Federal Court of Appeal  Cour d'appel fédérale

Date: 20240412

Docket: A-148-20

Citation: 2024 FCA 69

CORAM: **LASKIN J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

MEDHANIE AREGAWI WELDEMARIAM

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS and UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Interveners

Heard at Toronto, Ontario, on March 19, 2024.

Judgment delivered at Ottawa, Ontario, on April 12, 2024.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: LASKIN J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] In accordance with paragraphs 34(1)(a) and (f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), permanent residents and foreign nationals are inadmissible to Canada on security grounds if they are members of an organization that there are reasonable grounds to believe engages, has engaged or will engage in espionage "against Canada or that is contrary to Canada's interests".

[2] Medhanie Aregawi Weldemariam does not now dispute that he was a "member of an organization" that has engaged in espionage, as contemplated by paragraph 34(1)(f) of *IRPA*. The Minister of Public Safety and Emergency Preparedness does not allege that the espionage carried out by the organization in question was "against Canada". The sole issue on this appeal is thus whether the Immigration Division (ID) of the Immigration and Refugee Board reasonably found that the espionage in issue was "contrary to Canada's interests" within the meaning of paragraph 34(1)(a) of *IRPA*. The ID based its inadmissibility finding on an interpretation of paragraph 34(1)(a) that did not require the espionage in issue to have a nexus to Canada's national security.

[3] In a decision reported as 2020 FC 631 (*Weldemariam FC*), the Federal Court concluded that the ID's interpretation of paragraph 34(1)(a) was unreasonable, and that the phrase "contrary to Canada's interests" requires a nexus to Canada's security interests. Consequently, the Federal Court quashed the ID's decision and remitted Mr. Weldemariam's case to the ID for redetermination.

[4] In rendering judgment allowing Mr. Weldemariam's application for judicial review, the Court certified the following question:

> Is a person inadmissible to Canada pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* for being a member of an organization with respect to which there are reasonable grounds to believe it has engaged in, engages in, or will engage in acts of espionage that are "contrary to Canada's interests" within the meaning of paragraph 34(1)(a) of the Act if the organization's espionage activities take place outside Canada and target foreign nationals in a manner that is contrary to the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of Canada, including the fundamental freedoms guaranteed by paragraph 2(b) of the Charter?

[5] For the reasons that follow, I find that the Federal Court did not err in finding that the ID's decision was unreasonable, and in concluding that the phrase "contrary to Canada's interests" requires a nexus to Canada's national security or the security of Canada. I am satisfied that the ID failed to have regard to legal constraints imposed on it by international law, in particular the *non-refoulement* provisions of the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (*Refugee Convention*), as well as recognized principles of statutory interpretation.

[6] Consequently, I would answer the certified question in the negative, and would dismiss the appeal.

I. Background

[7] Mr. Weldemariam is an Ethiopian citizen and a former employee of the Information Network Security Agency (INSA), an Ethiopian state security and intelligence agency. Mr.

Weldemariam worked for INSA as a software developer, where, he says, he worked on the development of air defense simulation software used in training members of the military.

[8] Mr. Weldemariam worked at INSA until mid-2014, when he left Ethiopia for Sweden in order to pursue graduate studies. He returned to Ethiopia in 2016, after completing his studies. Mr. Weldemariam came to Canada in 2017, whereupon he made a claim for refugee protection. He alleged that he was at risk of persecution by Ethiopian security forces, which, he says, had targeted him after he returned to Ethiopia from Sweden.

[9] Mr. Weldemariam's refugee claim was held in abeyance while the Minister inquired into his admissibility to Canada in light of his employment with INSA. The ID then held a hearing with respect to Mr. Weldemariam's admissibility.

II. The Immigration Division's Decision

[10] As noted by the ID in its decision (reported as *X (Re)*, 2019 CanLII 135483), Mr. Weldemariam had conceded that his employment with INSA was sufficient to constitute membership in an organization for the purposes of paragraph 34(1)(f) of *IRPA*. This provides that foreign nationals are inadmissible on security grounds for "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a) […]".

[11] Consequently, the determinative issues before the ID were whether there were reasonable grounds to believe that the activities of INSA constituted espionage and, if so, whether such activities were "against Canada or […] contrary to Canada's interests".

[12] In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, the Supreme Court of Canada described the "reasonable grounds to believe" evidentiary standard as requiring "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". The Supreme Court went on in *Mugesera* to hold that reasonable grounds to believe will exist "where there is an objective basis for the belief which is based on compelling and credible information": at para. 114.

[13] The ID determined that there were reasonable grounds to believe that INSA had covertly gathered information from Ethiopian Satellite Television (ESAT) employees in the United States and Belgium. ESAT is an independent satellite, radio, television and online news outlet run by members of the Ethiopian diaspora in a number of countries, including the United States and Canada.

[14] INSA gathered information using offensive cyber capabilities and surveillance malware, targeting journalists and political dissidents. From this, the ID was satisfied that there were reasonable grounds to believe that INSA had engaged in "espionage" within the meaning of paragraph 34(1)(a) of *IRPA*. There was no evidence before the ID, however, to suggest that Mr. Weldemariam had any personal involvement in any of INSA's espionage activities, and the ID made no finding to this effect.

[15] While ESAT is active in Canada, the ID found that no evidence had been adduced to show that INSA had deployed hacking software on ESAT employees in Canada, or that it had otherwise targeted ESAT journalists in this country. Consequently, the ID did not find that INSA's actions were directed "against Canada". The question for determination was thus whether INSA's actions were nevertheless "contrary to Canada's interests" within the meaning of paragraph 34(1)(a) of *IRPA*.

[16] Although the individuals targeted by INSA were located outside of Canada, the ID found that INSA's acts of espionage against Ethiopian journalists and political dissidents in the United States were "contrary to Canada's interests", as they were carried out "against nationals of countries allied to Canada": at para. 34.

[17] The ID further found that "[t]he fundamental freedoms [of] opinion and expression, including freedom of the press and other media of communication are a cornerstone of the *Canadian Charter of Rights and Freedoms*": at para. 34. As such, the ID was satisfied that the acts of espionage engaged in by INSA against members of ESAT were "contrary to Canada's interests", as that phrase is used in paragraph 34(1)(a) of *IRPA*.

[18] The ID thus concluded that Mr. Weldemariam was inadmissible to Canada for being a member of an organization that engages in acts of espionage that are contrary to Canada's interests, as contemplated by paragraph 34(1)(a) of *IRPA*.

III. The Federal Court's Decision

[19] The Federal Court noted that Mr. Weldemariam's membership in INSA was no longer in issue, nor was the fact that INSA had engaged in espionage. There was also no suggestion that INSA's acts had been directed "against Canada". Consequently, the only finding made by the ID that was in issue before the Federal Court was its determination that INSA's activities were "contrary to the interests of Canada".

[20] The Federal Court identified reasonableness as the standard to be applied in reviewing the ID's interpretation of paragraph 34(1)(a) of *IRPA*. The Court concluded that ID's decision was not reasonable, as it had given an unreasonably broad interpretation to the phrase "contrary to Canada's interests" as it appears in that provision. Consequently, the decision was quashed, and Mr. Weldemariam's case was remitted to the ID for redetermination.

[21] The Federal Court found that the ID's decision was unreasonable in three respects. First, the ID failed to consider the history and purpose of paragraph 34(1)(a), which demonstrated that the provision was introduced to constrain determinations of inadmissibility on espionage-related grounds.

[22] Second, the ID had treated "Canada's interests" as being equivalent to "things Canada is interested in", without considering that there must be some actual nexus to Canada for paragraph 34(1)(a) to be engaged.

[23] Finally, relying on the Federal Court's decision in *Mason v. Canada (Citizenship and Immigration)*, 2019 FC 1251, the Federal Court found in Mr. Weldemariam's case that a nexus with national security was required to bring a matter within the scope of subsection 34(1) of *IRPA*. The Court further found that the ID failed to explain the nexus between the actions of INSA and Canada's national security.

[24] The Federal Court recognized that espionage activity directed against Canada's allies may be contrary to Canada's interests, and that the targeting of an ally could easily be understood as engaging Canada's national security. However, INSA was not targeting the United States or Belgium—it was targeting private individuals who were merely residing in these countries.

[25] In the Federal Court's view, it was "something else entirely" to suggest that Canada's national security interests are engaged by the targeting of individuals who are nationals or residents of one of its allies, rather than by the targeting of the ally itself. The Federal Court held that at the very least, it was necessary for the ID to provide a reasonable explanation of the nexus between the targeting of individuals in other countries and Canada's national security interests for the decision to withstand review. As no such explanation had been provided by the ID, the Federal Court found that its decision lacked justification, transparency, and intelligibility, and Mr. Weldemariam's application for judicial review was therefore granted.

IV. The Issue

[26] As noted earlier, the sole issue before this Court is whether the ID's interpretation of paragraph 34(1)(a) of *IRPA* was reasonable, and whether a nexus to Canada's national security or security interests is required with respect to "Canada's interests", in order to bring an act of espionage within the scope of that provision.

V. The Standard of Review

[27] This Court's role in an appeal such as this is to determine whether the Federal Court identified the correct standard of review—correctness or reasonableness—and whether it properly applied that standard: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47. This has been described as requiring us to "step into the shoes" of the Federal Court judge, focusing on the administrative decision below.

[28] This Court has previously expressed concerns with respect to the application of the reasonableness standard in the context of questions certified by the Federal Court under the provisions of subsection 74(d) of *IRPA*. This is especially so where, as here, this Court is called upon to answer questions of statutory interpretation that require a yes or no answer: see, e.g. *Canada (Citizenship and Immigration) v. Galindo Camayo*, 2022 FCA 50 at paras. 40-44. See also the dissenting opinion of Justice Côté in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 126, 152 (*Mason*). Nevertheless, the majority decision in *Mason* affirms

that reasonableness is the standard to be applied by reviewing courts in addressing certified questions in the immigration context.

[29] Consequently, I agree with the parties that the Federal Court correctly identified reasonableness as the standard to be applied in reviewing the ID's interpretation of paragraph 34(1)(a) of *IRPA*, specifically the phrase "contrary to Canada's interests" as it appears in that provision. The question for determination is thus whether the Federal Court properly applied that standard in this case.

VI. A Preliminary Comment

[30] Before commencing my analysis, it is important to note that neither the ID nor the Federal Court had the benefit of the Supreme Court's recent decision in *Mason*. There, the Court was called upon to interpret paragraph 34(1)(e) of *IRPA*, which makes permanent residents and foreign nationals inadmissible to Canada on security grounds for "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada".

[31] The Supreme Court concluded in *Mason* that there was only one reasonable interpretation of paragraph 34(1)(e) of *IRPA*, namely one that requires a nexus to national security or the security of Canada: above at para. 121.

[32] The implications that *Mason* has for the interpretation of paragraph 34(1)(a) of *IRPA*, and the reasonableness of the ID's understanding of what it means for an act of espionage to be

"contrary to Canada's interests" are in dispute, and will be discussed in the next section of these reasons.

VII. Analysis

[33] The parties and the interveners have raised a number of issues with respect to the interpretation of paragraph 34(1)(a) of *IRPA*. These include arguments related to the text, context and purpose of the provision, as well as submissions based upon international law. I will deal with the international law issue first.

A. *The International Law Argument*

[34] In *Mason*, the Supreme Court forcefully reminded us of the importance of international law as a useful tool in interpreting domestic legislation: *Mason*, above at paras. 104-117. There, the Supreme Court observed that in its earlier decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, it had stated that international law may impose an important constraint on administrative decision makers as a result of the presumption that domestic legislation will operate in conformity with Canada's international obligations: *Mason* at para. 105; *Vavilov* at para. 114.

[35] In this case, the Minister submitted that the determinative issues in *Mason* related to the failure of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board to address two "significant points of statutory context". These had been raised by Mr. Mason in

support of his contention that, properly interpreted, paragraph 34(1)(e) of *IRPA* requires a nexus with national security or the security of Canada. The Supreme Court held that the failure of the IAD to deal with these arguments had resulted in a failure of responsive justification, causing it to lose confidence in the IAD's decision: *Mason*, above at para. 10.

[36] From this, the Minister seemed to be suggesting that the Supreme Court's discussion of international law in *Mason* was essentially *obiter*.

[37] I do not agree.

[38] It is clear from the discussion at paragraphs 104-117 of the reasons in *Mason* that international law played a central role in the Supreme Court's analysis. At paragraph 118 of its reasons, the Court referenced the failure of the IAD to address arguments that Mr. Mason had raised in his written submissions. In the same paragraph, however, the Court went on to refer to the IAD's failure to interpret and apply paragraph 34(1)(e) in compliance with Canada's obligation of *non-refoulement* under the *Refugee Convention*. The Court then stated "[c]umulatively, these omissions rendered the IAD's decision unreasonable" [my emphasis].

[39] From this it is clear that international law played a central role in the Supreme Court's conclusion in *Mason* that the IAD's interpretation of paragraph 34(1)(e) was unreasonable, and that it formed part of the *ratio* of the decision.

[40] The Minister acknowledges that there is an obligation on administrative decision makers to render decisions that are compliant with the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, and with international human rights obligations binding on Canada. He submits, however, that this should not impose an additional burden on such decision makers to consider arguments that the parties never raised.

[41] This argument cannot succeed. It is not open to this Court to disregard the express teachings of the Supreme Court with respect to the duty on immigration adjudicators to construe and apply *IRPA* in a manner that complies with the international human rights instruments to which Canada is signatory: see *Mason*, above at para. 104.

[42] The Minister also argued that the reasonableness of the ID's interpretation of paragraph 34(1)(a) in this case should not turn on whether it considered the principle of *non-refoulement*. This, the Minister says, is because the determination of admissibility is distinct from the removal process, and the ID's finding that Mr. Weldemariam is inadmissible to Canada does not put him on a path to removal so as to trigger the principle of *non-refoulement*.

[43] However, the same may be said of a finding under paragraph 34(1)(e) of *IRPA*. The Supreme Court was nevertheless of the view that international law principles, including the principle of *non-refoulement*, should guide the interpretation of that provision: *Mason*, above at paras. 109-111.

[44] Specifically, the Supreme Court held in *Mason* that paragraph 34(1)(e) of *IRPA* had to be interpreted in a manner that complied with Article 33(2) of the *Refugee Convention*, which creates an exception to the principle of *non-refoulement*, permitting the removal of individuals who constitute a danger to the community of the host country: *Mason*, above at paras. 107-111.

[45] Article 1 of the *Refugee Convention* defines a "refugee" as an individual who has a "well-founded fear of being persecuted for reasons of their race, religion, nationality, membership in a particular social group or political opinion". Article 33(1) of the *Refugee Convention* provides that "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[46] In *Mason*, the Supreme Court described the principle of *non-refoulement* as the "centrepiece" of the *Refugee Convention* and "the cornerstone of the international refugee protection regime": above at paras. 107-108.

[47] There is, however, an exception to the principle of *non-refoulement*. That is, Article 33(2) of the *Refugee Convention* provides that its protection may not be claimed by a refugee for whom "there are reasonable grounds for regarding as a danger to the security of the country in which he is". Also excluded from the protection of the *Refugee Convention* are those "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

[48] The Minister submits that *IRPA* includes safeguards that would be available down the road that would protect Mr. Weldemariam against *refoulement*. As a result, he says that interpreting paragraph 34(1)(a) without requiring a nexus to Canada's national security or security interests at the admissibility stage would not contravene Article 33(2) of the *Refugee Convention*.

[49] However, the Supreme Court carefully assessed the ability of potential "safety valves" to ensure compliance with Canada's international obligations under the *Refugee Convention* in *Mason*. In so doing, the Court examined the structure of *IRPA*, including the interaction between its inadmissibility provisions and the purported safety valves available during the removal process.

[50] The Supreme Court specifically rejected the argument that processes available after a finding of inadmissibility under paragraph 34(1)(e) provide adequate protection against *refoulement*. Indeed, the Court expressly found that none of these processes ensured compliance with Canada's international legal obligations under the *Refugee Convention*: *Mason*, above at paras. 110-114. These processes are similar to those that would be available to Mr. Weldemariam following an inadmissibility finding under paragraph 34(1)(a) of *IRPA*.

[51] From this, I am satisfied that the Supreme Court's decision in *Mason* requires that this Court consider Canada's obligations under the *Refugee Convention*, and, in particular, the principle of *non-refoulement*, in assessing the reasonableness of the ID's interpretation of paragraph 34(1)(a) of *IRPA* at the admissibility stage of the process.

[52] Before commencing this assessment, however, and in fairness to the ID, I should note that the utility of international law as an interpretive aid does not appear to have been raised before it in Mr. Weldemariam's case. The Supreme Court nevertheless held in *Mason* that the principle of *non-refoulement* is a critical legal constraint on interpretation of *IRPA*—one that Parliament has mandated that immigration adjudicators consider in interpreting the legislation: *IRPA* at paras. 3(2)(b) and 3(3)(f); *Mason*, above at paras. 85, 106, 117 and 118; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at para. 49.

[53] The *Refugee Convention* is thus determinative of how *IRPA* is to be interpreted, in the absence of a contrary legislative intention: *Mason*, above at para. 106; *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para. 87; *B010*, above at para. 49. Neither the parties nor the interveners have identified any legislative provision that would evidence such a contrary intent on the part of Parliament.

[54] Canada has ratified both the *Refugee Convention* and the *Protocol Relating to the Status of Refugees*, Can. T.S. 1969 No. 29. These international human rights instruments trigger the interpretive presumption of conformity with international law: *Mason*, above at para. 105; *Németh v. Canada (Justice)*, 2010 SCC 56, at para. 17.

[55] As noted, Article 33(1) of the *Refugee Convention* enshrines the ban on *refoulement*, prohibiting contracting states from expelling or returning refugees to countries where their lives or freedoms would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion.

[56] Again as noted earlier, Article 33(2) of the *Refugee Convention* creates limited exceptions to the principle of *non-refoulement*, allowing refugees to be *refouled* where there are reasonable grounds to believe that the person poses a danger to the security of the host country or has been convicted of a serious crime: *Mason* at para. 109; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 at para. 25.

[57] As a result, a finding of inadmissibility under either paragraphs 34(1)(a) or 34(1)(e) of *IRPA* can effectively deny a person access to Canada's refugee procedures and protections.

[58] The Supreme Court observed in *Mason* that if paragraph 34(1)(e) were interpreted as not requiring a nexus to Canada's national security or security interests, a foreign national could be deported to persecution once they have been found to be inadmissible under that provision. This could occur without there ever being a finding that the person poses a danger to the security of Canada or has been convicted of a serious crime. This is because the exceptions under Article 33(2) would not apply: *Mason*, above at para. 109.

[59] The same analysis would apply in the case of inadmissibility under paragraph 34(1)(a) of *IRPA*.

[60] In this case, the ID interpreted the phrase "contrary to Canada's interests" in paragraph 34(1)(a) as encompassing a broad range of Canada's interests, including activities that are contrary to the values enshrined in the Charter. This interpretation could subject individuals to being deported to persecution once they have been found to be inadmissible under paragraph

34(1)(a) for being engaged in activities that were contrary to Canada's interests, without there ever being a finding that there were reasonable grounds to believe that they pose a danger to the security of Canada. This is because, under this interpretation, the exceptions under Article 33(2) would not apply.

[61] In other words, the ID's interpretation would allow the *refoulement* of persons inadmissible under paragraph 34(1)(a) of *IRPA* in circumstances that are outside the scope of the Article 33(2) exceptions.

[62] In contrast, interpreting paragraph 34(1)(a) of *IRPA* as requiring a nexus with Canada's national security or security interests would bring the provision into conformity with Article 33 of the *Refugee Convention*. In accordance with this interpretation, a person found inadmissible under paragraph 34(1)(a) for being engaged in activities that were contrary to Canada's national security or security interests would come within the security exception to the principle of *non-refoulement* enshrined in Article 33(2): *Mason*, above at para. 109. The result of this would be that a removal order in such cases would not breach Canada's obligation of *non-refoulement*: *Mason*, above at para. 111.

[63] When presented with two competing interpretations of paragraph 34(1)(a) of *IRPA*, one of which would comply with the requirements of Article 33 of the *Refugee Convention* and one of which would not, the interpretation that would comply with Canada's international commitments, including its *non-refoulement* obligations, should be utilized.

[64] As the Supreme Court observed in *Mason*, the failure of the ID to consider the role of the *Refugee Convention* in constraining the interpretation of *IRPA* was not a minor omission, but a crucial one—one that overlooks the principle of *non-refoulement*—the very cornerstone of the international refugee protection regime: *Mason*, above at para. 108; *Németh*, above at paras. 18-19. The ID thus ignored a critical constraint on the interpretation of *IRPA*—one that Parliament has expressly stated must be considered by immigration adjudicators in construing and applying the Act: *Mason*, above at para. 117. This makes the ID's decision in this case unreasonable.

[65] This finding provides a sufficient basis for upholding the Federal Court's decision to set aside the ID's decision in Mr. Weldemariam's case. However, a number of other arguments were advanced by the parties and the interveners with respect to the interpretation of paragraph 34(1)(a). These arguments will be considered in assessing whether there is more than one reasonable interpretation of paragraph 34(1)(a) of *IRPA*.

B. *The Other Statutory Interpretation Issues*

[66] As the Supreme Court has stated, reviewing courts must take a "reasons first" approach in reviewing administrative decisions. That is, the reviewing Court must start by examining the reasons provided by the administrative decision maker, paying them "respectful attention", seeking to "understand the reasoning process followed by the decision maker to arrive at its conclusion": *Mason*, above at para. 60; *Vavilov*, above at para. 84; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 48.

[67] The Supreme Court has further stated that a reasonable decision is one "based on an internally coherent and rational chain of analysis […] that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, above at para. 85.

[68] In this case, the ID's interpretation of paragraph 34(1)(a) was largely based on the Supreme Court's decision in *Agraira*, above, which dealt with an earlier version of the Ministerial relief provision in *IRPA*, and on the Citizenship and Immigration Canada (CIC) Operational Manual ENF 2/OP 18-Evaluating Inadmissibility. The Operational Manual sets out a non-exhaustive list of things that, in CIC's view, may constitute espionage that is contrary to Canada's interests.

[69] Insofar as the ID's reliance on *Agraira* is concerned, it found the Supreme Court's comments in that case with respect to the meaning of the phrase "contrary to the national interest" as they appeared in subsection 34(2) of *IRPA* to be helpful in defining "Canada's interests" in assessing inadmissibility under paragraph 34(1)(a).

[70] Subsection 34(2) (which was repealed in 2013) provided that the Minister could exempt an individual from an inadmissibility finding if the individual could satisfy the Minister "that their presence in Canada would not be detrimental to the national interest".

[71] Quoting at length from paragraph 65 of *Agraira*, the ID noted the Supreme Court's statement that the "national interest" refers to matters that are of concern to Canada and to Canadians. While this included public safety and national security, the plain words of the

provision favoured a more expansive reading than this, and that the "national interest" also included matters such as the preservation of the values that underlie the Charter and the democratic character of Canada. The ID found that INSA's espionage against members of ESAT, a media organization, ran contrary to freedom of the press and other media communication, a cornerstone of the Charter.

[72] The Federal Court noted that the Charter does not apply to INSA, nor does it protect the journalists that INSA had targeted. While ESAT is active in Canada, the ID made no findings as to any impact that INSA's actions may have had on ESAT's activities in this country. Without some explanation as to how those activities were affected, if at all, by INSA's targeting of individuals in other countries, the Federal Court found that this was "too tenuous a basis to reasonably support a finding that INSA's actions were contrary to Canada's interests": *Weldemariam FC*, above at para. 53.

[73] The Federal Court further found that the ID's reliance on *Agraira* was similarly misplaced. One reason for this was that it raised a question as to the appropriateness of using a test that serves one purpose— determining whether to exempt someone from an inadmissibility finding—to interpret a provision that serves an entirely different purpose: that is, determining inadmissibility: *Weldemariam FC*, above at para. 58.

[74] The ID also observed that the CIC's Operational Manual stated that activities that constitute espionage "contrary to Canada's interests" included the use of Canadian territory to carry out espionage activities and espionage activities committed outside Canada that have a

negative impact on the safety, security or prosperity of Canada. The phrase “prosperity of Canada” included, but was not limited to, financial, economic, social, and cultural factors. Espionage activity did not have to be directed against the state, but could also “be against Canadian commercial or other private interests”. According to the Manual, activity directed against Canada’s allies could also be contrary to Canada’s interests.

[75] As the Supreme Court has previously observed, guidelines such as those found in CIC’s Policy Manuals provide a useful indicator of what will constitute a reasonable interpretation of a given provision of *IRPA*: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 32. That said, CIC Policy Manuals are not legally binding on this Court: *Canada (Citizenship and Immigration) v. Kassab*, 2020 FCA 10 at para. 42.

[76] *Mason* tells us that administrative decision makers do not have to engage in formalistic statutory interpretation exercises in every case in the way that Courts are expected to do. Administrative decision makers’ interpretation of statutory provisions must, however, be consistent with the modern principle of statutory interpretation, which focuses on the text, context, and purpose of the provision in question. That is, administrative decision makers must demonstrate in their reasons that they were alive to these elements: *Mason*, above at para. 69; *Vavilov*, above at paras. 119-120.

[77] Even if an administrative decision maker does not explicitly address the meaning of a legislative provision, the reviewing Court may be able to discern the interpretation adopted from

the record, and to evaluate whether it is reasonable: *Mason*, above at para. 69; *Vavilov*, above at para. 123.

[78] The central question is whether the missing analysis "causes the reviewing court to lose confidence in the outcome reached by the decision maker": *Mason*, above at para. 69; *Vavilov*, above at para. 122.

[79] I have already addressed the ID's failure to have regard to the constraints imposed by the *non-refoulement* provision of the *Refugee Convention* in interpreting paragraph 34(1)(a) of *IRPA*. The question at this stage of the analysis is whether the failure of the ID to address other principles of statutory interpretation leads to a further loss of confidence in the ID's decision.

[80] When conducting reasonableness review, reviewing courts must be mindful of the consequences of the decision at issue on the rights and interests of affected individuals: *Mason* at para. 81; *Vavilov* at para. 133. That is, where a decision has particularly harsh consequences for an affected individual, "responsive justification" requires that the decision maker explain why its decision best reflects Parliament's intent: *Mason*, above at para. 76; *Vavilov*, above at para. 133.

[81] The interests here are serious: the result of the ID's inadmissibility finding is that Mr. Weldemariam is now on a path to removal to a country where it is alleged he will face persecution. The ID's reasons were thus required to reflect what was at stake: *Mason*, above at paras. 76, 81.

[82] In addition to not considering the significant legal constraint on the interpretation of paragraph 34(1)(a) imposed by the requirement that *IRPA* operate in conformity with Canada's international obligations, the ID also failed to consider several recognized techniques of statutory interpretation.

[83] The text at issue in this case is contained in paragraphs 34(1)(a) and (f) of *IRPA*. As noted earlier, these make permanent residents and foreign nationals inadmissible to Canada on security grounds if they are members of an organization for which there are reasonable grounds to believe engages, has engaged or will engage in espionage "against Canada or that is contrary to Canada's interests".

[84] Where the words of a statutory provision are precise and unequivocal, the ordinary meaning of the words will play a dominant role in the interpretive process: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10. Where, however, words in a statutory provision are capable of supporting more than one reasonable meaning, the ordinary meaning of the words plays a lesser role in the statutory interpretation analysis.

[85] There is no dispute that the phrase "against Canada" in the first part of paragraph 34(1)(a) refers to espionage that is directed against Canada.

[86] The phrase "contrary to Canada's interests" is not defined in Division 4 of *IRPA*, which is the section governing inadmissibility, and, as is evident from this case, there is a debate as to its scope. The question is whether "Canada's interests" refers to a broad range of matters of interest

to Canada, including compliance with Charter values and the preservation of the democratic character of Canada (as the ID found and as the Minister argues), or is limited to Canada's national security or security interests (as Mr. Weldemariam contends).

[87] The Minister argues that even if one were to accept that the inclusion of "Security" as the heading of subsection 34(1) signals that each provision in the subsection deals with matters of national security, that does not mean that engaging in espionage that "is contrary to Canada's interests" must also have a specific national security orientation. This is especially so, the Minister says, given that the reference to espionage "against Canada" already provides this direct national security nexus.

[88] Had Parliament intended the phrase "contrary to Canada's interests" in paragraph 34(1)(a) to require a direct nexus to Canada's national security or security interests, the Minister submits that it could easily have made that clear in the provision by prohibiting espionage, not just "against Canada" as it does, but also espionage that is inimical to Canada's national security interests. That is not, however, what Parliament did.

[89] The Minister further submits that the use of the disjunctive "or" in the phrase "against Canada or that is contrary to Canada's interests" [my emphasis] suggests that "contrary to Canada's interests" does not require a nexus to national security, and that the two phrases should be viewed as separate and distinct.

[90] As noted, the Minister contends that the phrase “against Canada” already refers to Canada’s national security interests, and that interpreting the phrase “contrary to Canada’s interests” as also requiring a nexus to national security would render words of the provision superfluous and redundant, and would offend the presumption against tautology.

[91] Having already made those whose espionage targets Canada inadmissible, the Minister contends that Parliament could not have intended that espionage that is “contrary to Canada’s interests” be directed to the identical type of activity. In addition to the problems noted in the previous paragraph, such an interpretation would also be contrary to the presumption of consistent expression.

[92] The flaw in the Minister’s argument is, of course, that the phrases “against Canada” and “contrary to Canada’s interests” do not share an identical meaning. Espionage “against Canada” clearly refers to espionage that is targeted at Canada, whereas espionage that is “contrary to Canada’s interests” refers to espionage that may not be targeted at Canada *per se*, but is nevertheless contrary to the national security or security interests of this country. It is the nature and scope of those interests that is in dispute here.

[93] In addressing this issue, it is important to read the phrase “Canada’s interests” in the context of the rest of subsection 34(1) and the larger context of Division 4 of *IRPA*, which is the part of the Act that deals with inadmissibility to Canada. Doing so makes it clear that the phrase “contrary to Canada’s interests” in paragraph 34(1)(a) refers to Canada’s security interests, and not to a broad range of matters that may be of interest to Canada, as argued by the Minister.

[94] Division 4 of *IRPA* makes permanent residents and foreign nationals inadmissible to Canada for a variety of reasons. These include violating human or international rights (section 35), serious criminality (section 36), organized criminality (section 37) and misrepresentation (section 40).

[95] As noted earlier, the heading for section 34 states that the section relates to inadmissibility for "Security" reasons [my emphasis]. This suggests that the Canadian interests at stake in paragraph 34(1)(a) are Canada's national security or security interests.

[96] I recognize that in accordance with section 14 of the *Interpretation Act*, R.S.C., 1985, c. I-21, marginal notes and headings do not form part of a statute, and are inserted only for ease of reference. That said, it is nevertheless permissible to consider them as part of the interpretative process, although they may be accorded lesser weight than other interpretive aids: *Corbett v. Canada*, [1997] 1 F.C. 386 (F.C.A.), [1997] 1 C.T.C. 2 at para. 13.

[97] The understanding that the interests at stake in paragraph 34(1)(a) are Canada's security interests is further confirmed when regard is had to the chapeau of subsection 34(1). This states that permanent residents or foreign nationals are "inadmissible on security grounds" [my emphasis] for various activities, including espionage and membership in organizations that engage in espionage. Once again, this suggests that Parliament intended that the Canadian interests at stake under this provision are its national security or security interests.

[98] In addition to espionage, permanent residents or foreign nationals may be found inadmissible to Canada under subsection 34(1) for involvement in the subversion by force of any government, engaging in terrorism, being a danger to the security of Canada, or engaging in acts of violence that could endanger the lives or safety of persons in Canada. Individuals may also be found to be inadmissible to Canada for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in any of these activities.

[99] That paragraph 34(1)(a) appears amidst other security grounds in subsection 34(1), "all of which have a link to national security or the security of Canada" is telling: *Mason*, above at para. 121. This placement further constrains the reasonable interpretation of paragraph 34(1)(a) of *IRPA*.

[100] There are other provisions of *IRPA* that constrain the interpretation of paragraph 34(1)(a) that were not considered by the ID. An example is the criteria that come into play when the Minister is conducting a pre-removal risk assessment (PRRA). A PRRA is a process whereby an individual subject to a removal order may apply to the Minister for protection, resulting in refugee protection or a stay of the removal order: see *IRPA*, subsection. 112 and 114(1).

[101] As the Supreme Court observed at paragraph 93 of *Mason*, the Minister must ordinarily consider the danger that a PRRA applicant would be subjected to torture, the risk to their life, and a risk they would be subjected to cruel and unusual treatment or punishment in a PRRA application.

[102] However, the PRRA process for persons found inadmissible on security grounds under subsection 34(1) of *IRPA* does not permit consideration of whether they meet the criteria for protection under the *Refugee Convention*. The Minister does, however, have to consider "whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada" [my emphasis]: *IRPA*, s. 113(d)(ii).

[103] This distinction supports the position that the security grounds under subsection 34(1) of *IRPA* require a nexus to national security or the security of Canada.

[104] None of these interpretive tools were considered by the ID in finding that "Canada's interests" should be given a broad interpretation—one that does not require a nexus to Canada's national security or its security interests. While, as noted above, administrative decision makers need not always engage in statutory interpretation as would a Court, their interpretation of statutory provisions must be consistent with the modern principle of statutory interpretation, which focuses on the text, context, and purpose of the provision in question. That is, administrative decision makers must demonstrate in their reasons that they were alive to these elements: *Mason*, above at para. 69; *Vavilov*, above at paras. 119-120. The ID's failure to do so here indicates that its interpretation of paragraph 34(1)(a) lacked the degree of justification required of a reasonable decision.

[105] Interpreting the phrase “contrary to Canada’s interests” in paragraph 34(1)(a) as requiring a nexus to Canada’s national security or security interests also accords with the purpose of the provision.

[106] The current version of paragraph 34(1)(a) came into force on June 19, 2013: *Faster Removal of Foreign Criminals Act,* S.C. 2013, c. 16, s. 13 (Bill C-43). Prior to 2013, paragraph 34(1)(a) stated that permanent residents or foreign nationals were inadmissible on security grounds for “engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada”.

[107] As a result of the 2013 amendments, engaging in acts of espionage and engaging in acts of subversion became two distinct grounds of inadmissibility, with acts of subversion being dealt with under paragraphs 34(1)(b) and (b.1) of *IRPA.* Whereas both espionage and subversion previously had to be directed against “a democratic government, institution or process as they are understood in Canada”, the two types of activity are now constrained by different requirements: *Weldemariam FC*, above at para. 46.

[108] Acts of espionage must now be directed against Canada or be contrary to Canada’s interests, whereas one can be inadmissible for acts of subversion if they are directed against “any government” or “a democratic government, institution or process as they are understood in Canada”.

[109] Comparing the text of the current provisions with those they replaced demonstrates that the scope of the term “espionage” as a ground of inadmissibility was narrowed in 2013. Whereas it was sufficient under the prior legislation that the act of espionage be directed against “a democratic government, institution or process as they are understood in Canada”, acts of espionage must now be directed against Canada or be “contrary to Canada's interests” to render an individual inadmissible to Canada.

[110] In finding that the purpose of the 2013 amendments to section 34 of *IRPA* was to narrow the application of the provision relating to espionage, the Federal Court had regard to comments made by the then-Minister of Citizenship, Immigration, and Multiculturalism. That is, when Bill C-43 received First Reading, the Honourable Jason Kenney explained the rationale for the change in the wording of the provision relating to espionage as being “to narrow the breadth of the inadmissibility provision for espionage to focus on activities carried out against Canada or that are contrary to the interests of Canada” [my emphasis].

[111] Minister Kenney observed that the language of the prior version of paragraph 34(1)(a) was “unnecessarily broad”, and could potentially catch “those who may have been involved in espionage for close democratic allies of Canada and who may in fact have been gathering intelligence on behalf of Canada against common security threats”. According to the Minister, it was therefore preferable to “focus the inadmissibility provision with respect to espionage on those who have been engaged in spying contrary to the interests of Canada”: *Weldemariam FC*, above at para. 47, citing Canada, Parliament, *House of Commons Debates*, 41st Parl., 1st Sess., Vol. 146, No. 151 (24 September 2012), at page 10327.

[112] Agencies such as the National Security Agency (NSA) in the United States and the Government Communications Headquarters (GCHQ) in the United Kingdom gather intelligence on behalf of Canada against common security threats. Such activities could be construed as acts of espionage "against a democratic government, institution or process as they are understood in Canada", and could thus be caught by the previous version of paragraph 34(1)(a). Consequently, paragraph 34(1)(a) was narrowed in 2013 to avoid the risk of agents of friendly security agencies being deemed inadmissible for espionage activities that may nevertheless be in Canada's interests.

[113] As the Federal Court observed, the ID's broad understanding of the scope of paragraph 34(1)(a) of *IRPA* could potentially capture those working for friendly security agencies such as the NSA or GCHQ. Such individuals could, for example, engage in espionage in a manner that is contrary to Canada's interests in matters such as adherence to Charter values, but that would not be contrary to Canada's national security or security interests. The ID never considered whether its expansive interpretation of paragraph 34(1)(a) was consistent with Parliament's intention to narrow the scope of this ground of inadmissibility: *Weldemariam FC*, above at para. 50.

[114] The failure on the part of the ID to consider these additional principles of statutory interpretation provides further reasons for a loss of confidence in the ID's interpretation of paragraph 34(1)(a) of *IRPA*.

VIII. Is There More than One Reasonable Interpretation of Paragraph 34(1)(a) of *IRPA*?

[115] As the Supreme Court observed in *Mason*, "a court may conclude during a reasonableness review that 'the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision'": above at para. 71, see also para. 120; *Vavilov*, at para. 124.

[116] In my view, this is such a case.

[117] I acknowledge that, as argued by the Minister, there are some interpretive constraints that would support the ID's interpretation of paragraph 34(1)(a) of *IRPA*. There are, however, critical legal constraints and principles of statutory interpretation that the ID failed to consider that lead to the opposite interpretation. These include the constraints imposed on the ID by international law, and by principles of statutory interpretation. These overwhelmingly support the conclusion that there is only one reasonable interpretation of paragraph 34(1)(a).

[118] That is, permanent residents or foreign nationals may only be found to be inadmissible to Canada under paragraphs 34(1)(a) and 34(1)(f) of *IRPA* where the espionage in which they are involved—either directly or indirectly—is directed against Canada or has a nexus to Canada's national security or security interests: *Mason* at para. 121.

[119] Given that there is only one reasonable interpretation of the disputed portion of paragraph 34(1)(a), it follows that the decision of the ID was unreasonable, and that it should be quashed.

[120] The next question is whether Mr. Weldemariam's case should be remitted to the ID for redetermination.

IX. Should Mr. Weldemariam's Case be Remitted to the ID for Redetermination?

[121] The Supreme Court observed in *Mason* that where the reviewing Court concludes that there is only one reasonable interpretation of a legislative provision, the Court may conclude that remitting the question to the administrative decision maker for redetermination would serve no useful purpose: *Mason*, above at paras. 71, 120; *Vavilov*, above at para. 124.

[122] INSA's espionage activities took place outside Canada, and they did not involve Canada in any way. Indeed, the only nexus that the ID found to Canada's interests was that INSA had "engaged in espionage against nationals of countries allied to Canada".

[123] There was in fact no definitive evidence before the ID that the journalists and political dissidents targeted by INSA were nationals of either the United States or Belgium. Even if they were, INSA was not targeting the United States or Belgium—something that could potentially be understood to engage Canada's national security. INSA was targeting private individuals who were living in these countries.

[124] As the Federal Court observed, it is quite a different thing "to suggest that Canada's national security interests are engaged simply by the targeting of individuals who are nationals or

residents of one of its allies, as opposed to the targeting of the ally itself": *Weldemariam FC*, above at para. 74.

[125] The Federal Court further noted that "[at] the very least, a reasonable explanation of the nexus between this and Canada's national security interests must be provided for the decision to withstand review": *Weldemariam FC*, above at para. 74. No such explanation was provided in this case.

[126] While ESAT is active in Canada, there was no suggestion that any of the targeted ESAT journalists live in this country. The evidence before the ID also did not suggest that INSA's acts were targeted at Canada as a state, at Canadian companies, at Canadian institutions or at Canadian individuals, including members of the Ethiopian diaspora. Nor was there evidence that INSA's acts involved Canada's national security or security interests in any way. They were thus beyond the purview of "Canada's interests" within the meaning of paragraph 34(1)(a) of *IRPA*.

[127] Nor was it established that Mr. Weldemariam was a member of an organization that was engaged in acts of espionage directed against Canada, or that had a link to Canada's national security or the security of Canada. Consequently, paragraphs 34(1)(a) and 34(1)(f) of *IRPA* do not provide a legal basis for a finding that Mr. Weldemariam is inadmissible to Canada. Given that the Minister has not alleged any other basis for Mr. Weldemariam's inadmissibility, there is no need to remit this case to the ID for redetermination.

X. Conclusion

[128] For these reasons, I find that the Federal Court did not err in finding that the ID's decision was unreasonable. I would answer the question certified by the Federal Court in the negative, and would dismiss the Minister's appeal.

"Anne L. Mactavish"
J.A.

"I agree.
J.B. Laskin"

"I agree.
K.A. Siobhan Monaghan"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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