

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

Decision No: [2011] NZIACDT 30

Reference No: IACDT 018/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Na Jia
Complainant

AND

Wei Wang (Summer)
Adviser

DECISION

REPRESENTATION:

Adviser

In person

Complainant

In person

Date Issued: 19 September 2011

Decision

The Referral

- [1] The Registrar of the Immigration Advisers Authority referred this matter to the Tribunal pursuant to section 45 of the Immigration Advisers Licensing Act 2007 (the Act).
- [2] He made the referral as a breach of the Code of Conduct, the Code having been developed pursuant to section 37 of the Act (published www.iaa.govt.nz). The referral was also under section 44 of the Immigration Advisers Licensing Act 2007, which makes dishonest or misleading behaviour grounds for complaint, as well as a breach of the Code.
- [3] The complaint alleged a failure to initiate the engagement under the code, failure to maintain proper business practices, failure to account for fees properly, and negligence, dishonest or misleading behaviour.

Facts

Process

- [4] The Tribunal undertook a review of the whole of the papers presented and issued a minute dated 17 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.
- [5] The parties responded. However, the responses did not provide sufficient information to determine the contention; an oral hearing was convened. As the Tribunal's process is inquisitorial, the parties were directed to the issues the Tribunal considered needed to be addressed.
- [6] Both the Adviser and the Complainant attended the oral hearing and gave evidence.

Undisputed background

- [7] The Complainant explained the background as she understood it, and the Adviser did not take issue with the following elements of the narrative.
- [8] The Complainant's mother usually lives in China. She contacted the Adviser's employer, Sea Consultants & Investments Ltd, by telephone in the later part of 2009, seeking assistance for the Complainant's uncle ("the Uncle") to apply for a work visa. He wished to come to New Zealand from China and work as a chef.
- [9] The telephone discussion was with Ms Jenny Fan, the principal of Sea Consultants & Investments Ltd. Ms Fan provided advice on the potential to obtain a visa. In the course of this conversation, Ms Fan spoke to the Adviser on the prospects of the Uncle's ability to obtain a work visa.
- [10] Ms Fan negotiated a fee of NZ\$20,000 to represent the Uncle in applying for the visa; half to be paid immediately and the balance on the grant of a visa. Later, Ms Fan provided the option of making the payment in New Zealand or China. The Complainant's mother elected to proceed with the option of payment in China, and the Uncle made the payment.
- [11] The Uncle did not have work arranged. He needed an appropriate position of employment if he was to be entitled to a visa. In addition, Immigration New Zealand needed to be satisfied of his qualifications. The application was made and received by Immigration New Zealand on 25 November 2009, but declined on 29 December 2009 after correspondence between Immigration New Zealand and Sea Consultants & Investments Ltd.

- [12] The reasons for the application being declined by Immigration New Zealand were:
- [12.1] A position of employment arranged through the agency of Sea Consultants & Investments Ltd was withdrawn, and
- [12.2] A concern the certificate relating to qualifications was potentially false or forged.
- [13] Correspondence with Immigration New Zealand was conducted in the name of the Adviser. She was also identified as the licensed immigration adviser in the application for a work visa.
- [14] In March 2010, the Complainant and her parents, who were in New Zealand on a visit, went to the office of Sea Consultants & Investments Ltd and sought a refund of the fees paid. At this point, the Adviser first had direct contact with the Complainant. Ms Fan gave the Adviser a contract relating to the work, and she presented it to the Complainant and her parents. In essence, the contract referred to forged documents and said that it was up to the Uncle to guarantee the documents were genuine. It was intended to discourage a claim for a refund of fees.
- [15] The Adviser saw the contract was not what she would have prepared and she had not engaged the Uncle or his family as a client.
- [16] The Complainant explained the inconsistencies in the contract. It was signed by a friend of the Complainant's mother, who had no authority to sign the contract. She was the person who introduced the Complainant's mother to Sea Consultants & Investments Ltd. The Adviser pointed out the contract post-dated the payment of the fees and she did not regard it as a genuine document (although at the time she first saw it, she did not have the opportunity for a close evaluation).
- [17] There was conflict between Ms Fan and the Complainant's family over refunding the fees. The process was difficult. Ms Fan, not the Adviser, dealt with the issues.
- [18] The Complainant explained the fee was a very substantial sum and likely represented all of her uncle's assets. He was seeking work in New Zealand to earn additional money for the purpose of giving his daughter the opportunity of attending university. Retaining the fees was a matter of serious concern for the family, as it would impact greatly on family members and their future aspirations.
- [19] Ultimately, the fees were refunded. That was after this complaint was lodged, and recovery proceedings had progressed in the District Court.

The Adviser's perspective

- [20] The Adviser's primary response is that she had no involvement in these matters, other than that she accepts she may have made some comment regarding entitlement to a visa when the initial telephone conversation occurred, and she delivered the contract when the request for a refund was made.
- [21] The Adviser accepts the treatment of the Complainant and her family by Sea Consultants & Investments Ltd was wrong and not in accordance with the Code. She did not dispute the alleged failure to enter into the engagement in compliance with the code, failure to maintain proper business practices, account for fees properly, and dishonest and misleading behaviour.
- [22] She frankly accepted what occurred caused her considerable concern. In particular:
- [22.1] The fee of \$20,000 was excessive. The normal fee was less than \$5,000 for an offshore person seeking a work visa. This raised the suspicion that there was overcharging of a naïve person; alternatively some of the funds were to be used (unlawfully) to induce an employer to provide a position of employment that was not genuine. The Adviser accepted the inferences but could not take the matter further in terms of her actual knowledge.

- [22.2] The contract produced was not genuine as it was produced after the fees had been paid. She also accepts it was not signed by anyone with authority to enter into it on behalf of the Uncle or his family.
- [22.3] She had no personal involvement in the matter and she was the only licensed immigration adviser in Sea Consultants & Investments Ltd.
- [22.4] Her signature was forged on the application for a work visa submitted to Immigration New Zealand.
- [22.5] Her name was used to correspond with Immigration New Zealand. She was neither writing the correspondence, nor aware of it at the time.
- [23] I accept the Adviser's evidence regarding the unlawful practices engaged in by persons associated with Sea Consultants in relation to the Uncle's visa application.
- [24] Ms Fan of Sea Consultants & Investments Ltd responded to the Tribunal's initial minute which raised the fact the Adviser had apparently been the author of correspondence and otherwise conducting the application for a visa. She said it had been conducted by a business partner in Beijing and the Adviser "has not been involved in the entire process of this application."
- [25] The Adviser explained the business partner in Beijing was a former employee of Sea Consultants & Investments Ltd named Jojo Xi. The concerns regarding the level of fees and genuineness of the contract are consistent with the documents before the Tribunal. It is evident there was one email address used in Sea Consultants & Investments Ltd and, accordingly, an opportunity for persons in control of the company to misrepresent their identity. I accept the Adviser's evidence this occurred. It is supported by the appearance of the visa application not being consistent with the Adviser's usual writing and signature.

Decision

The extent of the Adviser's responsibility to control the practice where she worked

- [26] A legal issue which requires elucidation is the personal responsibilities licensed advisers have in relation to the practice in which they operate.
- [27] Whether the complaint is upheld is significantly affected by the extent of the Adviser's responsibility. At the material time, she was the only person within Sea Consultants & Investments Ltd who was a licensed immigration adviser. It follows no other person in the organisation could lawfully provide immigration advice.
- [28] It is necessary to consider the position of an employee adviser where the employer or principal has the contractual relationship with the client.
- [29] 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 makes it 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; ..."
- [30] 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 immigration advice.
- [31] 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 ensuring 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.

- [32] The legislation provides an important privilege to licensed immigration advisers in allowing only them to provide immigration advice (along with exempt persons). 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.
- [33] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice.
- [34] A licensed immigration adviser must take responsibility for the practice operated in reliance on their licence.

The complaint is upheld

- [35] The Adviser claims in effect she was a victim of a dishonest pretence which excluded her from knowledge of what was occurring. If a licensed immigration adviser has taken reasonable steps to ensure a practice is properly managed, it is still possible illicit activity could occur. However, I must conclude that is not the Adviser's situation.
- [36] At the time the Uncle applied for a work visa, it was still lawful for persons outside New Zealand to give immigration advice without holding a licence. However, where a person engages a practice in New Zealand operating under the mandate of a licensed immigration adviser, I do not accept the New Zealand practice could absolve itself from compliance by having work done outside New Zealand. The licensed immigration adviser was, at the least, responsible for ensuring professional services were delivered to the client of the practice.
- [37] The complainant was in an invidious position. She was a junior entrant to the profession in that she had relatively recent tertiary qualifications and limited experience. Her only work in providing immigration services was under the supervision of Ms Fan in Sea Consultants & Investments Ltd's practice. Ms Fan was effectively the proprietor of the business. She provided immigration advice and ran the business until the licensing regime was introduced. Ms Fan did not get a licence when licensing became mandatory. The practice operated under the Adviser's licence. Accordingly, she had full responsibility for the delivery of professional services. That required her to control Ms Fan, who she regarded as her "boss", employer, and a person with far more experience than herself in providing immigration advice and services.
- [38] Ms Fan could not lawfully provide immigration services and it was the responsibility of the Adviser to ensure no person other than herself did so in the practice. There are three aspects which make the Adviser's conduct blameworthy in relation to the Complainant and the Uncle:
- [38.1] First, I am satisfied the Adviser was aware that Ms Fan was likely unlawfully providing immigration advice. She likely assisted Ms Fan to do so at the initial telephone contact in relation to the Uncle's application for a work visa. She accepted she had from time to time reminded Ms Fan she could not provide immigration advice. Accordingly, she was on notice that unlawful activity was likely occurring in the practice she was responsible for. She had a duty to address this issue as the holder of the licence the practice operated under.
- [38.2] The Adviser became directly aware of the issues relating to the complaint. She met the Complainant and gave her the purported contract signed by a person with no authority and in an irregular form. The Adviser was then on notice regarding a potential irregularity in the practice she was responsible for.
- [38.3] Third, the Adviser had a duty to be familiar with the practice and what was occurring within it. She failed to discharge that obligation. Lax controls allowed people associated with the practice to correspond with Immigration New Zealand pretending to be a licensed immigration adviser.
- [39] The standard of proof is on the balance of probabilities. However, it is a sliding scale and the allegations against the Adviser are serious. The most adverse view would be that she knew of, or was a party to, what she can now see was fraudulent conduct. Accordingly, I will regard

proof as having to essentially equate to the standard of beyond reasonable doubt in relation to the complaint.

- [40] I am satisfied the Adviser did suspect there were irregularities in the practice. She was aware Ms Fan was a risk and she would potentially provide immigration advice unlawfully.
- [41] The Adviser had a duty to inquire when she was asked to provide a copy of a service agreement she did not prepare and identified as irregular. There was an element of wilful blindness, at best, when she failed to make proper inquiries and address the issues that were then manifest.
- [42] I am also satisfied the Adviser failed to have systems in place that ensured she could properly control the practice. She failed to secure the email system; she should have taken steps to ensure she saw and controlled all communications coming into the practice. It is elementary in a professional practice that the principal/s must control correspondence, must ensure that they are aware of all professional services being provided and maintain systems to ensure they become aware of complaints and deal with them. The Adviser failed to establish these controls and the result has been dishonesty and forgery occurring. Her identity was assumed fraudulently to deal with Immigration New Zealand furthering an attempt to dishonestly claim excessive fees from a client who approached a practice presenting itself as under the control of a licensed immigration adviser.
- [43] The obligations on a licensed immigration adviser to control their practice are clearly evident in the Code.
- [44] In relation to the initial phase of the instruction, there is evidence the Adviser was consulted in relation to the initial advice. Giving the Adviser the benefit of the doubt, that conversation may have been too vague to conclude Ms Fan was unlawfully giving advice. Accordingly, I do not find a breach of the Code in relation to the Adviser being a party to the provision of unlawful immigration advice or a failure to initiate the engagement in accordance with the Code. I am satisfied the Adviser had no knowledge of the Uncle's application until she met with the Complainant. I find she was intentionally excluded from being aware of it and her identity used fraudulently.
- [45] However, the Adviser did admit, and the evidence demonstrates, she failed to control the practice. She said she could not control others, in particular Ms Fan. She had an obligation to do so, and ensure complete records were maintained, and that she could regulate finances, records, documents, contracts and staff in the practice. Failure to do so breaches clause 3 of the Code which requires professional business practices and clause 1 which imposes an obligation of professionalism. Her failure allowed the Uncle's application to be dealt with improperly. The client engagement was not in accordance with the Code.
- [46] There was also a failure to set fair and reasonable fees and account for the fees that had been paid. The Adviser was not aware when the original fee was set. She was, however, fully on notice when she was a party to attempting to justify the forfeiture of the excessive fee. At that point, she had an obligation to address the issues with the Uncle and his representatives. She then had evidence of serious irregularities occurring within the practice conducted through her licence and in relation to this particular client. The excessive fees were a breach of clause 8 of the Code which requires fees to be fair and reasonable and fully accounted for. It is closely related to the failure identified under clause 3 in the immediately preceding paragraph. The unacceptable dealing with the client arose from a failure to supervise.
- [47] A breach of the Code is grounds for upholding a complaint under section 44(2) of the Act.
- [48] Section 44(2) of the Act also provides that negligence and dishonest or misleading behaviour are grounds for upholding a complaint.
- [49] I am satisfied the Adviser did not act with the intention to mislead and was not dishonest. I have considered whether delivery of the contract when she met with the Complainant was dishonest. I am satisfied the Adviser is entitled to the benefit of the doubt. It appears she reflected on the document after delivering it the Complainant and only then realised the true implications.

- [50] The Adviser's failure is one of not supervising her practice. That failure led to the opportunity for others to seriously abuse the rights of a potential migrant in flagrant disregard of the Act and the Code. Negligence was as an aspect of her failure to supervise and control her practice.
- [51] I, accordingly, find the Adviser breached clauses 1, 3 and 8 of the Code. They are grounds for the complaint being upheld under section 44(2) of the Act. Further, I find the Adviser was negligent in not supervising her practice properly and that is a further ground for upholding the complaint under section 44(2).
- [52] I note I am not satisfied the Adviser was a party to an unlicensed person unlawfully providing immigration advice; only that she had good reason to suspect that may have been occurring, and took some, but inadequate, steps to prevent that occurring.
- [53] Given the complaint is upheld, the Tribunal may impose disciplinary sanctions under section 51 of the Act.
- [54] 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

- [55] 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.
- [56] 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.
- [57] The Complainant may indicate the extent of any loss so the Tribunal can consider an order for compensation at an appropriate level. The Complainant has informed the Tribunal a full refund of fees has already been made.

- [58] The Adviser will have the opportunity to respond to any submissions from the Authority and the Complainant. Whether or not they make submissions, the Adviser may provide submissions on penalty.
- [59] 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.
- [60] The timetable for submissions will be as follows:
- [60.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision, and
- [60.2] 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.
- [61] 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 19th day of September 2011

G D Pearson
Chair