

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

B E T W E E N:

**EARL MASON**

**APPELLANT**  
*(Respondent)*

- AND -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**RESPONDENT**  
*(Appellant)*

-AND-

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ASSOCIATION (ONTARIO)**

**INTERVENERS**

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**FACTUM OF THE INTERVENER**

**UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

*Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada, SOR/2002-156*

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## TABLE OF CONTENTS

	<b>Page No.</b>
<b>PART I</b> OVERVIEW AND FACTS	<b>1</b>
<b>PART II</b> POSITION ON QUESTIONS IN ISSUE	<b>1</b>
<b>PART III</b> THE LAW AND ARGUMENT	<b>2</b>
<b>A.</b> The views of UNHCR are persuasive	<b>2</b>
<b>B.1.</b> The human rights purpose of the <i>Refugee Convention</i> determines the overall approach to its application	<b>2</b>
<b>B.2.</b> Fair and efficient refugee determination procedures are essential to the full and inclusive application of the 1951 <i>Refugee Convention</i> .	<b>3</b>
<b>B.3.</b> Admissibility procedures are only appropriate in limited circumstances, subject to minimum procedural safeguards	<b>6</b>
<b>B.4.</b> The Refugee Convention enables States to address security concerns while upholding international protection principles and standards	<b>6</b>
(i) Exceptions to the principle of <i>non-refoulement</i> under Article 33(2)	<b>7</b>
(ii) Exclusion from international refugee protection under Article 1F	<b>9</b>
<b>B.5.</b> Section 34(1)(e) and compliance with the <i>Refugee Convention</i>	<b>9</b>
<b>B.6.</b> State Party obligation to ensure compliance with the <i>Refugee Convention</i> .	<b>10</b>
<b>PART IV</b> STATEMENT ON COSTS	<b>10</b>
<b>PART V</b> ORDER REQUESTED	<b>10</b>
<b>PART VII</b> TABLE OF AUTHORITIES	<b>12</b>

## PART I – OVERVIEW AND FACTS

1. This appeal concerns the interpretation of section 34(1)(e) of the *Immigration and Refugee Protection Act* (“IRPA”)<sup>1</sup>. Individuals found inadmissible under this provision are denied access to Canada’s asylum procedures. Regardless of whether they meet the definition of a refugee under Article 1 of the 1951 *Convention Relating to the Status of Refugees* (“*Refugee Convention*”)<sup>2</sup>, such persons face removal to countries where they fear persecution. The interpretation of section 34(1)(e), in so far as it applies to asylum-seekers or refugees, therefore engages Canada’s obligations under the *Refugee Convention* and in particular the prohibition against *refoulement* contained in Article 33.

2. This appeal also concerns whether Courts will consider compliance with the *Refugee Convention* during review of administrative decisions engaging the rights of refugees and asylum-seekers. The decision from the court below permits reviews to proceed *without any assessment of whether the underlying decisions or laws they address comply with the Refugee Convention*, which may lead to interpretations that are inconsistent with binding international law.

3. UNHCR submits that any interpretation and application of section 34(1)(e) of the *IRPA* that would result in denial of international refugee protection other than that based on the eligibility criteria in Article 1, or on an exception to the *non-refoulement* principle provided for in Article 33(2) of the *Refugee Convention*, would be at variance with Canada’s international obligations. UNHCR further submits that State Party obligations under the *Refugee Convention* should be at the forefront of any decision-making process engaging the rights of asylum-seekers and their access to asylum procedures in Canada, regardless of whether an individual litigant has argued this point before a tribunal at first instance.

4. UNHCR takes no position on the facts of the case or the disposition of the appeal.

## PART II– POSITION ON QUESTIONS IN ISSUE

5. The interpretation and application of Canadian laws impacting the rights of asylum-seekers and refugees in Canada must comply with Canada’s obligations under the *Refugee Convention*.

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<sup>1</sup> [Immigration and Refugee Protection Act](#), SC 2001, c 27, s. 34(1)(e)

<sup>2</sup> UN General Assembly, [Convention Relating to the Status of Refugees](#), 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, (as amended by the [Protocol Relating to the status of Refugees](#), 606 U.N.T.S. 267, Can. T.S. 1969/29 (“1967 Protocol”).

## PART III – ARGUMENT

### A. The views of UNHCR are persuasive

6. The United Nations General Assembly has entrusted UNHCR with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for them. UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.<sup>3</sup> This supervisory responsibility is further reflected in Article 35(1) of the *Refugee Convention* and Article II of the 1967 *Protocol* obliging State Parties to cooperate with UNHCR in the exercise of these functions.<sup>4</sup> Canada is a State Party to both instruments. The views of UNHCR are informed by its seven decades of experience supervising the treaty-based system for refugee protection. This Court<sup>5</sup> and high courts internationally<sup>6</sup> have endorsed the views of UNHCR as highly persuasive in this area of law.

### B.1. The human rights purpose of the *Refugee Convention* determines the overall approach to its application

7. Canada’s obligations under the *Refugee Convention* must inform the proper interpretation of section 34(1)(e) of the *IRPA*.<sup>7</sup>

8. The Preamble to the *Refugee Convention* embeds it within a broader human rights

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<sup>3</sup> [Statute of the Office of the United Nations High Commissioner for Refugees](#), UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, 1950, paras 1 and 8(a).

<sup>4</sup> *Refugee Convention* and 1967 *Protocol*, *supra* note 2.

<sup>5</sup> *Chan v. Canada*, [1995] 3 S.C.R. 593 at paras. 46 and 119; *Canada v. Ward*, [1993] 2 S.C.R. 689 (“Ward”), at pp. 713-714; *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, at paras 35, 76-77.

<sup>6</sup> UK: *Al-Sirri v. SSHD and DD v. SSHD*, [2012] UKSC 54, at para. 36; *R (on the application of EM (Eritrea)) v. SSHD*, [2014] UKSC 12, at paras. 71-72; USA: *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); 107 S. Ct. 1207, at para 28.

<sup>7</sup> *IRPA*, *supra* note 1, s. 3(3)(f). Section 3(3)(f) of the *IRPA* states that the Act is to be construed and applied in a manner that “complies with international human rights instruments to which Canada is signatory.” See also *de Guzman v. Canada*, 2005 FCA 436 at para 87. After citing with approval from this portion of the judgment in *de Guzman*, this Court noted in *B010 v. Canada (MCI)*, [2015] 3 SCR 704 at para. 49 that “There can be no doubt that the *Refugee Convention* is such an instrument.”



framework, grounded in the *Charter of the United Nations* and the *Universal Declaration of Human Rights*.<sup>8</sup> As this Court stated in *Ward*, “[u]nderlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.”<sup>9</sup>

9. In *Pushpanathan v. Canada*, this Court noted “[t]he human rights character of the Convention” and held that “[t]his overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.”<sup>10</sup> In later cases such as *Németh* and *B010*, this Court noted that the *IRPA*, which expressly incorporates certain provisions of the *Refugee Convention*, must be construed and applied in a manner that is consistent with Canada’s obligations under international treaties and principles of international law, including international human rights law.<sup>11</sup>

## **B.2. Fair and efficient refugee determination procedures are essential to the full and inclusive application of the *Refugee Convention***

10. Access to a fair and efficient refugee status determination procedure is an essential safeguard to protect refugees and asylum-seekers from *refoulement*. State Parties to the *Refugee Convention* are required to provide access to such a procedure.<sup>12</sup>

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<sup>8</sup> United Nations, [Charter of the United Nations](#), 24 October 1945, 1 UNTS XVI; UN General Assembly, [Universal Declaration of Human Rights 1948](#), 10 December 1948, 217 A (III); See also the following Executive Committee Conclusions: [No. 82 \(b\) and \(d\)](#); and [No. 85 \(f\) and \(g\)](#). The Executive Committee of the High Commissioner’s Programme (‘ExCom’) adopts Conclusions by consensus of the State members, reflecting their understanding of legal standards regarding the protection of refugees. Canada has been a member since 1957.

<sup>9</sup> *Ward*, *supra* note 5 at p. 733 (e)

<sup>10</sup> *Pushpanathan v. Canada*, [\[1998\] 1 SCR 982](#) (“*Pushpanathan*”) at para. 57. This Court has also repeatedly noted that “[t]he preamble to the *Refugee Convention* highlights the international community’s ‘profound concern for refugees’ and its commitment ‘to assure refugees the widest possible exercise of . . . fundamental rights and freedoms’ and has stressed its “overarching and clear human rights object and purpose”: *Febles v. Canada (MCI)*, [2014 SCC 68](#) at para. 27. See also *Ezokola*, *supra* note 5 at para. 32.

<sup>11</sup> *Németh v. Canada (Minister of Justice)*, [2010 SCC 56](#) (“*Németh*”) at para. 21, 34, 86.; See also *B010*, *supra* note 7 at para 49.

<sup>12</sup> UNHCR [Global Consultations on International Protection/Third Track: Asylum Processes \(Fair and Efficient Asylum Procedures\)](#), 31 May 2001, (“*Fair and Efficient Asylum Procedures*”)

11. The right to seek and enjoy asylum from persecution in another country derives from Article 14(1) of the *Universal Declaration of Human Rights*<sup>13</sup> and is elaborated on in the *Refugee Convention*. Central to the realization of this right is the obligation of States not to expel or return (*refouler*) a person to territories where their life or freedom would be threatened. *Non-refoulement* is a cardinal principle of international refugee law, most prominently expressed in Article 33 of the *Refugee Convention* and recognized as a norm of customary international law.<sup>14</sup> Article 33(1) prohibits States from expelling or returning a refugee *in any manner whatsoever* to a territory where they would be at risk of threats to life or freedom. The *non-refoulement* principle as expressed in Article 33(1)<sup>15</sup> is reflected in jurisprudence applying section 7 of the *Canadian Charter of Rights and Freedoms*, exemplified by this Court's decisions in *Singh v. Canada (MEI)* and *Charkaoui v. Canada (MCI)*.<sup>16</sup>

12. Refugee status is declaratory in nature, meaning that a person is a refugee within the meaning of the *Refugee Convention* as soon as they fulfill the criteria contained in the refugee

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at paras. 5, 8. See also, UNHCR and Inter-Parliamentary Union, [A guide to international refugee protection and building state asylum systems](#), 2017, Handbook for Parliamentarians N° 27, section 7.2, page 154.

<sup>13</sup> *Universal Declaration of Human Rights*, *supra* note 8. Article 14(1) provides that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

<sup>14</sup> See, UNHCR, [Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees](#), 16 January 2002, at para. 4. See also, UNHCR, [Note on the Principle of Non-Refoulement](#), November 1997; Elihu Lauterpacht and Daniel Bethlehem, “[The Scope and Content of the Principle of Non-Refoulement: Opinion](#),” in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), (CUP, 2003), at 140-164 (paras. 193-253); Concurring Opinion of Judge Pinto de Albuquerque in European Court of Human Rights, [Hirsi Jamaa and Others v. Italy](#), Application No. 27765/09, 23 February 2012 (“*Hirsi Jamaa*”), p. 42.

<sup>15</sup> *Refugee Convention*, *supra* note 2: Article 33(1) states: ‘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.’

<sup>16</sup> [Canadian Charter of Rights and Freedoms](#), s. 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982. C 11, s. 7; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 47; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 14

definition.<sup>17</sup> Thus, the prohibition against *refoulement* applies to all refugees, including those who have not formally been recognized as such, which includes asylum-seekers whose status has not yet been determined.<sup>18</sup> Accordingly, States are obliged not to return or expel an asylum-seeker to their country of origin pending a final determination of refugee status. As was recently explained by the Supreme Court of the United Kingdom:

Under the 1951 Geneva Convention recognition that an individual is a refugee is a declaratory act. The obligation not to refole an individual arises by virtue of the fact that their circumstances meet the definition of “refugee”, not by reason of the recognition by a Contracting State that the definition is met. For this reason a refugee is protected from *refoulement* from the moment they enter the territory of a Contracting State whilst the State considers whether they should be granted refugee status.<sup>19</sup>

13. To give effect to their obligations under the *Refugee Convention* in good faith,<sup>20</sup> including the prohibition against *refoulement*, State Parties are required to assess the asylum-seeker’s need for international protection,<sup>21</sup> a duty recognized by a wide range of national and regional Courts,<sup>22</sup> and provide them access to fair and efficient procedures.<sup>23</sup> Such procedures must allow for an

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<sup>17</sup> UNHCR, [Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees](#), April 2019, (“UNHCR Handbook”) at para. 28; *Németh*, *supra* note 11 at para. 50.

<sup>18</sup> UNHCR Handbook, *ibid* at para. 28; ExCom Conclusions [No. 6 \(c\)](#); [No. 79 \(j\)](#); [No. 81 \(i\)](#). See also, UNHCR, [Note on International Protection](#), A/AC.96/815, ExCom Reports, 31 August 1993, para. 11.

<sup>19</sup> *G v G*, [\[2021\] UKSC 9](#), (19 March 2021) at para 81. See also *ST (Eritrea) v Secretary of State for the Home Department* [\[2012\] UKSC 12](#) (“*ST*”), para 61.

<sup>20</sup> [Vienna Convention on the Law of Treaties](#), 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 (“*Vienna Convention*”) as discussed in relation to the UNHCR Handbook in *Pushpanathan*, *supra* note 10 at para. 54.

<sup>21</sup> UNHCR, [Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol](#), 26 January 2007 (“*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*”) at para. 8; “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, *supra* note 14 at para. 100; and K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, Antwerp (2009), p. 164-165.

<sup>22</sup> *Hirsi Jamaa*, *supra* note 14 at para. 146-148; *MSS v Belgium and Greece* (2011), [53 ECHRR 2](#) at paras 286, 298, 315, 321, 359; *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [\[2004\] UKHL 55](#), [2005] 2 AC 1 at para. 26; *C & Others v Director of Immigration & Another* [\[2013\] HKCFA 21](#) at paras 56, 64.

<sup>23</sup> ExCom Conclusions: [No. 65 \(o\)](#); [No. 71 \(i\)](#); [No. 74 \(i\)](#) [No. 81 \(h\)](#); [No. 82 \(d\)\(ii\)](#); [No. 93 \(a\)](#).

examination of the relevant facts and the application of the eligibility criteria of Article 1 of the *Refugee Convention*.<sup>24</sup> As Lauterpacht and Bethlehem state, “a *denial* of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of *refoulement*”.<sup>25</sup>

**B.3. Admissibility procedures are only appropriate in limited circumstances, subject to minimum procedural safeguards**

14. An application of section 34(1)(e) of the *IRPA* that denies asylum-seekers in Canada access to a full and fair assessment of their refugee claim is at variance with Canada’s international obligations and may pose a risk of *refoulement* contrary to Article 33(1) of the *Refugee Convention*.<sup>26</sup>

15. At international law, States may institute an admissibility stage to their asylum procedures only to determine whether the asylum-seeker has access to international protection in another country.<sup>27</sup> An assessment must be conducted as to whether the other country will ensure respect for international protection principles in relation to the asylum-seeker and in particular that of *non-refoulement*. Also required is an examination of the asylum-seeker’s own circumstances with an effective opportunity to rebut a general presumption of safety in the other country.<sup>28</sup>

**B.4. The *Refugee Convention* enables States to address security concerns while upholding international protection principles and standards**

16. The drafters of the *Refugee Convention* were concerned to incorporate provisions enabling States to address legitimate concerns about threats to their public order, security or community.<sup>29</sup>

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<sup>24</sup> *Regina v. Immigration Officer at Prague Airport*, *supra* note 22 at para. 26.

<sup>25</sup> “The Scope and Content of the Principle of *Non-Refoulement*: Opinion,” *supra* note 14 at para. 173.

<sup>26</sup> Risk assessments for persons found inadmissible under s. 34 are restricted to whether they face death, torture, or cruel and unusual treatment or punishment. There is no assessment of their risk of persecution. *IRPA*, *supra* note 1, s [112\(3\)](#)

<sup>27</sup> *Fair and Efficient Asylum Procedures*, *supra* note 12 at paras 11-14.

<sup>28</sup> *Ibid.*

<sup>29</sup> See, for example, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Twenty-fourth Meeting*, 27 November 1951, [UN Doc A/CONF.2/SR.24](#) and *Summary Record of the Twenty-ninth Meeting*, 28 November 1951, [UN Doc A/CONF.2/SR.29](#).

They did so expressly through the provisions on expulsion contained in Articles 32 and 33(2),<sup>30</sup> rather than the exclusion clauses in Article 1F.<sup>31</sup> Insofar as it applies to persons responsible for serious crimes who constitute a threat to others, Article 1F also serves to protect the community of the host country.<sup>32</sup>

*(i) Exceptions to the principle of non-refoulement under Article 33(2)*

17. The *Refugee Convention* allows for exceptions to the principle of *non-refoulement* in the limited circumstances provided for in Article 33(2), which permits States to withdraw protection against *refoulement* from refugees who pose a danger to the community or to the security of the host country. These exceptions were intended to be interpreted restrictively<sup>33</sup> and may only be applied to:

- a) a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which [they are], or
- b) [a refugee] who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.<sup>34</sup>

Most relevant to this appeal is the exception for asylum-seekers who are a “**danger to the security of the country in which [they are].**” (See para. 21 below)

18. Determination of whether a “danger to the security of the country” has been made out under Article 33(2) requires decision makers to assess first, whether the danger to the security constitutes

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<sup>30</sup> Article 32 and Article 33(2) of the *Refugee Convention* specify the circumstances under which international refugee law permits the expulsion of a refugee, including in certain exceptional circumstances permitting his or her return to a country where there is a risk of persecution.

<sup>31</sup> This distinction between Article 1F and Article 33(2) of the *Refugee Convention* was recognized by this Court in *Pushpanathan*, *supra* note 10 at para. 58. See also, UNHCR,

[\*Background Note on the Application of the Exclusion Clauses: Article 1F of the Convention Relating to the Status of Refugees\*](#), 4 September 2003 at paras. 10, 44.

<sup>32</sup> UNHCR Handbook at §151, *supra* note 17.

<sup>33</sup> Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires Analyzed with a Commentary*, at 327 and 342 (CUP, 1995) (“Weis”). Weis notes that “Not every reason of national security may be invoked...”. See also UNHCR, [\*Advisory Opinion from UNHCR on the Scope of the National Security Exception Under Article 33\(2\) of the 1951 Convention Relating to the Status of Refugees\*](#), 6 January 2006 (“*Advisory Opinion on the Scope of National Security Exception Under Article 33(2)*”) at paras 26-31.

<sup>34</sup> *Refugee Convention*, *supra* note 2, art 33(2).

a sufficiently serious danger to the country of refuge; and second, whether the *refoulement* of the refugee is a proportional response to this danger. Given the serious consequences for a refugee of *refoulement*, a high threshold applies to any exceptions to the *Refugee Convention*. “Danger” cannot be read as referring to anything less than “**very serious danger**”<sup>35</sup> and **significant threats to national security**.<sup>36</sup> Furthermore, Article 33(2) hinges on the appreciation of a future threat from the person concerned, rather than on the commission of an act in the past.<sup>37</sup> As Grahl-Madsen states:

Generally speaking ... ‘the security of the country’ is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned.<sup>38</sup>

19. Where a sufficiently serious danger to the security of the host country exists, the exception to *non-refoulement* protection is lawful only if it is **necessary and proportionate**, as with any exception to a human rights guarantee.<sup>39</sup> Consideration of proportionality is an important safeguard in the application of Article 33(2).<sup>40</sup> It represents a fundamental principle of international human rights law,<sup>41</sup> international humanitarian law,<sup>42</sup> and indeed, is a key aspect of Canada’s own framework for the protection of fundamental rights and freedoms.<sup>43</sup> This means there must be a rational connection between removal of the refugee and elimination of the danger posed;<sup>44</sup> *refoulement* must be the last

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<sup>35</sup> “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, *supra* note 14 at para 170

<sup>36</sup> See Weis, *supra* note 33, p. 342: The travaux préparatoires make clear that the drafters were concerned only with significant threats to national security.

<sup>37</sup> “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, *supra* note 14 at paras 147, 164, 177.

<sup>38</sup> Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963) at 140.

<sup>39</sup> “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, *supra* note 14 at para. 177.

<sup>40</sup> *Ibid.* See also, *Pushpanathan*, *supra* note 10 at para. 73.

<sup>41</sup> See, e.g., ECtHR, *Silver v United Kingdom* (1983), at para. 97; UN Human Rights Committee, *Guerrero v Colombia*, UN doc. CCPR/C/15/D/45/1979, at para. 13.3 (31 March 1982).

<sup>42</sup> See for example, [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts \(Protocol I\)](#), 1125 U.N.T.S. 3, 7 December 1978, article 51(5)(b).

<sup>43</sup> *R v Oakes*, [1986] 1 S.C.R. 103 at paras 69 - 71; *Canadian Charter of Rights and Freedoms*, *supra* note 16.

<sup>44</sup> “The Scope and Content of the Principle of *Non-Refoulement*: Opinion”, *supra* note 14 at para 176.



possible option for eliminating the danger<sup>45</sup>; and the danger for the host country must outweigh the risk of harm to the person as a result of *refoulement*.<sup>46</sup>

**(ii) Exclusion from international refugee protection under Article 1F**

20. The exclusion clauses of Article 1F of the *Refugee Convention* provide for denial of international refugee protection to persons who would otherwise meet the criteria of the refugee definition, but are considered undeserving of refugee status on account of having committed certain serious crimes or heinous acts.<sup>47</sup> The crimes and acts which may give rise to exclusion are exhaustively enumerated in Article 1F.<sup>48</sup> The exceptional nature and inherent complexity of exclusion requires that the applicability of Article 1F be examined within a regular refugee status determination procedure offering proper procedural safeguards, rather than in admissibility or accelerated procedures.<sup>49</sup>

**B.5. Section 34(1)(e) and compliance with the *Refugee Convention***

21. An interpretation of section 34(1)(e) of the *IRPA* that encompasses a broad range of criminal offences without requiring a criminal conviction or connection to national security is at variance with Canada's obligations under the *Refugee Convention* and its broad human rights purpose in so far as it applies to asylum-seekers and refugees. To comply with Canada's obligations under the *Refugee Convention*, section 34(1)(e) cannot be interpreted to bar asylum-seekers from access to a fair and efficient refugee status determination. Furthermore, in so far as section 34(1)(e) may lead to the return of a refugee to a country where he or she would be at risk of persecution, it must conform with the restrictive interpretation and application of the exceptions to the *non-refoulement* principle contained in Article 33(2) of the *Refugee Convention*.

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<sup>45</sup> See [Summary Conclusions: The Principle of Non-Refoulement](#), June 2003, para. 7. See also, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion," *supra* note 14 at para. 178; Weis, *supra* note 33.

<sup>46</sup> See Weis, *supra* note 33, pp. 329, 342; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 4th ed. (OUP, 2021) at 272.

<sup>47</sup> UNHCR, [Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#), 4 September 2003, ("*Guidelines on Exclusion*") at para 2, and its accompanying Background Note: [UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the Convention Relating to the Status of Refugees](#), 4 September 2003 at para. 3.

<sup>48</sup> *Guidelines on Exclusion*, *ibid* at para. 3; UNHCR, *Background Note*, *ibid* at para. 7.

<sup>49</sup> *Guidelines on Exclusion*, *ibid* at para. 31; UNHCR, *Background Note*, *ibid* at paras. 98-100.

**B.6. State Party Obligation to Ensure Compliance with the *Refugee Convention***

22. The Court below declined to consider whether the IAD’s interpretation of section 34(1)(e) of the *IRPA* complies with Canada’s obligations under the *Refugee Convention* because this question was not expressly argued before the IAD.<sup>50</sup> As this Court made clear in *B010*, “the values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted.”<sup>51</sup> UNHCR notes that the obligation to ensure compliance with the *Refugee Convention* falls on States Parties and not on individual asylum-seekers.

23. Compliance with the *Refugee Convention* should be at the forefront of all decisions that engage the rights protected thereunder. Declining to consider issues of compliance because an asylum-seeker did not raise the matter before a lower tribunal inappropriately places the responsibility for ensuring Canada’s compliance with the *Refugee Convention* onto the shoulders of individual asylum-seekers.

24. Once it is clear that a matter engages Canada’s obligations as a State Party under the *Refugee Convention*, compliance with those obligations should be fully canvassed. Whether this examination occurs by a reviewing Court, or after the matter is remitted back to the Tribunal for full examination of these issues, these obligations need to be assessed when they are engaged. Any framework for the judicial review of administrative decisions adopted by this Court should not permit administrative decisions to be upheld as reasonable or correct when they do not comply with Canada’s obligations as a State Party under the *Refugee Convention*.<sup>52</sup>

**PARTS IV and V – SUBMISSION ON COSTS AND ORDER SOUGHT**

25. UNHCR does not seek costs against any other party and does not waive its privileges and immunities under applicable international legal instruments.

26. UNHCR takes no position on the disposition of this appeal but respectfully requests that it be determined in light of the submissions set out above.

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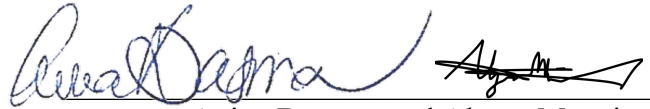
<sup>50</sup> *Canada (Citizenship and Immigration) v Mason*, [2021 FCA 156](#) at paras 72 - 75

<sup>51</sup> *B010*, *supra* note 7 at para 47.

<sup>52</sup> *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, [2022 SCC 30](#), paras 44 – 46.



ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6<sup>th</sup> DAY OF SEPTEMBER, 2022

Handwritten signatures of Aviva Basman and Alyssa Manning. The signature of Aviva Basman is on the left, and the signature of Alyssa Manning is on the right. Both signatures are in black ink and are written over a horizontal line.

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## PART VII – TABLE OF AUTHORITIES

	<b>CANADIAN CASES</b>	<b>PARA</b>
1.	<i>B010 v. Canada (MCI)</i> , <a href="#">[2015] 3 SCR 704</a>	7, 9, 22
2.	<i>Canada (Citizenship and Immigration) v Mason</i> , <a href="#">2021 FCA 156</a>	22
3.	<i>Canada v. Ward</i> , <a href="#">[1993] 2 S.C.R. 689</a>	6, 8
4.	<i>Chan v. Canada</i> , <a href="#">[1995] 3 S.C.R. 593</a>	6
5.	<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , <a href="#">2007 SCC 9</a>	11
6.	<i>de Guzman v. Canada</i> , <a href="#">2005 FCA 436</a>	7
7.	<i>Ezokola v. Canada (Minister of Citizenship and Immigration)</i> , <a href="#">2013 SCC 40</a>	6, 9
8.	<i>Febles v. Canada (MCI)</i> , <a href="#">2014 SCC 68</a>	9
9.	<i>Németh v. Canada (Minister of Justice)</i> , <a href="#">2010 SCC 56</a>	9, 12
10.	<i>Pushpanathan v. Canada</i> , <a href="#">[1998] 1 SCR 982</a>	9, 13, 16, 19
11.	<i>R v Oakes</i> , <a href="#">[1986] 1 S.C.R. 103</a>	19
12.	<i>Singh v. Minister of Employment and Immigration</i> , <a href="#">[1985] 1 S.C.R. 177</a>	11
13.	<i>Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association</i> , <a href="#">2022 SCC 30</a>	24
	<b>CANADIAN LEGISLATION</b>	
14.	<a href="#">Canadian Charter of Rights and Freedoms</a> , s. 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982. C 11	11, 19
15.	<a href="#">Immigration and Refugee Protection Act</a> , SC 2001, c 27	1, 7, 14
	<b>INTERNATIONAL LAW</b>	
16.	<i>Al-Sirri v. SSHD and DD v. SSHD</i> , <a href="#">[2012] UKSC 54</a>	6
17.	<i>C &amp; Others v Director of Immigration &amp; Another</i> , <a href="#">[2013] HKCFA 21</a>	13
18.	<a href="#">Charter of the United Nations</a> , 24 October 1945, 1 UNTS XVI	8
19.	<a href="#">Convention Relating to the Status of Refugees</a> , UN General Assembly, 28 July 1951, UNTS, vol. 189, p. 137, (as amended by the <a href="#">Protocol Relating to the status of Refugees</a> , 606 U.N.T.S. 267, Can. T.S. 1969/29	1, 6, 11, 16, 17
20.	<i>G v G</i> , <a href="#">[2021] UKSC 9</a>	12

21.	<i>Guerrero v Colombia</i> , UN Human Rights Committee, <a href="#">UN doc. CCPR/C/15/D/45/1979</a> (31 March 1982)	19
22.	<i>Hirsi Jamaa and Others v. Italy</i> , ECtHR, <a href="#">Application No. 27765/09</a> (23 February 2012)	11, 13
23.	<i>INS v. Cardoza-Fonseca</i> , <a href="#">480 U.S. 421 (1987)</a> ; <a href="#">107 S. Ct. 1207</a>	6
24.	<i>MSS v Belgium and Greece</i> (2011), <a href="#">53 ECHR 2</a>	13
25.	<a href="#">Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts (Protocol 1)</a> , 1125 U.N.T.S. 3, 7 December 1978	19
26.	<i>R (on the application of EM (Eritrea)) v. SSHD</i> , <a href="#">[2014] UKSC 12</a>	6
27.	<i>Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)</i> , <a href="#">[2004] UKHL 55</a> , [2005] 2 AC 1	13
28.	<i>Silver v United Kingdom</i> ECtHR, <a href="#">Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75</a> (25 March 1983)	19
29.	<i>ST (Eritrea) v Secretary of State for the Home Department</i> <a href="#">[2012] UKSC 12</a>	12
30.	<a href="#">Statute of the Office of the United Nations High Commissioner for Refugees</a> , UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, 1950, paras 1 and 8(a)	6
31.	UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, <i>Summary Record of the Twenty-fourth Meeting</i> , 27 November 1951, <a href="#">UN Doc A/CONF.2/SR.24</a> and <i>Summary Record of the Twenty-ninth Meeting</i> , 28 November 1951, <a href="#">UN Doc A/CONF.2/SR.29</a>	16
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33.	UNHCR, <a href="#">Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol</a> , 26 January 2007	13
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37.	UNHCR, <a href="#">Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees</a> , 16 January 2002,	11

	HCR/MMSP/2001/09	
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