Date: 20091130

Docket: A-594-08

Citation: 2009 FCA 347

CORAM: **BLAIS C.J.**
NOËL J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

EDWARD JAMES KUNKEL

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on November 30, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on November 30, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

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(Delivered from the Bench at Toronto, Ontario, on November 30, 2009)

LAYDEN-STEVENSON J.A.

[1] This appeal concerns a certified question that does not lend itself to a generic approach leading to an answer of general application.

[2] Mr. Kunkel, an American citizen, was issued work permits to work in Canada beginning in May 2001. He worked for Turbo Promote Inc. and Instaclick Inc. In June 2004, he applied for permanent resident status in Canada. In his application, among other things, he declared that he had never been convicted of a crime or offence in any country. In fact, he had been twice convicted for

impaired driving offences in the United States. He eventually disclosed the convictions in submissions to support his application and also applied for rehabilitation in relation to them on February 22, 2006.

[3] In processing Mr. Kunkel's application for a permanent resident visa, immigration officials discovered that the telephone number listed for Instaclick appeared to belong to OrgasmCash.com. Mr. Kunkel was requested to attend an interview to confirm his employment and other aspects of his application. He was not advised prior to the interview about the discrepancy regarding the Instaclick telephone number.

[4] During the interview, the visa officer disclosed the concern regarding the telephone number and provided an opportunity for Mr. Kunkel to address it. The visa officer's affidavit, corroborated by the CAIPS notes, indicates that, initially, Mr. Kunkel did not respond. Later, he stated that "OrgasmCash.com was one of Instaclick's clients." Still later, he suggested that his letter was forwarded by his former immigration consultant. Additionally, Mr. Kunkel gave inconsistent answers and insufficient information about his work at Instaclick. The visa officer determined that he did not qualify as a skilled worker and did not meet the requirements under paragraph 75(2)(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The visa officer also found that Mr. Kunkel had failed to answer truthfully as required by subsection 16(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). The application for a permanent resident visa was denied.

[5] Mr. Kunkel sought judicial review of the visa officer's decision. The Federal Court judge (the application judge) identified three issues for determination. The first question was whether the visa officer was required to disclose the inconsistent telephone number prior to the interview. The application judge identified this issue as a question of procedural fairness and reviewed it on a standard of correctness. The second question was whether the visa officer erred in determining Mr. Kunkel had not demonstrated his work experience as a management consultant. The third question was whether the visa officer erred by failing to acknowledge that Mr. Kunkel had disclosed his convictions. The application judge identified the second and third questions as ones of mixed fact and law for which a standard of review of reasonableness applied.

[6] With respect to the issue of procedural fairness, the application judge concluded that the visa officer provided Mr. Kunkel with a fair opportunity to address the discrepancy regarding the telephone number by raising it during the interview, given the simplicity of the issue. Regarding the issue of Mr. Kunkel's work experience, the application judge concluded that the decision was reasonable because, on the basis of the CAIPS notes, Mr. Kunkel had difficulty answering basic questions and was unable to explain the nature of his work. Since resolution of the first two issues was sufficient to dispose of the matter, the application judge did not address the third issue. The application for judicial review was dismissed.

[7] The judgment dismissing the application for judicial review indicates that no questions [were] posed for certification. Mr. Kunkel subsequently requested reconsideration of the judgment on the basis that two questions had been posed for certification and were not addressed. On

reconsideration, the application judge noted that "it is settled law that decision-makers must provide applicants a 'fair opportunity' to address extrinsic evidence." The following question was certified:

> Does an applicant have the right to notice before an interview of any extrinsic evidence to be considered by a visa officer in connection with an application for a visa?

[8] The test for certification appears in paragraph 74(*d*) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*/ SOR 93-22, as am. (the Rules). In *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89; 318 N.R. 365 (*Zazai*), the threshold for certification was articulated as: "is there a serious question of general importance which would be dispositive of an appeal" (paragraph 11).

[9] In *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68; 357 N.R. 326 (*Boni*), this Court determined that a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose.

[10] In this instance, the question is not one of general importance. That is not to say that it is not an important or serious question. Rather, it is one that turns on its own facts and does not transcend the immediate interests of the parties (*Boni* at para. 10).

[11] While extrinsic evidence must be presented to applicants to provide them with a meaningful opportunity to respond, the opportunity to respond will vary, depending upon the factual context. What is fair and reasonable in one instance may not be in another. There is no general requirement

that extrinsic evidence be provided to applicants prior to an interview, or that they be given an opportunity to clarify the situation after an interview. It may be that disclosing the evidence during an interview and providing applicants with the opportunity to explain will suffice. What constitutes sufficient notice turns on the circumstances of the particular case.

[12] The certified question has been referred to as the "trigger by which an appeal is justified" and therefore enables the Court to look into all aspects of the decision below: *Nagalingam v. Canada (Minister of Citizenship and Immigration),* 2008 FCA 153 (*Nagalingam)*. However, if a question has been improperly certified, the appeal is not justified. In *Varela v. Canada (Minister of Citizenship and Immigration)* 2009 FCA 145; 80 IMM. L.R. (3d) 1 (*Varela*), this Court determined that where questions have been improperly certified, the necessary prerequisite to a right of appeal has not been met and the appeal must be dismissed. At paragraph 27, the Court explained the screening mechanisms integral to the overall scheme of the IRPA:

> An integral part of this scheme is the presence of two 'gatekeeper' provisions. The first is the requirement that leave be obtained to commence an application for judicial review. The second is the absence of a right of appeal unless a judge of the Federal Court certifies that a serious question of general importance is raised by the application for judicial review.

[13] Further, where a question has been improperly certified, the Court should not have regard to other grounds of appeal. At paragraph 43 of *Varela*, the Court stated as follows:

> [T]he requirement that the application judge certify that a serious question of general importance is involved and that he or she states the question is a gatekeeper function. Some confusion has arisen with respect to the thrust of that function by the decision of the Supreme Court in *Baker*…to the effect that, once a question has been certified, all issues raised by the appeal could be considered by the Court: see paragraph 12…[However] the statutory requirement [for certification] remains as stated in subsection 74(*d*): there must be a serious question of general importance. The

> absence of such a question means that the pre-condition to the right of appeal has not been met, and therefore the appeal must be dismissed. To hold otherwise would be to allow the Court of Appeal to create a right of appeal where the Act has not provided one.

[14] In this case the question was improperly certified because it does not meet the test articulated in *Boni*. As a consequence, in accordance with *Varela*, the necessary pre-condition to the right of appeal has not been met and the appeal must be dismissed. The Minister did not seek costs and none will be awarded.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-594-08
(AN APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE SIMPSON OF THE FEDERAL COURT, DATED JULY 28, 2008, FROM COURT FILE DOCKET NO. IMM-964-07)	
STYLE OF CAUSE:	EDWARD JAMES KUNKEL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 30, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(BLAIS C.J., NOËL & LAYDEN-STEVENSON JJ.A.)
DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

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