Federal Court  Cour fédérale

Date: 20090130

Docket: IMM-2147-08

Citation: 2009 FC 104

OTTAWA, ONTARIO, JANUARY 30, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

HENRI JEAN-CLAUDE SEYOBOKA

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "Tribunal"), dated May 1, 2008, dismissing the applicant's motion to reopen his claim for refugee protection pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA").

BACKGROUND

[2] The applicant is a citizen of Rwanda, where he was born on July 22, 1966. He came to Canada on January 17, 1996 and made a refugee claim upon arrival. He was granted refugee status

on October 25, 1996. At that time, he made no mention of his membership in the Forces Armées Rwandaises, the Rwandan military ("FAR"), either at the port of entry, in his Personal Information Form ("PIF"), or during his refugee hearing.

[3] On November 1, 1996, the applicant filed an Application for permanent residence in Canada. Once again, he concealed his membership in the FAR.

[4] In March 1998, two people from the International Criminal Tribunal for Rwanda ("ICTR") and Mr. André Denault, from the RCMP, came to the applicant's house in Canada to interview him about Colonel Bagosora. They were looking for Colonel Bagosora due to his involvement in crimes against humanity committed during the Rwandan genocide. It is only after this interview that the applicant filed an amended version of his PIF to reflect the fact that he had served in the Rwandan army at the time of the genocide in April 1994.

[5] Around September 2000, Mr. Claude Beaupré, hearing officer for the Canada Border Services Agency ("CBSA") contacted the War Crimes Unit of the RCMP to ascertain the status of their file on the applicant. He learned that the RCMP's investigation on the applicant was still ongoing.

[6] On October 13, 2000, two investigators from the War Crimes Unit of the Department of Citizenship and Immigration ("CIC") met with the applicant. According to the interview notes, the

applicant then admitted to serving in the FAR between January 21, 1991, and June 28, 1994. He claimed that he quit the FAR because he became "bitter".

[7] In April 2002, a lawyer from ICTR telephoned the applicant and came to his house. He subsequently faxed a file the ICTR had on him, including testimony from an anonymous witness, DAS, who told the ICTR that the applicant had killed a woman named Francine.

[8] Sometime in late 2001 or early 2002, the applicant spoke to his childhood friend, Jean Claude Ndungutse, the grandson of Bishop Sebununguri, a bishop of the Anglican Church in Rwanda. The applicant learned that Bishop Sebununguri had been interviewed by the RCMP about the applicant's alleged involvement in Francine's death. On January 29, 2003, the applicant also spoke to his former cook, Aimable Rutanemara, in Kigali, Rwanda. Mr. Rutaremara told the applicant that two RCMP officers came to see him and asked him about Francine's death; he apparently said to the applicant that he had told the RCMP officers that the applicant was not in any way involved. The applicant, however, has not been able to obtain affidavits from either Bishop Sebununguri or Mr. Rutaremara attesting to these facts.

[9] In September 2004, while in Ottawa for another file, Mr. Beaupré met with an officer from the War Crimes Unit of the RCMP, Mr. Guy Poudrier, and asked him about the status of their file on the applicant. Mr. Poudrier told the Minister's representative that the RCMP investigation on the applicant was still ongoing and that the Crown was reviewing the file in order to determine if criminal charges could be laid against the applicant. The RCMP officer said that until a decision

was made on this subject, CBSA could not use documents from the RCMP file for immigration purposes.

[10] Mr. Poudrier did allow Mr. Beaupré to consult the RCMP file for five minutes. Mr. Beaupré attests, however, that Mr. Poudrier did not allow him to make copies of documents. Mr. Beaupré further attests that he did not read the witness statements. Knowing that he could not use the RCMP information, Mr. Beaupré says he stopped consulting the file. Finally, Mr. Beaupré claims that during the meeting with Mr. Poudrier, there was no allusion to the statements of Bishop Sebununguri or of Mr. Rutaremara, and he did not gain knowledge of these statements.

[11] On November 1, 2004, the applicant sent a letter to CIC, attached to which were two documents referring to his involvement in war crimes in Rwanda during the genocide. These documents were the written statements by the anonymous witness DAS, mentioned above, and the charge against Protais Zigiranyrazo before the ICTR. According to this indictment, Second-Lieutenant Jean-Claude Seyoboka manned a barricade with members of the Rwandan military and a militia (the Interahamwe), and they were ordered to kill all the Tutsis that would be found as a result of a search of neighbouring houses. The relevant paragraphs of that indictment read as follows:

> **Le barrage routier de Kiyovu**
> 11. En particulier, le ou vers le 7 avril 1994, les militaries affectés à la garde de la résidente de Protais Zigiranyirazo sise dans la cellule de Kiyovu, prefecture de Kigali-Ville, ont ordonné aux gardiens employés dans les maisons du quartier de tenir un barrage routier érigé entre le domicile de Protais Zigiranyirazo et l'église presbytérienne qui le jouxtait. Ce barrage routier qui était le plus grand de Kiyovu, était contrôlé par des militaires et des *Interahamwe*, notamment le sous-lieutenant Jean Claude SEYOBOKA, BONKE et Jacques

> KANYAMIEZI. Les civils qui y montaient la garde étaient armés de machettes et de gourdins.
>
> 12. Environ une semaine plus tard, à une date indéterminée de la mi-avril 1994, Protais Zigiranyirazo a ordonné aux militaires et aux *Interahamwe* de faction au barrage jouxtant sa résidence de Kiyovu de fouiller les maisons du voisinage et de tuer tous les Tutsis qu'ils y trouveraient. Protais Zigiranyirazo a également ordonné aux hommes qui contrôlaient le barrage de tuer tout Tutsi qui tenterait de franchir ce barrage routier. Peu après, les militaires et les *Interahamwe* se sont mis à tuer, sans discontinuer, des gens qu'ils ont trouvés chez eux-mêmes ainsi que toute personne identifiée comme tutsie, tentant de franchir ledit barrage routier.

[12] On March 4, 2005, the applicant, represented by counsel, filed an application for leave and judicial review seeking a mandamus to compel CIC to render a decision on his permanent residence application. Leave was granted on May 16, 2005, and a hearing on the merits of the application for mandamus was scheduled to take place on September 12, 2005. The Federal Court ordered CIC to produce a certified copy of its file, which it did, providing the applicant with 181 pages from his immigration file. On September 30, 2005, the Court denied the applicant's application for the issuance of the writ of mandamus.

[13] On June 30, 2005, the respondent made an application to vacate the applicant's refugee protection pursuant to section 109 of the IRPA and to exclude him from the definition of "Convention Refugee" and that of protected person pursuant to sections 1F(a), (b) and(c) of the United Nations *Convention relating to the Status of Refugees* ("UNCRSR"). The notice of application to vacate listed all the grounds relied on by the Minister to support his allegation that the

applicant's refugee protection should be vacated and that he should be excluded in light of his complicity in war crimes and crimes against humanity. A copy of the exhibits relied on by the Minister in support of the application was also attached to the notice.

[14] There were three hearings for the Application to vacate, held on February 22, 2006, and May 30 and 31, 2006. Before the first hearing, the applicant's counsel, then Me Nicole Goulet, sent the Minister a copy of the Exhibits that she intended to rely upon at the hearing. She did not refer to any witness. At the first hearing, Me Goulet did not request further disclosure. Following this hearing, the applicant forwarded a second list of documents he intended to use.

[15] The applicant was sent a notice to appear at the second hearing, which included information on how to call witnesses for the hearing. On May 5, 2006, the applicant sent a third list of documents he intended to file at the hearing. He referred to Senator Romeo Dallaire as his sole witness.

[16] On September 29, 2006, the applicant's refugee status was vacated on the basis that the applicant had obtained refugee status as a result of a material misrepresentation about his identity as an officer in the FAR. Moreover, the Tribunal excluded the applicant from the definition of Convention refugee and of protected person pursuant to sections 1F(a), (b) and (c) of the UNRCSR because the Tribunal found that he was complicit in crimes against humanity during the Rwandan genocide.

[17] The Tribunal found that the applicant was, if not a participant, at least complicit in the criminal acts committed by the FAR. Objective evidence demonstrated that the FAR participated largely in the terrible events that took place in Rwanda. The military systematically participated in the massacres and gave the authority and provided the example for others to follow. The FAR was an organization with a limited brutal purpose. There was abundant evidence that the FAR intervened militarily on the side of the "génocidaires". The Tribunal additionally found that the applicant was personally involved in the murder of his neighbour Francine, who he murdered because she wouldn't have sex with him.

[18] The Tribunal also found that the applicant gave vague responses regarding what he was up to between April 7, 1994, and April 16, 1994, when the massacres were in full rage. In its view, it was simply implausible that the applicant had no idea that massacres were taking place around him. The Tribunal concluded that the applicant did not have a clear conscience in lying about his involvement with the military and that the applicant continued to belong to the FAR during the massacres and was thus complicit in the accomplishments of its objectives.

[19] On October 26, 2006, the applicant filed an application for leave and for judicial review of the decision to vacate his refugee protection; this application was denied by the Court on February 6, 2007. Subsequently, the applicant filed a motion asking the Court to set aside this decision; this motion was also rejected on June 6, 2007.

THE IMPUGNED DECISION

[20] On September 20, 2007, the applicant submitted to the Tribunal an application to reopen the Tribunal's decision to vacate his refugee status. In support of his application to reopen, the applicant alleged that the respondent had breached natural justice in the applicant's vacation proceedings by not disclosing the potentially exculpatory testimonies of Bishop Sebununguri and Mr. Rutaremara undertaken by the RCMP.

[21] The Tribunal came to the conclusion that there was no breach of natural justice which could give rise to a reopening of the hearing, for the following reasons. First, the Tribunal concluded that the applicant knew the RCMP had met with Bishop Sebununguri and Mr. Rutaremara, but did not raise the issue of disclosure or mention them as witnesses who could attest to his innocence at the vacation hearing or in the subsequent application for leave and judicial review of the decision to vacate his refugee protection. Thus, the applicant was barred from raising the disclosure issue after there was a final decision against him.

[22] Second, the Tribunal found that even if the exculpatory statements of Bishop Sebununguri and Mr. Rutaremara had been introduced and given full weight, the applicant might still have been found excluded on the basis of his complicity to crimes against humanity by reasons of his active involvement in the FAR. Since the applicant did not allege the existence of exculpatory evidence regarding his involvement with the FAR, the Tribunal found that the undisclosed information was not determinative and the applicant would have been found to be complicit even if the exculpatory statements had been admitted.

[23] Thirdly, the Tribunal held that the applicant was not prejudiced by the fact that he was unrepresented for part of his vacation hearing. The presiding member of the Tribunal informed the applicant of his rights and explained to him the procedure of the Tribunal. Moreover, the applicant was represented by counsel during his application for leave and judicial review challenging the decision to vacate his refugee protection, yet never raised any issues relating to disclosure at that time.

ISSUES

[24] Counsel for the applicant argued before this Court that, at the time of the proceedings against him, the applicant knew that the RCMP had interviewed at least three witnesses in Rwanda who exculpated the applicant of any wrongdoing. What he did not know was that the RCMP had recorded or transcribed these interviews. The applicant had received disclosure of the evidence the Minister relied on to vacate his refugee status, but he was unaware that his file might contain other relevant and even exculpatory evidence as he did not know the practices of the RCMP regarding the collection and retention of evidence. It is only when he had read a news item about the experiences of another Rwandan facing similar allegations and after meeting him that he understood he had been treated unfairly.

[25] As a result, counsel for the applicant submits the following five issues arise in this application for judicial review:

> 1- What is the appropriate standard of review of the Tribunal's decision not to reopen the application to vacate the applicant's refugee protection?

2 – Does the Minister have a duty to disclose exculpatory evidence in vacation proceedings?

3 – If so, did the Minister breach her duty to disclose exculpatory evidence?

4 – Did the Tribunal err in law by concluding the applicant was barred from raising the issue of disclosure at this point?

5 – Did the Tribunal err in law by concluding there was no breach of natural justice?

ANALYSIS

[26] Pursuant to Rule 55 of the *Refugee Protection Division Rules* (the "RPD Rules"), a claimant may make an application to reopen a claim for refugee protection that has been decided. The application must be allowed if it is established that there was a failure to observe the principle of natural justice:

55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	55. (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
(4) The Division must tallow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[27] In *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada stated that a standard of review analysis need not be conducted in every instance where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence.

[28] Before *Dunsmuir*, the jurisprudence dealing with motions to reopen under RPD Rule 55 held that the standard of review was reasonableness *simpliciter*: see, for ex., *Nazifpour* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1694; *Masood* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1224. On the other hand, it has been made abundantly clear that the standard of review to be applied to issues of breach of natural justice is correctness (see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraph 46.

[29] As a result, I will apply the correctness standard with respect to the requirements of natural justice and whether they have been followed in the present case; whenever factual determinations will be at play in resolving these issues, however, they will be reviewed against the standard of reasonableness.

[30] The applicant contends that the Crown had evidence from witness interviews clearly exculpating the applicant of any crimes against humanity in its possession well before the outset of the application to vacate the applicant's refugee status. In failing to include this evidence in the disclosure provided to the applicant prior to the vacation proceedings, the respondent allegedly breached its duty to disclose as discussed in *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326, and violated the applicant's right to natural justice as well as his right to life, liberty and security of the person pursuant to s. 7 of the Charter.

[31] There are a number of problems with this submission, which I will now address in turn. First of all, the exculpatory nature of the statements given to the RCMP by Bishop Sebununguri and

Aimable Rutaremara is purely speculative at this stage, as neither one has filed an affidavit in support of the applicant's position, admittedly for reasons out of the applicant's control.

[32] More importantly, Mr. Beaupré claims to have had no knowledge of the existence of any declarations of these two witnesses; that being the case, the respondent's representative would have had no knowledge of the contents of these statements, exculpatory or otherwise. Indeed, the respondent in the case at bar did not use the testimonies of Bishop Sebununguri or Mr. Rutaremara or any other RCMP document at the hearing. Instead, Mr. Beaupré questioned the applicant on the basis of documents that the applicant himself had provided to the immigration authorities, that is, the testimony by DAS and the indictment of Protais Zigiranyirazo before the ICTR.

[33] The applicant retorts that for the purposes of disclosure obligations, the Crown is indivisible. Relying on the integrated nature of the War Crimes Unit and on the close cooperation of the War Crimes sections in Department of Justice, the CBSA, and the RCMP, the applicant contends that the Minister breached her legal obligation to make inquiries of all agencies involved in investigating the applicant to ensure a complete record was disclosed.

[34] A careful review of the case law on disclosure leads me to the conclusion that this is much too broad a proposition. One must never loose sight of the fact that the Refugee Protection Division of the Immigration and Refugee Protection Board is an administrative tribunal with specialized knowledge, not bound by legal or technical rules of evidence. As a result, the disclosure standards delineated in *Stinchcombe* do not necessarily apply automatically in the context of a refugee hearing

and may require some adaptation. On the other hand, I agree with the applicant that the level of disclosure owed to an applicant cannot be decided by a simple invocation of the distinction between criminal and administrative proceedings, and that the consequences of an adverse finding on the applicant must be taken into consideration. As the Supreme Court wrote in *Charkaoui* v. *Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, at para. 20:

> Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake: *United States of America v. Ferras*, [2006] 2 S.C.R. 77, 2006 SCC 33, at para. 14; *R. v. Rodgers*, [2006] 1 S.C.R. 554, 2006 SCC 15, at para. 47; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 656-57. The procedures required to meet the demands of fundamental justice depend on the context (see *Rodgers*; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361; *Chiarelli*, at pp. 743-44; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at paras. 20-21). Societal interests may be taken into account in elucidating the applicable principles of fundamental justice: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 98.

[35] On the basis of the five factors found to be relevant in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, in determining the content of the duty of fairness in a particular set of circumstances, I am prepared to accept that an applicant is entitled to a high degree of procedural fairness in a proceeding to vacate his refugee status based on alleged omissions of participation in war crimes and crimes against humanity. I rely for that finding more particularly on the consequences for the applicant to be branded as a war criminal, and on the adversarial nature of such a proceeding. Indeed, the Federal Court of Appeal came to that very

conclusion in the context of a finding of exclusion based on Article 1F(a) and (c) of the Convention, and opined that it entails the obligation for the Minister to disclose relevant information:

> Paragraph 69.1(5)(a) of the *Immigration Act* requires that the Tribunal afford the refugee claimant a "reasonable opportunity" to present evidence, cross-examine witnesses, and make representations. Although *Stinchcombe*, a criminal case, does not apply directly in the immigration context, it is nonetheless instructive. Counsel for the Minister conceded in oral argument, correctly, in my respectful view, that where the Minister alleges exclusion under Article 1F of the Convention, the Minister does owe a duty to disclose information relevant to the refugee claim. This concession is consistent with some of the literature regarding disclosure in the administrative context.
> *Siad* v. *Canada (Secretary of State)*, [1997] 1 F.C. 608.

[36] Counsel for the applicant relied on the recent decision of *Canada (Justice)* v. *Khadr*, 2008 SCC 28, where the Supreme Court found that Khadr was entitled to disclosure of the records of the interviews, and of information given to U.S. authorities as a direct consequence of conducting the interviews. In that case, the Court based its conclusion on Khadr's section 7 disclosure rights rather than directly applying *Stinchcombe*. While it is true that, strictly speaking, there was no criminal proceeding taking place in Canada, the fact remains that the ultimate proceedings for which disclosure was sought were military in nature, with potential attending consequences far more dire than criminal proceedings. Moreover, Mr. Khadr's Charter right to life, liberty and security of the person was triggered due to Canada's participation in providing information to U.S. authorities in relation to a process which is contrary to Canada's international human rights obligations.

[37] At the hearing, the applicant has made much of the recently released decision in *Charkaoui* v. *Canada (Minister of Citizenship and Immigration)*, 2008 SCC 38, where the Supreme Court recognized certain disclosure obligations in the security certificate context. Once again, the Court confirmed that the constitutional guarantees deriving from section 7 of the Charter do not turn on the areas of law involved, but on the consequences of the state's actions for the individual (para. 53). Dealing more specifically with the duty to disclose, the Court went on

> [56] In *La* (para. 20), this Court confirmed that the duty to disclose is included in the rights protected by s. 7. Similarly, in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at paras. 39-40, the Court stressed the importance of adopting a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled. In our view, the issuance of a certificate and the consequences thereof, such as detention, demand great respect for the named person's right to procedural fairness. In this context, procedural fairness includes a procedure for verifying the evidence adduced against him or her. It also includes the disclosure of the evidence to the named person, in a manner and within limits that are consistent with legitimate public safety interests.

[38] Despite counsel for the applicant's forceful and cogent argument, I have not been convinced that this second *Charkaoui* decision is determining in the present case. In *Charkaoui*, the Canadian Security Intelligence Service ("CSIS") played a central role in the security certificate proceeding, and the consequences of that proceeding could be dismal for the applicant. As the Court observed:

> [54] Investigations by CSIS play a central role in the decision on the issuance of a security certificate and the consequent removal order. The consequences of security certificates are often more severe than those of many criminal charges. For instance, the possible repercussions of the process range from detention for an

> indeterminate period to removal from Canada, and sometimes to a risk of persecution, infringement of the right to integrity of the person, or even death. Moreover, as Justice O'Connor observed in his report, "the security certificate process . . . provides for broader grounds of culpability and lower standards of proof than criminal law" (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, at p. 436).

[39] The implications of the decision not to reopen the refugee vacation hearing of the applicant, though serious, do not compare to the consequences of issuing and validating a security certificate. But may be more importantly, the RCMP did not play a role even approaching that of CSIS in the decision to seek the vacation of the applicant's refugee status. As previously mentioned, the RCMP War Crimes Unit had no role in the CBSA investigation, and the CBSA did not rely on RCMP intelligence relating to the applicant. As a matter of fact, the RCMP War Crimes Unit refused to provide any of its intelligence to the CBSA.

[40] Contrary to the applicant's submissions, the CBSA and the RCMP were divisible for the purpose of disclosure. Each agency was conducting separate investigations against the applicant for administrative law and criminal law purposes, respectively. The cooperation between the RCMP, CBSA, and the Department of Justice does not put an end to the divide between the police and the government. The RCMP has a common law investigative privilege, which can only be modified by statute. Until this is done (and cooperation between the three War Crime Units is certainly not explicit enough to be equated to such a curtailment of the privilege), the RCMP is entitled and, indeed, has a duty not to share the fruits of its criminal investigations with other agencies or departments of the government.

[41] The applicant relied on a few cases where the RCMP and the Crown were found to be indivisible for disclosure purposes. But each of these cases can be distinguished on their facts. In *R.* v. *Styles*, [2003] O.J. No. 5824 (Ont. S.C.J.), the Court held that any and all material, directly or indirectly connected to the charges before the Court, whether or not in the actual possession of the Crown, can properly be said to be in their constructive possession and must be disclosed if the material is in the possession of the same police service as is responsible for the particular prosecution at hand.

[42] In *R.* v. *Smith*, 2007 ABQB 172 (Alta Q.B.), what was sought to be produced was an internal administrative review within the RCMP that had been ordered as a result of the death of one RCMP officer and injuries to another following a car accident. It was determined that this material was so factually and intrinsically connected with the circumstances of the criminal charge of dangerous driving causing death and dangerous driving causing bodily harm that it had to be considered as one of the fruits borne out of the investigation and disclosed as part of the criminal prosecution.

[43] These two decisions are strikingly different from the case at bar. First of all, the relationship between the Crown and the material in the hands of the police for which the Crown was held to be in constructive possession was much more intimate in both of these cases than was the case here between the CBSA and the RCMP. Second, the duty to disclose was applied in the context of a criminal prosecution, and it was the information gathered for other purposes that was ordered

disclosed; here, it is the information collected as a result of an ongoing investigation that is sought in the context of an administrative procedure.

[44] It is to be noted that even these two cases do not question the general principle that the Crown and the police are separate entities for the purposes of disclosure. In *Stinchcombe*, the Supreme Court held that prosecutors have a duty to disclose relevant matters which the investigation of the crime has disclosed and which are within the control of the prosecutor. If the information is within the control of a third party, a separate procedure has to be followed, as laid out in *R.* v. *O'Connor*, [1995] 4 S.C.R. 411. It would set a dangerous precedent if this demarcation line was to be blurred, under the pretext that the Crown and the police were indivisible. Except in the most exceptional circumstances, an administrative agency should not have access to the file of a police force gathered as a result of an ongoing investigation, let alone be held responsible for not disclosing that information.

[45] Be that as it may, and even if the Minister did have a duty to disclose the testimonies of Bishop Sebununguri or of Mr. Rutaremara, it would make no difference to the outcome of this case since the applicant waived his alleged right. Having carefully reviewed the entire file, I am of the view that it was entirely reasonable for the Tribunal to hold that the applicant's failure to raise the insufficiency of the disclosure at the earliest opportunity bars him from raising it now.

[46] In his affidavit, the applicant alleges that he has been aware since late 2001 or early 2002 that the RCMP had been investigating his involvement in Francine's death. He also knew that

Bishop Sebununguri had been interviewed by the RCMP and that the Bishop had told the RCMP that he was innocent. He also learned, in January 2003, that the RCMP had met his former cook, Aimable Rutaremara, and other people, who also had told the RCMP that he was not involved in Francine's death.

[47] If the applicant truly wished to rely on interview information in the control of the RCMP, he should have raised the issue during the 2006 vacation hearing. He was represented by counsel for much of the proceeding. He has waived any alleged breach of natural justice. It is clear from the transcript of the February 22, 2006, vacation hearing that the applicant's then counsel did not seek disclosure of any RCMP information and in fact would be averse to the use of the fruits of the RCMP investigation.

[48] It is simply not open to the applicant to have waited until after receiving a negative decision by the Tribunal (and a negative decision from this Court on leave) to raise the issue of disclosure in the context of an application to re-open. Where defence counsel makes a tactical decision not to pursue disclosure of certain documents, the Court will generally be unsympathetic to a plea that full disclosure of those documents was not made: *R.* v. *Bramwell* (1996), 106 CCC (3d) 365 (B.C. C.A.). Counsel for the applicant submitted that there was no evidence that the applicant's then counsel made any tactical decision with respect to disclosure, and that in any event, the duty to disclose all exculpatory and relevant information is one that accrues to the Crown independent of any request. This is no doubt true; nevertheless, the Supreme Court of Canada has held that to do nothing in the face of knowledge that relevant information could have been withheld may, in certain

circumstances, support an inference that counsel made a strategic decision not to pursue disclosure:

R. v. *Dixon*, [1998] 1 S.C.R. 244:

> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R.* v. *Bramwell* (1996), 106 C.C.C.(3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:
>
> > …the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

[49] The applicant admitted that, at the time of the vacation proceedings against him, he knew that the RCMP had interviewed at least three witnesses in Rwanda who apparently exculpated him of any wrongdoing. However, he claimed that he did not know the RCMP had recorded or

transcribed these interviews, and that he was unaware of RCMP practices regarding the collection and retention of evidence. He also submitted that for most of the vacation proceedings, he was unrepresented by counsel, did not know that the Minister had a duty to disclose exculpatory information, and that he had a right to request further disclosure beyond what was already given to him by the Minister. It is only after meeting with another Rwandan facing similar allegations that he would have learned about this.

[50] I do not find this argument convincing, for several reasons. First of all, it is no excuse to argue that he could not exercise his right to request further disclosure because he did not know whether the RCMP recorded or transcribed these interviews, or what the practices of the RCMP are regarding the collection and retention of evidence. If he believed that some witnesses interviewed by the RCMP had given exculpatory statements, he could at least have asked for these statements and attempted to have them disclosed to him; all he was risking was to be told there was no record of these interviews.

[51] Moreover, the applicant cannot succeed on the ground that he was unable to safeguard his rights due to the lack of counsel. Litigants who choose to represent themselves must accept the consequences of their choice: *Wagg* v. *Canada*, [2004] 1 F.C. 206, at paras. 23-25 (F.C.A.); *Palonek* v. *Minister of National Revenue*, 2007 FCA 281, at para. 16; *Minister of Human Resources Development* v. *Hogervorst*, 2007 FCA 41, at para. 35. Moreover, the applicant was represented by counsel during his application for leave and for judicial review of the September 29, 2006 vacation and exclusion decision, where again disclosure was not raised as an issue. It is simply not the

Board's function at a hearing for an application to reopen to consider issues that should have been raised in a judicial review application.

[52] This case bears no similarity with the case of the other Rwandan upon which he relies. It is clear from the affidavit filed by Mr. Ndihokubwayo in support of the applicant that his counsel (who, incidentally, is now representing the applicant) had requested disclosure of the information contained in CBSA's file as soon as he received notice of the application to vacate refugee protection. He then made a motion to be heard at a pre-hearing conference. Throughout the proceedings, he insisted on having complete disclosure of witness statements. Also of significance is the fact that in Mr. Ndihokubwayo's case, the witness statements containing exculpatory evidence at issue were within the possession of the CBSA. The evidence originated from the RCMP and it was the CBSA's withholding of evidence they had knowledge of which was at issue. In light of these facts, the Tribunal could reasonably conclude that the applicant's case was not comparable to Mr. Ndihokubwayo's situation.

[53] Finally, the applicant faces another hurdle in his attempt to challenge the decision of the Tribunal to dismiss his application to reopen his refugee status vacation proceeding. As noted by the Tribunal, even if the applicant had not been excluded for the murder of Francine, he would still have been excluded for the more obvious crimes against humanity in which he was found to be complicit by reason of his active involvement in the FAR. As the Tribunal stated:

> Moreover, even if the exculpatory statements of Bishop Sebununguri and Aimable Rutaremara had been introduced and given full weight by the member, the applicant might not have been found

> excluded on that basis, but the more obvious crimes against humanity in which he was found to be complicit by reason of his active involvement in the FAR would nevertheless have yielded the same result. After a review of the member's decision it is clear to the tribunal that the applicant was not excluded only because of the murder of one Francine but because of his complicity in crimes against humanity while serving in the FAR. The applicant is not alleging that exculpatory evidence existed for that aspect of the case. The tribunal finds that the undisclosed information was not determinative in this case. In the circumstances, the applicant has suffered no prejudice.
> Applicant's Record, p. 10

[54] This conclusion was entirely reasonable. A simple perusal of the vacation proceeding transcript reveals that the applicant was highly connected to the governing regime of Rwanda during the genocide of 1994. The applicant testified that he was able to freely enter the presidential palace and wander around Kigali for two weeks while the genocide commenced. His implausible claim that he was unaware of the extent of the massacres was rejected by the Tribunal. Since the applicant has already unsuccessfully sought judicial review of that decision, he should be precluded from attempting to collaterally attack that decision.

[55] Had the Tribunal decided the applicant's case exclusively on the ground of his involvement in the murder of Francine, he might have been entitled to a new hearing (assuming, for the sake of the argument, that there has been a breach of the applicant's right to a fair hearing and that he has not waived his right). But this was not even the most serious ground to vacate his refugee status. It may well be, as the Supreme Court of Canada said in *Cardinal* v. *Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661, that "the denial of a right to a fair hearing must always render a

decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision". But when the impugned decision also rests on other grounds which are untainted by the breach of natural justice principles, there would be no point to send it back on judicial review: see *Lord's Evangelical Church of Deliverance and Prayer of Toronto* v. *Canada*, 2004 FCA 397.

[56] The applicant speculated that the exculpatory witness statements could have established that he was among the minority who used their position in the FAR to save Tutsi civilians rather than to kill them. But there is not a shred of evidence to support that theory, which was roundly rejected by the Tribunal on the applicant's vacation hearing. And nowhere in his affidavit filed in support of this application for judicial review does the applicant mention that Bishop Sebununguru or his cook Aimabe Rutaremera would have exculpated him from his complicity in crimes against humanity by reason of his involvement in the FAR. The possibility that their statements might have been relevant to this more serious ground for excluding him is therefore extremely remote, and I am therefore unable to conclude that the Tribunal was unreasonable in finding that the undisclosed information was not determinative at least in that respect.

[57] For all the foregoing reasons, I am therefore of the view that this application for judicial review ought to be dismissed.

[58] Counsel for the applicant proposed four questions for certification purposes:

> 1. Within the context of the judicial review hearing where the Minister intervenes to seek the exclusion of

> the claimant, is the Minister under a duty to disclose all relevant evidence in his possession, including exculpatory evidence, subject only to any claims to privilege which would be assessed by the tribunal?
>
> 2. Is that duty contingent on any request from the claimant or does the duty exist independently of any request from the claimant?
>
> 3. Can the right to disclosure be waived? If so, must the waiver be explicit, or can it be inferred from the conduct of the claimant?
>
> 4. If there is a duty to disclose, does that duty include a duty to disclose evidence in the possession of other Government agencies when Minister's counsel is aware that that government agency has a file on the person which might contain relevant evidence?

[59] The respondent opposes the certification of the proposed questions.

[60] It is well settled that the test to certify a question is twofold: first, the question must be serious and of general importance, and second, it must be determinative of an appeal: *Zazai* v. *Canada (Minister of Citizenship and Immigration),* 2004 FCA 89.

[61] I agree with the respondent that the questions proposed by the applicant have already been canvassed by the case law and are quite fact specific. On the other hand, counsel for the applicant strenuously stressed that *Charkaoui no.2* has changed the law with respect to disclosure. Since these issues are recurring and deserve to be clarified by the Court of Appeal, I am prepared to accept the certification of the four questions submitted by the applicant. As I made it clear in my reasons, I do not think that they are determinative in the context of this particular case; but in light of the

serious consequences of these proceedings for the applicant, it is well worth having the benefit of the Court of Appeal's assessment of these matters.

ORDER

THIS COURT ORDERS that:

1. This application for judicial review is dismissed.

2. The following four questions are certified:

> 1. Within the context of the judicial review hearing where the Minister intervenes to seek the exclusion of the claimant, is the Minister under a duty to disclose all relevant evidence in his possession, including exculpatory evidence, subject only to any claims to privilege which would be assessed by the tribunal?
>
> 2. Is that duty contingent on any request from the claimant or does the duty exist independently of any request from the claimant?
>
> 3. Can the right to disclosure be waived? If so, must the waiver be explicit, or can it be inferred from the conduct of the claimant?
>
> 4. If there is a duty to disclose, does that duty include a duty to disclose evidence in the possession of other Government agencies when Minister's counsel is aware that that government agency has a file on the person which might contain relevant evidence?

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2147-08
STYLE OF CAUSE:	**HENRI JEAN-CLAUDE SEYOBOKA v. MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 29, 2008
REASONS FOR ORDER AND ORDER:	de Montigny, J.
DATED:	January 30, 2009

APPEARANCES:

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