

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

Decision No: [2011] NZIACDT 16

Reference No: IACDT 33/10

IN THE MATTER

of a referral under s48 of the Immigration
Advisers Licensing Act 2007

BY

Immigration Advisers Authority
Authority

BETWEEN

Navneet Karan Singh Cheema
Complainant

AND

Chheogyal Jah Om Sandyang Lepcha
Adviser

DECISION

REPRESENTATION:

Complainant

In person

Adviser

In person

Date Issued: 20th June 2011

Decision

The Referral

- [1] This matter was referred to the Tribunal pursuant to section 45 of the Immigration Advisers Licensing Act 2007 (the Act) by the Registrar of the Immigration Advisers Authority. The principal ground of the complaint was the Adviser was dishonest and misled the Complainant.
- [2] The facts supporting the complaint also raised questions of whether the Adviser was a party to an unlicensed person unlawfully providing immigration advice and other breaches of his professional obligations.
- [3] The Registrar has referred the complaint as a breach of section 44(2) of the Immigration Advisers Licensing Act 2007. That provision makes both dishonest and misleading behaviour each a ground for complaint. In addition, the same provision makes a breach of the Code of Conduct a ground for complaint.
- [4] The Code has been developed pursuant to section 37 of the Act (published www.iaa.govt.nz). Materially, clause 1 of the Code requires a licensed immigration to act with professionalism and also commence a professional engagement with a written agreement.

Factual Issues

- [5] The Tribunal undertook a review of the whole of the papers presented and issued a minute dated 12 April 2011. Among other procedural matters, the minute identified the factual matters in issue and the potential conclusions that could be reached on the papers before the Tribunal. The parties were given an opportunity to respond.
- [6] The minute raised the following matters.
- [7] First, the key events and circumstances raised by the complaint appeared to be:
 - [7.1] The Adviser was engaged to assist the Complainant with seeking a renewal of his work permit on 3 March 2010.
 - [7.2] The Adviser permitted SN, a person who was not lawfully entitled to provide immigration advice, to provide such advice to the Complainant in the initial phase of the engagement.
 - [7.3] The Adviser failed to enter into a written agreement for the provision of immigration advice and failed to take the other preliminary steps required by the Code of Conduct developed under section 37 of the Immigration Advisers Licensing Act 2007.
 - [7.4] On 26 March 2010, an application was made under section 35A of the Immigration Act 1987, which was in force at the time. It was a discretionary provision allowing the Minister to grant a permit where a person does not hold a permit to be in New Zealand. The Minister's power would usually be exercised by a delegate in Immigration New Zealand.
 - [7.5] The Adviser was notified on 19 May 2010 by Immigration New Zealand the application failed.
 - [7.6] The Complainant had maintained regular contact with the Adviser by telephone and was not informed the application had been declined. In June, the Adviser personally told the Complainant that an application had been made direct to the Minister of Immigration and he would get an answer in three weeks. This was false and intended to mislead the Complainant as the Adviser was aware the application had been declined and there was no current application.

- [7.7] Until October 2010, the Complainant believed he was in New Zealand lawfully with an application pending whereas he was unlawfully in New Zealand without a permit. The Complainant engaged a different immigration adviser and discovered the Adviser had misled him.
- [8] The Adviser had said the Complainant instructed him when his permit was still valid but a police clearance was required before an application could be lodged. The police clearance was not available until the original permit expired. It was for that reason an application was made under section 35A as an ordinary application could not be made after the expiry of the original permit.
- [9] The Adviser has not given any explanation as to what steps he took to explain to the Complainant either the significance of a permit expiring or what steps he might take as a result of that.
- [10] The Adviser says SN, to his knowledge, was dealing with the Complainant regarding the decline under section 35A and what action was to follow.
- [11] The minute gave notice to the parties that the papers then before the Tribunal appeared to leave open the conclusions that:
- [11.1] The Adviser was a party to the unlawful provision of immigration advice by providing advice in conjunction with SN who could not lawfully provide such advice.
- [11.2] The Adviser failed to comply with the Code in relation to the requirements concerning entering into a professional engagement.
- [11.3] The Adviser failed to provide advice and manage the issues relating to the Complainant's permit expiring.
- [11.4] The Adviser dishonestly misrepresented to the Complainant what was occurring in relation to the Complainant's application and immigration status.

Legal issues

- [12] A legal issue which requires elucidation is the prohibition on an unlicensed person providing immigration advice.
- [13] Of course, the central legal question is whether the material presented requires that the complaint should be upheld.

The positions of the parties

- [14] The Adviser, in response to the minute, said a section 35A application had been made as previously explained and that, in addition, a different application for a "Ministerial Intervention" had been lodged after that. He said the application for a "Ministerial Intervention" was a different process from a section 35A application.
- [15] He did not explain what the difference was, which is not apparent given that section 35A of the Immigration Act 1987 provided power for the Minister of "the Minister's own volition" to "grant a permit of any type".
- [16] He provided no evidence of any second application having been made other than his unsupported assertion.
- [17] The Complainant and the Authority did not respond to the minute.

Decision

- [18] I am satisfied the facts set out in the complaint (as recorded in the minute) have been established. The written material supports the facts set out in the complaint. The Adviser has not challenged the essential facts. It is necessary to consider each element to determine whether the complaint should be upheld.

Party to unlawful provision of immigration advice

- [19] Section 6 of the Act is clear, unless a person is licensed under the Act or exempt from the requirement to be licensed, they may not provide immigration advice. Section 63 provides it is an offence to breach that requirement. "Immigration Advice" is defined in section 7. There are exceptions which are not presently material. Section 7(a) provides "Immigration Advice":
- "means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; ..."
- [20] The scope is broad. SN was unlawfully providing immigration advice. The Adviser was aware of that and a party to it. He provided no explanation or justification when told of this potential finding.
- [21] Licensed immigration advisers must be the only persons (unless exempt) who give professional advice and assistance to immigration clients. Of course, clerical assistance and the like are not excluded.
- [22] It is evident a key element of the mechanism in the Act is that licensed immigration advisers are clearly identified; client relationships commence with the Adviser identifying their standing and providing of a copy of the Code (Code clause 1.4). The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.
- [23] The legislation provides an important privilege to licensed immigration advisers in allowing them exclusively to provide immigration advice (along with exempt persons). However, consistent with that, licensed advisers carry professional obligations. They are personally responsible for the professional relationship.
- [24] I find the Adviser was a party to the unlawful provision of immigration advice by SN.
- [25] That amounts to a breach of clause 1.1 of the Code which requires that the Adviser act with professionalism in performing his services.
- [26] Section 44(2) of the Act sets out the grounds for complaints under the Act. Breaching the code is one of the grounds. Accordingly, this aspect of the complaint is upheld.

Failure to commence professional engagement in accordance with the Code

- [27] The Adviser failed to commence the professional engagement by entering into a written agreement and the other ancillary requirements under clause 1.5 of the Code.
- [28] He breached the code and as noted section 44(2) of the Act makes that a ground for complaint. It follows this aspect of the complaint is upheld.

Failure to manage the issues relating to the Complainant's permit expiring

- [29] Remaining in New Zealand after an immigration permit expired was a matter of substantial gravity. The Complainant engaged the Adviser with his permit expiring a short time later. If the permit expired and he remained in New Zealand he could not apply for a new permit in the usual way. In essence, the only way he could regain lawful status in New Zealand was under section 35A of the 1987 Act. That is a purely discretionary provision to the extent the section expressly provides "the Minister is under no obligation to consider the matter".
- [30] The Complainant consulted the Adviser intending that an application for a permit would be made in good time and he would not become an "over-stayer" or be in New Zealand unlawfully. The complaint is that the Adviser both failed to either progress the application and inform the Complainant of the issues that were arising. The Complainant's permit expired and he was in New Zealand unlawfully, but did not understand that as he was told by the Adviser he had an application pending and believed his affairs were in order.

- [31] Advisers have a clear duty, first to inform their clients of the importance of maintaining the status of being in New Zealand lawfully and, second, to advance their client's instructions efficiently to protect their status. The latter is expressly provided in clause 2.1 of the Code.
- [32] The Adviser claimed it was not possible to progress the application as first a police clearance was required. I accept that explanation though there may well have been interventions that were required.
- [33] The remaining issue is communication with the Complainant. The Adviser allowed the Complainant's permit to expire without first advising him of what was happening and its consequences. Instead, he advised him an application for a permit was pending. He led the Complainant to understand his immigration affairs were in order when in fact that was not correct.
- [34] Clause 1 of the Code requires that the Adviser perform his services with professionalism. He knew his client was in an invidious position and failed to advise him of the situation and its consequences. That was a breach of professional duty to advise and inform and falls far short of the standards required.
- [35] Accordingly, I uphold this aspect of the complaint. However, the allegation goes further than simply failing to provide adequate information and advice.

Dishonest misrepresentation

- [36] On 19 May 2010, Immigration New Zealand wrote to the Adviser informing him the Complainant's application had been declined. The Adviser failed to inform the Complainant. That, in itself, was a gross breach of his professional duties given the importance of the development.
- [37] In June 2010, the Complainant spoke with the Adviser and was told an application had been made direct to the Minister and there would be an answer within three weeks. The Adviser did not disclose the section 35A application had been declined.
- [38] In response to the minute, the Adviser has said there was second application to the Minister. The papers the Adviser has received have made it clear the Complainant's new adviser had made inquiries and found there was no second application in progress in June 2010, simply the one declined section 35A application. While the Adviser, in response to the Minute, has said there was a second application, he has provided no evidence of it and provided no explanation for failing to provide evidence of it.
- [39] If there had been a second application, it would necessarily have been in writing and easily substantiated.
- [40] I am satisfied the papers before me establish there was no second application and the Adviser had every opportunity to substantiate his claim. I find the Adviser was dishonest in failing to disclose the declined application in June 2010 when he spoke with the Complainant and further he dishonestly told the Complainant there was a current application being decided.
- [41] Section 44(2)(d) of the Act makes dishonest or misleading behaviour a ground for complaint. Accordingly, the complaint is also upheld in this respect.
- [42] Given the findings, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [43] The sanctions which are potentially open are prescribed by section 51 which provides:

"Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are —
- (a) caution or censure:

- (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
- (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
- (d) cancellation of licence:
- (e) an order preventing the person from reapplying for a licence for a period not exceeding two years, or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.”

Submissions on disciplinary sanctions

- [44] The Authority and the Complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees, and compensation.
- [45] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.
- [46] The Adviser will have the opportunity to respond to any submissions from the Authority and the Complainant. In any event, the Adviser may make further submissions on penalty.
- [47] Should the Adviser have a submission regarding inability to pay a penalty that submission is to be supported by a statement of assets and liabilities and particulars of income and outgoings.
- [48] The timetable for submissions will be as follows:
 - [48.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision, and
 - [48.2] The Adviser is to make any further submissions (whether or not the Authority or the Complainant make submissions) within 15 working days of the issue of this decision.
- [49] The parties are notified this decision will be published with the names of the parties after five working days unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 20th day of June 2011

G D Pearson
Chair