

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

Decision No: [2015] NZIACDT 82

Reference No: IACDT 39/14, 32/14,
50/14, 01/15, 05/15

IN THE MATTER

of an application in respect of section 27
of the Lawyers and Conveyancers Act
2006, made under section 49 of the
Immigration Advisers Licensing Act 2007

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Five Complainants

Complainants

AND

Mayank Kumar

Adviser

THE NAMES OF THE COMPLAINANTS ARE NOT TO BE PUBLISHED

DECISION

ON AN APPLICATION REGARDING REPRESENTATION

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, MBIE, Auckland.

Complainants: Unrepresented on this issue.

Adviser: Ms J Shadforth, agent, Immigration Law Advocates, Rangiora.

Date Issued: 17 August 2015

DECISION

The issue

- [1] Mr Kumar faces five complaints. The Tribunal has upheld three of the complaints, but has not yet imposed sanctions in any of them; Mr Kumar has applied for rehearing of each of these cases. The other two complaints have not yet been heard. Up to this point, Mr Kumar has been self-represented. Some of the complaints are serious and Mr Kumar could potentially have his immigration adviser's licence cancelled.
- [2] Mr Kumar engaged Ms Jacinta (Jay) Sascha Maria Shadforth, who is a licensed immigration adviser, to represent him. However, the Tribunal pointed out Ms Shadforth would commit a criminal offence under section 24 of the Lawyers and Conveyancers Act 2006 (the Act) if she did so without the Tribunal's permission.
- [3] Accordingly, the Tribunal issued directions giving Mr Kumar the opportunity to apply to have Ms Shadforth represent him. The direction was issued pursuant to section 49(4) of the Immigration Advisers Licensing Act 2007, and requested:
- [3.1] Mr Kumar attend the hearing to explain his reasons for seeking to have an unqualified person represent him rather than counsel; and
- [3.2] Ms Shadforth attend the hearing, confirm the details of her qualifications and experience to represent Mr Kumar, and explain:
- [3.2.1] The reasons why the Tribunal should allow her to represent Mr Kumar rather than have him instruct counsel; and
- [3.2.2] Whether the Tribunal can be satisfied the ethical duties imposed on counsel in advocacy will be observed, and are enforceable if the Tribunal does allow her to represent Mr Kumar; and
- [3.2.3] How the Tribunal can be satisfied that she has the skills and experience to deal competently as a representative in professional disciplinary proceedings, including lodging and advancing an application for a rehearing.
- [4] Mr Kumar and Ms Shadforth appeared before the Tribunal in accordance with the directions. This decision deals with whether the Tribunal will allow Ms Shadforth to represent Mr Kumar. Ms Shadforth explained that she proposes to offer advocacy services to licensed immigration advisers facing complaints before this Tribunal, on a fee-paying basis. However, this direction only relates to Mr Kumar and the five complaints to which this application applies.

The law

- [5] Counsel for the Registrar provided submissions on the relevant legal framework for considering representation before the Tribunal. Ms Shadforth did not engage in a review of the legal issues, beyond advancing an unfocused argument that allowing unqualified advocates in the courts and tribunals enhances access to justice; and that is the intention of Parliament.
- [6] The key principles advanced by the Registrar are:
- [6.1] The Lawyers and Conveyancers Act 2006 prevents a person other than a lawyer representing a party before this Tribunal; subject to the Tribunal allowing that person to do so.
- [6.2] A lawyer for this purpose is a person holding a current practising certificate as a barrister; or barrister and solicitor (section 6 of the Lawyers and Conveyancers Act 2006).
- [6.3] The Lawyers and Conveyancers Act 2006 provides that the giving of legal advice to any person in relation to the direction or management of any proceedings before any New Zealand court or New Zealand tribunal, or appearing as an advocate before them are defined as "reserved areas of work" (section 6). Section 24 provides it is an offence for an unqualified person to carry out any reserved area of work.

- [6.4] Section 27 of the Lawyers and Conveyancers Act 2006 allows an unqualified advocate to represent another person if either the Act or another piece of legislation permits that, or the court or tribunal allows them to do so.
- [6.5] The Immigration Advisers Licensing Act 2007, which established this Tribunal, does not allow unqualified advocates and nothing in that Act, or elsewhere, allows a licensed immigration adviser to represent another licensed immigration adviser.
- [6.6] In this case, Mr Kumar faces serious complaints; he is potentially subject to severe sanctions which may have considerable consequences for him. Mr Kumar requires an advocate to give legal advice and representation for what are in essence trial proceedings before the Tribunal. The critical skills involve leading evidence, cross-examination, submissions on legal process and objectively advising Mr Kumar.
- [6.7] This is an application for Ms Shadforth to represent Mr Kumar, and ultimately the interests of justice are the governing principle for the exercise of the Tribunal's discretion. In *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [41], Priestly J pointed out an immigration adviser contesting serious aspects of a complaint would be foolish not to take legal advice.
- [6.8] Ms Shadforth's status as a licensed immigration adviser does not provide proper redress if she fails to conduct Mr Kumar's defence to the standards required of counsel. Potentially some misconduct could be addressed by the complaints process before this Tribunal (*Re: A complaint by Michael John Bell* [2014] IACDT 115), but the disciplinary process for licensed immigration advisers is not designed to deal with complaints regarding advisers acting as advocates before this Tribunal.
- [6.9] The principles the Court of Appeal has applied in *Re: GJ Mannix Ltd* [1984] 1 NZLR 309, and *CIR v Chesterfields Preschools Ltd* [2013] NZCA 53 are relevant to the Tribunal's exercise of its discretion in this case. The Court of Appeal emphasised granting leave for unqualified advocates should generally be in exceptional situations. The skills barristers have, and the ethical framework they are required to understand and apply (enforced by a disciplinary regime), are key qualifications for advocates dealing with matters of importance and complexity. In the *Chesterfields Preschools Ltd* case the Court of Appeal examined the actual skills the proposed advocated had. He had been admitted as a lawyer with post-graduate qualifications, and had practised law. However, he did not hold a current practicing certificate and did not have the skills necessary to deal with the substantive hearing. The court had regard to those matters, and required that a suitably qualified lawyer conduct case at trial.
- [7] I also note that ensuring a licensed immigration adviser has a fair hearing before this Tribunal has a particular importance. While there is a right of appeal against the sanctions imposed, there is no right of appeal against the Tribunal's substantive decision (*ZW v Immigration Advisers Authority* [2012] NZHC 1069). The only likely remedy is judicial review, which is a costly form of redress. It is most important that a licensed immigration adviser presents their case effectively, and that the Tribunal is vigilant to ensure a licensed immigration adviser has the opportunity of doing so.

Ms Shadforth's qualifications and experience, and their relevance

- [8] Ms Shadforth is a licensed immigration adviser. However, she does not hold a tertiary diploma or degree. She did not complete the tertiary qualifications for her profession; she gained entry because of practical experience before the tertiary qualifications were available. She has completed a few papers at a tertiary level in social science, immigration and law.
- [9] Expertise in practice standards is not necessary to represent a licensed immigration adviser answering a complaint before this Tribunal. This Tribunal, like other professional disciplinary tribunals, will hear evidence on accepted standards. The Tribunal cannot use an advocate's submissions as evidence. Accordingly, Ms Shadforth's experience as a licensed immigration adviser no more equips her to appear in the role normally reserved to lawyers before this tribunal than being a nurse, chartered accountant, physiotherapist, or optometrist does in respect of their respective professional disciplinary tribunals. Typically, counsel appearing before professional disciplinary tribunals will have a number of years of post-qualification experience in litigation, and will have undergone a mentored learning process to develop skills

as counsel. Essential qualities are an ability to deal with written and oral evidence, and legal submissions. Additionally, in professional disciplinary work, providing advice to a client on pleading, mitigation, and remediation are often critical. Providing advice of that kind, effectively, will almost invariably require significant experience as an advocate. Where a client's ability to earn a living in their profession is in issue, a great deal is at stake.

- [10] The Tribunal gave Ms Shadforth the opportunity to establish that, notwithstanding her absence of qualifications, she does have the skills required to be an advocate for Mr Kumar. She contends she has ample experience and skill to take on the role of counsel in an oral hearing before this Tribunal. She points to having worked in a law office as an unqualified clerk, and completing three law papers at university.
- [11] Her work in the law firm was confined to the firm's immigration practice. In this role, she appeared as an advocate on at least two occasions before the Refugee Status Appeals Authority in 1999 and 2000. This was prior to the Immigration and Protection Tribunal taking over that jurisdiction. The Tribunal was an exceptional body, as virtually all of its hearings were under a truly inquisitorial model. Only the appellant appears, and the Tribunal will (at length) orally examine the applicant and any witnesses. The key advocacy in that jurisdiction was in written form, though presented at the oral hearing.
- [12] Ms Shadforth did not undertake any work in the law firm as a clerk assisting with civil or criminal litigation outside of immigration work. She did not qualify as a legal executive.
- [13] Ms Shadforth does have some experience representing clients before the Immigration and Protection Tribunal, and the previous tribunals that exercised that jurisdiction. However, most of those matters involve written submissions, which together with the file relating to the decision in issue comprise the material for making the decision. Distinctions between submissions and evidence are not usually critical in that forum.
- [14] Ms Shadforth has only a very small part of the academic training required to qualify as a lawyer. She has no experience in representing a professional person facing serious issues before a professional disciplinary tribunal. Ms Shadforth appears not to have the training or qualifications which would enable her to represent Mr Kumar competently. However, the Tribunal has also had the opportunity of assessing whether Ms Shadforth does, as she claims, have the required skills.

Ms Shadforth's ability to conduct proceedings before the Tribunal

- [15] Ms Shadforth said she is experienced, effectively, in the role of counsel at oral hearings. Accordingly, the Tribunal allowed her to present the application for leave to appear as Mr Kumar's representative. It was an oral hearing where Mr Kumar and Ms Shadforth gave evidence.
- [16] Ms Shadforth had no more ability to present this application than the typical self-represented person would have; she lacked the essential skills required of counsel at a hearing. Examples of elementary deficiencies were failing to serve her papers on the Registrar, and not bringing additional copies of documents she used at the hearing. When invited to present opening submissions, she presented evidence, expert evidence, and submissions in an intertwined address. She gave opinion evidence without qualifying herself. She did not appear to recognise the incongruity of an advocate giving opinion evidence, or evidence at all, or the further inappropriateness of doing so in the course of making submissions.
- [17] Ms Shadforth did not have the skills to lead evidence, cross-examine, and re-examine a witness. During the application it was evident Ms Shadforth did not understand what comprised a leading question, the essential concepts of relevance, the obligation to put issues to a witness, or what amounts to proof. She did not understand the rules of evidence; though these are relaxed in the Tribunal's hearings, it is necessary to understand at least the essential principles as they affect weight.
- [18] If Ms Shadforth represented a licensed immigration adviser facing serious allegations, it appears she would bring the level of knowledge and skill she applied to this application. She would not have the skill to adduce or challenge evidence effectively; that in itself is an insurmountable barrier to competently representing a licensed immigration adviser.

- [19] Ms Shadforth also lacked knowledge of both the law and how to ascertain what the law is. She failed to address the legal principles that apply to this application and had fundamental misconceptions, such as believing the District Courts Rules govern this Tribunal and evidential issues. While Ms Shadforth has passed a small number of law papers, she is many years of study short of what is required to qualify as a lawyer.

Integrity issues

- [20] Unfortunately, in the course of the application presented to the Tribunal, the observations of the Court of Appeal in the *GJ Mannix Ltd* case regarding the essential quality of integrity in advocates came into sharp focus. An advocate must observe the rules of the legal profession, which includes an overriding duty to the Court and the public. Among those rules is a strict obligation not to mislead the court or tribunal.

- [21] To advance the case that she has the skills to replace a lawyer as Mr Kumar's representative, Ms Shadforth produced a CV. She knew it was delivered to the Tribunal for that purpose. One of the significant pieces of information provided was the following, presented as a quote from *Refugee Appeal No.71564/99* [1999] NZRSAA 264 (14 October 1999):

The Authority was especially assisted by the very comprehensive and detailed oral and written submissions made by Ms Jay Shadforth. They were of an extremely high standard and it is right that the Authority records the considerable assistance it received by [her] highly professional and thorough presentations.

- [22] However, the quote is not what the decision said. In the decision, immediately after the word "Shadforth" it reads "and Mr Mark Williams".

- [23] When questioned about the discrepancy, Ms Shadforth admitted she intentionally altered the quote. She also admitted Mr Williams was a qualified lawyer who appeared at the hearing. The Tribunal put her on notice of the potential finding that inevitably follows.

- [24] Ms Shadforth claimed Mr Williams was a subordinate she was training, and that justified her altering what the Tribunal said. However, she also accepted that at the time she was an unqualified clerk in her twenties. Regardless, Ms Shadforth was purporting to present what the Tribunal said, not what she thought the Tribunal should have said.

- [25] Altering the quote was for the purpose of giving the appearance that the Refugee Status Appeal Authority made its comments in respect of Ms Shadforth alone. The truth was that the comments related to her and a qualified lawyer appearing at the hearing, and she misquoted the passage to hide that fact. Ms Shadforth altered the passage for the purpose of misleading this Tribunal regarding what the Refugee Status Appeal Authority said.

- [26] There is no place for conduct of this kind in any court or tribunal in New Zealand. If Ms Shadforth did not understand the magnitude of misrepresenting what a Tribunal said about her, that demonstrates her inability to meet the standards required of counsel and could have serious consequences for anyone she represents.

- [27] Furthermore, it became evident Ms Shadforth also misled the Refugee Status Appeal Authority. The report of the decision identified Ms Shadforth as counsel. The word "counsel" has always signified that a person is qualified as, and appearing as, a barrister. Ms Shadforth admitted she signed and presented documents to the Authority as "counsel", and said she had legal advice she was entitled to do so, as an unqualified clerk. Whatever advice she had, it was wrong to represent she was a barrister, and she misled the Refugee Status Appeal Authority by doing so.

- [28] Ms Shadforth has never studied legal ethics, never had the mentored experience required of a lawyer to practise on her own account as an advocate; it is evident that either she does not understand what those ethical obligations are or chooses not to comply with them.

Discussion

- [29] It is not appropriate to endeavour to set down a universal set of principles as to when this Tribunal will allow an unqualified person to represent a licensed immigration adviser. Each case will be determined on its merits. There may be quite different considerations relating to

the representation of a complainant where the complainant may have less at stake, or a case where an adviser is dealing with a minor complaint. There may also be different considerations applying to a simple written submission rather than those for a more complex matter. Exceptional and urgent situations may arise.

- [30] However, this present application concerns serious complaints. Some involve rehearing applications (where Mr Kumar will have to advance a case for the rehearing) and at least for the rehearing applications, and potentially other matters, oral hearings are likely. Ms Shadforth proposes to appear as a paid advocate. I assess this application against that background.
- [31] There was only one principle Ms Shadforth advanced in relation to how the Tribunal should exercise its discretion. She advanced a general argument that legislation increasingly allowed unqualified advocates, and that increased access to justice. Ms Shadforth did not explain how her claim that the legislative direction was toward unqualified advocates can be reconciled with the extension to reserved areas of work in the Lawyers and Conveyancers Act 2006. It is more restrictive than earlier Acts. Nor did she address the fact that this Tribunal is not one where persons come to it seeking a licence or other discretionary relief, where minimal formality makes the process easier.
- [32] Licensed immigration advisers facing complaints are effectively charged with professional offending, and the Tribunal decides whether allegations against them are made out. If made out, the Tribunal may impose sanctions, which can include a financial penalty of up to \$10,000, compensation without monetary limit and removing, or limiting, the adviser's right to earn a livelihood by practising their profession. Ms Shadforth's submission, that enhanced access to justice is achieved by allowing unqualified persons to take the role of counsel before the Tribunal, is misconceived. Justice is accessed by competent representation of persons responding to complaints.
- [33] The starting point is the default legislative position:
- [33.1] As of right, a party before the Tribunal can represent themselves.
- [33.2] Parties are also entitled to have any lawyer holding a current practising certificate appear for them.
- [34] Other representation requires this Tribunal to exercise its discretion. Some tribunals are constituted under legislation that allows unqualified advocates. This tribunal is not one of them, due to the nature of the matters it decides, and the processes appropriate to decide those matters.
- [35] I accept the Registrar's submission that the overriding consideration, when deciding whether to allow Ms Shadforth to represent Mr Kumar, is the interests of justice; the submission contended there are two elements:
- [35.1] The interests of the parties, particularly Mr Kumar, in having the best possible representation; and
- [35.2] The interest of the Tribunal in protecting its statutory duties, judicial functions, and effective and efficient discharge of its duties and powers.
- [36] I give weight to Mr Kumar's personal wishes. He was plainly concerned that Ms Shadforth should represent him. While Ms Shadforth would charge less than a lawyer, he said the cost was not a deciding factor. I noted he could potentially apply for legal aid if it were an issue. I also pointed out that there were potential issues arising from communications with Ms Shadforth not being subject to legal professional privilege. He remained satisfied his interests would lie with representation by Ms Shadforth. In essence, his reasoning was that a licensed immigration adviser would understand his professional practice in a way a lawyer would not understand. Accordingly, he was confident Ms Shadforth would present his case more effectively.
- [37] While I do give weight to Mr Kumar's wishes, I was left in no doubt that he had no real appreciation of the issues and, importantly, how essential it was that he presents a cogent case for the Tribunal to grant rehearing on the three already decided complaints. Unless the Tribunal has evidence to establish that there should be a rehearing, it cannot order a

rehearing. These complaints go to Mr Kumar's professional future. I do not consider Mr Kumar's perspective is an informed one. Regardless, other factors are determinative in this case.

- [38] I am left in no doubt Ms Shadforth is not capable of effectively representing Mr Kumar in relation to the matters before the Tribunal, and lacks the skills to do so. She does not know how to conduct a hearing before a professional disciplinary tribunal.
- [39] Accordingly, I am satisfied that it is not in Mr Kumar's interests to allow Ms Shadforth to represent him. If Mr Kumar has a case to advance, Ms Shadforth does not have the skills to present it.
- [40] I give the interests of the complainants and the Registrar limited weight. The extent of their interests in Mr Kumar's representation more properly lie with the matters the Tribunal must consider in terms of its own processes, particularly the efficient and honest conduct of the process.
- [41] In terms of the Tribunal's processes, I agree with Mr Dumbleton's submissions. I accept his submission that the principles that apply when granting leave to an unqualified person to represent another person are of general application. In the present case, there is potentially a particular imperative to scrutinise the application. Ms Shadforth intends to create a business of representing licensed immigration advisers before this Tribunal. This Tribunal, in granting leave, ought to be satisfied a case has been made out; the application is in effect to allow Ms Shadforth to offer professional services to the public. It is inevitable the Tribunal will signal Ms Shadforth can competently perform that role if it does allow this application and any future applications.
- [42] In my view the principles the Court of Appeal said should apply in *Re GJ Mannix Ltd* [1984] 1 NZLR 309 apply to this application in full measure. In that case, the court was considering a company, which could not represent itself, as it was not a natural person. The question was whether non-lawyer directors or officers should have leave to represent the company. Cooke J observed that it was "purely a discretionary power", and "no one has a right to appear as an advocate in any New Zealand Court unless admitted as a barrister and solicitor of the High Court". He referred to admission under the Law Practitioners Act 1982, since that time the Lawyers and Conveyancers Act 2006 has extended the principle to tribunals. He went on to note the discretion should be "a reserve or occasional expedient, for use primarily in emergency situations when counsel is not available", or in simple matters. The observation is not consistent with allowing Ms Shadforth to offer fee-paying clients advocacy services or with allowing Ms Shadforth to appear in a matter she lacks the skills to deal with.
- [43] In the *G J Mannix* case Cooke J said:
- "The reason for the rule ... is that it secures that the Court will be served by barristers or advocates who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy followed in presenting arguments to the court. (p.311)
- [44] Somers J said:
- The dispensing of justice according to the law calls for an understanding of the law and a dispassionate consideration of the circumstances. The barrister has the duty to advance his clients' case fully and fearlessly and is equipped by training with the skills necessary to do that. But even more importantly he has an overriding duty to the Court and to the public and, what is essentially the same thing, to the standards of the profession. (p.215)
- [45] I now apply those principles to this application.
- [46] Potentially, as an advocate before this Tribunal, Ms Shadforth is bound in some respects by the disciplinary code governing licensed immigration advisers. It is unnecessary to explore fully the extent to which the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code) applies to a licensed immigration adviser acting as an advocate before the Tribunal. It is sufficient to observe that, if it does apply, it prohibits Ms Shadforth appearing for Mr Kumar. Clause 8 of the Code requires a licensed immigration adviser to "work within the scope of their individual knowledge and skills". For the reasons discussed, appearing for Mr Kumar and

presenting a case for him is not within Ms Shadforth's knowledge and skills. This Tribunal cannot sanction Ms Shadforth breaching the Code.

- [47] Significantly, I have found Ms Shadforth attempted to mislead this Tribunal in the course of applying to appear as an advocate. That in itself is sufficient to determine I must decline this application. It is a very clear demonstration of the concerns expressed by both Cooke and Somers JJ. It is not in Mr Kumar's interests, the interests of other parties, or in the public interest, which this Tribunal must protect, to allow an unqualified advocate who has attempted to mislead the Tribunal to continue to represent Mr Kumar.
- [48] Ms Shadforth is not sufficiently familiar with the methods and scope of advocacy to deal with the complaints Mr Kumar faces before this Tribunal; she does not have the legal knowledge, research and reasoning skills, and she does not have the ability to advance and contest factual issues in the manner required.
- [49] Ms Shadforth also lacks the professional experience to undertake "a dispassionate consideration of the circumstances"; an essential skill for an advocate in a professional disciplinary matter. Only by considering an amalgam of the objective facts giving rise to the complaint, the licensed immigration adviser's personal circumstances, issues of proof, the relevant legal framework and restorative measures, can sound advice be given. Skilled counsel dealing with professional disciplinary matters often shape the potential for a favourable outcome. An imprudent response may leave the Tribunal with few constructive options. Priestly J in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 observed:

Unfortunately for the appellant, possibly because he was acting for himself, he made no attempt to express contrition. Nor did he produce to either the Tribunal or the District Court any information about the nature of his work, how he might be able to accommodate concerns in the short term, or other traditional mitigating factors. Instead he tried unsuccessfully to deny any capability. In that situation there is no basis on which to interfere with the Tribunal's stern sanctions.

- [50] The issues raised by Priestly J are the sort of matters an experienced lawyer will address after "a dispassionate consideration of the circumstances". Developing an optimal response requires legal skill, experience and judgement; which Ms Shadforth does not have.
- [51] Accordingly, I am satisfied it would be wrong to allow Ms Shadforth to represent Mr Kumar for the reasons discussed.

Decision

- [52] The Tribunal declines Mr Kumar's application to have Ms Shadforth represent him.
- [53] The Tribunal will issue timetables in each of the individual complaints.

Publication of names of complainants

- [54] The names of the complainants have not been set out in this decision to preserve confidentiality. This decision is not to be published with the name or identifying details of any complainant. Any issues relating to publication of the names of complainants in relation to the substantive complaints will be addressed in respect of the individual complaints. This direction only concerns the present decision.

DATED at WELLINGTON this 17th day of August 2015

G D Pearson