Federal Court  Cour fédérale

Date: 20130816

Docket: IMM-6304-12

Citation: 2013 FC 875

Ottawa, Ontario, August 16, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DOUGLAS GARY FREEMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY

Respondents

REASONS FOR ORDER AND ORDER

[1] Douglas Gary Freeman's application for a permanent resident visa was refused as a result of a Visa Officer's determination that he was a person described in paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). The Officer found that Mr. Freeman was inadmissible to Canada on security grounds for being a member of the Black Panther Party, a group for which there are reasonable grounds to believe has engaged in, engages in or will engage in terrorism.

[2] The Officer was also satisfied that Mr. Freeman was inadmissible to Canada on the additional ground of serious criminality under paragraph 36(1)(b) of *IRPA*, as a result of his conviction of the offence of aggravated battery in the United States.

[3] Mr. Freeman seeks judicial review of the Visa Officer's inadmissibility decision. In the context of this application for judicial review, the Minister has brought a motion under section 87 of *IRPA* for the non-disclosure of portions of the Certified Tribunal Record, asserting that the disclosure of the redacted information would be injurious to national security or to the safety of any person.

[4] In response to the Minister's motion, Mr. Freeman has brought this motion seeking the appointment of a Special Advocate to protect his interests in the section 87 proceedings.

[5] For the reasons that follow, I have determined that considerations of fairness and natural justice do not require the appointment of a Special Advocate in this case. As a consequence, Mr. Freeman's motion will be dismissed.

Background

[6] Born Joseph Pannell, Mr. Freeman is an American citizen who was involved in the shooting of a Chicago police officer in 1969. Mr. Freeman fled to Canada in 1974 where he lived under an assumed name for some 40 years. In the intervening period, Mr. Freeman legally changed his name, married and raised a family.

[7] In 2004, Mr. Freeman was arrested and detained on an extradition warrant, and he was extradited to the United States in 2008. He subsequently pled guilty to one count of aggravated battery in relation to the shooting of the police officer.

[8] Later in 2008, Mr. Freeman's Canadian wife sponsored him for landing in this country. This ultimately led to the inadmissibility decision underlying this application. An appeal brought by Mr. Freeman's wife to the Immigration Appeal Division of the Immigration and Refugee Board from the refusal of the sponsorship is currently pending.

[9] While Mr. Freeman does not challenge the section 36 serious criminality finding in his application for judicial review, he does challenge the section 34 membership finding.

Mr. Freeman's Submissions on the Special Advocate Issue

[10] Mr. Freeman vehemently denies ever having been a member of the Black Panthers. He says that he has never been provided with any credible evidence to support the allegations against him, and that he has thus never been able to respond to those allegations.

[11] Mr. Freeman notes that on three separate occasions, the Canadian Security Intelligence service had determined that there was "no reportable trace" suggesting that he was associated with the Black Panthers. In these circumstances, Mr. Freeman submits that fairness and natural justice require that a Special Advocate be appointed to represent his interests in any closed proceedings.

[12] Mr. Freeman further submits that the respondent Minister of Citizenship and Immigration has acted in bad faith and has reached a perverse and unreasonable decision in his case. In addition, he contends that the Minister's officials have breached their duty of fairness by finding that he was a member of the Black Panthers in the face of his sworn denials, without ever giving him a chance to address the Visa Officer's credibility concerns or the evidence against him. Mr. Freeman also asserts that there was a failure to provide him with reasons for the findings that he was a member of the Black Panthers and that the Black Panthers were a terrorist organization.

[13] Mr. Freeman contends that a review of consular records discloses that a negative finding had been made in relation to an earlier application for a Temporary Residence Permit before he had any opportunity to respond to the Minister's concerns, and that the unfairness in that process has been carried forward into these proceedings.

[14] According to Mr. Freeman, the history of this matter, including the allegedly abusive conduct on the part of the Respondents, and the fundamental human rights at stake in this proceeding requires that a Special Advocate be appointed to represent his interests.

Analysis

[15] The Special Advocate provisions of *IRPA* were enacted as a result of the Supreme Court of Canada's decision in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9. In *Charkaoui*, the Supreme Court held that in light of the significant liberty interests at stake in Security Certificate proceedings, the requirements of fundamental justice necessitated that the

individual named in the Certificate be provided with full disclosure of the case against him or her, or a "substantial substitute" for such disclosure had to be found: see *Charkaoui*, at para. 61.

[16] While the amendments to *IRPA* enacted following the *Charkaoui* decision make the appointment of Special Advocates mandatory in Security Certificate proceedings, the appointment of Special Advocates in other types of cases under the Act is left to the discretion of the presiding designated judge.

[17] That is, section 87.1 of *IRPA* gives this Court the discretion to appoint a Special Advocate "if it is of the opinion that considerations of fairness and natural justice require" such an appointment in order to protect the interests of an applicant.

[18] In considering a motion such as this, a number of factors should be weighed by the Court in assessing whether considerations of fairness and natural justice require the appointment of a special advocate to protect the interests of the individual. No one factor will necessarily be determinative – rather, the task for the Court should be to balance all of the competing considerations in order to arrive at a just result: *Farkhondehfall v. Canada (Minister of Citizenship and Immigration*), [2009] F.C.J. No. 1323, at para. 31.

[19] I accept that this matter is undoubtedly of great importance to both Mr. Freeman and to his family. However, in contrast to Security Certificate proceedings, there are no section 7 Charter rights at stake in this case.

[20] Non-citizens outside of Canada do generally not hold Charter rights: *Tabingo v. Canada (Minister of Citizenship and Immigration)*, [2013] F.C.J. No. 410 at para. 75. See also *Zeng v. Camada (Attorney General)*, 2013 FC 104, paras. 70-72; *Kinsel v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1515, paras 45-47; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, paras 81-82.

[21] There are limited exceptions to this principle, where, for example, the non-Canadian are physically present in Canada or are subject to a criminal trial in Canada: *R. v. Hape*, 2007 SCC 26; *Slahi v Canada (Minister of Justice)*, 2009 FC 160 (aff'd 2009 FCA 259, Leave to Appeal refused [2009] S.C.C.A. No. 444. None of the exceptions identified in the jurisprudence apply here. Mr. Freeman is not in Canada, and he is not a Canadian citizen. He is not in detention or facing trial in Canada, and there is no issue of his potential removal from Canada to a place where his life or freedom would be at risk.

[22] Given that section 7 of the Charter is not engaged in this proceeding, the issue is one of common-law procedural fairness.

[23] As the Supreme Court of Canada observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the content of the duty of fairness is variable, and how much fairness is owed in a given case depends on the context of the specific case at issue.

[24] As noted earlier, I recognize that the decision in issue in this case was of considerable importance to Mr. Freeman and his family, a factor that militates in favour of a somewhat higher

level of procedural fairness being owed to him. So too does the objective nature of the decisions in issue, and the fact that no appeal is provided for by *IRPA* with respect to the decision under review: see *Mekonen v. Canada (Minister of Citizenship and Immigration*), 2007 FC 1133, 66 Imm. L.R. (3d) 222, at para.17. Insofar as this latter consideration is concerned, Mr. Freeman is limited to his application for judicial review, and then only with leave of the Court.

[25] That said, there are other factors that limit the content of the duty of fairness owed to visa applicants, including Mr. Freeman: *Khan v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1699, at para. 30. In particular, the Visa Officer's decision in this case did not deprive Mr. Freeman of any legal rights. As a foreign national, he had no right to enter Canada: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at para. 24. This reduces the level of procedural fairness owed to Mr. Freeman: *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, at paras. 38-41.

[26] Also relevant is the fact that the amount of information that has not been disclosed to Mr. Freeman is limited. As the Court noted in *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 585, in Security Certificate proceedings, the amount of information that is not disclosed to the subject of the Certificate is usually extensive. Moreover, the individual in question will have no way of knowing the extent of the non-disclosure: see *Segasayo*, at para. 28.

[27] In contrast, in this case the Tribunal record is some 615 pages in length, and redactions appear on approximately 25 pages.

[28] As Justice Noël observed in *Dhahbi v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 400, experience has shown that in cases such as this, the information redacted from the record often adds little to the matters in issue. Examples cited by Justice Noël include references to investigative techniques, administrative and operational methods, names and telephone numbers of CSIS personnel, and information regarding relationships between CSIS and other agencies in Canada and abroad: at para. 24. A number of the redactions in issue in this case would fall within that description.

[29] A review of the unredacted Certified Tribunal Record also discloses that Mr. Freeman has already had access to much of the information on the record, and has been made aware of the nature of the Respondents' concerns with respect to his past activities.

[30] Finally, the issues raised by the section 87 application appear to be narrow, and the Court is clearly well-positioned to address the respondents' national security claims in this case without the involvement of a Special Advocate.

Conclusion

[31] Taking all of the above considerations into account, I have concluded that considerations of fairness and natural justice do not require the appointment of a Special Advocate in this case. As a result, Mr. Freeman's motion is dismissed.

ORDER

THIS COURT ORDERS that Mr. Freeman's motion for the appointment of a Special Advocate is dismissed.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6304-12
STYLE OF CAUSE:	DOUGLAS GARY FREEDMAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY
REASONS FOR ORDER AND ORDER:	MACTAVISH, J.
DATED:	AUGUST 16, 2013

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

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