

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

Decision No: [2014] NZIACDT 77

Reference No: IACDT 069/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Tze (Allan) Loon Lim

Complainant

AND

Sammi Li Shuang Gu-Chang

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 29 August 2014

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The grounds advanced in the Statement of Complaint concern an allegation that a website publication was unprofessional and disclosed confidential information. There was also an allegation that the adviser did not set fair and reasonable fees.
- [2] The website publication concerned a client's detention at a police station and likely deportation. The complainant says the publication was unprofessional and disclosed confidential information.
- [3] The other aspect of the complaint is that Ms Gu-Chang set a fee of \$12,800 to prepare an application to Immigration New Zealand for a visa under the discretionary provisions in the Act.
- [4] Ms Gu-Chang says the website publication was anonymous, did not defame her client and was accordingly professional. She says the fee was proper for the work contemplated, and actually performed.
- [5] The Tribunal has upheld both aspects of the complaint, finding the publication was unprofessional and amounted to a disclosure of confidential information, and that the fees were not fair and reasonable. Accordingly, Ms Gu-Chang breached clauses 1.1, 1.2, and 8 of the Code of Conduct 2010 (the Code).

The Complaint

- [6] The Registrar filed a statement of complaint, she put forward two grounds for the Tribunal to determine:
 - [6.1] Ms Gu-Chang acted unprofessionally and breached the complainant's right to confidentiality through a publication on her website.
 - [6.2] She overcharged the complainant by charging fees of \$12,800 for making a discretionary request for a student visa.
- [7] The background for the complaint as set out in the Statement of Complaint is:
 - [7.1] The complainant had been in New Zealand without a valid visa since 2007 and in late 2010 he approached Ms Gu-Chang's practice for assistance.
 - [7.2] He signed an agreement with the company operating as Ms Gu-Chang's practice in November 2010. The agreement provided for immigration services relating to a request under section 35A of the Immigration Act 1987 (now s 61 of the Immigration Act 2009), for the discretionary issue of a student visa or limited purpose visa. The fee set was \$12,800. The complainant paid that fee.
 - [7.3] Ms Gu-Chang's practice required a further payment of \$3,000 (the total was \$5,000) towards an English language course operated in conjunction with the practice. The complainant paid the \$3,000.
 - [7.4] The complainant asked Ms Gu-Chang to defer making the request for a visa until August 2012; Immigration New Zealand received the request on 16 August 2012.
 - [7.5] The application comprised a two and a half page letter, standard student visa application form and some material printed from Wikipedia.
 - [7.6] Immigration New Zealand declined the application on 17 August 2012. Shortly after that the police took the complainant into custody. It appears that was because he was in New Zealand unlawfully, and he was to be deported. Following that, Ms Gu-Chang published an account on her website of the complainant's circumstances, without naming him.

- [8] The Statement of Complaint identified the potential infringements of professional standards, and the reasons for potentially finding them established.

Clause 1.1 of the Code, failing to perform services with due care, respect and professionalism; and clause 1.2, breach of the obligation to preserve confidentiality.

- [9] The publication on the website described detention at the Henderson Police Station, and likely deportation, and said the person's visa expired almost five years ago.

- [10] The information was sufficient to identify the complainant to persons who knew something of his circumstances, and it was confidential information.

Breach of the Code in relation to setting fees that are fair and reasonable in the circumstances (clause 8(a))

- [11] The fee of \$12,800 was potentially excessive for the work performed.

The Responses

- [12] The complainant did not respond to the statement of complaint, and was not required do so unless he wished to take issue with it.

- [13] Ms Gu-Chang filed a statement of reply. She took issue with some factual material that is not significant. The material parts of her response were:

[13.1] The information submitted with the application was more extensive.

[13.2] The payment of \$3,000 toward a course was a necessary step to put the complainant in a position to apply for a student visa.

[13.3] The work performed justified the fee of \$12,800.

[13.4] The original complaint was different from the statement of complaint.

[13.5] The website article did not identify the complainant and when he objected Ms Gu-Chang withdrew it.

- [14] The Tribunal issued a minute noting there were potential issues with the translation of the website, which was published in Chinese script, and invited Ms Gu-Chang to consider providing a more adequate response to the level of fees.

- [15] The Registrar and Ms Gu-Chang have accepted a translation of the website.

- [16] Ms Gu-Chang provided further information on the fees. The information included what she says is a complete list of work performed, examples of comparable fees and an explanation of factors relevant to setting the level of fees.

Discussion

The standard of proof

- [17] 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].

The material before the Tribunal

- [18] The Registrar provided a chronology, and supporting documentation. Ms Gu-Chang has provided what she says is a full record of her engagement.

Scope of complaint

- [19] Ms Gu-Chang took issue with the scope of the complaint in the statement of complaint, and said it is different from the original complaint. In fact, it is narrower in important respects; it does not raise the issues of negligence, and dishonest or misleading behaviour.
- [20] The Registrar prepared the Statement of Complaint in accordance with section 47 and 48 of the Act. The process requires the Registrar to consider gathering further information, and the Tribunal's practice is to require the Registrar to identify potential grounds for the complaint after that process. In this case, the Registrar has not advanced the most serious ground of the complaint, and the complainant did not take issue with the Registrar excluding it.
- [21] Ms Gu-Chang has no basis to take issue with the grounds identified in the Statement of Complaint, which the Registrar related to material facts. The Tribunal will address the complaint on the narrower grounds the Registrar and the complainant have accepted.

The website publication

- [22] The Code requires that advisers preserve the confidentiality of their clients and do not disclose confidential information other than for specified purposes without their client's prior consent.
- [23] The requirements are elementary standards required in professional practice. Ms Gu-Chang has raised two responses to the complaint, first that the complainant could not be identified; second the information was not defamatory as the complainant alleged.
- [24] Whether or not the publication was defamatory was not important. A client's right to confidentiality is not limited to adverse information, the professional engagement and the information disclosed is confidential whether adverse or otherwise.
- [25] Regardless, Ms Gu-Chang should have known the published information would cause embarrassment. It describes an arrest and the futility of resisting deportation. Ms Gu-Chang said she did not know whether to "laugh or cry", that suggested the person would suffer hunger in prison. The writing was unprofessional due to its tone and content; it contained nothing that would inform a reader of immigration issues. It did not attempt to explain when persons in New Zealand unlawfully are subject to detention, and what they should do. Instead, it created an impression that New Zealand authorities would act arbitrarily, detained persons would suffer in detention, and the Courts would not assist. The publication has no place in professional marketing. It was a crude and unprofessional attempt to persuade persons unlawfully in New Zealand they should be fearful of official action, and implied the adviser may be able to assist them.
- [26] The information concerning the complainant's circumstances was confidential, as is all information in a professional setting, subject to disclosures necessary or appropriate for professional purposes. The Code (clause 1.2), unsurprisingly, requires confidentiality to be preserved subject to: disclosure required for the purposes of the Act, promoting client's interests with Immigration New Zealand, and the client's consent.
- [27] The publication in this case did contain identifying elements, including that the subject faced deportation, he was detained at the Henderson Police Station, he was an "Asian boy", his visa expired some five years before and he was Ms Gu-Chang's client. That information would not identify the complainant to the public at large, but people who were close to him would know the publication related to him.
- [28] I am satisfied Ms Gu-Chang breached her duty to perform her services with professionalism by publishing this article, and so breached clause 1.1(a) of the Code. Further, she failed to preserve the complainant's confidentiality and disclosed confidential information without her client's consent; in doing so she breached clause 1.2 of the Code.

Whether the fees were fair and reasonable

- [29] After she filed her statement of reply, the Tribunal put Ms Gu-Chang on notice that the level of fees she charged were potentially not fair and reasonable. In particular, the level of fees was sufficiently high to require an explanation from her.

- [30] The reason the Tribunal gave notice to Ms Gu-Chang is that the Tribunal had on its record the application submitted to Immigration New Zealand. The material was neither complex, nor large in terms of volume of supporting material. The complainant had been in New Zealand unlawfully for some five years, only compelling circumstances would justify issuing a visa under discretion (section 35A of the Immigration Act 1987, or section 61 of the Immigration Act 2009 as it was when the request was lodged).
- [31] The letter to Immigration New Zealand setting out the grounds identified some claims of previous mishandling of the complainant's affairs by former advisers. However, the letter did not set out information that either substantiated or proved that claim. The letter said the complainant had a desire to study in New Zealand, as it was more favourable due to race based educational policies in the complainant's country of origin, and said he was willing to meet the requirements to study in New Zealand. The application submitted with the request was routine, and the accompanying material similarly routine.
- [32] There was nothing to suggest either that this was a complex application, or that it had any realistic prospect of success. The fee of \$12,800 was not set after unexpected complications, Ms Gu-Chang set it when the complainant first engaged her practice. Ms Gu-Chang has suggested the agreement contemplated additional processes. In reality the only process open was to make a request under section 35A, or section 61 as it was under the 2009 Act; and then potentially write a letter to the Minister (which should only contain the same information if the first request was adequate). The Act otherwise prevents persons in New Zealand unlawfully from applying for a visa.
- [33] Ms Gu-Chang has provided a log of the interactions she says her practice had with the complainant. It is extensive and she claims her practice spent a great deal of time on the complainant's affairs. However, when comparing the log against the work produced, the time cannot be justified. If persons in Ms Gu-Chang's practice did spend the time claimed, they lacked the skills to perform the work in a manner that did not unnecessarily increase cost. I have looked at the request, which was the critical step in the process. It is a two and a half page letter, which is on its face both simple and hopeless in terms of its merits, and Immigration New Zealand declined the request. If the request was to have any prospect of success, the claim of adviser error needed to be documented and related to the complainant's unlawful status, and in addition, some sensible explanation provided for the complainant's lengthy period of non-compliance with New Zealand law. The log does not suggest Ms Gu-Chang or her practice directed any significant effort to those essential matters.
- [34] Ms Gu-Chang has sought to justify the fee in part due to services provided after Immigration New Zealand declined the application. That is in itself problematic as the Code required her to have an agreement in relation to those services, which were not part of the original agreement. However, the time involved in dealing with those issues should not have been substantial. It is evident she did little more than visit the police station and provide her records to a lawyer (which she was required to do on the request of her client in any case (clause 1.3 of the Code)).
- [35] Ms Gu-Chang presented redacted documents purporting to show comparable fees to what Ms Gu-Chang charged. I give the material no weight, the circumstances are not explained and the persons charging the fees have not provided any information for the Tribunal.
- [36] Ms Gu-Chang also provided the total expenses of running her practice; the information provides nothing that assists in justifying the fee or establishing an appropriate hourly rate, or charge on a fee for process basis.
- [37] This Tribunal is a specialist Tribunal¹, which is required to evaluate the conduct of licensed immigration advisers. The Registrar and Ms Gu-Chang have provided a record of the work carried out in Ms Gu-Chang's practice for the complainant. There is a very clear picture of the complainant's circumstances. I have explained the work that was required, and my evaluation of the work performed. The application should have involved a small number of hours. More realistically, the complainant should have been told frankly that his immigration prospects were poor, if there was to be any realistic hope of success his claims of adviser error needed investigation and he needed to prepare to leave New Zealand voluntarily. His readiness to

¹ *Loh v Immigration Advisers Complaints and Disciplinary Tribunal* [2014] NZHC 1166.

leave voluntarily would have assisted the claim that he was seeking to put his immigration status in order, despite extended non-compliance.

- [38] The Tribunal will readily accept costs that are fair and reasonable, which may be at a high rate. However, costs are not fair and reasonable unless the client has provided informed consent. A client may agree to extensive work with a limited expectation of success, but they must understand what they are agreeing to and not have their vulnerability exploited. There is nothing to suggest Ms Gu-Chang informed the complainant his case was almost inevitably hopeless, or that her practice performed effective and well directed work for him. Indeed, in response to the complaint Ms Gu-Chang has contended the prospects of success were high. She referred to other cases that have been successful, but failed to establish the circumstances of those cases were similar to the complainant's case.
- [39] The initial interview with the complainant would be important (and potentially take some time due to communication issues). Getting the complainant's immigration history would be necessary, as would ensuring supporting documents were available. The preparation of the application should not have been lengthy; the critical part of the work actually performed was a two and a half page letter, much of which was irrelevant narrative and of a low standard.
- [40] Ms Gu-Chang claims initial discussions took over 11 hours that was before starting to prepare the application, and the subsequent stages also occupied many hours of work. The time claimed is simply not consistent with a competent licensed immigration adviser practising effectively. I am satisfied the charge was grossly excessive. That is so both in relation to what could have been reasonably contemplated when the fees were set, and in relation to the value of the work actually performed. Accordingly I am satisfied Ms Gu-Chang set fees that were not fair and reasonable.

Decision

- [41] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [42] The adviser breached the Code in the respects identified.

Submissions on Sanctions

- [43] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [44] 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.
- [45] The Tribunal puts Ms Gu-Chang on notice it will consider ordering that she repay the fees of \$12,880 and \$3,000 in full. That is on the basis the fees were excessive and she provided no services of value as the failure of the application was foreseeable and the complainant had no notice of that. Further, Ms Gu-Chang procured the \$3,000 as a disbursement for which she is accountable. The Tribunal requests that she respond to this indication.
- [46] 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

- [47] The timetable for submissions will be as follows:
- [47.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [47.2] 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.

[47.3] 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 29th day of August 2014

G D Pearson
Chair