

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

Decision No: [2014] NZIACDT 29

Reference No: IACDT 033/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Mohammed Arafat Khan

Complainant

AND

Artika Archina Devi

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: S Singh, Singhs Barristers & Solicitors, Auckland.

Date Issued: 17 March 2014

DECISION

Preliminary

- [1] The essence of the complaint was that the adviser did not deal with the complainant; rather, unlicensed staff performed the professional duties and mismanaged the complainant's instructions.
- [2] The adviser was the only licensed immigration adviser in her practice. She says unlicensed persons provided clerical services, but did not provide professional services.
- [3] What an unqualified person can do in the professional practice of a licensed immigration adviser is narrow.
- [4] Determining whether to uphold or dismiss the complaint turns, first, on what unqualified staff can do in a licensed immigration adviser's practice, and second, on what happened in this case.
- [5] The Tribunal has found the adviser allowed unlicensed persons to carry out important parts of the professional engagement in dispute, and she knew that this was occurring. The Tribunal has upheld the complaint.

The Statement of Complaint

- [6] The Registrar filed a Statement of Complaint with the Tribunal, which set out the facts alleged in support of the complaint and information gathered by the Registrar.
- [7] There is a narrative where the complainant and a person, who is not a licensed immigration adviser, engaged in an arrangement for the provision of immigration services. The provision of those services was not satisfactory.
- [8] In the Statement of Complaint, the Registrar wrote the following with regard to the adviser:
 - [8.1] The complainant says he has never met the adviser.
 - [8.2] There is a written agreement that refers to the adviser.
 - [8.3] The adviser's name and licence number were recorded on documents submitted to Immigration New Zealand.

The adviser's response

- [9] The adviser responded to the Statement of Complaint by filing a Statement of Reply.
- [10] In the Statement of Reply the adviser accepts she:
 - [10.1] Was a "voluntary worker" for Universal Immigration Services Limited. That company apparently provided immigration services.
 - [10.2] Was aware of the complainant and acted for him, but did not refer to any personal dealings with him.
 - [10.3] Did not have full knowledge of what occurred in relation to the complainant as others were doing the work.
- [11] It appeared the adviser was the only licensed immigration adviser involved with the company.

Interim decision

- [12] The Tribunal issued an interim decision. In essence, there was sufficient material before the Tribunal to conclude the adviser was a party to providing immigration advice in her practice unlawfully, through unlicensed persons. However, the Statement of Complaint had not put her

on notice of that issue sufficiently clearly, and the Tribunal gave the adviser an opportunity to address fully the potential finding.

- [13] Numerous decisions of the Tribunal address the fundamental features of the regime for licensed immigration advisers. The interim decision drew attention to the following aspects of the regime:
- [13.1] Unless a person is licensed or exempt from holding a licence, it is a criminal offence to provide “immigration advice”.
- [13.2] The Act defines “immigration advice” in broad terms.
- [13.3] It is not possible for a client engagement to commence, in accordance with the Code of Conduct, without a licensed immigration adviser personally engaging with the client.
- [13.4] The scope of “clerical work”, which can be carried out by a person who is not licensed, is narrow.
- [13.5] A licensed immigration adviser is personally responsible for all aspects of client engagement, and will be personally responsible for the refund of fees, compensation, and the like.
- [13.6] A corporate body cannot hold a licence as an immigration adviser.
- [14] The interim decision put the adviser on notice that the material before the Tribunal pointed to a potential finding the adviser had, in effect, put her status as a licensed immigration adviser at the disposal of others. Accordingly:
- [14.1] She was a party to unlicensed persons providing immigration advice and services in her name.
- [14.2] The engagement with the complainant was unlawful, and not in accordance with the Code of Conduct, as:
- [14.2.1] It was not properly commenced with a licensed immigration adviser engaging with the client and undertaking the advice and disclosure obligations; and
- [14.2.2] The adviser allowed unlicensed persons to perform professional duties.
- [14.3] The adviser is responsible for refunding all fees paid, as she was a party to soliciting them, using her status as a licensed immigration adviser.
- [15] The Tribunal informed the adviser those findings would establish a breach of the Code of Conduct in that:
- [15.1] The adviser acted unprofessionally by being a party to the unlawful provision of immigration advice (Clause 1.1 of the Code of Conduct).
- [15.2] The adviser failed to initiate the professional relationship in accordance with the Code of Conduct (Clause 1.5 of the Code of Conduct).
- [15.3] The adviser failed to refund fees (Clause 3(d) of the Code of Conduct).
- [16] The Tribunal gave all parties notice that there were outstanding questions regarding how the adviser treated client funds, set fees, dealt with communication duties, and the like. There was also some evidence the unlicensed persons performed professional services in a manner that did not meet professional standards and the adviser was responsible.
- [17] However, the interim decision recorded there was insufficient information to make any finding adverse to the adviser on the material before the Tribunal, except for those outlined above in paras [14]–[15].
- [18] The interim decision notified the adviser that if the potential findings, as outlined, were upheld, she would potentially be personally liable for the refund of fees, and open to other sanctions

provided in the Act, as she was a licensed professional with a personal responsibility to her client. The Act imposes personal responsibility upon her for professional engagements in her practice.

- [19] The interim decision gave the adviser the opportunity to provide further submissions and factual material and to apply for an oral hearing.

Response to interim decision

- [20] The adviser is the only party who responded to the interim decision.
- [21] She provided submissions from her counsel, with a copy of some documents the Registrar had already filed with the Tribunal. There was no sworn evidence, and no application for an oral hearing.
- [22] The submissions:
- [22.1] Took issue with the factual claim by the complainant that the adviser had no personal contact with him. The only evidence referred to was the adviser's signature on the agreement for the provision of professional services.
- [22.2] Claimed unqualified staff performed only "clerical work" as permitted by the Act.
- [22.3] Stated that the adviser was not liable for fees, as she was a volunteer who was not aware of or responsible for fees.

Discussion

The legislative restriction on unlicensed persons providing immigration services

- [23] In many areas of professional and licensed practice there is extensive use made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots, and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.
- [24] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people, and the case would not be easily made out that they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [25] The Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.
- [26] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people being engaged in the delivery of professional services, to a degree that is unusual in the regulation of professional service delivery.
- [27] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person "rubber stamp" their continuing activity in the industry. Unfortunately, this Tribunal's work demonstrates that this was a well-founded apprehension, and an area where enforcement action has been necessary.
- [28] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [29] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice" without being either licensed or exempt from the requirement to be licensed.

- [30] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred within New Zealand.
- [31] The scope of “immigration advice” is defined in section 7 very broadly. It includes:
- using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...
- [32] There are exceptions to consider. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. Accordingly, the question arises as to whether the work in issue came within that exception.
- [33] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [34] *Clerical work* is defined in section 5 of the Act in the following manner:
- clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
- (a) the recording, organising, storing, or retrieving of information:
 - (b) computing or data entry:
 - (c) recording information on any form, application, request, or claim on behalf and under the direction of another person
- [35] The definition is directed to administrative tasks, such as keeping records, maintaining financial records and the like.
- [36] The definition deals specifically with the role a non-licensed person may have in the process of preparing applications for visas. They may record information “on any form, application, request, or claim on behalf and under the direction of another person”.
- [37] The natural meaning of those words is that the unlicensed person relying on the “clerical work” exception, may type or write out what another person directs.
- [38] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.
- [39] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [40] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application as they may only provide information, not advice. This exception is not at issue for the Tribunal on the material facts of this complaint.

Factual findings

- [41] The complainant is clear in his complaint that, as far as he could see, the adviser was not dealing with his instructions. He specifically says he never met the adviser.
- [42] The record should show whether the complainant is correct or not. Pursuant to Clause 3 of the Code of Conduct, the adviser was required to maintain written communication with clients. That included confirming in writing the details of material discussions.

- [43] The scope of work that unlicensed persons could perform in the adviser's practice was very limited. The adviser has been given the opportunity to provide sworn evidence and have it tested in an oral hearing; however she has not pursued that opportunity, despite facing both a stark allegation and notification from the Tribunal as to the findings she was at risk of.
- [44] Further, the adviser has made admissions in the Statement of Reply that point to her being a party to immigration advice being provided unlawfully, with her knowledge. She stated:
- Under normal circumstances, the background clerical work was attended to by [an unlicensed person] who also had correspondence with Immigration New Zealand on behalf of clients as and when required.
- [The unlicensed person] submitted the application without my knowledge...
- [45] The scope of clerical work, for the reasons discussed above, is very limited. It does not include filing applications and corresponding with Immigration New Zealand.
- [46] In essence, the Tribunal is in a situation where:
- [46.1] Its default approach is that it decides complaints on the papers (section 49 of the Act).
- [46.2] The adviser faces a complaint that she never engaged with her client. Whether or not she did so, is a factual matter. The Tribunal gave the adviser the opportunity of answering the complaint in an oral hearing. She has not done so (or provided affidavits).
- [46.3] The only evidence the adviser relies on to show she personally engaged with the complainant is her signature on a document. The complaint is that she did not attend when the complainant signed the document, and she must have signed it later. The document is consistent with the complaint.
- [46.4] The adviser has admitted an unlicensed person engaged in corresponding with Immigration New Zealand, and that person lodged the complainant's application without her knowledge.
- [46.5] In addition, the requirements of the Code of Conduct are such that if a licensed immigration adviser were dealing with the instructions in issue, there should be correspondence and communication that makes it clear the adviser was engaging with her client. The material before the Tribunal includes correspondence in which the adviser's name is absent, and has the names of unqualified staff. An exception is a letter dated 19 August 2011; it has the adviser's name on the letter to Immigration New Zealand. However, it is not signed, and in her Statement of Reply the adviser says an unqualified person submitted this application without the adviser's knowledge. It is evident unqualified staff were in a position to use the adviser's name on correspondence she had not seen.
- [47] 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).
- [48] I am satisfied on the balance of probabilities, having regard to the complaint being serious, that:
- [48.1] The adviser was the only licensed immigration adviser in her practice. The adviser did not dispute that.
- [48.2] I accept the complainant's claim he never met the adviser. The adviser has challenged this only with assertions, and by pointing to a document she could have readily signed after the event. The Code of Conduct requires a licensed immigration adviser to engage with a client personally and follow up with written communication. The record is consistent with the complainant's claim; the adviser has not provided evidence that rebuts the claim, despite having had the opportunity to do so.

- [48.3] I further rely on the adviser's admission that an unlicensed person corresponded with Immigration New Zealand and lodged the complainant's application without her knowledge, under her name. The adviser appears to accept that she allowed her name to be used with little or no control over those conducting her practice in respect of the complainant's instructions.
- [48.4] I am satisfied, given the adviser's claims she was a volunteer and that the complainant should look to unlicensed persons for redress and that unlicensed persons were using her name to correspond with Immigration New Zealand, that she effectively put her licence at the disposal of unlicensed persons to give them the opportunity to provide immigration services unlawfully.
- [48.5] I am also satisfied the adviser knew of the client relationship being discharged in her name as she admits she signed the agreement for the provision of professional services.
- [49] It follows the adviser breached the Code of Conduct in that:
- [49.1] She acted unprofessionally in becoming a party to the unlawful provision of immigration advice (Clause 1.1 of the Code of Conduct).
- [49.2] She failed to initiate the professional relationship in accordance with the Code of Conduct (Clause 1.5 of the Code of Conduct). She did not meet with the complainant or attend to the disclosure and recording requirements for properly commencing the engagement, nor did she complete the significant matters relating to it.
- [49.3] The adviser failed to refund fees (Clause 3(d) of the Code of Conduct). The engagement was under her name as the licensed adviser, and the complainant was entitled to require her to meet all professional obligations.

Decision

- [50] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [51] The adviser breached Clauses 1 and 3 of the Code of Conduct in the respects identified. They are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [52] In other respects, the Tribunal dismisses the complaint.

Suppression of name

- [53] The adviser sought an order to keep her identity confidential. The grounds were that she:
- [53.1] Is no longer a licensed immigration adviser.
- [53.2] Acted in a professional manner, and denies wrongdoing on her part.
- [53.3] Has another career, where she is in "a special relationship of mutual confidence and trust".
- [53.4] Did not gain financially.
- [53.5] Due to her culture, there will be repercussions for her and her family.
- [54] The submissions have an element of unreality. The Tribunal has upheld a number of complaints against the adviser, and cancelled her full licence. The decisions are public information, and involve conduct as serious as the present complaint. The incremental effect of publishing another disciplinary finding, which is the issue, is not consistent with the grounds advanced.
- [55] There is no sensible reason not to publish the present complaint in these circumstances. I appreciate counsel could of course advance reasons for suppression that were not advanced previously, and if a case were made out the Tribunal would make an appropriate order.

However, the situation is one where publication is a routine consequence of the disciplinary process.

- [56] There are no special circumstances. If the adviser is in a position of mutual confidence and trust in her current work, that is not a justification for suppressing her professional disciplinary background.
- [57] Unfortunately, the adviser's disciplinary history is not an isolated lapse; rather she has engaged in a sustained course of conduct resulting in multiple complaints the Tribunal has upheld. That is not information the Tribunal should deny the public, particularly when the adviser is seeking confidence and trust in a professional capacity. The Tribunal has found on repeated occasions that she had abused trust and confidence given to her as a licensed immigration adviser.
- [58] Accordingly, the Tribunal will not make an order restricting publication of this decision.

Submissions on sanctions

- [59] The Tribunal has upheld the complaint and, accordingly, pursuant to section 51 of the Act, it may impose sanctions.
- [60] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [61] 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

- [62] The timetable for submissions will be as follows:
- [62.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [62.2] The adviser is to make any further submissions (whether or not the Authority or the complainant make submissions) within 15 working days of the issue of this decision.
- [62.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at WELLINGTON this 17th day of March 2014

G D Pearson
Chair