Federal Court  Cour fédérale

Date: 20100218

Docket: IMM-3367-09

Citation: 2010 FC 173

Ottawa, Ontario, February 18, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MAXIMIN SEGASAYO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Segasayo was Rwanda's Ambassador to Canada from 1991 to 1995. After the new government in Rwanda recalled him, he and his family applied for and were given refugee status by the Immigration and Refugee Board (IRB) in 1996. He submitted that as a member of the Hutu Intelligentsia and as Ambassador to Canada appointed by the former government he feared persecution and reprisal by the new Tutsi government. He is now subject to a deportation order

because he has been found inadmissible to Canada for violating human or international rights. This is a judicial review of that decision.

[2] In 1998, the Minister of Citizenship and Immigration designated the two Rwandan governments in power from October 1990 to April 1994 and from April 1994 to July 1994 as regimes which engaged in crimes against humanity and genocide.

[3] That designation was made when the *Immigration Act*, R.S.C. 1985, c. I-2, was in force. However there is no material difference between the law then and the law as set out now in section 35(1)(*b*) and section 35(2) of the *Immigration and Refugee Protection Act* (IRPA) and section 16 of the *Immigration and Refugee Protection Regulations* (*Regulations*).

[4] The relevant provisions of section 35 of IRPA read:

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

	l'humanité et les crimes de guerre;
[…]	[…]
(2) Paragraphs (1)(*b*) and (*c*) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Les faits visés aux alinéas (1)*b*) et *c*) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[5] Section 16 of the *Regulations*, which mirrors section 19(1.1)(b) of the former *Immigration Act*, reads:

16. For the purposes of paragraph 35(1)(*b*) of the Act, a prescribed senior official in the service of a government is a person who, by virtue of the position they hold or held, is or was able to exert significant influence on the exercise of government power or is or was able to benefit from their position, and includes	16. Pour l'application de l'alinéa 35(1)*b*) de la Loi, occupent un poste de rang supérieur au sein d'une administration les personnes qui, du fait de leurs actuelles ou anciennes fonctions, sont ou étaient en mesure d'influencer sensiblement l'exercice du pouvoir par leur gouvernement ou en tirent ou auraient pu en tirer certains avantages, notamment :
(*a*) heads of state or government;	*a*) le chef d'État ou le chef du gouvernement;
(*b*) members of the cabinet or governing council;	*b*) les membres du cabinet ou du conseil exécutif;
(*c*) senior advisors to persons described in paragraph (*a*) or (*b*);	*c*) les principaux conseillers des personnes visées aux alinéas *a*) et *b*);
(*d*) senior members of the public service;	*d*) les hauts fonctionnaires;
(*e*) senior members of the military and of the intelligence	*e*) les responsables des forces armées et des services de

and internal security services;	renseignement ou de sécurité intérieure;
(*f*) ambassadors and senior diplomatic officials; and	*f*) les ambassadeurs et les membres du service diplomatique de haut rang;
(*g*) members of the judiciary.	*g*) les juges.
[Emphasis added.]	[Je souligne.]

[6] Mr. Segasayo sought a Ministerial Exemption under what is now section 35(2) of IRPA on the basis that he was not complicit in the crimes committed during the Rwandan genocide and that his permanent residence in Canada would not be detrimental to the national interest. The Minister refused to grant that exemption. The judicial review thereof was dismissed by Mr. Justice Blais, as he then was, in *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 585, 66 Imm. L.R. (3d) 111. Currently before the Court is a review of his deportation order, as the Immigration Division of the IRB determined that Mr. Segasayo was a person described in section 35(1)(a) of IRPA.

[7] The Member was of the view that the deeming provision in section 16 of the *Regulations* created an irrebutable presumption that an ambassador in the service of a government on the Minister's list was inadmissible on the grounds of violating human or international rights. In other words, once it is shown that Mr. Segasayo was the ambassador of a government designated by the Minister (facts that Mr. Segasayo has never disputed), then he is inadmissible and has no defence based on lack of complicity in crimes against humanity or human rights violations.

[8] The member also dismissed the argument that the provisions in question were unconstitutional as violating section 7 of the *Canadian Charter of Rights and Freedoms*. He was of the view that the issue before him was whether or not Mr. Segasayo was inadmissible to Canada. His right to life, liberty and security of his person were not in issue because there remained other avenues open to him to avoid a return to Rwanda. Consequently, a *Charter* argument was premature.

ISSUES

[9] In this judicial review Mr. Segasayo maintains that the leading case on what is now section 35 of IRPA, *Canada (Minister of Citizenship and Immigration) v. Adam*, [2001] 2 F.C. 337, 196 D.L.R (4th) 497, 11 Imm. L.R. (3d) 296 (C.A.), was wrongly decided. The correct interpretation of the law is to be found in the dissenting reasons of Mr. Justice Isaac.

[10] Once that premise is established, the rules of natural justice were violated because he had no opportunity to present his case that, despite occupying the position of ambassador, he was not in any way complicit in crimes against humanity.

[11] In the alternative, if the courts have, to date, correctly interpreted section 35 of IRPA, as well as section 16 of the *Regulations*, then those provisions are unconstitutional as they violate section 7 of the *Charter*. It is illusory to suggest that it is premature to raise the *Charter* argument at this stage, before other avenues open to him in an effort to remain to Canada are exhausted.

ANALYSIS

[12] As the issues raised are questions of law and of natural justice, I owe no deference to the decision maker below: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539.

[13] The *Adam* case, above, is somewhat peculiar. Ms. Adam attempted to sponsor her husband who had been a cabinet minister in the Somalian Government of Siad Barre. As such, he fell within section 19(1.1)(b) of the former *Act* which is now found in section 16 of the *Regulations*.

[14] In speaking for the majority, Mr. Justice Stone, with whom Mr. Justice Evans concurred, held that the presumption in the Act was not rebuttable. In strong dissenting reasons, Mr. Justice Isaac held that that interpretation was inconsistent with the fairness provisions of the *Charter* and contrary to the stated purpose and objectives of the *Immigration Act*. He was of the view, and he took as an instance the specific case of an ambassador, that a person should have the opportunity to show that he or she did not exert significant influence on the exercise of government power. It was wrong to automatically bar such persons simply because their occupation was listed.

[15] It should also be noted that the unconstitutionality of that section of the *Immigration Act* had not been squarely put in issue, and that the appellant was the Minister. No one appeared for the Adams.

[16] During argument, I inquired how the Member below and I could choose to follow the opinion of Mr. Justice Isaac rather than that of the majority of the Federal Court of Appeal. The

principle of *stare decisis* applies. Me Beauchemin, on behalf of Mr. Segasayo, was somewhat muted as perhaps he is saving that point for the Court of Appeal. He submitted that in any event *Adam* was distinguishable as in that case, and in all the others cited by the Minister, the individuals in question had not been granted refugee status. This distinction cannot be supported. Section 44 and following of IRPA mean that a successful refugee claimant, like any other foreign national or permanent resident, may be declared inadmissible at any time, even if not inadmissible when refugee status was first acquired.

[17] Mr. Segasayo's complaint is that he has not had an opportunity to make his case that he was in no way complicit in the atrocities of the Rwandan governments, and had no influence over them. Even criminals such as Mr. Chiarelli had an opportunity before a court of competent jurisdiction to defend themselves before being deported (*Canada (M.E.I.) v. Chiarelli*, [1992] 1 S.C.R. 711).

[18] However, I cannot see the merit of this argument which goes to the heart of procedural fairness. Under section 103(1)(a) of IRPA, proceedings before the Refugee Protection Division are suspended when an officer enforcing s. 44(1) of IRPA decides to refer a claimant's case to the Immigration Division to determine whether a claimant is inadmissible. It follows that had ambassadors of the designated Rwandan governments become inadmissible before Mr. Segasayo's refugee claim was decided, processing of his refugee claim would have been suspended while he underwent the same type of inadmissibility hearing as the one at issue here. If *Adam*, above, was followed, that inadmissibility hearing would inevitably come to the conclusion that Mr. Segasayo was inadmissible. His refugee claim would then be terminated pursuant to section 104(2)(a) of IRPA. He would never have had a chance to plead his case to the RPD.

[19] *Adam,* above, is binding on this Court and has been followed in cases such as *Hussein c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2009 CF 759, and *Lutfi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1391, 52 Imm. L.R. (3d) 99.

[20] Whether another panel of the Federal Court of Appeal might have or could come to a different conclusion is not for me to say. In *Kremikovtzi Trade v. Phoenix Bulk Carriers Ltd.*, 2006 FCA 1, [2006] 3 F.C.R. 475, the Court of Appeal was called upon to interpret a provision of section 43 of the *Federal Courts Act*. The Panel was of the view that if the matter had not already been decided it would have come to a conclusion different from a previous panel's decision in *Paramount Enterprises International Inc. v. An Xin Jiang (The)*, [2001] 2 F.C. 551 (C.A.). The Court stated it would not overrule one of its prior decisions unless it was manifestly wrong. Reliance was placed on *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. However the matter went to the Supreme Court of Canada as *Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade*, 2007 SCC 13, [2007] 1 S.C.R. 588. The Supreme Court agreed with the legal analysis in *Phoenix Bulk Carriers* and refused to follow *Paramount Enterprises*: "whatever the merits of the practice" of the Federal Court of Appeal not to reverse itself, the *Phoenix Bulk Carriers Ltd.* Panel's interpretation of the law was correct.

IS SECTION 7 OF THE CHARTER ENGAGED?

[21] Section 7 reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Having reached this stage in the analysis, the constitutionality of section 35(1)(b) must be considered. Mr. Segasayo relies strongly on the decisions of the Supreme Court in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 and *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

[22] Section 57 of the *Federal Courts Act* provides that:

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	**57.** (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).
(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.	(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.
(3) The Attorney General of Canada and the attorney general of each province are entitled to	(3) Les avis d'appel et de demande de contrôle judiciaire portant sur une question

notice of any appeal or application for judicial review made in respect of the constitutional question.	constitutionnelle sont à signifier au procureur général du Canada et à ceux des provinces.
(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, in respect of the constitutional question.	(4) Le procureur général à qui un avis visé aux paragraphes (1) ou (3) est signifié peut présenter une preuve et des observations à la Cour d'appel fédérale ou à la Cour fédérale et à l'office fédéral en cause, à l'égard de la question constitutionnelle en litige.
(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.	(5) Le procureur général qui présente des observations est réputé partie à l'instance aux fins d'un appel portant sur la question constitutionnelle.

[23] Such a notice was given prior to the hearing at the Immigration and Refugee Board. Four provinces or territories responded. All four said they would not participate. However the Attorneys General of Ontario and of Newfoundland and Labrador reserved the right to receive further notices if the matter went to appeal or judicial review.

[24] The Member decided that the constitutionality argument was premature, as what was in issue was not section 7 of the Charter, but rather whether Mr. Segasayo was inadmissible. He would have an opportunity to make his constitutional case in later proceedings.

[25] In this judicial review of that decision, the Attorneys General were entitled to notice in accordance with section 57(3) of the *Federal Courts Act*. No such notice was given.

[26] This defect could possibly have been cured by adjourning the hearing so as to give Mr. Segasayo the opportunity to serve a notice of constitutional question, and to give the Attorneys General a chance to participate if they so wished. However, like the Member, I am of the view that the constitutional question need not be answered as it is premature. Mr. Segasayo is not in detention and has other avenues open to him before he would be removed. At those times he would have his opportunity to make his *Charter* case.

[27] This reasoning follows that of the Federal Court of Appeal in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 on a certified question with respect to non-admissibility of a person who was considered a member of a terrorist organization in accordance with section 34(1)(f) of IRPA. In speaking for the Court of Appeal, Mr. Justice Rothstein, as he then was, held that section 7 of the *Charter* was not in issue. He stated at paragraph 63:

> Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, *Barrera v. Canada (MCI)* (1992), 99 D.L.R. (4th) 264 (F.C.A.).) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(*f*) of the Act.

See also *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392 (F.C.A.).

[28] Mr. Segasayo's position, however, is that the applicability of the Charter is engaged now. He submits that the two prime avenues open for him to remain in Canada, an application for permanent residence from within the country on humanitarian and compassionate grounds (H&C) pursuant to section 25 of IRPA, and a pre-removal risk assessment (PRRA) pursuant to section 112 and following thereof are illusory.

[29] With respect to the H&C application, Mr. Segasayo suggests the result is a foregone conclusion since the Minister has already taken the position that it is not in Canada's national interest that he remain here. However the considerations which come into issue in section 25 of IRPA are very broad. His wife and children have been granted permanent resident status, and the Minister may waive any requirement of the Act, including one supported by a previous decision taken under section 35(2).

[30] Turning to the PRRA, Mr. Segasayo's rights are admittedly restricted pursuant to section 112(3)(a) of IRPA as he has been determined to be inadmissible on the grounds of violating human or international rights. As such, by virtue of section 114(2), if the Minister forms the opinion that the circumstances surrounding a stay of a removal order have changed, he may re-examine the case and cancel the stay. Furthermore, the principle of "non-refoulement" referred to in section 115, i.e., that Canada will not remove a person to a country where he would be at risk of persecution or at risk of torture or cruel and unusual treatment or punishment does not apply to a person who is inadmissible on the grounds of violating human or international rights if the Minister is of the view the person should not be allowed to remain here "on the basis of the nature and severity of the acts committed or of danger to the security of Canada."

[31] It seems to me that if the matter gets to that stage, and if Mr. Segasayo would still be at risk of persecution in Rwanda, he would then have the opportunity of making his case as to the nature and severity of the acts, if any, he committed or as to the danger he poses to the security of Canada.

[32] For these reasons the application for judicial review shall be dismissed.

CERTIFIED QUESTION

[33] My decision cannot be appealed to the Court of Appeal unless, in accordance with section 74(d) of IRPA, I certify and state a serious question of general importance.

[34] The issues raised are important, and it cannot be said with certainty that my own point of view is correct. I am also mindful that *Adam* was argued in the Federal Court of Appeal on an *ex parte* basis.

[35] I shall certify the following question based on the one suggested by Mr. Segasayo:

> [TRANSLATION]
>
> Are s. 35(1) of the *Immigration and Refugee Protection Act* and s. 16 of the *Immigration and Refugee Protection Regulations* in accordance with the principles stated by the Supreme Court in the *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 and *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, decisions and with s. 7 of the *Canadian Charter of Rights and Freedoms* when a person targeted by those provisions had already obtained refugee or protected person status and does not have the right to defend him/herself against the allegations made against him/her under those provisions?

[36] As I am of the view my accompanying order determines a question of law of general public interest or importance, these reasons are issued simultaneously in both official languages as provided in s. 20 of the *Official Languages Act.*

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. The following serious question of general importance is certified:

> Are s. 35(1) of the *Immigration and Refugee Protection Act* and s. 16 of the *Immigration and Refugee Protection Regulations* in accordance with the principles stated by the Supreme Court in the *Singh v. Canada (Minister of Citizenship and Immigration)*, [1985] 1 S.C.R. 177 and *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, decisions and with s. 7 of the *Canadian Charter of Rights and Freedoms* when a person targeted by those provisions had already obtained the refugee or protected person status and does not have the right to defend him/herself against the allegations made against him/her under those provisions?

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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