BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2011] NZIACDT 18

Reference No: IACDT 09/10

IN THE MATTER	of a referral under s48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority** Authority
BETWEEN	**Christine Whiles-Clarry** **Stephen Whiles-Clarry** Complainants
AND	**Glen William Standing** Adviser

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 6 July 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. It concerns a complaint of dishonest and misleading behaviour, incompetence, and retaining passports and personal documents.

[2] The Registrar has referred the complaint as a breach of section 44(2) of the Immigration Advisers Licensing Act 2007. That provision makes incompetent, 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.

[3] 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 adviser to return passports and other personal documents without delay.

Factual Issues

[4] The Tribunal undertook a review of the whole of the papers presented and issued a minute dated 15 April 2001. 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.

[5] The minute raised the following matters.

[6] First, the key events and circumstances raised by the complaint appeared to be:

[6.1] The Complainants lived in the United Kingdom, and wished to migrate to New Zealand. They engaged the Adviser to assist them with that.

[6.2] The Complainants are a married couple. Ms Whiles-Clarry was an Australian citizen and her husband a United Kingdom citizen.

[6.3] Ms Whiles-Clarry, due to her Australian citizenship, could enter New Zealand and remain indefinitely with a permit that would be issued at the border. However, Mr Whiles-Clarry had to make a formal application to obtain a permit to live and work in New Zealand.

[6.4] The Complainants first contacted the Adviser in or about June 2008. He was not a licensed immigration adviser at the time. He became registered on 24 November 2008.

[6.5] In August 2008, the Complainants signed an agreement for the Adviser to provide immigration services and paid £1,300 (of an overall fee of £2,500).

[6.6] The Adviser told the Complainants Mr Whiles-Clarry should apply for a work permit. The Adviser's company was also engaged to undertake an employment search. However, issues relating to that aspect of the work are not within the jurisdiction of this Tribunal.

[6.7] The Complainants arrived in New Zealand on 4 March 2009. They came with all their possessions and intended to remain living in New Zealand indefinitely with their two children who accompanied them.

[6.8] The Complainants raised the question of Ms Whiles-Clarry being a "sponsor" for Mr Whiles-Clarry so he could apply for a residence permit. They were told by the Adviser that, as an Australian citizen, Ms Whiles-Clarry had to be resident in

New Zealand for three years and be present in New Zealand for 184 consecutive days in each of those years before she qualified as a "sponsor".

[6.9] On 15 July 2009, the Complainants requested their original documents be returned. An email in response dated 16 July 2009 said:

> "I'll be happy to send through the original documents we have on file, however before I can do this I will require our final invoice to be paid.
>
> If you could arrange for this to be paid ASAP it would be appreciated, and then I will return the documents."

[6.10] The letter was written by Ms Climo who described herself in the letter as a "Case Manager". The documents referred to included Mr Whiles-Clarry's passport, birth certificate and other documents.

[6.11] On 23 July 2009, the Complainants were told Mr Whiles-Clarry had been granted a work permit for one year. Ms Whiles-Clarry queried that:

[6.11.1] She said she had expected a work permit to be granted for three years. The Adviser proffered the explanation this was due to a change in immigration policy, and further Mr Whiles-Clarry should apply for a residence permit as soon as possible.

[6.11.2] Ms Whiles-Clarry queried the advice to apply immediately for a residence permit, as previously the Adviser had said a sponsor was necessary, and Ms Whiles-Clarry would not qualify as a sponsor until she was resident for three years. The Adviser responded by saying that too was due to a change in immigration policy.

[6.12] Ms Whiles-Clarry queried Ms Climo, following her discussion with the Adviser, and was told she had always been qualified as a sponsor and there had been no change in immigration policy. Ms Whiles-Clarry spoke direct to Immigration New Zealand and confirmed that as soon as she was residing in New Zealand she qualified as a sponsor.

[6.13] Ms Whiles-Clarry then understood the best way to proceed with their migration was for Mr Whiles-Clarry to have applied for a residence permit, with an open work visa while the residence application was considered. Failure to do so prevented Mr Whiles-Clarry obtaining work as early as possible and they had to spend their savings as a result.

[6.14] The passport and other documents were returned on 27 July 2009 after payment had been received.

[7] The Complainants are seeking a refund of fees of £2,500 and compensation of £4,000 (loss of income - $600/week for 16 weeks).

[8] The Adviser claimed:

[8.1] The issue could not be referred to the Tribunal as the events were prior to "the new licensing law [May 2009] being introduced".

[8.2] The advice regarding the appropriate visas/permits to apply for was correct.

[8.3] He would not comment on the retention of the passport as that was Ms Climo's conduct.

[9] The minute stated the papers then before the Tribunal left open the conclusions that:

Commencement of licensed status

[9.1] The Immigration Advisers Licensing Act 2007 came into force a year after it received the Royal assent, which was on 4 May 2007. The Act and the Authority operated as

from 5 May 2008. There was a period of "grace" for a year until it was compulsory to hold a licence when providing immigration advice. Between 4 May 2008 and 4 May 2009, advisers could apply for licences.

[9.2] As from 24 November 2008, the Adviser held a licence. From that time, he had the benefit of recognition as a licensed immigration adviser. He was then subject to the obligations that follow from holding that professional status.

[9.3] This Tribunal has no jurisdiction over events that predate the Adviser becoming a licensed immigration adviser. However, on attaining a licence an adviser is obliged to conduct an existing professional relationship on proper and fair terms, which comply with the Act and the Code. It is no answer to say an Adviser is entitled to perpetuate an unfair agreement or error as it predated the Act.

[9.4] The Complainants arrived in New Zealand on 4 March 2009. Accordingly, the time between the Adviser being licensed and their arrival was ample for the Adviser to review the position and ensure that the Complainants were proceeding on an informed and appropriate basis.

The Adviser's role

[9.5] The Adviser indicated Ms Climo was responsible for retaining a passport and personal documents.

[9.6] The papers left open the view the Adviser was responsible for the professional relationship with the Complainants and accountable for correspondence and all other matters.

[9.7] If Ms Climo was a licensed immigration adviser and the Adviser shared responsibility for the professional relationship with her, he was invited to put forward information that would allow the Tribunal to form a view of their respective roles.

Negligent advice

[9.8] The Tribunal could take the view the Complainants were wrongly advised and Mr Whiles-Clarry should have applied for a residence permit and open work permit after the Complainants came to New Zealand.

[9.9] There was no explanation in the papers indicating that course was not open, and further the advice initially given by the Adviser on the requirements for sponsorship was wrong.

Misleading clients

[9.10] The Tribunal could take the view the Adviser misled the Complainants. Doing so by representing to them there had been a change in immigration policy which was false. Further, this was intended to prevent the Complainants discovering he had given wrong advice. The wrong advice being related to the length of time a work permit could extend for Mr Whiles-Clarry and Ms Whiles-Clarry's qualification as a sponsor.

Retention of personal documents

[9.11] The Tribunal could take the view the Adviser was responsible for allowing a passport and other personal documents to be detained until fees were paid.

Parties response to the minute

[10] The parties both responded to the minute.

The Adviser's Response

[11] The Adviser took issue with the observation in the minute appearing in paragraph [9.4], claiming there was no need to review the position in relation to any immigration application between the time the Adviser became licensed and the Complainants came to New Zealand.

[12] He also contended he had not given any defective advice. He said:

> "All the evidence provided indicates that we assessed them and successfully applied for a temporary work visa and permit for Stephen Whiles-Clarry. Our contractual agreement was always only for a temporary work visa and never for residency."

[13] He said they were advised by Ms Leanne Climo, the Adviser's colleague that they were able to apply for either a work visa after Mr Whiles-Clarry had obtained employment or an open work visa when they could show New Zealand was their primary place of residence.

[14] He said that if the wrong advice was given initially, on arrival it was not be open to apply for an open work permit as at that point the primary place of residence test would not have been met.

[15] After November 2008, the Adviser conducted himself in accordance with the Code.

[16] He did not make any specific comments on the issues relating to dishonest conduct, the retention of documents, and the role of Ms Climo (other than in providing the advice discussed).

The Complainants' Response

[17] The Complainants referred to paragraph [9.9] of the minute. They attached a copy of a letter dated 19 June 2008. This letter canvassed the various immigration processes that could be considered. The date of the letter indicates it was written prior to the time the Adviser held a licence. The letter gives a preliminary assessment of the Complainants' situation. Given the assessment was preliminary, and prior the Adviser becoming a licensed immigration adviser, there is nothing adverse in this letter.

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 of the complaint to determine whether it should be upheld.

Commencement of licensed status

[19] For the reasons outlined in paragraph [9] above, I am satisfied the Adviser was subject to the Act as a licensed adviser from 24 November 2008. All the material events occurred after that time.

The Adviser's role

[20] First, I conclude the Adviser was responsible for the whole of the client relationship. Ms Climo had some involvement but it is not clear whether she was a licensed immigration adviser or whether advice she provided was prior to the Act coming into effect.

[21] The Adviser was notified in the minute the view was open that he was responsible for the professional relationship with the Complainants and if Ms Climo shared the responsibility he should provide information to determine what their professional roles were. No such information has been provided. I accordingly proceed on the basis the materials indicate the Adviser was responsible for the professional relationship with the Complainants, and he

oversaw all dealings with them and is accountable for them. If he delegated responsibilities, he was responsible for the delivery of the professional service.

Negligent Advice

[22] In terms of the relevant immigration policy I am satisfied:

[22.1] Ms Whiles-Clarry and her children were Australian citizens and entitled to travel to New Zealand and remain indefinitely;

[22.2] Mr Whiles-Clarry has UK citizenship as the family had committed to permanent migration to New Zealand (completely relocating, including pets). After they arrived in New Zealand, under Ms Whiles-Clarry's sponsorship Mr Whiles-Clarry was entitled to apply for an open work permit and could expect to receive one.

[23] In the initial advice in a letter dated 19 June 2008, prior to the Adviser being licensed, he discussed the process for obtaining a temporary work visa. The advice was preliminary. Such advice would usually be refined after gathering further information and confirming the intentions of the Complainants.

[24] There are two responses the Adviser made:

[24.1] First, he says he was only engaged to apply for a temporary work visa/permit so was not responsible for any failure to apply for a an open work permit; and

[24.2] It was only after a period of time after the family arrived in New Zealand that the residence requirements would be met so Mr Whiles-Clarry could obtain an open work permit.

[25] I do not accept either contention. The Adviser was licensed by the time the Complainants came to New Zealand. The Adviser had an obligation to gather sufficient information to be in a position to advise on the options the family had to migrate to New Zealand; and to give them accurate advice.

[26] It is no answer to say he was contracted to apply for a temporary work visa/permit and not responsible beyond that. He was engaged as a professional and needed to obtain the informed consent of his clients as to the course to be adopted after understanding the full range of reasonable options open. The Adviser has shown a concerning lack of comprehension of his obligations as a professional adviser. Professionals are engaged to advise on what initiatives are required, canvas the options with their client, and proceed after obtaining informed consent to a course of action.

[27] I have concluded this element of the complaint should be upheld, but not simply on the basis of the Adviser making an error regarding when an open work permit could be obtained.

[28] I have considered the approach to the concept of "negligence" under section 44(2)(a). The Act does not define the term, which is not surprising as its application turns on the wider statutory context.

[29] The jurisprudence from the various authorities dealing with medical professionals is appropriately applied to understand the threshold, but being mindful it is necessary to consider the statutory context in the respective situations.

[30] In *Tolland,* Decision No.325/Mid10/146P at para [39], the HPDT observed:

> "Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather it requires an analysis as to whether the conduct complained of amount to a breach of duty in a professional setting by the practitioner."

[31] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction, it follows it is not necessary to find a disciplinary sanction should be imposed to uphold a

complaint. However, it is important to recognise not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. It follows there will be occasions when advisers are responsible for a lapse from acceptable standards; but still not justify upholding a disciplinary complaint.

[32] It is a reality many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) provides the Authority may treat a complaint as trivial or inconsequential and should not be pursued or treat it as a matter that is best settled between the parties.

[33] It is necessary and appropriate for this Tribunal to be mindful there is a threshold before a complaint of negligence or want of care and diligence is established. The Act does not attempt to further prescribe where the boundaries lie, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[34] Had the Adviser in this case simply initially had a mistaken view of the options in relation to applying for an open work permit, in itself that may well have fallen short of being a breach of professional duty.

[35] However, the Adviser was responsible for giving his clients full advice on their immigration options. He failed to do that. He has made it clear the extent of his obligations, as he saw them, was to apply for an immigration visa of the kind he was contracted to apply for.

[36] Furthermore, in response to a complaint that his advice was wrong, he took the view that Immigration New Zealand was mistaken as to the policy requirements to establish a primary place of residence and hence the entitlement to sponsor.

[37] In his letter of 4 July 2009 he said, attempting to justify his advice: "you must conclusively show that you (the Australian passport holder and sponsor) are domiciled in New Zealand". He referred to the relevant policy. The policy, far from requiring domicile, required no more than that the primary place where the person lived was New Zealand.

[38] To refer to a domicile requirement demonstrated at best a failure to understand the policy. Domicile is a quite different legal concept and much more difficult to establish.

[39] It is plain from the papers that the Complainants met the residence requirement after relocating to New Zealand. They came to New Zealand and settled here with all their possessions, fully committed to living in New Zealand, and did so. That was sufficient.

[40] Accordingly, the Adviser had an incorrect understanding of the policy requirements, failed to review the options, failed to engage with his client in an informed way and even when confronted with his error failed to address his erroneous understanding.

[41] Section 44(2) provides negligence and incompetence are both grounds for upholding a complaint. I am satisfied the Adviser's failure to provide sound advice to his client, and the limited way in which he performed his duties was negligent, as he failed to acquaint himself with the relevant policy. It was incompetent as he failed to apprehend or accept the obligation on a professional adviser to understand a client's circumstances and advise them of their options and proceed to implement a course of action with the client's informed consent.

[42] The complaint goes further and alleges the Adviser actively and dishonestly attempted to mislead his client when confronted with his error.

Misleading clients

[43] In her letter dated 28 July 2009, Ms Whiles-Clarry recorded her discussion with the Adviser. The discussion had preceded her letter. She said:

> "We did not believe that we could apply for residency until I had lived in New Zealand for three years. You confirmed a change in immigration policy meant that I would be able to sponsor [Mr Whiles-Clarry] as long as we met the requirements. I later emailed Leanne Climo to confirm this and her response was (and I quote) 'You don't need to have lived in NZ for 184 days for each of the past

> three years to be able to sponsor Stephen – this requirement is in place if you are sponsoring a parent or sibling, but not under partnership. As far as I can see this has never been a requirement for this category, so you'll only need to prove that you are residing permanently in NZ'.
>
> To get clarity on the situation I telephoned Immigration New Zealand who advised me the following:-
>
> As I am an Australian Citizen and therefore a legal New Zealand resident, I have been able to sponsor Stephen in his residency because we have been in a stable relationship for more than 12 months. But also that we could have applied under the **Partnership Category** for an **OPEN Work Permit** allowing Stephen to work wherever he could find a job and not need to apply for a Work Visa/Permit once a job offer had been secured. In April we approached Shelley regarding leasing a motel business and me employing Stephen. After chasing Shelley for an answer she advised that Glen had stated we could not pursue that route with immigration. If Stephen had an Open Visa this would have been possible.
>
> To say we are cross and angry and the fact we have been misled is an understatement. **WE** have spent seven months looking for work, the past 4½ months here being told that Steve could only apply for truck driving jobs when he could have applied for any job. For example a company was advertising for blind fitters, Stephen worked for eight years manufacturing and fitting roller blinds and venetian blinds. He could have applied for this position if we had the right information."

[44] The Adviser responded in writing by letter dated 4 July 2009. In relation to the complaint, he had misled his client by telling her there had been a policy change when there was none. The Adviser said:

> "In regards to policy changes, we always inform all clients immediately of this by way of email in a newsletter format (due to volume). I have checked our system and you are on there as ... Therefore, not sure why you have not been kept updated."

[45] That response evaded the complaint. The Adviser has never given a response that either denies he misled Ms Whiles-Clarry or answered the complaint in any other way. That was so after the minute pointed out to him he was at risk of the Tribunal finding he had misled a client.

[46] I am satisfied the Complainants' allegation the Adviser misrepresented he had not made a mistake by falsely stating there had been a policy change is made out.

[47] It follows I find the complaint is made out under section 44(2)(d), being dishonest and misleading behaviour. It was both. A professional person has an obligation to deal frankly with clients and that extends to frankness about an error or mistake.

Retention of personal documents

[48] It is clear from the correspondence the Adviser, through the agency of Ms Climo, demanded the payment of fees before returning a passport. The conduct is an overt breach of clause 1.3 of the Code.

Potential Sanctions

[49] Given the complaint is upheld, the Tribunal may impose disciplinary sanctions under section 51 of the Act.

[50] 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

[51] The Authority and the Complainants have the opportunity to provide submissions on the appropriate sanctions.

[52] The Tribunal puts the Adviser on notice the findings against him are serious:

[52.1] The failure to give his clients competent advice was a substantial error. More significantly, there was a fundamental failure to provide advice in the manner required of a professional adviser.

[52.2] Misleading a client to avoid responsibility for error is a grave lapse from professional standards.

[52.3] To demand payment before releasing a passport is a flagrant breach of the Code.

[53] The Tribunal will consider whether the Adviser's licence should be cancelled or an order made that has the effect of preventing him practising on his own account.

[54] The Complainants have indicated they seek a full refund of fees and compensation for loss of wages. The Complainants should indicate the level of compensation and refund of fees sought in New Zealand dollars. The Tribunal will consider an application for compensation for income lost for the whole time Mr Whiles-Clarry was out of work if it is probable he could have been in work had he held an open work permit.

[55] 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.

[56] Should the Adviser have a submission regarding the ability to pay a penalty, the submission is to be supported by a statement of assets and liabilities, and particulars of income and outgoings.

[57] The Adviser should respond on the basis the full range of sanctions under section 51 are available and will be considered. The Tribunal has formed no views as to the appropriate sanctions at this point. It is, however, important that all parties understand the options available as the Tribunal will be assisted by submissions that address the relevant penalties.

[58] The timetable for submissions on penalty will be as follows:

[58.1] The Authority and the Complainants are to make any submissions within 10 working days of the issue of this decision, and

[58.2] The Adviser is to make any further submissions (whether or not the Authority or the Complainants make submissions) within 15 working days of the issue of this decision.

[59] 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 30th day of June 2011

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G D Pearson
Chair