**Date: 20071212**

**Docket: IMM-4499-07**

**Citation: 2007 FC 1304**

**Ottawa, Ontario, December 12, 2007**

**PRESENT: The Honourable Mr. Justice Lemieux**

**BETWEEN:**

**ASSUNTA MARY D'SOUZA**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## REASONS FOR ORDER AND ORDER

## Introduction

[1] For two hours in the early afternoon of November 5, 2007, in Toronto, I heard a motion by Ms. Assunta Mary D'Souza (the "applicant"), 23 years of age and a citizen of Pakistan, for a stay of the execution of her removal to Pakistan scheduled for the next day at 6:00 p.m. The motion appeared to be a typical one except for the fact the applicant had been arrested and has been in detention since October 13, 2007 on the basis she is a flight risk.

[2] The underlying decision challenged in the applicant's leave and judicial review application filed on October 30, 2007 is a decision by removal officer Pannu (the "removal officer") refusing to defer her removal pending the determination of a recently updated application for permanent residence based on H&C grounds (the "H&C application") to reflect a common law relationship entered into in June 2006 and an additional hardship factor. Deferral was also sought pending the determination of a recently filed second Pre-Removal Risk Assessment Application (PRRA) based on new evidence dated in October 2006.

[3] In this Court, the applicant's counsel sought a stay pending the determination of the recently filed or updated H&C and PRRA applications or, in the alternative, pending the determination of the underlying leave and judicial review application in respect of the removal officer's refusal to defer.

[4] After hearing argument, I took the matter under reserve indicating my decision would be released the next day at 9:00 a.m.

[5] At approximately 5:00 p.m. on the afternoon of November 5, 2007, as I was reviewing the arguments and evidence presented to me earlier on in that afternoon, I was advised by the Registrar at the hearing, I need not release my decision on the stay motion because the applicant would not be deported the next day since the Consulate of Pakistan in Toronto (the "Consulate") would not be issuing for another ten days the necessary travel document, i.e. a valid passport replacing her expired one.

[6] At approximately 18:00 in the afternoon of November 5, 2007, the Registrar provided me with a copy of a letter dated November 5, 2007 from counsel for the applicant sent to the Court at 17:22 that day indicating he had been contacted by his client after the hearing of the stay application before me had been concluded.

[7] Counsel for the applicant's letter informed me that:

- On the morning of November 5, 2007, the applicant had been escorted by two officials of the Canada Border Services Agency (CBSA) to the Consulate for an interview connected to the issuance of her passport;

- Counsel's letter also mentioned unverified allegations by the applicant that during her interview with the Vice-Consul at the Consulate (the "Vice-Consul") he had questioned her on her status in Canada and why she was being deported; questioned her regarding her immigration matters in Canada including but not limited to her second PRRA application; the applicant was told by the Vice-Consul after receiving a telephone call <u>while he was interviewing the applicant</u> [emphasis mine] that the call came from the removal officer who told him the applicant's immigration case was false and CBSA needed the travel document for her scheduled deportation the next day;

- Advised the Court that upon her return to the Immigration Holding Facility in Toronto, she was told by an immigration officer she would not be removed due to a

lack of a travel document. That conversation was said to have occurred at 14:30 on November 5, 2007.

[8] Counsel for the applicant's November 5, 2007 late afternoon/early evening letter submitted what the applicant had told him raised serious concerns regarding CBSA's conduct because it was clear the removal officer had made removal arrangements without a valid travel document in hand when she issued, on October 22, 2007, a departure notice for her removal on November 6th but more importantly, that her decision to refuse the applicant's deferral was made on the basis that the applicant's removal arrangements would proceed as scheduled.

[9] Counsel submitted removal arrangements ought not to have been made by CBSA prior to securing the valid travel authorization. He submitted the applicant acted on CBSA's representation that removal would proceed as scheduled and, as such, was required to undertake considerable legal expense in seeking a motion to stay her removal. Counsel noted the time of the Federal Court was required to deal with the motion and that "it is likely that the respondent will seek the applicant's removal once the passport has been issued". He submitted CBSA's conduct was an abuse of process and that the doctrine of unclean hands ought to be applied to its conduct. He submitted the information concerning the lack of a travel document could have clearly been brought to the attention of the Court by counsel for the respondent prior to the hearing but was not. He stated the case law under section 48 of the *Immigration and Refugee Protection Act* (the "IRPA") required the removal officer determine if there were any impediments to removal and stated "clearly, in this case, the lack of a travel document was an impediment to removal."

[10] Counsel for the applicant added another element to his letter of November 5, 2007; he stated CBSA's conduct "has now put the applicant at greater risk by facilitating (transporting) the applicant to her interview where, again, she was questioned about the merits of her second PRRA which addresses her risk in Pakistan. Counsel stated: "Arguably, the Consulate of Pakistan is now aware of the applicant's immigration matters and, more importantly, the subsequent PRRA. The applicant is now put at a sur place risk. We seek leave to assert this new development as irreparable harm that will be inflicted upon the applicant if returned to Pakistan."

[11] Counsel for the applicant submitted "the within matter was not premature as it concerns the underlying decision rendered by the removal officer. He suggested it was in the public interest to deter "this type of conduct engaged in by the respondent". He concluded by stating "however, if the underlying motion is found to be moot, our client has incurred considerable legal expense on the within matter; and we have been instructed by our client to seek costs on a solicitor client basis from the respondent."

[12] On Wednesday, November 7, 2007, the Court received a copy of the applicant's supporting affidavit deposing to the events which had transpired at the Consulate on November 5, 2007 and to subsequent developments.

[13] That same day, November 7, 2007, the applicant and the Court received from counsel for the Minister the Respondent's responding record consisting of the affidavits of four CBSA officials.

[14] Those officials were:

- The affidavit of Sindi Pannu;

- The affidavit of Ian Maynard and the affidavit of Johanna Cameron who escorted the applicant to the Consulate on November 5, 2007; and

- The affidavit of Makedonka Solakov, the enforcement assistant who assisted the removal officer to obtain the appropriate travel document.

[15] The thrust of the escorts' affidavits was to explain the escort to the Consulate; what happened there; when the interview was completed and the timing of the applicant's return to detention. Sindi Pannu's affidavit and that of Ms. Solakov explained the circumstances around CBSA's efforts to obtain a travel document for the applicant and why her removal was scheduled for November 6, 2007. Furthermore, those affidavits, particularly that of the removal officer, took issue with statements made by the applicant particularly in respect of the telephone conversation which she deposed occurred between her and the Vice-Consul during the afternoon of November 5, 2007.

[16] Faced with conflicting evidence and submissions, the Court convened a hearing in respect of the above noted recent developments. That hearing took place on Thursday, November 8, 2007. At the conclusion of the hearing I issued an interim injunction prohibiting the applicant's removal and scheduled a hearing on the matter for December 5, 2007 in Toronto. The Court also established a schedule for cross-examination on the various affidavits filed as well as a schedule for the

submission of additional representations arising out of those recent developments. The applicant and the removal officer were the only deponents cross-examined.

**Background**

[17] The applicant left Pakistan on October 11, 2003 entering the United States on the same day. She remained in the United States for a six month period but did not apply for asylum. On February 11, 2004, her application for a visitor's visa to Canada was refused by the Detroit Visa Post.

[18] She entered Canada on April 2004 and made a refugee claim which was refused by the Refugee Protection Division of the Immigration and Refugee Board ("RPD") on December 1, 2004.

[19] Before the RPD, the applicant alleged a fear of serious harm or persecution on the grounds of her religion, Christianity. She alleged that in April 2003, she was abducted by several unknown women, members of an Islamic Jihad movement, and was forcibly converted to Islam. She alleged that she was tortured and beaten during that ordeal. She alleged her parents reported the incident to the police without result. She states notwithstanding her forced conversion she is still a Christian.

[20] The RPD did not believe her story for a number of reasons principally due to lack of subjective fear and lack of credibility. The RPD based its credibility findings on serious omissions in her personal information form ("PIF") such as not mentioning threatening phone calls both before and after her departure, not mentioning the death of the son of family friends, a death on account of his Christianity as well as other incidents. The RPD also noted her brother's successful refugee claim in Canada and that she had not produced any hospital reports corroborating the treatments she

received after being tortured. The applicant applied to this Court for leave and judicial review. Leave was refused by a Judge of this Court on January 6, 2006.

[21] After the RPD's refusal, the applicant, in the middle of March 2005, filed an H&C application based on the same risk examined by the RPD. The H&C was referred to the Scarborough office of Citizenship and Immigration Canada ("CIC") on July 28, 2005. In August 3, 2007 an H&C officer advised the applicant there were no H&C grounds to justify an exemption from the law and her file was being passed on to a PRRA officer to determine whether the risk she alleged constituted undue or disproportionate hardship. Those risks were the same as in her refugee claim and in her first PRRA application.

[22] Later that month, she also filed a Pre-Removal Risk Assessment ("PRRA") Application which, on August 5, 2005, found the applicant would not be subject to risk of torture, be at risk of persecution or face a risk to life or risk of cruel and unusual treatment or punishment if returned to Pakistan.

[23] The negative PRRA decision was served on the applicant on September 29, 2005 at which time she was served with a direction to report for removal in Windsor on October 28, 2005. In response to a request by the applicant, a stay of removal was granted by an enforcement officer until November 4, 2005.

[24] On November 1, 2005, the applicant requested a further deferral of her removal to the United States. This second deferral was refused by an enforcement officer on November 2, 2005.

[25] The applicant then sought leave and judicial review from the enforcement officer's refusal to defer and she also sought an extension of time to file an application for leave and judicial review of the PRRA officer's decision. Based on these two underlying leave applications, she sought a stay of her removal from Canada scheduled for November 4, 2005. That stay motion was considered and dismissed by my colleague Justice Mosley on November 3, 2005. He was not satisfied that the applicant had established that there was a serious issue to be tried with respect to the two underlying applications.

[26] The applicant did not report for her removal. She went underground. She was eventually found by the police in October 2007. According to arresting officers, the applicant was residing with her parents on Silverbell Grove in Toronto contrary to a new allegation which she made in her updated H&C application that she lives with a common law partner in a different location.

[27] The record discloses after her arrest and after being served on October 22, 2007 with the departure notice, the applicant retained new immigration counsel.

[28] As noted, on October 26, 2007, her new counsel filed a second PRRA application on the basis of new evidence. That evidence consists of three e-mails her parents had received in October 2006 addressed to them and specifically to her mother telling them/her they/she was/were at risk of returning to Pakistan because they had spoken against Islam. On that same day, new counsel advised CIC that they had been retained by the applicant to update her H&C application which was then 32 months old and had been transferred to the PRRA Unit for assessment of hardship. Counsel

advised the updates related to the foreign hardship she would face in Pakistan, the hardship that would flow between her and her common law spouse, a permanent resident to Canada with whom she has been living for more that one year.

[29] That same day, new counsel wrote to the removal officer requesting deferral until determination of the applications filed that day. On November 1st, the removal officer refused and provided written reasons. She stated CBSA had under section 48 of the *Immigration and Refugee Protection Act* (the "IRPA") a duty to carry out removal orders as soon as reasonably practicable and did not consider appropriate in the circumstances to defer.

[30] She noted the outstanding H&C application but was not satisfied it being outstanding warranted deferral. She also noted the second PRRA did not trigger a regulatory stay. She noted her first PRRA had been denied and that she had had the benefit of a risk review. She was of the view her outstanding PRRA did not warrant deferral.

**Analysis**

[31] I propose to deal with the applicant's request for a stay of the execution of her removal order on the basis of all of the evidence before me which includes the affidavits and cross-examination thereon filed subsequent to the November 5, 2007 hearing as well as on the basis of the arguments which I heard both on November 5 and December 5, 2007.

1. Preliminary Matters

[32] Counsel raised three preliminary matters.

(a) Mootness

[33] At the December 5, 2007 hearing, both counsel agreed the stay application before me was not moot notwithstanding a new removal date had not been fixed and indeed could not be fixed given this Court's interim order. I agree with the submissions of both counsel on the point.

[34] Of importance is the fact of the clear, stated and continuing intent of the CBSA to remove the applicant from Canada in the enforcement of the valid deportation order made against her and equally the clear stated intent of the applicant that, in the circumstances of her case, she should not be removed from Canada and would seek to stay it. There is therefore a live controversy between the parties and an outstanding issue whether the removal officer was correct in refusing to defer for the reasons she did. Coupled with these facts is the existence of new evidence surrounding the events which occurred on November 5, 2007 which were the subject of argument on December 5, 2007.

[35] In any event, I told counsel at the December 5, 2007 hearing, even if I had been of the view the stay application was technically moot, in all of the circumstances of this case, I would decide the stay application as a matter of judicial discretion. *See Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

(b) Jurisdiction on the Scope of the Requested Stay

[36] A second preliminary point needs to be resolved. In the context of the additional submission arising out of the events surrounding the applicant's interview at the Consulate, counsel for the

applicant argued as an alternative argument to the mootness issue, the ability of this Court to grant the stay of the execution of deportation until a decision had been made on the later of the applicant's second PRRA application or updated H&C application, on the basis of this Court's authority to issue a free standing stay that is, without regard to the necessity of an underlying application for judicial review. As noted, the applicant had requested this relief as his primary relief when filing the applicant's stay motion.

[37] Counsel for the applicant's submission on the ability of this Court to grant a "free standing stay" drew a swift response from counsel for the Minister who submitted the Court had no jurisdiction to issue a stay on a free standing basis under section 18.2 of the *Federal Courts Act*. It could only do so "pending the final disposition of the application".

[38] Counsel for the applicant cited as authority for his proposition two recent cases decided by my colleagues where a stay was granted pending the determination until an outstanding H&C application had been finally disposed of. Those cases are *Trea v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 956 and *Acevedo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 401.

[39] Counsel for the respondent relied upon the wording of section 18.2 of *the Federal Courts Act* (the "Act") which provides: "On an Application for Judicial Review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application" as well as the Federal Court of Appeal's decision in *Forde v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. B-31 and the decisions by my colleagues in

*Muhammad v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 156 and *Razzaq v. Canada (Solicitor General)*, 2006 FC 442.

[40] In my view, counsel for the respondent expresses the correct view of the law. As clearly stated by Justice Strayer, on behalf of the Federal Court of Appeal in *Forde*, above, in order for a stay to be granted in immigration matters, there must be a leave or judicial review proceeding to which the stay is ancillary. Neither section 18.2 nor section 50(1)(b) of the *Act* allow the Court to stop deportations which are no longer under attack, directly or indirectly.

[41] With respect, *Trea* and *Acevedo*, above, are not appropriate authorities on the point because the jurisdictional question was not raised before my colleagues who never had the opportunity to consider the issue.

(c) Whether this Stay Application is an Abuse of Process

[42] I touch upon a final point raised by counsel for the respondent. At the November 5, 2007 hearing, she argued that I should not hear the stay application before me because it constituted an abuse of process. Her argument focussed on Justice Mosley's decision to refuse the applicant's stay motion made in November 2005. On that motion, then counsel for the applicant referred to the pending H&C application of March 2004 and the first PRRA application. In terms of the first PRRA application and the removal officer's then decision not to defer her removal set for November 5, 2005, Justice Mosley found no serious issue.

[43] Counsel for the Minister relies on two decisions by my colleague Justice Snider. Those decisions are *Kathirvelu v. Minister of Citizenship and Immigration*, 2003 FC 1404 and a very recent decision of hers contained in a speaking order in *Abbud v. the Minister of Citizenship and Immigration*, IMM-551-07, October 26, 2007 where an applicant's second stay motion had been refused after that applicant failed to attend for his removal subsequent to the denial of a first stay motion. In *Abbud*, Justice Snider ruled:

> "Given the Applicant's behaviour in blatantly ignoring Canadian immigration laws and the existence of a previous Court order, this motion constitutes an abuse of process. There is simply nothing that can excuse his behaviour. Granting – or even hearing – this motion would reward the Applicant for his disrespect of Canadian immigration authorities and laws …"

In any event, she went on to dismiss the motion on the basis that the balance of convenience clearly favours the respondent because "Otherwise, on the facts of this case, the integrity of Canada's immigration laws is seriously comprised."

[44] I note that my colleague Justice Mandamin in *Trea*, above, was faced with a similar preliminary issue. He was of the view that the applicant's failure to cooperate with the removal was not excusable in law since her application for a stay had not been granted by the Court. He was of the view that there was a reasonable explanation for her failure not to appear for her removal, namely, the fact that she was pregnant, a pregnancy which was difficult and in respect of which she had to spend time at a health clinic under observation. In those circumstances, it was appropriate in his view for the Court to exercise its discretion and to hear the application.

[45] Counsel for the applicant argued, notwithstanding the fact the applicant did not attend upon her removal, I should exercise my discretion to hear this stay application. Citing the recent Federal Court of Appeal's decision in *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14 where Justice Evans, on behalf of the Federal Court of Appeal outlined the Court's discretion to hear an application for judicial review in a case where the applicant had knowingly made false misrepresentations in earlier proceedings to review his detention. This is what Justice Evans wrote at paragraphs 10 and 11 of that decision:

> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.
>
> [11] These factors are not intended to be exhaustive, nor are all necessarily relevant in every case. While this discretion must be exercised on a judicial basis, an appellate court should not lightly interfere with a judge's exercise of the broad discretion afforded by public law proceedings and remedies. Nonetheless, I have concluded in this case that the Judge erred in the exercise of his discretion by failing to take account of the remedy provided to Mr. Thanabalasingham by his right to appeal to the IAD against his removal and the relevance of that appeal to an assessment of the consequences if the Minister's opinion stands.

[46] Counsel for the applicant argued the applicant had expressed her remorse in not attending her removal, her breach was not serious in that she was not engaged in criminal conduct; her case was a strong one and the impact of her removal put her at substantial risk.

[47] In the particular circumstances of this case, the balancing of the factors outlined in *Thanabalasingham*, above, favours the Minister. The applicant deliberately flouted an order of this Court when Justice Mosley refused her stay application in 2005 where the underlying applications are substantively similar to the stay application now before me. She has no legitimate excuse not to have appeared for her removal. In my view, she did not show remorse. Indeed, she tried to justify her non appearance for removal on the grounds that she understood Justice Mosley's stay was not denied on its merits but because it was brought late. Moreover, throughout her cross-examination, she sought to justify her actions on the basis she feared Islamic Jihad in Pakistan and the fact her conversion, albeit forced, to Islam and her continuing faith in Christianity would be considered blasphemy in Pakistan. She has been found not credible on this issue by the RPD and in her first PRRA application.

[48] In conclusion, on this point, I subscribe to the views expressed by Justice Snider in the two cases cited above. This second stay application is an abuse of process and need not be heard and determined.

[49] Nevertheless, the matter having been fully argued before and because of the new arguments raised by her interview by the Vice-Consul, I am disposed to express my views on the merits of the applicant's stay application.

(d) The Merits of this Stay Application

[50] For the reasons expressed below, I would dismiss this stay application. I divide my reasons in terms of the stay application argued on November 5, 2007 and those put forward on December 5, 2007.

1. The November 5, 2007 Arguments

[51] Pursuant to this Court's ruling on the scope of relief available on a stay of removal motion, the underlying application to this stay motion is the removal officer's November 1, 2007 decision.

[52] It is settled law that:

- The scope of a removal officer's discretion under section 48 of *IRPA* is very narrow;

- Because if a stay were to be granted in this case would effectively grant part of the relief sought in the underlying judicial review application, the existence of a serious issue is to be gauged not on the low threshold of whether the issue is frivolous or vexatious but rather whether the issue raised is likely to succeed;

- The existence of an outstanding H&C application or a recently filed second PRRA application is not the basis for, in and of itself without more, the grant of a stay of removal because those outstanding applications will be continued to be examined until a decision is reached. More must be shown.

[53] In connection with the updated H&C application, in their October 26, 2007 request for deferral, counsel for the applicant stated the H&C application had been outstanding for 32 months and decision on it was imminent. Counsel for the applicant submitted the H&C application was a particularly strong application in that it will consider the applicant's risk in Pakistan through the context of a foreign hardship determination, the hardship that would emanate from separating the applicant from her common-law spouse in Canada and the applicant's level of establishment in Canada.

[54] In terms of the second recently PRRA application, the new evidence submitted by counsel for the applicant were the e-mails that her parents received containing the threats that have been advanced against them by Islamic extremists in Pakistan. It was submitted those e-mails constitute a change of the circumstance.

[55] The applicant must satisfy the Court of the existence of the three necessary elements required to be established in order to obtain a stay: the existence of one or more serious issues to be tried, the existence of irreparable harm and the balance of convenience favouring the applicant.

[56] As I have already pointed out, the balance of convenience in this case, favours the Minister. The applicant's deliberate failure not to appear for her removal in 2005 after Justice Mosley refused her stay and then her going underground to evade the law for close to two years favours the Minister now being able to remove her.

[57] The balance of convenience favouring the Minister is sufficient to deny the applicant's stay.

[58] I understand that very recently, officials at Citizenship and Immigration Canada have decided both the second PRRA application and the updated H&C application which, while I have received copies, I have not considered because those decisions were not in existence when I took this stay application under reserve after hearing argument on December 5, 2007. Those two decisions make moot the arguments on serious issue and irreparable harm as argued at the November 5, 2007 hearing.

2. The December 5, 2007 Arguments

[59] The purpose of my assessment of the December 5th arguments, the affidavits filed after the November 5, 2007 hearing and the transcripts of the cross-examinations of the applicant and the removal officer is to determine their impact on the three part test for the grant of a stay.

[60] Counsel for the applicant argues the events of November 5, 2007 raise a serious issue: whether the removal officer erred in refusing to defer when she made her decision on November 1, 2007 being aware the Consulate wanted to interview the applicant on November 5, 2007 in connection with the issuance of a renewed passport. This argument rests on the uncontested proposition it cannot be reasonably practicable to remove an individual from Canada who is not in possession of a valid travel document.

[61] Counsel for the applicant also argued the applicant's interview with the Vice-Consul resulted in her having a sur place claim in that now, as a result of that interview, an agent of the

Government of Pakistan has knowledge of her forced conversion to Islam but yet her continued Christian faith laying the ground for a blasphemy charge on her return to Pakistan.

[62] Counsel for the Minister argued the cross-examination of the applicant demonstrates the version of was said at the interview is not credible.

[63] After reviewing very closely the transcripts of the cross-examinations of the applicant and the removal officer, I conclude the November 5th interview the applicant had with the Vice-Consul does not raise a serious issue that the removal officer should have deferred the applicant's removal on November 1, 2007.

[64] Counsel for the applicant attacked the removal officer's credibility. I find her testimony to be credible notwithstanding three facts which arise out of her cross-examination:

- The fact there was a minor discrepancy in her affidavit relating to one of the enclosures sent to the Consulate in her letter of October 22, 2007 delivered by hand by Agent Solakov on October 23rd. It is true the removal officer conceded on cross-examination the statement about the item in her affidavit was false. However, a review of her entire testimony on this point shows that her affidavit was inaccurate but not made to deceive the Court. It was a minor slip-up. In my view, nothing at all turns on this point;

- The fact the removal officer stated in her affidavit she spoke to the Vice-Consul in the afternoon of November 5, 2007 yet said on cross-examination: “afternoon” to her meant after 11:30. I draw no negative inference on this point given the fact the removal officer starts work at 6:00 in the morning and leaves work at 3:00 in the afternoon;

- The fact she was relying on a conversation with the Vice-Consul on October 18, 2007 on how long it would take to obtain the travel document yet this conversation is contradicted by her letter of October 22, 2007 in which she tells the Vice-Consul she will book a flight for the applicant’s departure only after receiving word from the Consulate on the expected date of receipt of the travel document. I see no contradiction after a review of all of the evidence and, in particular, the assurance that agent Solakov received on October 23, 2007 when she hand delivered the applicant’s documentation to the Consulate. She was told the document would be received by October 30, 2007 i.e. in seven days.

[65] I conclude, after a review of the testimony and cross-examination of the removal officer that she had a legitimate expectation on November 1, 2007 she would have the renewed passport in hand in time for the applicant’s removal when she refused to defer notwithstanding she knew at that time the applicant would be interviewed on November 5th in the morning at the Consulate.

[66] The evidence discloses the removal officer has considerable experience in her dealings with the Consulate on the issue of obtaining travel documents in aid of the execution of deportation

orders. She has handled approximately 200 such cases with the Consulate. In particular, as noted, she and Agent Solakov were told on October 23rd the documents would be issued in seven days i.e. by October 30, 2007. In her experience, the failure to receive the applicant's renewed passport was the first time ever the Consulate had failed to meet the deadline contained in their assurances.

[67] Moreover, the fact the applicant was to be interviewed on November 5, 2007 was not a cause to defer. In her experience, travel documents are issued within hours or a day after an interview. Overall, I find the removal officer provided the Court honest and forthright evidence of her efforts to effect the applicant's removal.

[68] For these reasons, I conclude the events of November 5, 2007 do not show the existence of a serious issue gauged against the standard of likely success.

[69] The applicant's sur place claim principally rests on her testimony of what happened when she was interviewed by the Vice-Consul. Counsel for the applicant suggests her testimony was corroborated by an e-mail the applicant sent to her mother shortly after her return to the detention centre at approximately 11:35. For the reasons expressed below, I place little weight on that e-mail.

[70] Central to an assessment of the credibility of the applicant's testimony of what happened during the interview is the time when the removal officer telephoned the Vice-Consul. The applicant in her affidavit deposed that the removal officer phoned the Vice-Consul during the time she was being interviewed by him. The removal officer testified she spoke to the Vice-Consul after 11:30 in the morning of November 5, 2007 to enquire when the passport would be available. A

review of the totality of all of the evidence clearly shows the applicant had left the Consulate before the removal officer phoned the Vice-Consul. At 11:30, the applicant was about to enter the detention center. The time to travel from the Consulate to the detention centre is about twenty minutes which corroborates other evidence that the applicant, escorted by two CBSA agents, left the Consulate at approximately 11:15 in the morning of November 5th. The applicant's version of what the Vice-Consul told her the removal officer told him is simply not credible. I find her affidavit on this part to be untrue. I find the applicant has led no credible evidence of a sur place claim.

[71] Counsel for the Minister gave many instances which, cumulatively, she argued show that the applicant's affidavit contained unjustified allegations which should lead to a general credibility finding against the applicant or at least a sanction by way of costs.

[72] I decline the Minister's suggestions. It is not necessary for me to deal with the issue of the applicant's overall credibility. Costs in immigration matters are only awarded for special reasons. The length of these reasons show counsel for the applicant had legitimate points to raise.

[73] On the other hand, I decline to award costs to the applicant. The Court's time was not wasted on November 5, 2007 as this stay application has now been decided. In any event, after the removal officer found out from the Vice-Consul on November 5th the document would not be issued in time for the execution of the applicant's removal order she took reasonable steps to try to reach counsel who was in Court. The same could be said of the applicant.

[74] I conclude by dealing very briefly with one last point. Counsel for the applicant argued the applicant was informed that she would be interviewed at the Consulate only on the morning of November 5, 2007, ten minutes before being escorted. Counsel for the applicant suggested she was denied the right to counsel. The evidence shows that the applicant never asked her escort agents nor the guard at the detention center she wanted to speak to her counsel. In the circumstances, as a fact, the applicant was not denied the right to counsel.

[75] For all of these reasons, this stay application is dismissed.

**ORDER**

**THIS COURT ORDERS** that this stay application is dismissed.

"François Lemieux"

_____

Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-4499-07 |
| **STYLE OF CAUSE:** | ASSUNTA MARY D'SOUZA v.<br>THE MINISTER OF PUBLIC SAFETY<br>AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATES OF HEARINGS:** | November 5, 2007, November 7, 2007 and<br>December 5, 2007 |
| **REASONS FOR ORDER AND ORDER:** | Lemieux J. |
| **DATED:** | December 12, 2007 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Jeinis S. Patel | FOR THE APPLICANT |
| Ms. Maria Burgos | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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