

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

Decision No: [2013] NZIACDT 14

Reference No: IACDT 021/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

Between

TX

Complainant

AND

MGK

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 19 March 2013

DECISION

The Complaint

- [1] Ms TX's complaint presented the following allegations and supporting factual propositions.
- [2] Mr MGK is a licensed immigration adviser whose practice is located outside of New Zealand.
- [3] Ms TX and her family had been living in Malaysia for some three years. They were Iranian nationals, and wished to migrate to New Zealand. Ms TX, her husband and their two children all wished to migrate.
- [4] Ms TX approached Mr MGK, and was advised that applying under the Long Term Business Visa program was an appropriate option.
- [5] On 5 May 2010 Ms TX entered into an agreement for the provision of Mr MGK's professional services. The total cost was \$11,600.
- [6] The visa application was lodged on 13 September 2010; on 30 September 2010 Immigration New Zealand indicated that one of Ms TX's sons could not be included as a dependent in her application as he was an adult. Ms TX consulted with Mr MGK, initially she wished to cancel her agreement with him and have a refund of fees. After discussion she decided to proceed with the application for herself, her husband, and their younger son. Her older son would apply for a visa later.
- [7] Ms TX was granted a visa on 17 February 2011 on the basis of a business plan submitted to support the application. That business plan was specific to an identified fast food restaurant in Warkworth.
- [8] After getting the visas, Ms TX moved to Auckland with her husband and son. They rented a home there, and enrolled their son in an Auckland school.
- [9] Ms TX complains that Mr MGK indicated that when she received a visa she was entitled to commence a business anywhere in New Zealand. Only after coming to New Zealand did she realise that the visa was specific to the business plan she submitted.

The Response

- [10] Mr MGK responded to the complaint by email dated 14 July 2011 addressed to the Authority, which included a statement and supporting material from his file.
- [11] The key points made by Mr MGK were:
 - [11.1] To initiate the process of gaining a visa a specific business opportunity had to be identified.
 - [11.2] Working with Ms TX, Mr MGK identified a business in Warkworth. It met with Ms TX's requirements, and Ms TX with Mr MGK's assistance developed a business plan relating to that business.
 - [11.3] The business plan is before the Tribunal, and it is specific to an identified existing business in Warkworth. The stated intention was to purchase that business, and the plan contains an analysis of the anticipated financial performance.
 - [11.4] Ms TX's older son was born on 6 June 1990; the application was submitted on 13 September 2010. On 30 September 2010 Immigration New Zealand indicated that as he was an adult he would have to apply for a visa on his own account, rather than as a dependent.

- [11.5] Mr MGK proposed that Ms TX's older son could seek a student visa at that point, but after discussion the family decided that he should finish his study in Malaysia, and the family would explore options when he had done so.
- [11.6] On 11 January 2011 Immigration New Zealand wrote to confirm the visa had been issued on the basis it had been sought, with Ms TX as the principal applicant, her husband and younger son also receiving visas; and they were founded on the Warkworth business proposal.
- [11.7] In June 2011 Ms TX contacted Mr MGK and inquired about taking up a business opportunity in Auckland. Mr MGK explained that it would be necessary to make an application to Immigration New Zealand for any business opportunity other than the one to which their visas related.
- [11.8] Mr MGK did not have any further contact until the complaint was lodged.

The Tribunal's First Minute

- [12] On 30 October 2012 the Tribunal issued a Minute. The Minute explained that it followed a review of the material then before the Tribunal and identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond as the Tribunal had reached no conclusions at that point. The key elements of the complaint and the response identified in the Minute were as outlined above.
- [13] The Tribunal is an expert inquisitorial body, which receives complaints and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. The Authority and the complainant do not lay charges and prove them. Accordingly, the Minute identifies issues and potential conclusions on the material presented to give the parties the opportunity to consider their positions and provide submissions and further proof if they wish to do so.

The issues to be determined

- [14] The Tribunal's Minute identified the following allegations and issues as appearing to arise at that point.
- [15] The Code of Conduct has been established pursuant to sections 37–39 of the Act.
- [16] Clause 1 of the Code requires a licensed immigration adviser to act with due care, diligence, respect and professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.
- [17] Clause 3 of the Code requires written records and communications, which ensure both that clients are fully informed, and that there is a record of the professional engagement and how it was discharged. It also requires that any refunds of fees are paid on the termination of an engagement.
- [18] Section 44 of the Act provides breaches of the Code are grounds for complaint, as are negligence, incompetence and misleading behaviour.
- [19] The issue for the Tribunal to determine was whether it was satisfied Mr MGK breached any of these professional standards. The questions would be primarily determined by factual findings.

Potential Conclusions

- [20] On the papers then before the Tribunal, the findings identified below appear to be open.

Grounds of complaint

- [21] It appeared there were two grounds of complaint. First that Ms TX was not informed of the difficulties her older son has due to not being a dependent. Second, she was wrongly told that she could migrate to anywhere in New Zealand.

Ms TX's older son

- [22] The view appeared open that Mr MGK should have told Ms TX of the issues relating to her older son when the application was lodged.
- [23] However, it appears Mr MGK did address the issue when Immigration New Zealand raised it, and reached a resolution acceptable to Ms TX.
- [24] Not every error or mistake is of sufficient gravity to justify upholding a complaint. The view was open that this matter did not reach the threshold, and this aspect of the complaint should not be upheld.

Misrepresentation of the effect of the visa

- [25] Ms TX essentially complained that Mr MGK misled her, and represented that when she got a visa she could pursue any business opportunity in New Zealand when she received the visa.
- [26] On the material before the Tribunal that claim may be rejected, as:
- [26.1] The Tribunal had no record of Mr MGK making that representation in writing.
- [26.2] Ms TX says there was an oral representation. To test that claim the Tribunal would have regard to whether the claim was consistent with the written record, given there was no other direct evidence.
- [26.3] When the record was examined, there was abundant evidence Ms TX was regularly and repeatedly informed that she was applying for a visa on the basis of purchasing a specific business in Warkworth. It followed the written record was not apparently consistent with Ms TX not knowing the visa she applied for related expressly to the purchase of a specific business in Warkworth.
- [26.4] The evidence included:
- [26.4.1] Ms TX's application and business plan both were clear they related to purchasing a specific business in Warkworth.
- [26.4.2] Ms TX had to satisfy Immigration New Zealand that she had English language skills to qualify for this visa.
- [26.4.3] Given the business skills, and English language skills required for Ms TX to qualify for the visa, it appeared implausible that she would not be fully aware she applied for a visa on the basis of a specific business in Warkworth.
- [26.4.4] It also appeared implausible she would believe she should submit a business plan for a specific business and expect to be granted a visa that was not tied to that business.
- [26.4.5] Immigration New Zealand, on giving notice that the visa had been granted said in a letter dated 17 February 2011:

“What does your work visa allow you to do?”

You may now set up and operate your business in New Zealand as outlined in your business plan.”

[26.4.6] Ms TX did not immediately raise any concern or complaint that she was issued a visa limited to the business identified in her application and business plan. Only after she settled in Auckland, without apparently attempting to comply with the visa did she make this complaint.

Complaint may be dismissed

[27] The minute informed the parties that if the potential conclusions reached were those identified above as potential conclusions, the complaint would be dismissed.

Decision

[28] Neither party responded to the minute; accordingly, the Tribunal must decide the complaint on the material before it when its minute was issued.

[29] For the reasons expressed in the minute, the complaint is dismissed.

DATED at WELLINGTON this 19th day of March 2013

G D Pearson
Chair