Date: 20070712

Docket: IMM-2702-07

Citation: 2007 FC 742

Ottawa, Ontario, July 12, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DIPESH KUMAR THALANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] "Justice is not taken by storm. She is wooed by slow advances." Justice Benjamin N. Cordozo; The Growth of the Law, 1924.

[2] To understand whether an imminent risk to life and limb exists for an individual if he were to apply outside of Canada, requires not only having read the evidence but demonstrating that one has reflected upon it in dispensing it.

INTRODUCTION

[3] On this application for a stay of the execution of the removal Order, subsequent to a humanitarian and compassionate (H&C) grounds decision, the Applicant sought to rebut the credibility determination of the Immigration and Refugee Board (IRB) by explaining (in a sworn affidavit) the context in which three letters had been provided to the Board as evidence, and pointing out that he had not been asked for an explanation at the hearing. This sworn evidence and submissions from counsel demonstrate that Maoists are in fact active in Kathmandu, undertaking abductions, extortion and executions there, and that they are also active in the region where the Applicant's home is located. (Applicant's Motion Record, Tab 2: Affidavit of Dipesh Kumar Thalang, Ex. B: Submissions of April 26, 2006, p. 18ff; Affidavit, p. 489ff.)

[4] The Applicant further provided detailed evidence regarding the rapidly changing political developments in Nepal on 2006 and early 2007 - namely the ceasefire and subsequent peace accord between the crown and the Maoists – and the fact that these political developments have yet to be translated from political agreement to implementation. He provided most recent evidence of continuing widespread violence by both Maoists and government forces in Kathmandu and elsewhere in Nepal during the ceasefire period and since the signing of the accord in late 2006. (Applicant's Motion Record, Tab 2: Affidavit of Dipesh Kumar Thalang, Ex. B: Submissions of April 26, 2006, p. 18ff; Affidavit, p. 489ff; Ex. D: Submissions of February 14, 2007, p. 640ff .)

[5] In addition, the Applicant provided information in respect of having established himself in Canada as an employee and since 2004 co-owner of a successful import/export entity in Toronto. (Applicant's Motion Record, Tab 2: Affidavit of Dipesh Kumar Thalang, Ex. B:

Submissions of April 26, 2006, p. 18ff; Affidavit, p. 489ff; Ex. C: Submissions of May 10, 2006, p. 603ff; Ex. D: Submissions of February 14, 2007, p. 640ff.)

DECISION UNDER REVIEW

[6] In his reasons, the Pre-Removal Risk Assessment (PRRA) officer considered the PRRA application concurrently with the H&C application, dismissed the Applicant's H&C application (as well as the PRRA application) by decisions dated May 28, 2007. The Officer reviewed the Applicant's request but found there were insufficient "humanitarian and compassionate grounds …to approve this application on the basis of personalized risk to the applicant," and that there was "**insufficient evidence to suggest that requiring the applicant to apply abroad in the normal manner would amount [to] unusual, undeserving or disproportionate hardship with respect to a risk to the applicant's life or personal security.**" (Applicant's Motion Record, Tab 2: Affidavit of Dipesh Kumar Thalang, Ex.A, Reasons, p. 14.)

[7] In setting out his reasons for this finding the Officer indicated that he relied on the signing of the peace accord between Maoist rebels and the government in late 2006. The officer acknowledged reports that some Maoist cadres continue to bear arms and indicated that the security situation in Nepal remains unstable; however, the Officer noted that "improving the situation is now also officially the responsibility of Maoists." On this basis, the officer found that "there is …insufficient evidence to suggest that the applicant would not be able to live and work safely in Kathmandu given the changes that have occurred in Nepal over the past year." (Applicant's Motion Record, Tab 2: Affidavit of Dipesh Kumar Thalang, Ex.A, Reasons, p. 14.)

[8] The Officer acknowledged that the Applicant has lived in Canada for "a significant period of time" but found that he had provided insufficient evidence of significant establishment in Canada during this time. The officer determined that there was insufficient evidence to suggest that the applicant is an integral part of the business or that he has significant community involvement or integration into Canadian society. (Applicant's Motion Record, Tab 2:Affidavit of Dipesh Kumar Thalang, Ex.A, Reasons, p. 15.)

[9] The Applicant received the Officer's reasons on June 21, 2007, found new counsel, and initiated an Application for Leave and Judicial Review on July 4, 2007.

ISSUES

[10] (a) Is there a serious issue to be tried;

(b) Would the Applicant suffer irreparable harm if a stay is not granted?

(c) In whose favour does the balance of convenience lie?

ANALYSIS

[11] The role of the Court at an interlocutory and preliminary stage of the proceeding has been clarified by the Supreme Court of Canada:

> [40] The limited role of a court at the interlocutory stage was well described by Lord Diplock in the *American Cyanamid* case, supra, at p. 510:
>
> > It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
>
> …

> [42] First, the extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the Province may not yet have been notified as is usually required by law…

(*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.)

SERIOUS ISSUE:

[12] The first branch of the test for injunctive relief is:

> [31] The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case… The House of Lords has somewhat relaxed this first test in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court [page128] that there was a serious question to be tried as opposed to a frivolous or vexatious claim.
>
> ....
>
> [33] …In my view, however, the *American Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience.In my view, however, the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience.

(*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, above; Reference is also made to: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).)

[13] Did the officer (a) apply the wrong test for hardship, (b) ignore or misunderstand the evidence rendering a patently unreasonable decision?

[14] In the circumstances, the Officer erred in law by requiring evidence of a risk to life or personal security in order to sustain a finding that denial of an exemption would cause unusual, undeserved or disproportionate hardship. The Officer thereby augmented the requirements for PRRA protection with that which is required for humanitarian and compassionate (H&C) approval, without differentiating between the two distinct tests. Evidence which may not satisfy the test of risk to life or security of the person, may, nevertheless, constitute unusual, undeserved and disproportionate hardship. (*Pinter v. Canada (Minister of Citizenship and Immigration),* 2005 FC 296, [2005] F.C.J. No. 366 (QL); *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404, [2006] F.C.J. No. 1763 (QL); Applicant's Motion Record, Tab 2: Affidavit of Dipesh Kumar Thalang, Ex.A, Reasons, p. 14.)

[15] The Officer erred in law in the assessment of the risk. (Applicant's Motion Record, IMM-2703-07.)

IRREPARABLE HARM:

[16] The second branch of the test for a stay or injunction is whether an Applicant will face irreparable harm of a kind that cannot easily be compensated in damages:

> [34] The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages.

(*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, above; Reference is also made to: *Toth*, above.)

[17] Recognizing hat this Court has in other cases determined that loss of a business, and even less serious harm, such as loss of market share, can be considered irreparable, the evidence

provided by the Applicant required a recognition of irreparable harm. (*Abazi v Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 429 (T.D.) (QL) at paras. 10-11; *Agard v Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 412 (T.D.) (QL); *Apotex Inc. v Wellcome Foundation Ltd.*, [1998] F.C.J. No. 1088 (C.A.) (QL) at paras. 6, 8; *Belkin Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1159 (QL); *Calabrese Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 723 (T.D.) (QL); *Charles v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1149.)

BALANCE OF CONVENIENCE:

[18] The third branch of the test for a stay or injunction is a consideration in respect of where the balance of convenience lies.

> The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.

(*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, above; *Toth*, above.)

[19] There is undoubtedly a public interest in the enforcement of the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and the subordinate regulations and policies. A very significant public interest exists in ensuring that individuals facing such serious consequences on removal from Canada have effective access to a remedy before the Courts. (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 206; [1999] F.C.J. No. 1180 (C.A.) (QL).)

[20] The Applicant poses no danger to the public or to the security of Canada. The Applicant would suffer a far greater harm if the stay were not granted than would the Respondent should

the Court permit him to remain in Canada while his application is pending before this Court. (*Singh v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1440 (F.C.T.D.) (QL); *Smith v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 1069 (F.C.T.D.) (QL).)

CONCLUSION

[21] For all of the above reasons, the application for a stay of the execution of the removal Order is granted.

JUDGMENT

THIS COURT ORDERS that the application for a stay of the execution of the removal Order be granted.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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