IMM-5946-98

2001 FCT 460

Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri et **Marie-Grâce Hoho** (*Applicants*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: MUGESERA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (T.D.)

Trial Division, Nadon J.—Québec, January 12, May 15, 16, 17, 18, 19, July 4, 5, 6, 7, October 3, 4, 5, 6, 2000, April 12, 2001; Ottawa, May 10, 2001.

Citizenship and Immigration — Exclusion and removal — Inadmissible persons — Inadmissibility based on speech inciting to hatred, murder and genocide of Tutsi ethnic group as offence under Rwandan Penal Code and Canadian Criminal Code — Not crime against humanity as insufficient evidence linking murders, massacres to speech — No misrepresentation of material fact in application for permanent residence as question on involvement in commission of crime against humanity calling for conclusion of law — Three questions of general importance certified for consideration by F.C.A.

A deportation order was issued against the applicants, citizens of Rwanda, on the basis of a speech delivered by Léon Mugesera (the applicant) in Rwanda in November 1992 inciting hatred, murder and genocide of the Tutsi ethnic group. The respondent alleged that the applicant was inadmissible under paragraph 27(1)(*a*.1) and subparagraph (*a*.3)(ii) of the *Immigration Act* because that speech constituted offences under sections 91(4), 166, 311 and 393 of the Rwandan *Penal Code* and offences under sections 22, 235, 318, 319 and paragraph 464(*a*) of the Canadian *Criminal Code*; that the applicant was inadmissible under paragraph 27(1)(*g*) and (*j*) of the *Immigration Act* because he had committed a crime against humanity by counselling the murder of the Tutsi, by participating in the massacre of Tutsi and by fomenting the genocide of an identifiable group; that the applicant was inadmissible under paragraph 27(1)(*e*) of the *Immigration Act* in that he had obtained landing through a misrepresentation of a material fact in his application for permanent residence by answering “no” to a question on an involvement in the commission of a crime against humanity; that the applicant’s wife was also implicated by paragraph 27(1)(*e*) of the *Immigration Act* since she too obtained landing in Canada through the negative reply she gave to that same question.

The Adjudicator found the allegations against the applicants were justified and ordered their deportation (and that of the children, under subsection 33(1) of the *Immigration Act*).

The Appeal Division of the Immigration and Refugee Board dismissed the appeal from that decision. This was an application for judicial review of the Appeal Division’s decision.

Held, the application should be allowed in part.

The applicants submit that the Appeal Division erred in fact and in law in its analysis of the speech given by Mugesera; that the Appeal Division erred in law in relation to the admissibility of certain evidence; that two of the three panel members erred in fact and in law in finding that Mugesera was a close associate of the president, that he was a member of Akazu (ruling clique) and of death squads, that he had participated in massacres, and that murders had been committed following his

speech; that the Appeal Division erred in law in determining that, by his speech, Mugesera had committed a crime against humanity; that the Appeal Division erred in fact and in law in determining that Mugesera had misrepresented a material fact by answering no to a certain question in his application for permanent residence as to an involvement in the commission of a crime against humanity.

On the issue of misrepresentation, a person must, in order to fall within the ambit of paragraph 27(1)(*e*) of the Act, have a subjective knowledge of the facts he is concealing. Once that knowledge exists, it is irrelevant whether the declarant had the intention to make a misrepresentation. Paragraph 27(1)(*e*) provides that the misrepresentation must pertain to a material fact. However, the question of whether Mugesera committed or participated in the commission of war crimes or crimes against humanity was a determination of law and not of fact, since the purpose of the proceedings in this case was precisely to arrive at such a determination. Therefore, the Appeal Division erred in law in finding that Mugesera had misrepresented a material fact.

On the evidence, the two panel members erred in fact and in law in finding that Mugesera was a close associate of the president, that he was a member of the ruling clique and of death squads and that he had participated in massacres, and that murders had been committed following his speech. These conclusions were patently unreasonable.

As to the admissibility of certain evidence, the Refugee Division is not bound by legal or technical rules of evidence and it may base a decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: Mahoney J.A. in *Fajardo v. Canada (Minister of Citizenship and Immigration)* (1993), 21 Imm. L.R. (2d) 113 (F.C.A.). Consequently, the Appeal Division could in this case admit and consider the evidence impugned by the applicants.

While a different interpretation could have been given to Mugesera's November 1992 speech, the Appeal Division's interpretation and the conclusion that parts of it constituted an incitement to murder and genocide were not unreasonable.

The Appeal Division erred in law in finding that the speech of November 1992 constituted a crime against humanity. Absent proof of a direct or indirect link between the speech and some murders committed in a systematic and widespread manner, the speech is not by itself cloaked in the requisite inhumaneness for it to constitute a crime against humanity.

Therefore, the matter, in so far as the Minister's allegations in relation to paragraphs 27(1)(*e*) and (*g*) of the Act are concerned, will be sent back to the Appeal Division for reconsideration in light of the present reasons. In regard to the other two allegations of the Minister against Léon Mugesera, which pertain to paragraphs 27(1)(*a*.1) and (*a*.3) of the Act, the application for judicial review will be dismissed.

Questions were certified as to whether the admission of testimony pertaining to oral out-of-court statements made by a witness who refuses to disclose the identity of those making these statements and the notes pertaining thereto breach the principles of fundamental justice; and whether incitement to murder, violence and genocide, in a context in which massacres are committed in a widespread or systematic way, but absent any evidence of a direct or indirect link between the incitement and the murders committed in a widespread or systematic way, constitute in itself a crime against humanity.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 9 December 1948, 78 U.N.T.S. 1021.

Criminal Code, R.S.C., 1985, c. C-46, ss. 7(3.76) (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 1), 7(3.77) (as am. *idem*), 22 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 7), 235, 318, 319 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 203), 464(*a*) (as am. *idem*, s. 60).

Federal Court Act, R.S.C., 1985, c. F-7, ss. 2(1) "federal board, commission or other tribunal" (as am. by S.C. 1990, c. 8, s. 1), 18.1 (as enacted *idem*, s. 5).

Immigration Act, R.S.C., 1985, c. I-2, ss. 19(1)(*j*) (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 3), 27(1)(*a*.1) (as am. by S.C. 1992, c. 49, s. 16; 1995, c. 15, s. 5), (*a*.3) (as am. by S.C. 1992, c. 49, s. 16), (*e*),(*f*),(*g*) (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 4), 33(1) (as am. by S.C. 1992, c. 49, s. 24), 68(3) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18), 69.4(3) (as enacted *idem*), 70(1) (as am. *idem*; S.C. 1995, c. 15, s. 13), 80.1(5) (as enacted by S.C. 1992, c. 49, s. 70), 83(1) (as am. *idem*, s. 73).

Penal Code (Rwanda), ss. 91(4), 166, 311, 393.

CASES JUDICIALLY CONSIDERED

APPLIED:

Virk v. Canada (Minister of Employment and Immigration) (1986), 2 Imm. L.R. (2d) 127 (App. Bd.); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; amended reasons [1998] 1 S.C.R. 1222; (1998), 11 Admin. L.R. (3d) 130; *Singh v. Canada (Minister of Citizenship and Immigration)* (1999), 173 F.T.R. 280; 2 Imm. L.R. (3d) 291 (F.C.T.D.) *Kabeya v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 106 (T.D.) (QL); *Gnanapragasam v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 786 (T.D.) (QL); *Goodman v. Canada (Minister of Citizenship and Immigration)* (2000), 4 Imm. L.R. (3d) 104 (F.C.T.D.); *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (F.C.A.); *Siad v. Canada (Secretary of State)*, [1997] 1 F.C. 608 (1996), 36 Imm. L.R. (2d) 1; 206 N.R. 127 (C.A.); *Fajardo v. Canada (Minister of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 113; 157 N.R. 392 (F.C.A.); *Huang v. Canada (Minister of Employment and Immigration)* (1992), 166 N.R. 308 (F.C.A.); *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4 (F.C.A.).

CONSIDERED:

Mohammed v. Canada (Minister of Citizenship and Immigration), [1997] 3 F.C. 299 (1997), 130 F.T.R. 294 (T.D.); *Medel v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345 (1990), 10 Imm. L.R. (2d) 274; 113 N.R. 1 (C.A.).

REFERRED TO:

R. v. Finta, [1994] 1 S.C.R. 701; (1994), 112 D.L.R. (4th) 513; 88 C.C.C. (3d) 417; 28 C.R. (4th) 265; 20 C.R.R. (2d) 1; 165 N.R. 1; 70 O.A.C. 241; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

APPLICATION for judicial review of a decision of the Appeal Division of the Immigration and Refugee Board (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [1998] I.A.D.D. No. 1972 (QL)) dismissing the appeal from a deportation order. Application allowed in part.

APPEARANCES:

Guy Bertrand and *Suzanne Gagné* for applicants.

Louise-Marie Courtemanche and *Barbara Boily* for respondent.

SOLICITORS OF RECORD:

Bertrand, Guy & Associés, Québec, for applicants.

Deputy Attorney General of Canada for respondent.

The following is the English version of the reasons for order delivered orally by

[1] NADON J.: Here are the reasons for the order I read aloud in Québec on April 12, 2001. In view of the media publicity surrounding this case in Québec, I concluded that it would be preferable, in the circumstances, to proceed in this way.

[2] Through their application for judicial review, the applicants Léon Mugesera, his wife Gemma Uwamariya, and their children Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho, are asking this Court to set aside the decision rendered November 6, 1998 by the Appeal Division of the Immigration and Refugee Board [[1998] I.A.D.D. N^{o} 1972 (QL)] (the Appeal Division).

[3] The Appeal Division dismissed the appeal filed by the applicants from the deportation order issued against them by the Adjudicator Pierre Turmel on July 11, 1996.

[4] It should be noted that all of the evidence filed with the Adjudicator was placed in the Appeal Division file. In the proceedings before the Adjudicator, 16 witnesses were heard at the applicants' request, while five witnesses were heard at the respondent's request. In the Appeal Division, each of the parties called four witnesses. Also testifying were the applicants Léon Mugesera, Gemma Uwamariya and Yves Rusi.

[5] It should also be noted that the hearing time before the Adjudicator and the Appeal Division amounts to 53 days: 34 before the Adjudicator and 19 before the Appeal Division. In the hearing on the application for judicial review in this Court, the parties needed 14 days in which to present their respective submissions.

[6] The applicants, citizens of Rwanda, obtained landing in Canada on August 12, 1993. Four allegations were made against the applicant Léon Mugesera and one allegation against the applicant Gemma Uwamariya. As to the other applicants, the children of the first two applicants, subsection 33(1) of the *Immigration Act*, R.S.C., 1985, c. I-2 [as am. by S.C. 1992, c. 49, s. 24] (the Act) is applicable to them. This clause reads as follows:

> **33.** (1) Where a removal order or conditional removal order is made by an Adjudicator against a member of a family on whom other members of the family in Canada are dependent for support, any member of the family dependent on that member may be

> included in that order and be removed from or required to leave Canada unless the dependant is a Canadian citizen or a permanent resident nineteen or more years of age.

Under this provision, any order rendered against Léon Mugesera could be applicable to the children.

[7] The following are the allegations made by the respondent:

A. The respondent alleges that Léon Mugesera is implicated by paragraph 27(1)(*a.*1) [as am. by S.C. 1992, c. 49, s. 16; 1995, c. 15, s. 5] of the Act, in that he delivered a speech in Kabaya, Rwanda on November 22, 1992, during which he incited the persons present to violence and the murder of Tutsi and political opponents. The respondent says the speech delivered by Léon Mugesera constitutes an offence under sections 91(4) and 311 of the Rwandan *Penal Code* and an offence under sections 22 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 7], 235 and paragraph 464(*a*) [as am. *idem*, s. 60] of the Canadian *Criminal Code* [R.S.C., 1985, c. C-46]. Paragraph 27(1)(*a.*1) of the Act provides:

> **27.** (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
>
> (*a*) is a member of an inadmissible class described in paragraphs 19(1)(*c*.2), (*d*), (*e*), (*f*), (*g*), (*k*) or (*l*);
>
> (*a*.1) outside Canada,
>
> (i) has been convicted of an offence that, if committed in Canada, constitutes an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or
>
> (ii) has committed, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that would constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under an Act of Parliament by a maximum term of imprisonment of ten years or more,
>
> except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

B. The respondent alleges that Léon Mugesera is implicated by subparagraph 27(1)(*a*.3)(ii) [as am. by S.C. 1992, c. 49, s. 16] of the Act, in that he incited the persons present at his speech to the murder and genocide of the Tutsi ethnic group, which constitutes an offence under section 166 of the Rwandan *Penal Code* and executive enactment 08/75 of 12 February 1975, on Rwanda's accession to the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948* [9 December 1948, 78 U.N.T.S. 1021], and an offence under section 318 of the Canadian *Criminal Code*. The respondent says that Léon Mugesera also incited the persons present to hatred against the Tutsi, which constitutes an offence under section 393 of the Rwandan *Penal Code*

and an offence under section 319 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 203] of the Canadian *Criminal Code*. Subparagraph 27(1)(*a*.3)(ii) provides:

> **27.** …
>
> (*a*.3) before being granted landing,
>
> …
>
> (ii) committed outside Canada, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence referred to in paragraph (*a.*2),
>
> except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

C. The respondent alleges that Léon Mugesera is implicated by paragraphs 27(1)(*g*) [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 4] and 19(1)(*j*) [as am. *idem*, s. 3] of the Act, because he committed a crime against humanity. Specifically, the respondent alleges that Léon Mugesera counselled the members of his political party, the MRND, and the Hutu to kill Tutsi, that he participated in the massacre of Tutsi, and that he fomented the genocide of an identifiable group, the Tutsi ethnic group. Paragraphs 27(1)(*g*) and 19(1)(*j*) of the Act read as follows:

> **27.** (1) …
>
> (*g*) is a member of the inadmissible class described in paragraph 19(1)(*j*) who was granted landing subsequent to the coming into force of that paragraph;
>
> …
>
> **19.** (1) No person shall be granted admission who is a member of any of the following classes:
>
> …
>
> (*j*) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

D. The respondent alleges that Léon Mugesera is implicated by paragraph 27(1)(*e*) of the Act in that he obtained landing in Canada through a misrepresentation of a material fact. Specifically, the respondent alleges that Léon Mugesera misrepresented a material fact when he answered “no” to question 27-F of his application for permanent residence. Paragraph 27(1)(*e*) of the Act reads as follows:

> **27.** (1) An immigration officer or a peace officer shall forward a written report to the

> Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who:
>
> …
>
> (*e*) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person,

The following is Question 27-F of the application for permanent residence:

> In periods of either peace or war, have you ever been involved in the commission of a war crime or crime against humanity, such as willful killing, torture, attacks upon, enslavement, starvation or other inhumane acts committed against civilians or prisoners of war, or deportation of civilians?

E. The respondent alleges that Ms. Gemma Uwamariya is also implicated by paragraph 27(1)(*e*) of the Act, since she too obtained landing in Canada through the negative reply she gave to question 27-F of the application for permanent residence.

[8] On July 11, 1996, after finding that the respondent's allegations against the applicants were justified, the Adjudicator Pierre Turmel ordered their deportation from Canada.

[9] The applicants filed an appeal from the Adjudicator's decision and on November 6, 1998, the Appeal Division dismissed their appeal. In a 125-page decision, the Appeal Division found that all of the respondent's allegations were justified. Accordingly, the Appeal Division dismissed the appeal and declared that the removal orders handed down by the Adjudicator were consistent with the Act.

[10] One of the panel members, Mr. Pierre Duquette, wrote the main reasons which were concurred in by the two other members of the panel, Mr. Yves Bourbonnais and Ms. Paule Champoux Ohrt. The latter two wrote concurring reasons, which they justify as follows at page 118 of the decision:

> We have had the opportunity to review our colleague's reasons for decision.
>
> Although we concur in most of his analysis and conclusions, we feel it is essential that a finding be made concerning the overall credibility of the two appellants (Léon Mugesera and his wife Gemma Uwamariya) and to clarify certain findings and state certain divergences in opinion.

[11] These two panel members also expressed their agreement with Mr. Duquette as to the allegations made by the respondent, other than the one pertaining to subparagraph 27(1)(*a.*1)(ii) of the Act. Concerning this allegation, Mr. Duquette concluded that Mr. Mugesera, by his speech of November 22, 1992, had incited the persons present during his speech to commit murder. Consequently, Mr. Duquette concluded that the Minister's incitement to murder allegation was justified. However, he was unable to reach a similar conclusion concerning the murder allegation since he

could not, on the basis of the evidence, link Mr. Mugesera's speech to any murder committed in Rwanda in the days, weeks and months following the speech.

[12] However, in the opinion of Mr. Bourbonnais and Ms. Champoux Ohrt, some murders committed in Rwanda resulted from the speech given by Léon Mugesera on November 22, 1992. At pages 123, 124 and 125, Mr. Bourbonnais and Ms. Champoux Ohrt explain their opinion, as follows:

> Section 12. Allegations (pages 102-117)
>
> We concur in our colleague's findings with respect to the allegations, except his conclusion based on s. 27(1)(*a*.1)(ii) of the *Immigration Act* to the effect that Mr. Mugesera incited others to commit murders and that one or more murders were committed as a result. Such an act constitutes offences under articles 91(4) and 311 of Book II of the Rwandan Penal Code, and would constitute offences under sections 22, 235 and 464(*a*) of the *Criminal Code*.
>
> Unlike our colleague, we conclude this first allegation is well founded because we find that the appellants have no credibility, that Mr. Mugesera was an Akazu and death squadron member and that he participated in massacres.
>
> Thus, unlike our colleague, who writes that
>
> > (t)here were killings following the speech, but we do not have any detailed evidence about them (the names of the victims and perpetrators, whether the perpetrators had attended the speech or whether it influenced them). Given the circumstances, it would have been very difficult to obtain such evidence. Thus, I am unable precisely to tie the speech to any particular murder,
>
> we conclude, applying the balance of probabilities rule, that murders were committed the day after the speech of November 22, 1992 and that some of the murders were directly tied to the speech.
>
> The evidence showed that more than two-thirds of the massacres of Tutsis in late 1992 and early 1993 occurred in the northwestern area of the country, within a 30-kn radius of President Habyarimana's parish. More specifically, the CIE report states
>
> > (translation) "On the day after (the speech), the surrounding communes of Giciye, Kayove, Kibilira and others once again ignited.
>
> and the report of the political-administrative commission to investigate the disturbances in the Gisenyi, Ruhengeri and Kibuye prefectures states:
>
> > (translation) The Tutsi massacre began in Giciye commune on the day after (the speech)
>
> and the Déclaration des ONG rwandaises et internationales notes that
>
> > (translation) "these deaths and displaced persons were the victims of acts inspired by tribalism, regionalism and inter-party rivalry, which were encouraged in statements by certain political leaders, including the speech delivered by Léon Mugesera in the Kabaya sub-prefecture on November 22, 1992 (…)"

> Contrary to our colleague's finding at page 107 of his reasons, we are of the opinion that murders were committed following the speech and that the murders were connected to it. In addition, we find he was an Akazu and death squad member and participated in massacres. These acts were also offences in Rwanda. Consequently, this allegation is well founded.

[13] It is not my intention to summarize the facts. These are amply summarized in the decisions of the Appeal Division and the Adjudicator. I will refer to these facts only in so far as I need to do so in order to dispose of the applicants' judicial review application.

[14] In the case at bar, the applicants appealed the Adjudicator's decision to the Appeal Division pursuant to subsection 70(1) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18; S.C. 1995, c. 15, s. 13] of the Act, which reads as follows:

> **70.** (1) Subject to subsections (4) and (5), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,
>
> (*a*) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (*b*) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

The Appeal Division stated, at page 7 of its decision, that since the hearing before it was *de novo*, the parties could file any new evidence considered necessary and relevant.

[15] A hearing before the Appeal Division is in fact a hearing *de novo*, which means that the Appeal Division may consider any new evidence that is filed and need not confine itself to the evidence filed with the Adjudicator. The Appeal Division may also make findings of fact that differ from those drawn by the Adjudicator. These principles were summarized as follows in *Virk v. Canada (Minister of Employment and Immigration)* (1986), 2 Imm. L.R. (2d) 127 (App. Bd.), at pages 134-135:

> The misinterpretation which seems to exist in the dissent in *Sangha*, *supra*, lies initially in the fact that the appellate functions of the [Immigration Appeal] board are erroneously compared to those of the regular appeal Courts in hearings of criminal and civil cases. These Courts hear arguments only on law and/or fact and they, unlike the board, do not hear evidence on the merits of the case. New evidence, created since the original criminal or civil trial or evidence not dealt with in the original trial, is generally not admissible in these Courts of Appeal. This is not the case with the board. Paragraph 65(2)(*c*) [now 69.4(3)(*c*)] of the *Immigration Act, 1976*, clearly indicates that the board "… may, during a hearing, receive such *additional* evidence as it may consider credible or trustworthy and necessary for dealing with the subject matter before it" (emphasis is mine). In other words, the board hears the case *de novo* and it does not merely exercise a review jurisdiction. The board considers that the word "additional" is purposely general, so as to include both "old" and "new" evidence, as long as such evidence is considered by the board to be credible or trustworthy.

> If Parliament had intended the Immigration Appeal Board to hear appeals only in the sense of "reviewing the record" of an administrative decision it would not have given it the powers of a Court of record along with the power of exercising an equitable jurisdiction. Indeed, this combination of powers that the board enjoys in a unique way, is further demonstrated in the actual wording and structure of the relevant appeal-granting sections of the *Immigration Act, 1976.*
>
> In paras. 72(1)(*a*) and (*b*) [now 70(1)(*a*) and (*b*)] and 79(2)(*a*) and (*b*) [now 77(3)(*a*) and (*b*)] an appeal exists on any ground that involves a question of law, facts or mixed law and fact *and* all the circumstances of the case or compassionate or humanitarian considerations, respectively ….

[16] I now turn to the applicable standard of review in a case like this. Any application for judicial review is subject to section 18.1 [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Court Act*, R.S.C., 1985, c. F-7, and more particularly subsection 18.1(4) of the *Federal Court Act*, which provides:

> **18.1** …
>
> (4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (*e*) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (*f*) acted in any other way that was contrary to law.

Subsection 18.1(4) of the *Federal Court Act* enumerates the grounds on which the Court may, *inter alia*, declare invalid, set aside or refer back any decision by a federal board, commission or other tribunal.[1] In the case at bar, paragraphs 18.1(4)(*c*) and (*d*) are the most relevant provisions, in that they allow the Court to set aside a decision rendered by a federal board, commission or other tribunal that erred in law or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material that was before it.

[17] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Supreme Court of Canada held that the standard applicable to questions of law was the standard of correctness. This means that any error of law committed by a federal board, commission or other tribunal is grounds for this Court to intervene.

[18] In regard to questions of fact, I agree with the remarks of my colleague Madam Justice Tremblay-Lamer in *Singh v. Canada (Minister of Citizenship and Immigration)* (1999), 173 F.T.R. 280 (F.C.T.D.), according to which the standard applicable to such questions is that of the patently unreasonable decision. Along the same lines, see the remarks of Lemieux and Heneghan JJ. in *Kabeya v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 106 (T.D.) (QL); *Gnanapragasam v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 786 (T.D.) (QL); and *Goodman v. Canada (Minister of Citizenship and Immigration)* (2000), 4 Imm. L.R. (3d) 104 (F.C.T.D.).

[19] Accordingly, any question of fact, including a question of credibility, is subject to the standard of the patently unreasonable decision. It is worth recalling what Décary J.A. of the Federal Court of Appeal said in *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315, where, at paragraph 4 of his reasons, he stated:

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

[20] I am now going to examine the applicants' submissions. First, the applicants submit that the Appeal Division erred in fact and in law in its analysis of the speech given by Mr. Mugesera.

[21] Second, the applicants submit that the Appeal Division erred in law in relation to the admissibility of certain evidence, such as the testimony of Ms. Allison Des Forges and of Mr. Éric Gillet both as experts and as material witnesses.

[22] Third, the applicants submit that panel members Bourbonnais and Champoux Ohrt erred in fact and in law in finding that Léon Mugesera was a close associate of President Habyarimana, that he was a member of Akazu and of death squads, that he had participated in massacres, and that murders had been committed following his speech.

[23] Fourth, the applicants submit that the Appeal Division erred in law in determining that Léon Mugesera, by his speech of November 22, 1992, had committed a crime against humanity.

[24] Finally, the applicants submit that the Appeal Division erred in fact and in law in determining that Léon Mugesera had misrepresented a material fact by answering no to question 27-F of his application for permanent residence.

[25] I am going to begin my analysis with the respondent's allegation concerning the negative reply to question 27-F, according to which Léon Mugesera misrepresented a material fact by answering no to question 27-F of his application for permanent residence.

[26] The Minister of Citizenship and Immigration alleges that the applicants are described in paragraph 27(1)(*f*) of the Act. According to the Minister, Léon Mugesera misrepresented a material fact when he filled out his application for permanent residence, following which he and his family obtained landing in Canada, by answering no to question 27-F of the application.

[27] The Appeal Division, at page 117 of its reasons, penned by Mr. Duquette, found that the Minister's allegation was justified for the following reasons:

> The words "such as" and "etc." in point 27-F are indications that the list is not closed. I have already said that inciting murder and genocide can be, and is in this case, a crime against humanity. I have also said that Mr. Mugesera was aware of this. He should therefore have answered "yes" to question 27-F. I am certain that if he had, neither he nor his family would have been granted landing.
>
> Mr. Mugesera knew very well why he left Rwanda and why he was wanted. He should therefore have known that he was providing false information in respect of a material fact.
>
> As for the speech, counsel for the appellants submitted that Mr. Mugesera reasonably believed he was not concealing any material facts because the speech did not constitute a crime against humanity: since he believed he was innocent, he was justified in answering no. I cannot accept that submission.
>
> In any event, s. 27(1)(*e*) merely requires a false statement; there need not have been any intention to mislead. The details are to be found in *Mohamed* [*sic*] *v. Canada* … . [Note omitted.]

[28] The Appeal Division cites *Mohammed v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 299 (T.D.) in support of the statement that paragraph 27(1)(*e*) of the Act merely requires a false statement and that the intention to mislead is not necessary. In *Mohammed*, *supra*, the applicant had married after completing his application for permanent residence and receiving his visa, but before entering Canada. Upon his entry, he failed to inform the immigration officials of the fact that he had married. MacKay J. held that despite the fact that the failure to inform the immigration officers of his new marital status was not intentional, it was nevertheless a misrepresentation, and the applicant was therefore a person described in paragraph 27(1)(*e*) of the Act.

[29] The applicants argued in this Court that although the intention to mislead is not an essential ingredient of the offence set out in paragraph 27(1)(*e*) of the Act, the information that the declarant is accused of concealing must have been subjectively known to him. In support, the applicants cite *Medel v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345 (C.A.). In that case, the applicant's husband had withdrawn his sponsorship of her without her knowledge. Prior to her departure for Canada, the applicant was informed by the Canadian embassy in Guatemala that her visa contained a mistake that would have to be corrected before she could enter Canada. The applicant examined her visa and, finding no error, kept it and entered Canada. The Federal Court of Appeal held that since she was subjectively unaware that

she was hiding something, she was not a person described in paragraph 27(1)(*e*) of the Act.

[30] Relying therefore on the *Medel* case, *supra*, the applicants submit that in replying in the negative to question 27-F of the application for permanent residence, Mr. Mugesera was subjectively unaware he was hiding anything, since for him the speech he had delivered did not constitute a crime against humanity. Furthermore, at the time he filled out his application for permanent residence, Mr Mugesera had no knowledge of the events in Rwanda or of the report of the International Commission of Inquiry, and he had not been charged with or convicted of a war crime or a crime against humanity by any judicial body. The applicants submit as well that question 27-F of the application for permanent residence refers to a legal concept, the interpretation of what constitutes a war crime or a crime against humanity.

[31] In my opinion, from the cases referred to above, a person must, in order to fall within the ambit of paragraph 27(1)(*e*) of the Act, have a subjective knowledge of the facts he is concealing. Once that knowledge exists, it is irrelevant whether the declarant had the intention to make a misrepresentation.

[32] In the case at bar, it is not necessary in my opinion to consider the questions of intention and subjective knowledge. Paragraph 27(1)(*e*) of the Act provides that the misrepresentation must pertain to a material fact. It is essential, therefore, that the misrepresentation be made in relation to a fact and not in relation to a conclusion of law or judicial determination. If it is not a fact but rather a conclusion of law, the declarant cannot fall within the ambit of paragraph 27(1)(*e*) of the Act, since he or she cannot be aware of this conclusion before it has been drawn by a juridical entity.

[33] If the 27-F answer in the application for permanent residence form consists of a fact, in my opinion the truthfulness of that answer should be completely independent of any other determination of law made in the course of the assessment and the legal determination of the evidence. More particularly, in this case the truthfulness of the reply to question 27-F of the application for permanent residence form, if that reply consists of a fact, should not be directly proportional to the conclusion drawn by the Appeal Division in relation to the allegation based on paragraph 27(1)(*g*) of the Act. The purpose of the proceedings before the Adjudicator and before the Appeal Division was, *inter alia*, to determine whether Léon Mugesera was, under paragraph 27(1)(*g*) of the Act, a person implicated by paragraph 19(1)(*j*) of the Act.

[34] This latter provision largely replicates the words in question 27-F of the permanent residence application. For example, it stipulates that the person has committed “an act or omission … that <u>constituted</u> a war crime or a crime against humanity” (emphasis added). This means, in my opinion, that it is necessary to arrive at a conclusion of law following the commission of this act or omission in order to characterize it as a war crime or a crime against humanity.

[35] To respond to the allegation under paragraph 27(1)(*g*) of the Act in the case at bar, a lot of evidence was examined by the Adjudicator and the Appeal Division over a

considerable number of hearing days before a conclusion could be drawn as to whether the acts or omissions of Mr. Mugesera constituted a war crime or a crime against humanity. In my opinion, this confirms that the question of whether Mr. Mugesera committed or participated in the commission of war crimes or crimes against humanity is a determination of law and not a fact, since the purpose of the proceedings in this case was precisely to arrive at such a determination.

[36] Furthermore, as I stated earlier, it is my opinion that the reply to the question, that is, whether Mr. Mugesera misrepresented a material fact, should remain unchanged irrespective of the conclusions of the Appeal Division on the other allegations. In this case the Appeal Division found, before coming to paragraph 27(1)(*e*) of the Act, that Mr. Mugesera was implicated by paragraph 27(1)(*g*) of the Act, i.e. that he was described in paragraph 19(1)(*j*) of the Act since he had committed an act or omission constituting a war crime or a crime against humanity. It was therefore easy for the Appeal Division to state, because of its conclusion in relation to paragraph 27(1)(*g*) of the Act, that Mr. Mugesera was wrong to answer no to question 27-F of the permanent residence application. However, if the Appeal Division had concluded that the evidence clearly showed that Mr. Mugesera had not participated in the commission of war crimes or crimes against humanity, or that the evidence was insufficient to allow a statement that Mr. Mugesera had participated in the commission of war crimes or crimes against humanity, it would have been clearly contradictory for the Appeal Division to find that Mr. Mugesera was a person contemplated in paragraph 27(1)(*e*) of the Act. The Appeal Division would then have had to conclude that the allegation under paragraph 27(1)(*e*) of the Act was not justified and that Mr. Mugesera had not made a misrepresentation.

[37] It seems to me, therefore, that the answer to the question raised by the allegation concerning paragraph 27(1)(*e*) of the Act directly depends on the reply given by the Appeal Division to the allegation under paragraph 27(1)(*g*) of the Act, determined previously. If the Appeal Division had had to deal with the allegation affecting paragraph 27(1)(*e*) of the Act in the first place, it would not have been able, in light of the evidence on the record and without evaluating the evidence or making any determination of law, to reach the conclusion that Mr. Mugesera had misrepresented the fact that he had participated in the commission of war crimes or crimes against humanity, since that determination had not yet been made. In support of this statement, it is appropriate to read the passage found at page 102 of Mr. Duquette's reasons, where he states:

> On the basis of my findings up until this point, I must determine whether the appellants are implicated by the allegations made against them in the investigation. As I mentioned at the beginning, four allegations are applicable to Mr. Mugesera and, by the effect of the Act, to his children. The fourth is also applicable to Mrs. Uwamaryia.
>
> The procedure for the first two allegations is identical and I will deal with them together. The third relates to crimes against humanity. The fourth, the allegations of misrepresentation of a material fact in order to obtain landed immigrant status, relates to crimes against humanity and is accordingly dependent on my finding with respect to the third allegation.

[38] In my opinion, it is absurd to say, retro-pectively, that Mr. Mugesera knew he had participated in the commission of war crimes or crimes against humanity at the time of his entry to Canada, since the Adjudicator and the Appeal Division needed several years in which to reach such a conclusion, by assessing, characterizing and interpreting the evidence and the events that had occurred in Rwanda, including some after Mr. Mugesera's departure. Mr. Mugesera could not be required, when filling out a form, to be able to analyze the legal aspects of the question, including the definition of war crime or crimes against humanity, and to make a determination of law as to the interpretation of the actions he took.

[39] I agree therefore with the submissions of the applicants that question 27-F of the application for permanent residence form invokes a legal concept that necessitates a determination or conclusion of law as to what constitutes a war crime or a crime against humanity pursuant to a characterization and interpretation of one or more acts or omissions.

[40] In my opinion, consequently, the Appeal Division erred in law in finding that Léon Mugesera had misrepresented a material fact. Question 27-F of the application for permanent residence necessitates a legal interpretation and not only a statement of fact. Thus the Appeal Division was not entitled to find that Mr. Mugesera, his wife and his children were persons described in paragraph 27(1)(*e*) of the Act, since Mr. Mugesera did not misrepresent a material fact when he completed his declaration.

[41] The applicants' second submission is that panel members Yves Bourbonnais and Paule Champoux Ohrt erred in fact and in law in finding that Léon Mugesera was a close associate of President Habyarimana, that he was a member of Akazu and of death squads, that he had participated in massacres, and that murders had been committed following his speech.

[42] The conclusions reached by panel members Bourbonnais and Champoux Ohrt on this point are, in my opinion, patently unreasonable. I adopt the reasons of the panel chairperson, Mr. Duquette, who concluded that he was unable, from the evidence on the record, to find that Léon Mugesera was a close associate of President Habyarimana, that he was a member of Akazu and of death squads, that he had participated in massacres, and that murders had been committed following his speech of November 22, 1992. See, in support of this statement, Mr. Duquette's remarks at pages 38, 99, 100, 101 and 107 of his reasons.

[43] In my opinion, there is no evidence to justify the conclusions of Mr. Bourbonnais and Ms. Champoux Ohrt on this point. It suffices, in my opinion, to read closely the evidence as a whole and more particularly the testimony of Ms. Des Forges, Mr. Reyntjens and Mr. Gillet, in order to realize that the conclusions of Mr. Bourbonnais and Ms. Champoux Ohrt are unreasonable. In my opinion, there is no evidence to support their conclusions.

[44] These errors of Mr. Bourbonnais and Ms. Champoux Ohrt are relevant to the respondent's allegation in regard to paragraphs 27(1)(*g*) and 19(1)(*j*) of the Act, namely,

that Léon Mugesera committed a crime against humanity. These errors are relevant, in my opinion, given Mr. Duquette's conclusion that Léon Mugesera did not participate in murders or massacres and that no murder can be linked to his speech. I will therefore analyze the Minister's allegation concerning the commission of a crime against humanity by Mr. Mugesera on the basis of the evidence as found by Mr. Duquette.

[45] The next criticism of the Appeal Division made by the applicants is that it erred in law as to the admissibility of certain evidence, in particular the evidence of Ms. Des Forges and Mr. Gillet. Subsection 69.4(3) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 18] of the Act is relevant to the admissibility of the evidence before the Appeal Division. It provides:

> **69.4** …
>
> (3) The Appeal Division has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may
>
> (*a*) issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to a subject-matter before the Division and to bring and produce any document, book or paper that the person has or controls relative to that subject-matter;
>
> (*b*) administer oaths and examine any person or oath: and
>
> (*c*) during a hearing, receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it.

[46] A similar provision pertaining to the Adjudication Division is found in subsection 80.1(5) [as enacted by S.C. 1992, c. 49, s. 70] of the Act:

> **80.1** …
>
> (5) An Adjudicator is not bound by any legal or technical rules of evidence and, in any proceedings, may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

[47] The relevant case law is unequivocal. In *Siad v. Canada (Secretary of State)*,[2] the Federal Court of Appeal, after quoting subsection 68(3) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18] of the Act, which is identical to subsection 69.4(3), adopted the remarks [at paragraph 23] of Mr. Justice Mahoney in *Fajardo v. Canada (Minister of Citizenship and Immigration)* (1993), 21 Imm. L.R. (2d) 113 (F.C.A.), at page 115:

> By s. 68(3) of the *Immigration Act*, the Refugee Division is not bound by legal or technical rules of evidence and it may base a decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances. If the tribunal here is suggesting that the affidavit evidence of patently respectable deponents as to facts within their knowledge may be discounted because, in the very nature of the process, the

> deponents are not available to be cross-examined, the tribunal is wrong. It is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them.

[48] Following this quotation, the Court of Appeal, discussing the admissibility of an expert's affidavit presented by the Secretary of State, says at page 12:

> Despite the hearsay frailties of Professor Samatar's evidence highlighted in the reasons of the presiding Judge, the Tribunal was entitled to find this evidence credible and trustworthy, and to base its decision upon on it. The Tribunal is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence. In this case, the credibility determination was made with regard to the evidence, and the Tribunal gave reasons to prefer Professor Samatar's evidence to that of the respondent, as it is required to do. The Tribunal was entitled to admit this evidence and to give it the weight that it did.

[49] In my opinion, the applicants' arguments on the question of admissibility must be rejected. The Court of Appeal's decision in *Siad*, *supra*, is clear. The Appeal Division, under subsection 69.4(3) of the Act, is in no way bound by the rules of evidence applicable to the courts. In *Huang v. Canada (Minister of Employment and Immigration)* (1992), 166 N.R. 308, Mr. Justice Hugessen of the Federal Court of Appeal made the following remarks, at page 309:

> Counsel has not persuaded us that the Appeal Division of the Immigration and Refugee Board committed any reviewable error of law or jurisdiction in receiving and relying on the evidence of Corporal Ditchfield. Even if parts of that evidence were, as described by counsel, "double hearsay", the Board was entitled to hear and act on it if it found it [to] be relevant, credible and trustworthy.

Consequently, the Appeal Division could in this case admit and consider the evidence impugned by the applicants.

[50] I now turn to the applicants' submission that the Appeal Division erred in fact and in law in its analysis of the speech delivered by Léon Mugesera on November 22, 1992. In his reasons, panel member Duquette, at pages 51 to 87, analyzes the speech in question and concludes his analysis as follows, at pages 86 and 87:

> This speech was made in wartime (although a cease-fire was in effect) when a multi-party system was emerging. In this context, we may therefore expect strong language to be used. But the speech related to another context that must have been understood by both speaker and audience: the ethnic massacres. In mid-October 1990, a short time after the outbreak of the war, 348 Tutsi were killed within 48 hours in Kibilira and 18 in Satinsyi, two communes close to Kabaya where the speech was made. In March 1992, 5 Tutsi were killed in Kibilira. Also in March of that year, again in Gisenyi prefecture and in neighbouring Ruhengeri prefecture, 300 Bagogwe (a Tutsi subgroup) were assassinated, according to official statistics. From October 1990 to February 1993, a total of 2,000 persons, mostly Tutsi, lost their lives in similar massacres in Rwanda. They were killed because they were considered accomplices of the "Inyenzi". They were not soldiers or combatants, but civilians who were identified with the enemy because they belonged to a particular ethnic group.

> Under such circumstances, the speech cannot be considered innocuous.
>
> Mr. Mugesera urged the crowd not to leave themselves open to invasion, first by the FRP and second by those identified with them, members of the opposition parties and the Tutsi within the country.
>
> The heads of the opposition parties, Twagiramungu, Nsengiyaremye, and Ndasingwa (Lando), are traitors to the country. These parties must leave the region. The language used is extremely violent and is an incitement to murder. He recommends that the public take the law into their own hands by exterminating or being exterminated, using a language to provoke panic. He also uses the argument of party authority: "[. .] do not say that we, the party representatives, did not warn you!".
>
> As for the Tutsi, it is already clear in paragraph 6 that the Hutu must defend themselves against them. I have concluded that the Tutsi were recruiting young people. Finally, the gist of paragraph 25 is clear: do not make the same mistake that you made in 1959 by letting the Tutsi leave; you must throw them into the river. All of this is an incitement to genocide.

[51] Just from reading Mr. Duquette's reasons, it cannot be denied that he made a painstaking and careful analysis of the speech delivered by Mr. Mugesera, one based on the evidence, including the testimony of Mr. Kamenze and Mr. Overdulve. I have considered at length all of the arguments advanced by the applicants in support of their submissions. Unfortunately for them, they have failed to convince me that the Appeal Division erred when it concluded that certain parts of the speech of November 22, 1992 constituted an incitement to murder and genocide. In other words, it is impossible for me to conclude that the interpretation of the speech and the resulting conclusion are unreasonable.

[52] Frankly, what the applicants are submitting is that an interpretation other than that of Mr. Duquette was possible and should have been accepted. I will agree that other panel members could have reached a different finding as to the meaning of Mr. Mugesera's speech. Furthermore, I am far from certain that I would have found the same meaning as Mr. Duquette. Notwithstanding, the applicable principles are clear: the impugned conclusion must be unreasonable. Unfortunately for the applicants, I am unable to reach such a conclusion.

[53] The fact that Mr. Duquette could not agree with Mr. Angenot's testimony does not make his conclusion unreasonable. Mr. Duquette could, in the exercise of his authority, accept Mr. Angenot's testimony if he found it credible and trustworthy. Such was not the case. In my opinion, the Appeal Division did not err in law or in fact in relation to the interpretation of the speech.

[54] The next criticism of the Appeal Division by the applicants is that it erred in law in finding that Léon Mugesera, through his speech of November 22, 1992, committed a crime against humanity. At pages 111 to 115 of his reasons, Mr. Duquette conducts a full analysis of the evidence in support of this allegation by the respondent and of the relevant legislation and case law, particularly subsections 7(3.76) [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 1] and 7(3.77) [as am. *idem*] of the Canadian *Criminal Code*.

At the end of his analysis, he concludes that Mr. Mugesera's speech constitutes a crime against humanity although, in this case, he is unable to link any murders or massacres to this speech. At page 115 of his reasons, Mr. Duquette writes:

> In Mr. Mugesera's case, we have no evidence of participation in specific murders, but in my estimation, advocating murders, during a period when they were being committed in a systematic and widespread manner, is what is meant by the concept of crimes against humanity.

[55] In my opinion, Mr. Duquette erred. Subsections 7(3.76) and 7(3.77) of the *Criminal Code*, which read as follows,

> **7.** …
>
> (3.76) For the purposes of this section,
>
> …
>
> "crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;
>
> …
>
> (3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.

require that the fact, i.e. an act or omission, including the counselling or abetting, constitute a "cruel and terrible" act,[3] if not an inhuman act committed against a civilian population or an identifiable group of individuals.

[56] It is my opinion that the speech of November 22, 1992, which Mr. Duquette found he could not link to murders or massacres, cannot in these circumstances constitute a crime against humanity. I agree with Mr. Bertrand's remarks in his written argument, at page 25, where he states at paragraph 157:

> [TRANSLATION] Absent proof of a direct or indirect link between the speech and some murders committed in a systematic and widespread manner, this speech is not by itself cloaked in the requisite inhumaneness for it to constitute a crime against humanity.

[57] Accordingly, I conclude that the Appeal Division erred in law in finding that the speech of November 22, 1992 constituted a crime against humanity.

[58] Accordingly, the application for judicial review will be allowed in part. The matter, in so far as the Minister's allegations in relation to paragraphs 27(1)(*e*) and 27(1)(*g*) of

the Act are concerned, will be sent back to the Appeal Division for reconsideration in light of my reasons. In regard to the other two allegations of the Minister against Léon Mugesera, which pertain to subparagraphs 27(1)(*a*.1)(ii) and 27(1)(*a*.3)(ii) of the Act, the application for judicial review will be dismissed.

[59] The applicants submit that the following questions, pursuant to subsection 83(1) [as am. by S.C. 1992, c. 49, s. 73] of the Act, raise serious questions of general importance:

1. Is the characterization of an act or omission as constituting an offence described in paragraphs 27(1)(*a*.1) and 27(1)(*a*.3) of the *Immigration Act* a question of fact or a question of law and, accordingly, what is the standard of judicial review applicable to this question?

2. Is an expert witness entitled to give his opinion on the liability or involvement of a permanent resident in the commission of an act or omission pursuant to paragraphs 27(1)(*a*.1), 27(1)(*a*.3) and 27(1)(*g*) of the *Immigration Act*?

3. Does the admissibility in evidence, under sections 68(3) and 80.1(5) of the *Immigration Act*, of testimony pertaining to oral out-of-court statements made by a witness who refuses to disclose the identity of those making these statements and the notes pertaining thereto breach the principles of fundamental justice, and, more particularly, the right to a full answer and defence?

[60] The respondent, for his part, proposes that the following questions be certified:

1. 27(1)(*a*) Allegation: Does the following question, which appears in clause 27(F) of the application for permanent residence, require that the interested party provide the immigration officer with the necessary objective and relevant information for the officer to rule on its admissibility, or does it necessitate a determination of law?

   In periods of either peace or war, have you ever been involved in the commission of a war crime or crime against humanity, such as willful killing, torture, attacks upon, enslavement, starvation or other inhumane acts committed against civilians or prisoners of war, or deportation of civilians?

2. 19(1)(*j*) Allegation: Does incitement to murder, violence and genocide, in a context in which massacres are committed in a widespread or systematic way, constitute in itself a crime against humanity?

[61] In my opinion, three questions meet the test for certification laid down by the Federal Court of Appeal in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4. These are, first, the initial question suggested by the applicants, which will be certified as proposed. Secondly, the third question proposed by the applicants will be certified, but with the following amendment:

> [TRANSLATION] Does the admission in evidence, and its consideration as credible and trustworthy, pursuant to sections 68(3) and 80.1(5) of the *Immigration Act*, of testimony pertaining to oral out-of-court statements made by a witness who refuses to disclose the identity of those making these statements and the notes pertaining thereto breach the principles of fundamental justice, and, more particularly, the right to a full answer and

defence?

Finally, the second question proposed by the respondent will be certified, but with the following addition proposed by the applicants:

> [TRANSLATION] 19(1)(*j*) Allegation: Does incitement to murder, violence and genocide, in a context in which massacres are committed in a widespread or systematic way, but absent any evidence of a direct or indirect link between the incitement and the murders committed in a widespread or systematic way, constitute in itself a crime against humanity?

[62] In so far as the other two questions are concerned, it is my opinion that they do not meet the test set down in *Liyanagamage*, *supra*. Having said that, these questions may nevertheless be considered by the Federal Court of Appeal since, as the Supreme Court of Canada held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, when a question is certified the Court of Appeal need not confine itself to the question as stated or the points directly pertaining to it, but it may consider all points raised by the appeal.

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[1] S. 2(1) [as am. by S.C. 1990, c. 8, s. 1] of the *Federal Court Act* defines "federal board, commission or other tribunal" as:

> **2.** (1) …
>
> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

[2] [1997] 1 F.C. 608 (C.A.).

[3] In *R. v. Finta*, [1994] 1 S.C.R. 701, Cory J., at p. 814, described the concept of a crime against humanity as follows:

> What distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.