

Federal Court



Cour fédérale

Date: 20171212

Docket: IMM-2139-17

Citation: 2017 FC 1134

BETWEEN:

REKHA OEDRA

Applicant

and

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

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. Introduction

[1] This is the judicial review of a decision by the Immigration Appeal Division [IAD] which dismissed the Applicant's appeal of a removal order made against her pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] due to a misrepresentation.

[2] The core of this case is the alleged misrepresentation by the Applicant's parent [Vili] directly, and by the Applicant indirectly, as to the nature of the relationship between them. The

Applicant is the adopted child of Vili, but the Applicant's birth certificate was allegedly submitted as part of her permanent residence application. This "birth certificate" is not in the record or otherwise anywhere to be seen.

II. Background

[3] The Applicant [Odedra] was born in India. Her biological parents gave her up for adoption to Vili and her husband when Odedra was five years old. An adoption affidavit purports to confirm the adoption.

[4] Vili divorced her first husband and remarried Girish Rathod. Odedra and her siblings lived with Vili. Girish Rathod, who lived in Canada, applied to sponsor Vili and her dependent children for permanent residence.

[5] The Computer Assisted Immigration Processing System notes [CAIPS Notes] state that a birth certificate was submitted as evidence of the familial relationship as part of the application process.

[6] Odedra was granted permanent residence in 2009. In 2010, upon returning to Canada from a trip to India, she admitted to a Canada Border Services Agency [CBSA] officer that Vili was not her biological mother. There is reference in the record to a confusing exchange where Odedra describes Vili as her "aunt", and the relationships between siblings – some adopted, some not – are unclear.

[7] The Immigration Division found Odedra inadmissible for indirect misrepresentation, which was indirect since she was a minor at the time of the permanent residence application.

[8] This Immigration Division decision was upheld by the IAD. The IAD found the failure to mention adoption the withholding of a material fact. While the IAD had credibility concerns, the decision read as a whole turned significantly on the provision of a birth certificate in the permanent residence application.

[9] The IAD relied on the CAIPS Notes to establish the existence of the birth certificate and concluded that if there had been an adoption, then adoption papers would have been filed. The IAD concluded that the legality of the adoption was immaterial because the misrepresentation that Odedra was Vili's biological daughter was made by submitting a most likely fraudulent birth certificate. As a result, Odedra had not met her onus of establishing on a balance of probabilities that no misrepresentation had been made.

[10] The IAD then engaged in a perfunctory and negative humanitarian and compassionate [H&C] consideration of whether special relief was warranted.

III. Issues

[11] The issues in this judicial review are whether:

- a) the IAD decision was reasonable pursuant to that review standard; and
- b) there was a breach of procedural fairness on the correctness standard of review.

[12] For the reasons to follow, this decision was both unreasonable and procedurally unfair.

IV. Analysis

[13] This matter does not require an analysis of how far the term “misrepresentation” extends and whether it covers innocent or unknowing statements or omissions.

[14] The relevant legislative provisions are:

Immigration and Refugee Protection Act, SC 2001, c 27

16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

...

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

16 (1) L’auteur d’une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[...]

40 (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d’entraîner une erreur dans l’application de la présente loi;

[15] It is important to set the context of this matter. In Canada adopted children are children of the parents – plain and simple. This is a matter of social policy and law. Section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, includes both an adopted and biological child in the definition of a “dependent child”. Only in specific circumstances are distinctions made.

[16] In my view, it was unreasonable for the IAD to conclude that Odedra would somehow “confess” to being adopted when interviewed by a CBSA officer without evidence that the issue was specifically put to Odedra. No such evidence was presented.

[17] The Court can and should take judicial notice of the fact that most adopted children, particularly if adopted when young, would not see a distinction between being related biologically or adoptively - “Mother is mother – Father is father”.

[18] In the present case, the IAD held that there was a misrepresentation. There is no evidence of a representation other than the birth certificate. There is no evidence that Odedra was asked how she was related to Vili nor anything that suggested that adoption was an issue.

[19] This is to be contrasted with the present system, as the Court was advised by Applicant’s counsel, where an applicant has to select the manner of kinship from a dropdown menu on the application.

[20] The major flaw in this case is the IAD's reliance on the birth certificate as a misrepresentation. Both the sponsor and Odedra denied under oath that they had submitted a birth certificate.

The Officer never provided a sworn statement and the only evidence of the birth certificate was the mention in the CAIPS Notes.

[21] Without an explanation for the IAD disregarding sworn evidence in favour of a few undetailed notes, the decision to find that there was a birth certificate filed by Odedra, or someone on her behalf, was unreasonable.

[22] It was particularly unreasonable and fundamentally unfair to rely on the supposed existence of the document when it could not be produced. There was no corroborating evidence, no circumstantial evidence, and no paper trail with respect to its existence.

[23] Odedra is unable to confront the accusation without access to the birth certificate. The alleged filing of that document was part of the rationale for the IAD's credibility concerns, putting Odedra in a perfect Catch-22: she was not credible because she filed a fraudulent document and was not entitled to H&C consideration because she showed no remorse for doing so, but her denial cannot be accepted because she filed a false document which cannot be proven or disproven.

[24] The finding of misrepresentation is a serious matter with significant consequences. Therefore, the level of procedural fairness must be correspondingly high. The IAD failed to

accord to Odedra the appropriate level of fairness by relying on a document which she denies filing when its filing and even existence cannot be established.

[25] Given the multiple reasons which could explain the situation ranging from misfiling to misdescription, the IAD's conclusions cannot be supported.

V. Conclusion

[26] This judicial review will therefore be granted, the decision quashed, and the matter referred back to a differently constituted appeal panel.

[27] Given the holiday season, the parties will have until January 15, 2018, to file submissions on whether there is a question to be certified.

"Michael L. Phelan"

Judge

Ottawa, Ontario
December 12, 2017

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2139-17

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SAFETY AND EMERGENCY PREPAREDNESS

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