Federal Court  Cour fédérale

Date: 20251010

Docket: IMM-5365-24

Citation: 2025 FC 1682

Ottawa, Ontario, October 10, 2025

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ABDELSAKHI ABBAS ADESAKHI ALI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mr. Ali was declared inadmissible by the Immigration Division [ID] of the Immigration and Refugee Board because he was a member of a political party that engaged in acts of subversion against a democratic government, institution or process in his country of origin. He is now seeking judicial review of the ID's decision mainly because the ID failed to consider whether his removal was consistent with the principle of *non-refoulement* set out in Article 33 of the *Convention Relating to the Status of Refugees*, TS Can 1969 No 6 [the Convention]. He is

relying on *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*], in which the Supreme Court of Canada stated that the ID must necessarily consider the constraints stemming from international law, including the principle of *non-refoulement*, before making a finding of inadmissibility.

[2] I allow his application because the ID did not consider the issue that the Supreme Court required it to address. In this case, the only relevant exception to the principle of *non-refoulement* is the danger posed by the person concerned to the security of the host country. Given the broad scope the pre-*Mason* case law confers on section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], there is no guarantee that a person in Mr. Ali's situation would be declared inadmissible only if that person poses a danger to the security of Canada.

I. Background

[3] Mr. Ali is a citizen of Sudan. He was a member of the National Congress Party [NCP], which was the party in power at the time, led by General al-Bashir. He held important political positions, including as a member of the legislative council of the state of Khartoum from 2010 to 2015, then, starting in 2015, as a member of the national parliament. He alleges, however, that in December 2016 he was interviewed on the radio and expressed his criticism of the direction the government was taking. This cost him his position within the party, even though he kept his seat in parliament until 2019, when a coup d'état toppled General al-Bashir's government.

[4] Mr. Ali then came to Canada and claimed refugee protection. His claim was suspended, however, so that a hearing before the ID could be held to determine whether he was inadmissible under paragraphs 34(1)(b.1) and 34(1)(f) of the Act.

[5] The ID found Mr. Ali inadmissible. It noted his admission that he was a member of the NCP. It then reviewed the evidence concerning the conduct of the government formed by the NCP, including during the 2010 and 2015 elections. It found that the NCP, led by General al-Bashir, harassed and arrested political opponents, notably with the help of the state security services, and was involved in various types of electoral fraud. Therefore, the ID found that the NCP was an organization that engaged in "an act of subversion against a democratic government, institution or process" within the meaning of subsection 34(1)(b.1) of the Act.

[6] Mr. Ali is now seeking judicial review of the ID's decision.

II. Analysis

[7] I allow Mr. Ali's application. The ID failed to consider whether Mr. Ali's inadmissibility was consistent with the constraints imposed by international law, specifically, the principle of *non-refoulement* set out in Article 33 of the Convention. In addition, the analytical framework stemming from the pre-*Mason* case law does not guarantee compliance with this principle.

[8] The analysis that follows is structured in three parts. I will begin by giving a general overview of inadmissibility on security grounds, as set out in section 34 of the Act. Then I will broadly summarize how case law has interpreted this provision. This will allow me to show why

the analytical framework stemming from the existing case law does not ensure compliance with the principle of *non-refoulement*.

A. *Inadmissibility on Security Grounds*

[9] Division 4 of Part 1 of the Act provides for a vast array of grounds on which a foreign national or permanent resident may be found inadmissible. Inadmissibility may prevent a person from entering Canada or lead to the person's removal if the person is already in Canada.

[10] Section 34 of the Act, which is at the heart of this case, sets out the circumstances giving rise to inadmissibility "on security grounds". Together with sections 35 and 37, this provision holds a special place in the inadmissibility regime both because of the seriousness of the conduct it covers and because of the consequences resulting from it.

[11] Indeed, pursuant to paragraphs 101(1)(f) and 103(1)(a) of the Act, a person found inadmissible under section 34 cannot claim refugee protection. If the person has already claimed refugee protection, the claim is suspended to allow the ID to hear the matter. Pursuant to section 104, a finding of inadmissibility terminates the refugee protection claim.

[12] In addition, through the combined effect of paragraphs 112(3)(a) and 113(d) of the Act, a person described in section 34 can seek only a "restricted" pre-removal risk assessment [PRRA], which means that only the grounds for protection set out in section 97 of the Act—a risk to their life, a danger of torture or a risk of cruel and unusual treatment or punishment—are examined.

The grounds for protection set out in section 96, which are based on the definition of Convention refugee, are not considered.

[13] The full text of subsection 34(1) of the Act reads as follows:

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 :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	**a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	**b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	**c)** se livrer au terrorisme;
(d) being a danger to the security of Canada;	**d)** constituer un danger pour la sécurité du Canada;
(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;
(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).	**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

[14] The introductory paragraph specifies that the inadmissibility resulting from this provision is linked to security grounds. In addition, paragraph 34(1)(d) explicitly provides that a person who is a danger to the security of Canada is inadmissible. Paragraphs 34(1)(a) to 34(1)(c) and 34(1)(e) list various wrongful acts all of which have a nexus to the security of Canada: *Mason* at paragraph 121.

[15] However, the person concerned does not need to have personally committed one of the wrongful acts listed to be found inadmissible. Paragraph 34(1)(f) provides that it is sufficient to be a member of an organization that commits such acts. I will address the interpretation of paragraph 34(1)(f) below.

[16] Moreover, section 34 must be applied in light of the preceding provision, section 33, which provides that the wrongful acts "include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur".

[17] Generally speaking, the pre-*Mason* case law interpreted section 34 broadly. See, for example, *Qu v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399 at paragraphs 33 and 36, [2002] 3 FC 3; *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 at paragraphs 78–82, [2015] 4 FCR 162 [*Najafi*].

[18] Interpreting the ground for inadmissibility set out in paragraph 34(1)(f) has proven particularly difficult. Conceptually, applying this provision requires three separate operations: first, an organization must be defined, then it must be found responsible for a wrongful act, and

then, the person concerned must be found to be a member of the organization. The Federal Court of Appeal and this Court have commented on each of these three components. Their comments can be summarized as follows:

- *Defining the organization*: There appear to be few limits regarding what can be considered an organization: *Najafi* at paragraphs 98–108. In practice, the ID has applied section 34 to large organizations like a political party or a country's army: see, for example, *Zahw v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 934. In some cases, two organizations can be sufficiently connected such that being a member of one is equivalent to being a member of the other: *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86, [2016] 1 FCR 428 [*Kanagendren*]. When organizations are intertwined, have internal divisions or have transformed over time, there are no clear guidelines to narrow down the relevant organization for the purposes of section 34: see, for example, *Lapaix v Canada (Citizenship and Immigration)*, 2025 FC 111 [*Lapaix*].

- *Responsibility of the organization*: When the wrongful acts were ordered by the leaders of the organization, the latter's accountability is not in doubt: see, for example, *Nanan v Canada (Public Safety and Emergency Preparedness)*, 2025 FC 138 at paragraphs 45–46. However, when the acts were committed by members of the organization acting in isolation, the situation must be examined as a whole to determine whether those acts can be attributed to the organization: *MN v Canada (Citizenship and Immigration)*, 2019 FC 796; *Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404.

- *Membership in the organization*: The concept of being a "member" of an organization must be interpreted broadly and includes formal and informal membership: *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paragraphs 27–29,

[2005] 3 FCR 487 [*Poshteh*]. This concept does not require the individual to be complicit or to have made a significant contribution to the wrongful acts committed by the organization: *Kanagendren* at paragraphs 12–28. To determine whether a person is a member of an organization, "three criteria that should be considered include the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organization's goals and objectives": *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at paragraph 29. In addition, the period when the person was a member of the organization does not have to coincide with the timing of the wrongful acts: *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274; *Najafi* at paragraph 101.

[19] The case law concerning section 34 rarely deals with the issue of consistency with the Convention and with the principle of *non-refoulement*. The Federal Court of Appeal has acknowledged that the scope of section 34 was broad, but asserted that this was justified, among other things, by the Minister's discretion to grant exemptions on a case-by-case basis pursuant to section 42.1: *Poshteh* at paragraph 28; *Najafi* at paragraph 80; *Kanagendren* at paragraph 26.

B. *The Teachings of Mason*

[20] The decision of the Supreme Court of Canada in *Mason* signalled a major change with respect to the role of the Convention and the principle of *non-refoulement* in the interpretation of section 34. The Court underscored the presumption that statutes must be interpreted in a manner consistent with international law. It noted that this presumption assumed added force with respect to the Act because paragraph 3(3)(f) of the Act requires it to be construed and applied in

a manner that "complies with international human rights instruments to which Canada is signatory", including the Convention. Most importantly, it required immigration decision makers to consider the Convention and the principle of *non-refoulement* when they interpret and apply the Act, even if the parties do not explicitly raise the issue.

[21] The principle of *non-refoulement* is set out in Article 33 of the Convention, which reads as follows:

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.	1. Aucun des États Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.
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.	2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

[22] The Convention therefore prohibits the *refoulement* of refugees, subject to two specific exceptions. In *Mason*, the Supreme Court found unreasonable an interpretation of section 34 of the Act that resulted in the inadmissibility of a broader category of people than those covered by

the two exceptions. The interpretation adopted by the Immigration Appeal Division [IAD] in that case would have rendered inadmissible any person suspected, but not convicted, of a violent crime committed in Canada. At paragraph 109 of its decision, the Supreme Court explains that this interpretation is contrary to the Convention because it goes beyond the two exceptions of Article 33(2):

> . . . On the IAD's interpretation, a foreign national can be deported to persecution once they are found inadmissible under s. 34(1)(e), without a finding that the person poses a danger to the security of Canada or even if they have not been convicted of a serious offence.

[23] The Supreme Court also considered the possibility that the PRRA or the mechanism set out in section 115 of the Act can act as "safety valves" to prevent a breach of the principle of *non-refoulement*. However, it rejected this argument given that these mechanisms would only apply to a smaller category of people than those covered by the principle of *non-refoulement*: *Mason* at paragraphs 110, 112–114. Although the Court did not explicitly discuss the Minister's discretionary power set out in section 42.1, *a fortiori*, the latter cannot ensure compliance with the principle of *non-refoulement*.

[24] The Federal Court of Appeal applied the teachings of *Mason* in *Canada (Public Safety and Emergency Preparedness) v Weldemariam*, 2024 FCA 69 [*Weldemariam*]. That case dealt with the wrongful act described in paragraph 34(1)(a) of the Act: "espionage that is against Canada or that is contrary to Canada's interests". In that matter, the ID stated that a broad range of "interests" was covered by that provision. At paragraphs 60–61 of its decision, the Federal Court of Appeal explained why such an interpretation was inconsistent with the Convention:

> . . . This interpretation could subject individuals to being deported to persecution once they have been found to be inadmissible under paragraph 34(1)(a) for being engaged in activities that were contrary to Canada's interests, without there ever being a finding that there were reasonable grounds to believe that they pose a danger to the security of Canada. This is because, under this interpretation, the exceptions under Article 33(2) would not apply.
>
> In other words, the ID's interpretation would allow the *refoulement* of persons inadmissible under paragraph 34(1)(a) of IRPA in circumstances that are outside the scope of the Article 33(2) exceptions.

[25] The Federal Court of Appeal therefore found that the only reasonable interpretation of paragraph 34(1)(a) was that "Canada's interests" included only interests with a nexus to national security. It also rejected the idea that the various discretionary remedies ("safety valves") set out in the Act provided adequate protection against *refoulement*: *Weldemariam* at paragraph 50.

C. *Reasonableness of the ID's Decision*

[26] The ID's decision in this case does not address the issue of whether Mr. Ali's removal would be contrary to the principle of *non-refoulement* set out in Article 33 of the Convention. In fairness to the ID member, the hearing took place one month before the Supreme Court rendered its decision in *Mason*, and the parties did not raise this issue before him. However, this does not affect the analysis. As mentioned above, *Mason* requires the ID to examine whether the finding of inadmissibility is consistent with the principle of *non-refoulement*, regardless of whether the parties have raised the issue.

[27] Even though the ID did not assess the danger Mr. Ali personally poses to the security of Canada, one must consider whether the analytical framework adopted by the ID and based on the

pre-*Mason* case law was designed in a manner that guarantees that a person in Mr. Ali's situation would not be removed contrary to the principle of *non-refoulement*. To show that this guarantee is lacking, I will use the methodology that flows from *Mason* and *Weldemariam*, that is, comparing the scope of the conduct giving rise to inadmissibility with the scope of the exceptions to the principle of *non-refoulement* set out in Article 33(2) of the Convention. In other words, the issue is whether the pre-*Mason* case law defined the conduct giving rise to inadmissibility in a manner that exceeds what is likely to pose a danger to the security of Canada.

[28] To make this comparison, certain principles must be kept in mind. It is difficult to define in advance what can pose a danger to the security of Canada: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 85, [2002] 1 SCR 3. Parliament must be given a certain margin of appreciation in this regard. It is also entirely conceivable that mere membership in an organization may in some cases be sufficient to conclude that a person is a danger to the security of Canada.

[29] Moreover, the various components of subsection 34(1) of the Act can be considered as presumptions that the person concerned is a danger to the security of Canada based on the conduct in question. Under Article 33(2) of the Convention, this makes the person lose the benefit of the principle of *non-refoulement*. Only paragraph 34(1)(d) is not a presumption because it explicitly refers to a danger to the security of Canada.

[30] In my view, the pre-*Mason* case law gave section 34 a scope that greatly exceeds that of the exceptions to the principle of *non-refoulement*. This stems from the fact that the

presumptions it sets out are not subject to any clearly defined limits that would ensure a nexus with the security of Canada. This is especially the case for the ground of membership in an organization: *Lapaix* at paragraph 64. As I mentioned above, the organization may have hundreds of thousands of members; it could have renounced its wrongful activities a long time ago, and membership in the organization is defined broadly and flexibly. The concatenation of the broad interpretation of these various concepts, especially if they are assessed independently from one another, results in the inadmissibility of persons who pose no danger to the security of Canada. I also do not exclude that the definition of the wrongful acts—subversion, in this case—may be problematic, even though Mr. Ali did insist on this aspect in his submissions.

[31] This overbreadth stems from the fact that the pre-*Mason* case law defined the main concepts used by section 34 without considering whether the result was consistent with the principle of *non-refoulement*. In other words, the case law never considered whether the presumptions established by section 34 retained a rational link with their object, namely, the danger to the security of Canada: *Mason* at paragraph 121. It also did not require the ID to consider, at the end of its analysis, whether the person it is about to find inadmissible is a danger to the security of Canada. Yet, according to *Mason* and *Weldemariam*, considering this issue is essential to ensure compliance with the principle of *non-refoulement* and to guarantee that the Act is construed and applied in a manner that complies with "international human rights instruments to which Canada is signatory", specifically, the Convention, as required by paragraph 3(3)(f) of the Act. Although *Mason* and *Weldemariam* dealt with specific components of section 34, their underlying reasoning applies to the provision as a whole and even to other

grounds for inadmissibility: *Wahab v Canada (Citizenship and Immigration)*, 2024 FC 1985 at paragraphs 24–26.

[32] To try to avoid these conclusions, the Minister submits that the reasoning put forward in *Mason* and *Weldemariam* applies only if the parties raise an issue of interpretation with respect to section 34, which Mr. Ali did not do before the ID. This argument cannot stand. Subsection 3(3) of the Act specifies that the Act "is to be construed and applied in a manner that … complies with" the Convention [emphasis added]. Although the issue in *Mason* and *Weldemariam* was described in a general and abstract way, there is no reason to think that the principle of *non-refoulement* becomes relevant only when an issue of interpretation can be worded in general terms. In any event, it is not always possible to draw a clear line separating issues of interpretation from issues of application. As I noted above, the breach of the principle of *non-refoulement* in this case stems from both the ID's failure to consider the issue of whether Mr. Ali personally poses a danger to the security of Canada—which relates to applying the Act—and of applying an analytical framework stemming from the case law that is not aligned with the principle of *non-refoulement*—which relates more to interpreting the Act.

[33] The Minister also submits that the presumption of compliance with international law does not apply in this case because the wording of the Act is clear. It is somewhat ironic to claim that wording is clear when a long series of decisions was needed to clarify its scope. In reality, it is the interpretation that the case law gave to section 34 that results in a potential breach of the principle of *non-refoulement*, not some aspect of the wording of the provision that is purportedly "clear". For the same reasons, the Minister's contention that Parliament expressly disregarded

the principle of *non-refoulement* cannot stand. The Minister did not identify any statutory provision that would evince such an intent: *Weldemariam* at paragraph 53.

[34] Lastly, the Minister submitted that the portion of *Mason* that deals with international law was an *obiter dictum*, and is therefore not binding on the lower courts. However, the Federal Court of Appeal rejected that contention in *Weldemariam*, at paragraphs 38–39. Likewise, the Minister submits that the principle of *non-refoulement* is relevant only at the removal stage. However, *Mason* is based on the opposite premise, and the Supreme Court rejected a similar argument in *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at paragraphs 72–73. Once again, the Federal Court of Appeal rejected this contention in *Weldemariam*, at paragraphs 43–44. It is surprising that the Minister is still putting forward these submissions.

[35] *Mason* and *Weldemariam* therefore force the ID (and the IAD) to take measures to prevent section 34 from resulting in the inadmissibility of persons who do not pose a danger to the security of Canada. As the ID in Mr. Ali's case did not do so, its decision is unreasonable.

[36] Mr. Ali takes the matter one step further and argues that, as in *Weldemariam*, there is only one reasonable outcome and the matter should not be remitted to the ID. I disagree. There is more than one reasonable way to apply section 34 while complying with the principle of *non-refoulement*. For example, the ID could decide to reassess the criteria established by the pre-*Mason* case law to set clearer limits for the various concepts used to delineate the scope of section 34. It could also decide to examine on a case-by-case basis whether the person concerned

is a danger to the security of Canada. It will be for the ID to propose a new analytical framework without being bound by the pre-*Mason* case law. This Court could then determine whether that framework is reasonable. At this stage, it is not this Court's role to dictate the outcome of this exercise. It may nonetheless be useful to add the following.

[37] Deciding whether someone poses a danger to the security of Canada is a forward-facing exercise. A criminal proceeding is directed toward the past. It follows that criminal-law concepts, such as the criteria for taking part in an offence, may be useful—but not determinative—in deciding whether a person poses a danger to the security of Canada because of the person's ties to others. To that end, Mr. Ali submitted that the ID should apply the test developed in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, to determine whether a person is a member of an organization. I should not be taken as mandating the approach developed in that decision. It will be for the ID to decide whether the *Ezokola* test is useful for deciding the issue of membership.

III. Conclusion

[38] For these reasons, Mr. Ali's application for judicial review is allowed, and the matter will be remitted back to the ID for redetermination.

[39] At the hearing, I asked the parties whether they wished to propose a question to be certified for the Federal Court of Appeal pursuant to paragraph 74(d) of the Act. The parties replied that they had no questions to submit. In these circumstances, it would not be useful to certify a question.

JUDGMENT in file IMM-5365-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Immigration Division concerning the applicant is set aside.

3. The matter is remitted back to a different member of the Immigration Division for redetermination.

4. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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