

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

Decision No: [2014] NZIACDT 39

Reference No: IACDT 040/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

ME

Complainant

AND

TK

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 25 March 2014

DECISION

Introduction

- [1] The complainant was in New Zealand unlawfully and sought the adviser's assistance to apply for a visa.
- [2] The adviser embarked on a course where he repeatedly filed unmeritorious requests, then made complaints on the same grounds. The responses from Immigration New Zealand and the Minister made it clear why his actions were inappropriate. He persisted.
- [3] He then lodged an appeal out of time; it could not be filed, and he did not refund the filing fee to the complainant.
- [4] The adviser did not challenge the statement of position setting out the complaint. The Tribunal has upheld the complaint.

The complaint

- [5] The Registrar filed a Statement of Complaint which identified the factual background as:
 - [5.1] The adviser began representing the complainant in 2005. He was not required to hold a licence at that time as the Immigration Advisers Licensing Act 2007 had not then been enacted.
 - [5.2] On 27 February 2009, the complainant's visa expired. She has not held a visa to be in New Zealand since then.
 - [5.3] On 29 May 2009, the adviser first became a licensed immigration adviser.
 - [5.4] Between 29 June 2009 and 1 July 2011, the adviser submitted seven requests to Immigration New Zealand and the Minister to issue a visa to the complainant.
 - [5.5] The grounds for each of the seven requests were the same, namely the complainant wanted to test her eligibility for residence under the family category. Each request failed.
 - [5.6] On 16 November 2011 and 23 December 2011, the adviser made two complaints regarding the decline of the previous requests and reiterated the requests. He relied on the same grounds as the earlier requests.
 - [5.7] On 28 January 2011, the complainant paid the adviser \$550 for a filing fee for an appeal to the Immigration and Protection Tribunal.
 - [5.8] On 21 June 2011, the adviser submitted an appeal to the Tribunal. The Tribunal could not accept it; it was out of time.
- [6] The Statement of Complaint identifies the potential grounds for upholding the complaint, with particulars. The key elements and particulars being:
 - [6.1] Incompetence (section 44(2)(b) of the Act). The particulars are:
 - [6.1.1] The seven requests for visas lodged between 29 June 2009 and 1 July 2011 contained identical information and were refused.
 - [6.1.2] On 18 October 2010, the Associate Minister wrote to the adviser pointing out the complainant made six ministerial appeals over ten years and been told repeatedly to leave New Zealand. Further, she should leave New Zealand or face compliance action.
 - [6.1.3] On 21 January 2011, the Associate Minister wrote to the adviser pointing out that, without new information, a repeated request for a visa would fail.

- [6.1.4] On 1 July 2011, the adviser lodged a further request for a visa using the same information.
- [6.1.5] On 16 November 2011, the adviser made a formal and unsuccessful complaint about Immigration New Zealand refusing the visa requests.
- [6.1.6] On 23 December 2011, the adviser lodged a second formal complaint on the same basis, with the same result.
- [6.2] A breach of Clause 1.5 of the Code of Conduct – obligations relating to written agreements. The particulars are:
 - [6.2.1] The Authority has requested that the adviser provide a copy of a written agreement for the provision of immigration services to the complainant; he has not done so. He claimed he had given his file to the complainant's family.
 - [6.2.2] There was no written agreement between the complainant and the adviser.
- [6.3] A breach of Clause 2.2 of the Code of Conduct – obligations relating to vexatious appeals. The particulars are:
 - [6.3.1] The appeal to the Immigration and Protection Tribunal was out of time. The adviser could not file the appeal.
 - [6.3.2] The adviser did not follow the procedure in Clause 2.2 of the Code of Conduct.
- [6.4] A breach of Clause 3(d) of the Code of Conduct – obligation to provide refunds payable upon completing or ceasing a contract for services. The particulars are:
 - [6.4.1] The complainant paid the adviser \$550 as a filing fee for the appeal to the Immigration and Protection Tribunal.
 - [6.4.2] He attempted and failed to lodge the appeal, as it was out of time.
 - [6.4.3] The adviser has not repaid the complainant.

Responses to the Statement of Complaint

- [7] The Registrar filed a Statement of Complaint on 30 October 2013 to which the adviser replied. The Tribunal then issued a direction identifying difficulties with the original Statement of Complaint and directed the Registrar to file an amended Statement of Complaint. On 14 February 2014, the Registrar filed an amended Statement of Complaint. Neither the complainant nor the adviser responded to that Statement of Complaint.
- [8] No response was required if the content of the Statement of Complaint was unchallenged.

Discussion

- [9] The adviser has not responded to the amended Statement of Complaint; the documentation filed with it supports its contents.
- [10] I am satisfied the Statement of Complaint, with its supporting documents, establish the grounds of complaint.

Incompetence

- [11] To lodge requests repeatedly on the same basis, ignoring the negative outcome, is not acceptable or effective. It amounts to a waste of time and effort for those processing the request and at best does not assist the person who is the subject of the request.
- [12] When the person is in New Zealand unlawfully, it has a particular risk of negative effects.

- [13] Immigration advisers are obliged to uphold the integrity of New Zealand's immigration system (Clause 2.1(f) of the Code of Conduct), and persons who do not appear to respect New Zealand's immigration law and policy may well have a great deal of difficulty obtaining a visa in the future.
- [14] Prolonging the complainant's stay in New Zealand without regard to her unlawful status was not in her interests. Indeed, the Associate Minister got to the point of directly pointing out the consequences of persistent non-compliance. In a letter of 28 October 2010, she said:
- "I am now requesting Compliance Operations to make [your client's] departure a top priority. I suggest she depart immediately and voluntarily or otherwise face compliance action, which could include detention."
- [15] In the present case, the material supporting the Statement of Complaint includes a letter from Immigration New Zealand dated 9 December 2011. It has the comment:
- "The officer allocated the submission refused to consider it on the grounds that no new information was presented. It is important when previous requests have been refused, to ensure that new information or changes in circumstances are clearly set out in the submission.
- ...
- [Your client] does appear to have a pathway to residence through the Family Parent category but does not need to have to be on-shore in order to test her eligibility for this."
- [16] The contents of the two letters were unsurprising and accurately conveyed the situation the complainant faced.
- [17] The complainant could potentially get residence in New Zealand, but it would not happen unless and until she left New Zealand. In this case, the particular category was "capped" and it would take approximately three years from application to consideration. It was very clear the complainant could not "jump the queue" and have her application processed while she was in New Zealand.
- [18] The risk was the complainant's persistent failure to comply with New Zealand immigration law could well preclude her getting residence at all. The adviser was a party to that by making repeated and hopeless applications; it appears that his client did not understand the applications were hopeless. She was certainly entitled to expect a licensed immigration adviser would only lodge well-founded applications.
- [19] Having made repeated hopeless requests on the same basis, the adviser then made two hopeless complaints before attempting to lodge an appeal out of time. I am satisfied the adviser's conduct had the following features:
- [19.1] The adviser repeated the unacceptable conduct in an identical manner, to the point it was apparently beyond justification. He has provided no sensible explanation.
- [19.2] His unacceptable conduct involved not only a single repeated action as there were four seriously erroneous actions that were distinct:
- [19.2.1] Lodging requests;
- [19.2.2] Making complaints;
- [19.2.3] Filing an appeal out of time; and
- [19.2.4] Not refunding filing fees.
- [19.3] The reasons the adviser's conduct was wrong and unacceptable is clear and obvious, even without any substantial understanding of immigration law and processes.
- [19.4] The conduct had a potentially serious adverse outcome for the complainant.

- [20] I am satisfied these elements put the adviser's conduct beyond an isolated error and satisfy me he is incompetent.
- [21] It follows I uphold the complaint on the grounds of incompetence which is a ground for complaint under section 44(2)(b) of the Act.

No written agreement

- [22] I am satisfied the adviser did not have a written agreement. The Code of Conduct prescribes the process of client engagement. It includes mandatory requirements that the adviser will:
- [22.1] Explain and provide a copy of the Code of Conduct (Clause 1.4(a) of the Code of Conduct).
- [22.2] Explain and provide a copy of their internal complaints procedure and the complaints and disciplinary procedures that are outlined in the Immigration Advisers Licensing Act 2007 (Clause 9(b) and (c) of the Code of Conduct).
- [22.3] Set out fees and disbursements (Clause 8(b) and (d) of the Code of Conduct).
- [22.4] Make their client aware in writing of the terms of an agreement for the provision of services and all significant matters relating to it (Clause 1.5(a) and (b) of the Code of Conduct).
- [22.5] Inform their client they are entitled to seek independent legal advice before entering into agreements (Clause 1.5(c) of the Code of Conduct).
- [23] The adviser was required to keep records of this process for seven years (Clause 3 of the Code of Conduct). He has not explained why he would deliver this information to the complainant's family. In her initial complaint, the complainant said there was no written agreement. The adviser has not explained how he could have no electronic record of the client engagement process, and it would be surprising he would deliver this material to a third party without keeping a copy given its importance if a complaint or dispute arose.
- [24] 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 satisfied the adviser did not have a written agreement.
- [25] I find the adviser failed to set out in writing the terms of his agreement to provide immigration services, and in doing so breached Clause 1.5 of the Code of Conduct.

Vexatious or grossly unfounded appeal

- [26] The appeal to the Immigration and Protection Tribunal was out of time; it was impossible to file and the appeal had no hope of success.
- [27] The adviser did not follow the procedure in Clause 2.2 of the Code of Conduct. It required him to discourage his client from filing the appeal, to advise the client in writing that it was a vexatious or grossly unfounded appeal, and, if his client persisted, to get written instructions acknowledging the advice and instructing him to proceed with filing the appeal.
- [28] The material before me satisfies me that it was the adviser's initiative to file the appeal.
- [29] I am satisfied the adviser breached Clause 2.2 of the Code by failing to encourage his client not to lodge an appeal that was grossly unfounded, and that indeed it was the adviser who proposed filing the appeal.

Not refunding the filing fee

- [30] The complainant paid the adviser \$550 as a filing fee for the appeal to the Immigration and Protection Tribunal. The appeal was out of time and the adviser did not repay the filing fee.

- [31] The money was client funds and so the adviser held the money only for the purpose it was paid to him (Clause 4(c) of the Code of Conduct).
- [32] The adviser was obliged to refund the money he received for the fee when his instructions ended as the appeal was out of time and could not be lodged (at the latest) pursuant to Clause 3(d) of the Code of Conduct; he breached that obligation.

Decision

- [33] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [34] The adviser was incompetent and breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2)(e) of the Act.

Submissions on sanctions

- [35] The Tribunal has upheld the complaint; accordingly, pursuant to section 51 of the Act, it may impose sanctions.
- [36] 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.
- [37] 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

- [38] The timetable for submissions will be as follows:
- [38.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [38.2] 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.
- [38.3] 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.

DATED at WELLINGTON this 25th day of March 2014

G D Pearson
Chair