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Intersection Between Different Legal Areas

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Case commented on:

Basha v Lofca, 2013 ABQB 159.

Introduction

It is quite common for certain legal areas to intersect with others in cases that come before the courts. In the recent Alberta Court of Queen's Bench case of *Basha v Lofca*, this intersection arose within the areas of immigration and family law.

In *Basha*, the Court had to decide whether a provision in a family court order requiring that three children not be removed from Alberta or Canada could block a removal order issued under the *Immigration and Refugee Protection Act*, SC 2001 c 27 (*IRPA*).

Facts

In March of 2007, an Albanian mother arrived in Canada on a work permit, and later on became ill. Her husband and younger child arrived in the country on a temporary visitor's visa later in the year, and the couple's two older children were granted permission to enter the country in 2009, also on a temporary basis. Sadly, later on in the year the mother died, and the father and three children applied to extend their temporary visas and remain in Canada. However, Citizenship and Immigration Canada refused their applications, and the family was asked to leave the country on January 27, 2010.

Following this, the children's aunt and uncle filed a claim for guardianship of the children under Alberta's *Family Law Act*, SA 2003, c F-4.5. Although the father of the children was the respondent in the guardianship proceeding, the factual content of the filed material and the order granted by the chambers judge made it clear that the proceeding was friendly and unopposed in nature, and designed to give the children a better chance to stay in Canada (*Basha*, at para 10). The family court order was granted in January of 2010, and provided that "the children shall not be removed from the province of Alberta or country of Canada, without further order of this court."

Later on in January, the Federal government requested that the entire family leave Canada voluntarily. The father did so, but the children remained in the country with their newly appointed guardians. Therefore, there were two legal process taking place. One was the Alberta Court of Queen's Bench family law guardianship action, and the second was the Federal Court and tribunal immigration proceedings. The children made several applications through the Federal immigration process and in Federal Court in order to remain in Canada on a

humanitarian and compassionate basis. These efforts failed, although some, particularly the review applications to the Federal Court, may have failed due to procedural non-compliance rather than a hearing on the merits of the case (*Basha*, at para 14).

In late 2012, the Attorney General of Canada applied to be added as an intervenor in the family law litigation, and requested that provision under the guardianship order preventing the removal of the children be struck out.

Positions of the Parties

The Federal Crown argued that the presence of the children in Canada was an immigration matter, and not a family law question of guardianship and custody. The Crown argued that there was no true family law dispute, and that the legal authority of the children to remain in Canada had expired. Therefore, the Crown wanted a variation order removing the order that prohibited the children from leaving Canada (*Basha*, at para 18).

The father, aunt, uncle and children took a common position and argued that the custody dispute was a proper family law matter, and that it was in the children's best interest to remain in Canada (*Basha*, at para 18). They also argued that provincial courts of competent jurisdiction have, in certain cases, made decisions and orders that relate to family law and protection of children that allow the children to remain in the jurisdiction. A net, but indirect effect of these court activities is to preclude the ability of the Federal Crown to remove the children via immigration processes (*Basha*, at para 19). Finally, the respondents also argued that article 3 of the United Nations *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3 (*Convention*) had a role to play in the matter (*Basha*, at para 20).

Analysis of the Court

The Court accepted the idea that a provincial superior court of inherent jurisdiction could make an order effectively blocking (at least temporarily) the removal of an individual from Canada by immigration authorities where a live and real family law litigation proceeding is underway. The Court provided an example where two parents, legally in Canada, bring their child into the country on a properly granted visitor's permit. When the permit ends, one of the parents could wish to return home with the child, and the other may wish to apply for sole guardianship and oppose the removal of the child from the country by the other parent. The Court noted that in a context like this, where a real and substantive conflict exists, a superior court of inherent jurisdiction should have the jurisdiction to deal with collateral matters that flow from valid family law orders (*Basha*, at para 25).

However, the Court stated that in this case, no real litigation was underway, as the family law custody "dispute" was really a tactic, and not a real disagreement before the Court. Further, the Court noted that caselaw provides that a superior inherent jurisdiction court judge must exercise caution to avoid extending the scope of inherent jurisdiction so as to not intentionally interfere with other lawful processes (*Basha*, at para 26). The Court noted the decision of *JH v FA*, 2009 ONCA 17, 306 DLR (4th) 496, where the Ontario Court of Appeal stated that the purpose of non-removal orders in family law legislation is not to prevent the deportation of persons ordered to be removed from Canada, but to prevent parents from removing children from the jurisdiction in

contested family law proceedings. Where no real dispute exists, such orders should not be used to frustrate the *IRPA* (*Basha*, at paras 29-30). The Court also noted a memorandum from the Alberta Court of Appeal, which stated that "the interests of the children are protected [in the immigration review system] on the basis of the compassionate and humanitarian considerations that are part of that immigration review process". Thus, the Court concluded that in typical immigration scenarios there is no 'gap' into which a court should intrude, apply its inherent jurisdiction, and provide a remedy that would otherwise be unavailable (*Basha*, at paras 32-33).

The Court also found that the United Nations *Convention on the Rights of the Child* gave the courts no additional power that they would not have already had to take jurisdiction and block the normal operation of the immigration apparatus (*Basha*, at para 38). Article 3 of the *Convention* essentially states that in all court actions concerning children, the best interests of the child shall be a "primary consideration" in the ultimate decision (*Basha*, at para 35). However, the Court noted that "primary consideration" does not equate to "the" or "the only" primary consideration, or that the interests of the children trump everything else (*Basha*, at paras 36- 37). Citing Chief Justice McLachlin in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 10, [2004] 1 SCR 76, the Court noted that "the best interests of the child may be subordinated to other concerns in appropriate contexts…" (*Basha*, at para 37). Finally, the Court pointed out that within the immigration system, the best interest of the child is always a consideration, and that the immigration system is required to implement state policy that flows from international treaty obligations (*Basha*, at para 38). Based on all these reasons, the Court granted the Federal Crown's request and ended the prohibition against the removal of the children from the province and Canada (*Basha*, at para 41).

Conclusion

For the most part, the Court's decision seems reasonable. There was no real family dispute in this case and the Court was simply following what the caselaw dictated. However, the Court did note that some of the immigration applications launched by the children failed due to procedural non-compliance issues, instead of the merits of the case. Those courts that denied those applications would then seemingly not have considered the "best interests of the children" at all. Thus, it is somewhat surprising that the Court in this case did not look at the best interests of the children more closely, especially since the Court admitted that the children had lived "model and productive lives in Canada" (*Basha*, at para 40).