File No. 39855

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

EARL MASON

APPELLANT
(Respondent)

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT EARL MASON

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal concerns the interpretation of s. 34(1)(e) of the *Immigration and Refugee Protection Act* ("*IRPA*"), an immigration security inadmissibility provision that has existed since 1976. Forty years after its enactment, the Immigration Appeal Division ("IAD") adopted a novel and expansive interpretation of the provision in this case. The section reads as follows:

> **Security**
> **34** (1) A permanent resident or a foreign national is inadmissible on security grounds for … (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada …

2. Section 34(1)(e) carries the harshest possible inadmissibility consequences under *IRPA*, on par with engaging in terrorism or crimes against humanity. The first instance tribunal, the Immigration Division ("ID") of the Immigration and Refugee Board ("IRB"), found s. 34(1)(e) must be interpreted to include a national "security" element in light of the provision's text, context and purpose.

3. The IAD overturned this decision and instead, through a markedly deficient exercise of statutory interpretation, found the provision captures <u>any</u> act of common violence in Canada that would or <u>might</u> endanger the life or safety of another person - regardless of whether there was any past charge or conviction, or the severity of the conduct. This converted s. 34(1)(e), a security provision, into a new basis for criminal inadmissibility on grounds which are far less severe than Parliament contemplated when it enacted the serious criminality provisions in s. 36. The IAD failed to consider numerous salient elements that reveal Parliament intended that it incorporate a national security element when it enacted the provision, including:

   a. the significant impact of security inadmissibility on persons affected;

   b. incoherence caused to the structure of the carefully tailored admissibility regime, where conduct Parliament defined as not captured in the s. 36 serious criminal inadmissibility provision stands to be captured by the more serious s. 34 security provision (including cases subject to lower maximum available sentences, stayed charges, peace bonds, youth convictions, discharges, pardons and acquittals);

   c. resulting violations of Canada's obligations under international law, given

inadmissible individuals can be deported to persecution in violation of Article 33 of the *Refugee Convention*, which requires they pose a danger to 'national security' or be convicted of a serious offence for this consequence;[1]

d. past practices and decisions applying the provision only where there was a 'national security' element; and

e. the context of the enactment of the provision, which was intended to capture violent terrorist-like acts in view of the upcoming 1976 Montreal Olympics, like those committed at the 1972 Olympics, before the terrorism admissibility provision existed.

4. The IAD instead relied only on elements that were inconclusive of Parliament's intent including the provision's plain text; that it only captures violent conduct and not all criminal conduct; and that it is not contrary to our *Charter* or democratic values to find a person inadmissible for conduct not resulting in conviction.

5. The Federal Court ("FC") found the IAD's decision unreasonable because it failed to consider the statutory context and the disruption this new interpretation would cause to the "carefully tailored structure" of the inadmissibility regime.[2]

6. The Federal Court of Appeal ("FCA") disagreed and restored the decision of the IAD. In doing so, it erred in declining to consider all salient elements of a modern statutory interpretation analysis. This included the *Refugee Convention*, which it unreasonably held it did not have the "evidence" to consider. The FCA also failed to consider whether, as per *Vavilov,* the "interplay of text, context and purpose leaves room for a single reasonable interpretation."[3] It acknowledged that some relevant elements of the provision could support a contrary interpretation but noted they could be considered by future administrative decision makers who could decide in favour of the rival conclusion.

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[1] *Convention Relating to the Status of Refugees*, Can TS 1969 No. 6, *entered into force* 22 April 1954 [the "*Refugee Convention*"].
[2] Judgment and Reasons, Grammond, J., Federal Court, 2019 FC 1251, October 2, 2019 (*Mason*), Appellants' Record ["AR"] Vol. I, Tab 6, p. 49 ["*Mason FC*"], at para 48.
[3] Reasons for Judgment, Stratas, Rennie, Mactavish, JJ.A., Federal Court of Appeal, 2021 FCA 156, July 29, 2021, AR Vol I, Tab 8, p. 84 ["*Mason FCA*"] at paras 9, 14 17-18; *Canada (MCI) v. Vavilov*, 2019 SCC 65 ["*Vavilov*"], at para 124.

7. The FCA then adopted its own interpretation of the provision, holding the term 'safety' must be "something approaching the level of a threat to life, not just minor harm."[4] These words were not in the IAD's own decision, the companion *Dleiow* ID decision, or the words of the provision itself. By bolstering the IAD's reasons in this way, the FCA departed from this Court's guidance in *Vavilov*, which stressed that for a reviewing court to "buttress" a decision in this way is to allow an administrative decision maker to "abdicate its responsibility" to justify the basis for its decision.[5] In this way, the FCA implicitly acknowledged the problematic nature of the IAD's expansive interpretation.

8. All the relevant considerations bearing on the interpretation of s. 34(1)(e) demonstrate it must include the element of national security and cannot bear contradictory interpretations.[6] This is ascertainable through properly conducted reasonableness review, which must be responsive to the significant rights and interests at stake. This provision renders permanent residents, protected persons, workers, students, and visitors inadmissible on security grounds. They are subject to deportation, permanently barred from Canada, and separated from their Canadian family members, including their children. Refugee claimants become ineligible to make a claim, barred from obtaining protected status and deportable to persecution.

9. Where the provision at issue is one that strips the fundamental rights of individuals in the name of security, more elements of a modern statutory interpretation approach are salient to ascertaining Parliament's intent in enacting the provision and must be considered by the tribunal. Such an approach does not constitute correctness review. To find otherwise would, as the FCA's decision admits, allow for "persistent discord", "serious concerns about consistency and the rule of law" and "uncertainty, inconsistent application and unfairness" to proliferate in the context of imposing Canada's harshest immigration sanctions.[7]

Statement of Facts

10. Earl Mason ("Mr. Mason", the "Appellant") is a citizen of Saint Lucia. He is married to a Canadian citizen and has two daughters in Canada. He entered Canada on June 10, 2010 and

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[4] *Mason FCA*, *supra* note 3, at para 57.
[5] *Vavilov*, *supra* note 3, at para 96.
[6] *Vavilov*, *supra* note 3, at para 124.
[7] *Mason FCA*, *supra* note 3, at paras 75, 77.

made a claim for refugee protection. He withdrew his claim when his wife's application to sponsor him for permanent residence was in the last stages of approval. Mr. Mason will be landed as a permanent resident through this application if he is not found inadmissible.[8]

11. The Minister initially alleged Mr. Mason may be inadmissible for serious criminality under s. 36(1)(a) of *IRPA* based on an allegation that he was involved in a shooting in May 2012, after a fight broke out between five individuals during a concert at a bar. He was alleged to have shot and injured two people in the kitchen of the bar. There is no allegation the shooting was related in any way to terrorism or organized criminality. The allegation concerns an act of common criminality resulting in bodily injury, which is an offence under the *Criminal Code*.[9]

12. Mr. Mason was charged with attempted murder and discharging a firearm with intent to wound. The Minister suspended Mr. Mason's refugee claim under s. 103 of *IRPA* pending a decision of the criminal court that would result in inadmissibility for serious criminality under s. 36(1) if a conviction was secured. The Minister did not write him up for inadmissibility under s. 34.

13. The Crown then exercised its prosecutorial discretion to stay the charges in November 2015. Because inadmissibility under s. 36(1)(a) of *IRPA* requires a conviction for an offence in Canada, Mr. Mason's refugee claim was re-opened. He was determined eligible to have his claim heard as there were no further outstanding inadmissibility issues. Mr. Mason then withdrew his refugee claim as his sponsorship was near completion. Only then did the Minister write and refer a s. 44 inadmissibility report to the ID raising the allegation that he may be inadmissible on "security" grounds under s. 34(1)(e) of *IRPA* for "engaging in an act of violence that would or might endanger the lives or safety of persons in Canada."

14. Given the novelty of this application of s. 34(1)(e), the ID agreed to render a preliminary decision on the legal issue of its interpretation before proceeding to a full hearing. At that point, the only reported decision that had substantively engaged with s. 34(1)(e) found the provision did not capture acts of domestic assault that had not resulted in a conviction, after the Minister

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[8] Reasons and Decision, M. McPhalen, IRB of Canada – ID, 2018 CanLII 57522 (Mason), March 20, 2018, AR Vo1. I, Tab 1, p.1 ["*Mason ID Decision*"].

[9] Excerpt from Minister's Exhibit C1 – Letter, Jeffrey Wicharuk (Minister's Counsel) to the Registrar at the IRB, with attachments (Mason), Section 44(1) and 55 Highlights, AR Vol. III, Tab 25, at p. 75 ["*Section 44 Highlights*"].

made similar arguments in 2017. In that case, ID Member King found that a "national security" nexus was required.[10] Member King's decision went unchallenged on appeal.

15. In this case, ID Member McPhalen agreed with Member King, concluding that a contextual interpretation of the provision and the overall scheme of *IRPA* meant that s. 34(1)(e) ought not apply to acts of common criminality without some security element and so did not capture the allegations levied against Mr. Mason.

The decision of the Immigration Appeal Division

16. The Minister exercised its unilateral right of appeal to the IAD – a right Mr. Mason would not have had if the ID had decided against him.[11]

17. Member Pemberton of the IAD disagreed with the ID, finding s. 34(1)(e) does not require a link to national security or the security of Canada. He concluded the provision captures any act of violence related to "security in a broader sense", to ensure "that individual Canadians are secure from acts of violence that would or might endanger their lives or safety."[12] His decision was based on the following conclusions:

    - The ordinary meaning of the words of s. 34(1)(e) are not determinative. However, the dictionary definition of "security" as among other things, a "secure condition or feeling," provides useful guidance.
    - The context of the other s. 34 subparagraphs – which all have some national security nexus and could signal Parliament's intent – is also not determinative.
    - The terms "security" and "security grounds" in s. 34 must have different meanings from "security of Canada" or "national security," used elsewhere in *IRPA* considering the presumption of consistent expression. This includes 'being a danger to the security of Canada' in s. 34(1)(d), which would become redundant (though it did not consider that our immigration laws have evolved from a series of amendments over time).
    - The related Ministerial relief provision addresses "national interest", which means

[10] *X (Re)*, 2017 CanLII 146735 (IRB), Member King ["*X (Re)* B6-00722, 2017"]
[11] Section s. 64(1) of the *IRPA* bars appeals by individuals found inadmissible on security grounds, while s. 63(5) grants the Minister a right of appeal in all admissibility decisions.
[12] Reasons and Decision, G. Pemberton, IRB – IAD, 2019 CanLII 55171 (Mason), February 6, 2019, AR Vol. I, Tab 3, p. 10 ["*Mason IAD Decision*"], at paras 20-27 (emphasis added).

national security and public safety.

- Although s. 36 'criminal inadmissibility' requires a conviction for offences committed in Canada, s. 34 captures 'conduct' and does not require a conviction. The two sections are described in different terms: one addresses criminal offences, the other addresses danger posed to lives and safety of persons in Canada.
- Given inadmissibility is not a criminal sanction, it does not offend Canadian values to find a person inadmissible for acts which were "arguably criminal, but which did not result in a criminal conviction."[13]

The decision of the Federal Court

18. Justice Grammond of the Federal Court found the IAD's interpretation of s. 34(1)(e) unreasonable, holding that the structure of the inadmissibility regime showed clear Parliamentary intent as to how the provision ought to be interpreted.[14]

19. The Court considered the nuanced way the s. 36 "criminality" and "serious criminality" inadmissibility provisions operate. The IAD's interpretation upsets this carefully crafted structure and thwarts Parliament's clear policy choices with respect to the way a great number of offences are treated – elevating conduct not serious enough to fall within the scope of s. 36 to *more* serious consequences through s. 34 inadmissibility, with few internal limits.

20. For this reason, the Court accepted that Parliament intended a "security" nexus to ground inadmissibility under s. 34(1)(e). It could not simply be applied to any case of common criminality in Canada involving an act of violence – particularly given that such an interpretation had never been applied previously.

***The ID and Federal Court decisions in* Dleiow**

21. Subsequently, in *Dleiow,* the ID applied the IAD's decision in *Mason* in the context of domestic assault allegations that had not resulted in conviction. The ID considered itself bound by the IAD decision, and found that the test to depart from binding precedent was not made out. It interpreted the IAD decision to mean a person would be inadmissible for any violent

[13] *Mason IAD Decision*, *ibid*, at paras. 20-27 and 35.
[14] *Mason FC*, *supra* note 2, at paras 48-50.

conduct that endangers the physical or psychological safety of another person, rejecting an implicit seriousness requirement.[15] It found Mr. Dleiow inadmissible. On judicial review, the Federal Court overturned the ID decision, following the reasoning of Grammond J.[16]

***The decision of the Federal Court of Appeal in* Mason**

22. The FCA found the Federal Court in *Mason* failed to show deference to the IAD's decision.

23. Justice Stratas, writing for the panel, noted that *Vavilov* leaves things "unclear" with respect to how reviewing courts are to go about reasonableness review of administrative decisions on statutory interpretation.[17] He determined the appropriate approach was set out in his pre-*Vavilov* analysis in *Hillier*: that courts must only conduct a "preliminary analysis of the text, context and purpose of the legislation just to understand the lay of the land" and gain "an appreciation of the interpretive landscape". He declined to consider all the relevant elements of a full statutory interpretation analysis, stating that courts "should not make any definitive judgments and conclusions themselves. That would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits," which would constitute correctness review. It stated this is what the Federal Court had done, and what the Supreme Court of Canada often does in immigration cases.[18]

24. The FCA concluded that "the issue of legislative interpretation is…open to some debate" but that the "indicia of reasonableness…peppered throughout" the IAD's decision were sufficient to make it reasonable. This was in part because s. 34(1)(e) only seeks to capture "acts of violence" rather than all criminal offences generally. It stated the Federal Court was wrong to assume s. 34 would capture "essentially the same" conduct as s. 36.[19]

25. The FCA then read its own restricting language into the broad interpretation adopted by the IAD, finding "safety" must be interpreted as "something approaching the level of a threat to

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[15] Reasons and Decision, L. Ko, IRB – ID, 2019 CanLII 129531 (Dleiow), June 25, 2019, AR Vol. I, Tab 4, at p. 23 ["*Dleiow ID Decision*"] at paras 9-13, 73.
[16] Judgment and Reasons, Barnes, J., Federal Court, 2020 FC 59 (Dleiow), January 16, 2020, AR Vol. I, Tab 7, p. 77.
[17] *Mason FCA, supra* note 3 at para 9.
[18] *Ibid* at paras 9, 12-14, 17, 24, 76.
[19] *Ibid* at paras 15, 17, 48, 76, 63 to 65; *Hillier v. Canada (AG)*, 2019 FCA 44, at paras. 13-17 ["*Hillier*"].

life, not just minor harm."[20] It did not comment on the reasoning of the ID in *Dleiow,* which found the provision extends to acts that endanger an individual's "psychological safety".

26. The FCA declined to consider the *Refugee Convention* or the provision's history because it noted these were not argued before the IAD, without considering they were discussed in the earlier Member King ID decision that Mr. Mason relied upon (it did not mention this decision or Member McPhalen's decision at all). It also declined to consider Canada's international obligations without "background documents and other instruments" in evidence.[21]

27. The FCA noted to the extent the IAD failed to consider "some possible elements of context" in the *IRPA*, this did not make the decision unreasonable. It observed the IAD "implicitly found that the preponderance of elements supported the Minister's interpretation." The Court acknowledged that "some elements of text, context and purpose concerning s. 34(1)(e)" favour the IAD's interpretation, "while others may not." However, it declined to consider these elements itself, finding later decision makers could do so and find in favour of a different interpretation. It did not consider the appellate structure of the IAD or Member Ko's reasons in *Dleiow* in noting future administrative decision makers will not be bound by the decision.[22]

28. The FCA acknowledged that "persistent discord" caused by rival interpretations "can cause serious concerns about consistency and the rule of law."[23] It concluded that to avoid "duelling administrative interpretations," the IRB could refer a question of law to the Federal Court pursuant to s. 18.3(1) of the *Federal Courts Act*.[24]

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[20] *Mason IAD*, *supra* note 12, at para 57.
[21] *Ibid* at para 74; *X (Re)* B6-00722, 2017, *supra* note 10.
[22] *Mason FCA*, *supra* note 3, at paras. 59, 68, 72-76 (emphasis added); *Dleiow ID Decision*, *supra* note 15, at paras. 9-13; *IRPA*, ss. 63(5), 64(1).
[23] *Mason FCA*, *supra* note 3, at para 75.
[24] *Ibid* at paras 77-78.

PART II – STATEMENT OF ISSUES

1) A properly conducted reasonableness review must consider all key elements of the modern approach to statutory interpretation, as informed by the rights and interests at stake, in ascertaining whether a tribunal reasonably ascertained the meaning of a provision intended by Parliament. This reveals 34(1)(e) can bear only one reasonable interpretation.

2) Parliament intended for s. 34(1)(e) to have a "national security" nexus. Section 34(1)(e) should not be interpreted to apply to acts of common criminality committed in Canada.

PART III – STATEMENT OF ARGUMENT

Introduction

29. Prior to the IAD *Mason* decision, s. 34(1)(e) had only been applied in cases with a national security nexus. It was never used or applied in cases of common criminal violence not resulting in a conviction to capture cases not caught by the s. 36 criminal inadmissibility provision.[25] In finding that s. 34(1)(e) can be interpreted to apply to acts with no nexus to national security or the security of Canada, the IAD forged a new interpretation of the provision through a markedly deficient exercise of statutory interpretation.

30. The FCA's 'lay of the land' approach to reviewing the IAD's decision and its refusal to consider important elements missing from the IAD's analysis that it acknowledged could support a contrary interpretation, does not accord with this Court's holdings in *Vavilov.* Both the administrative decision itself and reasonableness review of that decision must ensure legislative intent is respected, such that laws are interpreted in a manner that is consistent with the "modern principle" of statutory interpretation. The FCA erred in declining to engage with the tools of statutory interpretation that operate as constraints on the reasonableness of the tribunal's decision. This left the court unable to properly assess the impact of gaps and flaws

[25] See: *X (Re)* B6-00722, 2017, *supra* note 10; *Al Yamani v Canada (Solicitor General)*, 1995 CanLII 3553 (FC), [1996] 1 FC 174; *Moumdjian v Canada (Security Intelligence Review Committee)*, 1999 CanLII 9364 (FCA), [1999] FC 624 (*obiter*); *Singh v Canada (MCI)*, 2011 CanLII 26656 (CA IRB).

in the tribunal's reasons or whether the provision can reasonably bear more than a single reasonable interpretation.[26]

31. In this context, considering the rights and interests at stake, numerous elements of a modern statutory interpretation analysis were salient to its interpretation and had to be considered by the Tribunal to ensure the legislature's intention was properly ascertained and respected. This included Canada's obligations under international law, nuances of the statutory scheme, past practices and decisions, and the historical context. In this light, properly conducted reasonableness review reveals s. 34(1)(e) can only be interpreted as incorporating a national security nexus.

32. The FCA's decision to instead substitute its own arbitrary interpretation of the provision is also contrary to this Court's guidance in *Vavilov,* which states that buttressing a decision improperly abdicates the responsibility of decision makers to justify their decisions in a transparent and intelligible manner.[27]

A. Standard of Review

33. In considering how exercises of statutory interpretation undertaken by administrative decision-makers should be reviewed, this Court's decision in *Vavilov* struck a carefully considered balance between respect for the delegated authority and expertise of administrative decision-makers and the need to "safeguard the legality, rationality and fairness of the administrative process."[28] The FCA's decision upsets this balance, watering down the robust standard of reasonableness review articulated by this Court in favour of an excessively deferential reasonableness review of its own formulation.

34. For reviewing courts to ensure legislative intent is respected, they must assess whether laws are interpreted in a manner that is consistent with the modern principle of statutory interpretation. This means that on reasonableness review, after reviewing the tribunal's reasons, courts must analyse any elements of the text, context and purpose missing from the tribunal's reasons that are salient to ascertaining Parliamentary intent that constrain the

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[26] *Mason FCA*, *supra* note 3, at para 76.
[27] *Mason FCA*, *supra* note 3, at 57; *Vavilov, supra* note 3*,* at 96-97.
[28] *Vavilov, supra* note 3*,* at para 13.

reasonableness of the decision. They must also then consider whether the interplay of the elements establish that Parliament intended another definition than the one adopted by the tribunal or whether this leaves room for a single reasonable interpretation of the statutory provision at issue.[29]

35. Where a provision like this impacts the fundamental rights of persons in Canada in the name of security, this can increase the tribunal's burden of responsive justification. It can mean more interpretive elements are salient and bear on a reasonable interpretation of Parliament's intent when it enacted the provision, as has been observed in prior cases of this Court interpreting similar provisions. Reviewing courts must ensure tribunals have in fact considered all salient elements in order to properly give effect to this Court's guidance in *Vavilov.* This is indeed what this Court itself demonstrated in *Vavilov*, considering the similarly important citizenship provision.[30]

i. A reasonableness review must respect legislative intent and this requires statutes to be interpreted in a manner consistent with the modern principle of statutory interpretation

36. The FCA's decision to conduct only a "preliminary analysis of the text, context and purpose of the legislation just to understand the lay of the land" in assessing the reasonableness of the Tribunal's decision was fundamentally flawed. This approach was drawn from the FCA's pre-*Vavilov* decision in *Hillier* because it saw *Vavilov* as leaving things "unclear". However, this led the FCA to disregard critical points of guidance in *Vavilov*. It erred in declining to consider all the relevant constraints arising from a fulsome application of the ordinary tools of statutory interpretation.[31]

37. While this Court did not provide a step-by-step guide in *Vavilov* as to how Courts are to engage in reasonableness review of administrators' interpretations of legislative provisions, it did make clear that "[t]hose who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision

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[29] *Vavilov, supra* note 3*,* at para 124.
[30] *Vavilov*, *supra* note 3, at paras 194-195.
[31] *Mason FCA*, *supra* note 3, at paras 9, 17-18.

maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation."[32]

38. The question for a reviewing court to answer is therefore whether the administrative tribunal reasonably ascertained Parliamentary intent in enacting the provision. It cannot simply decline to assess whether a relevant factor or a number of factors taken together reveal an intent that was contrary to the decision reached by the lower tribunal.

39. While exercises of statutory interpretation undertaken by administrative decision makers "might look quite different from that of a court,"[33] as the FCA noted, this is not license for the Court to avoid assessing salient contextual factors bearing on the meaning of the provision or coming to any conclusions of its own about Parliamentary intent. The FCA's approach was an abdication of its judicial role to "ensure that exercises of state power are subject to the rule of law" and to ensure any administrative interpretation remains "consistent with the text, context and purpose of a provision."[34]

40. Reviewing courts have a critical role to play, even in a reasonableness assessment, in ensuring that laws enacted by Parliament are not rewritten through a deficient assessment of their interpretation – as in this case, more than 40 years after the provision was first enacted.

ii. There is only one reasonable interpretation of s. 34(1)(e)

41. In upholding the IAD's interpretation of s. 34(1)(e) and declining to consider factors relevant to a modern statutory interpretation analysis itself, the FCA acknowledged that "persistent discord" caused by rival interpretations of a provision like this "can cause serious concerns about consistency and the rule of law."[35] It unreasonably declined to consider whether the relevant considerations left room for only one single reasonable interpretation, as this Court in *Vavilov* stated may sometimes become clear in the course of a reasonableness review that

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[32] *Vavilov, supra* note 3, at para 118, citing *Re Rizzo & Rizzo Shoes Ltd.* 1998 CanLII 837 (SCC), at para 41 ["*Re Rizzo*"].
[33] *Vavilov, supra* note 3, at para 119.
[34] *Vavilov, supra* note 3, at paras 82, 120.
[35] *Mason FCA*, *supra* note 3, at para 75.

properly considers the interplay of text, context and purpose of the provision.[36]

42. The FCA's decision allows a provision that makes individuals deportable to persecution, permanently separates them from Canadian family members, including their children, and can result in their exile from a country they have called home for decades or since childhood, to be applied to completely different classes of individuals by different decision makers. This is particularly concerning for self-represented individuals who will not know how to argue that international law, Hansard debates from 1976, or the structure and context of *IRPA* inadmissibility provisions are applicable to this determination. While such divergence may be tolerable in some areas, the interpretation of provisions that allow for the deportation of permanent residents and *refoulement* of refugees must be set out in clear and unequivocal terms.[37] It is fundamentally offensive to the rule of law to have different decision makers applying inconsistent interpretations of laws that affect fundamental personal interests, leading to inequitable treatment of similarly situated individuals. Such decisions should not depend on which decision maker hears the case.

43. As this Court stated in *Tran,* in a decision where it found only one reasonable interpretation could be applied to the s. 36 criminal inadmissibility provision: "The right to remain in Canada is conditional, but it is conditional on complying with *knowable* obligations." The rule of law requires citizens and residents to "be able to know in advance" what "legal consequences" will flow "before committing themselves to any course of action." Parliament therefore must be presumed to have intended one specific knowable obligation in these circumstances.[38] In *Tran*, the FCA had also left open the possibility the provision could be interpreted differently by different decision makers and was overturned by this Court on appeal.[39]

44. By following its pre-*Vavilov* decision *Hillier*, the FCA in this case did not consider the possibility this provision may have one single reasonable interpretation, fearing that to do so

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[36] *Vavilov, supra* note 3, at para 124.
[37] See for example: *Tran v Canada (MPSEP)*, 2017 SCC 50, [2017] 2 S.C.R. 289 ["*Tran*"], at paras 42-44; and *R. v Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696.
[38] *Tran*, *ibid*, at paras 41, 42 and 44.
[39] *Tran*, *ibid*, at para 87.

would be to slip into a correctness review.[40] In *Hillier,* the FCA held that a reviewing court may conclude that one reasonable interpretation of a statutory provision can exist only where the legislative wording is clear and unambiguous. It did not, however, consider that this may also arise through the application of the ordinary tools of statutory interpretation.

45. *Hillier* was not cited in *Vavilov.* This Court did, however, cite *Nova Tube*, where the FCA held that the application of the tools of statutory interpretation meant that only one reasonable interpretation of the provision at issue arose.[41] In *Nova Tube,* the FCA cited *B010*, a decision of this Court interpreting s. 37(1)(b) of *IRPA*, the "people smuggling" inadmissibility provision, for the proposition that "[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable".[42]

46. In following the approach that it did, the FCA in *Mason* expressed concern that the Supreme Court itself has been vulnerable to the danger of slipping into correctness review in the past, particularly in immigration cases.[43] The FCA did not, however, consider why this Court has found it necessary to provide definitive guidance on the interpretation of similarly impactful immigration provisions that may give rise to only one reasonable interpretation.

47. This Court has concluded in the past that statutory provisions that remove and restrict the rights of permanent residents and refugees, and that seek to address concerns of national security or that touch on issues of international law, have only been capable of bearing one reasonable interpretation. This has included other inadmissibility subsections and refugee exclusion provisions that carry equivalent consequences to inadmissibility on security grounds.[44] This is

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[40] *Mason FCA*, *supra* note 3, at para 15; *Hillier*, *supra* note 23, at para 15.
[41] *Nova Tube Inc/Nova Steel Inc. v Conares Metal Supply Ltd.*, 2019 FCA 52 ["*Nova Tube*"] at paras 26 – 61; *Vavilov*, *supra* note 3, at para 124.
[42] *Nova Tube* at paras 24, 57; *B010 v Canada (MCI),* 2015 SCC 58 at paras 26, 76 ["*B010*"]. See also *Mason ID Decision*, supra note 8, at paras 12-13, citing *B010.*
[43] *Mason FCA, supra* note 2 at paras 13-14 [emphasis added].
[44] In *Suresh v Canada (MCI*), 2002 SCC 1 (predecessor provision to ss. 34(1)(c), 77) at paras 30 -32, 38, 39, 41 and *Kanthasamy v Canada (MCI)*, 2015 SCC 61 ["*Kanthasamy*"] (s. 25) at paras 44-45, this Court found one interpretation on the reasonableness standard. In *Tran, supra* note 41, (ss. 36, 64) at

because the significant operating constraints in a fulsome statutory interpretation analysis in this context reveal a single clear definition intended by Parliament, as is the case with s. 34(1)(e).

48. These immigration decisions can be contrasted with *McLean,* where this Court accepted that multiple reasonable interpretations of a *Securities Act* provision could exist and deferred to the administrative decision maker's interpretation. The same constraints were not found to bear in that context where human rights and national security concerns were not implicated.[45]

49. It should also be borne in mind that this issue reached the FCA by way of a certified question on a "serious question of general importance" for an appeal per s. 74(d) of the *IRPA.* This Court held in *Pushpanathan* that the certified question procedure "would be incoherent if the standard of review were anything other than correctness."[46] It held again in *Chieu* that the review of an issue of "general importance" pursuant to a certified question weighs in favour of a correctness standard.[47] This is because the *Federal Courts Act* "evinces a particular concern that questions of general importance be appropriately resolved."[48] The FCA has also expressed on several occasions that the need for a certified question to be brought in the immigration context constitutes a statutory indication that correctness should be the standard of

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para 23 and *B010*, *supra* note 45, (s. 37(1)(b)) at para 26, this Court found only one interpretation under either standard of review. In *Chieu v Canada (MCI)*, 2002 SCC 3 (s. 67(1)(c)) ["*Chieu*"] at paras 23-26, and *Pushpanathan v Canada (MCI)*, 1998 CanLII 778, [1998] 1 SCR 982, (s. 98, Art 1F(c)) at paras 43-45*,* this Court applied a correctness standard, observing the "incoherence" created if serious question of general importance certified for appeal to the FCA were upheld even if wrong in law and considering the issue as a matter of law in human rights adjudication *vis-à-vis* the state. In *Febles v Canada (MCI)*, 2014 SCC 68 (s. 98, Art. 1F(b)) at paras 24-25, the Court applied correctness, finding the presumption of reasonableness was rebutted because the provision comes from an international convention, the *Refugee Convention*, which should be interpreted as uniformly as possible. It adopted the reasons of Evans, J. A. over the concurring reasons of Stratas, J. A. applying a reasonableness standard.

[45] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 32, 33, 39.
[46] *Pushpanathan v Canada (MCI)*, 1998 CanLII 778, [1998] 1 SCR 982, at para 43.
[47] *Chieu*, *supra* note 44, at para 23; see also *Kanthasamy*, *supra* note 49, at para 44.
[48] *Chieu*, *supra* note 44, at para 23.

review.[49] Such an approach ensures clarity is brought about for the IRB when a question of law makes its way to the FCA. Whether the existence of a certified question is found to be indicative of the need for correctness review or not, it should at the very least be considered indicative of a particularly robust form of reasonableness review.

50. The FCA's decision and approach to reasonableness review ultimately invites significant and needless uncertainty into all points of law on which appellate guidance has previously been provided.

iii. Divergent interpretations by the IRB or a reference question to the Federal Court do not offer a realistic solution

51. The FCA's two suggestions that future decision makers could consider different arguments and new evidence in interpreting the provision or that a question could be referred by the tribunal to the Court for a decision under s. 18.3(1) of the *Federal Courts Act* are both fundamentally flawed.[50]

52. The first suggestion ignores the statutory structure of the IRB. Future s. 34(1)(e) decisions will be made by the ID or visa officers, and as made clear by Member Ko in *Dleiow*, the ID is bound by the IAD's decision by *stare decisis*.[51] The only opportunity for the IAD to reconsider *Mason* would be in the unlikely event the Minister exercises its unilateral right to appeal a decision that went against them.[52] As mentioned in *Vavilov*, any notion that dueling interpretations could co-exist within the tribunal until a consensus is reached amongst IRB members is unworkable.

53. The FCA's second suggestion of using a reference question is also not in line with current IRB practices – and in any case, may well simply be conducted on a reasonableness standard.[53] It

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[49] *Canada (MCI) v Galindo Camayo*, 2022 FCA 50 at para 41; *Kanthasamy v Canada (MCI)*, 2014 FCA 113 at paras 31-36.
[50] *Mason FCA, supra* note 3, at para 72-75, 77.
[51] *Dleiow ID Decision*, supra note 15, at paras 9-15.
[52] *IRPA, supra* note 11, ss. 63(5), 64(1).
[53] See P. Daly, "Certified Questions, References and Reasonableness: *Canada (CI) v Galindo Camayo*, 2022 FCA 50", April 8 2022, online at <https://www.administrativelawmatters.com>, citing *R v Joslin*,

is also not clear why the tribunal would refer a question like this to the Court for a decision. This makes sense where the matter is outside their own statutory expertise,[54] but this issue is central to their decision-making role: deciding admissibility matters under its home statute. The reference power should not function as a substitute for robust reasonableness review.

54. The FCA commented that the IRB "does not have any particular expertise that might contribute to the analysis of text, context and purpose," but this comment appears to come from pre-*Dunsmuir* jurisprudence, where this Court applied a correctness standard in *Chieu* and *Pushpanathan*. That the IRB has certain expertise is the entire basis for giving it deference on review in the first place.[55]

iv. The FCA improperly buttressed the reasons of the Tribunal and deferred to implicit reasons not apparent in the decision

55. The FCA's decision to read words into the definition of s. 34(1)(e) found nowhere in the IAD's decision improperly revives a methodology of deference to outcomes by buttressing the administration decision, to the exclusion of the rationale for the decision. This approach was explicitly rejected by this Court in *Vavilov*. Prior to *Vavilov*, some had interpreted this Court's decision in *Newfoundland Nurses* to allow for reviewing courts to reformulate or supplement the reasons of a tribunal, where they found the result of the decision to fall within a "range of acceptable outcomes."[56]

56. However, a majority of this Court in *Vavilov* favoured an approach centred around the "justification, transparency and intelligibility" of the reasons actually provided by the tribunal. It

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2022 ONCJ 151 at para 27 and *The Province of New Brunswick (Chief Firearms Officer) v Springfield Sports Club Inc.*, 2022 NBQB 56 at para 16: "The statutory review is called a 'reference'. The question becomes whether the review process is the equivalent of a statutory appeal thereby rebutting the presumption of reasonableness as the standard of review. In my view, it is not."

[54] See for example *Canada (MCI) v Hanjra*, 2018 FC 208 at para 42, considering whether the IAD is properly considered to be within the Minister's "circle of privilege".

[55] *Mason FCA*, *supra* note 3, at para 78; *Vavilov*, *supra* note 3, at para 119. See for example *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 25, 56; *Pushpanathan*, *supra* note 49, at para 45; *Chieu*, *supra* note 44, at para 24.

[56] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ["*Newfoundland Nurses*"], at paras 11-16.

explicitly rejected this aspect of *Newfoundland Nurses* as "mistaken", noting that to allow such "buttressing" of a tribunal's reasons "amount[s] to adopting an approach to reasonableness review focused solely on the outcome of a decision." This allows an administrative decision maker to "abdicate its responsibility" to justify the basis for its decision to the affected party.[57]

57. The FCA, in referring to "implicit" reasons, harks back to the rejected *Newfoundland Nurses* methodology, unduly filling fundamental gaps in the tribunal's logic by noting that the provision "would not be absurdly broad because the conduct captured by it is 'narrowly defined'" and this could "only mean that it interpreted 'safety' as something approaching the level of a threat to life, not just minor harm."[58] However, this was contrary to what the IAD itself found. The IAD explained what it meant: "The conduct described in s. 34(1)(e) is narrowly defined and anchored in terms of the danger posed to Canadians, not to criminal law." It then adopted a definition encumbered only by the four corners of the actual text in subsection (e): "Section 34(1)(e) creates a class of inadmissibility for engaging in acts of violence, criminal or not, that would or might endanger the lives or safety of persons in Canada."[59] That it captures acts that might endanger someone is necessarily broader than suggested by the FCA.

58. The FCA erred in buttressing fundamental gaps in the reasons of the tribunal. As explained below, this approach also resulted in a definition that is not derived from the modern approach to statutory interpretation.

B. Section 34(1)(e) of IRPA can only reasonably be interpreted as having a national security nexus

59. The modern principle of statutory interpretation requires the meaning of s. 34(1)(e) to be determined in a manner that is consistent with the words of an Act – "read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[60] Any interpretation must be presumed,

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[57] *Vavilov*, *supra* note 3, at paras 81, 96.
[58] *Mason FCA*, *supra* note 3, at para 57; *Mason IAD Decision*, *supra* note 12, at para 36. Note the FCA also took this approach in *Canada (PSEP) v Tran,* 2015 FCA 237 in a decision overturned by this Court on appeal.
[59] *Mason IAD Decision*, *supra* note 12, at paras 36 and 38 (emphasis added).
[60] *Re Rizzo*, *supra* note 32, at para 41; *Vavilov*, *supra* note 3, at para 117.

where possible, to comply with Canada's obligations under international law. A reasonable application of these principles reveals that s. 34(1)(e) requires a national security nexus, rather than simply capturing acts of common criminal violence contemplated under s. 36.

60. It was appropriate for the Federal Court to reverse the IAD's decision for failing to consider key aspects of the context and purpose of the statute, and incoherence or absurdities caused by the IAD's interpretation. The FCA's cursory 'lay of the land' methodology failed to properly consider essential elements that reveal Parliamentary intent in enacting this provision.

61. The elements missing from the Tribunal's reasons in this case were not minor – they were on significant points related to the importance of the decision to the persons affected, the immediate statutory context of the provision, the scheme of the act, violations of international law, departure from past decisions and practices, historical context and express statements by Parliament in Hansard.

62. The IAD instead relied only on elements that were inconclusive of Parliament's intent: that Parliament could have decided s. 34(1)(e) captured conduct without requiring a conviction because it captures only violent conduct and not all criminal offences; that the word "national" security or security of "Canada" was not specifically used in s. 34 as it was elsewhere in *IRPA*, even though the *IRPA* incorporated a series of amendments made over time; and that its interpretation was not "contrary" to our *Charter* values or history as a Parliamentary democracy. The interpretation was unreasonable and will have a detrimental effect on the untold number of people that it now stands to capture.

i. Statutory Provision

63. Section 34(1)(e) reads as follows:

Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for …	34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : …
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

64. Inadmissibility under s. 34 is made out where there are "reasonable grounds to believe" that the underlying facts, including facts arising from omissions, "have occurred, are occurring or may occur" pursuant to s. 33 of *IRPA*. In other words, it applies to past, present or future acts.

ii. Harsh consequences not considered by IAD

65. Section 34 is among the most severe sections of the *IRPA*, yet the IAD and FCA wholly failed to consider the severe impact of the IAD's decision on persons captured by their interpretation.

66. Section 34 renders long-term permanent residents, convention refugees, refugee claimants and persons on student, work and visitor permits, inadmissible with no right of appeal to the IAD. Persons in Canada become subject to deportation orders and persons overseas are barred entry. It strips a person of their right to remain with or reunite with family members in Canada, including Canadian children and spouses. Persons are precluded from seeking humanitarian relief under s. 25 of *IRPA*, and so the best interests of a child affected need not be considered at any stage.[61] These consequences all directly impact Mr. Mason.

67. The gravity of the section as it impacts permanent residents and refugees is particularly significant and ought to have been considered. Permanent residence is a status referred to in our Constitution.[62] By virtue of this inadmissibility, permanent residents lose their associated *Charter* mobility right to live and gain a livelihood in any province under s. 6(2).[63] They also lose a host of other important legal rights that attach to this status, including the right to receive health care, employment insurance, old age security pension, and social and disability assistance.[64]

68. As will be discussed in more detail below, refugee claimants become ineligible to make a claim, and can be deported to persecution contrary to Canada's obligations under international law. They are barred from obtaining protected status, and can only obtain a stay of removal,

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[61] *McAlpin v Canada (PSEP)*, 2018 FC 422, at paras 70-78.
[62] The *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (at subsection 6(2) of the *Canadian Charter of Rights and Freedoms*)
[63] *Ibid*. See also for example *Tung v Canada (PSEP),* 2019 FC 917, Brown J, at paras 9, 13.
[64] *Toussaint v Canada (MCI)*, 2011 FCA 146 at para 5; *Old Age Security Regulations*, C.R.C., c. 1246, s. 21(2.1); *Employment Insurance Act,* S.C. 1996, c. 23, s. 152.02(1); *Employment Assistance Act*, SBC 2002, c. 40 s. 15.2(1)(a); *Medicare Protection Act*, RSBC 1996 c. 286 s. 1 at definition of "resident".

which can be reassessed and cancelled at any time.[65] Convention refugees who are not removable for being "a danger" in essence become stateless in Canada.[66] Relief from s. 34 inadmissibility is highly restricted, lying solely in the hands of the Minister of Public Safety personally under s. 42.1 of *IRPA*.

69. Those found inadmissible cannot benefit from a suspension of removal to countries in turmoil where the entire population faces generalized risk as a result of, for example, armed conflict or environmental disasters,[67] including in countries like Afghanistan, Ukraine, Syria or Yemen.

70. In *Vavilov,* this Court found that "where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes… if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention." In discussing this point, this Court cited *Chieu*, which found the IAD's equitable jurisdiction must be interpreted as requiring it consider the potential hardship a deported person would face in an appeal of a removal order.[68] Persons inadmissible under s. 34 are barred access to this equitable appeal.

71. The IAD's failure to grapple with these consequences was unreasonable. Rather than consider whether the much broader interpretation was the one intended by Parliament in light of these profound consequences, the IAD simply observed that while "all reasonable Canadians agree that a person should not suffer criminal sanction unless they have been proven guilty according to the law in a fair and public hearing", "immigration consequences under the *IRPA* are not criminal sanctions."[69]

72. Yet this Court observed in *R v Wong*, when considering the potential deportation of a permanent resident, that*:* "collateral consequences that affect the accused person's fundamental interests could have a more significant impact on the accused than the criminal

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[65] *IRPA*, ss. 101(2), 112(3)(a), and 113(d).
[66] Brouwer, Andrew, "Statelessness in Canadian Context: A Discussion Paper" (UNHCR, 2003).
[67] See *Immigration and Refugee Protection Regulations,* SOR/2002-227 ["IRPR"] s. 230(3); See current list of countries subject to administrative deferrals of removal or temporary suspensions of removal online at: <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>
[68] *Vavilov*, *supra* note 3, at paras 133-135 [emphasis added]; *Baker v Canada (MCI),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817; *Chieu, supra* note 44.
[69] *Mason IAD Decision*, *supra* note 12 at para 36.

sanction itself…" It noted, "People who are to be deported may experience any number of serious life-changing consequences. They may be forced to leave a country they have called home for decades. They may return to a country where they no longer have any personal connections, or even speak the language, if they emigrated as children. If they have family in Canada, they and their family members face dislocation or permanent separation."[70]

iii. ***Grammatical and ordinary meaning of the text***

73. Modern statutory interpretation begins by considering the grammatical and ordinary sense of the words. None of the lower decision makers in this case found the text in s. 34(1)(e) itself to be clear or unambiguous. The ID found the meaning "is far from clear"[71] and the FCA noted the interpretation "is somewhat complicated and the outcome is open to some debate."[72]

74. That there is no reported case of any individual previously found inadmissible on this ground for common criminal acts before *Dleiow* further highlights the ambiguity. If the meaning were clearly as posited by the Minister, surely the provision would have been readily employed in the manner now argued in any number of earlier aggravated assault cases before, that regularly result in persons being found inadmissible for 'serious criminality' under s. 36(1)(a).

75. The opening words of s. 34 state that "A permanent resident or a foreign national is inadmissible on security grounds for" engaging in the described conduct. The heading of the provision reads "Security". Security is an undefined term in *IRPA*. ID Members King and McPhalen took it as self-evident that this term must mean 'national security' or 'security of Canada', and this text was found to be integral in the provision.[73] Member King noted the Act used "public safety" instead where that was what it specifically sought to address. Member McPhalen also referenced the *Security of Canada Information Sharing Act*, noting it contained a definition and itemized list of activities that undermine the 'security of Canada' that largely

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[70] *Wong*, *supra* note 37, at paras 4, 72-73 [emphasis added].
[71] *Mason ID Decision*, *supra* note 8, at para 4: "the meaning of the paragraph is far from clear"; *Mason IAD Decision*, *supra* note 12, at para. 20: "That approach is not sufficient"; *Mason FC*, *supra* note 2 at paras. 35, 55: "arguments about the ordinary meaning of the word "safety" are not dispositive. The IAD recognized as much…"; *Mason FCA*, *supra* note 3, at paras 8; 76: **"**the interpretation of s. 34(1)(*e*) is somewhat complicated and the outcome is open to some debate".
[72] *Mason FCA*, *supra* note 3, at para 8.
[73] *X (Re)* B6-00722, 2017*, supra* note 10, at paras 51, 54 and 75.

paralleled those listed in s. 34.[74]

76. The IAD, however, observed that "security" could mean "secure condition or feeling" of an individual given the words "national" security or security "of Canada" were not used in s. 34, as they were elsewhere in *IRPA*, including in s. 34(1)(d) (which creates inadmissibility for "being a danger to the security of Canada"). The Tribunal held that interpretating the provision to capture exclusively cases with a national security nexus would "not [be] consistent with the presumption of consistent expression."[75] However, the IAD failed to consider that the presumption of consistent expression can be rebutted where an act is amended "decade after decade" making it more likely for "inadvertent variation [to] occur within a single Act."[76] This is the case with the *IRPA*, as discussed further in the 'history' section below.[77] The word "security" *is* used alone elsewhere in the *IRPA* too, in a manner that appears to connote national security, including in the objectives of the Act.[78]

77. The language of the provision is therefore simply not conclusive of Parliamentary intent.

iv. Context of s. 34 'security' provision and structure of IRPA

78. Section 34(1)(e) must be read in context within s. 34 and within the "inadmissibility" division where it is situated, in view of the *IRPA*'s structure as a whole. That the provision was intended to have a national security nexus is demonstrated by the distinctly serious nature of the surrounding subsections and admissibility provisions with similar consequences that address things like terrorism and war crimes. It can also be seen in view of the nuances in the s. 36

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[74] *Mason ID Decision*, *supra* note 8, paras 18, 19 citing *Security of Canada Information Sharing Act*, s. 2(1): An 'activity that undermines the security of Canada' means any activity, including any of the following activities, if it undermines the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada.

[75] *Mason IAD Decision*, *supra* note 12 para 23-25.

[76] *R v Steele*, 2014 SCC 61 at paras 51, 65: [T]here may be situations in which the presumption of consistent expression is clearly rebutted by other principles of interpretation and, as a result, the intended meaning of violence may vary…: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008)..."[s]ome statutes, like Insurance Acts or the *Criminal Code*, are frequent[ly] amended decade after decade. It is not surprising, then, that inadvertent variations occur within a single Act. It is even more likely that they would occur within the statute book as a whole."

[77] *An Act Re Immigration Security*, 1976, c 91, s 2; *Immigration Act, 1976*, c 52, 19(1)(g).

[78] *IRPA,* s. 3(1) : The objective of this Act with respect to immigration are … '(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals **or** security risks.'

criminal inadmissibility provision where Parliament carved out a wide range of conduct in a carefully tailored way – including less serious offences, unconvicted conduct and youth offences – that the IAD's interpretation illogically brings within the scope of the more serious s. 34 provision. The Federal Court found the illogicality the IAD's interpretation introduced into the regime "thwarts Parliament's intention and policy choices" in significant ways and upset "the carefully crafted structure of the Act".[79] This IAD simply failed to address this.

Section 34 and its subsections

79. Section 34 is located under the "security" heading and the subsections of the provision provide a person will be "inadmissible on security grounds" for the following:

> (a) engaging in an act of **espionage** that is against Canada or that is contrary to Canada's interests;
>
> (b) engaging in or instigating the **subversion by force of any government**;
>
> (b.1) engaging in an act of **subversion against a democratic government**, institution or process as they are understood in Canada;
>
> (c) engaging in **terrorism**;
>
> (d) being a **danger to the security** of Canada;
>
> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (f) **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), (b), (b.1) or (c).

80. The IAD's inclusion of a broad subset of common criminality stands out from the threats to state security contemplated by the other subsections of s. 34, and does not sit comfortably within the provision. In statutory interpretation, "[t]he meaning of a term is revealed by its association with other terms." The "immediate context" of the words helps to reveal the meaning in dispute: "when two or more words linked by 'and' or 'or' serve an analogous grammatical and logical function within a provision, they should be interpreted with a view to their common features."[80] This was a key point in ID Member McPhalen's decision – that all the other subsections "deal with matters that threaten the state or governments… It is only logical that the focus of s. 34(1)(e) must be security like the rest of the subsection". ID Member

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[79] *Mason FC, supra* note 11 at paras 48-51.
[80] *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at para 30.

King also observed that s. 34(1)(e) "must refer to acts that reach the level of seriousness of terrorism, subversion and espionage."[81]

Scheme of Division 4 – Inadmissibility provisions

81. Section 34 is set out in Part I - Division 4 of the *IRPA*, which governs inadmissibility.[82] ID Member King noted s. 34 is positioned "in the same class as inadmissibility for being a prescribed senior official in the service of a government that engages in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity (s. 35(1)(b) and (c), or for being a member of or engaging in organized crime or trafficking in persons, or transnational laundering of money or other proceeds of crime (s. 37(1))."[83]

82. The section 36 'criminal' inadmissibility provision operates differently from sections 34, 35 and 37. An incoherence or absurdity is created where all acts of violence are elevated and treated as the most serious conduct possible under s. 34(1)(e), even though Parliament has taken great care to set nuanced thresholds around how this conduct is captured under s. 36.

83. Section 36 is a carefully tailored provision that provides two specific thresholds denoting what Parliament considers to be a "serious" offence. "Serious criminality" under s. 36(1) is made out where the offence carries a maximum term of imprisonment of 10 years or more under an Act of Parliament or where a person is sentenced to more than 6 months imprisonment.

84. Another important distinction between s. 34 and s. 36 relates to the standard of proof: a person may be found inadmissible for engaging in an act under s. 34(1)(e) which there are "reasonable grounds to believe have occurred, are occurring or may occur." It can therefore relate to possible future events. In contrast, s. 36 requires a conviction for offences in Canada, meaning

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[81] *Mason ID Decision*, *supra* note 8 at para 16; *X (Re)* B6-00722, 2017*, supra* note 10, at paras 72-73

[82] Permanent residents are only subject to the more serious forms of inadmissibility: security (s. 34), war crimes and crimes against humanity (s. 35), serious criminality (s. 36(1)), organized criminality (s. 37), and misrepresentation (s. 40), as well as residency obligations (s. 41). Foreign nationals can also be inadmissible on other grounds that include regular criminality (s. 36(2)), failure to comply with provisions of *IRPA* (s. 41), family member inadmissibility (s. 42), health reasons (s. 38) and financial reasons (s. 39).

[83] *X (Re)* B6-00722, 2017*, supra* note 10, at paras 72-73.

the offence must have already occurred and been proven beyond a reasonable doubt. Parliament decided, however, where the offence took place abroad, no conviction is required ("committing" a qualifying act suffices). It decided then that a higher burden of proof – a balance of probabilities – is required to find a permanent resident inadmissible on this basis.[84]

85. Under s. 36(3)(e) a person also cannot become inadmissible for a youth offence.

86. The *IRPA* also provides many avenues to overcome s. 36 inadmissibility where justified by the passage of time, evidence of rehabilitation, and/or humanitarian and compassionate factors under s. 25 of *IRPA*, including concerns for the best interest of any child affected by the decision. Persons sentenced to less than 6 months imprisonment retain an equitable right of appeal to the IAD. [85]

87. This stands in stark contrast to the sole avenue for relief for persons inadmissible under s. 34 of *IRPA*: through an exemption obtained from the Minister of Public Safety himself under s. 42.1, who must decide whether granting relief is not "contrary to the national interest".[86]

88. The refugee provisions provide still further nuancing thresholds for consequences that flow from s. 36 inadmissibility as compared to s. 34, as discussed further below at paras. 104 to 107.

89. An absurd result is therefore created where all acts of violence are elevated and treated as the most serious conduct possible under *IRPA*, even though Parliament has created a whole criminal scheme where it has explicitly set out a hierarchy for the seriousness of offences through the available sentencing ranges under the *Criminal Code*. This reveals many non-violent offences are actually regarded more seriously by Parliament – for example fraud, theft over $5,000, breaking and entering, and arson, among many other offences. There is no principled reason to elevate every offence involving violence, save where there is a national security element.

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[84] *IRPA*, ss. 33, 36(3)(d).
[85] *IRPA*, ss. 36(3)(b) to (e); ss. 63(3) and 64(2); *IRPR,* ss. 17 and 18. When *IRPA* was enacted, up until 2013, access to the IAD was restricted to persons with sentences over 2 years.
[86] *IRPA*, 42.1(1).

90. An absurd result is also created when considering the extent of the types of conduct captured under s. 34(1)(e) by the IAD's interpretation, given the lack of any internal limits on the language of the provision. Cases of common assault, that otherwise do not rise to the level of serious criminality and so would not render a permanent resident inadmissible under s. 36(2), become elevated to the most serious type of conduct for inadmissibility purposes, with the only recourse being through the Minister of Public Safety himself. Without a bounded "security" nexus, *any* act of violence can be captured under s. 34(1)(e) – including common assaults, domestic altercations, bar fights, schoolyard fights – even where no charges are laid, where a conviction is not pursued by Crown, where the charge results only in a peace bond or a conditional or absolute discharge, where the offender was a youth, and even where they are found not criminally responsible by reason of a mental disorder or acquitted.

91. An interpretation that causes unjust or unreasonable consequences is considered absurd, and decision makers ought to favour a plausible alternative that avoids the absurdity.[87] This Court found similar illogicalities introduced by alternate interpretations of s. 36(1) and s. 37 in *B010* and *Tran* respectively to have been instructive of Parliament's intent.[88]

92. In this case, had Mr. Mason been convicted of the underlying charges, he would have faced less serious consequences under s. 36(1) of the *IRPA*, given the broader relief mechanisms available for that inadmissibility. Mr. Mason's establishment in Canada, the hardship he faces abroad, the best interests of his two minor children who will be negatively impacted by his deportation, and rehabilitation factors would be weighed against the seriousness of his conduct by the IAD or in a humanitarian application under s. 25(1). That this is not available following

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[87] *Re Rizzo, supra* note 32 at paras 21, 27, citing Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

[88] In *B010*, *supra* note 42, this was found where the omission of a 'material benefit' in 'people smuggling' captured family members who crossed the border together as refugees. In *Tran*, *supra* note 37, the illogicality was introduced in the manner persons become inadmissible and are denied access to an equitable appeal for a 6 month "term of imprisonment" sentence: where defined as including a conditional sentence order, a less serious 7-month conditional sentence order would be treated more harshly than the more serious sentence of 5 months in jail.

a stay of the criminal charges is an absurd result.

93. It is also difficult to understand how the "national interest" requiring the personal attention of the Minister of Public Safety is needed in cases of common criminality, including this case. It is understandable that the Minister's personal attention is needed for cases with allegations of terrorism, subversion of governments, war crimes, and organized crime. Parliament could not however have intended for a large percentage of cases going through the criminal courts, where peace bonds are issued and charges are stayed or dismissed, to wind up on the Minister's desk under s. 42.1, rather than be assessed in a regular rehabilitation or humanitarian application.

Analysis of the lower Courts and Tribunals

94. The only element of this scheme that the IAD considered was that Parliament could have chosen to make persons inadmissible for *conduct* in Canada under s. 34 while distinguishing s. 36 as requiring a *conviction* because the sections are described in different terms.[89] Yet either interpretation, with or without a national security nexus, stood to capture both convicted and unconvicted conduct. The IAD missed the relevant point. It wholly failed to consider the illogicalities wrought in the admissibility scheme in considering the scope of conduct Parliament intended the provision to capture. The FCA's "lay of the land analysis" also misunderstood the Federal Court's analysis on this point where it stated the Court was mistaken in finding s. 34 would capture "essentially the same" conduct captured by section 36.[90] The FC's findings were much more nuanced than that.[91]

95. The IAD's holding that it is not contrary to Canadian values or our history as a democracy to make someone inadmissible for conduct that did not result in a conviction was fundamentally problematic. The Federal Court appropriately observed it was "puzzled by this argument. It is not based on a recognized method of statutory interpretation… If we push this logic to its conclusion, it would mean that a decision maker may disregard legislation as long as it does so in a manner that does not offend Canadian values. This, obviously, would be incompatible with the rule of law."[92] The FCA criticized the FC for failing to recognize this approach came from

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[89] *Mason IAD Decision*, *supra* note 12, para 30 to 36.
[90] *Mason FCA*, *supra* note 3 at para 63.
[91] *Mason FC*, *supra* note 2, at paras 49- 50.
[92] *Mason FC*, *ibid*, at para 91.

this Court's decision in *Agraira*. However, in *Agraira* this Court endorsed adopting interpretations *consistent* with Canadian values, not simply because they do not violate them.[93]

96. Finally, the IAD and the FCA sought to justify their decisions by observing their interpretation would cover only a "small subset of what would be considered serious criminality in section 36."[94] This ignores the full scope of conduct that *would* be captured: the plain language, without regard to its opening "security grounds" text, is expansive. As the Federal Court observed, "There are few internal limits to the [vast] range of conduct covered … Moreover, the ID rejected the idea that there is an implicit requirement of seriousness in the wording."[95] The FCA's decision to import its own arbitrary limiting language into s. 34(1)(e) implicitly acknowledged this problem but does not constitute a proper solution. This need to buttress the IAD instead supported overturning the decision and weighed in favour of finding the word "security" to have meaning that bounded the interpretation, as found by the ID Members.[96]

97. Like trial court judges, ID Members King and McPhalen were best placed as the first instance admissibility decision makers to understand how frequently people are arrested for allegations of violence, including those that do not result in charges, or that receive peace bonds, stays of proceedings, discharges, or youth sentences. The IAD sees only a fraction of the cases, given the very restrictive rights of appeal.[97] Beyond admissibility hearings, the ID also hears all immigration detention reviews, unlike the IAD, and so regularly considers public safety and security in the context of those proceedings.[98] The FCA's decision to fasten its own arbitrary language into the definition of s. 34(1)(e) implicitly acknowledges this problem but does not

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[93] In *Agraira v Canada (MPSEP)*, 2013 SCC 36, [2013] 2 SCR 559 ["*Agraira*"], this Court was also seeking to interpret "national interest", whose plain meaning it found incorporates preservation of *Charter* values, democratic principles, and equal rights.

[94] *Mason FCA*, *supra* note 3 at paras 55, 63-64; *Mason IAD Decision*, *supra* note 12 at paras 33, 36.
[95] *Mason FC*, *supra* note 2 at paras 49, 50; see also *Dleiow ID Decision*, *supra* note 15.
[96] As the Court in *Vavilov*, *supra* note 3, at paras 31, 93, 119 found, "judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons."

[97] *IRPA*, *supra* note 11, ss. 63(5) and 64.
[98] Member McPhalen was notably also the first-instance decision maker in *B010*, supra note 42. He explicitly sought to apply the guidance he received from this Court to his decision in *Mason*.

constitute a proper solution, as discussed above.

v. Importance of interpreting s. 34(1)(e) in line with Canada's international obligations

98. The FCA erred in refusing to consider how Canada's international obligations inform the proper interpretation of s. 34(1)(e) because this was a "new issue" and "background documents and other instruments needed to understand any international obligations are not in evidence before us."[99] The *Refugee Convention* was an important consideration in Member King's 2017 ID decision that was referred to throughout counsel's submissions and was placed before the IAD.[100] More importantly, the *Refugee Convention* is a critical constraint on the *IRPA*, which does not constitute evidence, but rather forms part of Canadian law.

99. That a Court would require secondary source material for it to consider and apply the *Refugee Convention* is an unreasonable dereliction of the Court's inherent duty to interpret and apply laws. It is well established that domestic legislation is presumed to comply with Canada's international obligations and must be interpreted, to the extent possible, in a manner that reflects international law principles.[101] In *Vavilov,* this Court stated international law can act as an "important constraint" on the reasonable exercise of administrative decision-making powers. [102]

100. Section 3(3)(f) expressly requires *IRPA* "be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory," which includes the *Refugee Convention*. In *B010* this Court noted the clear contextual significance of international law to interpreting provisions of *IRPA* with refugee protection aspects, which have been enacted with a view towards discharging Canada's obligations under the *Refugee Convention* – which applies to the serious inadmissibility provisions.[103]

101. This is significant because the IAD's overbroad definition of "engaging in acts of violence"

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[99] *Mason FCA, supra* note 2 at paras 73, 74.
[100] *X (Re)* B6-00722, 2017*, supra* note 10 at paras 48-54, 63, 73; Response Submission of Mr. Mason to the ID (Mason), AR Vol. II, Tab 13, p. 11.
[101] *B010*, *supra* note 42, at para. 47 – 49; *R v Hape*, 2007 SCC 26 at para 36*; Vavilov*, *supra* note 3, at para 182.
[102] *Vavilov*, *supra* note 3, at para 114.
[103] *B010*, *supra* note 42; *IRPA,* s. 3(3)(f).

results in a substantial unintended violation of Canada's *non-refoulement* obligations by allowing refugees to be deported to persecution without proper basis under the *Convention*. The IAD also wholly failed to consider this element.

102. The principle of *non-refoulement* is enshrined under Article 33 of the *Refugee Convention* and forms part of customary international law. It bars the expulsion or return of a refugee, by any means, to any country where they are at risk of persecution, unless they are a found to pose danger to the security of the host country *or* are convicted of a serious crime, as follows:

> **Prohibition of expulsion or return ("refoulement")**
>
> 1. No 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.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[104]

103. This principle automatically forms part of Canadian law absent express derogation and is expressly incorporated into the *IRPA* at s. 115. The *Refugee Convention* Introductory Note goes further in stating that because it is "so fundamental", "no reservations or derogations may be made to it".[105] The *Convention* contemplates refugee status as declaratory, which means a person is considered a refugee because of their circumstances, not because a tribunal has found them to be so – this principle therefore captures both claimants and protected persons.

Scheme of IRPA's Refugee and Inadmissibility Provisions

104. A person can be deported to persecution once found inadmissible under s. 34(1)(e). This consequence flows automatically under *IRPA* without a finding that the person poses a danger to the security of Canada or has been convicted of a serious offence. Persons become ineligible

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[104] *Refugee Convention, supra* note 1, Article 33 at p. 30.

[105] *Refugee Convention*, *ibid*, at p. 3, Introductory Note: This right of persons "to seek and to enjoy in other countries asylum from persecution" is also provided for in Art. 14 of the *Universal Declaration of Human Rights*, (1948), G.A. Res. 217 A (III), U.N. Doc to which Canada is a signatory and which the *Refugee Convention* "builds" on: *B010*, *supra* note 42 at para 49.

to make a refugee claim and are precluded from having their s. 96 risk of persecution assessed in the Pre-Removal Risk Assessment ("PRRA") application that is then provided to assess their risks. Only s. 97 risks to life, risk of cruel and unusual treatment or punishment, or danger of torture is assessed, and that risk is then balanced against the danger posed to the security of Canada in a decision on whether they will be removed.[106]

105. It is only at the inadmissibility stage that the danger to national 'security' element can be found, through a proper interpretation of s. 34(1)(e) that incorporates this nexus.

106. In comparison, section 36 of *IRPA* sets thresholds with a view to the contours of the first *non-refoulement* exception: it requires a final conviction and sets thresholds for what Parliament considers to be a "serious" offence – where the offence is punishable by a term of imprisonment of 10 years or more. Otherwise, they retain access to the refugee claim process.[107] The limiting PRRA provisions go further in providing a conviction must have resulted in an actual term of imprisonment of 2 years or more for a person to be deportable with no assessment of s. 96 risk of persecution.[108]

107. The IAD's overbroad interpretation undoes Canada's otherwise tailored compliance with *both* allowable exceptions to *non-refoulement* by allowing deportation to persecution where there is no national security nexus, *and* where there is no conviction and the offence does not meet the threshold Parliament has legislated as being "serious."

108. As the Supreme Court cautioned in *Suresh* in a manner that is equally applicable here and was cited in ID Member King's decision: "the government's suggested reading … effectively does an end-run around the requirement in Article 33(2) of the *Refugee Convention* that no one may be returned (*refoulé*) as a danger to the community of the country unless he has first been

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[106] See *IRPA*, ss. 101(1)(f), 112(3)(a), and 113(d).

[107] See *IRPA,* s. 101(1)(f). The s. 36 provisions for overseas conduct are similarly compliant: Persons retain access to the refugee claim process if inadmissible under s. 36(1)(c) for overseas criminal conduct alone, and the exclusion framework is considered per Article 1F of the *Refugee Convention*. If inadmissible based on an overseas conviction under s. 36(1)(b), and not excluded under Article 1F, they will still have their risk of persecution assessed: ss. 101(2) and 113(e).

[108] See *IRPA,* s. 113(e).

convicted by a final judgment of a particularly serious crime."[109]

109. Inadmissible individuals also become permanently barred from obtaining protected status, even where found to face s. 97 risk and not to pose a danger to security of Canada.[110] In these circumstances, the individual can remain in Canada under a stay of removal that can be reassessed and cancelled any time in the future. This deprives them of their right to naturalization under Article 34 of the *Refugee Convention* and to family unity under Articles 17 and 23 of the *International Covenant on Civil and Political Rights*.[111] Without status they are precluded from sponsoring spouses or children overseas.[112] These persons are left to live in limbo, unless the Minister finds it is in the natural interest to grant them status.

110. In *B010*, this Court held that "to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law."[113]

Relevance of Ministerial Relief

111. A Ministerial relief application under s. 42.1 of *IRPA* is insufficient to overcome these violations and ensure Canada's compliance with its international obligations, as was found by this Court in *B010.* The availability of this application does not establish that Parliament intended a sweepingly broad interpretation of s. 34(1)(e).

112. The Ministerial relief application reverses the onus: rather than requiring that the state establish that a person is a danger to national security, it requires the applicant prove they are not a danger and that it is in the "national interest" to approve their application, without any disclosure or notice of the case to meet. The application also does not stay the removal of an applicant. An individual who is caught by an overly broad definition of committing violent acts is therefore at a very real risk of being removed prior to a decision being made, given that the merits of the case need not actually be assessed prior to removal.

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[109] *X (Re)* B6-00722, 2017, *supra* note 10 at para 84.
[110] See *IRPA,* ss. 112(3) and 114.
[111] *Refugee Convention* supra note 1, at p. 30; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, UN Treaty Series, vol. 999, p. 171.
[112] *IRPA,* s. 12(1).
[113] *B010*, *supra* note 42, at para 47.

113. The Minister has also notably rendered relief under s. 42.1 largely illusory by failing to decide requests for relief in a timely manner. Mr. Mason made an application under s. 42.1 in October 2016 and the request is still pending. Given past processing times and the number of pending applications, it could be a decade or more before a decision on relief is made.[114]

vi. Departure from long-standing past practice and prior administrative decisions

114. The IAD and the FCA also ignored the historical context of s. 34(1)(e) and failed to give any reasons to explain the marked departure from long-standing past practice and past decisions applying the provision. The IAD bore the "justificatory burden of explaining that departure in its reasons" and its failure to do so made its decision unreasonable, as set out in *Vavilov*.[115]

115. Although the provision has existed since 1976, it had only ever been applied in cases with a national security element: Mr. Al Yamani, with the Popular Front for the Liberation of Palestine; Mr. Singh, with the International Sikh Youth Federation (both now designated terrorist organizations); and Mr. Moumdjian in connection with the Armenian Secret Army for the Liberation of Armenia.[116]

116. The notion that s. 34(1)(e) ought to be interpreted to extend to acts of common criminality was raised for the first time by a representative of the Minister in 2016 – 40 years after the provision was first enacted – in *X (Re)* B6-00722, 2017, and rejected. The Minister did not appeal ID Member King's decision finding the provision requires a national security nexus. Member King considered the historical use and prior reported decisions of the predecessor provision in detail. She remarked that historically, this provision had only been interpreted and applied in the context of national security, and this confirmed the provision intended to capture

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[114] See *Stables v Canada (MCI)*, 2011 FC 1319: since *IRPA* was enacted in 2002, 246 applications had been submitted for persons inadmissible under s. 34. Only 24 had been granted and 223 remained pending. See also for example *Canada (PSEP) v Najafi,* 2019 FC 59 at para 45, where the application was noted to be pending for over 15 years.

[115] *Vavilov*, *supra* note 3, at paras 112, 129-131.

[116] *Al Yamani v Canada (Solicitor General)*, 1995 CanLII 3553 (FC), [1996] 1 FC 174; *Moumdjian v Canada (Security Intelligence Review Committee)*, 1999 CanLII 9364 (FCA), [1999] FC 624 (*obiter*); *Singh v Canada (MCI)* cited in *X (Re)* B6-00722, 2017, *supra* note 10.

only conduct that showed the person was a "threat to the security of Canada."[117] In all prior decisions, the individual was alleged to pose a risk of committing future violent terrorist-type acts and so inherently posed a danger to national security.[118] This shows the longstanding practice of immigration officers was to apply this provision only in the context of national security. Member King's decision was not mentioned by the IAD.

117. Apart from Member King's decision, the meaning of s. 34(1)(e) had only been remarked on in passing in case law, in *obiter*.[119] Cases cited by the IAD did not even mention the provision.[120]

118. The ramifications of a drastic departure from past practice are significant, considering the many unintended or unanticipated impacts it can have. For example, in *Wong* this Court found an individual's decision to enter a guilty plea must be properly informed with respect to the immigration consequences that will flow from that decision.[121] The IAD's interpretation of 34(1)(e) may have unintended consequences for purposes of the need for an informed guilty plea. This went entirely unremarked upon by both the IAD and the FCA, making it unclear whether the impact of this expansive new interpretation was carefully considered.

vii. Statements of Parliamentary intent in Hansard

119. The historical legislative context at the time of the provision's enactment also supports maintaining the interpretation that has guided the use of s. 34(1)(e) for the past 40 years.[122]

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[117] *X (Re)* B6-00722, 2017, *supra* note 10 at paras 53-68.
[118] *Ibid* at paras 56, 60, 64, 67.
[119] For example, see *Agraira, supra* note 94, *Suresh*, *supra* note 44, and *Kamel v Canada (Attorney General),* 2013 FCA 103.
[120] See *Mason IAD Decision*, *supra* note 12, at para. 28 citing *El Werfalli v Canada (PSEP),* 2013 FC 612 and *Fuentes, Fuentes v. Canada (MCI),* 2003 FCT 379, [2003] 4 FC 249. Note where the IAD relied on *Fuentes*, it did so based on confused logic: it understood a passage to be referring to s. 34 alone (where it referenced "subversion, terrorism, crimes against humanity, war crimes and ordinary crimes"). It took this to indicate that s. 34(1)(e) was also intended to capture ordinary crimes. In fact, the passage referred to *all* the ss. 34 to 37 predecessor admissibility provisions, which were all listed under one section of the *Immigration Act,* s. 19.
[121] *Wong*, *supra* note 37.
[122] *Re Rizzo, supra* note 32 at para 35.

The predecessor provision was enacted just before the Olympics were held in Montreal in 1976.[123] At that time, Parliament expressed concern in legislative debates about being able to "facilitate the exclusion from Canada of persons who might engage in violent criminal activity in this country", i.e. "suspected terrorists". Importantly, this provision also preceded the inadmissibility provision for "terrorism", which was not added until 1992, indicating it was intended to capture a similar type of conduct before the meaning of this term had fully crystalized in public discourse or law.[124]

120. In 1976, the Government was seeking to give itself the necessary tools to respond to forward-looking security risks if it had "satisfactory evidence of the dangers they might present to this country" to prevent attacks like those in Munich during the 1972 Olympics:[125]

> [**Mr. Andras**]: This bill is significant, although it is a short and temporary measure, and if approved it will facilitate the exclusion from Canada of persons who might engage in violence criminal activity in this country….
>
> As some hon. members already know, this bill was prepared primarily to enable my department to deal more effectively with potential threats related to the forthcoming Olympic Games in 1976… This bill simply gives me the power to turn people away at the border where we have, in my opinion, satisfactory evidence of the dangers they might present to this country.
> ..
> **Mr. Lachance:** The minister said there was no doubt in his mind that the powers Bill C-85 gives him were absolutely necessary to fight possible abuses that could occur during the 1976 Olympic Games in Montreal if known terrorists had access to the olympic site, for example via the US-Canada border which is relatively easy to cross. [126]

121. The Government therefore enacted this provision which, at the time, captured persons who there are reasonable grounds to believe "will" engage in acts of violence and included members

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[123] *An Act Re Immigration Security*, 1976, c. 91, s. 2; *Immigration Act,* 1976, c. 52*,* s. 19(1)(g).
[124] *Immigration Act*, RSC 1985, c 12 [am. 1992, c. 49, s. 11(2)], s. 19(1)(e)(ii), (f)(ii), (iii)(B).
[125] Hansards House of Commons, 30th Parliament, 1st Session: Volume 11: February 26, 1976, Temporary Immigration Security Act Bill C-85 1976 - *Measure to provide for the deportation of undesirable aliens*, pp. 11281-11290.
[126] *Ibid*.

of organizations who may engage in violence (as the terrorism provision now captures).[127]

122. The government's concern at the time was its ability to identify and respond to forward-looking security risks because "international terrorists can strike anywhere with lightning speed." Their intention was to capture "persons intending to carry out such acts against representatives of governments other than democratic governments or even against individuals without political motivation" that the other admissibility provisions may not capture.[128]

123. This demonstrates the provision was therefore actually broadly worded to intentionally create overlap with the other inadmissibility provisions, to avoid gaps that may otherwise exist. At the time an admissibility provision also existed that captured persons who may commit an indictable offence, which certainly overlaps with this provision. This historical context therefore renders nugatory the suggestion by the IAD that Parliament would not have intended to create redundancy or overlap in the inadmissibility provisions, for example between ss. 34(d) and (e), where persons are "a danger to the security of Canada".[129] Overlap within the s.

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[127] *Immigration Act,* 1976, s. 19(1)(g), *supra* note 124: Persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;

[128] *Hansard*, *supra* note 129: *"*Mr. Jake Epp (Provencher)…it is my view and the view of my party that it is incumbent on all of us to co-operate in every way with the government to enable our security officials in the RCMP, in the Department of Manpower and Immigration and in the armed forces to prevent an incident such as that which occurred in Munich during the 1972 Olympics. … We all know that international terrorists can strike anywhere with lightning speed.… Mr. Andras: In addition, not all those who pose a threat are covered by the existing prohibitions of the Immigration Act. Persons who might engage in violent activity directed against democratic states or governments are quite clearly prohibited, but there is no clear prohibition against the admission of persons intending to carry out such acts against representatives of governments other than democratic governments or even against individuals without political motivation."

[129] *Mason IAD Decision*, *supra* note 12 at para 23. The other subsections of s. 34 also demonstrate considerable overlap: A person who engaged in a terrorist attack in Canada would be inadmissible under multiple subsections of s. 34. It is difficult to understand how someone could be inadmissible under s. 34(1)(a) for engaging in espionage against Canada without also posing a danger to the security of Canada under s. 34(1)(d). Anyone who had engaged in terrorism would also be a danger to the security of Canada under s. 34(1)(d). In fact, much of s. 34 appears to be specific examples of inadmissibility under s. 34(1)(d).

34 sub-provisions simply arose organically through the history of legislative amendments to the admissibility provisions over time.[130]

124. The inadmissibility provision for terrorism, which is now set out at s. 34(1)(c) of *IRPA*, was not added until 1992. This is a further telling indicator that s. 34(1)(e) was intended to capture terrorist-like conduct at a time when terrorism as a legal concept had not fully crystalized. When the terrorism provision was added, it made sense for s. 34(1)(e) to be kept to capture overlapping conduct and avoid definitional gaps in conduct that may not be captured as 'terrorism,' given its open-ended definition at the time.

125. In *Suresh* in 2002, this Court called defining terrorism a "notoriously difficult endeavour" and commented that "one searches in vain for an authoritative definition of 'terrorism' – IRPA does not define it and there is no one definition accepted internationally." It ultimately defined it as follows: "Any…act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in ... armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[131]

126. Given that terrorism has since been found to capture violent conduct, the purpose of which is to intimidate or compel government action, s. 34(1)(e) can be understood to capture equally serious acts of violence, that create national security concerns.

127. When the provision was adopted in 2002, s. 33 expanded the temporal nature of all provisions to cover past, present and future acts, allowing for further overlap. It is unclear that Parliament turned its mind any further to the meaning and scope of this provision at that time. A review of Hansard records and reports disclosed no commentary on this specific provision, which indicates no further intended purpose or scope beyond its original historical one.

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[130] *Immigration Act,* s. 19(k), *supra* note 125, previously sought to avoid some overlap when amended in 1992, where it provided that inadmissibility for being 'a danger to the security of Canada' (now, s. 34(1)(d)) did not capture conduct captured by other sub-provisions, however that provision was not retained in *IRPA*, further signalling Parliament was broadly allowing for overlap.

[131] *Suresh*, *supra* note 44 at paras 93, 94, 96 [emphasis added].

viii. Purposive Interpretation of Parliament's Intention

128. The Minister has argued that a "broad and unrestricted" interpretation should be given to s. 34(1)(e). However, it is notable that the Minister when taking this approach omits: the courts have consistently referred to the gravity of national security concerns in endorsing broad interpretations of membership in terrorist groups or criminal organizations.[132] This approach also has as it limits the *actual* intention of Parliament.

129. As the Federal Court also aptly observed: "Statutes often strike a balance between various competing purposes. This is especially so with the Act – section 3 lists no less than nineteen different purposes that it seeks to achieve. Thus, the invocation of a statute's purpose does not override a careful examination of its internal logic. Indeed, in *Medovarski*, the main basis of the Court's decision is a detailed analysis of the wording of the relevant provisions and the manner in which they interacted with one another."[133] This Court also observed in *Tran* that *IRPA*'s security objectives involve balancing the need for outlining obligations of permanent residents with other objectives that aim to permit Canada to obtain the benefits of immigration.[134]

130. There is no sound purpose for expanding the use of s. 34(1)(e) in the manner argued by a single CBSA Minister's counsel seeking to expand the scope of the provision 40 years after it was enacted. If Parliament saw a gap that it needed to fill in 2022, it could enact a new provision that is clearly tailored to this new purpose.

iv. Conclusion

131. Ultimately, Mr. Mason faced charges for what is on its face serious unexceptional criminality that is addressed by Canada's criminal laws. Those charges were stayed and he was never convicted. However, unlike in prior s. 34(1)(e) cases, this case had no national security aspects. Our immigration law does not create inadmissibility for common criminal conduct in Canada that does not result in a conviction, and there are very sound reasons for that choice on the part of Parliament grounded in principles underlying s. 11(d) of the *Charter* and international law. The exceptions to those principles set out at ss. 34, 35 and 37 all engage the

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[132] *Medovarski v Canada (MCI)*, 2005 SCC 51, at para 10. *Tran*, *supra* note 37, at para 40.
[133] *Mason FC*, *supra* note 2, at para 49.
[134] *Tran*, *supra* note 37 at paras 40-42.

national security of Canada either directly or through broader implications for global security. Common criminality like that alleged in the present case, regardless of the apparent gravity, does not rise to the level of engaging national security as that term is understood in Canadian law and is therefore not, and has never been, caught by s. 34(1)(e) of IRPA.

PART IV – SUBMISSIONS AS TO COSTS

132. The Appellant does not seek costs and asks that no costs be awarded against him.

PART V – NATURE OF THE ORDER SOUGHT

133. The Appellant requests the appeal be allowed and the decision of the IAD be quashed with the effect of restoring the ID decision per s. 45 of the *Supreme Court Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Vancouver, in the Province of British Columbia, this 30th day of May 2022.

Erica Olmstead
Molly Joeck
Aidan Campbell

PART VI – TABLE OF AUTHORITIES

DOCUMENT	PARAGRAPHS
Statutes	
An Act Respecting Immigration Security, 1976, c. 91, s. 2	76
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Baker v Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC) [1999] 2 SCR 817	70

Other Sources	
Brouwer, Andrew, "Statelessness in Canadian Context: A Discussion Paper" (UNHCR, 2003).	68
CBSA, Removal from Canada, accessed May 29, 2022, online at: <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>	69
P. Daly, "Certified Questions, References and Reasonableness: *Canada (CI) v Galindo Camayo*, 2022 FCA 50", April 8, 2022, online at <https://www.administrativelawmatters.com>	53
Hansards House of Commons, 30th Parliament, 1st Session: Volume 11: February 26, 1976, Temporary Immigration Security Act Bill C-85 1976 – *Measure to provide for the deportation of undesirable aliens*, pp. 11281-11290.	120-122