

Date: 20080313

Docket: IMM-2702-07

Citation: 2008 FC 340

Toronto, Ontario, March 13, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

DIPESH KUMAR THALANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Thalang is an adult male citizen of Nepal. He entered Canada on a work permit and when that permit expired in 2002 he claimed refugee protection. That claim was denied; judicial review was sought and also denied. The Applicant made an application for a pre-removal risk assessment (PRRA) and for an exemption from the in-Canada selection criteria for permanent residence based on humanitarian and compassionate (H&C) grounds. Both the PRRA and H&C applications were denied. The Applicant sought and obtained leave to have both decisions judicially reviewed. On the consent of the Minister, the application in respect of the PRRA judicial

review was allowed and remitted for a new consideration. It remains pending. This is a judicial review of the H&C decision communicated to the Applicant by letter dated May 28, 2007.

[2] For the reasons that follow, I find that the application is allowed and the matter is sent back for redetermination by a different Officer who is not the Officer who is to redetermine the PRRA application.

[3] Briefly the Applicant's history is that he was born and raised in the countryside in Nepal. His wife and children fled Nepal and reside in India. The Applicant's parents continue to reside in Nepal but have moved to the main city, Kathmandu where they remain. The Applicant, since arriving in Canada, has become engaged with two or three others in a small business specializing in Nepalese goods located in Toronto. He is a good citizen, pays his taxes and has not been in trouble with any police authorities.

[4] The Applicant, as previously stated, made both a PRRA application and an H&C application both of which were apparently considered by the same Officer at the same time. This practice, I am advised by Counsel, is not unusual whereby the same Officer reviews both such applications. This may be the reason for the difficulties experienced in this case.

[5] In rejecting the H&C application, the Officer gave, as the reason for so doing, the following at page 4:

I have reviewed this and counsel's submissions, as well as publicly available documentary evidence on country conditions in Nepal and

how the [sic] pertain to the applicant or a person in similar circumstances, and having done so, I am not satisfied that sufficient humanitarian and compassionate grounds exists to approve this application on the basis of personalized risk to the applicant. There is insufficient evidence to suggest that requiring the applicant to apply abroad in the normal manner would amount [sic] unusual, undeserving, or disproportionate hardship with respect to a risk to the applicant's life or personal security. This finding has been made based on the following reasons.

[6] In so doing, the Officer based the H&C assessment on the wrong test. The Officer's assessment was based on risk, which was a PRRA criteria, not an H&C criteria. The proper H&C criteria are unusual and undeserved or disproportionate hardship (*Liyanage v. Canada (MCI)* 2005 FC 1045 per the Chief Justice at para. 41, *Pinter v. Canada (MCI)* 2005 FC 296 per the Chief Justice at paras. 2-7). This is an error of law in respect of which the standard of review is that of correctness as stated in *Pinter, supra* as well as by the Supreme Court of Canada in their recent decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 41-64.

[7] Given the error of law it must be emphasised that an officer considering an H&C application should, as stated by the Chief Justice in *Pinter, supra* at paragraph 6, have an open mind as to all matters that need to be taken into account when considering unusual and undeserved or disproportionate hardship. A review of the record in this present matter strongly suggests that the previous Officer did not give sufficient consideration as to the evidence as to what was happening "on the ground" in Nepal as may affect an everyday person endeavouring to carry on a life there, as opposed to treaties and settlements that were signed but may not have been efficiently implemented as between warring parties within the country. Nor did the Officer give sufficient weight to the fact that, as a returnee to Nepal, the Applicant may suffer greater hardship.

[8] It is appropriate not only to allow this judicial review application but to ensure that another Officer consider the matter and, to avoid confusion as between PRRA and H&C criteria, that this Officer not be the one to consider the Applicants PRRA application.

[9] There is no reason to certify a question or to award costs.

JUDGMENT

For the Reasons above:

THIS COURT ADJUDGES that:

1. The application is allowed;
2. The H&C application shall be returned to be considered anew by a different Officer who is also not the Officer considering the Applicant's PRRA application;
3. There is no question for certification;
4. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2702-07

STYLE OF CAUSE: *DIPESH KUMAR THALANG v.
MINISTER OF CITIZENSHIP AND IMMIGRATION*

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 12, 2008

REASONS FOR JUDGMENT: HUGHES J.

DATED: MARCH 13, 2008

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