had largely settled into place. The VRS had gained significant territory; the HVO had lost territory in the north and defended certain lands further to the south and west, in what has been described as the Republic of Herceg-Bosna, a potential Croatian mini-state inside the state of Bosnia-Herzegovina. Fighting continued in and around Sarajevo, Goražde, Srebrenica, Žepa and Bihać.

[7] Importantly, by October of 1992 the relationship between the HVO and the ABiH, while they remained allies, was becoming increasingly strained, as the HVO eyed control of Herceg-Bosna in the south and west and, by some, even the potential annexation of Herceg-Bosna by Croatia.

[8] According to Dr. William B. Tomljanovich, an historian declared an expert witness at the trial of this matter, the spark which ignited the conflict between the HVO and the ABiH was the peace talks. He is of the opinion that the *Vance-Owen Peace Plan*, A. Izetbegovic, R. Karadzic, M. Boban, C.R. Vance, D. Owen, January 30, 1993 [Vance-Owen Peace Plan] was negotiated "with very little coercion from the outside, so it was imperative that at least one party sign on to the proposal". Dr. Tomljanovich contends that, as a result, the smallest warring party, the HVO, was given very generous treatment in the proposed map of the "Vance Owen cantonal borders which was issued at the end of 1992". At paragraph 112 of his opinion, Dr. Tomljanovich provides the following perspective:

> Determined not to let such an opportunity slip by the HVO seized this moment to "implement" their own version of the still unsigned plan and claim their territory. On 15 January 2003, HVO President Jadranko Prlic signed an ultimatum ordering troops from the HVO and the ABiH to either leave the provinces which were not "theirs" and for remaining Bosnian authorities to subordinate themselves to the HVO in proposed provinces 3, 8 and 10. The Department of Defense was to enforce this order in five days. The Croats (meaning officials of the state of Croatia) must have had serious concerns regarding the reception of the ultimatum in Central Bosnia, as they sent the Assistant Minister of Defense of Croatia, (and later commander of the HVO), Slobodan Praljak to the Lasva Valley at this time. This ultimatum was rejected by the Sarajevo authorities. This led to localized conflicts between the HVO and ABiH. Fighting had already begun in Gornji Vakuf from 12 January 1993 to 20 January 1993, and moved to Busovaca on 23/24 January. By the end of the month, the HVO had backed down from the ultimatum and a shaky peace was temporarily restored in February.

[9] The events which are the subject of this court action occurred in the village of Poljani in the municipality of Kakanj. Kakanj municipality is majority Muslim. Kakanj was spared any serious fighting in the winter and spring of 1993. One of the reasons, according to Dr. Tomljanovich, that fighting did not come to Kakanj municipality early on in the struggles between the HVO and the ABiH was because it was foreseen to be part of Province 9 in the Vance-Owen Peace Plan. Province 9 was <u>not</u> to be part of HVO controlled territory. Also, in Kakanj municipality it was evident from the beginning of the civil war that parallel institutions had been set up by the HVO and Bosnia-Herzegovina. While friction existed at times between the two, they, in large measure, resolved any issues without resort to violence. Dr. Tomljanovich, at paragraphs 159, 160, 168 and 169 of his report describes the situation in Kakanj in January and February of 1993 as follows:

> The fighting which enveloped the Lašva Valley next door did not yet spread to Kakanj and Vareš. This is most likely due to the fact that as those two municipalities were foreseen to become a part of

> Province 9 in the Vance Owen Peace Plan, they did not fall under the purview of the ultimatum which only included Croat-dominated Provinces 10 and 8. The ultimatum did state that HVO forces in Province 9 were to subordinate themselves to the ABiH, although there is no indication they formally did so.
>
> …
>
> Although the January fighting did not spread to Kakanj, it did indirectly have an effect on the municipality. After the fighting in Gornji Vakuf a truce was reached between HVO Zone Commander Blaškić and ABiH Deputy Zone Commander Džemo Merdan. Part of this plan was to reduce tensions where fighting had been worst by removing the 305th ABiH Brigade … from their position in Gornji Vakuf and relocating them to Kakanj. According to HVO commander Marić, this led to more tension between the HVO and ABiH. In any event it added to the already large advantage in manpower the ABiH enjoyed in the municipality.
>
> …
>
> From April 16 onwards, Kakanj saw an all-out war being conducted in the next-door municipalities of Zenica and Busovača. Again, the war did not spread there, but a number of incidents did follow in Kakanj. … [On] 19 April, the ABiH attacked the kindergarten in Kakanj which was then the headquarters of the Kakanj HVO Presidency and the HVO military police. However, according to Marić, "with great efforts a broader conflict was prevented"… On 21 April 1993, Croatian sources reported that HVO premises in Kakanj had come under attack the previous day by the ABiH and were demolished. One soldier from each side was killed and negotiations followed amidst fire.
>
> …
>
> Despite these smaller conflicts, all-out war was delayed in Kakanj for nearly two months. This isn't entirely unusual as fighting was delayed elsewhere along the lines as locals failed to take part in the war.
>
> …

[10] The war finally came to Kakanj on or about June 4, 1993 when the ABiH launched its attack. Recall, Kakanj was and remained predominantly Muslim. The local Croatian population,

by that point, was to be found largely on the eastern side of the municipality in majority Croat villages. Immediately before the attack on Croat installations in Kakanj, the ABiH had the following units in Kakanj: the 309th Mountain Brigade was headquartered in the elementary school in the center of Kakanj; part of the 305th brigade which had been defeated in Jajce; the Lašva Detachment which was a part of the 7th Muslim Brigade as well as the Black Swans which was a Special Purpose Unit of the 1st Corps ABiH of Sarajevo. Also present in Kakanj, fighting alongside the ABiH troops were the Mujahidin with members from various Islamic states in the Middle East, including Iran. These ABiH units and the Mujahidin were opposed by the Kotromanic Brigade of the HVO. Also present in Kakanj municipality were international troops. The French United Nations Protection Forces (UNPROFOR) was stationed at the power plant.

[11] The events, which occurred from June 9 to June 13, 1993 in Poljani and Kraljeva Sutjeska, predominantly Croat villages lying on the most eastern part of Kakanj municipality, are at the heart of the dispute before me. While much more about what occurred in and around Poljani during the relevant times will be discussed in more detail, suffice it to say at this point, that the majority of Muslim civilians then present in the village of Poljani and Kraljeva Sutjeska were arrested and detained at the local school. While the HVO released women, children and the elderly prior to the able-bodied male population, all were subjected to imprisonment and some were subjected to intimidation. All appear to have received adequate food and water. I conclude all had access to toilet facilities although those who testified declined to use them out of fear. Two males were assaulted on their last day of detention, while being forced to perform work for their captors. None of the captives lost their lives. None suffered serious physical injuries. All were eventually released, on June 13, 1993.

[12] The plaintiffs contend the defendant was an active participant in the mistreatment of the Muslim civilian population, that he misled Canadian immigration authorities about his involvement in the HVO, and that he obtained his citizenship through misrepresentation or fraud or by concealing material circumstances, with respect to a fact described in section 35 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] (sometimes referred to as "s. 35 facts"), pursuant to section 10.1(1) of the *Citizenship Act*, RSC 1985, c C-29 [2017 *Citizenship Act*].

II. Positions of the Parties

[13] The plaintiffs seek a declaration revoking the defendant's Canadian citizenship and a declaration that he is inadmissible to Canada. The requests are made pursuant to subsection 10.1(1) and 10.5(1) of the *Citizenship Act*, RSC 1985, c C-29 as they appeared on December 2017 [2017 *Citizenship Act*], that was in force on December 4, 2017, the date of filing and service of the Statement of Claim. The declarations sought read as follows:

> a declaration pursuant to section 10.1(1) of the Citizenship Act, R.S.C. 1985, c. C-29, that the defendant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in section 35 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [the "first declaration"] and
>
> a declaration that the defendant is inadmissible to Canada on grounds of violating human or international rights for committing an act outside Canada that constitutes a crime against humanity or a war crime, pursuant to sections 10.5(1) of the Citizenship Act, R.S.C. 1985, c. C-29 and 35(1)(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27; [the "second declaration"]

[14] On March 9, 2023, this Court, on consent of the parties, granted the plaintiffs' motion to amend the Statement of Claim to add the words "unlawful confinement" to subparagraph 114(a) of the Statement of Claim. The amended paragraph now reads as follows:

> 114. The defendant therefore also directly participated in, and/or voluntarily made a significant and knowing contribution to, the following war crimes:
>
> a) wilful killing of protected persons; unlawful confinement; inhuman treatment; and committing outrages upon personal dignity, in particular humiliating and degrading treatment (which are applicable in an international armed conflict), or

[15] With respect to the first declaration, the plaintiffs say that they need only show that the defendant misrepresented a material fact by concealing his membership in the HVO. In their opinion, if they prove on a balance of probabilities that the defendant concealed his membership in the HVO, he foreclosed further inquiry into whether or not he had committed or was complicit in war crimes and/or crimes against humanity.

[16] With respect to the first declaration, the defendant contends the plaintiffs bear the onus of establishing all three elements required under section 10.1(1) of the 2017 *Citizenship Act*, on a balance of probabilities, namely:

1. They must prove a false representation or fraud or intentional concealment;
2. They must prove the false representation or fraud was material to the issue of a fact set out in s. 35 of the *IRPA*; and,
3. They must prove the alleged fact in s. 35 of the *IRPA*.

[17] If a section 35 fact cannot be proven on a balance of probabilities, then the defendant contends there is no fraud, misrepresentation or concealing of a material fact, and therefore no basis for revocation of his citizenship.

III. Witnesses called and my assessment of their credibility

[18] The plaintiffs called eight witnesses during the five-week trial of this matter. Ms. Donna Marie Capper, a retired Foreign Service Officer, testified about her experiences in processing applications for entry into Canada, arising from the conflict in Bosnia and Herzegovina. Ms. Capper did not process the defendant's application for permanent residency. She did, however, review his landing documents upon arrival in Canada. Until preparing to testify for the trial, she had not seen the defendant's permanent resident applications. She had never interviewed the defendant. While she knew the identity of the person who conducted the interview, Jacques Jodoin, she had no access to his notes or memoranda. She had access to the forms completed by the defendant. She testified that, given the responses made by the defendant on the forms, she would have asked further questions. In particular, the defendant had failed to mention "military service" during the Bosnian conflict, stating rather that he had served in "civil defence" during the war years. Given that the defendant was male and of military service age during the war years, she says she would have asked questions about potential military service. She does not know whether such follow-up questions were asked by the interviewer, Mr. Jodoin.

[19] In summary, I found Ms. Capper to be truthful. She tried to be helpful to the Court. However, her evidence was of little value other than to establish that the defendant appears to have denied any military service during the war years. This observation, however, must be

qualified by his admission that he was involved in “civil defence”. The concept of civil defence is clearly not foreign to those males from the former Yugoslavia where this notion of “all-people’s defense” constituted part of their civic duty. The name HVO is an English acronym for the Croatian Defence Council (emphasis is mine), which further explains why one might describe oneself as being involved in civil defence. Furthermore, as noted earlier, HVO had many organs, including, political, administrative, civic, and defence. While Ms. Capper gave examples of what the expression “civil defence” might mean to her, there is no evidence of what it meant to the interviewer or the defendant interviewee.

[20] In the Immigrant Visa and Record of Landing, completed in November, 1997, the defendant correctly states his name, Božo Jozepović; his birthdate, 05 June 1966; his place of birth, Kakanj; his country of birth, Bosnie-Hercegovine; and, the fact he is a citizen of Bosnie-Hercegovine. Upon entry, he provided a copy of his Bosnian-Herzegovinian passport and stated that he was of Croat ethnicity. He states in that document that his intended work in Canada is as a chauffeur. Each part of that document appears to have been completed correctly. I find there to be no misleading information in his Immigrant Visa and Record of Landing.

[21] In his application for Permanent Residence in Canada, completed in February 1997, the defendant properly sets out his name, birthdate, and last country of permanent residence; namely, Bosnia and Hercegovina. He indicates his place of birth to be Kakanj in Bosnia and Herzegovina. He sets out his address from 1983 to June of 1993 as being in Poljani, in the hamlet of Kraljeva Sutjeska Kakanj. From June of 1993 to the then present he provides an address in Croatia. The form specifically requests information about where he lived since his 18th birthday.

He answers BH (Bosnia and Herzegovina) and Croatia. In a second application for permanent residence completed in June of 1997, he stated that he lived in Poljani, without any mention of Kraljeva Sutjeska, from 1983 to June of 1993. I find that discrepancy to be of no moment, as both hamlets are in Kakanj municipality and near (within several kilometres) of one another. There is no evidence contradicting the statement that he lived in both of those locations since his 18th birthday. However, on that same form, Citizenship and Immigration Canada requests applicants for permanent residence provide their work history for the past 10 years. The defendant reported having worked with "Rudnik Kakanj" from 1982 to June, 1993. He reported that his occupation was "Repairing Machines". This information appears, at best, to be incomplete. As will be evident in the remainder of these reasons, I accept that he was engaged by the HVO. There is no evidence he was a "volunteer". Presuming the defendant worked for "Rudnik Kakanj" when not busy with HVO duties, one would still have expected him to declare his service at the HVO.

[22] As will be seen, Sedika Topalović, testified that the defendant visited her home when he was not on guard duty. She described him as working four days on and four days off. I do not dispute that he may have worked for Rudnik Kakanj on his days off from HVO duties. While one witness, Ibro Husic, testified that the defendant did not attend work after joining the HVO, there is no evidence Mr. Husic knew the defendant's schedule or what arrangements the defendant may have made with any employer while also engaged by the HVO.

[23] In his Application for Permanent Residence in Canada, the defendant was also required to describe the circumstances under which he became a refugee. He accurately states that in June of

1993, “hostilities between Croats and Muslims started in Kakanj”. He also says that on June 13, 1993 that he went to work “near Kakanj”. He says that on that date, the Muslim Army “started shelling all Croatian villages around the town and entering the villages as all the rest of Croats (sic) who were either living in those villages or working there. I started retrieving (sic) towards Vareš and I could not (sic) Kakanj any more”.

[24] Finally, the Application for Permanent Residence in Canada required the defendant to answer several questions about his militia, army or defence unit service. The first title on the first page of that document reads:

> **THIS MUST BE COMPLETED BY ALL MEN BETWEEN THE AGES OF 18 AND 65 YEARS**
>
> **1. DID YOU SERVE IN ANY MILITIA OR ARMY OR DEFENCE UNIT SINCE 1991? IF YES, COMPLETE ALL OF HE QUESTIONS/IF NO, SEE OTHER SIDE:**

[25] Unlike the remaining portions of the first page of that part of the questionnaire, there are no lines demonstrating where to place the answer. If one’s response is “yes” then that appears to be understood, by answering questions 2 to 13. If one’s response is “no”, then that appears to be understood by completing the form on the reverse side of the paper. The reverse side of the paper, complete with answers in space provided for that purpose, reads as follows:

> **TO BE COMPLETED BY ALL MEN BETWEEN THE AGES OF 18 AND 65 YEARS WHO CLAIM THEY DID NOT SERVE IN ANY MILITARY, MILITIA OR DEFENCE UNIT SINCE 1991.**
>
> **YOU CLAIM THAT YOU DID NOT SERVE IN ANY MILITARY, MILITIA OR DEFENCE UNIT SINCE 1991 THEREFORE PLEASE ANSWER THE FOLLOWING QUESTIONS:**

1. WHY DID YOU NOT HAVE TO SERVE MILITARILY DURING THE WAR?

I was driver in civil defence

2. IF YOU DID CIVIL DEFENCE/COMMUNITY DUTIES PLEASE DESCRIBE WHAT YOU DID, WHERE AND WHEN:

I was driver for humanity help

3. IF YOU RETURN TO YOUR HOME COUMMUNITY, WHERE YOU LIVED BEFORE THE WAR WHICH BEGAN IN 1991/1992, WOULD THERE BE ANY CHARGES AGAINST YOU BECAUSE YOU DID NOT SERVE IN ANY MILITARY:

I can non (sic) return because I am Croatian and my house is destroyed.

4. DID YOU REFUSE TO SERVE MILITARILY DURING THE WAR WHICH BEGAN IN 1991/1992, AND IF SO WERE YOU PENALIZED FOR THIS:

No, I do not refuse to serve militarily. I was not asked becose (sic) I was in civil defence.

PLEASE SIGN THE DECLARATION ON THE OTHER SIDE OF THIS PAGE.

[26] That declaration, which the defendant signed reads as follows:

I (YOUR FULL NAME) Božo Jozepović DECLARE THAT ALL OF THE ABOVE STATEMENT ARE TRUE, COMPLETE, AND CORRECT AND I MAKE THIS STATEMENT KNOWING THAT IT IS THE SAME AS APPEARING IN A COURT OF LAW.

Božo Jozepović

13/06/97

[27] By going directly from Question 1 on the first page to the reverse side of the page, all applicants were able to avoid such questions as whether they ever witnessed ill treatment of prisoners or civilians. Why such a question was not included on the reverse side, whether one was part of an army or not, escapes me.

[28] In the application for permanent residence completed by the defendant in June of 1997, he responded “not at all” to the question about his proficiency at speaking, reading and writing in English or French. In his application completed in February of 1997 he responded “with difficulty” to each of those categories in English and “not at all” to those categories in the French language.

[29] The second witness to testify was Dr. William Tomljanovich, an expert witness on the history of the conflict in Bosnia and Herzegovina from 1991 to 1995. I have used much of Dr. Tomljanovich’s report to outline the facts set out above. I found Dr. Tomljanovich testified in a straightforward manner, was trying his best to assist the court and appeared to be very knowledgeable about the subject matter. That said, I find much of his opinion evidence-related to matters for which first-hand direct (non-opinion) evidence should have been available. The Croatian, Slovenian and Bosnian and Herzegovinian wars of independence are very recent historical phenomena. Witnesses familiar with many of the events for which Dr. Tomljanovich could only provide an opinion, should have been available with minimal investigative effort. I am somewhat surprised that the plaintiffs would rely almost exclusively upon opinion evidence in relation to such matters as the organization of the ABiH, the HVO and the VRS when non-opinion evidence was no doubt readily available. Dr. Tomljanovich provided his opinion about

many battles, negotiations, and events surrounding the conflict, about which first-hand direct witnesses should also have been readily available. Those witnesses could have been subjected to cross-examination in order for the court to have a first person account of events as they unfolded.

[30] Dr. Tomljanovich's report is lengthy and highly detailed. His background is exclusively in the investigation and prosecution of alleged human rights' abusers. He has never worked for the defense, nor has he ever written a report favourable to an accused person. He brings to his work a prosecutorial bias, which is evident in the manner in which he testified.

[31] In addition to his prosecutorial bias, Dr. Tomljanovich's report demonstrates a bias in favour of the ABiH. For example, at paragraph 165, he describes how ABiH and HVO commanders met on April 21, 1993 for purposes of exchanging lists of attacks, which the other had perpetrated. However, his descriptions of the attacks are largely, although not exclusively, related to HVO attacks on ABiH. Also, when speaking about HVO attacks on ABiH populations he, on occasion, uses the word "massacre". When speaking about similar actions by the ABiH he uses the word "killings". He refers to the ABiH as having detained or arrested HVO members. However, when the HVO arrested ABiH members, Dr. Tomljanavich says they were "abducted". I consider the use of the word "massacre" to be more inflammatory that the use of the word "killing". Similarly, the word "abduction" or "abducted", is more inflammatory than the word "arrested".

[32] At paragraph 44 of his report under the title "The Creation of the Armies in Bosnia and Herzegovina and the Outbreak of War" Dr. Tomljanovich referred to the long-standing policy of

"all-people's defense" and explains how this concept blurred the traditional boundaries between soldiers and civilians. His report, at paragraph 95 reports how the term HVO was "thrown around in a very confusing fashion and could refer to the armed forces as well as municipal governments". This observation provided the introduction, to yet another organ of the HVO; namely, the central cabinet consisting of a president, vice-presidents, and six department heads.

[33] Given all of the above, I find Dr. Tomljanovich's opinion evidence useful to establish historical perspective, geographical locations and military organization. Because I find his evidence biased in favour of the plaintiffs, I have made a conscious attempt not to let that bias influence my assessment of the case against this low level, member of the HVO, who claimed to be a driver for "civil defence". Dr. Tomljanovich's knowledge of what Presidents, Generals and other would-be leaders in the post-Yugoslav world might or might not have thought, about which he testified at length has very little influence on the knowledge I am prepared to attribute to the defendant.

[34] The third witness to testify was Mr. Ibro Husic. He is a Bosnian Muslim who was detained from June 9 to June 13, 1993 at the elementary school in Poljani, a village in the municipality of Kakanj. Mr. Husic's testimony was helpful in demonstrating how he was detained and taken to the school. It is also helpful in demonstrating the good relations between the Croatians (Catholics) and the Bosniaks (Muslims) in the village of Poljani until the events of June, 1993. He testified that he grew up in Poljani and currently resides there. He testified that he knew the defendant his whole life and that they worked in the local mine together. He testified that the defendant, a Croat, was the best man at the wedding of Smajo Topalović, a Muslim. He

testified that prior to the events of June 1993 Croats and Muslims in their community got along well. Mr. Husic's testimony as to relations before the war was as follows:

> Q. Now, I'm going to ask you if you could explain for us or describe for us what life was like between the Croat and the Muslim population before the war started.
>
> A. The life before the war was 10 out of 10. It was a good life. Nobody looked at others through the angle of nationality, ethnicity. We worked together. We visited each other's (sic). And it went like that until the beginning of the conflicts.
>
> Q. When did things – when did you notice that things began to change, that the relations between the Croats and Muslims began to change in Poljani?
>
> A. It was not only in Poljani, throughout the municipality of Kakanj things started to change when the so-called HVO started to be established. They joined their army, they joined our army, and I could se that it will not lead us anywhere good. And in the end I proved right because the conflict started, the conflict broke out. But before that we were together and we even tied together our flags, I mean, HVO and army.

[35] Mr. Husic acknowledged that early in the war he joined the ABiH and that ABiH soldiers would see HVO soldiers and that there was no exchange between them. I interpret his reference to "no exchange" as meaning that in the early stages of the troubles in the former Yugoslavia there was no exchange of gunfire or hostilities between the two groups. The ABiH was the official army of Bosnia and Herzegovina, it was engaged to protect the Bosniak or Muslim population, and presumably, all populations in the country. That said, the HVO clearly evolved into the principal protector of the Croat or Catholic population. Regardless, they were both protecting groups from the VRS (Serbs) and, at least at the early stages, both armies had members of the other ethnic group within their ranks.

[36] Mr. Husic described that in the village of Poljani, there were about 315 households, 300 of which were Croatian and 15 of which were Muslim. Mr. Husic testified that the HVO, shortly after its formation, set up a barracks in the former elementary school in Poljani. I note here that while Kakanj municipality is a large municipality composed of many villages and hamlets, the main village of Kakanj also bears the name of Kakanj and is approximately 13 kilometres from Poljani. The defendant lived in the hamlet of Kovačići, while Mr. Husic lived in the hamlet of Sepercp. Both hamlets would be considered part of the village of Poljani.

[37] Mr. Husic described how, on June 8, 1993, he moved his elderly parents, his wife and their two children to Kakanj, fearing that war would come to his community. He, however, was told he would need a permit from the Commander before he could leave, he being male and of military age. He never did receive such a permit. He blames the defendant for this failure, stating that he asked the defendant to speak to the Commander. Mr. Husic says the defendant feigned asking the Commander and then advised him (Mr. Husic) that the Commander had refused. I find the blame he places on the defendant conjecture. I accept his evidence that his spouse and children were able to leave on June 8. I also accept his evidence regarding the good relations among Bosniaks and Croats, where he and the defendant lived, and the fact that HVO and ABiH tied their flags together early on in the newly created Bosnia and Herzegovina.

[38] On June 9, 1993, Mr. Husic began his journey out of Polanji. He was accompanied by Smajo Topalović and Alija Topalović, both Muslim males, the former being the gentleman for whom the defendant was the best man. After traveling through several villages and being stopped at HVO checkpoints, the three men, Mr. Husic, Smajo Topalović and Alija Topalović

were eventually arrested, blindfolded and returned to Poljani, where they were placed in the elementary school basement.

[39] Mr. Husic testified that essentially the whole Muslim population of the village of Polanji was to be found in the basement. That included, according to him, women, children, the elderly and able-bodied men. His contention that the whole of the population was in the basement is obviously incorrect given his earlier testimony that he had moved his family out of the village on June 8. When asked to identify the children in the basement, he could name only two, they being a young boy Mirza Topalović and a young female Zuhra Topalović (now Sabanović). While Ms. Sabanović testified to being 15 at the time of her detention, Mr. Husic said she could not have been more than ten. The women and children were allowed to leave to get bedding and warm clothing. However, in doing so, they were accompanied by HVO soldiers. He described the basement as being cold and damp, with only a light into the entryway. He said there were toilets in the basement but they had no doors on them. The entry into the basement constituted a doorframe without the door installed. He says a door from a classroom leaned against the frame. He described that at one point someone threw rags on fire into the basement. The rags were quickly extinguished, by the guards and removed. It is unclear whether the rags were thrown into the basement by soldiers or civilians.

[40] At the end of the first day of captivity, according to Mr. Husic, the elderly, the women and the children were allowed to leave. However, he testified that 17 able-bodied men were required to remain. Alija Topalović, whose testimony is discussed later in these reasons, testified there were ten to twenty people remaining in the basement after the women, children and elderly

had left. According to Mr. Husic, four women returned to the basement on the last day of captivity, they being: Kadira Mehak, Sedika Topalović, Bahirja Topalović and Zuhra Topalović. Zuhra Topalović (now Sabanović) testified she did not return to the basement. I reject Mr. Husic's evidence as to the precise number of people who were detained. Given the time that has passed and his errors regarding Ms. Sabanović's age as well as his mistake about her having returned to the school basement, I prefer the testimony of Mr. Alija Topalović that ten to twenty males remained after the women, children and the elderly were permitted to leave.

[41] Mr. Husic said the guards brought food every second day and that they were held there until the 13th of June. Mr. Husic described seeing the defendant in the basement on four occasions, one of which he was wearing a "sock" on his head. Mr. Alija Topalović, testified that the defendant came to the door of the basement on only one occasion. Mr. Topalović was present in the basement the whole time Mr. Husic was present. I reject Mr. Husic's testimony about the number of times the defendant entered the basement. I also reject his testimony that on one occasion the defendant entered wearing a "sock" over his head. The one time the defendant entered, according to Mr. Topalović, he was not wearing anything on his head.

[42] In general, I found Mr. Husic's testimony to be exaggerated. He often attributed motives to his captors for which there was no evidence. He often stated what he presumed they would do, without any basis for such statements. He often resorted to hearsay evidence despite several suggestions by the Court and counsel to avoid the same. He demonstrated animosity toward the defendant, on one occasion calling him a "war criminal". To the extent his evidence differs from that of Alija Topalović, I accept Mr. Topalović's. I conclude that following the release of

women, children and the elderly after the first day of captivity, ten to twenty people remained in custody. I reject Mr. Husic's precision of 17 men and four (4) women, which included Zuhra Sabanović (née Topalović). I accept that some women were returned to custody but do not accept that Zuhra Sabanović (née Topalović) was one of them. AS noted earlier, I reject Mr. Husic's evidence the defendant entered the basement on four occasions. I also reject Mr. Husic's testimony he saw the defendant in the basement with a "sock" on his head. I reach this latter conclusion, not only for reasons stated above; but also because of the vastly differing descriptions given of the defendant by Mr. Husic during an interview with the Royal Canadian Mounted Police [RCMP] in 2008 and that given at trial.

[43] Before concluding my analysis of Mr. Husic's testimony, I note that he testified to having been called upon to serve with the ABiH and having gone absent without leave on several occasions. On each occasion, he served time in prison and was then released. He says he eventually convinced Bosnian and Hercegovinian authorities to exempt him from military service because his brother was also serving. He testified to having a bus pass available to military personnel for purposes of moving about the territory. He says he destroyed it while under arrest on June 9, 1993. He also testified that on June 9, 1993 during his travels from Poljani, that if he believed the Mujahidin had been in the area, he would have joined them.

[44] The fourth witness, Ms. Sedika Topalović, is a Muslim female who was also detained in the school in Poljani. Sedika (I use the first name, not out of any disrespect, but only to distinguish her from another witness, Hasija Topalović) is the mother of Smajo Topalović and

clearly considers herself somewhat of a friend to the defendant. After plaintiff's counsel asked Sedika what life was like before the war, she responded as follows:

> It was beautiful. We were all having a good life and we were visiting each other. We would visit the crowds for Christmas, and crowds would come to visit us during Eid. We were friends and we were a close community.
>
> Q. And you said Eid. Is that a Muslim religious holiday?
>
> A. Yes. After Ramadan when you finish fasting, the Eid comes. And then two months after, there is another Eid where you slaughter an animal, and then, you give the meat to the poor.
>
> Q. Friends? Yourself?
>
> A. Yes. Yes, we did. We had coffees together. Our women used to work together. We visited each other. Yes.
>
> Q. Your children. Did your children have any co-ed friends?
>
> A. Yes. The children would call Smajo and Samir and all the other children to play with marbles and to play other games and they never fought.
>
> They would also call our girls to play, but we did not allow the girls to go there and play with them because they were girls.
>
> Q. At some point I guess that changes, right? Can you tell us about how that changes?
>
> A. When the war broke out, everything changed. And then again, still we get along with the former neighbours when we see them.
>
> …
>
> Q. So can you – when we go back to when things were bad during the war, can you just give some examples of how things changed?
>
> A. The military came from other villages into the school and the neighbours in our village said that we are going to – we are not going to participate in this war. But once they came, they captured us and they had us in the school basement for seven days.
>
> …

Q. Okay. Now, I'm going to ask you – earlier you mentioned Smajo's best man, I think.

A. Boshko (ph.) was his best man, wedding best man. And Boshko and his wife they were good friends. And they too and their wives would hang out together, go to the parties together. Smajo's wife and Bozho's wife and them too. And their house was close to the river at the end of the village. Kovacici is the name of that settlement.

Q. Your referred to two different names, Bozho and Boshko. Does that – do those names refer to the same person?

A. It's the same person but he had two names. I mean, one name and a nickname. Someone would call him Bozho, or Bozyca, and his father was also called Bosho. He also had brothers and I don't recall their names.

Q. Okay.

A. It was 30 years ago. I mean, you forget so much.

Q. Now do you remember if this person, Bozho, had any other nicknames or any other names, sorry? De he have any other names that you knew of, or any nickname?

A. No, but Bozyca and Bozho.

…

Q. Okay. Then so you said that this was Smajo's best man?

A. Yes. They were so close. Bozyca would come four days in a row in our house and Smajo would say to his wife, "Bring out the brandy and bring out the food". And he would sit there and sit and eat and drink with us.

And Bozyca said, "Smajo, where are your tr[e]nches?"

And Smajo said, "There are not trenches of ours. I was only with my mother" Ibro (Husic) and Alia (Topalovic) and Smajo jumped from the cherry tree and fled. And they saw that the Croatian army were digging the trenches.

Q. Thank you for that.

A. They put it in the school during the night and one from Shepad came and picked the eyes of this guy. I was so shocked.

Q. Thank you. I'm going to take you back now to this person Bozho. Did your son Smajo -- did Smajo have other best men besides Bozho?

A. Only Bozho. Only Bozho, no one else. I mean he had other friends but the only best man was Bozho. What would you do with ten best men? That's right.

…

Q. Do you know where Bozho worked?

A. Haljinjici with Smayo in the pit. Haljinjici. They all worked in the mine, both young and old. Only those who went abroad to Germany – otherwise everyone who stayed in Poljani, they worked in the mine pit. And there was a bus taking them to the workplace.

…

Q. So I guess that's my question then next question to you, Ms. Topalovic, is which army's uniform did you see him wearing?

…

A. Croatian Army. It's not Muslim army for sure. I mean, there were no Serbs there, only Croat army.

Q. What was Bozho's ethnicity?

A. He was Croat. Croat. There were only Croats in Poljani except us.

…

Q. Now, so these times when Bozho came over, did he ever come over after the military was in the school?

A. Yes, every morning he would come when it was his shift. Se he would be four days in school and four days at home. So every morning when it was school he would come to our house for a coffee, for some breakfast. And Medina was the name of Smajo's wife. He would tell her – offer him some meat. We had a cow and also a litre of brandy.

And then after 12:00 he would go to the school and this repeated every morning. Sometimes he too would bring brandy. He was the one drinking. Smajo did not drink alcohol.

Q. When he came over on these occasions, how was he dressed?

A. Military, when going on guard duty.

He bought a small camouflage suit for our grandson, my grandson Damir, and his son as well.

Q. So you said – you mean, he brought a camouflage uniform for your grandson?

A. Yes. Later on everyone was wearing it, and still they wear it today such type of clothes.

…

Q. Do you recall what was happening in and around your village in early June, 1993.

A. Nothing. We fled. We did not know anything after school. We fled. Two or three houses were torched. They took everything. We were not in our houses.

…

[45] I need not quote any more from Sedika's testimony. It is clear that her memory has faded over time as it relates to the exact chronology of the events. While I find that the chronology is not entirely accurate, I have no hesitation in concluding that the defendant is the person who visited her regularly up until the war came to Poljani; that is, until June 9, 1993. I have no hesitation in concluding that the defendant fired a round into the ground on June 9, 1993 to cause her and those accompanying her to turn from their intended journey to Kakanj and return to Poljani where she and others were placed in the school basement. A few other witnesses testified to a different number of rounds fired from the defendant; the exact number of rounds fired by the defendant is irrelevant, as the fact that there was gunfire is sufficient to prove that they were indeed returned to the school basement by force. I accept her evidence that when she, and the others, were stopped by the defendant, he searched her and found 2,000 German marks, which he

returned to her and advised her to keep. He also found coffee and two rocks in her bag, which he threw to the ground. I also accept that the defendant instructed her not to look into a truck into which she saw two males being placed, along with other males who were already in the vehicle. I accept her evidence that the defendant did not order the two males into the truck and that she distinguishes the defendant from the "soldiers" who made that order. She stated: "The others were sitting in the van already, and they forced two others in the van, the soldiers, not Božo or the other one, the soldiers who were there around". I accept her evidence that she saw men bloodied and beaten inside the van. I do not accept her evidence that one "Shepad" had carried out any assault. She did not testify that she was present when people were injured. When speaking about "Shepad" she appears to be referring to something she had heard from someone else. I accept her evidence the defendant did not force anyone into the van.

[46] I accept Sedika's evidence that, while in captivity, she wet herself rather than attempt to go to one of the toilets. I accept her evidence that the men in the basement urinated in the sink, and the women turned their heads to give them privacy. I accept her evidence that the guard, Lambi, assured her and others detained, that they would not be harmed. I accept her evidence that although some soldiers threatened the detainees with violence or death, that other soldiers attended and assured them they would not be killed. I accept her evidence that she did not see the defendant in the basement of the school. However, given that she was not in the basement at all times, having been provided the opportunity to go to her home to get blankets and having been released at one point, I do not find this evidence contradicts that of Mr. Alija Topalović, who said that the defendant came to the door of the basement on one occasion. I also accept Sedika's evidence that when the women were allowed to get blankets on the first night at the school, that

one of the women also made meat pies. Meat pies, bread and water were delivered to the male captors on two occasions. This was in addition to the food supplied by the HVO, which, according to Mr. Husic, was delivered by the HVO soldiers every second day.

[47] According to Sedika, the length of detention varied from seven days to 20 days. I reject that testimony. I am satisfied the detention for the able-bodies males was from June 9 to June 13, 1993, namely a minimum four days or a maximum of five days depending upon how one counts the days. The period of detention for the females who were returned to the basement, which clearly included Sedika, is unclear. Mr. Husic says it was the last day of captivity and Sedika says it was for three or four days. For my purposes, I need not decide that issue.

[48] I accept Sedika's evidence that her son, Smajo was attacked by one "Skaelo" on the last day of detention while Smajo was stacking boxes of ammunition for his captors. I also accept her evidence that the HVO soldiers permitted a medical doctor to attend to Smajo's wounds.

[49] Finally, I note that Sedika described the defendant as a "nice" man. He was her son, Smajo's best man at his wedding. She closed her testimony with the following exchange with the Court:

> JUSTICE BELL: Thank you Ms. Topalovic, that concludes your testimony. We thank you for coming. We thank you for sharing what you saw and experienced during that time period. And we wish you all the best. Thank you.
>
> MS. TOPALOVIC: Thank you too. Again, I'm sorry for Bozo and for you taking his citizenship. He was not that bad because there were other people who were worse than him.

[50] Mr. Alija Topalović, a Bosnian Muslim male from Poljani also testified. He accompanied Mr. Husic as they tried to escape to ABiH controlled territory on June 9, 1993. His description of their arrest and initial detention does not differ in any material respects from that offered by Mr. Husic.

[51] Like Mr. Husic and Sedika, Mr. Topalović testified that in Poljani there were about 300 households, of which 16 were Muslim. He described the village of Poljani as "one of the most beautiful villages in Kakanj" prior to the war. He said they lived "very nicely". He described the chapel, the Muslim religious school and the fact that Catholics and Muslims attended one another's weddings and were often best men for one another. He described Poljani as a community in which "we were looking after each other".

[52] In speaking about the HVO, Mr. Topalović described that it was predominantly Croat, but there were also some "Bosnians who were members of the HVO". In response to questioning by plaintiffs' counsel, Mr. Topalović testified that they [the HVO] started to organize themselves "immediately during the war". In the early days of the conflict in Bosnia and Herzegovina, he described the relationship between Muslims and Croats in Poljani as follows:

> We were together with them. We organized – joined (sic) guards (I understood him to say "joint" guards) and they had groups in Poljani and were also involved in the guards at their check points in Poljani. I think it was in 1991 when they started organizing themselves. But that was – everything was planned within the Army of Bosnia and Herzegovina. We were together because there was one aggressor who attacked both Croats and Muslims, and they were the Serbs.

[53] In response to plaintiffs' counsel's question, "Did you join one of these armies yourself?" Mr. Topalović responded: "We had village guards … We had some guns and we were holding guards together with the Croats, who were better armed. So we had a checkpoint at the entrance to Poljani."

[54] When questioned about the barracks in Poljani, Mr. Topalović stated that all the neighbours, but for the elderly and the younger ones joined the HVO barracks in Poljani. In response to plaintiffs' counsel's question about whether he recalled any "incidents with the HVO in the month or two leading up to the events of June 1993?", Mr. Topalović responded:

> There was a village Krasici with a few houses of Bosnian Muslims. That's a village on the boundary between Vares and Kakanj. And that was the village from which they expelled Bosnia (sic) first before the outbreak of the conflict between the Bosnians and Croats.
>
> And then there were situations when they did not allow us to go to the shop to buy flour or so, or move around. They had checkpoints. And they told us that we should surrender our hunting guns. And we had to move to the neighbouring village with the majority Muslim population. And then we would come back to our village just to do some farming, because we didn't have anything else to eat. But we had our houses in Poljani and we did come on several occasions there.

[55] I note this last excerpt is consistent with Mr. Husic's testimony about having taken his family to a neighbouring hamlet on June 8, 1993, and returning, by himself, to Poljani, to cut hay and generally maintain his property.

[56] Based upon Mr. Topalović's testimony, I conclude he awakened on June 9, 1993 to the sound of shooting in the neighbouring village of Lucici. In his words, he realized the situation

was not “good”. He and his family started to walk toward Lucici, which is his mother’s birth village. Authorities told them they should return to Poljani, which they did. After some discussion at the family table, the women left and passed through a checkpoint. He remained with his father, who was shaving. That would be the last time he saw his father alive. He then believed that the HVO was about to deploy to attack. During shooting and shouting, he ran through a field and arrived at a wood. Mr. Topalović saw Mr. Husic and Smajo Topalović. The three then decided to walk together. Mr. Topalović’s story of their capture, detention, delivery to the HVO military police and eventual detention at the school is very similar to Mr. Husic’s version of events.

[57] He described how women, children and the elderly were released on the second day of captivity. Some of the women returned with food for the men. He also testified that a Croat woman brought them food. He testified that ten to twenty men remained. In this regard, as already noted, I accept his evidence over the precision offered by Mr. Husic.

[58] Just as Mr. Husic described the UNPROFOR presence in the area, so did Mr. Topalović. However, Mr. Topalović testified that “UNPROFOR realized that the civilians were detained in the basement. They could see them from this car”. He described holding his now-deceased younger brother, Mirzo up to the window so he could see other children playing, as well as the UNPROFOR vehicle. I note here that Mirzo did not die as a result of the conflict in Bosnia-Herzegovina. In re-direct, Mr. Topalović said the UNPROFOR troops did not see them. Later in these reasons, I observe that Zuhra Sabanović (née Topalović) testified that the UNPROFOR members saw them in the basement. I accept her evidence in this regard. I also accept Mr.

Topalović's direct evidence that UNPROFOR officers were aware that people were detained in the basement. I reject Mr. Topalović's re-direct evidence that UNPROFOR soldiers did not see them.

[59] Mr. Topalović testified that the defendant only came down to the basement on one occasion. I have already indicated I accept that evidence over that offered by Mr. Husic. During the one time that the defendant entered the basement, he said "Allah Akbar" meaning "God is great" and he said to Smajo "We are not your wedding witness or our best man anymore." Mr. Topalović also testified that the defendant cursed Smajo's mother. Given the close relationship between the defendant and Sedika, I can only conclude that Mr. Topalović must have been mistaken about whom the defendant was cursing. Mr. Topalović described feeling miserable about the defendant's conduct because he had only recently been having coffee and "hanging around" with him.

[60] Mr. Topalović also testified that on the last day of captivity he and two others, one of whom was Smajo Topalović, were required to unload ammunition and that they suffered physical abuse in the process. Smajo was hit on the back of the neck with a knife. He also testified that some soldiers called for the killing of the civilians and the rape of the women. There is no evidence the defendant was among those calling for the killing of civilians and rape. There is no evidence the defendant participated in the assault of those unloading the ammunition boxes; nor, was there any evidence he was aware prisoners were required to do work.

[61] Mr. Topalović credits his survival and the survival of the other detainees, to their guard, a Croat neighbour, Susnja Lambi. He said:

> But we had a very good guard. He didn't allow them to enter the basement. He said, "You can enter the basement only over my dead body". And that's how we survived.

[62] Mr. Topalović described threats and intimidation from some HVO soldiers, while others assured them they would all "leave this place alive".

[63] Hasija Topalović is the mother of Alija, Mirza and Zuhra Sabanović (née Topalović). Hasija (again, I mean no disrespect by calling her by her first name. I only wish to distinguish her from Sedika Topalović) described life in Poljani before the war. Her description is much the same as the previous witnesses. When asked about when things changed in Poljani between the Croats and the Muslims she replied "in a matter of 10 days…" She also described the events of June 9, 1993. She recounted how her husband was shaving that morning. She talked about it being a nice summer day and that many people were gathered around the school. Importantly, she described many people foreign to her, Croats, passing by her house on the way to Vareš. When asked whether any of her neighbours were there, her reply was "I did not see our people there. Those that I saw were foreign to us". I note here that Dr. Tomljanovich reports that as many as 24,000 Croats were displaced in Kakanj in early June, 1993, and 12,000 to 15,000 were making their way to Croat majority, Vareš, from Muslim majority Kakanj. I also note that Poljani was one of a number of villages on the route that those Croats would have to take to get to Vareš.

[64] Hasija described how she was leaving Poljani with Sedika, two (2) other women and two (2) of her children, 9 year-old Mirza and 15 year-old Zuhra. She described hearing three (3) shots to make them stop. This compares to the one shot described by Sedika. For my purposes it makes no difference whether one shot was fired or three. The fact remains that HVO personnel prevented them from passing, turned them around and led them by force to the school basement. I am satisfied Hasija knew the defendant through her relationship with Sedika. She also knew that the defendant had been the best man at Smajo's wedding.

[65] As with Sedika, I find Hasija's recollection of the chronology of events to be weak. That said, I am satisfied that she was apprehended by, among others, the defendant, that the defendant fired at least one round of ammunition during their apprehension, that she was taken to the school basement along with her children and on the way she saw two men placed into a van. She also described how she held Mirza up to the window, hoping that UNPROFOR peacekeepers would see him. She also described how a man who had eaten cherries with her husband the day before placed a covering over the windows, which would prevent people from seeing inside, or those inside from looking out. She says food was available but she did not eat. She also described how, on the very first day, for personal sanitary reasons she had to return to her home to get a change of clothes. During this visit to her home she was accompanied by an HVO officer and later returned to the school. When she returned to her home, Croats, foreign to her, were in her home. She also described having been released at one point during which time she took food, prepared by others, and water, back to the school for the men who remained there.

[66] She testified about her fears for her son Mirza and her daughter, Zuhra. In particular, she feared her daughter would be raped. On occasion, she heard people say to bring the daughter out. She pled with them not to do so. Her version of the last day in captivity is consistent with the others who testified. She described how Smajo and two others were ordered to help load ammunition, how Smajo was injured by a knife (it is unclear whether it was the blade or the handle, but that is immaterial). She also described how one man Cokara, came to the basement. Although she accused him of planning to kill them all, he assured her she would be "going home soon".

[67] At the close of her testimony, the following exchange occurred between Hasija and the Court:

> JUSTICE BELL: … At one point before you were taken to the school, I understood you to say you saw a large number of people walking by your house. Was I mistaken or was I correct in understanding that?
>
> THE WITNESS: Yes, people, were moving – children, women, uphill, downhill. And then the women from our village gathered around and left and then Boska [the defendant] caught us and he fired. And he brought us to Prihode and there were women dancing there and they were yelling and shouting and saying this – this woman was saying "Why don't you kill them all like cattle."
>
> JUSTICE BELL: Now ---
>
> THE WITNESS: I don't remember her name. I forgot.
>
> JUSTICE BELL: So then you saw those all (sic) people moving about that you just described – I'm talking about before Boska took you before you left your house. The people you saw moving along the road, we[re] those Bosniak people or Croat people, or both?
>
> THE WITNESS: Not too many Bosniaks. What – we were in the school, kept in the school. These were Croats who came from Kakanj, from Kraljeva Sutjeska.

> JUSTICE BELL: Thank you, Madam. Anything arising from that, Mr. Poulton?
>
> MR. POULTON: No.
>
> JUSTICE BELL: Anything arising from that, Mr. Gaudet?
>
> MR. GAUDET: Perhaps one question, you Honour, that arises from that, if I may. So when you were describing the people who you found in your house, now, were they Croats or Muslims?
>
> THE WITNESS: Croats. Croats. They broke the door and they fixed it later. There were lots of people there – women, children – and they asked me what I was doing there and I didn't want to remain silent. I said, "This is my house. Here, you have the cow. It will give birth soon." And then I took some clothes and I left the house.

[68] Hasija does not recall seeing the defendant in the basement on any occasion. The only soldier she spoke about being in the basement was "Cokara". She did not testify that the defendant was present when people suggested her daughter be taken outside, nor did she testify he was present when Smajo, and others, were forced to load ammunition. She did not testify that he made any threats to kill her or others. Her only involvement with the defendant was when he apprehended her as she was leaving Poljani, and forced her and the others, to return to Poljani, where they were placed in the school basement. During her return to the school she testified that the defendant placed two people into a van and put a stocking over his head. I reject her testimony that the defendant forced anyone into the van. In this regard, I accept the testimony of Sedika. I also reject her testimony that the defendant put a "sock" over his head. I am concerned that her evidence in that regard is contaminated by discussions she may have had with her son, Alija Topalović or Mr. Husic, both of whom spoke about people with "socks" over their head during their escape from Poljani on June 9. In cross-examination she acknowledged she had had

discussions with other witnesses about those events over the ensuing months and years. Those conversations may be confusing the witness.

[69] Zuhra Sabanović (née Topalović) is the daughter of Hasija. She was accompanying her mother en route to Kakanj on June 9, 1993, when she, along with her younger brother, Mirza, and two other Muslim women, were apprehended, by the defendant, and one other person. She was a young lady of 15 at the time. She describes that day of June 9, 1993 as starting with shells flying overhead:

> On that day, my mother and I were in our yard when we saw shells or some – or whatever it was, flying over. We went immediately to see my late father and told him that we should leave. However, he told us that we should leave and save ourselves. However, he didn't want to come along, and he started shaving. My mother grabbed me by the hand, and my small brother, Mirza. So we set off first in the direction of Lucici.

[70] She, her brother and her mother never did arrive at Lucici. Having been warned by neighbours that there was fighting in the area of Lucici, they set off in the direction of Kraljeva Sutjeska, another village in Kakanj municipality, about three kilometers from Poljani. While en route to Kraljeva Sutjeska, they were stopped by the defendant and, according to Ms. Sabanović, one other male. This contrasts with Hasija's testimony who said there were three males. Regardless, I accept the evidence that the defendant was one of the persons who stopped this group of women and children. I also accept Ms. Sabanović's testimony that the defendant was traveling in a yellow Stojadin car, which was a private civilian vehicle. I accept her evidence that a young man by the name of Kupus was the operator of the civilian vehicle, I accept that she could identify him and the vehicle because she had, on occasion, been in the car when Kupus drove her and her friends to their village from school.

[71] Ms. Sabanović testified that on the way back to Poljani, they saw a van stopped along the side of the road. She said:

> There were some neighbours, civilians, standing there, mostly women, and there was a huge celebration there. And I remember well, Ms. Pavanica (ph), she was dancing and signing and she was saying "kill the Balijas" and she was so overjoyed that they caught us.
>
> And there was a van standing there and they were happy about what they had seen. My father was in that van. The asked us – told us to bow our heads. However, I raised my head and looked at my father. He was holding his arms above his head. He was bloody. And my mother tried to look at him. I don't know if she did see him. They hit her with a rifle because we were directed not to look aside.

[72] Ms. Sabanović testified that the defendant placed two other males in the van and remained at the van, while other soldiers accompanied her group to the school basement. She stated that the defendant did not accompany them to the school, nor did he place them in the basement. She did not testify that the defendant was wearing a "sock" or balaclava over his head. I reject her evidence that she saw the defendant place anyone in the van. As I indicated before, I accept Sedika's evidence in this regard. I fear Ms. Sabanović's testimony is tainted by discussions she had with her mother, the fact her father was killed and the fact that she showed animosity toward the defendant during trial, as discussed below.

[73] Ms. Sabanović testified that the defendant hit her mother with his rifle, when they were at the van because she looked up. I reject that testimony. Her mother testified. Her mother made no mention of being struck by the defendant with a rifle. Her mother was specifically asked if anyone pushed her on the road to the school. Her answer was spontaneous – Pero Coric "would push us against our back". Another factor, which motivates me in disbelieving Ms. Sabonavic on

this point and the reference to him hiding his face with a “sock” is the animosity shown by her toward the defendant. She called him by the nickname “Kujica”, which according to her is a “person who often changes his mind and does very bad things. He did all the bad things a person can do. So that’s an ugly nickname.” Later in her testimony, she said of the defendant: “The majority of the villagers from Poljani knew him because he always made major problems, and his nickname tells you everything about him”. She also accused him of murdering her father by cutting him up. There is no evidence the defendant was involved in or had knowledge of any murders.

[74] Ms. Sabanović stated that the defendant and others used derogatory names toward them such as cursing their “Balijas mother”, Turkinje and Balinke. I reject this testimony as it relates to the defendant. Her mother, Hasija, had every opportunity to describe such insults and credited none to the defendant. I accept that passersby yelled such words at them – sadly mostly women, according to Hasija. I also accept Ms. Sabanović’s testimony that some women expressed glee they were captured and, sadly, expressed the view they should be killed.

[75] When asked if she saw the defendant fire his weapon, Ms. Sabanović initially said “Yes, they were shooting at us”. She immediately caught herself, and said “Actually, they were shooting in the air, but they were telling us that we should stop”. I reject the evidence anyone was shooting at her. I reject Ms. Sabanović’s testimony that soldiers forced her mother by pushing guns to her back except to the extent that her mother credited such conduct to Pero Coric.

[76] She also testified that once inside the basement:

> … anyone could see us there, even UNPROFOR units passed by. They could see us, but they didn't' do anything to try and rescue us.

[77] Recall that Ms. Sabanović's brother, Alija Topalović, initially testified that UNPROFOR units saw them inside the school and then changed his testimony on re-direct. Given Ms. Sabanović's testimony on this point, Mr. Topalović's testimony, the small size of the community in Poljani, the fact the HVO in Poljani was located in the school and the very public manner in which people were taken to the school, I conclude UNPROFOR officers knew there were people detained in the school basement. Having made that conclusion, I cannot conclude UNPROFOR did nothing about it. I have no evidence of discussions that may have taken place between HVO leadership and UNPROFOR regarding the prisoners, including why they were detained, who should be released or when they should be released.

[78] While Ms. Sabanović was in the basement, one of the guards, Marinko, a friend of her late father, assured her safety and advised her that nobody would "lay a finger" on her. He apparently informed her that some soldiers wanted him to take her out. He assured her and her mother that would not happen. Ms. Sabanović testified she assumed the soldiers wanted to rape her. She testified to soldiers walking by the windows threatening them, intimidating them and making racial slurs about their mothers. I accept that testimony. She did not identify any of those soldiers walking by the window and making threats and slurs, as being the defendant.

[79] Ms. Sabanović testified about her release the following day, June 10, 1993, and visits with her mother to their home to feed cattle. Like her mother, she testified that Croats were

occupying their home during those visits. Following her release, she was escorted by HVO soldiers, to a home where she stayed with her mother other than her visits to her own home and occasions when she tried to escape. Her efforts to escape were unsuccessful because of fighting in the area between the ABiH and the HVO. While staying at that home, Marinko visited her to advise that she, her brother Mirzo and others staying there, should remain at that place and that no one would harm her. She testified that Marinko asked the women staying at the home to wash the blood off a uniform. She presumed the uniform to that of her late father. Contrary to the evidence of Mr. Husic, Ms. Sabanović testified that she did not return to the school basement.

[80] Ms. Sabanović concluded her direct testimony by describing the psychological challenges she has faced since the events of June 1993. She described having had two miscarriages, suffering from insomnia and other health issues, all of which she attributes to her experiences from June 9, 1993 to June 13, 1993. The plaintiffs did not call any expert witnesses regarding the cause of the various physical and psychological issues experienced by Ms. Sabanović. That said, I accept that she suffered psychological trauma as a result of her arrest and detention in June, 1993.

[81] The final witness to testify for the plaintiffs was Mirza Terzo, Assistant Minister to the Minister of the Bosnian and Herzegovinian Federation for Veterans Affairs. The Assistant Minister has been the Acting Minister since the death of the Minister in 2020. Minister Terzo and the Prime Minister of Bosnia-Herzegovina are in charge of the Ministry. The Ministry is responsible for caring for war veterans and their families, as well as civilians who provided services to those who were in the war or, whose family members were killed during the war. The

veterans include members of the Army of Bosnia and Herzegovina (ABiH), the Croatian Defence Council (HVO) and the Ministry of Interior of the Republic of Bosnia and Herzegovina who served in the war from 1992 to 1996. Not surprisingly, there is no indication members of the VRS are entitled to veterans' benefits.

[82] Minister Terzo's evidence was very helpful in placing before this Court the service record of the defendant during the war years. Former HVO members, including the defendant, are entitled to the same benefits from the Federation of Bosnia and Herzegovina as are the members of the ABiH. The records admitted through Minister Terzo and Ivo Kalfic, the Senior Official for the Question of Military Records in the Group for Conscription Records Affairs in Kakanj were useful in identifying the defendant as a member of the HVO and one who is entitled to veterans' benefits. They do, however, contain some apparent inaccuracies or demonstrate a lack of information. For example, the translation of the "Military Card (VOB-3)" document indicates that the defendant's profession is a "locksmith" but two pages later in the same document it indicates that he was a "Rifleman". In the documents held for the Croatian Republic of Herzeg-Bosnia by the Ministry of Defence for Bosnia and Herzegovina, differing dates of service are given for the defendant. One suggests he served from June 08, 1992 to June 10, 1994 while the other suggests he served from September 19, 1991 to August 28, 1993. Another suggests he began service on April 19, 1992. In a document dated June 14, 1996, the defendant is identified as a PARTICIPANT OF ORGANIZED RESISTANCE registered in the Defence Office of Kakanj from December 21, 1991 to April 7, 1992. It is signed by the President of the Croatian Defence council Pavo Šljivić and the Head of Defence Office Anto Duvnjak. In another document dated August 11, 1994 the defendant's name appears on the "OPERATING SHEET

FOR THE MILITARY RESERVE OF THE CROATIAN DEFENCE COUNCIL" [Emphasis is mine]. There are two dates of enlistment for the defendant on that document, October 20, 1993 and October 18, 1993.

[83] I note that in all of the documents admitted through Minister Terzo and Ivo Kalfic, none assign a rank to the defendant although he is identified variously as a "gunner", "machine gunner" or "rifleman". In the operating sheet for the military reserve, which was updated on June 8, 1993, people are defined by their duty and their rank. The defendant's duty is identified as "Machine Gunner"; however, he is not assigned any rank. Six people on the list, whose names appear before his, have their rank identified as "Lance Corporal", "Private", "Lance Corporal", "Lance Corporal", "Corporal" and "Private", respectively. It appears that on the very day before hostilities started in Polanji the defendant did not even hold the rank of "private". I interpret that to mean he held no rank. I question whether that makes the defendant more akin to a civilian than a soldier, given his reserve status. Recall the evidence of Dr. Tomljanovich, referred to at paragraph 32 of these reasons, regarding the blurring of the boundaries between soldiers and civilians.

[84] I consider it important to comment upon those who did not testify. The plaintiffs are entitled to conduct their case as they choose. That said, the Court is surprised that Jacques Jodoin, the immigration officer who interviewed the defendant was not called to testify. The plaintiffs informed the court he could not be located. This case has been ongoing since 2008 when the RCMP investigated allegations against the defendant. RCMP officers attended in Bosnia-Herzegovina and interviewed, among others, the witnesses who testified at the trial of

this matter and 21 other potential witnesses. Mr. Jodoin is a former public servant. I find it incredulous that he could not be located, or, presuming he is now deceased, that someone could not have so informed the Court. In *Canada (Citizenship and Immigration) v Rogan*, 2011 FC 1007 [*Rogan*], Brian Casey and Michel Dupuis were key witnesses necessary to establish the materiality of apparent concealment of informaton. I draw an adverse interest against the plaintiffs for not having called Mr. Jodoin or, for not having been able to fully inform the court as to his whereabouts, and the reason why he could not testify.

[85] Marko Janjić was the defendant's commander in Poljani. He was a member of the HVO. He did not indicate that fact on his application for permanent residence. Mr. Janjić is now a Canadian citizen and, like the defendant, was investigated in 2008 by the RCMP for alleged war crimes in the Poljani area. Marko Janjić, like the defendant, was never prosecuted by the International Criminal Tribunal for the former Yugoslavia or the government of Canada. As the defendant's former commanding officer, Mr. Janjić could have testified with first-hand direct knowledge about the defendant's actual postings, his active service, his duties in Poljani and his whereabouts following the ABiH routing of the HVO in Kakanj municipality in June of 1993. I draw an adverse interest again the plaintiffs for their failure to call Mr. Janjić or explain why he could not testify. Evidence from Dr. Tomljanovich, Minister Terzo and Ivo Kalfic as to the defendant's postings and potential duties based upon historical records pales in comparison to the first hand knowledge and eye witness account that would have been available from Mr. Janjić. He could have testified as to the purpose of detaining the individuals at the school, who issued the order, how it was to be done, and much more.

[86] No one testified from UNPROFOR. I draw an adverse interest against the plaintiff for not having called UNPROFOR officials or at least explaining why no one could be present to testify. Witnesses spoke of UNPROFOR presence on the ground and in close proximity to the school. Ms. Sabanović testified that UNPROFOR knew they were present in the school. If anyone had any independent knowledge of circumstances in Poljani between June 9 and June 13, it would have been UNPROFOR officials.

[87] The defendant did not testify. This trial experienced several delays because of the precarious state of the defendant's health. Defendant's counsel kept the court informed as to his medical condition, right up to the opening days of the trial. The plaintiffs examined the defendant on discovery. Large portions of the defendant's discovery testimony were read into the trial record. Given the defendant's frail state of health and the fact he was examined on discovery, I draw no adverse interest against the defendant for not having testified.

[88] Based upon all of the above, I conclude the plaintiffs have established that the defendant was a member of the HVO during the conflict in Bosnia and Herzegovina. I accept Minister Terzo and Ivo Kalfic's evidence the defendant served in various units during the war years. That conclusion, however, is not determinative of whether he misled Canadian officials or obtained his citizenship by representation or fraud or by knowingly concealing material circumstances.

[89] I conclude the defendant, while traveling in a civilian vehicle, apprehended a number of people en route from Poljani during fighting on June 9, 1993. I conclude that two (2) men, who were being escorted to the school, were ordered by soldiers, other than the defendant, to get into

a van. I conclude threats to the lives and bodily integrity of those four captives and others were made by soldiers and civilians while en route to the school. I conclude no threats were made by the defendant other than at the time of the initial stopping to force them to return to Poljani. I conclude that during the search of Sedika, the defendant removed from her, and discarded, coffee and rocks. He also discovered on her person, 2000 German marks which he returned to her immediately. I conclude that while the captives were detained in the basement conditions were poor. I conclude toilet facilities were available, but were not used out of fear. I conclude HVO soldiers brought food to the basement every second day and that, in addition, women who had been released from captivity arranged for the delivery of food, water and blankets for those who remained. I conclude that at least two guards, Marinko and Lambi, as well as some unidentified soldiers assured the captives they would not be harmed. I conclude some soldiers, other than the defendant, threatened the detainees with death and bodily harm. I conclude the defendant entered the basement on one occasion between June 9 and June 13, 1993 during which time he made derogatory remarks about Muslim women, cursed a Muslim mother and informed Smajo that they were no longer “best men”. I conclude that at one point someone placed paper over the windows to the basement so that no one could see inside, and those inside could not see outside. There is no evidence the defendant was involved in placing coverings over the windows. I conclude that before the windows were covered, those inside could see UNPROFOR vehicles pass by. I conclude UNPROFOR knew there were people being held in the basement of the school. I conclude that at some point during their captivity someone threw a rag on fire into the basement, which the guards extinguished. There is no evidence the defendant was responsible for throwing the burning rag into the basement of the school or had any knowledge of that fact. I conclude that women, children and the elderly were released from the basement within 24 hours

of their detention. I conclude four women were later returned to the basement and remained there, with approximately ten to twenty men until their release on June 13, 1993. I conclude two captives were assaulted, while loading ammunition for their captors on their last day of detention. I conclude the defendant was not part of those assaults nor is there any evidence he knew about them. I conclude those injured captives received medical attention. I also conclude the defendant made no threats to any detainees other than at the time Sedika, Hasija, Zuhra and Mirza were forced to return to Poljani.

[90] With respect to general events in the area of Kakanj leading up to June 9, 1993, I conclude there was relative calm in Kakanj municipality and, in fact, in large parts of potential Province 9 of the Vance-Owen Peace Plan. I conclude this relative calm arose from the fact that locals refused to take up arms and fight one another, the strong Bosniak (Muslim) majority in Kakanj municipality and the fact HVO commanders had ordered the HVO to subordinate itself to the ABiH in Province 9, on two occasions, the latest being April 9, 1993. I accept that seven (7) Muslim men were killed near Poljani in and around June of 1993 based upon the evidence of Dr. Tomljanovich and I accept that the HVO committed a massacre at Stupni Do in October 1993. There is no evidence the defendant was involved in, or knew about the killings, in June and October of 1993.

[91] I conclude the defendant did not answer all questions completely in the Application for Permanent Residence in Canada. I conclude he served in the HVO. Given the testimony of Dr. Tomljanovich, Minister Terzo and Ivo Kalfic, I am unable to conclude where the defendant served or whether he was in actual combat at any time. Dr. Tomljanovich testified that even

though people were listed as having served with a particular unit, that does not mean they served for the whole period of time. Being a member of a unit and actively serving are two different matters. The only evidence of active service results from the evidence of Sedika, that the defendant performed guard duty; Mr. Alija Topalović, about performing guard duty with the defendant before June 9, 1993; the evidence of all witnesses from Poljani, about the defendant's service between June 9 to June 13, 1993; the defendant's conduct on June 9, 1993, when he detained Sedika, Hasija, Ms. Sabanović and others while travelling in a civilian vehicle; and, the one visit he made to the basement of the school. I am unable to conclude he saw active duty at any location other than Kakanj municipality, and, in particular, Poljani. I am unable to conclude he saw combat duties anywhere. I am cognizant of the blurring of lines between soldiers and civilians referred to by Dr. Tomljanovich (see paras 32 and 83, *supra*).

[92] I turn now to the nature of the attacks on the civilian population in Central Bosnia and Herzegovina in the run-up to the events of June, 1993 in Kakanj municipality. As of January 17, 1993, UNPROFOR reported that the situation was apparently stable between the HVO and ABiH in Kakanj municipality. On January 26, 1993 Croatian forces in Vitez, Travnik, Novi Travnik and Kiseljak came under attack by the ABiH. Busovaca had been attacked by the 5th Mountain Brigade. That predominantly Croatian town was attacked from all sides. The Mujahidin were active throughout Bosnia and Herzegovina throughout the war, but were primarily active in Central Bosnia. Some of the war crimes committed by the Mujahidin in Central Bosnia are recounted in the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the International Criminal Tribunal for the

former Yugoslavia or ICTY) in the case of *Prosecutor v Enver Hadzihasanovic and Amir Kubura*, IT-01-47-T, (International Criminal Tribunal for the fomer Yugoslavia). I cite this case for its evidentiary value only because it was relied upon, and referred to, by Dr. Tomljanovich in his expert opinion report. When war did come to Kakanj, it, according to Dr. Tomljanovich, came from the outside as part of an ABiH counter-attack against HVO positions throughout Central Bosnia at the beginning of June 1993. ABiH used its manpower advantage to strike where the HVO was most vulnerable, Central Bosnia. On June 4, 1993 the ABiH overran Travnik, then attacked Guča Gora and then on June 8, 1993, Podstinje and Maline. These attacks by the ABiH led to a refugee crisis among Croats. To place matters in perspective, each of these villages is about 60 to 80 kilometres from Poljani. Within a period of about five (5) days there were 24,000 Croats driven from their homes. According to Dr. Tomljanovich 12,000 to 15, 000 of those refugees were traveling eastward to reach Vareš, a predominantly Croat municipality. As those Croats were traveling east, they would be coming from the west with ABiH troops pressing from behind as they (ABiH) prepared to attack majority Croat villages on the east of Kakanj municipality, including Poljani.

IV. Relevant Legislation

A. *The two-stage process for revocation of citizenship and admissibility determination*

[93] The latest iteration of the *Citizenship Act* (RCS 1985, c C-29) establishes a two-stage process, essentially merging what had formerly been two separate proceedings into one process; the first being a declaration that citizenship is revoked and, following a declaration of revocation, a second declaration that the individual is inadmissible to Canada. If the Court does not declare

citizenship revoked, it does not proceed to a consideration of the inadmissibility issue. The legislation is silent about how this one trial is to proceed. What is clear is that there are two entirely different standards of proof at play. At the revocation stage, the court is required to consider only admissible evidence and make a decision based upon the civil standard of a balance of probabilities. At the second stage, that of inadmissibility, reasonable grounds to believe is the standard the Court is to apply, and, the Court may rely upon material that it considers reliable but not necessarily admissible in a civil trial. Section 10.5(5) of the 2017 *Citizenship Act* (the Act that was in force from May 28, 2015 to January 23, 2018, at the date of filing and service of the Statement of Claim in 2017, as explained above) provides as follows:

Evidence	**Preuve**
10 (5) If a declaration sought under subsection (1) is not denied under subsection (4), the Court:	**10 (5)** Si elle n'a pas rejeté, en application du paragraphe (4), la demande faite au titre du paragraphe (1), la Cour :
(a) shall assess the facts — whether acts or omissions — alleged in support of the declaration on the basis of reasonable grounds to believe that they have occurred, are occurring or may occur;	**a)** apprécie les faits — actes ou omissions — qui sont allégués au soutien de la demande en fonction de l'existence de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir;
(b) shall take into account the evidence already admitted by it and consider as conclusive any finding of fact already made by it in support of the declaration sought under subsection 10.1(1); and	**b)** prend en compte les éléments de preuve qu'elle a déjà admis au soutien de la demande faite au titre du paragraphe 10.1(1) et est liée par toute décision qu'elle a déjà prise sur une question de fait s'y rapportant;

(c) with respect to any additional evidence, is not bound by any legal or technical rules of evidence and may receive and base its decision on any evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	**c)** n'est pas liée, à l'égard des éléments de preuve supplémentaires, par les règles juridiques ou techniques de présentation de la preuve et peut recevoir les éléments de preuve déjà traités dans le cadre de l'instance qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sa décision sur eux.

Given the two different standards, I concluded at this trial that proposed evidence offered by the plaintiffs, relevant only to the issue of inadmissibility, which would otherwise not be admissible at a civil trial, would not be admitted at the revocation stage of these proceedings. On March 30, 2023, I refused to admit documents marked "N" and "O" for identification. The documents consisted of affidavit evidence, which the plaintiffs acknowledged would not be admissible at the stage one (revocation) portion of the hearing. I advised the parties, through oral reasons delivered at that time, that if the plaintiffs are successful at the first stage, then the Court would reconvene to consider any evidence admissible only at the second stage (inadmissibility). By proceeding in that fashion, the Court would not risk being influenced by evidence inadmissible at the first stage. Furthermore, by proceeding in that fashion, the defendant would not be called upon to respond to potentially irrelevant material.

[94] Numerous statutory enactments impact the Court's decision making: the 2017 *Citizenship Act* at ss. 10.1(1) and 10.5(5); the *Immigration and Refugee Protection Act*, SC 2001, c 27 as it appeared in 2004 (more specifically, the Act in force in 2004, at the date of the defendant became a permanent resident [2004 *IRPA*]) at ss 33 and 35; and its predecessor, the *Immigration*

Act, RSC 1985, c I-2 as it appeared in 1997 (more specifically, the Act in force prior to 2003, at the date of the defendant became a Canadian Citizen in 1997 [*Immigration Act*]) at s 19; the *Criminal Code*, RSC 1985, c C-46 as it appeared in 1997 (more specifically, the version that was in force in 1997, at the date the defendant became a Canadian Citizen in 1997 [1997 *Criminal Code*]) at ss 7(3.76) and (3.77). A review of the various pieces of legislation is necessary in order to determine the defendant's substantive and procedural rights at any particular time. Also, I note here that the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*CAHWCA*] did not receive royal assent until June 29, 2000. It is therefore not relevant to the analysis of the substantive rights of the defendant.

[95] Substantive rights under new legislation will be presumed to have only a prospective effect, in the absence of clear legislative intent of retrospectivity (*R v Chouhan*, 2021 SCC 26 at para 91, citing *R v Dineley*, 2012 SCC 58, [2012] 3 SCR 272 at paras 10-11).

[96] The defendant became a permanent resident of Canada upon his arrival in Montreal, at the Dorval airport (as it was then) on November 27, 1997. On July 6, 2004 he obtained his Canadian citizenship, as did his wife and their two minor daughters. The defendant's third child, a son, is a Canadian citizen by birth.

[97] Consequently, where the issue is the defendant's acquisition of citizenship, his substantive rights are governed by the citizenship legislation that was in force when he obtained his Canadian citizenship on July 6, 2004: namely, the 2017 *Citizenship Act* and the *Immigration and Refugee Protection Act*, SC 2001, c 27 as it appeared in 2004 (which replaced the former

Immigration Act, RSC 1985, c I-2 as it appeared on in 1997). With respect to the acquisition of his permanent residency, the Court must consider the relevant legislation in effect on November 27, 1997 (prior to the January 24, 1998 amendments) and, in particular, the version of the *Immigration Act* that was in force at that time.

[98] From a procedural perspective, the citizenship legislation, namely the 2017 *Citizenship Act* in effect at the time of the filing of the initial statement of claim; namely on December 4, 2017, applies.

[99] The version of section 10.1(1) in force on December 4, 2017 provided as follows:

Revocation for fraud — declaration of Court	**Révocation pour fraude — déclaration de la Cour**
10.1 (1) If the Minister has reasonable grounds to believe that a person obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in section 34, 35 or 37 of the *Immigration and Refugee Protection Act* other than a fact that is also described in paragraph 36(1)(a) or (b) or (2)(a) or (b) of that Act, the person's citizenship or renunciation of citizenship may be revoked only if the Minister seeks a declaration, in an action that the Minister commences, that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances and the Court makes such a declaration	**10.1 (1)** Si le ministre a des motifs raisonnables de croire que l'acquisition, la conservation ou la répudiation de la citoyenneté d'une personne ou sa réintégration dans celle-ci est intervenue par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels — concernant des faits visés à l'un des articles 34, 35 et 37 de la *Loi sur l'immigration et la protection des réfugiés*, autre qu'un fait également visé à l'un des alinéas 36(1)a) et b) et (2)a) et b) de cette loi —, la citoyenneté ou sa répudiation ne peuvent être révoquées que si, à la demande du ministre, la Cour déclare, dans une action intentée par celui-ci, que l'acquisition, la conservation ou la répudiation de la citoyenneté de la personne ou sa réintégration dans celle-ci est intervenue par fraude ou au moyen

	d’une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels.
Effect of declaration	**Effet de la déclaration**
(3) A declaration made under subsection (1) has the effect of revoking a person’s citizenship or renunciation of citizenship.	(3) La déclaration visée au paragraphe (1) a pour effet de révoquer la citoyenneté de la personne ou la répudiation de la citoyenneté de celle-ci.
Proof	**Preuve**
(4) For the purposes of subsection (1), the Minister need prove only that the person has obtained, retained, renounced or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.	**(4)** Pour l’application du paragraphe (1), il suffit au ministre de prouver que l’acquisition, la conservation ou la répudiation de la citoyenneté d’une personne ou sa réintégration dans celle-ci est intervenue par fraude ou au moyen d’une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels.
Presumption	**Présomption**
10.2 For the purposes of subsections 10(1) and 10.1(1), a person has obtained or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances if the person became a permanent resident, within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, by false representation or fraud or by knowingly concealing material circumstances and, because of having acquired that status, the person subsequently obtained or resumed citizenship.	10.2 Pour l’application des paragraphes 10(1) et 10.1(1), a acquis la citoyenneté ou a été réintégrée dans celle-ci par fraude ou au moyen d’une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels la personne ayant acquis la citoyenneté ou ayant été réintégrée dans celle-ci après être devenue un résident permanent, au sens du paragraphe 2(1) de la *Loi sur l’immigration et la protection des réfugiés*, par l’un de ces trois moyens.

[100] Because s. 10.2 of the 2017 *Citizenship Act* directs that a material misrepresentation in the acquisition of permanent residency leading to Canadian citizenship is presumed to be a material misrepresentation, the admissibility provisions – including those relating to war crimes and/or crimes against humanity in force in the former *Immigration Act* in 1997 – must be considered.

[101] Subsections 9(3) and 19(1) of the former *Immigration Act* read as follows:

***Immigration Act*, RSC 1985, c I-2**	***Loi sur l'immigration*, LRC 1985, c I-2**
9 (3) Every person shall answer truthfully all questions put to that person by a visa officer and shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations.	**9 (3)** Toute personne doit répondre franchement aux questions de l'agent des visas et produire toutes les pièces qu'exige celui-ci pour établir que son admission ne contreviendrait pas à la présente loi ni à ses règlements.
…	…
19 (1) No person shall be granted admission who is a member of any of the following classes:	**19 (1)** Les personnes suivantes appartiennent à une catégorie non admissible :
(j) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission	**j)** celles dont on peut penser, pour des motifs raisonnables, qu'elles ont commis, à l'étranger, un fait constituant un crime de guerre ou un crime contre l'humanité au sens du paragraphe 7(3.76) du Code criminel et qui aurait constitué, au Canada, une infraction au droit canadien en son état à l'époque de la perpétration.

[102] We must therefore turn to the definition of a "war crime" and a "crime against humanity" as it was then defined in the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*] given that the *CAHWCA* did not receive royal assent until June 9, 2000. One must also consider how the 1997 *Criminal Code* defined "conventional international law".

Criminal Code, RSC 1985, c C-46	***Code criminel*, LRC 1985, c C-46**
7. …	7. …
(3.76) For the purposes of this section,	(3.76) Les définitions qui suivent s'appliquent au présent article
"conventional international law" means	« droit international conventionnel » Conventions, traités et autres ententes internationales en vigueur auxquels le Canada est partie, ou qu'il a accepté d'appliquer dans un conflit armé auquel il participe.
(a) any convention, treaty or other international agreement that is in force and to which Canada is a party, or	
(b) any convention, treaty or other international agreement that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved;	
"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal	« crime contre l'humanité » Assassinat, extermination, réduction en esclavage, déportation, persécution ou autre fait — acte ou omission — inhumain d'une part, commis contre une population civile ou un groupe identifiable de personnes — qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration — et d'autre part, soit constituant, à l'époque et dans ce lieu, une transgression du droit international coutumier ou

according to the general principles of law recognized by the community of nations;	conventionnel, soit ayant un caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations.
"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.	« crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé international — qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration — et constituant, à l'époque et dans ce lieu, une transgression du droit international coutumier ou conventionnel applicable à de tels conflits
(3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.	(3.77) Sont assimilés à un fait, aux définitions de « crime contre l'humanité » et « crime de guerre », au paragraphe (3.76), la tentative, le complot, la complicité après le fait, le conseil, l'aide ou l'encouragement à l'égard du fait.

[103] Section 35 of the *IRPA* is relevant in these proceedings as the plaintiffs allege that the defendant obtained his citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in section 35. Section 35 was enacted in 2002, when the *IRPA* came into force, thereby replacing the provisions of the former *Immigration Act*. As such, only those provisions in the *Immigration Act* in force in 1997, which set out targeted facts in section 35 of *IRPA* are relevant here.

[104] Because the *CAHWCA* was not in force at the relevant time, this Court must consider the inadmissible classes as they were defined in subsection 19(1)(j) of the former *Immigration Act* and the "acts or omission" that constituted a war crime or crime against humanity, as defined by reference to subsection 7(3.76) of the 1997 *Criminal Code*.

[105] There is an important difference between the section 35 (of the *Immigration and Refugee Protection Act*, SC 2001, c 27) facts set out in the 1997 provisions of the *Immigration Act*, as referenced in the 1997 *Criminal Code*, and the *Crimes Against Humanity and War Crimes Act*, 2000, which is referred to in section 35; namely, the absence of "imprisonment" as a crime against humanity in the 1997 framework.

[106] In sum, in order to issue the first declaration and revoke Mr. Jozepović's Canadian citizenship, the plaintiffs must establish, on the standard of balance of probabilities, that the defendant acquired permanent residency by false representation or fraud or by knowingly concealing material circumstances, with respect to a section 35 fact, which by extension includes, facts contemplated by section 7 (3.76) of the 1997 *Criminal Code*.

[107] The courts have held that intent constitutes a required element for each of the three means listed in subsection 10.1(1) of the 2017 *Citizenship Act* (see *Canada (Minister of Citizenship and Immigration) v Zakaria*, 2014 FC 864 at para 77; *Rogan* at para 32; *Canada (Citizenship and Immigration) v Odynsky*, 2001 FCT 138 at para 159; *Canada (Minister of Citizenship and Immigration) v Schneeberger*, 2003 FC 970 at para 20; *Canada (Citizenship and Immigration) v Savic* 2014 FC 523 at paras 68, 74, *Canada (Citizenship and Immigration) v Thiara*, 2014 FC

220 at para 49; *Canada (Citizenship and Immigration) v Rubaga*, 2015 FC 1073 at para 74 [*Rubuga*]; *Canada (Citizenship and Immigration) v Kljajic* 2020 FC 570 at paras 94-95, 122 [*Kljajic*]).

[108] In *Canada (Citizenship and Immigration) v Rubuga*, 2015 FC 1073 [*Rubuga*], the Court stated that materiality does not mean the Minister must prove that false representation, fraud, or knowingly concealing material circumstances would "… necessarily have led to the rejection of the application for permanent residence, but merely that the false representation, fraud or knowing concealment of material circumstances, had the effect of foreclosing or averting further inquiries". (*Rubuga* at para 72, citing *Canada (Minister of Manpower and Immigration) v Brooks*, [1974] SCR 850 at 873, [1973] SCJ No 112 (QL); *Rogan*, at para 31; *Canada (Citizenship and Immigration) v Halindintwali*, 2015 FC 390 at para 35).

V. Issues for determination

A. *Did the defendant obtain his citizenship by false representation or fraud or by knowingly concealing material circumstances, with respect to a fact described in section 35 of the Immigration and Refugee Protection Act, pursuant to subsection 10.1(1) of the Citizenship Act*

B. *Is the defendant inadmissible to Canada pursuant to paragraph 35(1)(a) of the Immigration and refugee Protection Act, on the grounds that he violated human or international rights, by having committed an act outside Canada that constitutes a crime against humanity or a war crime, pursuant to subsection 10.5(1) of the Citizenship Act.*

[109] As earlier indicated, the parties agree that the legislative scheme contemplates a two-step procedure with differing standards of proof. At the revocation stage, the standard is proof on a

balance of probabilities. At the admissibility stage the standard of proof is essentially reasonable and probable grounds. The parties disagree about what must be proven at step one.

[110] The plaintiff contends that at step one, it need only prove the defendant concealed a material fact (his membership in the HVO) from his Permanent Residency application, for the court to make a finding that he obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. The plaintiff asserts this would have foreclosed any further investigation as to whether the Defendant committed a war crime or crime against humanity. Importantly, the plaintiff asserts that no section 35 fact need be proven at this stage of the analysis. The plaintiffs also contend the defendant misrepresented his address and place of work.

[111] The defendant asserts that a section 35 fact must be proven at step one, on a balance of probabilities, in order to make a finding that Canadian citizenship was obtained by false representation or fraud or by knowingly concealing material circumstances.

VI. Analysis

A. *Overview*

[112] Given that the defendant, in his final submissions, admitted that he was a member of the HVO, the plaintiff submits that this is a material circumstance, and therefore a complete answer to the first declaration. It was a misrepresentation that was made knowingly. His HVO membership was a material fact because, according to the plaintiffs, membership in a military

organization during an armed conflict where war crimes were known to have occurred could potentially lead to a finding that he may have committed a war crime or crime against humanity.

[113] The plaintiffs rely on s. 10.1(4) in support of their position that the minister does not have to prove on any standard that a war crime or crime against humanity occurred in order for the first declaration to be issued:

> For the purposes of subsection (1), the minister need prove only that the person has obtained, retained, renounced, or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.

[114] The plaintiffs contend it is sufficient that the defendant made a misrepresentation or concealed material circumstances that had the effect of foreclosing or averting further inquiries of whether a war crime or crime against humanity potentially occurred. The Act does not require that any war crime or crime against humanity be proven on a balance of probabilities.

[115] The defendant contends the plaintiffs must prove on a balance of probabilities that he committed either a war crime or crime against humanity in order for the first declaration to be issued. He says it would be illogical for there to be a trial on the issue of misrepresentation and revocation of citizenship for complicity in a war crime or crime against humanity without establishing the existence of such crimes.

[116] I conclude a section 35 fact must be proven on a balance of probabilities by the plaintiff, at the revocation stage. To conclude otherwise would, in my respectful opinion, constitute a

misinterpretation of not only the relevant legislation, but a misinterpretation of the plaintiffs' pleadings and the current jurisprudence.

[117] Recall that the plaintiffs seek a declaration of revocation of citizenship, pursuant to s. 10.1(1) of the *Citizenship Act* by pleading as follows:

> 1. The plaintiffs claim:
>
> a declaration pursuant to section 10.1(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29 that the defendant obtained Canadian citizenship by false representation or fraud of by knowingly concealing material circumstances with respect to a fact described in section 35 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27.
>
> (…)
>
> 17. The defendant obtained his Canadian permanent resident status by false representation or fraud or by knowingly concealing material circumstances ("false representation") regarding his involvement in crimes against humanity and war crimes.
>
> (…)
>
> 20. In applying for permanent residence in Canada, the defendant also represented that he had never been involved in the commission of a crime against humanity or a war crime.
>
> 21. Those representations were false.
>
> 22. The defendant's false representations had the effect of foreclosing or averting further inquiries by Canadian immigration officials.
>
> [Emphasis is mine]

[118] It is a fundamental principle of law that he or she who asserts must prove. I am satisfied that based upon the plaintiffs' own pleadings they are required to prove, on a balance of

probabilities, that the defendant committed a fraud, false representation or knowingly concealed information with respect to a fact contemplated by section 35 of the *IRPA*.

[119] The plaintiffs were correct in the manner in which they chose to set out their case in the pleadings. Although decided under a different statutory scheme, the case of *Rogan* is instructive. *Rogan* was decided at a time when the *Citizenship Act* contemplated a hearing before the Court on the facts, with a determination of whether, on a balance on probabilities, the defendant had committed a fraud, false representation or knowingly concealed information with respect to a fact contemplated by section 35 of the *IRPA*. The Court was not called upon to make a determination on the issue inadmissibility. Justice Mactavish, as she then was, stated as follows:

> 381 (…) the issue before me is not whether Mr. Rogan was in fact excluded from the protection of the Refugee Convention or was inadmissible to Canada. Rather, the issue for me to determine is whether Mr. Rogan gained his permanent residence in Canada, and through that his Canadian citizenship, by false representation or fraud or by knowingly concealing material circumstances, in this instance his involvement in crimes against humanity. This question must be decided on the balance of probabilities standard.
>
> 382. Having made findings as to Mr. Rogan's actions as a prison guard at the detention facilities in Bileca in the summer of 1992, I must then determine whether Mr. Rogan was untruthful or knowingly concealed material circumstances when he stated at his immigration interview that he had not been involved in crimes against humanity. To do this, I must consider whether Mr. Rogan's actions constituted a crime against humanity. This is a question of law. (*Morgan* at paras 381-382)

[120] Bearing in mind that Question 27 on Mr. Rogan's application for permanent residence specifically asked whether he had been involved in crimes against humanity, Justice Mactavish framed the issue of the standard of proof in the following manner:

> 404. The question for this Court is not whether it has been established beyond a reasonable doubt that Mr. Rogan is guilty of a crime against humanity under the *Criminal Code*, but rather whether it has been established on a balance of probabilities that he made false representations or concealed material information in his answer to Question 27 on his application for permanent residence. (*Morgan* at para 404)

[121] Before concluding that Mr. Rogan had made false representations in his application for permanent residence, Justice Mactavish assessed each allegation made against Mr. Rogan and made a determination about whether the allegation had been proven by the plaintiff on a balance of probabilities. For example, at paragraph 197 she stated that she was "satisfied on a balance of probabilities that Mr. Rogan struck Sreco Kljunak in the face". At paragraph 241, in addressing the issue of an assault upon Asim Catovic, Justice Mactavish stated: "I am therefore satisfied on a balance of probabilities that this was indeed the case". With respect to allegations of prisoner abuse, Justice Mactavish states at paragraph 245 "I am satisfied on a balance of probabilities that Mr. Rogan struck Sreco Kljunak in the face, and the he personally and knowingly facilitated and was complicit in a beating inflicted on Mr. Kljunak".

[122] What is important from all of the above is that Justice Mactavish considered it necessary that the accusations of unlawful conduct made against Mr. Rogan be proven on a balance of probabilities before she could consider whether he had obtained his citizenship based upon fraud, false pretences of having knowingly concealed information. Facts, in addition to the action of concealing those facts, had to be proven before one's citizenship could be revoked.

[123] Chief Justice Crampton recently took a similar approach with respect to the legislative scheme which is now in place; namely, the two-step procedure in which the court is called upon

to consider revocation of citizenship followed by a determination of the issue of inadmissibility. In *Kljajic,* the Chief Justice considered the case against the Defendant who had held the position of Under-Secretary for Public Security of the Ministry of Internal Affairs of Bosnian Serb Republic (RS MUP) from the outbreak of the Bosnian civil was until September 1992. In that capacity, Mr. Kljajic was responsible for, and the defence of, the police academy. Unlike the case of the defendant, Mr. Jozepović, Mr. Kljajic was a senior official in the service of a government, which in the opinion of the Minister, was engaged in systematic or gross human rights violations, genocide, war crimes and crimes against humanity. Because the *CAHWCA* had not yet been declared in force, the Court in Kljajic was required to apply subsection 7(3.76) of the *Criminal Code*.

[124] At paragraph 98 of the Chief Justice's reasons, he sets out the test to be applied where a declaration is sought under section 10.1(1) of the *Citizenship Act*. He states:

> Of course, where the Minister seeks a declaration that a person's false representations, fraud or knowing concealment was with respect to a fact described in one of the sections of the IRPA that are specifically mentioned in subsection 10.1(1) of the *Citizenship Act,* the Minister must, in addition, "establish on a balance of probabilities that the false representation, fraud, or knowing concealment was with regard to" such a fact: *Rubuga,* above, at paragraphs 33 and 76. [Emphasis is mine.]

[125] As already noted, the issue in the case of Mr. Kljajic was whether he was a superior official in the service of a government that was, in the opinion of the Minister, engaged in terrorism, a systematic or gross human rights violation or war crime or crime against humanity. As it relates to the revocation of his citizenship, Chief Justice Crampton opined, at paragraph 129, as follows:

> In summary, for the reasons I have provided above, I have concluded, on a balance of probabilities that Mr. Kljajic became a permanent resident in Canada by knowingly concealing material circumstances on his PR Application… Those material circumstances consisted of his position as Under-Secretary of the RS MUP, his places of work and his addresses between April 1992 and the Fall of that year. They also consisted of Mr. Kljajic's positions in the SRBiH MUP, particularly those in the period immediately before the breakout of the Bosnian war. Those material circumstances concerned facts that are described in section 35 of the IRPA. I will therefore issue the first two of the four declarations that the plaintiffs have requested.

[126] Importantly, Chief Justice Crampton found all of the facts listed by him concerned facts described in section 35 of the *IRPA*. To the extent any of those facts did not concern a section 35 fact, they would, by extension, have been irrelevant to his analysis.

[127] In my view, the fact being concealed, in order to be material, must concern a section 35 fact and that fact must be proven on a balance of probabilities.

B. Application of the law and facts to the present case

[128] I now turn to a review of the facts proven in this case, and a consideration of whether section 35 facts have been proven, as alleged in the pleadings and as required by statute; or, whether there is proof on a balance of probabilities that the defendant foreclosed or averted further enquiry into those facts by his answers to questions. See, *Canada (Minister of Manpower and Immigration) v Brooks,* [1974] SCR 850; [1973] SCJ No 112 at 873. As stated by Justice Mactavish at paragraph 28 of *Rogan,* the Court "must be satisfied that an event or fact in dispute is not only possible, but probable".

[129] Before I begin that part of my analysis there are several important matters, which need be said, as one compares the present circumstances with those in *Rogan* and *Kljajic*. In *Rogan*, the record was replete with crimes committed by him. There were eyewitnesses to his beatings of prisoners and to the fact he released prisoners and saw them returned bloodied and abused. There was even one statement by him that he had murdered someone's father. Importantly, the two consular officers who interviewed Mr. Rogan testified. Justice Mactavish observes at paragraph 254 that Michel Dupuis and Brian Casey were both "personally involved in the processing of Mr. Rogan's immigration application". Between 1992 and 1995, Mr. Dupuis worked as a senior immigration officer at the Canadian Embassy in Belgrade, in what became Serbia after the dissolution of Yugoslavia. He processed applications for permanent residence and reported to Mr. Casey. Mr. Casey was the immigration program manager. Mr. Jodoin, the immigration officer who processed the defendant's application for permanent residence was not called. The plaintiffs provided no satisfactory explanation of his whereabouts.

[130] In *Kljajic,* the factual finding that he was a senior official of the RS MUP, was, in and of itself, sufficient to revoke his citizenship. This because RS MUP was, in the opinion of the Minister, an organization engaged in systematic or gross human rights violations, genocide, war crimes and crimes against humanity. In the present case, the Minister held no such opinion of the HVO. The HVO clearly and fundamentally was not such an organization.

(1) The elements of a crime against humanity – was there a widespread or systematic attack?

[131] As a matter of customary international law, the *chapeau* elements of a crime against humanity may be divided into five sub-elements:

1. there must be an attack,
2. the attack must be 'directed against any civilian population'
3. the attack must be 'widespread *or* systematic'
4. there must be a sufficient link or 'nexus' between the acts of the accused and the attack; and
5. the accused must have known that there was a widespread or systematic attack directed against a civilian population, and he must have known that his acts formed part of that attack.

[132] The Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraph 119 stated that a criminal act rises to the level of a crime against humanity when four elements are made out:

1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
2. The act was committed as part of a widespread or systematic attack;
3. The attack is directed against any civilian population or any identifiable group of persons; and
4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

See also *Rogan* at paragraph 384.

[133] Each of the four (4) constituent elements are legal requirements falling within the fact-finding responsibility of this Court.

[134] In order to establish a crime against humanity, the act in question must be committed as part of an "attack" directed against a civilian population. The *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, being Sch V of the *Geneva Conventions Act*, RSC, 1985 c G-3, at article 49 (1) define "attacks" as "acts of violence against the adversary, whether in offence or in defence".

[135] The reason for the attack appears not to be relevant: "The fact that the ultimate objective of those involved in the attack on a civilian population might have been legitimate or aimed at responding to an aggression by the other side, would not, without more, disqualify their actions as crimes against humanity" (Guénaël Mettraux, *International Crimes: Law and Practice: Volume II: Crimes Against Humanity* (Oxford University Press, 2020) at 214, citing *Prosecutor v Fofana & Kondewa*, SCSL-04-14-A, Judgment (28 May 2008), (Special Court for Sierra Leone (Appeals Chamber)).

[136] When determining whether an attack is widespread or systematic, the evidence must be considered as a whole, accounting for all relevant factors militating in favour and against the suggestion that the attack was either widespread or systematic. The requirements of "widespread

or systematic" must be assessed *relative* to the civilian population that is alleged to have been subject to the attack.

[137] Were the acts that occurred in Poljani and Kraljeva Sutjeska a part of a broader attack on the civilian population of Bosnia and Herzegovina? Or, more importantly, did the plaintiffs establish the occurrence of a "widespread or systematic" attack by the HVO against the civilian Bosniak/Muslim population?

[138] I am satisfied that an attack was committed by the HVO and by the defendant, upon an identifiable group, the Muslim civilian population of Poljani and Kraljeva Sutjeska, on June 9, 1993. That said, I am not satisfied on a balance of probabilities that the attack constituted part of a widespread or systematic attack. Furthermore, if the attack was widespread or systematic, I am not satisfied the defendant was aware of that nature of the attack.

[139] In considering whether the attack was widespread or systematic, I note that Muslim civilians in Poljani were permitted to leave Poljani right up until June 8, 1993. If a planned attack was to be systematic or widespread, I question whether civilians would have been permitted to leave that close to actual battle, particularly since the ABiH attack began in other parts of Kakanj on June 4, 1993. Other indicia that the attack was not widespread or systematic include the following: the limited geographic area of the attack; HVO instructions that its members in proposed Province 9 subordinate themselves to the ABiH; confusion by the HVO guards encountered by Mr. Husic, Smayo and Mr. Alija Topalovic, about whether they could continue on their way or be delivered to military police; Muslim women, children and the elderly

were allowed to leave the school; medical care was provided to two captives by the HVO; the assertions by Marinko, Lambi and other HVO personnel that the civilians would not be harmed when compared to threats of death and rape by other soldiers. The confusion that appeared to reign on June 9, 1993 appears to be anything but systematic. Also, while there was evidence of military battles between the ABiH and the HVO outside Kakanj municipality, the evidence did not relate to systematic attacks upon Muslim civilians. The best evidence before me was of widespread or systematic attacks upon the Croatian population, creating upwards of 24,000 displaced persons. I am not satisfied there has been proof on a balance of probabilities of a widespread or systematic attack upon the Muslim civilian population in and around Poljani, Kakanj or for that matter, proposed Province 9 in the Vance Owen peace plan.

[140] Presuming I am incorrect, there is no evidence the defendant was aware of the attack upon Supni Do in October of 1993 or the killing of the 7 Muslim men near Poljani, in June of 1993 or any other attack upon Muslim civilians. There must be a temporal nexus between the defendant's conduct and the widespread or systematic attack. In this case, there has been none. There is no evidence the defendant was aware or had knowledge of any attacks upon civilians, or others for that matter, by the HVO in any other part of Bosnia and Herzegovina during the whole of the war years between 1991 and 1996.

[141] In addition to a failure to establish a widespread or systematic attack, the plaintiffs have not established any crime against the defendant other than that of imprisonment, which at the relevant time was not a war crime or crime against humanity in Canada.

(2) Was there an international armed conflict?

[142] Presuming I am incorrect, and the plaintiffs have established, on a balance of probabilities, that there existed a widespread or systematic attack against the Muslim civilian population; and, that the defendant had knowledge of such attacks, I am not satisfied the plaintiffs have proven on a balance of probabilities that the conflict in Kakanj in June of 1993 was part of an international armed conflict within the meaning of "war crime", as defined in s. 7(3.76) of the 1997 *Criminal Code*. Recall that at the beginning of hostilities in what became Bosnia and Herzegovina, the VRS, supported by the personnel, finances and military equipment of the former Yugoslavia was the aggressor against both the HVO and the ABiH. The ABiH, the official army of the new state of Bosnia and Herzegovina, which in the beginning was poorly financed and poorly equipped, fought alongside the HVO, supported by Croatia, in the protection of the Bosnian and Herzegovinian state. Recall the evidence of Mr. Ibro Husic that the HVO and the ABiH tied their flags together. Recall the evidence of Mr. Alija Topalović that he performed guard duty with HVO personnel, including the defendant.

[143] In addition to the above acts of friendship between the HVO and the ABiH in the early years of the conflict in Bosnia and Herzegovina, recall the evidence of Dr. Tomljanvovich about the Vance-Owen Peace Plan. Not once, but twice, the HVO issued an ultimatum requiring the HVO to subordinate itself to the ABiH in proposed Province 9. Kakanj, as well as all communities discussed in these reasons, are located in proposed Province 9. If the government of Croatia's involvement in the HVO was sufficient to make the conflict between the ABiH and the HVO international in scope in some parts of Bosnia and Herzegovina, the same cannot be said with respect to activities in proposed Province 9.

[144] The means by which a conflict between two parties can become internationalized is open to some debate. That debate is clearly evident in the trial and appellate decisions of the ICTY in *Prosecutor v Tadić*, IT-94-1-T, Trial Judgment (7 May 1997), (International Criminal Tribunal for the former Yugoslavia) [*Tadić* Trial Judgement] and *Prosecutor v Tadić*, IT-94-1-A, Appeal Judgment (15 July 1999) (International Criminal Tribunal for the former Yugoslavia) [*Tadić* Appeal Judgement], respectively. The trial chamber in *Tadić* concluded the conflict was not international in character but the appeal chamber reached the opposite conclusion. One author, Kubo Mačák in his text *Internationalized Armed Conflicts in International Law* (Oxford University Press, 2018), opines that both chambers misconstrued the law of state responsibility. He contends that a test based on the law of state responsibility is ill suited for the determination of the internationalization of an internal conflict.

[145] For present purposes it makes no difference which Chamber (trial or appeal) was correct. By either approach, the conflict in proposed Province 9 could not constitute an international armed conflict. In *Tadić*, the issue was whether the dependence of the VRS on financing, equipment and manpower from the Federal Republic of Yugolavia converted the conflict between the VRS and the ABiH into an international armed conflict. The trial chamber concluded that the test was not simply one of dependence on a foreign power but also one of control. In other words, did the dependence upon the Yugolav Army result in the VRS being controlled by the Yugoslav Army? The trial chamber answered that question in the negative. If by analogy, one looks to the relationship between the state of Croatia and the HVO, an argument exists, based upon the testimony of Dr. Tomljanovich, that the HVO was dependent upon the

Croatian state. However, at least in proposed Province 9, it is clear that Croatia exerted no control. Any control it might have exerted was ignored by the HVO in Province 9.

[146] The appeal chamber in *Tadić* crafted one general test – that of overall control, which includes dependency by equipping and financing, but also by "coordinating or helping in the general planning of its military activity" (*Tadić* Appeal Judgement at para 131). Again, applying that test, I am of the view the conflict in proposed Province 9 did not become internationalized. One cannot say a foreign state is assisting in the planning of an organization's (in this case the HVO's) military activity, when it has instructed that organization not to carry out military activity and it fails to follow that instruction. The HVO in proposed Province 9 did not subordinate itself to the ABiH, as directed on two occasions, presumably, by Croatia. Croatia, if it did have control in some other parts of Bosnia and Herzegovina, certainly did not have any in proposed Province 9. The conflict was not international in that geographic area.

[147] For all of the above reasons; namely, the absence of a widespread or systematic attack; the absence of any war crime captured by the *Criminal Code*; and, the absence of an internationalized conflict, I am not satisfied that the plaintiffs have proven, on a balance of probabilities, a section 35 fact, which, according to their pleading and the law, they were required to do.

[148] As a result of all of the above, the plaintiffs have not proven a s. 35 fact as contemplated by subsection 10.5(1) of *the Citizenship Act*.

(3) Did the defendant obtain his citizenship by false representation, fraud or by concealing material circumstances with respect to a fact described in section 35 of the *IRPA*, pursuant to subsection 10.1(1) of the Citizenship Act?

[149] In the event I am incorrect and the plaintiffs need not prove a section 35 fact on a balance of probabilities, I will now consider whether they have established on a balance of probabilities that the defendant obtained his citizenship through misrepresentation or fraud or by concealing material circumstances, without proof of a section 35 fact.

[150] I have already concluded that the defendant did not make any misleading statements, fraudulent or otherwise, in his landing documents. I have also already concluded that he failed to disclose his membership in the HVO, in his application for permanent resident status. The plaintiffs assert that that failure constitutes the concealment of a material circumstance, which foreclosed further inquiry into whether or not he had committed or was complicit in war crimes and/or crimes against humanity. The plaintiffs also allege that the defendant lied about his address and his work status.

[151] I will first deal with address and work status. The defendant indicated that he lived in Kankanj municipality in June of 1993. That fact is not disputed. In the June, 1997 application for permanent residence, he stated his full name, his full and complete place and date of birth, that he was married in Kraljeva Sutjeska in 1987, and that he had completed eight (8) years of elementary school and three (3) years of secondary school for a total of 11 years in school. These facts are consistent with his narrative in the application for permanent residence completed in February, 1997 wherein he advised that he was displaced from his home in June of 1993,

following the success of the ABiH in Kakanj. In both applications for permanent residence the defendant indicated his employer as other than HVO. As noted earlier Mr. Husic testified as to when the defendant stopped working at the mines. I find his evidence in this regard unreliable for two reasons: first, the animosity shown by him toward the defendant, which included calling him a war criminal; second, his evidence that he no longer saw the defendant at the work site, does not point to a cessation of employment by the defendant. The defendant could have been working a shift entirely different from Mr. Husic. Mr. Husic's evidence about the defendant's employment is conjecture at best.

[152] For the reasons set out below in paragraph 153, *infra*, I am satisfied the defendant was a reservist. Reservists normally carry on duties with their civilian employer when not expected for duty at their unit. There is no reliable evidence the defendant was not employed where he said he was until June of 1993. I therefore reject the plaintiffs' contention that he falsely represented or concealed his address and his place of employment – except as it relates to the HVO.

[153] Based upon the documentary evidence admitted through Minister Terzo and Ivo Kalfic I am satisfied the defendant served in the HVO as a reservist. He was not assigned a rank. He was not regular army. That conclusion is supported by the evidence of Sedika who referred to the defendant having performed "guard duty". It is also consistent with the evidence of Mr. Alija Topalović who testified to having performed guard duty with the defendant. It is also consistent with the testimony of Zuhra Sabanović (née Topalović) who testified that on a day when the HVO was facing imminent attack in Poljani by the ABiH, June 9, 1993, the defendant was

performing his duties in a civilian vehicle. Finally, it is consistent with the confusion referred to by Dr. Tomljanovich between soldier and civilian (see paragraphs 32 and 83, *supra*).

[154] When I consider all of the above, I am not convinced, on a balance of probabilities, that the defendant intended to mislead or conceal anything. His admission that he was of military age, lived in Kakanj in June of 1993 and was employed in civil defence, signal information that would lead to further questions. Considering that evidence and the concept of "all people's defense", with which the defendant would have been familiar; the several roles played by the HVO in civic administration, government and military; the confusion alluded to by Dr. Tomljanovich between civilian and soldier; and the fact the defendant was a reservist without rank, I cannot conclude on a balance of probabilities that he was intentionally concealing anything. His answers are consistent with the descriptions of his duties by witnesses called by the plaintiff, some of whom showed animosity toward him.

[155] In the event I am incorrect about whether the defendant intended to mislead or conceal his employment in the HVO, I am not satisfied, on a balance of probabilities, that he foreclosed further inquiry into whether or not he had committed or was complicit in war crimes and/or crimes against humanity. I reach this conclusion for a number of reasons. First, Mr. Jodoin did not testify. Recall that in the *Rogan* case, evidence of the immigration officers was instrumental in assisting the Court in assessing whether there had been concealment, which foreclosed further enquiry. I have already indicated that I draw an adverse interest from the failure of Mr. Jodoin to testify or for the plaintiffs to satisfactorily explain his unavailability. Second, Ms. Capper stated that given the defendant's birthdate, his address and his admission to having served in Civil

Defence, she would have posed a number of questions to him about potential military service. Ms. Capper's testimony demonstrates his answers did not foreclose further enquiry – in fact, quite the opposite. His answers, including his address in June of 1993, his age, his work in civil defence, would have led to further enquiry.

[156] Based upon all of the above the plaintiffs have not proven, on a balance of probabilities that the defendant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances with respect to a fact described in section 35 of the *IRPA*. I therefore dismiss the plaintiffs' action against the defendant. Step 1 of the two-part test has not been met. I need not consider whether Step 2, on a lower standard of proof has been met.

VII. Certified Question

[157] Both the plaintiffs and the defendant have proposed questions for certification for consideration by the Federal Court of Appeal pursuant to section 10.7 of the *Citizenship Act*. I have carefully considered the submissions of both parties and have decided not to certify any question for consideration by the Federal Court of Appeal.

[158] In *Liyanagamage v Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4 (FCA), [1994] FCJ No 1637 [*Liyanagamage*], the Court of Appeal concluded that in order to be certified, a question must be determinative of the appeal and must be one that "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Liyanagamage* at 2). Put even more succinctly it must be a "serious

question of general importance which would be dispositive of an appeal" (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[159] The three questions proposed by the plaintiffs can be summarized as follows:

(1) In order to meet the test for revocation need the minister only establish that the misrepresentation had the effect of foreclosing or averting further inquiries into circumstances with respect to a fact described in s. 35 of the *Immigration and Refugee Protection Act*?

(2) Where declarations are sought pursuant to s. 10.1(1) and s. 10.5 of the *Citizenship Act*, is the Court required to conduct a single trial where it determines the admissibility of evidence, hears arguments, and issues a single judgment at the end of the trial, all with respect to both declarations?

(3) Are law enforcement investigative documents, which are subject to litigation privilege and would otherwise not be disclosed, subject to disclosure based upon *Stinchcombe* principles of criminal law (*R v Stinchcombe*, [1991] 3 SCR 326, 130 NR 277)?

[160] The answer to question 1 would not be dispositive of any appeal brought in relation to this trial, given the alternative paths of arriving at the conclusion to dismiss this action. In addition, I note that the outcome of this trial was highly dependent upon evidentiary conclusions regarding the reliability of witnesses and the failure of the plaintiffs to call at least two key witnesses. Mr. Jodoin's evidence could have been determinative about which inquiries were foreclosed, as a result of the answers given by the defendant. Without that testimony, the Court is left to guess whether any inquiries were foreclosed.

[161] The parties agree on the proposed question 2. This Court agrees with the plain language of the statute. One trial is to be held, curiously, with two (2) different standards of proof to be applied. One judgement is to be issued at the end of the trial. However, the manner in which the trial should be conducted will be determined by the trial judge. Clearly, one cannot proceed to the second question (admissibility) until the first (revocation) is answered. In some cases, out of fairness to the process and the parties involved, a bifurcated process may be the result. Whether a trial judge bifurcates a trial or deals with all issues via one sitting is a matter of trial management. It is not a question of broad significance or general application. Bifurcation or not, one trial is held. Trial management is not a matter of broad significance or general application.

[162] On June 3, 2021, Associate Judge Tabib issued an order directing the plaintiffs to disclose a report prepared by the RCMP regarding their investigation into allegations the defendant had been involved in war crimes or crimes against humanity. In making her order, she noted that citizenship was at stake. In the circumstances, she ordered the release of the RCMP investigative report. I have concluded that report, which constitutes hearsay, is useful to show what was communicated to the plaintiffs but should not be used as proof of the truth of the contents. With or without the RCMP Report, the decision in this case would have been the same. The answer to the proposed question would have no impact upon the outcome of the trial.

VIII. Costs

[163] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 provides the Court with full discretion in fixing and allocating costs. Rule 400(3) provides direction to the Court in the

exercise of its discretion in awarding costs. The list is not finite in that it includes a consideration of any other matter the Court "considers relevant".

[164] The defendant contends the plaintiffs are guilty of excessive delay and, as a result, he has been prejudiced. The defendant points to the fact that the RCMP investigated this matter in 2008, and, in 2011 recommended administrative proceedings be taken against the defendant as opposed to the laying of criminal charges. The RCMP communicated to the plaintiffs that there were no reasonable and probable grounds upon which to lay criminal charges. Despite the recommendation made in 2011, the plaintiffs did not commence this court action until 2017. During the ensuing years, at least one potential witness for the defendant passed away.

[165] After being ordered to produce the RCMP Report, the plaintiffs refused to do so and took the matter on appeal, an appeal for which the Court had no jurisdiction. This resulted in further delays. In addition to the delay in producing the RCMP Report, I note that the report was not provided to the expert witness called upon to testify at this trial. This is somewhat surprising given the large volumes of materials, also hearsay, that were provided to him.

[166] The defendant seeks solicitor client costs. Such costs are clearly the exception. In *Young v Young*, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193 Justice McLachlin (as she then was) stated:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor client costs;

[167] In the circumstances, I am not satisfied that the conduct of the plaintiffs merits an award of solicitor-client costs. There is, however, jurisprudence for awarding enhanced costs in certain circumstances. See, for example, *Kajat v Arctic Taglu (The)*, 1997 CanLII 5937 (FC), 145 FTR 102 at paras 12-15.

[168] When I consider the Statement of Claim issued by the plaintiffs, it is replete with allegations, which were never proven, nor was there even an attempt to prove many of them. For example, in paragraph 69 the plaintiffs contend that the defendant participated in the beating of at least one Muslim civilian. No evidence was led of any beating at the hands of the defendant. In paragraph 70, the plaintiffs attempt to connect the defendant to the search for two Muslim men who were later murdered. There was no evidence of that allegation offered by the plaintiffs. While the plaintiffs allege in paragraph 80 that women, children and the elderly were taken from the basement and placed under house arrest, such a description does not accord with the facts. They were taken to a house of friend and neighbour and told to remain there. There was no guard standing at the door, although there were regular patrols in and about the area. The "house arrest" to which the plaintiffs refer could easily have been protection from the marauding 12,000 to 15,000 Croats who were en route to Vareš from Kakanj. Those Croats were traveling eastward with the ABiH army behind them. During the period June 9 to June 13, 1993 being near the fields or roads of Poljani would not have been a safe place to be for those of Muslim ethnicity. At paragraph 93 the plaintiffs claim that the HVO looted and burned many houses. The evidence is that three (3) houses were burned. There was no evidence the burning of any house could be attributed to the HVO. Those three (3) houses could equally have been burned by some of the 12,000 to 15,000 Croats escaping form the ABiH as they traveled eastward to Vareš. In

paragraph 107 the plaintiffs attempt to link the defendant to the murder of seven (7) Muslim men by claiming he was seen near Klasnice, the place where the massacre occurred. There was no evidence called by anyone to prove that the defendant was anywhere near Klasnice at any time. Lastly, the plaintiffs plead in paragraph 113 and 114 that the defendant directly participated in, and or voluntarily made a significant and knowing contribution to the crimes of murder and the war crime of "wilful killing of protected persons". The plaintiffs led no evidence of his complicity in the murder or the wilful killing of protected persons. I earlier stated that he RCMP Report could not be used to prove the truth of its contents but merely what was said to the plaintiffs. I note that the RCMP Report informed the plaintiffs that no witnesses placed the defendant near Klasnice, nor did nay witnesses implicate him in the murder of seven (7) Muslim men. While that report is not proof of the truth of its contents, it demonstrates what was told to the plaintiffs. Despite what was told to them, they made the allegation of participation in the killing and failed to prove it.

[169] The plaintiffs made serious allegations against the defendant, most of which were not proven. Such conduct, in the circumstances of this case, calls for an enhanced award of costs. The delays, which foreclosed the testimony of at least one witness, call for an enhanced award of costs.

[170] In *Carrero v Canada (Citizenship and Immigration)*, 2021 FC 891, I made an award of costs of $62,040.29 all inclusive of costs and disbursements following significant prejudicial delay by the state.

[171] In the present case, two lawyers represented the defendant over a five-week trial, not counting their preparation time, time spent on preliminary matters, and the preparation of briefs on closing argument. If anyone reading this should think two lawyers were unnecessary, I would remind the parties that the plaintiffs were represented by four lawyers throughout most of the trial.

[172] The defendant is not entirely without blame with respect to cost consequences. He denied being a member of the HVO and only admitted to same, at the close of the trial. The plaintiffs, as a result, consumed considerable court time to establish that the defendant was indeed a member of the HVO. This observation limits any cost award otherwise favourable to the defendant.

[173] In the result, I award costs, in the amount of $125,000.00 all inclusive of disbursements and HST, payable by the plaintiffs to the defendant.

IX. Conclusion

[174] Given all of the above, I conclude the plaintiffs have not established on a balance of probabilities that there existed, in proposed Province 9 of the Vance Owen Peace Plan, a widespread or systematic attack upon the Muslim civilian population, nor was there an international armed conflict. In the event I am incorrect on either of those points, I am not satisfied on a balance of probabilities that the plaintiffs have proven that the defendant was aware of, or had any temporal connection to, a widespread or systematic attack on the civilian Muslim population. Furthermore, I am not satisfied on a balance of probabilities that the defendant intentionally concealed material information in his application for permanent

residence. However, if he did conceal material information, that fact did not foreclose further enquiries by any immigration officer or other Canadian official. The information provided was sufficient to alert Jacques Jodoin to ask the same questions one would have expected if the defendant had declared he was a member of the HVO. In the circumstances, the Court need not re-convene in order to consider further evidence to determine whether the plaintiffs have met the lower test of reasonable grounds to believe the defendant is inadmissible to Canada (Step 2 of the procedure engaged in this process). No question is certified for consideration by the Federal Court of Appeal. The defendant is entitled to costs in the all-inclusive amount of $125,000 payable by the plaintiffs, jointly and severally.

JUDGMENT in T-1862-17

THIS COURT'S JUDGMENT is that the action is dismissed with costs, payable by the plaintiffs to the defendant, in the amount of $125,000. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1862-17
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APPEARANCES:

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