

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

Decision No: [2012] NZIACDT 26

Reference No: IACDT 008/10

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**  
Authority

**BETWEEN**

**Bowen Zhang**  
Complainant

**AND**

**Ran Deng**  
Adviser

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**DECISION**

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**REPRESENTATION:**

**Adviser**

Mr P McPherson, Hesketh Henry, Lawyers, Auckland

**Complainant**

In person

Date Issued: 31 May 2012

## DECISION

### Introduction

- [1] Ms Zhang complained about Ms Deng's conduct as a licensed immigration adviser.
- [2] Ms Zhang's complaint is that:
  - [2.1] Ms Deng failed to enter into a written agreement in relation to providing services, as her professional Code of Conduct requires; the Code having been developed pursuant to section 37 of the Immigration Advisers Licensing Act 2007 (the Act), and found at [www.iaa.govt.nz](http://www.iaa.govt.nz).
  - [2.2] Ms Deng failed to provide the documentation required by Immigration New Zealand to support Ms Zhang's application for a visitor's permit, even after Ms Zhang gave it to her for that purpose.
  - [2.3] Ms Deng told Ms Zhang the application had been declined, but did not explain it was due to her failure to forward the documents.
  - [2.4] Ms Zhang engaged counsel, who queried why Ms Zhang's application had not progressed. Ms Deng misrepresented to Ms Zhang's counsel that Ms Zhang had not supplied necessary documents.
- [3] Accordingly, the key issue is whether I am satisfied the material before the Tribunal establishes those grounds, on the balance of probabilities, but having regard to the gravity of the allegations. The allegations are serious, as they include misrepresentation in the course of Ms Deng's professional conduct. I deal with proof on that basis.

### Procedural Matters

- [4] This complaint was subject to a previous decision; however the decision was issued in the absence of submissions from Ms Deng, which she sent to the Tribunal but were not delivered.
- [5] Ms Deng through her counsel assured the Tribunal she had taken all practicable steps to deliver the submissions, and understood they had been delivered. The Tribunal relied on Ms Deng's evidence of a failure in delivery occurring, through no fault of her own. Accordingly, the Tribunal regarded the preceding decision as a nullity, and issued a direction to that effect.
- [6] This decision is made on the whole of the information now before the Tribunal.
- [7] Ms Deng has instructed counsel, and has filed an affidavit and submissions, which fully address the issues. Ms Deng's counsel has gathered the relevant factual material, which is essential to evaluate Ms Deng's response to the complaint. It has been of considerable assistance to the Tribunal.

### Agreement

- [8] Ms Deng and Ms Zhang have entered into an agreement which purports to withdraw this complaint.
- [9] However, the agreement is not effective in achieving that. The complaint is a statutory process. Being a professional disciplinary matter, there are public interest issues arising. A complaint which has been lodged with the Tribunal is not solely an *inter partes* matter. The Tribunal will consider a request to withdraw a complaint, but it is not the complainant's right to do so.
- [10] This Tribunal, as is commonly the case for professional disciplinary tribunals, has an inquisitorial function. The Tribunal is not dependent on a complainant to "prosecute" a complaint. Indeed, in the case of this Tribunal, it is not usual for counsel to represent complainants and "prosecute" their complaint.

- [11] The Act provides for complaints to be put before the Tribunal, and requires the Tribunal to hear the complaint; usually on the papers, and where necessary by exercising powers to seek further information (Immigration Advisers Licensing Act 2007, section 49).
- [12] In the present case, I am satisfied the Tribunal should consider the complaint, notwithstanding the fact Ms Deng has settled with Ms Zhang. The allegations against Ms Deng are serious. If upheld in full, the complaint would have serious implications for Ms Deng's fitness to practice. The complaint includes an allegation that Ms Deng misrepresented to Ms Zhang's counsel how she discharged her professional engagement. There is a significant public interest in an allegation of that kind.
- [13] As it transpires, on the evidence before the Tribunal that allegation is not upheld, it is none-the-less important it is addressed.

### **The Facts**

- [14] The Tribunal issued a minute to the parties (8 April 2011), identifying the issues that appeared to arise on the papers before the Tribunal, and the conclusions that could potentially be reached.
- [15] At that point, the papers before the Tribunal included Ms Zhang's complaint, and the initial reply that Ms Deng had given in response to the complaint. That material provided a basis for the following findings:
  - [15.1] Ms Deng was engaged to assist Ms Zhang with seeking a visitor's permit on or about 26 February 2009. Ms Deng was not then a licensed immigration adviser, she obtained a licence on 1 April 2009.
  - [15.2] Ms Deng failed to enter into a written agreement with Ms Deng for the provision of immigration services.
  - [15.3] Ms Deng received Ms Zhang's passport, and was paid the sum of \$1,580 as fees and disbursements when instructed.
  - [15.4] Ms Deng filed an application for a visitor's permit, but failed to provide the necessary medical and x-ray certificates.
  - [15.5] Immigration New Zealand notified Ms Deng of the requirement to provide the certificates on 9 April 2009, and returned the application without lodging it.
  - [15.6] Ms Deng told Ms Zhang about the need for the certificates, and Ms Zhang supplied them on 23 April 2009.
  - [15.7] After receiving the certificates, Ms Deng failed to submit them to Immigration New Zealand; the application failed.
  - [15.8] Ms Deng told Ms Zhang her application for a permit had been declined, but did not inform her of the true reason.
  - [15.9] Ms Zhang engaged counsel to represent her, and Ms Deng told him she had been ready to lodge the application, but due to lack of documentation "we did not submit her application until 15th of May".
- [16] Following the minute, with the assistance of her counsel, Ms Deng has addressed the facts on which the potential findings were based. She did so in an affidavit dated 30 March 2012.
- [17] Ms Zhang has not responded to Ms Deng's affidavit.

### *Engagement process*

- [18] The first issue is the engagement process, and the absence of a written agreement. Timing is important. Ms Zhang was a client, and gave these instructions before Ms Deng was, or was required to be, licensed as an immigration adviser.
- [19] The licensing regime under the Immigration Advisers Licensing Act 2007 came into force one 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 after the Act came into force until it was compulsory for onshore advisers to hold a licence when providing immigration advice. Between 4 May 2008 and 4 May 2009, advisers could apply for licences.
- [20] The Licensed Immigration Advisers Code of Conduct 2008 had been developed and was published on 6 March 2008 (refer sections 37 and 38 of the Act).
- [21] Ms Deng obtained her licence on 1 April 2009.
- [22] Ms Deng explains that she commenced providing advice to Ms Zhang about 26 February 2009, and she submitted Ms Zhang’s application for a visitor’s permit on 30 March 2009. The application was lodged that day, as Ms Zhang’s student permit was due to expire on 31 March 2009.
- [23] Accordingly, Ms Deng lodged the application immediately prior to obtaining her licence.
- [24] After that point, Ms Deng continued to act for Ms Zhang in relation to the application, but took no steps to enter into a written agreement or other processes required by the Code to commence a client relationship.
- [25] However, Immigration New Zealand did not accept the application, and returned it for want of necessary documentation.
- [26] This complaint primarily relates to Ms Deng’s actions after Immigration New Zealand rejected the application.

### *The adequacy of the information in the application for a visitor’s permit*

- [27] Ms Deng accepts Immigration New Zealand properly returned the application as the information was not adequate. That was under cover of a letter dated 9 April 2009.
- [28] She explained the two missing documents identified by Immigration New Zealand were a current medical certificate, and a current x-ray certificate.
- [29] Ms Deng said she made proper inquiries, and from the information Ms Zhang provided she believed Ms Zhang had previously supplied certificates to Immigration New Zealand that were still current; and in addition was not intending to remain in New Zealand for a period that triggered the need for such certificates.

### *Communication following return of the application*

- [30] The letter of 9 April 2009 from Immigration New Zealand did not give a deadline for resubmitting the application. That is because Immigration New Zealand rejected the application as not meeting the lodgement requirements, so the process had not been initiated.
- [31] Ms Deng said following the rejection of the application, she immediately tried to contact Ms Zhang. She telephoned Ms Zhang, and also called Ms Zhang’s friend who had been nominated as a secondary point of contact. It took some 10 days to establish contact.
- [32] On 23 April 2009 Ms Zhang supplied the certificates that were required. However, Ms Deng did not immediately resubmit the application. That was because she was seeking an attendance report from the educational facility Ms Zhang had attended.

- [33] Ms Deng said the attendance report was necessary, and she had told Ms Zhang that was the case in the initial consultation. The importance of the attendance report arose from Ms Zhang having changed between a visitor's permit and a student permit over a period of some years.
- [34] While Ms Zhang had provided Ms Deng with an attendance report from her educational facility dated 31 March 2009, this report did not contain the necessary detail. Accordingly, Ms Deng herself sought an attendance report from the educational facility. After repeated requests for a complying attendance report that were not successful, Ms Deng resubmitted the application on 15 May 2009 using what she believed to be an inadequate attendance report.
- [35] Ms Zhang had claimed that on that date, 15 May 2009, Ms Deng had informed her that Immigration New Zealand had declined the application. That claim was central to Ms Zhang's original complaint and set out in a letter from Ms Zhang's counsel to Ms Deng dated 25 June 2009.
- [36] However, Ms Deng's affidavit provides sworn testimony that on 15 May 2009 she resubmitted the application, and that was the first interaction with Immigration New Zealand since the letter dated 9 April 2009 when Immigration New Zealand refused to accept the application. The Tribunal has not received a copy of the documents lodged on 15 May 2009.
- [37] Ms Deng also said in her affidavit that on the same day, Ms Zhang instructed her to withdraw the application, as she understood her poor attendance as a student would cause the application to fail.
- [38] On 25 June 2009, Ms Zhang's counsel wrote to Ms Deng complaining that Ms Deng had failed to resubmit the application on 23 April 2009, when Ms Zhang provided the medical certificates.
- [39] Ms Deng says that she did not believe the 31 March 2009 attendance report was adequate, as it did not quantify Ms Zhang's attendance record. Ms Deng says the first time she received an attendance report that she believes met Immigration New Zealand's requirements was on 29 June 2009.
- [40] This report, which she produced, confirmed poor attendance, and quantified it (25%, when 80% was required).
- [41] Ms Deng surmised the facility was reluctant to quantify the poor attendance, as it may have not met its reporting obligations. A report of 25% attendance showed the educational facility should have reported the unsatisfactory attendance to Immigration New Zealand when it occurred.

*Dealing with Ms Zhang's counsel*

- [42] Ms Zhang's counsel, in his letter of 25 June 2009, took issue with how Ms Deng had managed Ms Zhang's affairs.
- [43] The correspondence from Ms Zhang's counsel asserted that Ms Deng had not given a true account of events, in particular the process of reporting the initial rejection of the application to Ms Zhang, and her justification for failing to resubmit the application (asserting that Ms Deng already had the documents she said she still needed).
- [44] Ms Deng's affidavit affirms that her explanation to Ms Zhang's counsel was correct, and provides documentation to support that claim.
- [45] Ms Deng said she had made a series of telephone calls, and accurately reported the situation to Ms Zhang. She also demonstrated that there was a second attendance report. The second report contained further information as it quantified Ms Zhang's attendance as a percentage, rather than being simply descriptive. She further explained her opinion that the level of detail was necessary, and she was reluctant to resubmit the application without it. She also said she actively sought a report with the information.
- [46] Ms Deng said in her affidavit Ms Zhang was aware her poor attendance record was a significant issue, and they had discussed the issue.

- [47] Given the totality of this information, Ms Deng asserted her responses to Ms Zhang's counsel were fully accurate.

### **The Parties' Positions**

- [48] Ms Deng's counsel has submitted:

[48.1] In the circumstances, the oral agreement Ms Deng had prior to becoming a licensed immigration adviser did not need conversion to a written agreement.

[48.2] Ms Deng acted reasonably and appropriately in preparing Ms Zhang's application, and in dealing with obtaining additional information.

[48.3] Ms Deng was accurate and truthful in her dealings with Ms Zhang and her counsel.

[48.4] Ms Zhang effectively withdrew her complaint by entering into a settlement with Ms Deng.

- [49] Ms Zhang has not responded to the affidavit filed by Ms Deng, or her counsel's submissions. The Tribunal's decision must necessarily place considerable weight on the material in Ms Deng's affidavit and the submissions. They contain a full explanation of the events, which were not clear until Ms Deng's affidavit was available.

- [50] Ms Deng's affidavit is consistent with her previous statements. Though the affidavit makes it evident the previous statements were not complete, and aspects of what Ms Deng said then were not substantiated until the affidavit was filed.

### **Decision**

- [51] The evidence in Ms Deng's affidavit is plausible, and supported by the written record. I will accordingly proceed on the basis this affidavit accurately sets out the facts.

- [52] The issue relating to Ms Deng and Ms Zhang settling their dispute has already been addressed in this decision.

#### *No written agreement*

- [53] The first issue is Ms Deng's failure to enter into a written agreement to provide services. She was not required to do so until after she was licensed, and by then she had endeavoured to submit the application.

- [54] However, Ms Deng very quickly found herself in a situation where she was a licensed adviser, with instructions to lodge an application. The application had not been lodged, as Immigration New Zealand had not accepted it. She knew she was in that position when she received the letter dated 9 April 2009 from Immigration New Zealand giving her notice to that effect.

- [55] Ms Deng had instructions she was acting on, and had not complied with the Code in relation to having a written agreement. Given the application had not been accepted for filing, it was not simply a matter of "tidying up". The key element of the instruction had not been completed.

- [56] From the time Ms Deng became licensed, she was required to act in compliance with the Code. The Code requires an agreement that contains "a full description of the services to be provided" (Code Clause 1.5(b)), and "clients must confirm in writing that they accept the terms of agreements" (Code Clause 1.5(d)). A copy of the Code and internal complaints procedure must also be supplied (Code Clauses 1.4(a), and 9(b)).

- [57] When Ms Deng accepted the privileges and responsibilities of being a licensed immigration adviser, she was obliged to put her professional relationships on a footing that complied with the Code. The fact she had commenced the instruction, but not successfully lodged the application, did not exempt her from compliance.

- [58] Clause 3(f) of the Code requires:

“3. Business management

A licensed immigration adviser must maintain professional business practices relating to finances, records, documents, contracts and staff management, including:

- f) confirming in writing the details of material discussions with clients; and”

- [59] Compliance with the Code is not optional, and is of real value to both the client and the adviser. Had Ms Deng complied with the Code the difficulties she faced in this instruction would have been unlikely to occur. She failed to document her instructions, and her communications with Ms Zhang. That led to this complaint, which she only answered with the assistance of her counsel.
- [60] I am satisfied the complaint must be upheld on the basis Ms Deng failed to meet the requirement of the Code to complete written terms of engagement, and the attendant requirements for commencing a client engagement. Accordingly, she breached Clause 1 of the Code. A breach of the Code is grounds for upholding a complaint pursuant to section 44(2)(e) of the Act.

*Negligent preparation of application*

- [61] The complaint, to the extent it relates to the negligent preparation of the application, cannot be upheld.
- [62] First, I accept Ms Deng’s evidence that she made proper inquiries of her client, and received information to the effect Immigration New Zealand held Ms Zhang’s previously filed, and still current certificates. I am satisfied the inquiry she made of her client, and the plausible explanation she received was an adequate foundation for Ms Deng to proceed with the application.
- [63] Second, the application was filed prior to Ms Deng being licensed. Accordingly, there is no jurisdiction held by this Tribunal over Ms Deng’s conduct in submitting the application.
- [64] To the extent the complaint relates to the failure to re-submit the application after it was rejected, I am satisfied Ms Deng was gathering the information she required. Ms Deng has provided evidence she was obtaining what she reasonably understood was required for a complying record of Ms Zhang’s attendance as a student. I am satisfied Ms Deng was diligent and professional in seeking information.

*Communication following return of the application*

- [65] Ms Deng said in her affidavit she made a number of telephone calls, and did accurately explain to Ms Zhang the reasons for Immigration New Zealand returning the application.
- [66] I accept Ms Deng’s account in her affidavit. It is sworn testimony, not challenged by contrary testimony; and it is consistent with the written record as far as that extends, and plausible.
- [67] I am accordingly satisfied Ms Deng was accurate in what she told Ms Zhang’s counsel. Ms Zhang originally challenged what Ms Deng said, but has not responded to the affidavit, which fully sets out the circumstances with further information.
- [68] It is unfortunate Ms Deng did not adopt a practice of ensuring a higher standard of written communication, as clause 3 of the Code contemplates. However, there were difficulties contacting Ms Zhang, so the evidence does not support any adverse disciplinary finding in relation to that aspect of Ms Deng’s management of this matter.

*Allegation of misleading Ms Zhang's counsel*

- [69] Ms Zhang claimed Ms Deng had not given a true account of events to her counsel.
- [70] I am satisfied Ms Deng's explanation should be accepted. She said in her affidavit she had made a series of telephone calls, and communicated frankly and accurately with Ms Zhang, as she told Ms Zhang's counsel.
- [71] Central to this issue, she produced the two copies of attendance reports, and fully explained her perspective of a misunderstanding between Ms Deng and Ms Zhang and her counsel. Ms Deng was saying she was waiting for an attendance report, which seems implausible as she already had one. However, now Ms Deng has explained there were two reports. That was because the first one was defective, and she was actively seeking a further report with the information she thought to be necessary.

**Complaint Partially Upheld**

- [72] For the reasons identified Ms Deng breached Clause 1 of the Code as she did not comply with the requirements to document terms of engagement, the complaint is upheld pursuant to section 44(2)(e) of the Act to that extent.

**Submissions on Sanctions**

- [73] Given the findings, section 50 allows the Tribunal to take no further action, or impose one or more of the disciplinary sanctions under section 51 of the Act.
- [74] The parties have the opportunity to present submissions.
- [75] The timetable for submissions will be as follows:
- [75.1] The Authority and Ms Zhang are to make any submissions within 10 working days of the issue of this decision.
- [75.2] Ms Deng is to make any submissions (whether or not the Authority or Ms Zhang make submissions) within 15 working days of the issue of this decision.
- [76] The parties are notified that 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 31<sup>st</sup> day of May 2012

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**G D Pearson**  
Chair