

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

Decision No: [2011] NZIACDT 3

Reference No: IACDT 019/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Nitin Kumar
Complainant

AND

Chheogyal Jah Om Sandyang Lepcha
Adviser

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 27 January 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 that the Adviser was a party to a fraudulent application for a student permit.
- [2] The Complainant had no part whatever in the fraud, though the application was made in his name. The Complainant lodged a complaint after he became aware the Adviser had altered an immigration form without his knowledge or authority, adding false information.
- [3] The complaint alleges the Adviser:
 - [3.1] Altered the application adding false information,
 - [3.2] Falsely representing he was acting professionally as an immigration adviser submitting the application, and
 - [3.3] In fact was never engaged by the Complainant, had no authority to add the false information and knew it was false when he added it.
- [4] The Registrar has referred the complaint as a breach of Clause 1.4, 1.5, 2.1 and 5.2 of the Code of Conduct. The Code having been developed pursuant to section 37 of the Act (published www.iaa.govt.nz).
- [5] Clauses 1.4 and 1.5 of the Code require that a licensed immigration adviser explain and provide a copy of the code of conduct before entering into an agreement to provide professional services, and that the agreement be in writing. Clause 2.1 relates to acting lawfully, and obtaining written authority. There are a number of ancillary matters outlined in those parts of the Code that pertain to establishing a professional relationship with a client. Clause 5.2 addresses the knowing provision of false or misleading documentation.

Factual Issues

- [6] The Tribunal undertook a review of the whole of the papers presented, and issued a minute dated 15 November 2010. 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.
- [7] The minute raised the following matters.
- [8] The factual basis for the referral is that the Adviser was not engaged by the Complainant, and was a party to a dishonest attempt to misrepresent the Complainant's circumstances in a student visa/permit application.
- [9] The allegation of dishonesty had two aspects:
 - [9.1] First the Adviser never met the Complainant, had no contact with him, and was given no authority to act. However, he represented in documentation he was authorised to act as the Complainant's Adviser.
 - [9.2] Second there was a pretence the Complainant had paid fees for a course at Kingsland Institute of New Zealand, when that was not true. The Complainant had paid a deposit of \$1,000, a false certificate showing that a total of \$17,700-00 had been paid was issued purporting to be from the Kingsland Institute of New Zealand. In fact funds had been supplied by a party associated with the Institute, a bank deposit made, and immediately withdrawn. The purpose being to create a misleading record, indicating fees had been paid beyond what was in fact the case. It is alleged, that to advance this the Adviser altered forms signed by the Complainant, intending that misleading information would be supplied to Immigration New Zealand for the purpose of

processing the application for a student visa/permit. The alterations included that the Adviser had been appointed to act for the Complainant, the details relating to the course at Kingsland Institute of New Zealand, and payment of the fees.

- [10] The minute gave notice to the Adviser the conclusions that may be reached on the papers then before the Tribunal appeared to be:
- [10.1] First the Adviser represented he was authorised to act as the Complainant's Adviser, when he had no, or no adequate, basis to do so; and
- [10.2] He was a party to a dishonest pretence intended to advance the complainant's immigration status. Including, knowingly being a party to misrepresentations contained in a student visa/permit application, and participating in a process by which it was submitted to Immigration New Zealand.
- [11] The Adviser had provided a response to the complaint, and that was noted in the minute.

Legal issues

- [12] A legal issue which requires elucidation is the personal responsibilities licensed advisers have in establishing and maintaining their professional relationship with clients. In particular the extent to which they can allow other persons to effectively act as their delegate in dealing with professional matters.
- [13] Of course, the central legal question is whether the material presented requires that the complaint should be upheld, and if so in what respects.

The positions of the parties

- [14] The Adviser responded to the minute by letter dated 25 November 2010, a further letter dated 29 November 2010, and a statutory declaration dated 29 November 2010 (there was also a transcript of an interview). The key points in the response were:
- [14.1] The Adviser was employed by B & L Associates Ltd marketing courses for Kingsland Institute of New Zealand (Kingsland). Kingsland was an educational facility and the Adviser procured students. In some cases on referral from licensed immigration advisers. Though there is no indication any other licensed immigration adviser was involved in the present matter.
- [14.2] B & L Associates Ltd and Kingsland had respectively Mr Donald Han, and his wife Mrs Kathy Hou as directors.
- [14.3] Because he held a licence as an immigration adviser the Adviser was "directed by the director of the company to represent certain student applications", including one by the Complainant.
- [14.4] Another marketer named "Naresh" and Mr Han would discuss potential enrolment with students. The Adviser explained the circumstances in his letter dated 25 November 2010. Given the importance of the admissions, I will set out the material **verbatim** from the Adviser's letter:

"Some time in October 2009 an application form for Mr Kumar and other supporting documents were placed on my desk shortly afterwards I was directed by the Director to check and lodge the application. In good faith and taking for granted that the Mr Kumar was already informed that I would be representing his application I browsed through the form and all other supporting documents, wrote a cover letter and handed it to Mrs Kathy Hou as Mr Han was not in the city campus that day. Some crucial information I added to the application form information that was readily available as per other documents that were enclosed with the application form which were [crucial] for Mr Kumar's best interest (I believe that the application would have been returned by Immigration New Zealand if the readily available information as per other documents supplied, were not filled on the

application form as is their common practice), safety of his documents and receipt of indirect immigration advice. I then signed the form thus declaring.

- [14.5] In the letter the Adviser went on to concede he acted on the direction of Mr Han apparently due to his status as a “newly admitted” employee of the company of which Mr Han was a director. He said he did so in good faith, and had no authority to investigate whether the documents were true and correct. He denied being aware “of the fraudulent nature of the documents enclosed with the application form”, or having any other material involvement in the dishonesty.
- [14.6] The Adviser also claimed in the letter that his actions were no more deficient than the practices at other educational facilities in New Zealand, where online lodgement of applications are effected by “various licensed or unlicensed staff”.
- [14.7] In his letter dated 29 November 2010 the Adviser referred to what he now recognised as shortcomings in his admitted conduct. The Adviser says he has learned that “the delivery of indirect immigration advice within a company or organization must be formalized in writing.” He also explains that if sections of documents are incomplete “it will be good practice to directly contact a client” before making additions to the form.
- [14.8] The statutory declaration is to substantially the same effect as the preceding information. The background to the transcript he supplied is not fully evident, the subject matter appears to be what the Adviser says was a fraudulent scheme. However for reasons I will explain, I am not satisfied the Adviser was knowingly a party to that scheme, so it is not necessary to make findings regarding the details.

Decision

- [15] The Adviser’s admissions, which have previously been outlined, largely confirm the complaint. The complaint was clearly articulated, and consistent with the written record.
- [16] I conclude the material before me establishes the Adviser:
- [16.1] Wholly and completely failed to establish a professional relationship with the Complainant (the Code sets out the requirements in detail).
- [16.2] The Adviser had no proper or adequate basis to represent he had been engaged by the Complainant, and as a licensed adviser must have been aware of the requirements in the Code to establish a professional relationship. He knowingly created the misleading impression he was duly engaged as the Complainant’s licensed immigration adviser in his dealings with Immigration New Zealand. He did this in the Complainant’s Student Permit Application (stamped with the received date 13 October 2009 by Immigration New Zealand). The misleading impression was effected in the application form by:
- [16.2.1] Setting out a declaration he was a licensed immigration adviser, and identifying his licence number; and
- [16.2.2] Signing an acknowledgement he had provided immigration advice under the Act.
- [16.3] I am satisfied the Adviser intended Immigration New Zealand would believe the Student Permit Application had been prepared by a licensed immigration adviser acting in accordance with the standards and duties of his profession. Whereas he had not had any contact with the Complainant, taken no adequate steps to establish a professional relationship with him, and not been engaged in accordance with the Code.
- [16.4] The Adviser delegated his professional duties to non-licensed people, and one or more of them effected a fraud, and used the Adviser to “sign off”.

- [16.5] The Adviser altered a form which furthered the fraud, but I am not satisfied he knew the information he added was false. Though he would have likely become aware of that fact if he had contact with the Complainant.
- [17] I have approached the facts on the basis I must consider all the material before me, and reach factual determinations on the balance of probabilities, but subject to a sliding scale reflecting the gravity of the allegations. In the present case, I regard the allegations as at the most serious end of that scale.
- [18] Section 6 of the Act provides, 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; ..."
- [19] 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.
- [20] 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) (along with the other Code requirements). The scope of section 6 is wide, one, no doubt intended; effect is to ensure licensed advisers are not able to be used as a "front" for unlicensed operators. The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.
- [21] The legislation provides an important privilege to Licensed Immigration Advisers in allowing them to exclusively provide immigration advice (along with exempt persons). However, there are corresponding professional obligations placed on licensed advisers. They are personally responsible for the professional relationship, regardless of whether they are employees, or otherwise.
- [22] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice.
- [23] In this case, the Adviser effectively put his professional reputation and standing at the disposal of his employer. That was the consequence of agreeing to "sign off" as though he had a professional relationship with the Complainant, when in fact that was untrue. He now believes his employer was putting a fraud into effect. While I am not satisfied he was knowingly a party to the fraud, his dishonest pretence he was lawfully engaged as an immigration adviser was instrumental in allowing the fraud to be perpetrated.
- [24] There is a suggestion in the Adviser's response that he was entitled to act on the instructions of his employers. Licensed Immigration Advisers are given the freedom to practise as employees where they have little control over the business practices of their employer. However, they do so at their peril unless they establish proper protection for their professional independence, and assurance they can manage and deliver service for all aspects of the professional relationship (alone or with another licensed adviser). It is not open to an Adviser to claim they are subordinate to an employer or contractor, or say an unlicensed person was responsible for aspects of the professional relationship. It is not lawful for someone other than a licensed immigration adviser to be undertaking the work, other than clerical functions and the like. Accordingly, the Adviser was not entitled to defer to direction from his employer in his professional dealings, the facts of the present case make the reasons for that plain.
- [25] It follows I find the complaint is upheld. The conduct was in breach of Clauses 1.4, 1.5, and 2.1 of the Code of Conduct, in relation to the failure to establish a proper professional relationship. The Adviser failed to provide the Complainant with a copy of the code of conduct, enter into a written agreement for the provision of professional services, and failed to obtain a written

authority from him. They are all elementary requirements in the Code to establish a professional relationship, and knowledge of those requirements is an essential competency to be demonstrated before any person is licensed as an immigration adviser.

- [26] The more serious finding is that under clause 5.2 of the Code the Adviser knowingly provided misleading documentation, namely making a statement in the Student Permit Application that was intended to cause Immigration New Zealand to believe he was engaged as the Complainant's licensed immigration adviser.
- [27] Section 44(2) of the Act sets out the grounds for complaints under the Act, breaching the code is one of the grounds, and dishonest or misleading behaviour is also a ground.
- [28] Given the finding, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [29] 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 2 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

- [30] 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.
- [31] 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.
- [32] 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.
- [33] 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.

[34] The timetable for submissions will be as follows:

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

[34.2] The Adviser 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.

DATED at WELLINGTON this 27th day of January 2011

G D Pearson
Chair