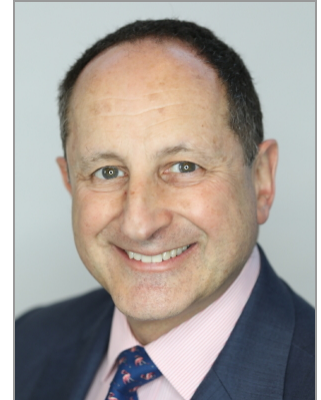


## Court decisions spark debate on how Canada deals with alleged spies | Sergio R. Karas

By **Sergio R. Karas**

Law360 Canada (May 1, 2024, 2:16 PM EDT) -- Two recent rulings by the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v. Canadian Association of Refugee Lawyers*, 2024 FCA 69, and *Canada (Public Safety and Emergency Preparedness) v. Yihdego*, 2024 FCA 70, have ignited concerns regarding their implications for public security. These decisions have quashed the inadmissibility of individuals linked to organizations accused of spying on journalists residing abroad. The individual appellants are now eligible to seek refugee status in Canada, sparking debate regarding the interpretation and enforcement of immigration regulations related to espionage and national security.



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In these two decisions, individuals with ties to Ethiopia's state intelligence agency, the Information Network Security Agency (INSA), sought refuge in Canada, claiming persecution by Ethiopian authorities. Despite their affiliation with INSA, known for cyber espionage targeting Ethiopian journalists and political dissidents in the United States and Belgium, the Federal Court of Appeal determined that involvement in such activities does not directly oppose Canada's interests.



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The court examined which actions could be "against Canada's interests" in the context of espionage involving foreign entities. Sections 34(1)(a) and (f) of the *Immigration and Refugee Protection Act* (IRPA) provide the framework for assessing admissibility based on security grounds, particularly the person's affiliation with groups engaged in espionage activities "against Canada or that are contrary to Canada's interests."

In the initial decisions concerning the two cases, the Immigration Division had determined that there were valid grounds to suspect that INSA engaged in espionage as defined by s. 34(1)(a) of the IRPA. They acknowledged that while INSA's activities did not directly target individuals inside Canada, they were still deemed "contrary to Canada's interests" due to their impact on citizens of allied nations. This broader interpretation of s. 34(1)(a) of the IRPA was correct, as it recognized the wide-ranging implications of espionage, even when Canadian citizens or entities were not the primary targets. The

Immigration Division was concerned that Ethiopian journalists in Canada were part of the same group targeted abroad by the spies.

The Immigration Division based its reasoning on established guidelines, focusing on the definition of espionage activities “contrary to Canada’s interests” outlined in the CIC Operational Manual, but the court rejected this reasoning. The manual definition encompasses the use of Canadian territory for espionage activities conducted beyond its borders, potentially endangering Canada’s safety, security and prosperity across various domains. In addition, a Parliamentary Committee Note, titled “Risks from Espionage, Sabotage, and Weapons of Mass Destruction,” cites the Canadian Security and Intelligence Service (CSIS) Public Report, which states that activities targeting Canada’s allies could also undermine Canadian interests. However, the Federal Court of Appeal disapproved of this reasoning, stating that policy manuals are not legally binding.

Citing the Supreme Court of Canada decision in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, the court ruled that a clear link to national security is required for a case to fall under ss. 34(1) of the IRPA. It emphasized the importance of establishing a connection between INSA’s activities and Canada’s national security, noting that INSA primarily targeted private individuals residing in allied countries rather than directly focusing on the governments or institutions of those nations. However, this interpretation focuses only on the immediate threat to national security and not on the safety of Canadian citizens. This interpretation is overly restrictive and flawed. The court decisions overlook the potential exploitation of intelligence gathered through espionage against citizens of Canada’s allied nations, which could erode trust and cooperation among nations.

In *Mason*, the SCC stressed the seriousness of inadmissibility under s. 34(1) of the IRPA, emphasizing the need to adhere to Canada’s humanitarian international obligations. *Mason* focused on the consequences of deportation and international legal duties, such as refraining from deporting individuals to persecution unless they present a national security risk or have a conviction for a serious offence. However, by adhering so slavishly to this approach, the Federal Court of Appeal overlooked the fact that Canada can fulfill its international obligations to protect refugees and uphold due process while still deeming inadmissible individuals involved in espionage.

According to CSIS, as a developed economy and democracy, Canada is a prime target for foreign entities seeking to advance their strategic interests clandestinely. These threats manifest in various forms, including infiltration of academic research programs and cyber attacks on both the government and the private sector, posing significant risks to national security and economic stability. In response, the federal government established the Commission of Inquiry on Foreign Interference to safeguard Canadian interests from espionage and foreign interference threats. The government’s failure to appeal these court rulings to the SCC would undermine the Commission’s objectives and jeopardize Canada’s security and democratic principles.

While the court rulings held that surveillance of foreign residents does not directly endanger Canadian security interests, such a narrow view is naive. Foreign individuals involved in political activities that intersect with Canadian interests may be targeted by espionage.

Canada faces ongoing and escalating security challenges, highlighting the need for proactive measures to safeguard our interests. The two court decisions must be appealed to protect Canadian interests from espionage threats. Failing to do so undermines our capacity to counter espionage, jeopardizing both Canada’s security and relations with our allies. Granting refugee status to individuals engaged in espionage against allied nations or foreign citizens threatens Canada’s national security.

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