**Date: 20061201**
**Docket: A-486-05**
**Citation: 2006 FCA 394**

**CORAM:** **LINDEN J.A.**
**EVANS J.A.**
**MALONE J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**FERENC VARGA, MONIKA MESZAROS, FERENC VARGA**

**Respondents**

Heard at Toronto, Ontario, on November 30, 2006.
Judgment delivered at Ottawa, Ontario, on December 1, 2006.

REASONS FOR JUDGMENT BY:
EVANS J.A.
CONCURRED IN BY:
LINDEN J.A.
MALONE J.A.

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## REASONS FOR JUDGMENT

**EVANS J.A.**

[1] This is an appeal by the Minister of Citizenship and Immigration from a decision of a Judge of the Federal Court who granted an application for judicial review by the respondents, a Hungarian family of father, mother and child. The Applications Judge set aside a negative decision by a Pre-removal Risk Assessment ("PRRA") officer. The Judge's decision is reported as *Varga v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1280.

[2] In the decision letter, dated August 24, 2004, the PRRA officer stated that he was not satisfied that, if the deportation orders issued against the respondents were executed and they were removed to Hungary, they would be at risk of torture or persecution, or exposed to a risk to life, or to cruel and unusual treatment or punishment.

[3] The adult respondents also have two Canadian-born children. The Applications Judge held that the PRRA officer erred in law when he refused to take into account the interests of those children on the ground that, as Canadian citizens, they could not be subject to a removal order.

[4] The Judge certified the following question pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"):

> What obligation, if any, does a PRRA Officer have to consider the interests of a Canadian-born child when

assessing the risks involved in removing at least one of the parents of that child?

[5] Other Judges of the Federal Court have considered this question, both before the decision under appeal was rendered (see, for example, *Sherzady v. Canada (Minister of Citizenship and Immigration)* (2005), 273 F.T.R. 11, 2005 FC 516) and subsequently (see, for example, *Alabadleh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 716, *and Ammar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1041). They reached the opposite conclusion from the Applications Judge in the present case, as have I.

[6] PRRA officers' mandate is carefully defined by *IRPA* and should not be judicially expanded to include the interests of any Canadian-born children who may be adversely affected by a parent's removal. It is not necessary to read words into the relevant provisions of *IRPA* in order for it to comply with the *Canadian Charter of Fundamental Rights and Freedoms*, and Canada's obligations in international law.

[7] I would allow the appeal for the following reasons. First, subsection 112(1) of *IRPA* provides that only those subject to a removal order may apply to the Minister for protection. As Canadian citizens, the adult respondents' Canadian-born children cannot be subject to removal orders.

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| 112. (1) A person in Canada ... may, in accordance with the regulations, apply to the Minister for protection <u>if they are subject to a removal order</u> that is in force … . | 112. (1) La personne se trouvant au Canada … peut, conformément aux règlements, demander la protection au ministre <u>si elle est visée par une mesure de renvoi</u> ayant pris effet … . |

[8] Second, section 113 sets out the bases on which an application under subsection 112(1) must be considered:

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| 113. Consideration of an application for protection shall be as follows: | 113. Il est disposé de la demande comme il suit : |
| … | […] |
| (*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98; | *c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98; |

[9] Sections 96 refers to a well-founded fear of persecution, and section 97 refers to a risk of torture, and exposure to risks to life and of inhuman or of cruel and

unusual treatment or punishment. Only risks to applicants are relevant. A broad-ranging consideration of children's interests is not contemplated by these provisions.

[10] This latter exercise is properly conducted in the more open-ended inquiry to be undertaken in the course of an application under subsection 25(1) to remain in Canada on humanitarian and compassionate grounds ("H&C").

| | |
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| 25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations. | 25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient. |

[11] In their H&C application, the respondents' grounds included the interests of their Canadian-born children. However, the application was rejected, and an application for judicial review of that decision will be heard on December 12, 2006.

[12] Although the same officer may sometimes make a PRAA and determine an H&C application, the two decision-making processes should be neither confused, nor duplicated: *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.) at paras. 16-17; *Rasiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 583 at para. 16.

[13] Neither the Charter nor the *Convention on the Rights of the Child* requires that the interests of affected children be considered under every provision of *IRPA*: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655, 2005 FCA 436 at para. 105. If a statutory scheme provides an effective opportunity for considering the interests of any affected children, including those born Canada, such as is provided by subsection 25(1), they do not also have to be considered before the making of every decision which may adversely affect them. Hence, it was an error for the Applications Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children.

[14] The Applications Judge relied on *Munar v. Canada (Minister of Citizenship and Immigration)*, [2006] 2 F.C.R. 664, 2005 FC 1180, a stay decision, where Justice de Montigny held that a removals officer has a limited duty to give consideration to the short-term interests of Canadian-born children prior to a parent's removal. This view was adopted when the application for judicial review was heard: *Munar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 761.

[15] Thus, for example, if a Canadian-born child is leaving with his or her parent, the officer should consider whether the parent's removal ought to be temporarily delayed to enable the child to complete the school year. Or, if the child is remaining in Canada after the parent's removal, the officer should enquire whether adequate care arrangements have been made for the child.

[16] However, there is no analogy between the statutorily defined functions of a PRRA officer and the role of a removals officer. The latter has a limited but undefined discretion under section 48 with respect to the travel arrangements for removal, including its timing ("as soon as reasonably practicable"). Within the narrow scope of removals officers' duties, their obligation, if any, to consider the interests of affected children is at the low end of the spectrum, as contrasted with the full assessment which must be made on an H&C application under subsection 25(1).

[17] In oral argument, counsel for the respondents argued that the PRRA officer failed to consider the possibility that, if their two Canadian-born children went to Hungary, the respondents would themselves be exposed to a greater risk of persecution. I agree that this is a matter within the PRRA officer's jurisdiction. However, since counsel did not make this submission to the officer, he cannot complain that the officer was at fault in not considering it.

[18] Counsel also argued that PRRA officers ought, at the very least, to consider allegations of the most serious kinds of risk because the remedy under subsection 25(1) is illusory: H&C determinations are often not made before applicants are removed. However, as I have already noted, the respondents have in fact received an H&C determination, for which they did not apply until 2004, two years after the birth of their second Canadian-born child and the dismissal by the Refugee Protection Division of the Immigration and Refugee Board of their claims to be recognized in Canada as refugees. Applications for H&C under subsection 25(1) should be made at the earliest practicable opportunity.

[19] Counsel for the Minister conceded that, if the respondents' H&C application had not been completed, they could have requested the removals officer to defer their removal pending the H&C consideration of any risks that their Canadian-born children would face in Hungary, assuming that leaving them in Canada was not a viable option. Thus, although the respondents were not entitled to have this issue taken into account by the PRRA officer, they would not be removed without some further consideration of the situation by the removals officer.

[20] For these reasons, I would allow the Minister's appeal, set aside the decision of the Applications Judge, restore the decision of the PRRA officer, and dismiss the respondents' application for judicial review. I would answer the certified question as follows:

A PRRA officer has no obligation to consider, in the context of the PRRA, the interests of a Canadian-born child when assessing the risks involved in removing at least one of the parents of that child.

"John M. Evans"

J.A.