Federal Court Cour fédérale

Date: 20131023

Docket: IMM-6304-12

Citation: 2013 FC 1065

Ottawa, Ontario, October 23, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DOUGLAS GARY FREEMAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] An immigration officer found Douglas Gary Freeman to be inadmissible to Canada on the basis of serious criminality and because there were reasonable grounds to believe that he had been a member of the Black Panther Party - an organization that had engaged in terrorism.

[2] Mr. Freeman does not dispute the inadmissibility finding inasmuch as it is based upon his serious criminality. He does, however, challenge the finding that he was a member of a terrorist

organization. Mr. Freeman asserts that Canadian immigration authorities have acted in bad faith in the processing of his application for landing and that he was denied procedural fairness throughout the process. He further asserts that the inadmissibility decision was unreasonable.

[3] While the Ministers do not agree that there has been a breach of procedural fairness in this case, they do concede that Mr. Freeman's application for judicial review should be granted due to the inadequacy of the reasons provided to Mr. Freeman in relation to the finding that he had been a member of a terrorist organization.

[4] Mr. Freeman has also brought a constitutional challenge to section 87.1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Mr. Freeman says that the granting of discretion to the Court not to appoint a Special Advocate to represent his interests in section 87 proceedings violates his rights under the *Canadian Charter of Rights and Freedoms*.

[5] For the reasons that follow, I have concluded that the application for judicial review should be granted insofar as it relates to the finding that Mr. Freeman is inadmissible to Canada under section 34(1)(f) of *IRPA*. I have further concluded that in light of the basis upon which the application will be granted, it is not necessary to address Mr. Freeman's constitutional challenge.

Background

[6] Born Joseph Pannell, Mr. Freeman is an American citizen who was involved in the shooting of a Chicago police officer in 1969. As a result, Mr. Freeman was charged with attempted murder.

[7] In 1974, before he could stand trial, Mr. Freeman skipped bail and fled to Canada where he lived under an assumed name for some 30 years. In the intervening period, Mr. Freeman lived without status, legally changed his name, married, was gainfully employed and raised four children.

[8] In 2004, Mr. Freeman was arrested and detained on an extradition warrant, and after four years in detention, he was extradited to the United States. In 2008, he pled guilty to one count of aggravated battery in relation to the shooting of the police officer, for which he served a 30-day sentence in the Cook County Jail. Mr. Freeman also donated $250,000 to a charity chosen by the officer, and was on probation for a period of two years after his release from jail.

[9] 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 for judicial review. Mr. Freeman has also twice applied for temporary resident permits that would have allowed him to enter Canada. Both of these applications were refused.

[10] Mr. Freeman was found to be inadmissible to Canada on two separate bases. He was found to be inadmissible under section 36(1)(b) of *IRPA* for serious criminality as a result of his criminal conviction in the United States. Mr. Freeman was also found to be inadmissible under section 34(1)(f) of *IRPA*, as a result of the finding that there were reasonable grounds to believe that he was a member the Black Panther Party, an organization for which there were reasonable grounds to believe had engaged in terrorism.

[11] Mr. Freeman's wife has appealed the inadmissibility decision to the Immigration Appeal Division of the Immigration and Refugee Board. That appeal is being held in abeyance pending the outcome of this application.

[12] As was noted earlier, Mr. Freeman is not challenging the section 36 serious criminality finding in this application. He does, however, challenge the finding that he was a member of a terrorist organization. Mr. Freeman explains that the IAD cannot consider his wife's appeal as long as the section 34(1)(f) finding is maintained. In addition, he may be entitled to rehabilitation consideration down the road in relation to his inadmissibility for serious criminality, but this option will not be available to him if the section 34(1)(f) finding remains in force.

The Ministers' Motion for Judgment

[13] In October of 2012, the Ministers brought a motion for judgment seeking to have the immigration officer's decision set aside and the matter referred back to a different officer for redetermination. The basis for this motion was the Ministers' recognition that the immigration officer's decision lacked the requisite analysis required of a decision under section 34(1)(f) of *IRPA*.

[14] Mr. Freeman did not consent to this motion, arguing that he should be permitted to advance his arguments with respect to the alleged abuse of power and bad faith on the part of immigration officials in open court. Justice Hughes dismissed the Ministers' motion, holding that the matter should proceed to a hearing before this Court.

The Section 87 Proceedings

[15] After leave was granted in this matter, the Ministers brought a motion for non-disclosure under section 87 of *IRPA*. Justice Noël ordered that a designated judge deal with the case, and I was subsequently assigned to hear the section 87 motion.

[16] Mr. Freeman then brought a motion seeking the appointment of a Special Advocate to represent his interests in the section 87 proceedings. I dismissed that motion on August 16, 2013, for reasons reported at 2013 FC 875.

[17] On October 1, 2013, I granted the Ministers' section 87 motion in part. I ordered that Mr. Freeman be provided with certain additional information on the basis that the Ministers had not established that the disclosure of this information would be injurious to national security or endanger the safety of any person. I ordered that other information be kept confidential as the Ministers had established that the disclosure of that information would be injurious.

The Issues

[18] As was noted earlier, Mr. Freeman accepts that he is currently inadmissible to Canada on the basis of his serious criminality. Moreover, both sides agree that the decision under review must be set aside, inasmuch as it relates to the section 34(1)(f) inadmissibility finding, given the absence of any meaningful analysis in the officer's decision.

[19] What is still at issue is the fairness of the process accorded to Mr. Freeman and whether the Ministers have acted in bad faith or otherwise abused their power relation to his application

for landing. Also at issue is Mr. Freeman's claim that section 87 of *IRPA* infringes section 7 of the Charter, and if it does, whether this infringement can be justified under section 1 of the Charter.

[20] There is also an issue as to the remedy that should be granted, specifically, whether this Court should issue directions governing the redetermination of Mr. Freeman's application for permanent residence, and what form those directions should take.

[21] Finally, there is an issue as to Mr. Freeman's entitlement to an order of costs on a solicitor and client basis or otherwise as a result of the way in which this matter has been handled.

Has Bad Faith Been Demonstrated by Mr. Freeman?

[22] Before turning to review the facts relied upon by Mr. Freeman in support of his argument that the Ministers have acted in bad faith or otherwise abused their power, it is helpful to start by reviewing the jurisprudence relating to the issue of bad faith in the performance of public duties.

Legal Principles Relating to the Concept of Bad Faith

[23] As the Supreme Court observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, "there is no such thing as absolute and untrammelled 'discretion'" in the performance of public duties. The Court went on in *Roncarelli* to observe that "'[d]iscretion' necessarily implies good faith in discharging public duty". Noting that "there is always a perspective within

which a statute is intended to operate", the Court held that "any clear departure from its lines or objects is just as objectionable as fraud or corruption": at para. 41.

[24] The Supreme Court also stated in *Roncarelli* that "good faith" means "… carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose…". According to the Court, "good faith" does not mean acting "for the purposes of punishing a person for exercising an unchallengeable right" and "it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status": at para. 46.

[25] An allegation of bad faith by a public official in the performance of public duties is a serious matter. The party alleging bad faith has the burden of proof; good faith "is always presumed and it is the person that alleges [bad faith] that must prove it": *St. Laurent (Ville) v. Marien*, [1962] S.C.J. No. 39, 35 D.L.R. (2d) 165 at para. 14. See also *Entreprises Sibeca v. Frelighsburg*, 2004 SCC 61, [2004] 3 S.C.R. 304.

[26] While bad faith certainly includes situations where there is intentional fault on the part of a decision-maker (as was the case in *Roncarelli*), evidence of actual malice or intent to harm is not required in order to rebut the presumption of good faith: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 40.

[27] As the Supreme Court observed in *Entreprises Sibeca*, above at para. 26, in addition to deliberate acts, the concept of bad faith can include "acts that are so markedly inconsistent with

the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith".

[28] Direct evidence of bad faith is not required. It can, in the appropriate case, be inferred from the surrounding circumstances: *Finney***,** at paras. 37-39, *Enterprises Sibeca*, above at para. 26.

[29] "Bad faith" can encompass serious carelessness or recklessness. Indeed "recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed": *Finney*, above at para. 39.

Mr. Freeman's Allegations of Bad Faith

[30] Mr. Freeman asserts that Canada Borders Services Agency and Citizenship and Immigration Canada records show that an unfavourable recommendation was made in relation to his application before he was ever given an opportunity to address the Ministers' concerns about him. These records further demonstrate that in November of 2009, consular officials had determined that there was insufficient evidence to support a refusal of his application for landing, but that Mr. Freeman's application for a Temporary Residence Permit was nevertheless refused just a few days later.

[31] While the 2009 decision refusing Mr. Freeman's application for a Temporary Residence Permit is admittedly not the subject of this application for judicial review, Mr. Freeman says that

regard must to be had to the totality of the record as it relates to his immigration situation in order to fully appreciate his allegations of bad faith.

[32] Mr. Freeman also says that Canadian officials approached his application from the starting assumption that he had indeed been a member of the Black Panther Party. When repeated inquiries failed to turn up any evidence linking him to the Black Panther Party, Mr. Freeman alleges that immigration officials intentionally delayed the processing of his application for landing, while continuing to seek evidence to bar him from Canada on security grounds.

[33] In addition, Mr. Freeman points to comments made by an immigration official in response to the suggestion that he be accorded an interview in light of the credibility issues in his case. The official suggested that there was no point in interviewing Mr. Freeman as he had had forty years to come up with a story.

[34] Mr. Freeman says that these comments demonstrate that immigration officials prejudged his credibility, determining that he was a liar, without ever talking to him, or giving him a chance to address their credibility concerns. By failing to keep an open mind, Mr. Freeman submits that immigration officials acted perversely and arbitrarily in his case.

[35] Mr. Freeman also asserts that he was only given half the story when his application for a Temporary Residence Permit was refused. In support of this claim, he points to a letter from the Minister of Citizenship and Immigration responding to inquiries about Mr. Freeman's case from

a Member of Parliament. The Minister's September 24, 2010 letter to the Member of Parliament provides reasons for the decision that do not appear in the November 13, 2009 refusal letter.

[36] Mr. Freeman also cites statements made about him by the Minister of Citizenship and Immigration in support of his arguments of bad faith and abuse of power. That is, while Mr. Freeman's case was still before immigration officials for a decision, the Minister erroneously referred to Mr. Freeman as a "cop killer" in the House of Commons.

[37] For these reasons, Mr. Freeman asserts that he was not treated fairly. In sum, he alleges that Canadian officials decided at the outset that he was a terrorist and that he should not be permitted to return to Canada. When no evidence was found to bar him from Canada on security grounds, officials nevertheless went ahead and refused his application on security grounds. The failure of immigration officials to keep an open mind and their perverse and arbitrary actions against him constitute bad faith.

[38] Mr. Freeman further asserts that Canadian officials actively sought grounds to exclude him from Canada permanently, in a way that would deprive his wife of a right to appeal the decision on equitable grounds. According to Mr. Freeman, this constitutes an abuse of power.

[39] Finally, Mr. Freeman alleges that the Ministers' motion for judgment did not represent a good faith attempt to resolve this matter, but was instead an attempt to prevent him from having his allegations of bad faith aired in open court. This, Mr. Freeman says, represents a continuation of the abusive conduct that has marked the Ministers' handling of this case.

Analysis

[40] The content of the duty of procedural fairness is variable, and the degree of fairness owed to visa applicants tends to be towards the lower end of the scale. However, as was noted in my decision relating to the appointment of a Special Advocate, I have accepted that the decision at issue in this case was of considerable importance to Mr. Freeman and to his family. The significant interests at stake in this matter militate in favour of a somewhat higher level of procedural fairness being owed to Mr. Freeman than might otherwise be the case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[41] Mr. Freeman has provided a detailed review of the record in this matter in support of his allegations of bad faith and abuse of power. While I have considered all of his submissions in light of the documentary evidence before me, it is not necessary to address all of them. There are, however, several matters that require comment.

[42] Mr. Freeman points to emails generated shortly after his application was filed in 2009, which describe him as "a former member of the Black Panthers" and "a Black Panthers member". According to Mr. Freeman, these emails reflect an assumption on the part of the Ministers that he was in fact a member of the Black Panther Party, before they ever heard from Mr. Freeman on the issue. I agree that the choice of language used by immigration officials is troubling, but would note that other emails from this time period clearly recognize that what was at issue at that point was only an *allegation*.

[43] Mr. Freeman asserts that bad faith is also demonstrated by the fact that on November 4, 2009 consular officials had determined that there was insufficient evidence to support the refusal of his application for a Temporary Residence Permit on security grounds. Mr. Freeman's application was nevertheless then refused under section 34(1)(f) of *IRPA* just a few days later, as reflected by a decision letter dated November 13, 2009.

[44] However, the record reveals that on November 6, 2009, a report was sent to consular officials in Buffalo from CIC headquarters which concluded that "reliable open source information" described Mr. Freeman as a member of the Black Panthers, with the result that there were "reasonable grounds to believe that he was a member".

[45] While Mr. Freeman may not agree with CIC's assessment of the reliability of the open source information (which consisted of newspaper reports going back to 2004 linking Mr. Freeman to the Black Panther Party), the receipt of the report does explain the apparent change in position on the part of immigration officials.

[46] The letter provided to Mr. Freeman on November 13, 2009 provided limited reasons for refusing his application for a Temporary Residence Permit. However, the Minister of Citizenship and Immigration later provided additional reasons for the decision in response to an inquiry from a Member of Parliament. I agree that this correspondence seems to suggest that immigration officials had reasons for refusing Mr. Freeman's application for a Temporary Residence Permit that were never shared with him. This gives rise to concerns with respect to the fairness of the process.

[47] Mr. Freeman further asserts that the Ministers' officials denied him procedural 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 officials' credibility concerns. Indeed, Mr. Freeman says that immigration officials had already made up their minds that he was a liar.

[48] In support of this contention, Mr. Freeman points to comments made by an immigration official in response to the suggestion that he be accorded an interview in light of the credibility issues in his case. Mr. Freeman says that these comments show that immigration officials did not approach his case with open minds and acted perversely and arbitrarily.

[49] A review of the record shows that on April 28, 2010, an official with the National Security Screening Division of the CBSA stated in an email to colleagues that "I believe that an interview by partner agency with subject should be conducted and that a new brief should be provided based upon the interview results and the PR application".

[50] Later in the same email chain is a response from a consular official. This official stated:

> If dealing with a different applicant. I might try to call into question subj's credibility via a personal interview. However, Mr. Freeman has been dealing with these allegations for some 40 years and has likely concocted a very solid story by now. I don't think that an interview would be very fruitful, but if you had a list of questions for me I am willing to try.

[51] These comments were repeated in a number of later emails, and Mr. Freeman was never interviewed in connection with his application for landing.

[52] Counsel for the Ministers acknowledged that although visa applicants have no general entitlement to an interview, there may be an obligation to interview an applicant where there are issues with respect to the applicant's credibility. Counsel further acknowledged that there were issues with respect to Mr. Freeman's credibility in this case, and that this may well have been a situation where an interview was required.

[53] Counsel denies however, that there was any unfairness here as Mr. Freeman had an opportunity to address the officer's concerns in his written submissions. As a result, counsel submits that he was not denied procedural fairness in this matter. I do not agree.

[54] There are two different fairness concerns that arise in these circumstances.

[55] The first is that Mr. Freeman was never afforded an interview even though there were serious issues of credibility in this case in light of his sworn denials of membership in the Black Panther Party. The whole purpose of an interview with a visa applicant in cases where there are issues of credibility is to afford the applicant the face-to-face chance to persuade Canadian immigration officials of their position, and to afford immigration officials an opportunity to assess the credibility of the applicant. The fact that Mr. Freeman may have had an opportunity to address the officer's concerns through written submissions does not make up for the failure to interview him.

[56] The second and more troubling concern is that the comments noted above demonstrate that there was clearly an assumption on the part of immigration officials that there was no point

in interviewing Mr. Freeman as he had had forty years to come up with a story. In other words, immigration officials had clearly concluded that Mr. Freeman was a liar before ever meeting him.

[57] Once again, the fact that Mr. Freeman may have had an opportunity to address the officer's concerns through his written submissions does not take away from the fact that a judgment had already been made with respect to his credibility.

[58] Mr. Freeman also points to statements made by the Minister of Citizenship and Immigration in the House of Commons on May 1, 2012, while Mr. Freeman's case was still before immigration officials, as further evidence of bad faith.

[59] The Leader of the Opposition had suggested to the Minister that a "double standard" was allegedly being applied in relation to Mr. Freeman and "the British criminal Conrad Black", who had just been granted a Temporary Residence Permit. The Minister initially refused to address Mr. Freeman's case, citing privacy concerns. He nevertheless went on to refer to Mr. Freeman as "a convicted police murderer", suggesting that the Opposition wanted the Government "to welcome convicted cop killers".

[60] The Minister later corrected himself, stating that Mr. Freeman "was convicted of shooting and I believe blinding a police officer, not killing him, so I should have said police shooter, not police killer". This statement also appears to have been inaccurate, as the police officer had not been blinded, but had been left partially paralyzed in one arm.

[61] Mr. Freeman says that the Minister's "inflammatory comments" are of particular concern, given his belief that the Minister was "the directing hand behind the scene", controlling the processing of his case.

[62] I agree that the Minister's comments were ill-advised, given that Mr. Freeman's application for landing was still pending before the Minister's own departmental officials.

[63] That said, I have not been persuaded that the Minister was personally involved in the processing of Mr. Freeman's case, particularly in light of the Minister's explicit statement in the House of Commons that he "would not have any involvement in an application from [Mr. Freeman]" and was leaving the matter to his departmental officials.

[64] It has also not been shown that the departmental officials dealing with Mr. Freeman's case were ever made aware of the Minister's comment, nor has it been demonstrated that the Minister's comment had any impact on the outcome of the case.

[65] Mr. Freeman has not persuaded me that the length of time taken to reach a decision in relation to his application for permanent residence is indicative of an abusive delay. A review of the record reveals that the file was under active consideration throughout the period between the filing of the application in 2008 and the final decision in 2012.

[66] It was, moreover, clearly a complex case, involving events which had taken place decades earlier. It is also apparent that it took some time to obtain information with respect to Mr. Freeman's criminal case in the United States.

[67] As was noted earlier, there were media reports going back as far as 2004 linking Mr. Freeman to the Black Panther Party, including at least one article in which Mr. Freeman was reported to have admitted to investigators that he was a Party member: Applicant's record at p.221. There was also contrary evidence from Mr. Freeman and from the counsel handling Mr. Freeman's criminal case prior to his flight to Canada. There was also evidence in the record linking the Black Panther Party to actions such as aircraft hijackings, actions which could potentially fit within the legal definition of terrorism.

[68] This and other conflicting evidence had to be considered, investigated and analyzed. These circumstances explain the delays in this case.

[69] Mr. Freeman's final allegation is that the Ministers' motion for judgment did not represent a good faith attempt to resolve this matter, but was instead an attempt to prevent him from having his allegations of bad faith and abuse of power aired in open court.

[70] I am not persuaded that there was anything untoward about the Ministers' motion for judgment in this case. As both parties have recognized, the decision under review was clearly deficient on its face. In the circumstances, I am not prepared to impute any bad faith to either the

Ministers or their counsel in seeking to have Mr. Freeman's application for judicial review dealt with in a timely and cost-effective manner.

Conclusion on the Bad Faith Issue

[71] As explained above, I have concluded that there are several problems with the way that Mr. Freeman's immigration applications have been handled, and I am satisfied that he has been denied procedural fairness in this case.

[72] I have carefully considered the procedural fairness concerns that I have identified, both individually and on a cumulative basis, in the context of all of the surrounding circumstances. While I have real concerns with respect to the way that Mr. Freeman's application for landing has been handled, I have not been persuaded that the breaches of procedural fairness in this case are so egregious as to give rise to the inference that there has been bad faith or an abuse of power on the part of Canadian immigration officials in the handling of the application.

The Charter Challenge to Section 87.1 of *IRPA*

[73] The Supreme Court of Canada has held that when dealing with constitutional litigation, Courts should generally avoid making pronouncements of law unless compelled to do so by the facts of the case: see, for example, *R. v. Hape,* 2007 SCC 26, at para. 184.

[74] As was noted at the outset, the parties have agreed that the immigration officer's decision cannot stand as no meaningful reasons were provided to explain the rationale for finding Mr. Freeman to be inadmissible to Canada on security grounds. I have, moreover, concluded that

Mr. Freeman was denied procedural fairness in this matter. These grounds are sufficient to dispose of Mr. Freeman's application for judicial review. As a consequence, I will not address the constitutional issue raised by Mr. Freeman in this case.

Remedy

[75] Mr. Freeman asks that I return this matter to a different immigration officer for redetermination with specific directions as to how that redetermination should be carried out.

[76] In particular, Mr. Freeman asks that I find that there is no evidence presently available that would support a finding that he was ever a member of the Black Panther Party. Mr. Freeman also asks me to direct immigration officials to decide that the record does not demonstrate that the Black Panther Party was a terrorist organization. In so doing, Mr. Freeman acknowledges that he is, in essence, seeking a directed verdict.

[77] I am not prepared to issue the directions requested by Mr. Freeman.

[78] Section 18.1(3)(b) of the *Federal Courts Act* provides that this Court may refer a matter back to a decision-maker with such directions as the Court may consider appropriate. While this includes directions in the nature of a directed verdict, "this is an exceptional power that should be exercised only in the clearest of circumstances": *Rafuse v. Canada (Pension Appeals Board)*, [2002] F.C.J. No. 91 at para. 14, citing *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125, [1994] F.C.J. No. 286, at paragraph 18.

[79] In *Xie*, Justice Rothstein stated that: "the Court should only issue directions to a tribunal in the nature of a directed verdict, where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal": at para. 18.

[80] This "will rarely be the case when the issue in dispute is essentially factual in nature": *Rafuse*, above at para. 14, citing *Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73, 76 F.T.R. 182 (T.D.).

[81] The issues in this case are largely factual, and the evidence, both public and confidential, should be evaluated in its totality by the officials who have been assigned the responsibility for making such assessments by Parliament.

[82] The Ministers acknowledged at the hearing that the provision of timelines for a new decision would be appropriate in this case. Accordingly, I will direct that Mr. Freeman be given 60 days to provide any additional submissions that he may wish to make, and that the Ministers be given 4 months thereafter to make a decision. Having regard to the credibility issues discussed earlier, serious consideration should be given to affording Mr. Freeman an interview.

[83] Mr. Freeman also seeks his costs of this application, submitting that the handling of his case has been "egregious", and that costs are therefore warranted on a solicitor-client basis so as to deter blatant abuses of power by Canadian officials.

[84] Costs are not ordinarily awarded in immigration proceedings in this Court. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 provides that "[n]o costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders".

[85] The threshold for establishing the existence of "special reasons" is high, and each case will turn on its own particular circumstances: *Ibrahim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1342, [2007] F.C.J. No. 1734, at para. 8.

[86] I have concluded that Mr. Freeman was treated unfairly in this process in several respects. However, it must also be kept in mind that the Ministers were prepared to consent to having the decision under review set aside a year ago. That motion was dismissed and Mr. Freeman was allowed to proceed to a hearing so that he could advance his bad faith and abuse of power arguments. While he has succeeded in demonstrating that he was denied procedural fairness in the processing of his application, he did not demonstrate either bad faith or an abuse of power in this matter. In these circumstances, I decline to make any order of costs.

Certification

[87] Mr. Freeman has proposed two questions for certification, both of which relate to the constitutionality of section 87.1 of *Immigration and Refugee Protection Act*. Mr. Freeman acknowledges that these questions would only be determinative of this case in limited circumstances.

[88] The Ministers oppose certification. They say that the questions proposed by Mr. Freeman do not arise in light of their concession that the application should be allowed because of the lack of any meaningful analysis of the issues relating to Mr. Freeman's admissibility.

[89] Given that I have not found it necessary to address the constitutional issues raised by Mr. Freeman, I decline to certify either question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed only insofar as it relates to the finding that Mr. Freeman is inadmissible to Canada under section 34(1)(f) of *Immigration and Refugee Protection Act*. That issue is remitted to a different immigration officer for re-determination in accordance with these reasons;

2. Mr. Freeman shall have 60 days in which to provide any additional submissions that he may wish to make;

3. The Ministers will have four months thereafter in which to make a decision;

4. No order is made as to costs and no question is certified.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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