

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

Decision No: [2014] NZIACDT 16

Reference No: IACDT 031/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Apamah Theyv Appalamy

Complainant

AND

Lip Funn (James) Yap

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 15 March 2014

DECISION

Preliminary

- [1] The Registrar received a complaint relating to the adviser.
- [2] The Registrar identified the basis of the complaint as being that the adviser, who is a licensed immigration adviser, was:
 - [2.1] Negligent;
 - [2.2] Incompetent;
 - [2.3] Engaged in dishonest or misleading behaviour; and
 - [2.4] Failed to provide a refund that was due pursuant to the Code of Conduct.
- [3] In essence, the complaint is founded on the grounds that:
 - [3.1] The adviser accepted instructions to apply for a residence visa without giving adequate advice so that informed instructions could be taken; and
 - [3.2] The adviser refused to provide a refund when the complainant ascertained that her circumstances presented difficulties in proceeding to migrate to New Zealand under the proposed visa category.
- [4] The Tribunal is required to determine whether the material before it establishes the allegations against the adviser.
- [5] The Tribunal has determined that the adviser was negligent, incompetent, and failed to provide a refund. However, the Tribunal has dismissed the complaint of dishonest or misleading behaviour.

The Statement of Complaint

- [6] The adviser conducts an immigration practice in Malaysia; the complainant who wished to migrate to New Zealand approached him for assistance. The Registrar identified the grounds of complaint in his Statement of Complaint. They were that the adviser:
 - [6.1] Negligently failed to identify what was required for the complainant to apply successfully for a visa for herself and her children.
 - [6.2] Was incompetent for the same reason he was negligent.
 - [6.3] Engaged in dishonest or misleading behaviour as:
 - [6.3.1] He failed to disclose information pertinent to the visa requirements; and
 - [6.3.2] He incorrectly said her children would be able to migrate to New Zealand as dependents.
 - [6.4] He failed to provide a full refund of fees when the complainant realised she could not apply for a visa that would meet her needs. This occurred before the adviser had undertaken any work on the visa application.
- [7] The Registrar identified the material facts supporting the allegations in his Statement of Complaint. In essence the facts were:
 - [7.1] The adviser told the complainant she could expect to get a business visa (residence) to migrate to New Zealand.
 - [7.2] She could include her son in the visa until he was 21 years of age.

- [7.3] She then engaged the adviser to provide immigration services and paid RM11,560 by credit card.
- [7.4] The written agreement relating to the engagement provided that “No refund will be given if the application is requested to be withdrawn”.
- [7.5] A few days after signing the agreement, the adviser’s office advised the complainant that her son, who was 20 years of age, could not be included in the visa application. The adviser’s office also told her she needed information from her estranged husband in the visa application.
- [7.6] The complainant informed the adviser she did not wish to proceed with the visa application. This was at a point where the adviser had not prepared or lodged an application; he had not carried out any substantial work for the complainant.
- [7.7] The adviser’s response (beginning in September 2011 and running through to March 2012) was to:
- [7.7.1] Tell the complainant she was not entitled to a refund, but he would consider the matter.
- [7.7.2] Initially refuse to provide any refund.
- [7.7.3] Later he referred the complainant to someone else in his practice; they said a 30% refund would be provided.

There was a series of correspondence and communication relating to the matter.

The adviser’s response

- [8] The adviser responded to the initial complaint; the Statement of Complaint contained an outline of his response to the Registrar.
- [9] In essence the adviser’s response to the complaint is:
- [9.1] He did not withhold information from the complainant.
- [9.2] He sent the relevant information regarding dependents and the age restrictions on qualifying as a family under a parent’s visa promptly after opening the file and studying the complainant’s case.
- [9.3] When he offered a 30% refund, he was not aware of the issue relating to the complainant’s children.
- [9.4] Later he realised the depth of the problem with the complainant’s children and offered a refund of 70%.
- [9.5] He considers a “no refund policy” as appropriate and justifiable.
- [9.6] The complaint is an excuse to obtain a refund.
- [9.7] On 5 July 2012, the adviser offered a refund of RM11,000 (refusing to refund RM560 as administration costs and a credit card surcharge).
- [10] The adviser did not file a Statement of Reply in response to the Statement of Complaint and was not required to do so, if he did not challenge the contents of the Statement of Complaint.

The complainant’s response

- [11] The complainant filed a Statement of Reply. It added some detail to the Statement of Complaint, but did not alter the essential grounds.

The adviser's reply to the complainant's Statement of Reply

[12] The adviser responded to the complainant's Statement of Reply.

[13] The essential points he made were:

[13.1] His position was that the complainant should have applied for a business visa, and her two sons being over 17 years of age would later apply for student visas.

[13.2] The complainant had adequate opportunity to consider her immigration opportunities, the terms of engagement and agreed to them.

Discussion

The standard of proof

[14] 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 at [55]).

[15] It is necessary to address the allegations against the adviser and consider the factual basis for each of them.

Negligence and incompetence

[16] The allegations of negligence and incompetence both proceed from the same factual basis, namely a failure to provide adequate advice regarding the complainant's migration options prior to engagement.

[17] The adviser has not disputed the essential facts, taking the position that:

[17.1] He investigated the position after being engaged; and

[17.2] He was not obliged to provide a refund, as he was engaged on written terms, which did not allow for a refund.

[18] The difficulty for the adviser is that he was obliged to get informed instructions before accepting an engagement to carry out immigration work (Clause 1.1(b) of the Code of Conduct). He could have properly accepted a limited engagement to assess the complainant's immigration opportunities before then getting informed instructions to proceed with a particular course.

[19] What happened, on his own admission, is that he provided preliminary advice, accepted instructions to proceed with an application for a visa, and then ascertained information that materially affected the application proposed.

[20] The complainant was entitled to have all the relevant information regarding her immigration options, an opportunity to assess them against her circumstances and then decide on the course she wished to pursue. Instead, she had only partial information and the adviser led her to understand she had sufficient information to decide to apply for a visa to migrate with her family.

[21] I am satisfied the adviser was negligent as he was obliged to ensure his client understood her options before giving instructions to apply for a visa. The adviser failed to provide relevant information. A licensed immigration adviser acting with care would ensure his client had that information. The issues relating to the complainant's family were elementary and she had raised them before giving instructions to proceed.

[22] The adviser is clear he had firm instructions and on that basis refused a refund. Accordingly, it is not open to him to take the position the instructions were conditional, limited to a preliminary investigation, and subject to confirmation. If he had taken instructions in that way, subject to further investigation, he would not have been negligent. His negligence lies not in lack of

knowledge when first taking instructions, but in allowing his client to give definite instructions before he informed her of the relevant issues.

- [23] In relation to incompetence, I am satisfied that allegation is also made out.
- [24] The adviser had every opportunity to reflect on what had occurred after his client terminated his instructions and asked for a refund. He knew, or certainly should have known, if he was competent, that:
- [24.1] His client engaged him without sufficient information;
- [24.2] Did not have the opportunity of giving informed instructions; and accordingly
- [24.3] His instructions were defective.
- [25] Despite that, he took the position that his client was obliged to continue with the instructions and forfeit fees.
- [26] That course of conduct demonstrates a serious failure to comprehend fundamental professional obligations; it amounts to incompetence and is not a simple error he corrected when detected.
- [27] I am conscious the adviser now says he could have solved the issue with Student Visas. However, he raised this issue for the first time on 17 February 2014, provided no evidence of presenting that as a solution earlier, and has not shown that student visas were available or appropriate for the complainant's family.
- [28] Every licensed immigration adviser is required to understand the importance of getting informed instructions before being engaged to proceed with a particular course of action.

Dishonest or misleading behaviour

- [29] The Registrar has lodged the Statement of Complaint on the basis the adviser intentionally failed to disclose relevant information regarding the complainant's immigration opportunities at the initial meeting prior to engagement.
- [30] The adviser challenges that. He says he did, relatively promptly after that point, inform the complainant of the true position. That does not appear to be in dispute.
- [31] There is nothing that supports the suggestion the adviser provided information about the complainant's immigration opportunities, either:
- [31.1] With the intention of misleading his client; or
- [31.2] In a form that was contrary to his understanding and belief.
- [32] Accordingly, I am not satisfied the adviser engaged in dishonest or misleading behaviour; the evidence establishes only negligence and incompetence.

Refunding fees

- [33] The Statement of Complaint identifies the ground of complaint relating to the refund of fees as being that the adviser had done no work but had retained fees.
- [34] The adviser did undertake preliminary work that disclosed the complainant faced difficulties in her immigration opportunities. However, the preliminary work does not alter the position. The instructions accepted were to apply for a visa, not to make a preliminary assessment of the opportunity to apply for a visa.
- [35] Clause 8(a) of the Code of Conduct requires that fees set must be "fair and reasonable in the circumstances". An agreement cannot override that requirement.
- [36] In the present case, the instructions in issue were to apply for a visa. That work was not possible, as the adviser failed to make an adequate initial assessment.

- [37] All of the fees should have been refunded immediately when the adviser realised he had not adequately advised his client when accepting the instruction; he could not justify charging for work he could not do. He created this situation.
- [38] Clause 3(d) of the Code of Conduct requires an adviser to pay refunds, when payable, at the conclusion of instructions.

Conclusion

- [39] I am satisfied the Adviser:
- [39.1] Was negligent and incompetent, which are grounds for upholding the complaint under section 44(2)(a) and (b) of the Act.
- [39.2] Failed to refund fees as required by Clauses 8(a) and 3(d) of the Code of Conduct, which are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [39.3] The Tribunal upholds the complaint in those respects and otherwise dismisses the complaint.

Decision

- [40] Pursuant to section 50 of the Act, the Tribunal partially upholds the complaint as the adviser breached the Code of Conduct in the respects identified. He has not, however, been found to have engaged in dishonest or misleading behaviour.

Submissions on sanctions

Preliminary

- [41] As the Tribunal has upheld the complaint, section 51 allows the Tribunal to impose sanctions:

51 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 2 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.

- [42] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions. Whether they do so or not, the Adviser is entitled to make submissions and respond to any submissions from the other parties.
- [43] 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.

Timetable

- [44] The timetable for submissions will be as follows:
- [44.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [44.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.
- [44.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.
- [45] 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 25th day of February 2014

G D Pearson
Chair