

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2016] NZIACDT 51

Reference No: IACDT 048/14

IN THE MATTER of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY **The Registrar of Immigration Advisers**
Registrar

BETWEEN **Thi Thanh Thu Nguyen**
Complainant

AND **Yijun Hu**
Adviser

DECISION
(SANCTIONS)

REPRESENTATION:

Registrar: Marija Urlich, lawyer, Ministry of Business, Innovation and employment, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 12 September 2016.

DECISION

The complaint

- [1] The Tribunal upheld this complaint in a decision dated 16 May 2016, *Nguyen v Hu* [2016] NZIACDT 24 (www.justice.govt.nz). The Tribunal found:
- [1.1] Immigration New Zealand wrote to Mr Hu explaining his client did not have a current police clearance.
- [1.2] Shortly after that Mr Hu assisted her to apply for a work visa, it was necessary for her to do so before her visa expired.
- [1.3] As Mr Hu filed the visa application without a police clearance, Immigration New Zealand rejected the attempt to lodge the application, and the complainant was in New Zealand unlawfully.
- [1.4] Mr Hu took time to remedy the absence of a police clearance, and request a visa.
- [1.5] The Mr Hu failed to provide a copy of his file for the Immigration Advisers Authority to evaluate this complaint when requested under a statutory power.
- [2] When the Tribunal set the complaint down for hearing to take his evidence and hear his explanation, Mr Hu failed to take any steps. The Tribunal found Mr Hu was negligent, and breached the Licensed Immigration Advisers Code of Conduct 2014 when he failed to comply with the statutory requirement to produce his file for the Registrar.
- [3] This decision imposes sanctions following the Tribunal upholding the complaint.

The Registrar and Complainant's position on sanctions

- [4] The Registrar did not take any position on sanctions. The complainant also took no position, but provided evidence she reached a settlement with Mr Hu, and did not seek any other compensation.

Mr Hu's position on sanctions

- [5] Mr Hu did not provide any submissions relating to sanctions.

Discussion

Perspective

- [6] This complaint presents a concerning picture. Mr Hu was negligent in a series of steps in his service delivery; critically his client was put into the position of being in New Zealand unlawfully as she did not hold a visa, and Mr Hu then failed to take appropriate steps when his client was in that position.
- [7] Mr Hu then failed to comply with a statutory demand from the Registrar to produce his file.
- [8] When facing the complaint before the Tribunal Mr Hu failed to provide evidence, and has still not delivered his file.
- [9] When a licensed immigration adviser facing a serious complaint, fails to comply with statutory directions, which amounts to criminal offending; and fails to take steps to address the situation even when facing professional disciplinary charges, protection of the public becomes a priority.
- [10] In its directions of 11 June 2015 the Tribunal put Mr Hu on notice the Tribunal would potentially make orders affecting his licence, and indicated he may wish to take legal advice. Mr Hu's response was to fail to take any steps to comply with the timetable the Tribunal set.

The legal principles relating to exclusion from the profession

- [11] The authorities indicate it is a last resort to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence: *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC) at paragraphs [13]-[14].
- [12] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland, HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [30]-[31], the Court stressed, when imposing sanctions in the disciplinary process applicable to that case, that it was necessary to "consider the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case".
- [13] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [97]:
- the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.
- [14] The statutory purpose is achieved by considering at least four factors that materially bear upon maintaining appropriate standards of conduct:
- [14.1] *Protecting clients*: section 3 of the Act states that "[t]he purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ..."
- [14.2] *Demanding minimum standards of conduct*: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 725-726 and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC), discuss this aspect.
- [14.3] *Punishment*: the authorities, including *Z v Dental Complaints Assessment Committee* at [1], [65], [70] & [149]-[153], emphasise that punishment is not the primary purpose of disciplinary sanctions. Regardless, there is an element of punishment that serves as a deterrent to discourage unacceptable conduct (*Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28]).
- [14.4] *Rehabilitation*: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable (*B v B* HC Auckland HC4/92, 6 April 1993).

Background to regulating this profession

- [15] In *ZW v Immigration Advisers Authority* [2012] NZHC 1069, Priestley J observed at [41]:
- In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.
- [16] The Act has established a regime in which, with limited exceptions, licensed advisers have an exclusive right to provide immigration advice. Criminal sanctions are used to enforce that exclusive right.

Alternatives short of cancellation of licence

- [17] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to effect deterrence. These are caution or censure, and a financial penalty not exceeding \$10,000 (s 51(a) & (f)).
- [18] In relation to licences there are two options:

[18.1] cancellation and/or a direction that the person may not apply for a licence for up to two years, or until meeting specified conditions (s 51(d) & (e)); or

[18.2] suspension (s 51(c)).

[19] Other possibilities include training and directions to remedy a deficiency (s 51(b)). There are also powers relating to imposing costs and compensation (s 51(g)-(i)).

[20] Suspension may ensure that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].

[21] In making this decision, the Tribunal is required to weigh the public interest against Mr Hu's interests (*A v Professional Conduct Committee* at [82]).

[22] When dealing with integrity and behavioural issues there is never any certainty that, short of exclusion from a profession, a person will not reoffend. This Tribunal must carefully weigh the circumstances. It is appropriate to place an element of considered trust in a practitioner who has shown the capacity and willingness to rehabilitate.

The Tribunal will remove Mr Hu from the profession

[23] Mr Hu holds a licence that gave him privileges. They included being one of a narrow class of persons entitled to provide immigration advice; he had a status clients could rely on, knowing the Act and the Code of Conduct enforced professional standards. Immigration New Zealand too would treat him as a trusted professional, relying on his status under the Act.

[24] To enjoy those privileges, licensed immigration advisers must accept the disciplines of complying with the Act and the Code; which require professional behaviour. Mr Hu failed to comply with statutory directions from the Registrar. Then he failed to present the information he withheld from the Registrar to the Tribunal, when it gave him the opportunity to present the information to it. Mr Hu has disintegrated himself from having the status of a professional person who consumers of immigration services can trust to act in accordance with the Act and the Code. He has defiantly failed to comply with them. While removal from the profession is a last resort, it is the only option in this case.

[25] If there is any prospect of rehabilitation it can only be after Mr Hu has invested in gaining the knowledge to provide services at a standard much higher than is evident in this complaint. Accordingly, Mr Hu will be prohibited from applying for a licence again until he completes the entry requirements for the profession. However, he should not assume the Registrar would ever consider he is fit to hold a licence. Fitness is an issue for the Registrar, not the Tribunal. He would be unwise to embark on training without discussing that issue with the Registrar.

[26] I will delay the cancellation of Mr Hu's licence for two weeks to allow him to make proper arrangements for new representation for his clients. Mr Hu is warned that during that period he must comply with the Licensed Immigration Advisers Code of Conduct 2014, including refunding fees. The consequences of failure to comply with the Code may well be severe.

Penalty

[27] Exclusion from the profession will be an imposition on Mr Hu.

[28] However, Mr Hu's failure to provide his file and continued defiance must result in a substantial penalty. He was required to provide his file in respect of a serious complaint. The starting point would be a monetary penalty of \$7,500. The maximum monetary penalty is \$10,000.

[29] Given Mr Hu's failure to express contrition or even belatedly comply with the Registrar's requirement to deliver his file, the discount to allow for the loss of licence will be modest. The penalty will be \$5,000.

Costs

[30] The parties have not sought costs, so there will be no order.

Determination and Orders

[31] Mr Hu is:

[31.1] Censured;

[31.2] Ordered to pay a penalty of \$5,000;

[31.3] Any licence Mr Hu holds under the Act is cancelled with effect from 5:00 pm on the 10th working day after this decision is issued;

[31.4] Pursuant to section 51(1)(e) of the Act, Mr Hu is prevented from applying for any category of licence under the Immigration Advisers Licensing Act 2007 (or any Act replacing it) until:

[31.4.1] He has complied with all orders made by this Tribunal, and

[31.4.2] Enrolled in and been issued with a Graduate Diploma in New Zealand Immigration Advice (Level 7).

[32] The order to make payment takes immediate effect.

[33] The Tribunal reserves leave for the Registrar or Mr Hu to apply to vary the orders relating to the Graduate Diploma in New Zealand Immigration Advice (Level 7), in the event the qualification changes, or there are alternative qualifications available. For the reasons discussed, this decision does not imply Mr Hu would meet the fitness requirements to hold a licence. That is not a decision for the Tribunal.

DATED at Wellington this 12th day of September 2016.

G D Pearson
Chair