**Date: 20081106**

**Docket: IMM-2397-08**

**Citation: 2008 FC 1242**

**Toronto, Ontario, November 6, 2008**

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

**BETWEEN:**

**JULIO ESCALONA PEREZ AND**
**DENIS ALEXANDRA PEREZ DE ESCALONA**

**Applicants**

**and**

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

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are husband and wife, citizens of Venezuela. They, together with their children, entered Canada from Venezuela in 1990 without status and only made refugee claims in 2002. The claims on behalf of two of their children were pursued and ultimately allowed. A third child was removed from Canada back to Venezuela. The claims of the Applicants, the two parents, have been pursued through various proceedings including the one under review, without success. Under review is a decision of an Officer of the Respondent dated April 15, 2008, wherein the

Applicants' request for permanent residence in Canada by way of exemption on humanitarian and compassionate (H&C) grounds was not granted.

[2] For the reasons that follow, I find that the application is dismissed.

[3] The Applicants arrived in Canada together with their three children in 1990 without status and did not make a claim for refugee protection until 2002. That claim was rejected by a decision of the Board dated June 9, 2004. Leave to apply for judicial review was denied. A pre-removal risk assessment was conducted and a decision unfavourable to the Applicants was given December 16, 2005. Leave to apply for judicial review was granted but that application was dismissed by this Court on November 15, 2006.

[4] The Applicants had submitted an application for exemption on humanitarian and compassionate grounds in 2005. However, since that time they have retained new counsel who submitted a new application for exemption on their behalf by letter dated January 5, 2007. By the decision now under review, dated April 15, 2008, that application was not granted and a date for removal was set. The Applicants applied for a stay of that removal which application was granted by an Order of this Court dated June 2, 2008.

[5] The Applicants lived in a mountainous region in Venezuela and allege that they became suspicious that drug dealings involving police officers and government officials were occurring near their home. One day in about 1988, they allege that police came to their home, roughed them up

and took them away at which time they were interrogated for a number of days and arrested on charges related to dealing in drugs. The Applicants retained a lawyer who applied to the Court on their behalf within a few days. A judge dismissed the charges for lack of evidence and the Applicants were released.

[6] Shortly thereafter, another warrant for the Applicants' arrest was issued. The basis for and nature of that warrant is not clear on the evidence. The Applicants apparently moved around in Venezuela until they left to come to Canada in 1990. They allege that they secured passports with the assistance of a relative who was a government official. The warrant has never been executed even though photos of the Applicants apparently appeared in local newspapers heightening the risk of apprehension.

[7] Since arriving in Canada, the Applicants have become settled without any evidence of problems or incidents. The male Applicant has a business; the female Applicant has a job. One of their sons was removed to Venezuela. There is little evidence as to what has happened to him there.

[8] The Officer assessed the Applicants' humanitarian and compassionate application and approved the application of their youngest son, Pradiumna. The other Applicants (mother and father) application was not granted. Hence this review.

[9] Applicants' counsel at the hearing defined the issue as one being whether the decision of the Officer was reasonable having regard to the evidence presented. The single circumstance raised in

argument by Applicants' counsel was whether the Officer gave due consideration to the evidence as to whether the Applicants, if returned to Venezuela, would be arrested under the warrant and placed in detention under horrible circumstances for a prolonged period of time until the merits of the matter could be determined by a Venezuelan court.

[10] The Applicants do not contest that they would bi given access to counsel in Venezuela, and do not contest that, once the matter reached trial, they would be afforded due process. The argument raised by the Applicants is that the Officer did not deal adequately with the Applicants' assertion that, if they were returned to Venezuela, they would be arrested and imprisoned in horrible circumstances pending trial and that this would constitute proper grounds for exemption from rendering requirements in applying for permanent residence in Canada on humanitarian and compassionate grounds.

[11] Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 consideration has been given to the standard upon which a review of an Officer's humanitarian and compassion decision is to be made. As stated by Dawson J. in *Zambrano v. Canada (MCI)* 2008 FC 481 at paragraphs 31 and 32, the standard is that of reasonableness:

> ***31*** *The appropriate standard of review for a humanitarian and compassionate decision as a whole has previously been held to be reasonableness simpliciter. See:* Baker v. Canada *(Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at paragraphs 57-62. In my view, given the discretionary nature of a humanitarian and compassionate decision and its factual intensity, the deferential standard of reasonableness continues to be appropriate. See:* Dunsmuir *at paragraphs 51 and 53.*

> ***32*** *As to what the two standards of review require of a reviewing court, the correctness standard does not require the Court to show deference to the decision-maker. Rather, the Court is to undertake its own analysis and determine whether it agrees with the determination made by the decision-maker. In the event that the Court disagrees, it is to substitute its own view and provide the correct answer. See: Dunsmuir at paragraph 50. Review on the reasonableness standard requires the Court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law. See: Dunsmuir at paragraph 47.*

[12] The Applicants do not contest that the decision making process was transparent and intelligible. What is contested is whether the decision was justified on the evidence. They argue that the decision falls outside the range of reasonable outcomes.

[13] The Applicants accept that they bear the evidentiary burden of persuasion such that the Officer must be persuaded that, on the evidence presented, exemption on humanitarian and compassionate grounds is warranted. It must also be borne in mind that a decision made on humanitarian and compassionate grounds is an exceptional measure and discretionary one (*Legault v. Canada (MCI)*, 2002 FCA 125 at para.15).

[14] The Applicants argue that, in arriving at the decision at issue, the Officer erroneously did not take into consideration determinations by the Refugee Board as to whether the Applicants' stay for two years in Venezuela could be explained, as could the manner in which they obtained passports to exit the country. Further the Applicants' argue that the Officer failed to consider expert evidence

presented to the Refugee Board to the effect that the Applicants would be arrested upon re-entry to Venezuela.

[15] As to the obtaining of passports, the Board in its Reasons dated June 9, 2004 said at page 7:

> *16. On the issue of credibility, I note that there were several areas of inconsistent testimony between the written narrative of the principal claimant's Personal Information Form (PIF), the oral allegations, and the contents of some of the supporting documents. These, and some areas of implausibility, were pointed out by the Hearings Officer in his submissions.*
>
> *17. In my opinion, acceptable explanations were provided in most areas, such as with respect to the means and methods used by the claimants in leaving Venezuela, including the acquisition of Venezuelan passports. I have no evidence that would contradict the claimants' sworn testimony, and it is plausible that the claimants obtained legal documents with the assistance of a passport officer, their family member. It is also plausible that they were facilitated in leaving Venezuela, even when there existed a warrant of arrest.*

[16] As to whether the Applicants would be subject to arrest upon their return to Venezuela, Applicants' counsel points to expert evidence given by a Venezuelan lawyer, Dr. Alvarez, as quoted at page 12 of the Board's Reasons:

> *This judicial pronouncement is equivalent in practice to this aspect: The accused would be immediately placed in jail (imprisoned) without right to bond, which translate into an infinite trial without respect for guarantee of physical integrity…*

[17] It is clear, however that the evidence of the Venezuelan lawyer was compromised in several respects and, as to the issue as to whether the Applicants' could expect fair process or be subjected to cruel and unusual treatment or punishment, the Board concluded that the legal system worked in Venezuela. The issue was set out at page 14 of their Reasons:

> *The determinative issue is whether the claimants can expect a fair process of prosecution for having allegedly violated an ordinary law of general application in Venezuela, given all of the evidence, or whether, as counsel argues, they have good grounds to fear measures that would amount to persecution for a Convention reason. Counsel has argued that, among other things, the claimants have committed a political act by fleeing Venezuela. Counsel also argues that the principal claimant can be subject to a lengthy incarceration before trial, and that that would amount to cruel and unusual treatment or punishment.*

[18] Without reciting all of the Reasons of the Board which reviewed the evidence including that of Dr. Alvarez, which it determined was compromised, the Board concluded at pages 16 and 17 of its Reasons:

> *In the area of testimony, I note another significant discrepancy that is relevant. The principal claimant states orally that on being released, he actually saw a copy of the warrant of arrest. Yet, in his narrative, he states that it was his lawyer who learned that a new arrest warrant had been issued. The lawyer also mentions that the new warrant of arrest was issued, once the police had learned that the principal claimant had been released from detention.*
>
> *Whatever version is correct, there is a strong indication that the legal system worked in Venezuela for <u>these particular claimants, and they enjoyed due process</u>. The principal claimant and the female adult claimant were released from custody by Order of the 5th Court, whether they were physically in the court, or whether the process was handled by their lawyer in their absence.*
>
> *If the legal system in Venezuela had failed its claimants, as is their argument, it would be logical to assume that they would not have been released. Or, it is logical to assume that they would have been rearrested, if at the time there was a valid outstanding warrant for arrest, without being given time to plan their escape.*

[19] When read as a whole, the Reasons of the Board were essentially directed, in respect of the two year stay and obtaining of passports, to credibility and lack of contradictory evidence. In

respect of the Venezuelan lawyer, his evidence was considered to be compromised and, on the whole, the Board concluded that the Applicants would not be subject to arrest or unreasonable detention upon return to Venezuela.

[20] Turning to the decision of the Officer who rejected the humanitarian and compassionate application, the Officer's reason state:

> *I note that there has been little information regarding the type of warrant and the circumstances surrounding the issuance of the second warrant, other than what was provided to the RPD over 4 years ago. I note that the applicants were the subject of the warrant at the time of their departure from the country and for two years prior to leaving the country. During the two years in Venezuela, immediately prior to their departure, they had another child, in October 1988. They left the country using passports from authorities at the airport. I note that this was accomplished while they were the subjects of a warrant for arrest on charges that were only two years old. I note that they continue to be represented by counsel in Venezuela who was able to secure their release and who provided evidence for consideration in their affairs in Canada. It is reasonable that they would be represented by legal counsel upon their return to Venezuela and that if they were arrested at some point, they would have access to this counsel. The evidence before me does not support that they would be denied due process.*

[21] Given the state of the evidence before the Officer such a determination is not unreasonable. While the Officer does not specifically refer to whether the Applicants' two year stay in Venezuela was clandestine or not, there is little in the Record one way of the other on the point. The Applicants bear the evidentiary burden. As to whether passports were obtained through a compliant relative who was a government official is not specifically mentioned, what is stated is that the authorities at the airport stamped those passports.

[22] The Officer's Reasons address the Applicants' son who was removed from Canada to Venezuela and comment that there is no evidence that the authorities were making inquiries of the son as to the Applicants:

> *The applicant's son has returned to Venezuela. I note that evidence has not been provided to indicate that he has been approached, questioned or contacted by the police or government authorities in an attempt to obtain information about the whereabouts of his parents. Evidence does not indicate that corrupt members of the PTJ, or those involved in the false charges, or those involved in the drug deal that was witnessed by the principal applicant have approached or contacted or threatened their son, in an attempt to locate the applicants.*

[23] Applicants' counsel argues that a lack of evidence cannot be used against them. This is not so. The Applicants bear the evidentiary burden. It is reasonable to expect that, if the authorities were making enquiries of the son, it would have somehow been put in evidence. It is not unreasonable for the Officer to make these observations.

[24] The Officer concluded at the penultimate page of the Reasons:

> *In determining the application I find that the applicants have not established that the hardships they would face are disproportionate. I note that leaving Canada after having resided here for 18 years will be difficult and upsetting. I note, however, that the applicants made a choice to leave the country while there was an outstanding warrant for their arrest. It has not been established with sufficient evidence that the charges were fraudulent. Nor has it been established that the police reissued the warrant in a persecutory manner. The applicants have not established that they did not receive due process in their first dealing with the judicial system in Venezuela, nor has it been established that the police were actively seeking them throughout the two years that they remained in the country prior to their departure or that they would target them upon their return. Evidence does not support that the warrant is such that*

> *the government has been actively pursuing the applicants through an application for extradition.*

[25] I find that these conclusions are reasonable within the standards set by *Dunsmuir supra*.

There is no basis upon which to set the decision aside.

[26] No party asked for a question certified nor for costs.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that**

1. The application is dismissed;

2. There is no question for certification;

3. There is no Order as to costs.

"Roger T. Hughes"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2397-08 |
| **STYLE OF CAUSE:** | JULIO ESCALONA PEREZ AND DENIS ALEXANDRA PEREZ DE ESCALONA v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 5, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HUGHES J. |
| **DATED:** | NOVEMBER 6, 2008 |

**APPEARANCES:**

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| Tamrat Gebeyeho | FOR THE RESPONDENT |

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