

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

Decision No: [2012] NZIACDT 10

Reference No: IACDT 027/10

IN THE MATTER

of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY

Immigration Advisers Authority
Authority

BETWEEN

LLC
Complainant

AND

ICQ
Adviser

DECISION

REPRESENTATION:

Complainant

In person

Adviser

In person

Date Issued: 28 March 2012

DECISION

Preliminary

- [1] Ms LLC engaged Ms ICQ as a licensed immigration adviser.
- [2] Ms LLC was in a situation where she had not left New Zealand at the time her permit expired. Ms ICQ lodged applications with Immigration New Zealand seeking the exercise of discretion to allow her to be granted a new permit.
- [3] The applications were not successful, and Ms LLC complains that Ms ICQ did not inform her of the difficulties she faced with the applications, and pursued hopeless applications at her expense.
- [4] Ms ICQ says she did properly advise Ms LLC, who elected to proceed when fully informed of the difficulties. In Ms ICQ's judgement the applications had merit, though she could have no confidence they would succeed.
- [5] Ms LLC also said Ms ICQ did not provide a copy of her file when asked, however Ms ICQ said there was no request for the file.
- [6] There are two issues:
 - [6.1] Did Ms ICQ communicate with Ms LLC so she was in a position to, and did, give informed consent to proceeding with the applications?
 - [6.2] Was Ms ICQ asked for her file, and did she fail to provide it to her client?

Events and Circumstances Presented by the Complaint

- [7] Ms LLC's complaint was that:
 - [7.1] She engaged Ms ICQ to assist with her immigration situation. Terms of engagement dated 30 April 2010 were agreed in writing.
 - [7.2] The terms of engagement identified that her visitor's permit expired that day, and to obtain a work permit an application would need to be made under section 35A of the Immigration Act 1987.
 - [7.3] Ms LLC said she was not told an application had to be made under section 35A.
 - [7.4] However, it appears there was no dispute that the terms of engagement were created when the decision to make that application was made.
 - [7.5] On 4 May 2010 Ms ICQ submitted an application under section 35A of the Immigration Act 1987. The application was declined on 29 June 2010 as the application did not meet Immigration New Zealand's policy requirements. The fee for this application paid to Ms ICQ was \$750 and a fee of \$260 payable to Immigration New Zealand.
 - [7.6] The same application was submitted for a second time on 30 July 2010, and again refused on 11 August 2010. For the second application only the fee of \$260 required by Immigration New Zealand was paid, without further professional fees.
 - [7.7] Immigration New Zealand declined the applications on the basis they lacked adequate grounds, in particular:
 - [7.7.1] the offers of employment submitted with the applications were not relevant to Ms LLC's course of study;

- [7.7.2] she did not hold a graduate job search permit, and applied more than 3 months after the end of her course of study; and
- [7.7.3] the job offers would not have supported a labour market test as they offered relatively low skilled employment.
- [7.8] Ms LLC says the applications were made when Ms ICQ knew they could not succeed.
- [7.9] Ms LLC said she requested a copy of her file, and Ms ICQ refused to provide it.
- [8] Ms ICQ responded to the complaint, and stated:
 - [8.1] The terms of engagement demonstrated the need to proceed under section 35A, and this was identified at the outset of the professional engagement.
 - [8.2] There was no request for a copy of Ms LLC's file, and had there been one it would have been supplied. That approach is a policy applied in Ms ICQ's practice.
 - [8.3] Ms ICQ said the first approach from Ms LLC was on 26 January 2010, at which time she had a visitor's permit that expired on 20 February 2010. On this occasion there was no engagement beyond initial discussion.
 - [8.4] On 30 April 2010 Ms LLC had a further meeting with Ms ICQ, who was concerned as her permit was expiring that day, and had received no response to an application for a visitor's permit she had filed some two weeks earlier. The meeting was after 5:00 pm on 30 April 2010, and it was a Friday so nothing could be done to address Ms LLC's position before her permit expired.
 - [8.5] Ms LLC told Ms ICQ she had an offer of employment, and had (on the basis of erroneous advice from an unlicensed person) deferred applying for a work permit until her existing permit expired. Ms ICQ then explained to Ms LLC the seriousness of being in New Zealand without a permit, and that she must not work or train without a work permit.
 - [8.6] Ms ICQ also told Ms LLC her prospects of getting a work permit approved were not good. She elected to apply regardless, and returned with the necessary supporting documentation the following week. She was fully informed of the necessity to proceed under section 35A, and questioned as to whether she wanted to allow an application for a visitor's permit that had been lodged earlier to be determined before proceeding with the work permit application under section 35A.
 - [8.7] After the application under section 35A was lodged, Ms LLC contacted Ms ICQ, and asked for assistance with the application for a visitor's permit (which she had lodged herself). This resulted in Ms ICQ gaining further information regarding Ms LLC's position. It became apparent to Ms ICQ that Ms LLC had proceeded inappropriately with the applications Ms LLC had personally lodged, and her application for a visitor's permit was declined. Ms ICQ attempted to seek alternatives which could have facilitated Ms LLC getting a work permit. That was not successful, and the section 35A application was declined on 29 June 2010.
 - [8.8] Ms LLC instructed Ms ICQ to make a further application for a work permit, under section 35A. That application was lodged on 28 July 2010, and declined on 12 August 2010.
 - [8.9] The complaint is without merit, and Ms LLC had been professionally and properly advised throughout.
- [9] Ms ICQ forwarded a letter, apparently from an acquaintance of Ms LLC. The letter is favourable to Ms ICQ. However, I give the letter no weight, as it is no more than an unsubstantiated assertion.

Parties Given an Opportunity to Respond to Potential Findings


- [10] The Tribunal issued a minute outlining the factual findings that could be made on the material then before the Tribunal, and the consequent conclusions regarding the complaint.
- [11] The minute identified the key element of the complaint was that Ms ICQ advanced the section 35A applications without merit and without the informed consent of Ms LLC, who said she did not understand the work being undertaken on her behalf, due to lack of advice. Further, that she was refused access to her file.
- [12] If the facts Ms LLC alleged were established, they would be grounds for upholding the complaint as a breach of the Code of Conduct. The Code was developed pursuant to section 37 of the Act (published www.iaa.govt.nz). Section 44(2) of the Act makes a breach of the Code grounds for upholding a complaint, and in addition aspects of the conduct would in themselves be grounds for upholding the complaint under that section.
- [13] However, the minute identified that the papers left open the view that the facts on which the complaint was founded were not made out. The minute indicated the papers before the Tribunal would be a foundation for the Tribunal to be satisfied:
- [13.1] Ms ICQ clearly communicated to Ms LLC she faced difficulties in relation to being in New Zealand unlawfully due to an expired permit.
 - [13.2] The written terms of the engagement communicated to Ms LLC that she would need to pursue a work permit under section 35A of the Immigration Act 1987, and that was problematic.
 - [13.3] Ms ICQ pursued a section 35A application as a “last resort” measure, appreciating the risk of it failing, but did so with the informed consent of Ms LLC.
 - [13.4] The two section 35A applications were accurate and frank, and not so devoid of merit as to be irresponsible.
 - [13.5] The fee of \$750 was modest for the work undertaken.
 - [13.6] There was no request for access to Ms LLC’s file that was either refused or ignored.
- [14] The minute noted that potential conclusions would follow from weighing the material before the Tribunal on the basis of requiring the complaint to be established on the balance of probabilities, but on a sliding scale according to the gravity of the complaint.

Decision

- [15] The parties did not respond to the minute.
- [16] I am satisfied the potential findings identified in the minute must follow on the papers before the Tribunal.
- [17] The written agreement accurately identified the difficulties with a section 35A application. It is unsurprising that Ms ICQ would have a further oral discussion regarding the difficulties Ms LLC faced, as she claims. The record is not consistent with an adviser who was acting in ignorance, under a mistake, or misleading her client.
- [18] Ms LLC’s assertion that she was not informed finds no support in the contemporaneous record.
- [19] The fee charged was modest, and the papers do not suggest there was any element of exploitation where fees were sought to be generated by advising that a meritless application should be made.

- [20] Ms ICQ says she endeavoured to provide Ms LLC with an opportunity to put her immigration affairs in order; and acted both fairly and responsibly in her client's interests. I find the record supports that claim.
- [21] The Code appropriately prohibits an Adviser lodging an application that is grossly unfounded. However, the Code does not, and should not, prevent a practitioner from pursuing an immigration outcome where the prospects of success are limited; provided that this is done with informed consent and attendance to all other professional obligations.
- [22] Clients are entitled to pursue applications with professional assistance where there is some prospect of success, and it is important to recognise that in many areas of immigration policy there is considerable discretion. An application under section 35A seeking the exercise of ministerial discretion is an example of a very wide discretion.
- [23] There is nothing to support Ms LLC's claim she requested her file and was refused access to it. Ms ICQ provided the relevant material to the Authority when the complaint was made, and says there was no earlier request for the file.
- [24] Accordingly, the complaint is not upheld. I find no basis to conclude Ms ICQ's conduct fell short of the professional standards required of a licensed immigration adviser in relation to the issues raised in the complaint.
- [25] In accordance with the usual practice where a complaint is not upheld, the Tribunal directs that this decision will only be published in any form which does not identify the complainant and the adviser.

DATED at WELLINGTON this 28th day of March 2012


G D Pearson
Chair

