

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

Decision No: [2014] NZIACDT 18

Reference No: IACDT 045/12

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**NNS**

Complainant

**AND**

**MUL**

Adviser

**NAMES AND IDENTIFYING PARTICULARS ARE NOT TO BE PUBLISHED**

---

**DECISION**

---

**REPRESENTATION:**

**Registrar:** Ms K England, MBIE, Labour Group, Auckland.

**Complainant:** Ms C Curtis, Marshall Bird & Curtis, Lawyers, Auckland.

**Adviser:** Mr S Laurent, Laurent Law, Lawyers, Auckland.

Date Issued: 26 February 2014

## DECISION

### Preliminary

- [1] The Registrar received a complaint relating to the adviser concerning her handling of a Refugee Status claim.
- [2] The complainant says:
  - [2.1] The adviser advised the complainant regarding her immigration options.
  - [2.2] The advice she gave was to apply for refugee status and there was no discussion of other options.
  - [2.3] The refugee status option failed; it was ill conceived and badly handled.
  - [2.4] Furthermore, the adviser held only a provisional licence and required supervision. The supervision was not adequate.
  - [2.5] Furthermore, the costs were excessive and nothing of value was gained.
- [3] The adviser denies these claims and says she did provide appropriate advice; the complainant rejected options other than seeking refugee status and had adequate information when she did so. The adviser says she handled the refugee status application competently, for a fair cost, and engaged the supervisor appropriately.
- [4] The Tribunal is required to determine the merits of these competing positions as to how the adviser dealt with the instructions. The Tribunal is satisfied on the evidence it should dismiss the complaint.

### The matters in issue

- [5] The Registrar filed a Statement of Complaint setting out the grounds of complaint. There were difficulties in establishing what was in issue and ultimately, the complainant, through her counsel, filed a Memorandum of Claim dated 18 December 2013.
- [6] I will take the Memorandum of Claim as setting out the full extent of the grounds of complaint; the Tribunal informed the parties of that approach, and they have not taken issue with it.
- [7] There are four heads under which the complaint is presented:
  - [7.1] Negligence, in particular the adviser filed an application for the complainant's protection as a Convention Refugee. The complaint contends that was not an appropriate course.
  - [7.2] The adviser was a provisional licence holder, and failed to work under "direct supervision" as required. In addition, she disclosed information to her supervisor without permission, and did not properly disclose the arrangements.
  - [7.3] The adviser was providing a regulated professional service, and owed a fiduciary duty, and it was not discharged in that she:
    - [7.3.1] Did not deliver the immigration advice required;
    - [7.3.2] Delivered bad advice; and
    - [7.3.3] Delivered services without the necessary supervision.
  - [7.4] The adviser did not treat the complainant properly in respect of her financial responsibilities:
    - [7.4.1] Excessive fees were charged.

- [7.4.2] No invoice was issued.
- [7.4.3] Fees were not put into a client account.
- [7.4.4] The adviser did not tell the complainant she might be entitled to legal aid.

### **The material to consider**

- [8] The Registrar filed the complaint with a copy of material he received. Subsequently both the complainant and the adviser filed Statements of Reply. Further, the complainant filed submissions dated 14 October 2013; the adviser filed a memorandum from counsel, and an affidavit on 1 November 2013. On 5 November 2013, counsel for the complainant wrote a letter regarding the Tribunal's procedure, and another letter concerning the substantive issues the following day. On 17 December 2013, counsel for the adviser filed two memoranda.
- [9] Following that, counsel for the complainant filed the Memorandum of Claim. The Registrar followed with submissions on his approach to supervision.
- [10] The Tribunal has considered all of this material.

### **The complainant's position**

#### *Negligence*

- [11] The essence of the complainant's position is that the adviser held only a provisional licence and did not have the skills to give advice as to the complainant's immigration opportunities. She gave the inappropriate advice to apply for recognition as a convention refugee.
- [12] The complainant says the decision to apply for refugee status was the adviser's, and she did not explore a "straightforward immigration path to residence".
- [13] She says the adviser ought to have known the refugee status application was unlikely to succeed.
- [14] Under the heading of "negligence", the complainant's counsel has incorporated aspects of supervision and failure to give advice in relation to legal aid. This decision will consider them under those heads rather than as an aspect of alleged negligence.

#### *Lack of supervision*

- [15] The adviser held a provisional licence, and accordingly was required to comply with section 19(5) of the Act. She was required to work under "direct supervision of a fully licensed immigration adviser".
- [16] The adviser failed to sign a privacy waiver (as required under her supervision agreement).
- [17] The complainant claimed (not necessarily correctly) that supervision is ongoing; however, the Tribunal is dealing only with this complaint. Accordingly, it is sufficient to note that during the relevant period the adviser was subject to the Act's supervision requirements.
- [18] The complainant says evidence of supervision is limited, and characterised as "brief, impressionistic and offers no evidence of the level of supervision expressly required under the Act." Further, claiming that between 29 October 2011 and 8 February 2012 the adviser did not have either a supervision agreement or a supervisor, which is the period of time to which the complaint relates.
- [19] The position taken for the complainant is that direct supervision required that the supervisor would attend the refugee interview conducted by Immigration New Zealand.

*Fiduciary duty*

- [20] The complainant through her counsel says the adviser owed a fiduciary duty to the complainant, and it is a ground for complaint that the adviser did not discharge the duty.
- [21] She says the failure to deliver appropriate advice caused the breach.

*Fees*

- [22] The complainant says she should have received a refund, as the fees she paid were not fair and reasonable for the services provided.
- [23] Further, that the adviser did not deposit fees into a client account until earned, and no invoices were issued.
- [24] In addition, she says the adviser did not tell her she could have applied for legal aid to engage a lawyer to pursue a refugee status claim.

**The adviser's position***Negligence*

- [25] The adviser's position is that the complainant and her family came to New Zealand and were irrevocably resolved to seek protection. She accepts that even so, she had to give advice on immigration options. That is particularly so, as after pursuing a refugee status claim, section 150 of the Immigration Act largely closes off other options. Accordingly, remaining in New Zealand is largely contingent on the success of the protection claim.
- [26] The adviser says she did discuss applying for residence on other grounds; however the complainant was fully committed to seeking protection under the Refugee Convention. She confirmed this in an affidavit submitted to the Tribunal. When first responding to the complaint in her letter to the Registrar, the adviser said there were two factors that made an application under the Family Parent Category, rather than an application for refugee status, problematic:
- [26.1] Unless explicable as an aspect of persecution, the complainant potentially faced a "character issue" with Immigration New Zealand. She said the authorities she claimed would persecute her had made adverse official findings, explicable as persecution. In short, unless there was proof officials in the other country persecuted her through false claims of dishonesty; the evidence of dishonesty was a potential barrier to migrating to New Zealand.
- [26.2] The time for processing a Family Parent Category application would require a return to the other country, and she had a well-founded fear the officials would persecute her there for a convention reason.
- [27] Through her counsel, the adviser says she prepared documentation and represented her client appropriately at the Refugee Status Branch interview conducted by Immigration New Zealand. She accepts a lawyer may have taken a more technical approach, but she presented the foundation for the claim properly. Additional legal analysis would have only served to provide information the officer assessing the claim understood as an essential competency for a person assessing a refugee status claim. The adviser in her affidavit confirmed this.

*Fiduciary duty*

- [28] The adviser did not specifically address the issue of fiduciary duty.

*Lack of supervision*

- [29] Counsel for the adviser addressed the issue of supervision and identified it as raising the issue of whether the adviser was working within her scope of knowledge and skill. Accordingly, the submission relates also to negligence.

- [30] Counsel pointed out that failure of a refugee status claim does not demonstrate the claim was ill founded. The statistics he raised indicated that overall, nearly 80% of claims fail, and possibly more made in respect of the country in issue.
- [31] The adviser had previously represented a successful refugee claimant (prior to the current licensing regime coming into effect). Accordingly, the Tribunal could not assume she lacked the necessary skills, simply as she had limited experience as a licensed immigration adviser. The adviser provided information in her affidavit regarding her experience.
- [32] The supervisor provided a sworn statement to the effect she was satisfied with the supervision arrangements. There was a record of a discussion between the adviser and the supervisor in relation to the complainant.

#### *Fees*

- [33] The adviser took the position she was content to have her level of fees assessed as to whether they were fair and reasonable for the work she undertook.
- [34] In relation to providing information concerning legal aid, counsel for the adviser accepted the view could be open; it was a reasonable obligation to expect an adviser to provide advice to a client on the subject. However, he also pointed out the Registrar of the Immigration Advisers Authority had been requested by the New Zealand Law Society to include such information in his publications; the Registrar had responded with the opinion he was being asked to undertake marketing for the legal profession, and would not do so. In such circumstances, the adviser's counsel argues, it is not reasonable to criticise the adviser.
- [35] In her affidavit, the adviser gave particulars of the work she undertook.

#### **The Registrar's position**

- [36] The Registrar only took a position on the issue of supervision. In essence, the Registrar is satisfied the adviser acted appropriately in terms of establishing an environment for supervision. However, it was a matter for the Tribunal to determine whether there had in fact been appropriate supervision.

#### **Discussion**

##### *Standard of proof*

- [37] This 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 [113]-[118]). None of the parties sought an oral hearing.

##### *Negligence*

- [38] I have assessed negligence on the basis the adviser was required to provide professional services at a standard required of a fully licensed professional engaged in refugee status work.
- [39] I note the circumstances could involve consideration of a shared responsibility between the adviser and her supervisor; however if I am satisfied the complainant received services at that level, I need not consider the issue further.
- [40] The first issue is whether the adviser should have given the advice to lodge an application for refugee status at all. The alternative was seeking a residence visa; the adviser points to three issues:
- [40.1] The complainant was informed and committed to seeking refugee status;
- [40.2] The refugee status claim was viable;
- [40.3] The alternative had two potential difficulties:

[40.3.1] A character issue that could only be answered in the context of persecution; and

[40.3.2] Timing would result in a return to a country where the complainant had a well-founded fear of persecution.

- [41] The first issue to recognise is the effect of section 150 of the Immigration Act 2009. It reflects a legislative policy that has been in place for some time. The essential effect is that if a person applies for refugee status, they will not be able to seek a visa on other grounds if the claim fails.
- [42] In practical terms, this means a refugee claimant and their adviser must take considerable care before making a refugee status claim. It requires proof of specific and significant matters; it does not allow for discretionary humanitarian considerations, and it closes off other options.
- [43] The adviser has provided her explanation on oath, including that she discussed the option of applying for a residence visa rather than proceeding with an application for refugee status. In hearing the matter on the papers, the Tribunal cannot lightly put the adviser's testimony to one side. The character issue and the concern regarding having to return to a country where a person has a fear of persecution are potentially valid grounds for the strategy adopted.
- [44] There is nothing in the written record before me that is inconsistent with the claim the adviser discussed the option of applying for a residence visa on conventional grounds. The complainant through her counsel submits the adviser said a refugee status application was her only option. That was the position taken in the original complaint, and the adviser challenged it when first answering the complaint. I have no basis to reject the adviser's sworn evidence on this point, which confirms her initial response.
- [45] The Tribunal can evaluate whether the claim for refugee status was deficient to the point the adviser should not have lodged it, using its specialist expertise.
- [46] The Refugee Status Branch's decision reviews the merits of the claim. It is evident there were significant issues to consider, and the claim was not one that fell into the category of being manifestly unfounded.
- [47] The fact the complainant's counsel continued with the claim, rather than simply identifying it as hopeless, reinforces this view. She has informed the Tribunal an application for legal aid failed. The fact counsel for the complainant considered the claim had sufficient merit to apply for legal aid, is not consistent with the allegation the adviser lodged a claim so lacking in merit it warrants a professional disciplinary finding.
- [48] Counsel for the adviser points to the relatively small numbers of successful refugee status claims. Having examined the claim, I cannot put it outside the range of claims routinely lodged in New Zealand. It is not necessary to be specific, beyond observing the complainant's background in the country where she claimed to have a well-founded fear of persecution warranted consideration. The decision of the Refugee Status Branch reflects that view.
- [49] The final limb of the negligence complaint is that the complainant says representation was not of a standard required. The evidence does not justify that finding. The refugee status process is at least part inquisitorial and that is very much the case in practice not only in the abstract.
- [50] The adviser produced her notes, and described the role she played. The decision of the Refugee Status Branch also provides some indication as to whether there was a deficiency in representation. I am not willing to find representation was outside of the usual range.
- [51] Counsel for the complainant criticises the adviser for taking an overly passive role, and not raising some points that did not succeed. However, in this particular jurisdiction an inexperienced advocate is far more likely to take an overly active role, failing to appreciate the hearings are inquisitorial. Nothing identified by counsel for the complainant could have led to a different outcome, if advanced by the adviser. Counsel for the complainant has in essence used the same information, attempted to advance the claim, and had the same result as the adviser.

- [52] Accordingly I am satisfied I must accept the adviser reviewed the complainant's options, took informed instructions, and adequately presented the refugee status claim. The Tribunal will dismiss the complaint the adviser was negligent.

*Fiduciary duty*

- [53] Counsel for the complainant contends there is a fiduciary duty that is additional to the Code of Conduct and the grounds for complaint in the Act (section 44).
- [54] She has provided no submissions to support that proposition. Furthermore, she has not identified that if there are such additional fiduciary duties they would result in culpability wider than that contained in the Act and the Code.
- [55] This Tribunal has a statutory jurisdiction. If fiduciary duties arise in the relationship between a licensed immigration adviser and his or her client, they are not matters for this Tribunal as a "stand alone" issue.
- [56] There certainly instances where there are fiduciary duties, an obvious case being a licensed adviser holding funds for their client as a trustee. However, fiduciary duties are an issue for a court exercising civil jurisdiction. Unless a breach of the fiduciary duty is also a breach of the Act or the Code, only then does the Tribunal have jurisdiction to hear the matter. Commonly that will be the case, for example, a breach of a fiduciary duty will likely involve a lack of professionalism under the Code of Conduct (Clause 1), and potentially other breaches.
- [57] However, I do not find anything in the complaint beyond the issues raised in relation to the Code of Conduct and the Act. The Tribunal dismisses this aspect of the complaint.

*Lack of supervision*

- [58] Counsel for the adviser addressed the issue of supervision and identified an aspect being whether the adviser was working within her scope of knowledge and skill. On the limited information available, I am not in a position to find she was working outside of her knowledge and skill. She had previously been an immigration officer, worked in immigration for an extended period, and previously had a client who had a successful refugee status claim in relation to the same country in issue in this case.
- [59] Counsel for the complainant is critical of various matters of style, the time taken and the like. As noted, she claims the adviser failed to raise certain points. However, the issues canvassed in the Refugee Status Branch decision appear to cover the material issues, and counsel has not been able to identify new issues that have led to a different outcome. In these circumstances, I would need to have clear evidence of a deficiency on the part of an advocate to find negligence in the presentation of the case.
- [60] This is not a case where deficient service delivery indicates a failure of supervision.
- [61] The Registrar has answered issues raised by the complainant regarding the structure for supervision. The complainant has not challenged that. I am satisfied the structure was appropriate.
- [62] As to whether there was "direct supervision" under the Act, the meaning of the requirement in section 19(5) is not beyond debate. The Registrar has developed a policy, and he has not detected anything in the information supporting the complaint demonstrating non-compliance with the essential structure.
- [63] The adviser has produced notes demonstrating she did discuss the case with her supervisor. However, it is not evident there was more than a relatively brief review of the refugee status application, or that it went to the level of disclosing personal information. The view may be open the supervision should have gone further, and the adviser has a responsibility for that. However, the Registrar has not lodged a complaint against the supervisor, and there is evidence the adviser was experienced in dealing with this area of work (and had a significant background in immigration work). I cannot be satisfied on the balance of probabilities the supervision fell short of meeting the minimum standards. Particularly when measured against the Registrar's policy.

[64] The complainant also makes some specific complaints regarding supervision. One of them was a lack of consent to disclose personal information. However, the evidence does not establish the adviser did disclose personal information; indeed the complaint tends more to suggest a lack of disclosure in the allegation the supervisor did not engage sufficiently with the case.

[65] Accordingly, the Tribunal dismisses the complaint relating to supervision.

#### *Fees*

[66] The adviser took the position she was content to have her level of fees assessed as to whether they were fair and reasonable for the work she undertook.

[67] The evidence does not establish the fees were excessive.

[68] Counsel for the complainant says the ground for challenge of the quantum is that costs of \$3,000 under legal aid are as much as a lawyer would receive. However, there can be no doubt a lawyer charging a commercial fee for representation in a refugee status claim could justifiably charge far more (depending on the case).

[69] The adviser has given evidence she worked on the matter for some 75.5 hours. It may well be the work could have been done in less time by someone with recent experience. However, that is far from novel for a practitioner dealing competently with a matter they have not recently handled.

[70] I am not satisfied there is a foundation for finding the fees were not fair and reasonable.

[71] In relation to providing information concerning legal aid, the Registrar did not challenge counsel for the adviser's claim regarding his approach to the availability of legal aid. Apparently, some people contest his view. However, as a newly licensed person it would be unfair to find the adviser responsible for taking a position the Registrar is willing to defend.

[72] Counsel for the complainant raised two further issues. Saying as an aspect of supervision there was "no evidence" fees were put into a client account and no invoice issued. These were new issues not part of the original complaint, or the subject of responses in the process. They appeared for the first time in the complainant's Memorandum of Claim (by which time the adviser had responded fully to the complaint). At this point in the process, the absence of evidence concerning matters not in issue is not a sufficient basis to extend the scope of the complaint.

[73] I note in her memorandum of 18 December 2013 counsel for the complainant did not include the failure to refund fees under the terms of the written engagement as an issue to be determined. The Tribunal gave the parties notice it relied on that memorandum as containing the full extent of the live issues.

[74] The view is open the written terms required a refund of fees if the application failed. Failure to honour terms of engagement could have professional disciplinary consequences.

[75] Counsel did not inform the Tribunal whether the adviser had refunded the fees or whether there were other reasons she no longer pursued the matter.

[76] The Tribunal expressly records it makes no finding on the issue of whether the written terms required the adviser to refund fees; and leaves that matter for the parties to deal with between themselves; or in the Disputes Tribunal or other jurisdiction.

[77] I am satisfied the complaint relating to fees must be dismissed.



**Decision**

[78] The complaint is dismissed pursuant to section 50(a) of the Act.

**DATED** at WELLINGTON this 26<sup>th</sup> day of February 2014

---

**G D Pearson**  
Chair