Federal Court  Cour fédérale

Date: 20100120

Docket: IMM-500-08

Citation: 2010 FC 66

Ottawa, Ontario, January 20, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

FAUSTIN MUTABAZI KANYAMIBWA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Minister Stockwell Day, then Minister of Public Safety, wherein he rejected the Applicant's application for Ministerial relief under s. 35(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 ("*IRPA*"). The Applicant had previously been deemed inadmissible pursuant to s. 19(1)(l) of the former *Immigration Act*, R.S.C. 1985, c. I-2 (now s. 35(1)(b) of the *IRPA*) because he was considered to

be a senior official in two Rwandan governments who have been determined to have engaged in systemic or gross human rights violations, genocide, war crimes, or crimes against humanity.

I. Facts

[2] The Applicant is a Rwandan citizen of Hutu ethnicity, born October 10, 1950. After earning a bachelor's degree in psychology in 1975, he worked briefly (from January 1976 to October 1977) for the Government of Rwanda in Kigali in the immigration department. In November 1977, the Applicant went to Bordeaux, France, on a government scholarship, where he earned a master's degree in education (in 1979).

[3] Upon his return to Rwanda, he resumed working for the government, first as an intelligence analyst for the "Service central de renseignements" (from October 1979 to August 1984), and then as a diplomat in the "Ministère des affaires étrangères". From August 1984 to July 1988, he was stationed in Switzerland, and from July 1988 to September 1991 he was posted in the Ivory Coast. In September 1991, he was transferred to Canada, where he has remained ever since. His position at the Rwandan Embassy was "premier conseiller", which made him the second highest ranking officer after the Ambassador Maximin Segasayo. During all those years since 1984, he never returned to Rwanda except to attend the funeral of his mother-in-law in 1991.

[4] The Applicant's posting in Canada coincided with the regimes of President Juvenal Habyramana (October 1990 to April 1994) and the Interim Rwandan Government (April 1994 to July 1994). It will be remembered that President Habyramana was assassinated in April 1994, the

event which unleashed a civil war and a terrible genocide. In July 1994, the opposition forces of the Rwandan Patriotic Front (RPF) took power in the capital of Kigali. The Applicant continued to work at his post in Canada albeit unpaid until March 1995, when he received orders from the new government to return to Rwanda with his family.

[5] The Applicant did not follow these orders, allegedly because of the difficulty of extricating himself from his life in Canada on such short notice, but also because he knew he would be at risk in Rwanda. The Applicant claimed that the RPF had harmed members of his family before, and that he was hearing new stories of persecution from Hutus who had returned to Rwanda. He and his family therefore elected to claim refugee protection in Canada in October 1995.

[6] Prior to the beginning of the hearings, a journalist at the Ottawa Citizen named Jacquie Miller filed an application to have the hearing made open to the public. A corresponding application was made by the Applicant for an order to ensure the confidentiality of the proceedings. Ms. Miller's application was denied in an interim decision, but the Refugee Protection Division (RPD) stated that she could re-apply upon review of the completed reasons for decision. Subsequent to that interim decision, Ms. Miller swore an affidavit wherein she stated that "sources from the Rwandan community" had informed her that Mr. Kanyamibwa was a senior official in the early 1980s for the Rwandan security service, and she added that "[a]t that time, the security service was linked to torture of political prisoners and severe human rights abuse". She also reported the views of a human rights expert at the Université du Québec in Montréal according to whom former diplomats would not be in danger if returned to Rwanda. That affidavit

was filed before the RPD. A Hearings Officer also filed a notice of intent to participate on December 6, 1996.

[7] On March 19, 1997, the RPD decided that the Applicant's claim was well-founded, and as such, he was included in the Convention refugee definition. The Board concluded this part of its reasons in the following way:

> By his testimony and personal documents the claimant has satisfied the panel that he is an intellectually prominent Hutu who would certainly come to the attention of the government if he returned to Rwanda. He has a graduate degree from a French university and has held relatively important posts within the former government. As well, the claimant produced building permits and photographs of his two residences in Kigali and gave credible evidence that they have been occupied by others, including the RPA [Rwandan Patriotic Army]. Considering the objective country information, the panel finds that if the claimant returned to Rwanda there is a reasonable possibility that the claimant would be subjected to arbitrary arrest and detention if not some more serious harm either because of his prominence as a member of the Hutu elite or because he would be unjustly denounced by someone now occupying one of his properties. He therefore has a well-founded fear of persecution by reason of his ethnic identity and perceived political opinion.

[8] The Minister intervened to seek the exclusion of the Applicant, both on the ground of his work for the Rwandan government in the 1980s and because he served as a diplomat during the genocide in 1994. At the conclusion of the Applicant's testimony on December 10, 1996, the RPD granted the Minister's request for an adjournment in order to obtain additional evidence and in particular, speak with sources in the Rwandan-Canadian community referred to in the affidavit of Ms. Miller. The Minister requested an extension of the adjournment, which was also granted. After a three-month adjournment, the Minister informed the RPD that he had completed his

investigation, that no new evidence was forthcoming, and that he would be calling no witnesses and making no submissions.

[9] The RPD accepted the Applicant's testimony regarding his assignment to the "Service central de renseignements" following his return from the University of Bordeaux. In particular, the RPD wrote:

> His Department in the Information Services was responsible for gathering and summarizing international information about Rwanda which was generated by external sources. Much of the information was economic and political in nature and was gathered from Rwandan embassy sources and international press clippings. The claimant also wrote security reports for various government departments based on the information. The government had an on-going concern that some of its neighbours, notably Uganda, would seek to destabilize the economy by blocking access to coffee markets.
>
> The claimant was closely questioned by the Minister's representative and the RCO on the relation of the claimant's department to other departments within the Information Services. The claimant said he knew that arrests were made by another department within the Information Services which was responsible for internal problems within Rwanda. If officials of that department tortured prisoners, he was unaware of it. He testified there was no formal communication between the departments. In general officials throughout the Information Service did not speak about their work. (…)
>
> In the compound where the claimant worked, no one wore a uniform or bore arms. There were no cells in the compound. The nearest prison was about five kilometres away. He had not visited it personally. He has never received military or police training. In summary, the claimant testified that in the course of his duties, the claimant had not been involved in the arrest or torture of anyone in Rwanda either directly, or indirectly by the processing of any files or information obtained though torture.

[10] The RPD therefore found that the Applicant's testimony was "detailed, consistent and plausible". It gave Ms. Miller affidavit "very little weight", since the allegations contained therein "although quite serious, are double or triple hearsay". The RPD concluded:

> Presumably the witnesses are available in Canada and have not been forthcoming after a generous amount of time was permitted for the Minister to marshall the relevant evidence. The panel therefore finds there is no evidence before it which would permit a finding that the claimant committed or was complicit in committing crimes against humanity during his employment in his country's Information Services from 1979 to 1984.

[11] Similarly, the RPD found no evidence to establish that the Applicant was excludable based on complicity in the 1994 genocide. In this respect, the RPD wrote:

> There is limited documentary information available on the planning and organization of the genocide perpetrated against Tutsis and Hutu moderates. It is still not known who assassinated President Habiyamara although many suspect anti-Tutsi extremists who were close to the president and the Rwandan military. Little is known about the genocide except that it was precipitous and any planning of it must have been extremely secretive since it was linked to the assassination. Although fomented by extremist leaders, much of the killing was performed by individual Rwandan citizens over an extremely brief period of several weeks. There is no evidence before this panel that the claimant was actively involved in Rwandan politics, espoused extremist anti-Tutsi views nor that he had any connections with the Interhamwe or other Hutu militias involved in the killing. Indeed, given that he has lived outside of Rwanda since 1985, it does not appear likely that he would have had the opportunity to be intimately involved with clandestine power struggles at the highest levels of the former Rwandan government.
>
> Again, after completing his investigation, the Minister has been unable to offer any contrary information on the claimant's role in regard to the genocide.
>
> The panel finds that no evidence has been presented which would allow a finding that the claimant has either committed or been

> complicit in the commission of crimes against humanity in regard to the 1994 genocide. Mindful of the present finding and earlier finding in regard to the claimant's work for his country's Information Service, the panel concludes that the provisions of Article 1F of the Convention do not apply and the claimant is not excluded from the Convention Refugee definition.

[12] On April 27, 1998, Citizenship and Immigration Canada ("CIC") designated the Rwandan governments under President Habyramana and the Interim Rwanda Government (the "designated regimes") as regimes that had engaged in systemic or gross human rights violations, genocide, war crimes or crimes against humanity for the purposes of s. 19(1)(l) of the *Immigration Act*.

[13] On July 20, 1998, CIC advised the Rwandan Ambassador Segasayo that he was inadmissible pursuant to s. 19(1)(l) of the *Immigration Act*. The Ambassador's application for ministerial relief was denied, and that decision was subsequently upheld on judicial review: *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 585, [2007] F.C.J. No. 792.

[14] On December 17, 1999, CIC advised the Applicant that he was inadmissible to be landed in Canada due to his position in the two designated regimes pursuant to s. 19(1)(l) of the *Immigration Act*. In reply, the Applicant wrote a letter stating his surprise and shock at the allegations and requested a re-examination of his file.

[15] On March 15, 2000, the Applicant received a letter from CIC stating that he could make an application for ministerial relief. He retained counsel and submissions were made on his behalf on October 2, 2000.

[16] On November 10, 2000, a positive recommendation for his ministerial relief was made, based on the fact that the Applicant's activities were oriented to cultural and educational cooperation and that he did not have signing authority to sign agreements. The recommendation also referred to the RPD's decision where the Applicant was determined not to be involved in the genocide. However, no final determination was made at that time.

[17] On November 14, 2006, the Applicant received a package from the Canada Border Services Agency ("CBSA"). It contained a draft Briefing Note recommending that the Applicant's application for ministerial exemption be denied. The Applicant was given an opportunity to respond to this material, which he did on March 27, 2007.

[18] On June 21, 2007, the Applicant was advised by CBSA that its recommendation against ministerial relief had been amended. He was given an opportunity to respond to the amendments and did so on August 10, 2007.

[19] On November 15, 2007, the Minister denied the Applicant's application for ministerial relief following the recommendations of the Briefing Note dated August 31, 2007.

[20] After the Applicant was granted leave for judicial review of the Minister's denial, the Respondent filed a motion for non-disclosure of some information in the tribunal record pursuant to s. 87 of the *IRPA* on the grounds that disclosure would be injurious to national security or to the safety of any person. Fourteen pages of the Certified Tribunal Record (CTR) were partially (and in some cases, heavily) redacted. They consisted of five documents: a letter or report from the Canadian Security Intelligence Service ("CSIS"), dated September 28, 1999; a second letter or report dated November 2002, also from CSIS to the Modern War Crimes section of CIC; a memorandum from CSIS to the Modern War Crimes Unit of CBSA, and a memorandum from the RCMP War Crimes Section to the CBSA dated June 1, 2005. The last document is entitled "Classified Analysis Pertaining to the Application of Ministerial Relief for Faustin Kanyamibwa" and is almost entirely redacted.

[21] Following the *ex parte* and *in camera* hearing on the Respondent's Motion for non-disclosure that took place on September 9, 2009, it was determined that three pages of the CTR contained redactions of information that could be made public. On September 21, 2009, these un-redacted pages that now form part of the public record (pages 115, 125 and 126 of the CTR) were disclosed and sent to the Applicant. The Applicant was also given permission to file a further affidavit in response to this disclosure, which he did on October 14, 2009.

[22] The new information provided to the Applicant as a result of this partial disclosure is to the effect that the RCMP received information about the Applicant from the Rwandan Ambassador on October 15, 1996. This was before the Applicant's refugee hearing had commenced. The

Ambassador is the source of the initial allegation that “members of the Rwandan Intelligence Agency at the time of Mr. Kanyamibwa’s involvement were known to use torture during interrogation of their targets”. The document then notes that a witness was interviewed, who claimed to have been a victim of torture. This information was clear from the redacted CTR. The new information provided that the interview took place on July 11, 1997, the interviewee’s name, the date and length of his alleged detention, and the supposed reason for his arrest. The document also stated that the interviewee claimed to have seen the Applicant here in Canada, and felt that Mr. Kanyamibwa did indeed recognize him.

[23] In parallel to the Respondent’s Motion for non-disclosure, counsel for the Applicant made a motion requesting the appointment of a special advocate. After hearing counsel by way of teleconference on September 28, 2009, I dismissed the motion on October 6, 2009 for reasons briefly explained to the parties during the teleconference that took place on that day. I indicated at the time that more fulsome reasons would be provided with respect to these two motions as part of my reasons on the judicial review application.

II. The impugned decision

[24] The reasons for the decision must be taken to be the Briefing Note prepared and signed by the President of the CBSA, who recommended that Ministerial relief not be granted. Since the Minister adopted the negative recommendations without giving any further reasons, the Briefing Note must be taken to constitute the reasons for the decision by the Minister: *Miller v. Canada*

(Solicitor General), 2006 FC 912, [2006] F.C.J. No. 1164, at para. 55; *Kanaan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 241, [2008] F.C.J. No. 301 at para. 5.

[25] The reasons began with a summary of what the CBSA President saw as the key issues, namely:

> i.) the applicant is a Convention Refugee who is inadmissible to Canada pursuant to s. 35(1)(b) of the *IRPA* on the grounds that he is a former senior official of the Rwandan government under President Habyarimana and in the Interim Rwandan government from April 1994 to July 1994, both of which are responsible for having committed gross human rights violations and for the 1994 Rwandan Genocide.
>
> ii.) the applicant should not be granted Ministerial relief pursuant to s. 35(2) of the *IRPA* but should remain inadmissible to Canada and ineligible for permanent residence, though he may only be removed through a vacation of his refugee status pursuant to s. 109(1) of *IRPA* or through an opinion of the Minister of Citizenship and Immigration that the nature and severity of the acts committed outweigh the person's need for protection pursuant to s. 115(2)(b).

[26] The Briefing Note then laid out some background details, including the Minister of Citizenship and Immigration's designation of the Rwandan government under President Habyramana and the interim Rwandan government from October 1990 to July 1994 as regimes which had engaged in gross human rights violations. It then outlined the Applicant's immigration history in Canada.

[27] Then the CBSA President presented the arguments in favour of granting ministerial relief. In doing so, he referred to the Applicant's submissions. These arguments are to the effect that the Applicant would have been a neutral, mid-level public servant who did not have the ability to

significantly influence others. His position as First Secretary at the Embassy would not have permitted him to act instead of the Ambassador. His duties would have been essentially related to education, science, economy and commerce, but not politics. His contacts with the Canadian International Development Agency ("CIDA") and with some provinces would have only been relevant to education and trade. Furthermore, he and his family were well integrated in Canada. The Applicant also stressed that he never went back to Rwanda since 1984 except for a brief visit for a funeral and therefore he could not be implicated directly in the Rwandan conflict. The CBSA President also referred to the Applicant's Personal Information Form ("PIF") for his RPD hearing where he explained his employment at the Department of Information Services. He would have been in charge of collecting and summarizing international information about his country generally from external sources. Finally, the CBSA President also mentioned that at the RPD hearing the Minister decided not to pursue the art. 1(F)(a) exclusion due to a lack of available evidence.

[28] The CBSA President then turned to the arguments against granting relief on which he based his recommendation. The CBSA considered that, notwithstanding the Applicant's representations on his mid-level position, he was the second highest ranking individual at the Rwandan Embassy in Canada after the Ambassador and has been appointed by the Rwandan President himself. In addition, although it might be true that he was not in a position to sign agreements, he was involved in negotiations in which more than $67 million dollars in aid money were at stake. The fact that he was never required to replace the Ambassador does not negate the fact that if required, he could have done so. Similarly, being outside the country in the periods before and during the genocide did not sufficiently dissociate him from the regimes.

[29] The Briefing Note then dealt with the allegations of torture against the Applicant mainly in one paragraph, where it stated:

> During the course of preparing and reviewing the material for this recommendation the War Crimes section of the RCMP submitted concerns regarding Mr. Kanyamibwa. The RCMP had received information about Mr. Kanyamibwa's activities that required further investigation. As a consequence they interviewed a witness who had been arrested and detained in Rwanda and had been subjected to torture. He stated that while he was in detention in Rwanda, Mr. Kanyamibwa was present at the time of this witness's interrogation sessions, when the witness was tortured by members of the Rwandan Intelligence Service. The witness stated that while Mr. Kanyamibwa was not the person who inflicted the torture, he was the one who gave orders to the other intelligence officers.

[30] The CBSA President also addressed the positive recommendation of the Ontario Regional War Crimes Unit submitted in November 2000. He explained that this recommendation was made without being in possession of all of the relevant information with respect to the Applicant's role at the Embassy, and should therefore carry little weight in the final determination.

[31] The Briefing Note stressed the massive human rights abuses and use of violence associated with the designated regimes for which the Applicant worked as a senior official during the entirety of their designations. It is also noted that the Applicant never consciously separated himself from nor condemned the abuses carried out by these regimes.

[32] Finally, the Briefing Note indicated that the fact that exclusion under art. 1F(a) of the Convention was not pursued before the RPD should not indicate that the Applicant was not

involved in the events in Rwanda because the allegation regarding the Applicant had been made by a reporter, but were not substantiated by more credible sources at the time. The reasons also noted that external consultations revealed classified information pertaining to the Applicant's application for ministerial relief. This information was added in Appendices 15-19 to the Note, and were not disclosed on the ground that disclosure would be injurious to national security or to the safety of any person. After leave for judicial review was granted, the documents were communicated to the Applicant's counsel, with the redactions already referred to and which were the subject of the motion for non-disclosure submitted by the Respondent.

[33] Based on all the foregoing arguments, the President of the CBSA recommended that the relief not be granted to the Applicant because he had not shown that his presence in Canada would not be detrimental to the national interest as required by s. 35(2) of the *IRPA*. That recommendation was endorsed by the Minister on November 15, 2007.

III. Issues

[34] Mr Waldman, counsel for the Applicant, raises three issues in challenging the Minister's decision. First, he argues that the decision is in breach of natural justice due to its reliance, at the time of the decision, on undisclosed information to which the Applicant could not answer. This argument is somewhat novel, in that Mr. Waldman is not trying to re-litigate my decision on the Respondent's motion for non-disclosure. As he candidly confessed during oral argument, he would have had no argument had I ruled that all of the information could be withheld. But having ordered that three pages be disclosed without redactions, Mr. Waldman submits that judicial review should

be granted to allow the Applicant to make a meaningful submission to the decision-maker addressing this newly disclosed evidence. Since there is a substantial difference between what was disclosed to the Applicant before the Minister made his decision and what he now knows, argues Mr. Waldman, he should be able to respond more fully not before this Court, but rather, before the original decision-maker.

[35] The second argument made on behalf of the Applicant is more straightforward. According to Mr. Waldman, the issue of exclusion was dealt with conclusively before the RPD. Relying on the doctrines of *res judicata*, issue estoppel and abuse of process, he contends that the Minister was barred from considering whether the Applicant committed or was complicit in crimes against humanity in the context of the ministerial relief application, as this decision was based on the same allegations and the same facts that were put before the RPD.

[36] Finally, the Applicant argues that the Minister erred in making unreasonable findings of fact, or by ignoring evidence, or by making unreasonable inferences. He submits that he could not act instead of the Ambassador, that it was an error to give little weight to the Ontario Regional War Crimes Unit positive recommendation on the basis that it was made in the absence of all relevant information, that there is no evidence that he was involved in atrocities, and that the evidence which the Minister relied on to suggest that the Applicant was complicit in torture and crimes against humanity was inherently unreliable.

IV. Analysis

A. Preliminary Remarks

(1) The Respondent's Motion For Non-Disclosure

[37] Section 87 of the *IRPA* provides statutory assurance that the confidentiality of sensitive information will be maintained by allowing the Court to hear all or part of this information in the absence of the Applicant, his counsel and the public where it is believed that disclosing it would be injurious to national security or to the safety of any person. It provides as follows:

Application for non-disclosure judicial review	**Interdiction de divulgation contrôle judiciaire**
87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 other than the obligations to appoint a special advocate and to provide a summary applies to the proceeding with any necessary modifications.	**87.** Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

[38] The information referred to in that section is defined in s. 76 of the *IRPA* in the following way:

"information"	**« renseignements »**
means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a	Les renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs

government or international organization.	organismes.

[39] The relevant sub-paragraphs of section 83 state :

Protection of information	**Protection des renseignements**
83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	83. (1) Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
(…)	(…)
(c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;	c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;
(d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;	d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

[40] In *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at paras 38-44, the Supreme Court of Canada acknowledged that the state has a legitimate interest in preserving

intelligence information received from foreign sources and noted that the inadvertent release of such information would significantly injure national security. Consequently, the Supreme Court recognized the interest of the state in protecting national security and that the need for confidentiality in national security matters superseded the individual's right to an open judicial forum. See also: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at para. 744; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 122. This Court has similarly commented on a number of occasions on the rationale underlying the need to protect national security information: see, for example, *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1429, [2003] F.C.J. No. 1836; aff'd 2004 FCA 212, [2004] F.C.J. No. 947; *Gariev v. Canada (Minister of Citizenship and Immigration)* 2004 FC 531, [2004] F.C.J. No. 657; *Alemu v. Canada (Minister of Citizenship and Immigration)* 2004 FC 997, [2004] F.C.J. No. 1210; *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 372, [2007] F.C.J. No. 529; *Malkine v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 496, [2009] F.C.J. No. 635; *Rajadurai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 119, [2009] F.C.J. No. 147; *Nadarasa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1112, [2009] F.C.J. No. 1350.

[41] As I stated in *Rajadurai*, above, at para. 16:

> The state has a considerable interest in protecting national security and the security of its intelligence services. Disclosure of confidential information related to national security or which would endanger the safety of any person could cause damage to the operations of investigative agencies. In the hands of an informed reader, seemingly unrelated pieces of information, which may not

in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. In the past, this Court has consistently relied on the principles articulated in *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (F.C.T.D.), aff'd (1992), 88 D.L.R.(4th) 575 (F.C.A.). At pages 578 and 579, Mr. Justice Addy wrote:

> […] in security matters, there is a requirement to not only protect the identity of human sources of information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the service, the identity of certain members of the service itself, the telecommunications and cipher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.
>
> It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at

> some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the Service; (3) the typographic and teleprinter systems employed by C.S.I.S.; (4) internal security procedures; (5) the nature and content of other classified documents; (6) the identities of service personnel or of other persons involved in an investigation.

[42] As already mentioned, the Applicant did not formally object to the non-disclosure motion, but responded with his own motion for the appointment of a special advocate. It was submitted that the presence of a special advocate was important to protect the interests of the Applicant in the absence of the Applicant's presence when dealing with sensitive evidence. Counsel for the Applicant also contended that a special advocate would ensure a perception of an independent judiciary, since it would ensure that the Judge would have an opportunity to hear argument from both sides, despite the non-attendance of the Applicant prior to rendering a decision.

[43] The Respondent is correct in pointing out that the Supreme Court in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] S.C.J. No. 9 stressed the importance for the judge not only to be, but also to appear to be, independent and impartial. In light of the significant liberty interests in the context of security certificates, the Court came to the conclusion that the principles of fundamental justice required that the individual named in the certificate be provided with a full disclosure of the case against him or her, or in the alternative, a "substantial substitute" for such disclosure. As a result of that decision, amendments were made to the *IRPA* making it

compulsory to appoint a special advocate in security certificate proceedings (s. 83(1)(b)) and leaving it to the discretion of the Court in other types of cases (s. 87.1). These two provisions read as follows:

Protection of information	**Protection des renseignements**
83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83. (1)** Les règles ci-après s'appliquent aux instances visées aux articles 78 et 82 à 82.2 :
(b) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;	b) il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;
Special advocate	**Avocat spécial**
87.1 If the judge during the judicial review, or a court on appeal from the judge's decision, is of the opinion that considerations of fairness and natural justice require that a special advocate be appointed to protect the interests of the permanent resident or foreign national, the judge or court shall appoint a special advocate from the list referred to in subsection 85(1). Sections 85.1 to 85.5 apply to the proceeding with any necessary modifications.	**87.1** Si le juge, dans le cadre du contrôle judiciaire, ou le tribunal qui entend l'appel de la décision du juge est d'avis que les considérations d'équité et de justice naturelle requièrent la nomination d'un avocat spécial en vue de la défense des intérêts du résident permanent ou de l'étranger, il nomme, parmi les personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à ce titre dans le cadre de l'instance. Les articles 85.1 à 85.5 s'appliquent

alors à celle-ci avec les
adaptations nécessaires.

[44] Having carefully considered the information that is redacted from the CTR, as well as the submissions made by counsel for the Respondent and the testimony of the affiant who swore the confidential affidavit during the *in camera* and *ex parte* hearing that took place on September 9, 2009, I am satisfied that the disclosure of the information contained in pages 114, 116, 117, 118, 119, 120, 121, 122, 123, 124 and 127 "could be injurious to national security or endanger the safety of any person".

[45] As already indicated, I have also come to the conclusion that three pages of the CTR (pages 115, 125 and 126) contained redactions of information that could be made public. The witness who alleged to have been tortured in the presence of the Applicant, as well as the Rwandan Ambassador who tipped the RCMP in 1996, have both consented to have their name disclosed. Accordingly, there is no more reason to keep their names confidential, and this is why I ordered to remove most of the redactions found on these three pages.

[46] Mr. Kanyamibwa submitted that a special advocate should be appointed to protect his interests. Relying on two cases decided in the context of *Canada Evidence Act*, R.S.C. 1985, c. C-5 proceedings, he contended that the requirements of procedural fairness dictate such a result: *Canada (Attorney General) v. Khawaja*, 2007 FC 463, [2007] F.C.J. No. 648; *Khadr v. Canada (Attorney General)*, 2008 FC 46, [2008] F.C.J. No. 47.

[47] He also sought to distinguish the circumstances of this case from those at play in *Segasayo*, above, where Mr. Justice Pierre Blais (as he then was) refused to appoint a special advocate within the context of an immigration judicial review. According to the Applicant, his case is much different, first because the redacted pages form a much more significant proportion of the evidence than in *Segasayo*, second because the redacted evidence appears to refer to allegations which were made and discredited at the Applicant's refugee hearings and is therefore very significant, and finally because the matter in *Segasayo* was decided before section 87.1 was added to the *IRPA* to provide for the power to appoint a special advocate in the context of a judicial review.

[48] Mr. Kanyamibwa also relied extensively on the decision of the Supreme Court in *Charkaoui*, above for the proposition that in an adversarial system, it is important for the judiciary not only to be independent, but also to be perceived as independent, and that a special advocate would be key to ensure that the judge has an opportunity to hear argument from both sides.

[49] Taking into account the contextual factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, to assess the requirements of procedural fairness in a given case, Mr. Kanyamibwa finally argued that a higher requirement is mandated both by the legislative scheme itself and by the importance of the decision to the Applicant. Relying on *Mekonen v. Canada (Citizenship and Immigration)*, 2007 FC 1133, [2007] F.C.J. No. 1469, a case dealing with an admissibility assessment just like the present case, the Applicant submitted that the objective nature of the decision and the lack of any appeal procedure call for a relatively high degree of procedural fairness. This can be achieved through the

appointment of a special advocate, who can ensure that the correct decision is reached by acting on behalf of the Applicant in contradicting errors, identifying omissions, challenging the credibility of informants or refuting false allegations. As for the importance of the decision to the Applicant, it is submitted that without permanent residence, he is not eligible for the same social benefits and mobility rights as most Canadians, that his protections under the *Canadian Charter of Rights and Freedoms* is limited, and that he cannot apply for citizenship.

[50] Despite the able arguments presented by counsel for the Applicant, I cannot accede to his request for the appointment of a special advocate. I agree with the Respondent that the interests of justice do not require the appointment of a special advocate in the present case, given that the information the Respondent is seeking to protect from disclosure is minimal and this information did not form the basis for the Minister's decision.

[51] First of all, it is worth stressing that the Minister's decision under s. 35(2) of the *IRPA*, while not insignificant as it could potentially lead to the Applicant's removal from Canada further down the road, has a limited immediate impact on the Applicant's life, liberty and security interests. Not being able to access the same social benefits and mobility rights as other Canadians and being barred from obtaining Canadian citizenship are no doubt important restrictions for the Applicant, but they are a far cry from the consequences of being subjected to a security certificate.

[52] Moreover, the Applicant has already been found to be a convention refugee. As such, he is subject to s. 115 of the *IRPA*, which prohibits his deportation barring a determination by the

Minister that "…he should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada" (s. 115(2)(b)). Accordingly, I agree with Justice Blais' conclusion in *Segasayo* that "a judicial review of a denial of ministerial relief under subsection 35(2) differs substantially from both a judicial determination concerning the reasonableness of a security certificate and a judicial review of the detention of a person subject to a security certificate": *Segasayo*, above, at para. 26.

[53] Moreover, the extent of the non-disclosure is now very limited. There have been minimal redactions from the Certified Tribunal Record, and the Applicant has had access to an overwhelming majority of the information on the record. There are currently only 12 pages out of the 222 pages of the CTR which contain redactions, and the redactions on pages 115, 116, 119, 120 and 124 are limited to a few words; only two pages redacted in their entirety.

[54] Finally, it is well established that one of the factors to take into consideration is the materiality or probity of the information in question, and the ability of the Applicant to meet the case against him. The Minister's decision was based mainly on the fact that the Applicant held a high ranking position in the regimes of President Habyramana and the Interim Rwandan Government. The information forming the basis for the Minister's decision is public and was brought to the attention of the Applicant, who then had the opportunity to provide submissions on the issue of his role in the aforementioned Rwandan regimes.

[55] As for the allegations that the Applicant was present when a person was subjected to torture while detained in Rwanda in 1980, the Applicant was well aware of them and did indeed respond to this information both in his response to the Briefing Note to the Minister and in his Affidavit filed on September 16, 2008. I am satisfied that he was fully aware of the substance of the information that was relied upon by the CBSA President in his Memo and, subsequently, by the Minister in deciding not to grant Ministerial relief to Mr. Kanyamibwa.

[56] For all of these reasons, I have concluded that considerations of fairness and natural justice do not require the appointment of a special advocate in this proceeding. These reasons therefore confirm and elaborate upon the oral reasons communicated to the parties on October 6, 2009.

B. *Standard of Review*

[57] There is no dispute between the parties that the decision of the Minister to grant or deny relief pursuant to s. 35(2) of the *IRPA* deserves a high degree of deference and is reviewable on the reasonableness standard: *Ramadan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1155, [2008] F.C.J. No. 1435, at para. 16; *Afridi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1192, [2008] F.C.J. No. 1471, at paras. 22 and 37; *Kablawi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1011, [2008] F.C.J. No. 1256, at paras. 10 and 23; *Tameh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 884, [2008] F.C.J. No. 1111, at paras. 33-36; *Chogolzadeh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 405, [2008] F.C.J. No. 544 at paras. 37-45.

[58] As for the issues of *res judicata*, issue estoppel and abuse of process, they are clearly questions of law and must be adjudged on a correctness standard: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] S.C.J. No. 64, at para. 15. The same is true with respect to questions of natural justice and procedural fairness: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at paras. 54-55.

C. *The Reasonableness of the Decision*

[59] Section 35(1)(b) of the *IRPA* prescribes that a permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for:

Human or international rights violations	**Atteinte aux droits humains ou internationaux**
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35. (1)** Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(…)	(…)
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;	b) occuper un poste de rang supérieur au sens du règlement au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les*

crimes de guerre;

[60] The definition of what constitutes a "senior official" is found at section 16 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*Regulations*") which state:

Application of par. 35(1)(b) of the Act	**Application de l'alinéa 35(1)b) de la Loi**
16. For the purposes of paragraph 35(1)(b) of the Act, a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes	**16.** Pour l'application de l'alinéa 35(1)b) de la Loi, occupent un poste de rang supérieur au sein d'une administration les personnes qui, du fait de leurs actuelles ou anciennes fonctions, sont ou étaient en mesure d'influencer sensiblement l'exercice du pouvoir par leur gouvernement ou en tirent ou auraient pu en tirer certains avantages, notamment :
(…)	(…)
(f) ambassadors and senior diplomatic officials;	f) les ambassadeurs et les membres du service diplomatique de haut rang;

[61] Section 35(2) of the *IRPA* empowers the Minister to grant exceptional relief in the face of a previous finding of inadmissibility. The Applicant bears the onus of satisfying the Minister that his presence in Canada would not be detrimental to the public interest. This Court has recognized that the Minister must take into account a wide range of factors. Unless the decision is based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the evidence before him, this Court will not intervene: *Segasayo*, above, at para. 13; *Miller*, above.

[62] The Applicant does not argue that the Briefing Note mischaracterizes his argument in favour of granting him ministerial relief. Instead, he submits that the Minister did not consider the totality of the evidence and made unreasonable findings of fact. According to the Briefing Note, the Applicant consistently tried to minimize his role in the Rwandan governments; far from being a mid-level public servant, as he insisted, he was the second in command after the Ambassador, he was involved in negotiations with CIDA, and he could have replaced the Ambassador even if he was never required to do so.

[63] I have to agree with the Applicant that the Minister's findings are not supported by the evidence on the record. It is true that like every diplomat of his rank, he was appointed directly by the President whereas people at a lower rank were appointed by the Minister of Foreign Affairs. But this is not sufficient, in and of itself, to conclude that he was in a position to exert much influence on the "exercise of government power", to quote from section 16 of the *Regulations.*

[64] The Applicant attested and provided evidence that he could not act in the Ambassador's stead or make decisions of his own. Indeed, the then Ambassador confirmed in a letter to the Research Directorate of the Immigration and Refugee Board in 1999 that the First Secretary of the Embassy could only replace the Ambassador if given the explicit and written mandate to do so by the Ambassador himself or the Minister of Foreign Affairs. And there is no evidence that Mr. Kanyamibwa acted for the Ambassador between 1990 and 1994. This, combined with the fact that the Applicant had no signing authority and that aid agreements between Canada and Rwanda would have been signed by officials in Rwanda or at the Ambassadorial level in exceptional cases,

would tend to confirm that Mr. Kanyamibwa was not considered a senior diplomatic official. Even assuming that he was rightly considered to be a senior diplomatic official for the purposes of s. 35(1)(b), the Minister still had to assess whether his presence in Canada would be detrimental to the national interest. It is in focusing on the fact that he was involved in the negotiations with CIDA and that he could have replaced the Ambassador if requested to do so that the Minister erred; he was entitled to use his discretion in making this decision, but he could not selectively read the evidence and discard relevant portions of it, such as the actual role of the Applicant during his years in the Embassy.

[65] It is indeed significant that the Ontario Regional War Crime Unit reached a completely opposite conclusion to that of the Minister in November of 2000. The Briefing Note suggested that very little weight should be given to that determination, on the basis that it was made at a time when all relevant information was not available. This, it seems to me, is quite unfair. There is no evidence that the regional office did not have all of the relevant information, at least with respect to Mr. Kanyamibwa's role at the Embassy. In fact, nowhere does the Briefing Note expand on the new information that would not have been available to the regional office in 2000 and that would explain the different assessment reached in 2007.

[66] Finally, there is no discussion of the reliability of the evidence suggesting that the Applicant was complicit in torture and crimes against humanity. The substance of those allegations was known and available to the Officer who made a positive recommendation to the Minister in 2000. And nowhere is it mentioned that the evidence the Rwandan Intelligence Agency was

known to use torture during interrogations of their targets came from the Ambassador of a regime from which the Applicant was found to have a well-founded fear of persecution. Nor are the allegations of the Applicant that the new government is bent on "getting him" and uses war crimes allegations as a means of persecuting its political opponents ever discussed. Similarly, the Briefing Note is silent as to the fact that the Applicant denied knowing the person allegedly being tortured in the presence of Mr. Kanyamibwa, and that these allegations have not been corroborated. At the hearing, counsel for the Respondent stressed that Parliament did not require proof beyond a reasonable doubt, or even proof on a balance of probabilities, but merely reasonable grounds to believe. This is no doubt true at the stage of determining whether a person should be declared inadmissible. But this is not what the Minister had to decide pursuant to s. 35(2) of the *IRPA*; otherwise, that provision would be redundant. Notwithstanding what the Applicant may have done in the past, what the Minister must assess is whether his presence in Canada would be detrimental to the national interest. It is in that context I find the decision defective, as it fails to explain why the uncorroborated evidence of a person allegedly tortured is given so much weight. To that extent, the Minister erred as he did not consider the totality of the evidence and selectively relied on evidence presented to the detriment of the Applicant. Indeed, the Briefing Note deals quite summarily with the allegations of torture, and deals at much more length with the position of the Applicant in the Embassy. And yet, the role of the Applicant in the Rwandan Intelligence Service appears to be of crucial importance, if not determinative, in the decision of the Minister.

[67] Once again, I agree with the Respondent that the Minister is entitled to a high degree of deference when deciding whether the presence of the Applicant in Canada would be detrimental to

the national interest. The assessment of what is in the national interest involves the exercise of broad discretion, calling for an examination of a wide range of factors and considerations over which the Minister has a particular expertise. That being said, it does not dispense him from the duty to provide adequate reasons and to address material evidence which favours the Applicant's interests. In the case at bar, the Briefing Note is deficient as it does not deal adequately with all of the evidence and fails to address cogently some factors that favoured the Applicant's interests. In those circumstances, the decision of the Minister to deny relief to the Applicant cannot be said to be reasonable.

C. *Is the Minister's Decision in Breach of Natural Justice*

[68] The Applicant argues that the Minister's reliance on information that was initially undisclosed but subsequently unredacted as a result of a Court Order constitutes a breach of natural justice. According to the Applicant, this *ex post facto* disclosure is of little use to him because the decision has already been taken. As such, he argues that he has been denied fairness as a result of the non-disclosure of the information in a timely fashion. Even if he was given the right to file a further affidavit after the disclosure of pages 115, 125 and 126 was ordered, it was too late because his response should have been considered by the decision-maker, that is, the Minister. I do not think this argument holds sway, for the following reason.

[69] It will be remembered that the Memorandum to the Minister, which was disclosed to the Applicant, specifically referred to information relating to the Applicant's presence when a person was subjected to torture while detained in Rwanda. The Applicant responded to this information in

his response to the Memorandum, and stated that these allegations were false and baseless. In his affidavit filed on September 16, 2008, the Applicant denied these allegations.

[70] The information that was disclosed to the Applicant following the in-camera hearing to rule on the Respondent's motion for non-disclosure revealed two things. First, it divulged that the previously disclosed fact that the Rwandan intelligence services were known to use torture came from the Rwandan Ambassador to Canada in 1997. Second, it also revealed the name of the person who had alleged to have been tortured while the Applicant was present: Mr. Musafili. It was also stated on page 126 that Mr. Musafili had seen the Applicant in Canada and that he felt that the Applicant had recognized him.

[71] At the hearing, counsel for the Applicant conceded that there would be no breach of fairness if the substance of the allegations made against his client had been disclosed before the Minister made his decision. In other words, he accepted that the exercise by his client of his right to make his case and address the Minister's concerns would not have been successful if there had been no material difference between what he knew and what was later disclosed to him.

[72] I agree with the Respondent that this is precisely the situation here. The Applicant was given leave to file a further affidavit after the three un-redacted pages were disclosed to him. The affidavit does not contain any new information that could have had an effect on the Minister's decision. The Applicant acknowledges that he was aware of the allegations that he had been involved in the torture of a witness, and denied these allegations. After receiving the name of the

witness, he continued to deny the allegations, but added that he did not know that person and had no knowledge of the events recounted by that person. This additional information could not have affected the decision's outcome. The same is true with respect to the Applicant's questioning of the Ambassador's neutrality. In his submissions to the Minister, the Applicant has already argued that the new government in Rwanda is spreading lies against him and was bent on having him returned to his country out of revenge. The fact that the Rwandan Ambassador is the source of the allegations relating to the practices of the Rwandan intelligence service was not crucial, and it has not been shown that it could have had an impact on the Applicant's ability to make representations.

[73] Of course, the situation might have been different had the Applicant been able to undermine the credibility of the Rwandan Ambassador, of Mr. Musafili, or the reliability of their testimony. Yet, despite being given the opportunity to file a further affidavit, the Applicant could do no better than repeat his blanket denials and his vague assertions of persecution by the new regime. In those circumstances, I fail to see how the disclosure of that information before the Minister denied relief pursuant to s. 35(2) could have made a difference. The Applicant knew the concerns of the Minister and he did have an opportunity to address them. Moreover, the decision not to disclose at the time was a reasonable one, considering the provisions of the *Privacy Act* (R.S., 1985, c. P-21) which prohibits the government from disclosing personal information about people unless they consent or unless there is a court order. There was, therefore, no breach of natural justice.

D. *Res Judicata, Issue Estoppel and Abuse of Process*

[74] Counsel for the Applicant submitted that the Minister was barred from raising the issue of torture as it had been conclusively determined by the RPD. According to the Applicant, the issue of exclusion due to the Applicant's involvement with the designated Rwandan regimes was addressed by the RPD when it found that the Applicant was a Convention refugee and that there was not enough evidence to make an exclusion finding against the Applicant. The Applicant believes the Minister should be bound by the RPD's finding, namely, that there was not enough evidence to find that the Applicant committed or was complicit in committing crimes against humanity.

[75] The common law developed two doctrines to deal with problems of unfair re-litigation, consistency of result, and finality. The first branch of *res judicata* is sometimes called cause of action estoppel (in the civil context), while the second is referred to as issue estoppel. Although these two concepts are often intertwined, they have distinct meanings as explained by the Federal Court of Appeal in *Apotex Inc. v. Merck and Co.*, 2002 FCA 210, [2002] F.C.J. No. 811, at para. 25:

> These two estoppels, while identical in policy, have separate applications. Cause of action estoppel precludes a person from bringing an action against another where the cause of action was the subject of a final decision of a court of competent jurisdiction. Issue estoppel is wider, and applies to separate causes of action. It is said to arise when the same question has been decided, the judicial decision which is said to create the estoppel is final, and the parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised…

[76] Subsection 15(b) of the *Regulations* illustrates the common law principle of *res judicata* and explicitly manifests Parliament's intention not to allow the re-litigation of some issues. It reads as follows:

Application of par. 35(1)(a) of the Act	**Application de l'alinéa 35(1)a) de la Loi**
15. For the purpose of determining whether a foreign national or permanent resident is inadmissible under paragraph 35(1)(a) of the Act, if any of the following decisions or the following determination has been rendered, the findings of fact set out in that decision or determination shall be considered as conclusive findings of fact:	**15.** Les décisions ci-après ont, quant aux faits, force de chose jugée pour le constat de l'interdiction de territoire d'un étranger ou d'un résident permanent au titre de l'alinéa 35(1)a) de la Loi :
(…)	(…)
(b) a determination by the Board, based on findings that the foreign national or permanent resident has committed a war crime or a crime against humanity, that the foreign national or permanent resident is a person referred to in section F of Article 1 of the Refugee Convention;	b) toute décision de la Commission, fondée sur les conclusions que l'intéressé a commis un crime de guerre ou un crime contre l'humanité, qu'il est visé par la section F de l'article premier de la Convention sur les réfugiés;
(…)	(…)

[77] Contrary to the Applicant's submissions, that provision is not triggered where an applicant is found to be inadmissible under s. 35(1)(b) of the *IRPA*. Indeed, counsel for the Applicant admitted as much in his oral submissions and conceded that it applies only in the context of

paragraph 31(1)(a). *A contrario*, it would tend to show that the issue estoppel and *res judicata* concepts cannot be relied on when determining whether a foreign national is inadmissible under paragraph 35(1)(b), as is the case here.

[78] It is also clear that cause of action estoppel is not applicable here. The cause of action before the RPD, specifically whether the Applicant should be granted Convention refugee status, was not the same as the one that was before the Minister, which was whether he should be exempted from inadmissibility pursuant to s. 35(2) of the *IRPA*.

[79] As for the issue estoppel concept, three preconditions have been established by numerous decisions of the Supreme Court of Canada. They are mentioned in the *Apotex*, above decision from the Federal Court of Appeal quoted above, and can be set out in the following way: 1) Has the same question been decided in a previous proceeding? 2) Is the previous proceeding which is said to create issue estoppel final? and 3) Are the parties to the previous proceeding the same as those in the present proceeding or their privies? See also: *Toronto (City)*, above, at para. 23; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] S.C.J. No. 46, at para. 25; *R. v. Mahalingan*, 2008 SCC 63, [2008] S.C.J. No. 64, at para. 112.

[80] There is no doubt that the RPD decision was final. But I cannot agree that the parties before the RPD were the same as in the proceeding that is now being challenged. First of all, the ability of the Minister to intervene before the RPD does not make him a party to that proceeding. Moreover, the Minister is the decision-maker when relief is sought pursuant to s. 35(2) of the *IRPA*

whereas the decision to grant or deny refugee status is made by the RPD, an independent administrative body separate and distinct from the Minister.

[81] Maybe even more importantly, the issues are not the same and the third condition is therefore not met either. In *Ratnasingam v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1096, [2007] F.C.J. No. 1422, at paras. 17-19, the Court found that the determination of whether an individual is a Convention refugee is substantially different from the determination of whether an applicant is admissible for the purposes of becoming a permanent resident. The Court concluded that a RPD hearing did not address the "same question" as is addressed by an inadmissibility determination. As such, the doctrine of issue estoppel could not prevent the Minister from making an inadmissibility finding where the RPD had already found a person to be a Convention Refugee and therefore not excluded from Canada.

[82] It is true that in the case at bar, contrary to the situation in *Ratnasingam*, above the exclusion issue was explicitly raised and investigated. The Minister, however, was unable to marshall the relevant evidence and informed the panel that he would not be calling witnesses or make submissions. On that basis, the RPD concluded that the provisions of art. 1F of the Convention did not apply since no evidence had been presented which would allow such a finding. This conclusion, it seems to me, is a far cry from a definitive determination that the Applicant is not inadmissible.

[83] Even assuming, for the sake of the argument, that the RPD did finally determine that the Applicant was not complicit in crimes against humanity, it would not be the end of the matter. It must be remembered that this case is about the denial of ministerial relief to the Applicant pursuant to s. 35(2) of the *IRPA*, and not the inadmissibility finding under s. 35(1) of the *IRPA*. As such, the question of whether issue estoppel prevented the Minister from making an inadmissibility finding against the Applicant due to the RPD's findings relating to exclusion is immaterial. Had the Applicant wished to challenge the finding that he was inadmissible to Canada pursuant to s. 35(1)(b) of the *IRPA*, he should have done so. His attempt to challenge this finding through his judicial review application of the Minister's decision to deny him relief pursuant to s. 35(2) of the *IRPA* amounts to a collateral attack of the inadmissibility finding; as such, it is improper and must not be permitted by the Court.

[84] It is true that the allegation of complicity in torture is raised by the Minister as one of the grounds for denying relief to the Applicant, and that the role of the Applicant in the Rwandan Intelligence Service in the early 1980s was also considered by the RPD. But this is only one of the factors considered by the Minister in coming to his decision pursuant to s. 35(2) of the *IRPA*. As already indicated, the factors to be taken by the Minister in making his discretionary decision are multi-faceted and his determination must rest not only upon what the Applicant may have done, but more broadly, upon whether the Applicant's presence in Canada would be detrimental to the national interest.

[85] In the alternative, the Applicant submits that the decision of the Minister constitutes an abuse of process. This doctrine of abuse of process stems from the inherent and residual discretion of judges to prevent an abuse of the court's process in a way that would bring the administration of justice into disrepute. It is a flexible doctrine, unencumbered by the specific requirements of common law concepts such as issue estoppel. As explained by the Supreme Court in *Toronto (City)*, above, at para. 37:

> "…Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice…

[86] In the case at bar, I fail to see how the Minister's decision can be said to be a proceeding "unfair to the point that [it is] contrary to the interest of justice" (*R. v. Power*, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601, at para. 12), or an "oppressive treatment" (*R. v. Conway*, [1989] S.C.J. No. 70, [1989] 1 S.C.R. 1659, at para. 8). In principle, the Minister should not be prevented from considering information supporting allegations of crimes against humanity obtained after the RPD decision in deciding what the national interest requires. This could not be considered to be in the interest of justice.

[87] Counsel for the Applicant relied on the decision of this Court in *Thambiturai v. Canada (Solicitor General)*, 2006 FC 750, [2006] F.C.J. No. 966, for the proposition that the Minister should not be allowed to re-litigate a matter that he has lost before the RPD on the basis of the same allegations. In that case, the applicant had been found inadmissible for serious criminality

and misrepresentation by the Immigration Division, and was ordered deported. The applicant appealed this decision before the Immigration Appeal Division. Before it was heard on the merits, the Minister applied to vacate the decision to allow the claim for refugee status. Because the appeal from the decision of the Immigration Division was still pending, Mr. Justice Yvon Pinard found that the prior judicial decision was not final for the purpose of issue estoppel and therefore dismissed that argument. However, he also determined that the proceedings to vacate the applicant's refugee status constituted an abuse of process. He came to that conclusion essentially because the latter proceeding was unnecessary and duplicitous. It was particularly egregious because the respondent knew that a successful result in the vacation proceedings would terminate the applicant's status and, consequently, his appeal of the Immigration Division decision.

[88] The decision of the Minister to deny relief to the Applicant pursuant to s. 35(2) of the *IRPA* cannot be equated to the course of action condemned by Justice Pinard in *Thambiturai*, above. It is true that the Minister, as suggested by counsel for the Applicant, could have applied to vacate the Applicant's refugee status pursuant to s. 109 of the *IRPA*. But that would have worked to the prejudice of the Applicant, as it is a lot better and of less consequence to be inadmissible and to be denied an exemption from that inadmissibility than to lose refugee status. I agree with counsel for the Respondent that the Minister should be free to decide that the nature or severity of the acts purportedly committed by an individual are not such that he or she should not be considered as a Convention refugee, but that he or she should nevertheless be inadmissible and barred from becoming a permanent resident. This is much different and in no way comparable to the conduct of

the respondent in *Thambiturai*, and the Applicant has failed to demonstrate that the Minister's decision in the present case was tantamount to an abuse of the judicial system.

[89] For all of the foregoing reasons, I am therefore of the view that this application for judicial review must be granted, on the only ground that the decision of the Minister was unreasonable. No question was proposed for certification, and I agree with counsel that there is no basis for issuance of a certified question in this case.

JUDGMENT

THIS COURT ORDERS that this application for judicial review is granted, the decision of the Minister is quashed, and the matter is remitted back for re-determination.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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