LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 033

Ref: LCRO 190/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City]Westland Standards Committee [X]
BETWEEN	**JG** Applicant
AND	**VK** Respondent

DECISION

The names and identifying details of the parties in this decision have been changed.

Introduction

[1] Ms JG has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of her complaint concerning conduct on the part of Ms VK.

Background

[2] Ms JG obtained an International Relocation Order from the [Country] Federal Magistrates Court in [City] She held her two sons' [Country] passports. Ms JG and the children lived in New Zealand. Both children were [Country] citizens.

[3] Around June 2018 Ms JG became concerned that her former husband may be contemplating attempting to remove the children to [Country].

[4] Ms JG sought legal advice from Ms VK's colleague, Mr TF

[5] Ms JG had further meetings with Mr TF in March 2019.

[6] Mr TF went on leave from 25 March until 27 March. He advised Ms JG that he would be absent from his office during that time.

[7] On Sunday 24 March 2019, Ms JG became increasingly apprehensive that her former husband was contemplating removing one of the children from the New Zealand jurisdiction. She forwarded an email to Ms VK's firm ([Law Firm A]) advising that she wished to proceed with making application for a border alert. She attached to that correspondence, a scanned copy of a request for a border alert which she had completed.

[8] Early in the morning of Monday 25 March 2019, Ms JG went to Mr TF's office.

[9] Ms JG left the hard copy of the border alert notification with reception, with she says, instructions to take action to have the border alert put in place,

[10] An appointment was made for her to meet with Ms VK at 11 am on that day.

[11] Ms JG came in to see Ms VK at 11 am as arranged. Ms VK's file note records that Ms JG was at that stage able to apply for a "temporary border alert", pending orders being made by the Family Court.

[12] Ms VK despatched the form requesting a border alert to be actioned at 12.47 pm. On receipt, Interpol made request for further details to be provided. They considered the form it had received to be "invalid" for want of Ms VK's details. The form was amended and resent at 1.59 pm. Regrettably an error was made and the first version of the form was forwarded rather than the form which had been amended through the addition of Ms VK's details. The form was sent again at 2.55 pm. The border alert was loaded into the system by Police at 3.06 pm.

[13] Regrettably by this stage, Ms JG's younger son had already boarded a flight to [Country] with his brother and father at 2.14 pm. Immigration NZ subsequently advised that the child had been permitted to travel, "undocumented".

[14] Ms JG says that unbeknown to her, the children's father had obtained "temporary travel documentation" from the [Country] High Commission. It was Ms JG's

view that these documents had been obtained on the back of various misrepresentations made by the children's father.

[15] Ms JG raised her concerns with Ms VK's firm. She was advised to obtain independent advice. The firm contributed $1,000 towards the costs of that.

[16] On the basis of the independent advice she received, the firm agreed not to charge Ms JG for further services provided. She continued to instruct Mr TF to make application under the Hague Convention for her younger son's return. The application was not successful.

[17] Ms JG considers Ms VK should be held to account for her part in the system's failure to prevent her 15-year-old son from leaving New Zealand.

The complaint and the Standards Committee decision

[18] Ms JG filed her complaint with the New Zealand Law Society Complaints Service on 23 March 2020.

[19] The substance of her complaint was that:

(a) Ms VK had failed to apply promptly and urgently for an urgent border alert under the Care of Children Act 2004; and

(b) prior to her meeting with Ms VK she had made it clear that she wanted an application to be made for a border alert as a matter of urgency; and

(c) Ms VK had delayed in forwarding the request to Interpol; and

(d) as a consequence, her former husband had been able to remove both children from New Zealand;

(e) on receipt of the email requesting a border alert to be put in place, Interpol staff members observed that the form provided was missing crucial details and was therefore invalid; and

(f) Interpol had reported the defects in the application to [Law Firm A]; and

(g) a properly executed form was forwarded to Interpol at 2.55 pm on 25 March 2019; and

(h) on learning that the border alert had not been put in place, Ms JG was advised to take independent advice; and

(i) she did not consider that [Law Firm A] had provided all relevant details to the lawyer she had been referred to, in order to be legally advised; and

(j) she did not consider that she had received competent advice from [Law Firm A], or that the firm had acted on her instructions in a timely manner.

[20] Ms JG contends that if Ms VK had acted promptly on her instructions, her 15-year-old son would not have been able to board the plane, misrepresentations made by the father to secure temporary travel documentation would have been revealed, and she could have avoided all the difficulties and costs that followed.

[21] Ms VK, through her counsel, provided a response to Ms JG's complaint. Attached to that response was correspondence from Ms VK in which she explained how she had become involved with Ms JG's case and provided account of the steps she had taken.

[22] It was submitted for Ms VK that:

(a) the complaint was unfounded; and

(b) Ms VK's conduct was properly considered from the context that

(i) Ms JG was not, initially, Ms VK's client; and

(ii) she had made time available at short notice to accommodate Ms JG.

(c) Ms VK had made arrangements to forward the form provided by Ms JG to Interpol within an hour of meeting with Ms JG; and

(d) the form provided to Interpol was sufficient to enable a border alert to issue; and

(e) the border alert form regrettably was ambiguous in that it did not clearly identify as to whether an application when submitted, was required to be signed by a lawyer; and

(f) Ms VK had reorganised her day to enable her to promptly attend on Ms JG; and

(g) it would be concerning if a practitioner was to dispatch a request for a border alert request without first having spoken with the client; and

(h) Interpol had erred in failing to action the border request when first received; and

(i) an administrative error on the part of Ms VK's secretary had resulted in a wrong version of the border request being forwarded to Interpol; and

(j) Ms VK had acted promptly and appropriately; and

(k) Ms VK cannot be held liable for a minor secretarial error; and

(l) if Ms VK's conduct was deemed to be unsatisfactory, that would set the bar at a level inconsistent with the Lawyers and Conveyancers Act 2006 (the Act).

[23] Subsequent to filing Ms VK's response to the complaint, Ms VK's counsel forwarded to the Complaints Service, correspondence he had received from the Police Interpol Acting National Coordinator, in which the Police provided explanation for the delay in actioning the alert request. In that correspondence, the Coordinator advised that:

> In respect of paragraph 9(a)(iii) of your letter, I record that the alert request in the present case was not rejected. An INTERPOL officer phoned [Law Firm A] upon receipt of an incomplete request, and later emailed in response to a second incomplete request. On both occasions the officer informed [Law Firm A] that a solicitor's contact details were required. There was a delay of some two hours and eight minutes from the time of original request until the requisite information was provided; an alert was entered within eleven minutes of receipt [sic] that information.

[24] Ms JG responded to the advice provided by the Police. It was her view, that whilst Ms VK's counsel was endeavouring to characterise the process for dealing with border alerts as uncertain and discretionary, the information provided by the Police confirmed that this was not the case. She maintained that if Ms VK had responded promptly to instructions she had provided on the evening of 24 March and early on the morning of 25 March in a timely fashion using documents already on the file, the alert would have been in place that would have prevented removal of her youngest son from the New Zealand jurisdiction.

[25] The Committee identified the issue to be addressed as a consideration of the question as to whether Ms VK's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[26] The Committee determined pursuant to s 138(2) of the Act that no further action on the complaint was necessary or appropriate.

[27] In reaching that decision the Committee, after having scrutinised the exchanges between [Law Firm A] and Interpol from the time Ms VK took instructions to the time the alert was actioned, concluded that it agreed with the submission made on behalf of Ms VK, that if it was considered that Ms VK's conduct, and all the circumstances of the case, met the threshold of unsatisfactory conduct as defined in the Act, that would set the bar at an unreasonably high level.

Application for review

[28] Ms JG filed an application for review on 13 October 2020.

[29] She submits that the Standards Committee:

(a) had failed to consider all the facts; and

(b) made a number of errors in its decision; and

(c) had taken a narrow view of the complaint and had not considered all aspects of what had taken place prior to, and on the morning of, 25 March 2019; and

(d) had failed to recognise that the very nature of a border alert application requires urgency and accuracy; and

(e) had failed to recognise that careful perusal of her file would have immediately identified that there was significant risk that her son would be removed from the New Zealand jurisdiction; and

(f) had omitted to mention that the documentation for the border alert had been completed and was sitting in draft form on her file together with an accompanying cover letter; and

(g) had paid insufficient attention to the fact that she had alerted [Law Firm A] that she required a border alert to be put in place on the afternoon of 24 March at 1.42 pm, and on the morning of Monday 25 March at 6.15 am; and

(h) had paid insufficient attention to the fact that instructions to register the alert had been provided, at the latest at 8.30 am on the morning of 25 March 2019, not at the 11 am meeting with Ms VK which was focused on "other issues".

[30] Ms JG considered that Ms VK's management of her case had been grossly incompetent.

[31] By way of remedy, Ms JG made request for:

(a) Ms VK to be permanently debarred from practising law;[1] and

(b) for the processes and procedures of the law practice of [Law Firm A] to be reviewed and inspected with a view to achieving "mandatory improvement" in those processes; and

(c) compensation for loss said to have been suffered as a consequence of Ms VK's "gross incompetence".

[32] In providing response to Ms JG's review application, Ms VK submitted that the decision of the [City] Standards Committee [X] was correct and that Ms JG's review application:

(a) seeks to broaden the complaint to include [Law Firm A] and its systems and processes; and

(b) seeks to have Ms VK's limited involvement in the matter assessed as though she had played a more substantial role in Ms JG's case than she had; and

(c) disregards evidence that Ms JG's instructions as late as Friday 22 March 2019 were that she did not wish to seek a border alert; and

(d) fails to disclose that Ms JG had not informed the lawyers earlier, that there was imminent risk that her son would be removed from New Zealand; and

(e) does not accurately and fully reflect events; and

(f) misconstrues the form on which a border alert was sought.

[33] It is submitted for Ms VK, that Ms JG was seeking an "extraordinary suite of remedies" quite disproportionate to the conduct breach under investigation.

[1] This is not an order that either a Standards Committee or Legal Complaints Review Officer has jurisdiction to make. The power to strike off a practitioner is available to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, consequential upon the Tribunal determining a lawyer's conduct to have amounted to misconduct.

Review on the papers

[34] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[35] The parties have agreed to the review being dealt with on the papers

[36] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[37] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[38] More recently, the High Court has described a review by this Office in the following way:[3]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO

[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[3] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[39] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Discussion

[40] Framed in a disciplinary context, Ms JG's complaint engages a consideration as to whether Ms VK provided competent representation to Ms JG.

[41] In the course of providing regulated services to their client, a lawyer must act competently, and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[4]

[42] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[5]

[43] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[6]

[44] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[7]

[45] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.[8]

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[4] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.
[5] Lawyers and Conveyancers Act 2006, s 12(a).
[6] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[7] At [11.3].
[8] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.20].

[46] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[47] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[48] It has been noted that:[9]

> while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

[49] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.[10]

[50] In considering the issue as to whether Ms JG was competently advised, the issues to address are:

(a) Was Ms VK responsible for steps not being taken to immediately activate the border alert on the morning of Monday 25 March 2019?

(b) Did Ms VK err in failing to sign the request for a border alert?

(c) Do any disciplinary issues arise as a consequence of the delay in finalising the amendments to the application form that Interpol had advised were required.

Was Ms VK responsible for steps not being taken to immediately activate the border alert on the morning of Monday 25 March 2019?

[51] Ms JG contends that steps should have been taken immediately on the morning of Monday 25 March, to action her request for a border alert to be lodged.

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[9] Webb, Dalziel and Cook, above n 9 at [11.3].
[10] Paragraphs [41]–[49] of this decision referenced from LCRO 205-2015, at p [41]–[49].

[52] She notes that she had emailed Mr TF's PA on Sunday 24 March 2019, to confirm instructions for steps to be taken. She notes that she conscientiously followed up those instructions with an email early on the Monday morning, and attended at [Law Firm A]'s office at 8.30 am, at which time she provided the office receptionist with a hard copy of the application which had been prepared by Mr TF.

[53] It is difficult to see how events that had transpired to this point could reasonably engage a consideration as to whether Ms VK had breached any duties or obligations owed to Ms JG.

[54] Ms JG was not Ms VK's client. Ms VK, had not, until late in the morning of 25 March 2019, ever met with Ms VK.

[55] Ms JG argues that as Mr TF had prepared an application in draft, steps could, and should, have been immediately taken to action that document on indication from her that she wished to proceed.

[56] She explained her position thus:[11]

> At approximately, 8:30am on Monday, 25th March 2019, I handed the signed hard copy, of the Border Alert to the [Law Firm A] receptionist, and asked her to action. Ms VK was the lawyer responsible for actioning the request. Contrary to the impression created by the Standards Committee, my instructions were given at the latest on 8:30am on the Monday morning, not at the 11.00am meeting with Ms VK, which discussed other issues. This is the key flaw in the Standards Committee decision, as they have adopted 11.00am as the starting point for the instruction.

[57] With every respect to Ms JG, her expectation that her matter could be immediately attended to does not pay sufficient regard to the practical realities of the demands made on lawyers in attending to work in a busy legal practice.

[58] It was regrettable that Mr TF was on leave. If he had been available, Ms JG's inquiries would no doubt have been immediately directed to him.

[59] But in his absence, inquiries had to be made within the practice as to whether a lawyer was available to attend to Ms JG's request.

[60] Neither the office receptionist, nor Mr TF's PA, could, in the absence of instructions from one of the firm's lawyers, dispatch the border alert form.

[61] It is a serious matter to action a request which has consequences of imposing restrictions on a parent's ability to travel with their children.

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[11] Ms JG, correspondence to LCRO (12 October 2020).

[62] Whilst Ms JG had discussed with Mr TF the possibility of making an application,[12] and steps had been taken to prepare an application for filing if required, any lawyer who dealt with the matter in Mr TF's absence would have been required to check the file, speak with Ms JG, and garner an understanding of the circumstances which necessitated the application being filed.

[63] It was not possible to arrange for a lawyer to see Ms JG immediately.

[64] At 8.39 am, a senior receptionist emailed one of the lawyers in the practice, to enquire if she was available to attend to Ms JG's matter.

[65] At 9.34 am, the lawyer to whom the initial enquiry had been directed, informed the receptionist that her existing commitments did not provide her an opportunity to meet with Ms JG, but she had made enquiry of two colleagues as to whether either would be able to organise time to attend on Ms JG.

[66] Ms VK was able to meet with Ms JG at 11 am.

[67] Ms VK was not responsible for steps not being taken to immediately activate the border alert on the morning of 25 March 2019.

[68] To the extent that Ms JG's complaint embraces argument that processes or procedures should have been in place to ensure that instructions provided to a lawyer would be implemented in the event of the lawyer instructed being absent from his/her office, Ms JG's complaint broadens the scope of the conduct enquiry to encompass consideration of matters that are not properly within the scope of this review.

[69] Nor am I persuaded that it was Ms JG's expectation that her request for the border alert would be actioned without need for her to meet with a lawyer.

[70] Ms JG's email to Mr TF's PA on the afternoon of Sunday 24 March 2019, advised that she wished to proceed with the border alert, attached a scanned copy of the application form, and confirms her intention to deliver the signed hard copy to [Law Firm A]'s office the following morning.

[71] Ms JG suggests that when she met with Ms VK at 11 am, that she understood it to be the case that her request for a border alert had already been actioned.

[12] I note that after instructing Mr TF, Ms JG then informed him that she did not anticipate an immediate need to file the application.

[72] In her initial complaint, she says this:[13]

> Later on the morning of the 25th at 11am I met with Ms VK, during that meeting we discussed more substantive steps such as an application for a non removal order. I was not advised during that meeting that the request to have the Border Alert put in place, had not yet been processed and it was my expectation that because it was a communication to Interpol that had already been drafted by [Law Firm A], and I had provided all the necessary details and hard copy on that morning, that it would have been done as soon as possible.

[73] Following her meeting with Ms JG, Ms VK drafted a file note in which she recorded the following:

> Ms JG instructed me that she wants us to apply for the Non-Removal Order. I am to come back to her with a draft affidavit in the next few days. In the meantime, we are to apply to have the Border Alert put in place.

[74] Ms JG considered that Ms VK's file note was:[14]

> … not quite correct as I had already given the instructions for the Border Alert to be put in place prior to this meeting. I had sent the email on 24 March attaching the scanned copy and already visited the offices with a hard copy in case this was required at 8:30am that day. I certainly was not under the impression that steps would only be taken after my meeting with Ms VK at 11am. I already understood it was an urgent interim step.

[75] I do not discount the possibility that Ms JG has a genuine misunderstanding of the process that was underway, but I think it improbable that in the course of an almost hour-long meeting between Ms JG and Ms VK, that there would not have been a direct and forthright discussion (likely at the commencement of that meeting) as to the steps that would be taken to lodge the border alert. I think it unlikely that if Ms JG was labouring under the impression that her request for a border alert had been actioned before meeting with Ms VK, that this misunderstanding would not have been promptly identified in the meeting.

[76] I do not consider it probable, particularly in light of the explanation provided in Ms VK's file note, that the meeting proceeded on a mutual understanding that the application had been lodged, and that the focus for the meeting was solely on preparing the substantive application that would need to be filed with the court to ensure more permanent arrangements were put in place to provide safeguard that Ms JG's youngest child could not be removed from the jurisdiction without her consent.

[77] As previously noted, I do not consider that a prudent lawyer would action a border alert without assurance that they were sufficiently informed as to the context for the application and satisfied that it was an appropriate application to make.

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[13] Ms JG, letter attached to complaint to Law Society (23 March 2020) at [8].
[14] Ms JG, letter attached at [9].

[78] I consider it probable that when Ms VK's meeting with Ms JG concluded at close to midday, the understanding was that Ms VK would then proceed to take steps to register the border alert.

Did Ms VK err in failing to sign the request for a border alert?

[79] An examination of this issue requires, at first step, consideration of the question as to whether the document that was required to be completed in order to advance an application for a border alert, was required to be signed by Ms VK, as (then) counsel for Ms JG.

[80] It could be reasonably expected, that documents which provide a foundation for an intervention of such consequence, would be clear and explicit in detailing filing requirements.

[81] Mr BH, counsel for Ms VK, submits that the application form is ambiguous in its directions, particularly in identifying whether the application requires a lawyer's signature.

[82] In the course of addressing Ms JG's complaints on behalf of his client, Mr BH took steps to raise with Interpol, concerns he had arising from Interpol's refusal to action the first request submitted by Ms VK.

[83] Mr BH considered the application filed by Ms VK to have been properly filled out by her. He was dismissive of Interpol's explanation for refusing to action the first request on grounds that the application had not been signed by Ms VK. He considered Interpol's approach to be "inexplicable".

[84] Mr BH submitted that the application form clearly presented as allowing opportunity for an applicant to apply for a border alert, without need for the assistance of a lawyer.

[85] The form submitted by Ms VK had been signed by Ms JG. If the process allowed provision for applicants to make request for a border alert to be registered, why, argued Mr BH, was the application that had been submitted by Ms VK rejected?

[86] Interpol responded to Mr BH's enquiry, and in doing so, advised that:

(a) a lawyer's signature and contact details were not required "in the ordinary course of events", when a border alert was accompanied by a court order preventing removal; and

(b) in circumstances where an application was made without support of an accompanying court order, Police will not accept instructions from parents, as custody disputes are "inherently emotive"; and

(c) In appropriate cases, Police may exercise a discretion to enter a temporary border alert at the request of a family lawyer, pending an imminent application for a court order; and

(d) Police would exercise a discretion in determining whether a border alert would be issued, in circumstances where the application was not supported by a court order.[15]

[87] Ms JG contended that as the application form provided direction that it was a mandatory requirement for a lawyer to provide contact details, it was clear that a lawyer was required to attach their signature to the application form.

[88] It is not the role of a Review Officer to make definitive determinations on issues as to how provisions of documents are to be interpreted, in circumstances where there is disagreement as to how a particular provision is to be interpreted or applied.

[89] But it is necessary, because of the nature of the complaint under review, to consider from a disciplinary perspective, whether Ms VK's failure to witness the initial document raises any conduct issues.

[90] Having carefully considered the document that parties are required to complete when making request for a border alert, I find myself in agreement with Mr BH, that the attestation provisions which record the details of the party making the request, present as ambiguous and potentially confusing.

[91] The application form requires to be recorded:

(a) details of the child to whom the order is to apply; and

(b) details of applicant and respondent (mother and father).

[92] The form then requires the party making the request (the applicant) to provide full name and signature.

[15] Interpol response to Mr BH (undated copy on file). Note: I have not provided summary of all matters addressed in that correspondence.

[93] Following request made of the applicant to record their name and signature, the form provides a further box for attestation purposes, the instructions for which commence with… “Or signed by Lawyer (if you have one)”.

[94] I can see no reasonable construction to be drawn other than that it appears to indicate that an application may be filed by a party, without need for that party to have the assistance of a lawyer.

[95] No other sensible interpretation can be taken from a direction that says “Or signed by Lawyer (if you have one)”.

[96] Explanatory notes accompanying the application form, reinforce the possibility of a parent independently applying for an order, without the assistance of legal counsel.

[97] Those notes advise that “[o]ne of the applicants asking for the order preventing removal or their lawyer must complete and sign this form which should then accompany the application when filed in court”.

[98] But it is clear from the helpful clarification Interpol provides to Mr BH, that when application is made for a border alert in circumstances where the application is **not** accompanied by a court order preventing removal, the Police exercise a considerable degree of caution. In practice, an application will not be sanctioned in circumstances where a parent alone has made the application without a supporting court order, but may be actioned in situations where the application (although not accompanied by a court order) is in a sense “supported” by evidence of the applicant having engaged a lawyer to act for them.

[99] The approach adopted by the Police is not surprising.

[100] It would be problematic if parents had unfettered opportunity to restrict the other parent’s ability to travel with children, through the process of filing, without notice to the other party, a brief document, unsupported by other evidence.

[101] It is clearly anticipated that the majority of applications for border alerts be accompanied by court order, this to provide comfort for the authorities that a court has determined that there are reasonable grounds to curtail potential travel.

[102] I take it from Interpol’s response to Mr BH, that on occasions Police will exercise a discretion and implement a border alert in circumstances where there is no court order, if the application is supported by a lawyer. In those situations, the Police presumably take a view that a lawyer properly exercising their professional judgement, would only

support a client's application in circumstances where they considered it was appropriate to do so and there was sufficient evidence to advance a credible application to prevent removal.

[103] But an application unsupported by court order, will only be granted at the discretion of the Police.

[104] Ms VK says that it was her understanding, and one in which she was supported by colleagues that she had spoken with, that she was not required to sign the form.

[105] Whilst I accept there is potential for confusion when the issue is considered by reference to the form alone, I nevertheless think it not unreasonable that experienced family lawyers would have an understanding that Interpol would be reluctant to action stand-alone applications by a parent, unless the application was supported by a court order.

[106] But the initial application filed by Ms VK was not a "bare application".

[107] It was an application prepared by an experienced Family Court lawyer, who had drafted correspondence to accompany the application.

[108] Ms VK, sensibly, attached Mr TF's correspondence with the application.

[109] The correspondence provided, in concise and succinct form, the information that Police required when considering exercising its discretion to implement a border alert, before the Court had been given opportunity to consider the merits of an application to prevent removal.

[110] Mr TF's correspondence (appropriately pp'd by Ms VK) recorded that:

(a) [Law Firm A] acted for Ms JG; and

(b) Ms JG had care of the children pursuant to an order of the Federal Magistrates Court of [Country]; and

(c) Ms JG was concerned, in the face of her former husband's urgent return to New Zealand, that there was possibility of her former husband attempting to remove the children; and

(d) application was to be made for an order preventing removal.

[111] I have noted that it is not the task of a Review Officer to determine whether Interpol appropriately exercised the discretion available to it, but I consider it significant

that an application supported by correspondence from a lawyer who had precisely identified the fundamental issues that needed to be addressed when making an application for a border alert in circumstances where risk was considered imminent, and the intention was to make immediate application to the court for orders, was not considered to be in completed form, as a consequence of the lawyer not signing the application form.[16]

[112] In my view, no disciplinary issues arise as a consequence of Ms VK omitting to sign the initial application.

[113] But that is not the end of the matter.

[114] Ms VK says that following her meeting with Ms JG, she made request of her secretary at around 12.30 pm, to forward the application to Interpol.

[115] The application was dispatched at 12.47 pm.

[116] At around 1.43 pm, Ms VK says she received a message from the firm's receptionist, making request of her to contact an officer from Interpol.

[117] On doing so, she was informed by Interpol, that she was required to sign the application.

[118] Despite her belief that it was not necessary for her to do so, rather than engage in what would have been pointless dispute, she completed the application form and instructed her secretary to resend the application. This was dispatched with note that the form had been "duly signed".

[119] Regrettably, in what presents as a case of genuine human error, Ms VK's secretary inadvertently resent the application in its original form.

[120] This was unfortunate, but an administrative error in that nature of that which inevitably occurs from time to time in busy offices where a significant number of communications are managed daily

[121] Ms VK became alerted to the error when her attention was drawn to an email which had been forwarded to Interpol at 2.55 pm, that email responding to an email received from Interpol at 2.45 pm, which had informed [Law Firm A] that the second application forwarded was identical to the first. If, as I have concluded, no disciplinary

[16] In fairness to Interpol, they reject suggestion that the application was declined. On receipt of the application they took steps promptly to alert Ms VK to their concerns. Their approach to endeavouring to sort out difficulties with the application was conscientious.

issues arise for Ms VK as a consequence of Ms JG's application not being forwarded to Interpol prior to her meeting with Ms VK, and having concluded that no disciplinary issues arise as a consequence of Ms VK taking around 30 to 40 minutes after meeting with Ms JG to finalise arrangements for dispatching the application,[17] the question that remains, is whether Ms VK has breached any duties or obligations owed to Ms JG, arising from the events that followed her office being notified by Interpol at 1.43 pm on the afternoon of 25 March 2019, that the application needed amendment.

Do any disciplinary issues arise as a consequence of the delay in finalising the amendments to the application form that Interpol had advised were required necessary?

[122] Having carefully considered the train of events that occurred on the afternoon of 25 March 2019, I do not consider that Ms VK failed to provide competent representation to Ms JG.

[123] For reasons that have been explained, I do not consider that Ms VK can be fairly criticised for failing to sign the initial application.

[124] Interpol's advice that they required the application to be signed was drawn to Ms VK's attention at around 1.45 pm.

[125] The application was resent at 1.59 pm. This reflected a prompt response on Ms VK's part to accommodating Interpol's request.

[126] If the correct form had been sent at 1.59 pm, the application may (although it would have been a close-run thing) have been in place before Ms JG's husband took the children through border controls and completed formalities for leaving the country at around 2.14 pm.

[127] When Interpol received the correct form, it processed the application promptly.

[128] Ms VK cannot be fairly criticised for the error made by her secretary.

[129] The error was only drawn to her attention, after it had been rectified.

[130] Having given careful consideration to the helpful submissions filed by Ms JG in support of both her complaint and review applications, I have considerable sympathy for the predicament Ms JG was put in, when her youngest son was removed, without her consent, from the country.

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[17] Addressed at [133] below.

[131] She understandably advances her criticisms of Ms VK from the perspective that she did not consider that a great deal of time would be required to complete and send a form that had been prepared in draft form. It was, in her view, a task capable of being completed in a matter of minutes.

[132] I agree with her.

[133] But in my view, the only period of time that is reasonably subject to scrutiny in terms of addressing question as to whether Ms VK had acted sufficiently promptly, is the period from when Ms VK ended her interview with Ms JG, to the time she instructed her secretary to despatch the application, a period of around forty minutes. Bearing in mind that Ms VK had juggled arrangements to enable to attend on Ms JG and considering that implementing these instructions occurred at the end of a busy morning for her when she likely would have had competing matters to attend to, I think it would be unreasonable for a delay of this duration to be determined to constitute unsatisfactory conduct.

[134] I am satisfied that Ms JG's predicament was, to a significant degree, occasioned by the unhappy outcome of a convergence of circumstances which had regrettably impeded the process of registering a border alert which would have protected Ms JG from what she correctly perceived to be, imminent threat of her husband removing the child.

[135] Whilst I consider, with the benefit of the minute scrutiny that frequently accompanies the luxury of hindsight analysis, that there were aspects of Ms JG's case that could have been more promptly managed, I agree with the Committee that if in the circumstances of this case, it was concluded that Ms VK's conduct met the threshold of unsatisfactory conduct as defined in the Act, that would set the bar at an unreasonably high level.

Anonymised publication

[136] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 23rd day of March 2021

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R.Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms JG as the Applicant
Ms VK as the Respondent
Mr BH as the Representative for Ms VK
AB, CD, EF, GH, IJ and KL as the Related Persons
[City] Standards Committee [X]
New Zealand Law Society