

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

Decision No: [2013] NZIACDT 7

Reference No: IACDT 004/11

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

KM
Complainant

AND

XND
Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: Laurent Law, Auckland

Date Issued: 14 February 2013

DECISION

Preliminary

- [1] Ms KM came to see Mr XND's wife regarding various matters, primarily relating to her role as an agent for educational facilities. They discussed some issues, which potentially had a bearing on immigration matters.
- [2] Mr XND later dealt with Ms KM and gave her immigration advice of a preliminary nature.
- [3] The Tribunal has to decide whether Mr XND was party to his wife's dealings with Ms KM; then whether he discharged his professional obligations when he advised Ms KM.
- [4] The Tribunal explored the issues with the parties. It has concluded it could neither be satisfied there was anything inappropriate in Mr XND's wife's dealings with Ms KM; nor that Mr XND was a party to those dealings.
- [5] The Tribunal has also been satisfied Mr XND advised Ms KM appropriately when he was dealing with her.
- [6] Accordingly the complaint has been dismissed.

Events and Circumstances Presented by the Complaint, and the Response

Ms KM's complaint

- [7] Ms KM's original complaint was as follows.
 - [7.1] Mr XND is a licensed immigration adviser, and he conducts his practice through the company X.
 - [7.2] In early 2010 Ms KM came to Mr XND's office and met with Ms MA. Ms MA is not a licensed immigration adviser, she is Mr XND's wife.
 - [7.3] Ms MA gave Ms KM immigration advice, which included telling her she was eligible for a student permit, and Ms MA charged a fee for this advice. Ms KM accordingly applied for a student permit. Her application was made on 31 March 2010. In fact, Ms KM was not eligible for a student permit and should not have been advised to apply for one.
 - [7.4] On 8 June 2010, Immigration New Zealand wrote a letter to Ms KM, and told her she was not eligible for a student permit. Ms KM consulted Ms MA regarding the letter. Ms MA wrote a letter to Immigration New Zealand in response and submitted it with supporting documentation in Ms KM's name. This letter dated 18 June 2010 was produced to the Tribunal.
 - [7.5] On 30 July 2010 Immigration New Zealand gave Ms KM notice that her application had been declined.
 - [7.6] Ms KM and her husband then went to Mr XND's office. They spoke with Mr XND. This was the first time Ms KM, or her husband, had any contact with Mr XND.
 - [7.7] In August 2010 Ms KM signed an authority to act. It was directed to Immigration New Zealand. The document said Mr XND had been retained to represent Ms KM, and authorised him to pursue an Official Information Act request. There was no contract for the provision of professional services, and all advice was given orally.
 - [7.8] Mr XND obtained Ms KM's file from Immigration New Zealand under an Official Information Act request. He advised Ms KM her only option was to leave New

Zealand with her family. At that time Ms KM's husband and her daughter were both in New Zealand and had current permits.

[7.9] The fee Ms KM paid for Ms MA's work has been refunded.

[7.10] The complaint appears to infer that Mr XND was a party to his wife unlawfully giving immigration advice. Further, that when he became engaged with the case, he encouraged the family to leave New Zealand, to make it less likely the improper conduct would be detected. He knew, or ought to have known, the family qualified for appropriate permits to be in New Zealand.

[7.11] Ms KM purchased a ticket for air travel to leave New Zealand, but sought further immigration advice and subsequently obtained a permit to remain in New Zealand.

Mr XND's reply to the complaint

[8] Mr XND initially replied to the complaint in a letter (2 February 2011) addressed to the Authority. The key points in his response were as follows:

[8.1] Mr XND said his first contact with Ms KM occurred on 9 August 2010. He got written authority to obtain Ms KM's file from Immigration New Zealand. However, there was no service agreement as he had not reached the point of entering a professional engagement and charging a fee.

[8.2] It appears implicit in Mr XND's response that he says he was gathering sufficient information to form a view of the circumstances, so Ms KM could decide on an informed basis whether she would engage Mr XND. After his inquiries, he advised Ms KM he thought it unlikely he could be of assistance, and for that reason there was neither any formal engagement, nor a fee paid.

[8.3] Mr XND provided a statement from Ms MA regarding the events prior to Mr XND's involvement. The key elements were:

[8.3.1] Ms MA has her own business, which operated at the same premises as her husband's (Mr XND) practice.

[8.3.2] Ms MA's company was an agent for educational enterprises, and assisted them in the recruitment of international students and the provision of support when the students came to New Zealand.

[8.3.3] Ms KM approached her and she arranged for her to be enrolled in an English language course.

[8.3.4] On 12 March 2010, Ms MA received a cheque for \$6,000 for the tuition fee, and \$200 for an immigration application fee. The money was receipted. A copy of the receipt has been provided, but it does not state the name of the issuer of the receipt, or other information that is usual for a business receipt.

[8.3.5] Ms KM completed an application for a student permit. I infer from the receipt of the \$200 that Ms MA filed the application, but she does not say so expressly.

[8.3.6] Ms MA invited Ms KM to her church, and social contact developed from that.

[8.3.7] On 2 August 2010 Ms KM's husband brought the decline letter to her, and she referred him to Mr XND. Mr XND offered to look into the issues given the church connection. Mr XND advised that Ms KM had no real prospect of obtaining a student permit, and accordingly Ms MA arranged for a refund of the tuition fees; but the \$200 fee for the immigration application was lost.

- [8.3.8] In September at the church, Ms KM and her husband acknowledged it was their decision to make their own application for the student permit, as they thought it would be a simple process.
- [8.3.9] Ms MA does not provide immigration advice, and when she had clients who needed such advice, she referred them to Mr XND.
- [8.4] Mr XND formed the view that Ms KM and her husband would qualify for residence under the parent category, but needed to wait until June 2011 when Ms KM's stepson qualified as an eligible sponsor. For that reason, Ms KM's best option was to leave New Zealand before her permit expired, to ensure she was not here unlawfully, as that could create long-term difficulties. If she left New Zealand, she could apply for a temporary permit from outside New Zealand. Mr XND never suggested the whole family leave; only Ms KM.
- [8.5] Mr XND produced an email dated 18 June 2010, and a translation of the email. It was from Ms KM to Ms MA. It said she had read an email from Ms MA and authorised Ms MA to sign a document on her behalf. It appears it relates to the letter dated 18 June 2010 which Ms KM produced. The apparent inference is that, as Ms KM claimed, Ms MA drafted the letter and sent it to Immigration New Zealand. However, Mr XND does not explain the circumstances.
- [8.6] Mr XND said he would not normally deal with a routine student visa application where the person is in New Zealand, as it was not usually necessary to have assistance.
- [8.7] Mr XND infers that the real reason for the complaint was to justify Ms KM being in New Zealand unlawfully, and gain more a favourable view from Immigration New Zealand.

Issues

- [9] The parties agree the issues are:
- [9.1] Did Mr XND conduct his practice in a way that he was a party to Ms MA providing immigration advice unlawfully?
- [9.2] What professional duties did Mr XND have to Ms KM when he was dealing with her, and became aware of the circumstances. Furthermore, did he properly discharge those duties?

Discussion

Was Mr XND party to giving immigration advice unlawfully?

- [10] In the course of the discussions regarding the complaint, counsel for Ms KM accepted there were difficulties in establishing that Mr XND was a party to Ms MA providing immigration advice to Ms KM unlawfully.
- [11] Ms MA had an appropriate and legitimate role in relation to arranging educational courses, and Ms KM discussed those services with her.
- [12] The evidence did not establish that Mr XND was a participant in, or had any role in discussions and arrangements between Ms KM and Ms MA.
- [13] The Tribunal is required to determine facts on the balance of probabilities; however the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1). I am mindful that a finding of being a party to the unlawful provision of immigration advice would be at the more serious end of the scale.

[14] I am satisfied that the material before the Tribunal does not establish either that there was immigration advice provided by Ms KM unlawfully, or that Mr XND was a participant in any material dealings between Ms KM and Ms MA.

Did Mr XND act properly when advising Ms KM?

[15] At the core of Ms KM's complaint is that Mr XND gave self-serving advice that she should leave New Zealand.

[16] The parties agreed that while it was not necessarily determinative, the appropriateness of the advice Mr XND gave may assist the Tribunal in determining whether there was any inappropriate conduct.

[17] Mr Laurent produced a helpful analysis of the circumstances, in a memorandum dated 17 August 2012 produced to the Tribunal. Ms KM has not contested that analysis.

[18] The first point was that Mr XND was giving advice to provide Ms KM with the information to decide whether she should engage him to apply for an immigration permit. Preliminary advice of this kind is necessary and appropriate, and contemplated by the Code, which only requires formal engagement when payment is required for work.

[19] Mr Laurent pointed out that advice in such circumstances is necessarily qualified, and subject to further information gathering and analysis that may occur if there is a professional engagement.

[20] The essence of Mr XND's advice was that Ms KM should leave New Zealand and apply for a visa from outside New Zealand. He gave that advice as she was in New Zealand unlawfully, and had been for some months. She could not apply for a permit in the usual way; the only option was section 35A of the Immigration Act 1987.

[21] Mr Laurent pointed out that an application under section 35A was problematic, and that any persistent non-compliance with New Zealand immigration law could imperil Ms KM's prospects of getting residence in New Zealand. It suffices to say that the Tribunal accepts that Mr Laurent's observations are correct. A prudent adviser in the circumstances would reasonably identify that leaving New Zealand and applying for a visa from outside New Zealand may be a better option than engaging the adviser and applying under section 35A. While other views were possible, it was certainly a reasonable and prudent strategy.

[22] Mr Laurent also drew attention to Mr XND taking the trouble of getting information from Immigration New Zealand to verify that he correctly understood the immigration history that potentially put Ms KM's prospects of being able to remain in New Zealand at risk.

[23] It follows that the Tribunal is satisfied the advice Ms KM received was appropriate in the circumstances, and Mr XND had no improper motive in providing it.

Conclusion

[24] I am satisfied the factual material before the Tribunal cannot support the complaint.

Decision

[25] The Tribunal dismisses the complaint.

DATED at WELLINGTON this 14th day of February 2013

G D Pearson
Chair