Federal Court Cour fédérale

Date: 20170721

Docket: IMM-2575-16

Citation: 2017 FC 708

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 21, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JACQUES MUNGWARERE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

PUBLIC JUDGMENT AND REASONS
(Public version released on October 11, 2017)

[1] On June 2, 2016, the Immigration and Refugee Board of Canada's [IRB] Immigration Division [ID] issued a deportation order against the applicant, Mr. Jacques Mungwarere, on the grounds that he was inadmissible for violating human or international rights [impugned decision].

[2] On June 17, 2016, the applicant filed this application for judicial review to declare invalid or unlawful, or quash, set aside or refer back for determination, in accordance with such directions as the Court considers to be appropriate, the impugned decision.

[3] On October 4, 2016, this Court ordered the redacting and sealing of the parties' main files, as well as the reply memorandum in accordance with Appendix "A" attached to the respondent's motion record, as well as the sealing of the applicant's motion record and the respondent's reply record for obtaining the confidentiality order. On December 16, 2016, this Court received a certified copy of the court record under confidential seal, as the ID, on November 2, 2015, ordered that the entire admissibility hearing be held in camera. On February 16 and April 24, 2017, the Court heard counsels' oral submissions.

[4] For the reasons that follow, this application for judicial review should be allowed in part. A complete version of the Court's judgment and confidential reasons were released on July 21, 2017. The Court is satisfied that paragraphs 49, 50, 56, 58, 79, 86 to 91 and 97 of the reasons for judgment should remain confidential in whole or in part. The following is a public version of said reasons, as amended by the Court on October 11, 2017, according to the parties' proposed redactions. An order partly maintaining the confidentiality of various sealed exhibits and parts of the certified court record and the parties' records was issued concurrently by the Court after submissions were received from counsel.

I. *Applicable law*

[5] As we will see further on, the applicant is first claiming that the ID's admissibility hearing with respect to his involvement in the Rwandan genocide constitutes an abuse of process on the basis that he was acquitted by the Ontario Superior Court of Justice [OSCJ] of criminal charges of genocide and crimes against humanity that had been laid against him. Alternatively, the applicant submits that the OSCJ's findings have force of *res judicata* and, therefore, the impugned decision is unreasonable. We will in turn examine the law that applies to genocide and crimes against humanity from the perspective of the three possible scenarios (criminal charges, refugee status exclusions, and inadmissibility).

A. *Criminal charges*

[6] First, in international law, crimes against humanity can be committed both in times of war and peace. Various international instruments, including article 7 of the *Rome Statute of the International Criminal Court*, which was signed on July 17, 1998, and came into force on July 1, 2012 [2187 UNTC I-38544] [*Rome Statute*], provide definitions of crimes against humanity. Generally speaking, they involve criminal acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of this attack, for national, political, racial, or religious reasons. Think of a whole series of inhuman acts, such as murder, extermination, enslavement, and deportation. Similarly, crimes including torture, rape, and persecution are also included. It goes without saying that genocide is a crime against humanity.

[7] Recognizing that the most serious crimes that affect the international community as a whole should not go unpunished and that they must be effectively suppressed through action

within a national framework and greater international cooperation, the Parliament of Canada adopted the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 [CAHWCA], which criminalizes genocide, crimes against humanity, and war crimes, whether they are committed in Canada (sections 4 and 5) or outside Canada (section 6). Specifically, anyone who commits genocide or crime against humanity abroad—before or after section 6 of the CAHWCA came into effect—is guilty of an indictable offence (paragraphs 6(1)(*a*) et (*b*) of the CAHWCA). A person who conspires or attempts to commit one of these offences is also guilty of an indictable offence and is complicit after the fact or counselled to commit it (subsection 6(1.1) of the CAHWCA). In fact, the perpetrator of such an act may be charged and be prosecuted under sections 8 and 9 of the CAHWCA, as well as the relevant provisions of the *Criminal Code,* R.S.C. 1985, c. C-46.

[8] In this regard, although the Supreme Court of Canada has considered issues of genocide and crimes against humanity on the basis of the former provisions of the *Criminal Code* and the former *Immigration Act*, R.S.C. 1985, c. I-2, what was written in 2005 in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 S.C.R 40, [2005] SCJ No 39 [*Mugesera*] is still relevant today. Having noted that subsections 7(3.76) and (3.77) of the *Criminal Code* have since been repealed, that crimes against humanity are now defined in and proscribed by sections 4 and 6 of the CAHWCA, and that the current definition "differs slightly" from the definition in the *Criminal Code* and the principles of international law, an indictable offence—such as murder, which is an "underlying offence"—must meet four conditions to be considered a crime against humanity (*Mugesera* at paras 118 and 119).

[9] Those conditions are:

a) An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);

b) The act was committed as part of a widespread or systematic attack;

c) The attack was directed against any civilian population or any identifiable group of persons; and

d) The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[10] However, subsection 2(2) of the CAHWCA states that "[u]nless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*." Consequently, the conviction of a person accused of genocide or crimes against humanity is determined in Canada based on the "beyond a reasonable doubt" standard.

B. *Refugee status exclusion*

[11] Second, on the margins of criminal process, various international instruments establish not only the criteria for recognizing refugee status, but also the criteria under which persons who have committed crimes against humanity may be excluded from international protection. The

exclusion clauses serve to uphold the integrity of the institution of asylum. Specifically, paragraph 1Fa) of the United Nations' *Convention relating to the Status of Refugees*, signed in Geneva on July 28, 1951, [*Convention*] provides for the exclusion of "any person **with respect to whom there are serious reasons for considering that** […] he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."

[12] In Canadian law, section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] specifically states that a person referred to in section E or F of the *Convention* is not a Convention "refugee" (section 97 of the IRPA). As the Supreme Court of Canada noted at para 38 of *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] FCJ No 40 [*Ezokola*], contrary to international criminal tribunals, the RPD does not determine guilt or innocence, **but to exclude *ab initio* those who are not bona fide refugees** at the time of their claim for refugee status. Another difference is that asylum may be denied if there are serious reasons for considering that the applicant has committed a crime against peace, a war crime, or a crime against humanity (article 1Fa)). This standard of proof is less strict than that applied at a criminal trial, but it requires more than mere suspicion.

[13] On the other hand, according to *Ezokola*, although the various modes of commission recognized in international criminal law articulate a broad concept of complicity, individuals will not be held liable for crimes committed by a group simply because they are associated with that group or because they passively acquiesced to the group's criminal purpose (*Ezokola* at para 68). **Common purpose liability,** the broad residual mode of commission recognized in the *Rome*

Statute, **appears to require a significant contribution to a crime** committed or attempted by a group acting with a common purpose. And while joint criminal enterprise, as recognized by the *ad hoc* tribunals, encompasses recklessness with respect to the crime or criminal purpose, even it does not capture individuals merely based on rank or association. Furthermore, the Supreme Court notes that other state parties to the *Convention* have approached article 1Fa) in a manner that concentrates on the actual role played by the particular person. Thus, a person may be complicit without being present at or physically contributing to the crime, but to be denied asylum, **there must be evidence that the individual knowingly made a significant contribution to the group's crime or criminal purpose**. In other words, complicity that leaves any room for guilt by association or passive acquiescence violates the fundamental principles of criminal law.

[14] **In addition, the Supreme Court held in *Ezokola* that excluding protection based on the criminal activities of the group and not on the individual's contribution to that criminal activity must be firmly foreclosed in Canadian law**. Whether an individual's conduct meets the *actus reus* and *mens rea* for complicity will depend on the facts of each case, including (i) the size and nature of the organization; (ii) the part of the organization with which the claimant was most directly concerned; (iii) the claimant's duties and activities within the organization; (iv) the claimant's position or rank in the organization; (v) the length of time the claimant was in the organization, particularly after acquiring knowledge of the group's crime or criminal purpose; and (vi) the method by which the claimant was recruited and claimant's opportunity to leave the organization. These factors are not necessarily exhaustive, nor will each of them be significant in every case. Their assessment will necessarily be highly contextual, the focus must always remain

on the individual's contribution to the crime or criminal purpose, and any viable defences should be taken into account.

C. *Inadmissibility*

[15] Third, subsection 35(1) of the IRPA separately creates inadmissibility for violation of human or international rights **for**:

a) **committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;**

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*;

c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

[16] Section 33 of the IRPA states the following: "The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which **there are reasonable grounds to believe** that they have occurred, are occurring or may occur." What distinguishes a criminal charge under the CAHWCA from the inadmissibility or exclusion proceedings under section 35 or section 98 of the IRPA is essentially the applicable burden of proof, which is much more onerous for criminal charges. In passing, there does not appear to be any significant differences between the "serious reasons for considering" in the refugee status exclusion clause (article 1F of the *Convention*) and the "reasonable grounds to believe" with respect to inadmissibility *(Moreno v. Canada (Minister of Employment and Immigration),* (CA), [1994] 1 FC 298).

[17] For determining inadmissibility, some decisions ("findings of fact set out in that decision") have "conclusive findings of fact." With respect of the application of paragraph 35(1)(*a*) of the IRPA, section 15 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] stipulates the following:

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:	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 :
(a) a decision concerning the foreign national or permanent	a) toute décision rendue à l'égard de l'intéressé par tout

resident that is made by any international criminal tribunal that is established by resolution of the Security Council of the United Nations, or the International Criminal Court as defined in the *Crimes Against Humanity and War Crimes Act*;	tribunal pénal international établi par résolution du Conseil de sécurité des Nations Unies ou par la Cour pénale internationale au sens de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
(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; or	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;
(c) a decision by a Canadian court under the *Criminal Code* or the *Crimes Against Humanity and War Crimes Act* concerning the foreign national or permanent resident and a war crime or crime against humanity committed outside Canada.	c) toute décision rendue en vertu du *Code criminel* ou de *la Loi sur les crimes contre l'humanité et les crimes de guerre* par un tribunal canadien à l'égard de l'intéressé concernant un crime de guerre ou un crime contre l'humanité commis à l'extérieur du Canada.

[18] Under subsection 44(1) of the IRPA, an officer of the Minister who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts [inadmissibility report]. From that moment, the Minister—the respondent in this case—may, if it is of the opinion that it is well-founded, refer the report to the ID for an admissibility hearing (section 44(2) de la IRPA).

[19] In the case at hand, the impugned decision was made under paragraph 45(1)(*d*) of the IRPA, which authorizes the ID to make the removal order against a foreign national or a permanent resident after the Minister has referred the case to it and if it is satisfied, following the hearing, that the foreign national or permanent resident referred to in the report prepared under subsection 44(1) of the IRPA is inadmissible.

II. ***Chronology of events***

[20] Currently, the applicant is neither a Canadian citizen nor a permanent resident. The chronology of events leading up to the criminal charges against the applicant, the loss of his refugee status and his admissibility despite being acquitted, is not being challenged.

A. *Background*

[21] Genocide and crimes against humanity were committed in Rwanda in 1994. It should be noted that since the 1960s, Rwanda and Burundi had been the scene of bloody internal conflicts between the members of two opposing ethnic groups, the Hutus and Tutsis, who fought hard to maintain or seize power since the decolonization and independence of these two neighbouring countries in East Africa. Following a coup d'état in 1973, the head of the army, Juvénal Habyarimana, took power in Rwanda and in 1975 founded the National Republican Movement for Democracy and Development [NRMDD]. In 1986, Tutsi refugees in Uganda founded the Rwandan Patriotic Front [RPF], whose goal was to take power in Rwanda. On October 1, 1990, the RPF invaded northern Rwanda, triggering a civil war. This attack was supported by the majority of Tutsis abroad. Moreover, in Burundi in October 1992, Tutsi soldiers kidnapped and

killed the new Hutu president, who had been democratically elected several months before. The Arusha Accords on Rwanda took place from June 1992 to August 1993 between the Rwandan Government and Paul Kagame's RPF to end the civil war. However, the accords remained a dead letter.

[22] In 1993, Hutu extremists formed a group called "Hutu Power." In opposition to the Arusha Accords and transcending partisan rivalries, it embodied the ethnic solidarity advocated by President Habyarima for three years. In fact, Hutu Power organized meetings in many communities, and several influential individuals met to develop genocide plans. Militias were created within the youth wings of political parties and received military training. The militia members from the youth wing of President Habyarimana's party (the NRMDD) were called the Interahamwe, while those from the youth wing of the Coalition for the Defence of the Republic [CDR], a new Rwandan party, were known as the Impuzamugambi. Machetes were distributed to the militia, while the RPF, aware of the risks that any resumption of fighting would pose to Tutsis, recruited new supporters and fighters, in violation of the peace agreements. In late 1993, the hate speeches of the CDR broadcast on Radio Télévision Libre des Mille Collines [RTLM] labelled moderate Tutsis and Hutus as RPF collaborators and encouraged the militias to target Tutsis.

[23] On April 6, 1994, President Habyarimana and the new president of Burundi, Cyprien Ntaryamira, as well as several senior officials from Rwanda and Burundi were killed aboard the plane that was bringing them back from Tanzania, where they had been at a summit on the Burundi and Rwanda crises. Responsibility for this crime has never been established.

Nevertheless, a small group close to President Habyarimana decided to take action. The Presidential Guard and other members of the Rwandan army commanded by Colonel Bagosora and supported by the militias took advantage of this incident to kill government officials and leaders of the opposition parties, thereby creating a vacuum that allowed Colonel Bagosora and his supporters to take power and to establish in the days that followed an interim government consisting mainly of members of Hutu Power.

[24] Indeed, between April 7 and mid-July 1994, a genocide occurred in Rwanda, and crimes against humanity were committed by various individuals and groups, including the army, the interim government, the gendarmerie and the militias, acting in concert and targeting the civilian Tutsi population in a widespread or systematic attack that lasted approximately 100 days. Although the initial organizers of the genocide were military and administrative officials in Colonel Bagosora's immediate circle, they still had to obtain not only the collaboration of politicians, prefects, and mayors affiliated with the NRMDD, but also that of local officials and administrators from other parties that were dominant in central and southern Rwanda. This became possible as the extermination campaign progressed and moderate Hutus were killed.

[25] The perpetrators of the genocide had a common goal: to exterminate the Tutsi population. Yet, the perpetration of genocide requires concerted actions of several components of the civilian population and planning of actions to exterminate the individuals who are targeted. Because, in order to carry out a genocidal plan, it is first necessary to gather Tutsis in central areas. Furthermore, in many communities, Hutu Power militias attacked and burned Tutsi dwellings to force Tutsis to flee. Authorities then encouraged them to take refuge in churches, schools, and

other public buildings so they were supposedly better protected. Once the Tutsis were together, militia members and civilians, many of whom were recruited under the command of soldiers, gendarmes and municipal police, attacked. Those with weapons opened fire and threw grenades into the middle of the area. Sometimes the buildings were also set on fire. The attackers then entered the buildings with machetes, hatchets, and knives to finish off the survivors. Once the massacres were finished in their own community, the militias would travel to surrounding communities to continue the exterminations or to trigger violent protests against Tutsis, if this was not already done. During these events, Tutsi women were often raped, tortured, and mutilated before being killed by the Hutu attackers.

[26] The applicant is a Rwandan national of Hutu ethnicity and was 22 years old at the time of the genocide. He was living with the rest of his family in Kibuye prefecture—one of the country's eleven administrative regions. His father was a well-known figure in the area. The first major massacres in Kibuye Prefecture began around April 12, 1994. In fact, on April 16, 1994, a large-scale attack was launched against Tutsis who had sought refuge in the Mugonero hospital complex. Located in Ngoma, a sector in the Gishyta Commune, the complex is run by the Association of Seventh-Day Adventist Nurses. There is a nursing school, chapel, and hospital. Numerous militia members from the region or other regions were involved in the attack. A large majority of Tutsis died, and the survivors sought refuge in the hills surrounding Gitwe, Murambi, and Bisesero. From May to June 1994, brigades of armed individuals carried out almost daily attacks in the hills. Hundreds of Tutsis were kills or seriously injured. The attackers included members of the Rwandan army, militia members, and Hutu men from the civilian population.

[27] The RPF, with help from French troops, eventually ended the Rwandan genocide by routing the interim government and the army. However, in the months that followed, RPF soldiers were quick to kill individuals who were taken for Interahamwe or suspected of involvement in the genocide, and numerous summary executions occurred in the weeks and months following the takeover of Rwandan territory by the forces of General Kagame. In July 1994, approximately two million Rwandans, mostly Hutus, fled their country and ended up in refugee camps in Zaire, Tanzania, and Burundi.

[28] The applicant left Rwanda in July or August 1994, prior to the arrival of the RPF. For her part, Marie Claire Kubwiman, the applicant's future wife, left Rwanda in July 1994. The couple lived in a refugee camp in Zaire for a while, where they met. In 1998, the settled in Belgium, where their minor child, Jerry Benson Simbi, was born. The three arrived in Canada in the fall of 2001 and immediately filed refugee claims. One year before, they had been denied protection by Belgian authorities due to a lack of credibility, an important material fact that was not disclosed to the IRB's Refugee Protection Division [RPD].

B. *Refugee status*

[29] On April 11, 2002, the applicant, his wife, and minor child obtained refugee status in Canada. However, the applicant lied about his actual age and falsely stated that he had left Rwanda in February 1995, while his wife also lied about her actual age and falsely stated that she had left Rwanda in October 1994. Moreover, in her Belgian claim, the applicant's spouse stated that her father's name was Charles Sikubwabo and not Ferdinand Seburikoko, as noted in her

Canadian Personal Information Form (PIF). Charles Sikubwabo was the mayor of Gishyita at the time of the genocide and is still wanted by the International Criminal Tribunal for Rwanda.

C. *Charges of genocide and crimes against humanity*

[30] On November 9, 2009, following an investigation by the Royal Canadian Mounted Police [RCMP], the applicant was arrested and accused of genocide and crimes against humanity due to his involvement and complicity in massacres that occurred in the Kibuye Region in 1994. The original indictment contained four charges: two charges of genocide and two charges of crimes against humanity. On April 16, 2012, the Crown decided to reduce the indictment to two counts, namely:

> [TRANSLATION]
>
> THAT SAID JACQUES MUNGWARERE, between April 1, 1994, and July 31, 1994, in the Prefecture of Kibuye, Rwanda, committed the intentional murder of an identifiable group of persons, namely Tutsis, with the intent to destroy, in whole or in part, Tutsis and committing genocide, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24,* thereby committing the indictable offence of genocide, as provided for in said *Crimes Against Humanity and War Crimes Act*; and
>
> THAT SAID JACQUES MUNGWARERE, between April 1, 1994, and July 31, 1994, in the Prefecture of Kibuye, Rwanda, committed the intentional murder of a civilian population and an identifiable group of persons, namely Tutsis, knowing that said intentional murder was part of a widespread or systematic attack against Tutsis, committing a crime against humanity, as defined in subsections 6(3), 6(4) and 6(5) of the *Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24,* thereby committing an indictable offence of crimes against humanity as defined in paragraph 6(1)(*b*) of said *Crimes Against Humanity and War Crimes Act*.
>
> [Emphasis in original.]

[31] The applicant's criminal trial took place before Justice Charbonneau of the OSCJ from May 2012 to March 2013. On July 5, 2013, the applicant was found not guilty of both remaining counts (*R c Jacques Mungwarere*, 2013 ONCS 4594 [judgment of acquittal]). For the purpose of these proceedings, it is not necessary to summarize the 202-page judgment of acquittal, except to mention the following.

[32] At the outset, the parties agreed on the facts surrounding the genocide and massacres committed in the Kibuye Region, including the major attack of April 16, 1994, at the Mugonero hospital complex, during which the vast majority of Tutsis were exterminated, and the subsequent pursuit of survivors in the hills of Bisesero in the months that followed this attack. The following was also admitted:

> [TRANSLATION]
>
> Thousands of Tutsis were killed by attackers in all these places. The group of attackers was composed of members of the Rwandan army, members of militias, members of the Interahamwe, and members of the civilian population grouped and led by military and local authorities. During May and June, practically all of the Hutu men in the Kibuye Prefecture took part in the attacks.
>
> (Judgment of acquittal, at para 1187, section 10).

[33] As a matter of fact, did the applicant participate in the major attack of April 16, 1994, and the attacks in the subsequent months in the hills of Bisesero?

[34] Not only did the applicant attack the many witnesses during the proceedings, but his testimony also included an alibi. He denied that he was at the scene of the crimes for which he was charged. Moreover, in the weeks that followed the attack of April 16, 1994, he claimed that

he was still teaching in Esapan, which was then corroborated by several of the defence's witnesses, meaning that he could not have been part of the groups of attackers who left the village in the morning to go to the hills of Bisesero.

[35] In his decision, Justice Charbonneau emphasized the distinction between criminal responsibility of a person who is the perpetrator or co-perpetrator of crimes against humanity or genocide and that of an accomplice (judgment of acquittal at paras 46 to 62). From a legal perspective, reiterating that the principles of criminal law in this area are based on international criminal law, Justice Charbonneau established three scenarios in which the applicant's guilt may or may not be accepted (judgment of acquittal at para 66):

> [TRANSLATION]
>
> <u>In the case at hand, the central question is whether the accused participated actively and with the necessary criminal intent in the murderous attacks against the Tutsis that occurred in the Kibuye sector from April to July 1994.</u> Mr. Mungwarere testified and denied any involvement in these attacks. <u>If his testimony is believed, he must be acquitted.</u> The presumption of innocence applies. <u>Consequently, even if his testimony is not believed, if his testimony raises a reasonable doubt with respect to his involvement, he must be acquitted.</u> Similarly, <u>if Mr. Mungwarere's testimony is dismissed, he cannot be convicted unless, in light of all the remaining evidence, the court is satisfied beyond a reasonable doubt that he is guilty.</u>
>
> [Emphasis added.]

[36] Justice Charbonneau made it clear that to establish the applicant's guilt, he first needed to weigh each piece of evidence to determine whether it was more probable that he believes its content. This first analysis was carried out based on a balance of probabilities, not on the burden

of beyond a reasonable doubt, which intervenes only when the judge is required to examine all the evidence to reach a verdict.

[37] During the trial, the Crown called several Rwandan witnesses to testify, most of whom testified remotely via Skype. They testified about the terrible events in the Kibuye Prefecture, and some identified the applicant as a member of the group of attackers. The problem, however, was that several witnesses fabricated evidence, which the Crown acknowledged for the testimony of TIP 111, TIP 117 and TIP 112, while "[Translation] [t]here is every reason to believe that Alphonse Nsemgi-Yumba and François Ndaduma orchestrated false testimony against the accused" (judgment of acquittal at para 1169). In fact, several of the survivors from the Kibuye Region deliberately lied to Canadian investigators. Justice Charbonneau even found that these false statements constituted a substantial part of the Crown's case when the applicant was arrested in November 2009 (judgment of acquittal at para 1222).

[38] On the other hand, Justice Charbonneau rejected the applicant's defence alibi that he allegedly hid or stayed at home during the attack of April 16, 1994, and in the weeks that followed was not involved in the attacks against Tutsis in the hills of Bisesero because he was teaching in Esapan. Justice Charbonneau clearly indicated that he did not believe the applicant's testimony in the sense that all the evidence established that the Esapan school was not reopened after President Habyarimana's assassination (judgment of acquittal at paras1195 to 1210).

[39] Ultimately, Justice Charbonneau found that the Crown failed to prove beyond a reasonable doubt the essential elements of the applicant's alleged crimes. But before reaching

this conclusion, Justice Charbonneau took care to revisit, one by one, each of the witnesses and to explain for each whether he gave any credibility or a certain probative value of their testimony (judgment of acquittal from pp. 29 to 83 for the Crown witnesses, and from pp. 84 to 142 for the defence witnesses). Justice Charbonneau ultimately found the applicant not guilty of the criminal charges for genocide and crimes against humanity. The applicant, who had been incarcerated since his arrest, was therefore released. The Crown decided not to appeal the judgment of acquittal.

D. *Revocation of refugee status*

[40] On June 25, 2013, ten days before the OSCJ delivered the judgment of acquittal, the Minister submitted an application to the RPD under section 109 of the IRPA to set aside the decision granting the applicant his refugee status under the *Convention*. On September 10, 2014, the applicant's refugee status was revoked on the basis that he had made misrepresentations in his refugee claim, with respect to, among other things, what he was doing during the genocide.

[41] Relying on the revelations made by the applicant during his testimony before the OSCJ, the RPD found that he had misrepresented the facts surrounding his departure from Rwanda. Moreover, the RPD found that if the additional facts uncovered during the applicant's trial had been brought to the RPD's attention in 2002, it would not have granted him asylum given that there were serious reasons for considering that he was complicit in crimes against humanity due to his significant, wilful, and conscious contribution to the attacks against Tutsis in 1994, thereby excluding him under paragraph 1Fa) of the *Convention*. In fact, even if the RPD had not been bound by the findings of the OSCJ, it is required to assess the probative value of the Crown's

and defence's evidence from the criminal trial. According to the judgment of acquittal, "[Translation] Although he was probably guilty of complicity, there was reasonable doubt because none of the credible witnesses saw what he was doing when he was with these groups [of attackers]. In particular, nobody saw him attack anyone […] However, he was likely armed at least once with a gun and once with a grenade in a group that was pursuing Tutsis and moderate Hutus to kill them […] there are serious reasons for considering that Mr. Mungwarere wilfully participated in pursuing Tutsis and moderate Hutus to kill them as part of a widespread and systematic attack against a civilian population or an identifiable group of persons. He therefore consciously contributed to the genocidal plan […]." Nevertheless, the RPD does not have jurisdiction to exclude the applicant under section 109 of the IRPA because it is an application to quash a refugee status for misrepresentation.

[42] The applicant appealed this decision for judicial review, but lawful permission was denied by this Court on January 10, 2015.

E. *Inadmissibility*

[43] On February 3, 2015, the applicant was the subject of an inadmissibility report by an immigration officer. The officer relied exclusively on the fact that on September 18, 2014, the RPD found that there were serious reasons for considering that the applicant had committed a crime against humanity within the meaning of article 1Fa) of the *Convention*—being of the view that under subsection 15(b) of the IRPR, the RPD's decision is *res judicata* for the finding of inadmissibility of a foreign national or permanent resident under paragraph 35(1)(*a*) of the IRPA.

[44] The Minister referred the case to the ID for an admissibility hearing.

[45] On August 26, 2015, member Stéphane Morin [member] held a first hearing during which several preliminary issues were argued. On the Minister's side, the hearing officer, Daniel Morse, as he indicated in his correspondence from May 7, 2015, argued that "[Translation] the Minister's case is *prima facie*" and that he is "ready to submit the Minister's submissions based on the findings of the RPD's decision on September 18, 2014." However, "[Translation] depending on Mr. Mungwarere's disclosures, the Minister may disclose evidence in reply." Not only did the applicant's counsel, Annick Legault, object to this approach—because it is "[Translation] up to the Tribunal to decide the genuine issue"—but, furthermore, she invited the ID to grant the motion for abuse of process made by the applicant on the basis that he was found not guilty by the OSCJ of criminal charges for genocide and crimes against humanity that were brought against him under the CAHWCA.

[46] An interlocutory decision was made the same day. First, the member dismissed the motion for a stay of proceedings on the basis that the inadmissibility proceedings undertaken by the Minister under the IRPA before the ID were different in nature than the criminal proceedings initiated by Her Majesty the Queen under the auspices of the CAHWCA and the *Criminal Code* before the Ontario Superior Court of Justice. The member also refused to suspend the hearing until the Federal Court had the chance to decide on the issue of abuse of process. Second, the member rejected the Minister's recommendation that the ID apply paragraph 15b) of the IRPR to deal with this case, so that it will be for the "[Translation] Minister to prove that Mr. Mungwarere, as marked on his report [under section] 44 [of the IRPA] that was referred to us

[…] committed under paragraph 35(1)(*a*) [of the IRPA] a war crime or a crime against humanity as defined in sections 4 to 7 [of the CAHWCA].”

[47] Having tried unsuccessfully in the meantime to have this interlocutory decision reviewed by the Federal Court, because the application for judicial review was premature, the hearing before the member continued on February 16 and 17, 2016. For his part, the Minister voluntarily accepted the member’s determination that the RPD’s decision is not considered a conclusive finding of fact under paragraph 15b) of the IRPR. Furthermore, in support of the inadmissibility allegations, counsel for the Minister filed voluminous documentary evidence (M-1 to M-29). In addition to filing various exculpatory documents (D-1 to D-37), the applicant testified at the hearing. After the hearing closed, the parties entered written pleadings. In their respective written submissions, counsel examined in great detail all the evidence in the record, including the applicant’s statements and the testimony of several witnesses heard during the applicant’s criminal trial.

[48] In short, the Minister submitted to the member that the inadmissibility report had merit because there were reasonable grounds to believe that the applicant committed a crime against humanity during the genocide **due to his association with known perpetrators of genocide**, namely Charles Sikwabwabo, Dr. Gérard Ntakirutimana, Pastor Eliezer Ntakirutimana and Obed Ruzindana, and his wilful participation in the genocide; **the applicant did not have a credible alibi**, despite that fact that he categorically denied that he was involved whatsoever in attacks against the civilian population. Yet, **according to the evidence in the criminal record**, the applicant was part of a group of individuals armed with clubs that chased a civilian Tutsi, Eliézer

Nasbmana, on April 14, 1994, who in fact managed to escape (judgment of acquittal at para 1253). The applicant testified that on April 15, 1994, the day before the major attack against the Mugonero complex, there were 27 people in his residence and that on April 16, 1994, there were only six, including himself and his brothers. The applicant testified that his house was 700 metres from the hospital and that he could see the mob of attackers, made up of shirtless civilians brandishing stakes, as it was heading towards the hospital to kill the Tutsis who had sought refuge inside. The applicant also testified that on the morning of April 16, 1994, he saw Obed Ruzindana, one of the main leaders of the genocide, transporting militia members in the *trunk* of a pickup truck to attack the hospital. **After analyzing the applicant's statements, as well as passages from the decision made on February 21, 2003, by the International Criminal Tribunal for Rwanda** [ICTR] *Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10-T and ICTR-96-17-T (Exhibit M-19), **the Minister inferred** that the applicant was likely with one of the groups of attackers during the attack of the Mugonero hospital complex. After April 16, 1994, the applicant allegedly joined a group of attackers in Ngoma to kill the surviving Tutsis who had sought refuge in the hills of Bisesero. In this respect, **the Minister relied to a large extent on the testimony of Maria Nyirbamboyi**: "[Translation] I saw him go out during the nights and days" (Exhibit M-18, page 71), as well as on the fact that "[a]t night, he went to the nightclub with the attackers" (judgment of acquittal at para 1198). The Minister also submitted that the applicant had a lot to lose by not participating in the genocide. His father was a notable person in the community and owned several pieces of land; it was therefore necessary to protect him against the Tutsi enemy. It should also be noted that the media, and the RTLM in particular, appealed to the Hutus to defend themselves. Furthermore, the documentary evidence shows that almost all the Hutus in the Kibuye Prefecture participated in the Bisesero attacks.

[49] **For his part, the applicant denied all direct involvement in the genocide and complicity by association**. On one hand, the Minister relied on out-of-context passages from the judgment of acquittal. On the other hand, as an exception to the principle of *res judicata*, the new evidence submitted by the applicant should be admitted and considered, in particular Exhibits D-6, D-7, D-25, D-26 and D-27. Moreover, the Minister implied a collective responsibility for the genocide, namely that of all Hutu men, which is contrary to what was decided in *Ezokola*. **Specifically, the applicant was never associated with the army, nor with the local authorities, while he was not a member of a political party and/or a militia, but was a simple civilian**. In an affidavit dated October 19, 2013 (Exhibit D-7), **Fernand Batard**, one of the investigators who personally conducted an in-depth hearing of 272 potential witnesses, said that he "[Translation] quickly developed the firm conviction that Jacques MUNGWARERE was innocent." Mr. Batard personally met and interrogated, after their confessions of false testimony, Crown witnesses **TIP 111 and TIP 112**. **Both witnesses admitted to lying for pecuniary interest, which was also the case with several other witnesses** when they "[Translation] realized that they could make money by testifying outside of Rwanda, and mainly in Arusha." Moreover, the evidence respecting the episode on April 14, 1994, given by **Eliézer Nsabimana** is insufficiently probative and trustworthy. The applicant did not share the criminal intent of the genocide perpetrators. Quite on the contrary, according to the investigation led by Mr. Batard, during the attack on April 16, 1994, and in the days before, the applicant and his brothers gathered and protected several threatened Tutsis in their residence, including Lydia Nyirere and five of her children, Pauline Kabagwira and Erina Nyirazagima. **On the other hand, the OSCJ dismissed all the evidence that attempted to implicate the applicant in the attack of April 16, 1994. Importantly, counsel for the applicant submitted evidence of statements by**

witnesses (Exhibit D-6, D-25, D-26 and D-27 <u>(sealed)</u>**) that cast doubt on the so-called** "credible" **evidence heard during the trial.**

Moreover, Mr. Batard, who testified at the trial and was found to be credible, gave a statement that corroborated the applicant's alibi, which was dismissed by Justice Charbonneau. He explained that around mid-May 1994, classes had resumed at the Esapan school, the school in Ngoma where the applicant taught, which was confirmed by the former principal of Esapan, the disciplinarian, two teachers, several former students, and parents of students (protected witnesses). Finally, referring to each of the *Ezokola* factors in light of all the evidence in the record, counsel for the applicant argued that the applicant could not be found complicit in genocide and crimes against humanity. Specifically, there was no credible evidence establishing that the applicant was part of a group and that nothing was known about the nature of the organization in question, the rank the applicant may have had, the time spent in the organization, and the applicant's potential involvement.

[50] On June 2, 2016, the ID rendered the impugned decision stating that the applicant was inadmissible in Canada under paragraph 35(1)(*a*) of the IRPA. Although the evidence in the criminal record did not allow the OSCJ to find beyond a reasonable doubt that the applicant was criminally responsible as perpetrator, co-perpetrator, and/or accomplice in a crime against

humanity or genocide, the ID considered that the judgment of acquittal did not preclude the applicant from otherwise being found inadmissible on the basis of "reasonable grounds to believe." The findings of Justice Charbonneau in paragraphs 1186 to 1260 of the judgment of acquittal are relevant, in particular the testimony of Eliézer Nasbmana, Jonas Bizimana, Asinathe Nyiragwiza, and Maria Nyiramaboyi. With respect to the new evidence relied on by the applicant, the ID refused to admit it. In light of paragraph 15(c) of the IRPR, the ID is bound, on the facts, by the *res judicata* OSCJ decision. Since "[Translation] It is only exceptionally that there may be departure from the application of *res judicata*" and that Justice Charbonneau "[Translation] meticulously weighed the evidence and each testimony", the ID is not satisfied in the case at hand that the "[Translation]The first trial was tainted by fraud or dishonesty arising from [redacted] [redacted] constitute new evidence that conclusively casts doubt on the initial result," as the applicant argues in the case at hand. The ID is therefore bound by the OSCJ's finding of fact, which establishes that the applicant was part of a group that was going to commit attacks—the presumption of validity of that finding not being overturned by the new evidence (in particular, documents D-6, D-25, D-26 and D-27 (sealed)), [redacted] who are ineligible or otherwise unreliable.

[51] The ID is satisfied that there are reasonable grounds to believe that the applicant was complicit in a crime against humanity, without being connected to a specific crime. Even if the OSCJ did not conduct an analysis of the evidence based on the criteria of *Ezokola*, the ID "[Translation] is bound by the findings of the Ontario Court of Justice" with respect to the application of the *Ezokola* criteria (paragraphs 78 to 82 of the impugned decision). On the basis

of Justice Charbonneau's final conclusion, at paragraph 1260 of the judgment of acquittal, the ID expressed that it, among other things, was satisfied that the applicant was involved in a certain number of attacks after April 16, 1994. On the other hand, the ID relied on the RPD's detailed analysis of the applicant's complicity based on the *Ezokola* criteria. The ID "[Translation] gives this documentary evidence significant probative value" and relied on the RPD's finding that "[Translation] […] Mr. Mungwarere's contribution was significant and furthered the criminal intent of the perpetrators of the genocide."

III. ***Issues and positions of the parties***

[52] The applicant is the second person in Canada to be criminally charged under the CAHWCA. In 2009, the Quebec Superior Court rendered a guilty verdict against Désiré Munyaneza (*R c. Munyaneza*, 2009 QCCS 2201, [2009] QJ 4913 conf. 2014 QCCA 906, [2014] QJ 3059 application for leave to appeal dismissed [2014] SCCA 313), but contrary to this individual, the applicant was acquitted by the OSCJ of the charges of genocide and crimes against humanity.

[53] The issue is deciding on the reasonableness, on one hand, of the ID's refusal to grant a stay of proceedings and, on the other hand, of its findings on the merit that the applicant is inadmissible for violating human or international rights.

[54] The court record is lengthy and is almost 4,000 pages. It contains not only exhibits and excerpts from testimony in the criminal record, but also new evidence that was before OSCJ or the RPD. Nevertheless, the ID relied almost exclusively on Justice Charbonneau's analysis of the

few credible testimonies that were not excluded, which raises questions about the application of paragraph 15(c) of the IRPR, and about the use and probative value of some of Justice Charbonneau's findings for the purposes of establishing whether the applicant was part of a group of attackers and was complicit in genocide and crimes against humanity based on the *Ezokola* criteria; the application of these criteria was not considered by Justice Charbonneau, but it was by the RPD when it quashed the applicant's refugee status.

[55] The applicant submits that the ID committed numerous reviewable errors. On one hand, the member acted arbitrarily by agreeing to hear the inadmissibility report: the Minister cannot question the judgment of acquittal finding the applicant not guilty of charges of genocide and crimes against humanity. The continuation of the hearing is an abuse of process, in that it violates the principles of economy, consistency, finality, and the integrity of the administration of justice. The panel also erred by refusing to analyze or arbitrarily excluding the new evidence filed by the applicant, which confirmed the falsity of the allegations made by witnesses that the OSCJ had found to be credible. Finally, with respect to the finding of the participant's knowing involvement in murder, extermination, and torture against a civilian population or an identifiable group of persons, the ID should have conducted its own analysis of the evidence on the record and could not rely exclusively on Justice Charbonneau's analysis of some of the testimony.

[56] With respect to the Minister's out-of-context use of several passages of the judgment of acquittal, the applicant submitted that, in general, paragraph 15(c) of the IRPR does not apply to judgments of acquittal.

Thus, even if he did not agree with some of Justice Charbonneau's findings of fact, the applicant could not challenge or attack them in an appeal. He had already been acquitted. It was therefore contrary to procedural fairness or otherwise unreasonable to admit these findings of the OSCJ as *res judicata*, given the serious concerns raised by Justice Charbonneau regarding the veracity of these testimonies and not to give any weight to the new evidences, in particular, Exhibits D-6, D-25, D-26, and D-27 (sealed),

[57] The applicant also challenged the reasonableness of the decision on the merits, in that not only did the OSCJ never find that he was part of a group of attackers but also that there was no concrete evidence allowing the member to reach such a conclusion even under a less onerous burden of proof than that in criminal matters. Furthermore, Justice Charbonneau never made it clear that the applicant was part of a "[Translation] group of attackers," nor described in detail who could be part of this group, given the state of the evidence. The *Ezokola* criteria do not apply here.

[58] The respondent submits that the applicant's position is contradictory. On one hand, the applicant invokes *res judicata* or abuse of process in order the have the legal effect of a judgment of acquittal rendered by a criminal court under a more onerous burden of proof than in inadmissibility proceedings under the IRPA. On the other hand, the applicant relied on new evidence to contradict Justice Charbonneau's findings of fact on which the ID relied in the impugned decision confirming the applicant's inadmissibility. On this point, the respondent

submitted that [redacted] in question are unreliable because they are not sworn. Also, it was reasonable for the ID to exclude them, if not to give them little weight, just as it was reasonable to consider that the factual findings on the basis of "reasonable grounds to believe" that the applicant had participated in the genocide and committed crimes against humanity.

[59] Furthermore, the respondent submits that, although the case at hand is not a good example, paragraph 15(c) of the IRPR can still apply to judgments of acquittal due to the various burdens that exist within immigration law for the same situation. As an illustration, complicity in crimes against humanity is entirely different in criminal and immigration law. The first situation requires evidence beyond a reasonable doubt that a particular crime was committed. In the second situation, based on *Ezokola,* reasonable grounds for believing that the applicant made a significant contribution to a widespread attack is sufficient. In addition, it is wrong to infer that the applicant was exonerated by the OSCJ—he was only found not guilty of charges of genocide and crimes against humanity. Instead, the respondent emphasizes the fact that an acquittal is not tantamount to the finding that accused did not do what he was accused of, but rather, as is the case in the case at hand, it was not proved beyond a reasonable doubt that the committed the crimes for which he was charged.

[60] On the contrary, the respondent argues that the member's decision is reasonable, stating that the general finding in paragraph 1260 of the judgment of acquittal is sufficient to prove that the applicant was part of a group of attackers. **Furthermore, counsel for the respondent, at the hearing before this Court, acknowledged that the primary basis of the member's decision**

to declare the applicant inadmissible for violating human and international rights was based on the ultimate conclusion, of fact and law, in paragraph 1260 of the judgment of acquittal:

> [TRANSLATION]
>
> [1260] Even if I ignore that concerns that I raised regarding the testimony of Asinathe Nyiragwiza and Maria Myiramaboyi, all of the evidence that appears credible to me would not allow me to find, beyond a reasonable doubt, that after he left with the group of attackers to carry out attacks, the accused carried out actions that greatly facilitated the murder of Tutsis and carried out actions that materially facilitated the death of Tutsis. In my view, in both cases the evidence must identify that specific acts on which the Crown relied. Here, what the accused did after he left the small shopping centre is pure speculation. At most, this evidence establishes a probability of guilt.
>
> [Emphasis added.]

[61] During the hearing before this Court, counsel for the respondent submitted that Justice Charbonneau chose his words carefully when he stated "[Translation] after he left with the group of attackers to carry out attacks" (paragraph 1260 of the judgment of acquittal). This finding is significant in that it shows that the evidence was sufficient to prove that the applicant was part of the group of attackers that left for the hills of Bisesero. It is in that sense that the OSCJ found as a matter of law that the evidence established "[Translation] a probability of guilt" at most. Furthermore, the OSCJ clearly dismissed the alibi defence and the overall testimony of the applicant that he was not involved in the attacks. However, the respondent noted that, with respect to immigration law, it is not necessary to prove the applicant's specific actions. As stated in *Mugesera*, the reasonable grounds to believe standard requires more than mere suspicion, but remains less strict than the balance of probabilities. Considering that the widespread and

systematic attacks took place in Kibuye Prefecture against Tutsis, it was reasonable for the ID to find that the applicant had voluntarily made a significant and conscious contribution to a crime against humanity based on the criteria developed in *Ezokola*.

IV. ***Analysis***

[62] The Court considered the respective submissions of the parties in light of the evidence in the record and the applicable principles of law. The ID's continued hearing with respect to the allegations in the inadmissibility report does not amount to abuse of process. However, there are grounds for intervention in this case, given the reviewable errors made by the member and the overall unreasonableness of the impugned decision.

A. *Standard of review*

[63] Counsel acknowledged before this Court, during the hearing on February 16, 2017, that the member had jurisdiction to hear and decide the abuse of process motion (*Kaloti v. Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 365 at para 10). The question of whether the estoppel or abuse of process conditions are met is a mixed question of law and fact, which must be reviewed based on the standard of reasonableness.

[64] It is well established that the ID's decision to issue a deportation order falls within the standard of reasonableness. (*Faci v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693, [2011] FCJ No 893 at para 17; *Melendez v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363, [2016] FCJ No 1434 at para 11). Reasonableness is concerned

mostly with the justification, transparency, and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] FCJ No 9 at para 47 [*Dunsmuir*]).

[65] That said, in light of counsel's submissions and the somewhat confusing positions with respect to *res judicata,* the applicant argues that the legal scope of paragraph 15(c) of the IRPR must be reviewed based on a standard of correctness, since it is question of whether the ID applied the correct legal test (*Lauture v. Canada (Citizenship and Immigration)*, 2015 FC 336, [2015] FCJ No 296 at para 17).

[66] As noted by the Supreme Court in *Mouvement laïque québécoise v. Saguenay (City)*, 2015 SCC 16 at paras 46–48, on judicial review of a decision of a specialized administrative tribunal interpreting and applying is enabling statute, it should be presumed that the standard of review is reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 SCR 654 at paras 30, 34 and 39 [*Alberta Teachers*]). This presumption may nonetheless be rejected, particularly when a question of law is raised that is of central importance to the legal system and outside the specialized area of expertise of the specialized administrative tribunal (*Dunsmuir* at paras 55 and 60).

[67] In *McLean* (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895), Justice Moldaver noted the following with respect to paragraph 27:

> The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*,

> "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22)

[68] In his submissions filed at the hearing on April 24, 2017 [submissions], counsel for the applicant argued that applying paragraph 15(c) of the IRPR was an important bulwark to prevent and stop unconscionable, vexatious, or abusive proceedings, not to mention that ID decisions are of vital importance to the individuals concerned. Although in some manner the applicant is attempting to refute the presumption established in *Alberta Teachers*, I am not satisfied that the question of interpretation argued today by the parties is an exceptional case (*Kidd v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1044, [2016] FCJ No 1022 at para 15). In sum, paragraph 15(c) of the IRPR does not redefine the scope of *res judicata*, but, instead, circumscribes its application in recourse under paragraph 35(1)(*a*) of the IRPA. This is not an issue that will affect the overall administration of justice. Reasonableness is therefore the standard of review.

[69] Therefore, it remains to be established whether the ID erred in applying paragraph 15(c) of the IRPR with respect not only to the facts but also to the applicable principles of law. But first, let us start with the issue of abuse of process argued by the parties at the outset.

B. *The ID's continuance of the hearing did not amount to abuse of process*

[70] The Supreme Court of Canada noted in *Toronto (City) v. C.U.P.E, Local 79*, 2003 SCC 63, [2003] SCJ No 64 at para 64, that abuse of process is applied to prevent the reopening of

litigation in circumstances where the strict requirements of issue estoppel arising from a previously decided matters were not be applicable. Abuse of process occurs when the proceedings are "unfair to the point that they are contrary to the interest of justice."

[71] On the assumption the Court refused to intervene to quash the member's interlocutory decision by dismissing the abuse of process motion because it was premature, and now having the opportunity to have an overview of the case, I am satisfied that the ID's decision to continue the hearing does not amount to abuse of process. The member did not commit any reviewable errors by refusing to give full effect to the judgment of acquittal in the context of the inadmissibility proceedings. In fact, the decision-maker must be satisfied that the damage that would have been done to the public interest in the fairness of the administrative process should the proceedings continue would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] SCJ No 43 [*Blencoe*]).

[72] However, in this case, there is no identity of object between the criminal trial and the hearing before the ID. The respective burdens of evidence against the OSCJ and the ID are very different and cannot satisfy the criteria for issue estoppel (*Hamid v. Canada (Citizenship and Immigration)*, 2007 FC 220, [2007] SCJ No 386 at para 8 [*Hamid*]). Although the Crown must prove beyond a reasonable doubt that the applicant committed the alleged crimes, before the ID, the Minister must only establish that there are "reasonable grounds to believe" that the applicant committed the crimes for which he was charged. Moreover, the burden is **less onerous** than that of the balance of probabilities, i.e. evidence that makes the existence of a fact more likely than its

absence. While doctrine of abuse of process is unquestionably more flexible than issue estoppel, it does not mean that abuse of process applies without restriction or is not governed by other criteria. (*Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, [2003] SCJ No 1931 at para 34 [*Yamani*]). In the case at hand, the applicant has not satisfied me that the ID's decision to hear the allegations in the inadmissibility report is unfair to the point of being against the interests of justice.

C. *Interpretation of section 15 of the IRPR and legitimate expectations of the parties to the hearing*

[73] We have already referred to section 15 of the IRPR (Division I. C. at para 17). In this case, the notion of "conclusive finding of fact" contained in section 15 of the IRPR is like a blanket that each party tries to pull to their side based on their particular interests and desired result, while not compromising their right to submit new evidence, or even the same evidence that was before the OSCJ, regardless of whether it was accepted or excluded in the judgment of acquittal.

[74] I agree with the respondent that this case, in which an acquittal was made, is not the best example of enforcement of section 15 of the IRPR. It makes senses that when an individual has been convicted in Canada for a crime against humanity that the decision rendered under the *Criminal Code* or the CAHWCA by a Canadian court is, with respect to the facts, *res judicata* for the finding of inadmissibility of a foreign national or a permanent resident under paragraph 15(c) of the IRPA. This is what paragraph 15(c) of the IRPR stipulates on its face. Furthermore, under paragraph 15(a) of the IRPR, the same effect must be given to any decision made in

respect of the foreign national or permanent resident by any international criminal tribunal established by resolution of the United Nations Security Council or the International Criminal Court within the meaning of the CAHWCA. For example, in his written submissions to the ID, by analyzing the applicant's statements, as well as portions of the decision handed down on February 21, 2003, by the International Criminal Tribunal for Rwanda [ICTR] in *Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No ICTR-96-10-T and ICTR-96-17-T (Exhibit M-19), the Minister inferred that the applicant was likely among a group of attackers during the attack on the Mugonero hospital complex, without necessarily claiming that the ID was bound by the ICTR's decision, since the applicant is not one of the individuals convicted for crimes against humanity and genocide in that case. Therefore, the Minister understood very well at the ID hearing that the probative value of the ICTR decision should be assessed based on other evidence in the record.

[75] At first glance, the purpose of paragraphs 15(a) and (c) of the IRPR is to avoid resuming the debate before the ID when an individual who is the subject of an inadmissibility report has been convicted in Canada or outside Canada by and international tribunal for crimes against humanity or genocide. Under paragraph 15(b) of the IRPR, the same consideration applies when the RPD has formally excluded an individual from the protection of refugee status under section 98 of the IRPA (*Syed v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1163, [2006] FCJ No 1461 at para 22). Nevertheless, the ID holds the discretion to admit new evidence that would contradict the guilty verdict or the refugee status exclusion order (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*]).

[76] That said, it may be risky to categorically exclude, for the future, the member's enforcement of paragraph 15(c) of the IRPR to all judgments of acquittal. Nevertheless, in this case, the enforcement of this provision is not only problematic but highly prejudicial. Although Justice Charbonneau found the applicant not to be credible and he dismissed his alibi defence, the applicant could not appeal the judgment of acquittal. In any event, *res judicata* applies only to findings of fact and not findings of mixed fact and law. The introductory paragraph of section 15 of the IRPR is clear. In short, the ID may only be bound by factual findings that are conclusive, determinative, and definitive of each element of guilt (i.e. identity, *actus reus*, and *mens rea),* and not by the finding of mixed fact and law that the individual has been found guilty or not guilty. That is indeed the problem with the impugned decision. As noted in paragraph 60 of these reasons, the member mainly relied on the ultimate finding of fact and law, which is contained in paragraph 1260 of the judgment of acquittal, which constitutes a decisive error of law in this case.

[77] Moreover, if the OSCJ's judgment of acquittal indeed had the force of *res judicata* for the finding of inadmissibility for violating human or international rights, one could then wonder why the Minister took the time to submit at the ID hearing a list of twenty-eight documents, some of which were from the criminal trial, and others that were brand new (Exhibits M-9, M-10, M-11, M-12, M-19, M-20, M-21, M-22, and M-28) to argue the merits of the inadmissibility report. Counsel for the respondent justified this blatant inconsistency by explaining, in particular, that this additional material evidence compensates for the lack of findings of fact in the OSCJ's decision with respect to the attacks in the hills of Bisesero, in particular. In such a case, the conclusion should be drawn that this is an eloquent demonstration that the respondent wanted the

ID to attribute appreciable weight to the OSCJ's judgment of acquittal, without the ID being bound by each and every one of the findings of fact reached in July 2013. But this is not the only contradiction in the Minister's position, which changed over time. It must be recalled that at the beginning, the inadmissibility report prepared under section 44 of the IRPA by the immigration officer makes absolutely no reference to the OSCJ's judgment of acquittal but instead to the RPD's decision to quash the applicant's refugee status. For his part, **the officer relied exclusively on paragraph 15(b) of the IRPR**, which stipulates that any determination by the RPD based on findings that the foreign national or permanent resident has committed a war 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 *Convention* has, with respect to the facts, force of *res judicata* for the finding of inadmissibility of a foreign national or permanent resident under paragraph 35(1)(*a*) of the IRPA. The Minister made its bed by recommending, more or less, automatic inadmissibility.

[78] However, with respect to conferring "conclusive findings of fact" to the RPD's decision quashing the applicant's refugee status, in his interlocutory decision, the member rightly refused to apply paragraph 15(b) of the IRPR for the inadmissibility finding—as requested at the opening of the Minister's hearing. However, in his final decision, he "[Translation] gave this documentary evidence significant probative value." It is evident that the member is perfectly aware of the differential treatment between a finding of fact with "conclusive findings of fact" and conclusive or inconclusive effect relating to a fact. But then, although in his interlocutory decision the member made it clear to the parties that it will be up to "[Translation] the Minister to prove that Mr. Mungwarere, as marked on his report [under section] 44 [of the IRPA] that was referred to us […] committed under paragraph 35(1)(a) [of the IRPA] a war crime or a crime

against humanity as defined in sections 4 to 7 [of the CAHWCA], in his final decision, the member appears to have forgotten that instruction, as well as the counsel's submissions at the hearing inviting him to examine all the evidence filed on both sides (M-1 to M-29 and D-1 to D-37).

[79] The problem is that the member's entire analysis in this final decision relies on the premise that, in accordance with paragraph 15(c) of the IRPR, the OSCJ's findings of fact have force of *res judicata,* and those may only be challenged for exceptional considerations which are not met in the case at hand, even though the new evidence referred to by the applicant establishes, at first glance, [redacted]

[redacted] The member noted in passing that the OSCJ found that the applicant was not a credible witness and had dismissed all his testimony, including his alibi defence that he was not involved in the killings in Kibuye Prefecture because he was teaching at Esapan. However, the applicant testified himself on February 16, 2016, before the ID, and he was cross-examined by counsel for the Minister. However, in the impugned decision, the member completely failed to address the applicant's examination and the new evidence to corroborate that Esapan school had reopened in mid-May 1994, or even that several of the witnesses in the trial had a pecuniary interest to making false testimony, as noted by investigator Batard in this sworn affidavit from October 19, 2013; Mr. Batard had already testified at the trial and was considered to be a credible witness by the OSCJ (judgment of acquittal at paras 414 to 421, 596, 597, 639, 655, 724, 1031, and 1041).

[80] Following the interlocutory decision made by the member on August 26, 2015, the parties had a legitimate expectation that all the evidence filed at the ID hearing on the inadmissibility report would be considered by the member. In that case, the member made a decisive error when he applied paragraph 15(c) of the IRPR, without reservation, adopting Justice Charbonneau's general finding of fact and in law contained in paragraph 1260 of his judgment. Moreover, Justice Charbonneau's particular findings of fact are far from clear with respect to the applicant's personal involvement in attacks against the Tutsi population in the Kibuye Region. In fact, Justice Charbonneau excluded numerous non-credible or fabricated testimonies that established the applicant's personal involvement in the murders or rapes reported to the investigators that gave rise to the charges in 2009. With respect to the major attack on April 16, 1994, no concrete evidence, even from generally credible witnesses, directly connects the applicant to specific crimes committed that day at the Mugonero hospital complex (judgment of acquittal at paras 1227, 1242 to 1247, and 1248 to 1252). The remaining issue is that of the attacks that occurred after April 16, 1994, in the hills of Bisesero, but again, the findings of fact in the judgment of acquittal are inconclusive, namely that the applicant was among the group of attackers or even that he committed specific acts during these attacks (judgment of acquittal at paras 1228, 1231 to 1241, 1254, 1255, and 1256 to 1259).

[81] The evidence in the criminal record cannot be treated as a monolithic block. This lack of analysis of all the evidence on the record is reflected not only in the immigration officer's inadmissibility report, which merely referred to the RPD's decision, but also in the ID member's decision, which failed to analyze what Justice Charbonneau actually said. For example, in its written submissions to the ID, the Minister suggested that the applicant was probably part of a

group of attackers by referring to paragraphs 1238 et seq. of the judgment of acquittal that deal with the testimony of Gérard Bandora, who said that he saw the applicant participate in the Bisesero attacks. He also claimed that during this attack he saw the applicant shoot and kill a toddler of four or five years who was running down a road. However, if we look carefully at paragraph 1240, it notes that Justice Charbonneau completely dismissed this evidence in that Mr. Bandora deliberately exaggerated his testimony against the accused. To conclude, using, in a different factual and legal context, the findings of a judgment of acquittal, and giving force of *res judicata* to findings, which themselves are vague drawn from evidence obtained or examined by Justice Charbonneau from the point of view of applying the *Ezokola* criteria in respect to expulsion for complicity appears unreasonable to me in the case at hand (*Johnson v. Canada (Citizenship and Immigration)*, 2014 FC 868, [2014] FCJ No 893 at paras 24 to 26). In fact, the member merely made a selective analysis of Justice Charbonneau's judgment while, overall, the impugned decision is unreasonable.

D. *Unreasonableness of the impugned decision as a whole*

[82] Although there is a simple presumption that the member, in his analysis, considered all the evidence, his decision does not display intelligibility or transparency. The member must carry out an independent analysis of the evidence in the record. At the risk of repeating myself, except to arbitrarily exclude the applicant's new evidence, the member in no way addresses the evidence submitted by the parties and merely considered the findings of fact from the judgment of acquittal by adopting the RPD's reasoning to find that the applicant was inadmissible based on the *Ezokola* criteria. However, Justice Charbonneau's findings with respect to the testimony of Jonas Bizimana, Asianathe Nyiragwiza, and Maria Nyiramaboyi on which the Minister relied to

seek the applicant's inadmissibility do not allow the ID to find, on the basis of "reasonable grounds to believe" that the applicant was involved in the genocide or committed crimes against humanity.

[83] During the criminal trial, Jonas Bizimana, a Hutu, testified for the Crown about the events of April 16, 1994, surrounding the killing at the Mugonero hospital complex (judgment of acquittal at paras 301 to 336). The day of the attack, he followed the armed group towards the hospital and veered off halfway to go home. The next day, he went to the Petit Centre to meet the leader of the armed group and saw the applicant with a grenade on his hip. Mr. Bizimana appeared to be a credible witness. However, the judge noted that he had never seen the applicant among the attackers, which affected the reliability of Ms. Nyiragwiza and Ms. Nyiramaboyi's testimony (judgment of acquittal at paras 1253 to 1254).

[84] During the criminal trial, the Crown also called Asinathe Nyiragwiza to testify (judgment of acquittal at paras 337 to 374). She is Hutu and lived in Kibuye Prefecture with her Tutsi husband and their six children, who are also Tutsi through the father. During the attack at the hospital complex, she allegedly sought shelter in the church with many other Tutsis. However, the armed group reportedly found them and locked the doors, then broke the windows and threw tear gas grenades inside. Under the blinding gas, she and other Tutsis rushed out the back door of the church, while the attackers entered to kill the people who were still inside. Once outside, she recognized several attackers, including the applicant, who was carrying a gun. She was able to escape with the help of one of the attackers, who happened to be her nephew and helped her escape through the bushes. During cross-examination, Ms. Nyiragwiza admitted that she did not

see the applicant actually fire his gun due to the chaos. Ms. Nyiragwiza appeared reliable in Justice Charbonneau's view, but he found it very difficult to give weight to her assertion that she saw the applicant when she was leaving the church, since she had admitted that the tear gas had had a blinding effect. Therefore, the Justice did not rely on this part of the testimony to find that the applicant had participated in the hospital complex attack (judgement of acquittal at paras 1248 and1252).

[85] During the criminal trial, Maria Nyiramaboyi, of Hutu origin, also testified for the Crown (judgment of acquittal at paras 375 to 399). She stated that she was living in the centre of Ngoma in 1994 at the time of the attacks against the Tutsis. She also heard shots at the church during the attack at the hospital complex. She testified that when she was living in the centre of Ngoma, the men should gather every day before leaving for the attacks and yell "Exterminate them!" There were many of them, and among them she saw the applicant, who would usually hang out and go out with them. Ms. Nyiramaboyi stated that she saw the applicant with grenades, as well as guns. During cross-examination, Ms. Nyiramaboyi explained that she knew the accused well and had herself seen him leave with the attackers. Justice Charbonneau found that Ms. Nyiramaboyi was a credible witness. However, the fact that she confused what had been said to her by Mr. Bizimana, to the point of being part of her sworn testimony against the accused, raised concerns about her entire testimony.

[86]

[87]

[88]

[89]

[90]

[91] The reasons for the ID to exclude or give no weight to the above-mentioned statements, which are highly relevant to exculpating the applicant, appear capricious and arbitrary to me. The authenticity of this new evidence is not really being questioned. At most, it is a matter of the reliability of the statements by witnesses But the ID is not bound by the requirement that testimony received out of court has been sworn, or that the opposing party was able to cross-examine the declarant. It was therefore incumbent on the member to appreciate the relative weight to give to this new evidence in the record, based on how conclusive Justice Charbonneau's findings were with respect to the credibility of the witnesses who were already heard. Conclusive findings of fact could not be determinative due to the absence of identity of object between the criminal trial and the inadmissibility hearing, the different burdens of proof, and the existence of new evidence discrediting witnesses who had been deemed credible during the criminal trial. The probative value of evidence and *res judicata* of a final judgment, in this case the judgment of acquittal, should not have been confused.

[92] I also agree with the applicant's suggestion that in this case the respondent attempted to impugn him by making him an "[Translation] accomplice by association" in crimes against humanity committed by the perpetrators of the genocide. On one hand, it was admitted that the

attacks against the Tutsis were committed by various groups of attackers, including members of the Rwandan army, militias, and the Interahamwe, as well as members of the civilian population who were grouped together and led by military and local authorities (judgment of acquittal at para 1187). On the other hand, neither the OSCJ nor the ID was able to find that the applicant was part of the army, the police, a political party, or the militias. He was a simple civilian. It was also admitted, at the time, that almost all the Hutu men from Kibuye Prefecture were involved in the attacks. This was also confirmed by the applicant, who stated before the ID that "[Translation] about 85% of people went to hunt Tutsis." But then, without *actus reus* or significant and wilful contribution, the generic concepts of ethnicity and sex cannot constitute an valid test for establishing an individual's complicity in crimes against humanity committed by other members of the same ethnicity or sex. Being part of a "group of attackers" is also very broad, but also vague; this is not an organization. Likewise, the *Ezokola* criteria are difficult to apply to groups that are unorganized or difficult to identify. However, complicity by association is excluded by the most recent Supreme Court case law, and the collective commission of crimes by members of any civilian population does not make it possible to infer that an individual was personally involved because he has the same interests as the group of attackers. This is, in my respectful view, an unreasonable extension of the notion of criminal involvement in international law. At best, the applicant would be a sympathizer due to family or other ties that he may have had with some of the perpetrators of the genocide, which remains to be proved, since the ID itself did not make any specific findings of fact based on the contradictory evidence submitted by both parties at the hearing.

[93] The “reasonable grounds to believe” test in section 33 of the IRPA requires more than mere suspicion of participation or complicity in the acts or crimes contained in the inadmissibility report. Likewise, should the Minister, who seeks to find the applicant inadmissible for violating human or international rights, not be required to produce credible and convincing evidence of the personal involvement or meaningful and wilful contribution of the applicant to the genocidal plan and the crimes committed between April 6 and July 17, 1994, against the Tutsi population?

[94] I would say “yes” based on the following passage from *Ezokola*:

> [88] Given that contributions of almost every nature to a group could be characterized as furthering its criminal purpose, the degree of the contribution must be carefully assessed. <u>The requirement of a significant contribution is critical to prevent an unreasonable extension of the notion of criminal participation in international criminal law.</u>
>
> [Emphasis added.]

[95] By now requiring proof of voluntary and significant contribution in the criminal intent of the group, the Supreme Court is moving away from the previous test of exclusion or inadmissibility based on the “knowing participation” test in *Ramirez v. Canada (Minister of Employment and Immigration)*, 1992 FCA 8540, [1992] 2 FC 306 [*Ramirez*]. However, it is not necessary today to base the Court’s intervention on this last finding. Specifically, as a result of the incomplete and selective analysis of the evidence in the record by the member, I am not satisfied in the case at hand that the confirmation of the inadmissibility report and the issuance of a deportation order is an acceptable outcome that can be justified with respect to the evidence in the record and applicable law.

V. ***Conclusion***

[96] For the reasons given above, the application for judicial review is allowed in part, as hereinafter specified.

[97] First, the hearing before the ID with respect to the allegations contained in the inadmissibility report does not constitute abuse of process. Second, the decision made on the merits by the ID is unreasonable as a whole. Third, since the Minister triggered the hearing process, not the applicant, there is no need to refer the matter to the ID; any action to be taken with respect to the inadmissibility report is now within the jurisdiction of the Minister.

[98] The respondent did not pose any question of law of general importance, and counsel suggested to the Court in her oral submissions that the highly contested nature of certain questions of fact that were unresolved in the ID decision did not lend itself to a question being certified by the Court. For his part, in his submissions, the applicant asked the following questions for certification under section 79 of the IRPA.

[99] First, does paragraph 15(c) of the grant the force of *res judicata* to a judgment of acquittal?

[100] It is difficult to answer “yes” or “no” to this question, the resolution of which does not seem to me to be determinative for the purposes of a potential appeal. Both parties argue that paragraph 15(c) of the IRPR does not apply exclusively to sentencing judgments, although in several instances this is in fact the case. In sum, enforcement of paragraph 15(c) is very specific and must be analyzed on a case-by-case basis. In this case, Justice Charbonneau did not want to accept the alibi defence submitted by the applicant. It therefore seems unsafe to categorically exclude for the future the enforcement of paragraph 15(c) of the IRPR to any judgment of acquittal (see para 76 of these reasons). The fundamental problem in this case is that the members relies heavily on the final finding <u>of fact and law</u> in paragraph 1260 of the judgment of acquittal, which is a decisive error in law. In fact, section 15 of the IRPR refers exclusively to findings of fact that are contained in the decisions outlined in paragraphs (a), (b) and (c). Likewise, issue estoppel has already been covered by several important decisions (*Balasingham v. Canada (Citizenship and Immigration)*, 2015 FC 456, [2015] FCJ No 429 at para 25 and *Danyluk* at paras 21, 22 and 54).

[101] Second, does the ID have inherent power to rule on an abuse of process motion?

[102] The applicant raises this question as a result of the member’s questioning in his interlocutory decision with respect to the jurisdiction of the ID to rule on a motions for abuse of process, but the parties admitted in this Court at the hearing that the ID had the authority to hear and rule on the motion for abuse of process. Therefore, the question posed by the applicant cannot be determinative in this case. Furthermore, this Court has found that the continuation of

the hearing by the ID, in fact and in law, is not an abuse of process and there was no need to quash the member's final decision on this latter ground (paras 70 to 72 of this decision).

[103] Also, I am not satisfied that the applicant raises above a serious question of general importance that transcends the interests of the parties, addresses issues of significant consequence or general importance, and that allows a potential appeal (*Canada (Minister of Employment and Immigration) v. Liyanagamage*, [1994] FCJ No 1637 (FCA) at paras 4 to 6).

[104] Therefore, no question will be certified by the Court.

JUDGMENT in docket IMM-2575-16

THE COURT ADJUDGES that:

1. The application for judicial review is allowed in part;

2. The hearing before the Immigration and Refugee Board's Immigration Division [ID] on the allegations in the inadmissibility report is not an abuse of process;

3. The decision on the merits made by the ID is unreasonable as a whole.

4. The Court quashes the ID's decision confirming the inadmissibility report and issuing a deportation order against the applicant;

5. There is no need to refer the matter back to the ID; all subsequent action is under the jurisdiction of the Minister; and

6. No question is certified by the Court.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2575-16
STYLE OF CAUSE:	JACQUES MUNGWARERE v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 16, 2017 AND APRIL 24, 2017
ORDER AND REASONS:	MARTINEAU J.
DATED:	JULY 21, 2017

APPEARANCES:

Mr. Philippe Larochelle Mr. Sébastien Chartrand	FOR THE APPLICANT
Ms. Patricia Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Roy Larochelle, Avocats Montréal, Quebec	FOR THE APPLICANT
Ms. Nathalie G. Drouin Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT