

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

Decision No: [2016] NZIACDT 63

Reference No: IACDT 009/15

**IN THE MATTER** of a referral under s 48 of the Immigration  
Advisers Licensing Act 2007

**BY** **The Registrar of Immigration Advisers**  
Registrar

**BETWEEN** **Haodong (Danny) Peng**  
Complainant

**AND** **Wei-Xiang Shawn (Shawn) Tan**  
Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person

**Complainant:** In person

**Adviser:** In person

Date Issued: 29 September 2016

## DECISION

### Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The allegations founding the complaint are that in the course of providing immigration services as a licensed immigration adviser Mr Tan:
- [1.1] failed to complete the client engagement process in accordance with the Code of Conduct; and
- [1.2] failed to notify his clients of the outcome of their request for visas.
- [2] Mr Tan accepted the grounds of complaint, but provided further information regarding the circumstances. Accordingly, the Tribunal upheld both grounds of complaint.

### The complaint

- [3] The background narrative relating to the complaint is that as from February 2011, Mr Tan provided immigration services to Mr Peng in respect of him seeking visas for his parents.
- [4] Mr Peng and his parents dealt with Mr Tan, but also with his assistant Mr Feng. Ms Aasa; a colleague of Mr Tan, corresponded with Immigration New Zealand regarding Mr Peng's parents, but they did not meet with her. She was a licensed immigration adviser.
- [5] On 9 August 2011, Mr Tan received his licence as an immigration adviser. On 12 August, Ms Aasa submitted visa requests to Immigration New Zealand for Mr Peng's parents. On 6 September 2012, Immigration New Zealand refused the requests.
- [6] The following year, 2012, Mr Peng called Mr Tan's office, and Mr Feng told him Immigration New Zealand refused his parents' request.
- [7] The Registrar's investigation reduced the grounds of complaint from including dishonest or misleading behaviour to two allegations. The first aspect of the complaint is:
- [7.1] An alleged breach of clauses 1.5(a), (b) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
- [7.2] Those provisions relate to the requirement to commence a professional relationship with a written agreement meeting particular requirements.
- [7.3] In short, the Registrar alleges that Mr Tan did not comply with the requirements at all, as he had no written agreement.
- [8] The second aspect of the complaint is:
- [8.1] An alleged breach of clause 3(a) of the 2010 Code, which requires that a licensed immigration adviser must maintain professional business practices relating to finances,

records, documents, contracts and staff management, including confirming in writing to clients when applications have been lodged, with timely updates.

[8.2] Mr Tan failed to inform Mr Peng or his parents when Immigration New Zealand declined the visa request.

## **The responses**

### ***Mr Peng***

[9] Mr Peng generally supported the Registrar's statement of complaint and the grounds. Mr Peng did not seek to widen the elements of the 2010 Code or pursue other grounds under section 44(2) of the Immigration Advisers Licensing Act 2007.

### ***Mr Tan***

[10] Mr Tan's initial response to the complaint was, in significant part, to challenge the way the Registrar has investigated the complaint, and criticise Mr Peng. He did admit to not having a written agreement.

[11] Accordingly, the Tribunal requested Mr Tan, pursuant to section 49(4)(a) to file an affidavit setting out,:

[11.1] whether he had anything to say in justification or excuse regarding not having a written agreement;

[11.2] evidence of notifying Mr Peng and his parents that Immigration New Zealand declined the visa requests on 6 September 2011; and

[11.3] any other relevant evidence.

[12] When he responded, Mr Tan:

[12.1] Confirmed he did not have a written agreement, and claimed it was unintentional and overlooked due to busyness.

[12.2] He claimed that he told Mr Feng; an unlicensed person in his office, to inform Mr Peng and his parents that Immigration New Zealand declined the requests, and believed Mr Feng had done so. He referred to a statutory declaration from Mr Feng saying he had informed the complainants of Immigration New Zealand declining the visas.

[12.3] He admitted he did not follow up with written notification to Mr Peng and his parents.

### ***Mr Peng's reply***

[13] Mr Peng said he had no contact with Ms Aasa, and that Mr Feng was an interpreter and he did not inform them that Immigration New Zealand declined the visa requests.

## Discussion

### *The issues*

[14] It is important to focus on the specific grounds of complaint the Registrar raised. The Registrar's narrative implies that Mr Tan provided immigration services unlawfully, in breach of sections 6 and 63 of the Immigration Advisers Licensing Act 2007 (the Act). However, the Tribunal has no jurisdiction over that matter; accordingly, it will not take account of that part of the narrative. It also appears that Ms Aasa provided services, without holding authority from Mr Peng or his parents, in breach of clause 2(h) of the 2010 Code. Again, it is not relevant to the scope of the statement of complaint.

[15] The grounds of complaint focus on what Mr Tan did while he was a licensed immigration adviser, the role of others is relevant only to the extent Mr Tan was responsible for their conduct.

[16] The only matters to determine are the two grounds of complaint identified by the Registrar:

[16.1] Failure to complete have a written agreement and the related client engagement processes; and

[16.2] Failure to notify clients of the outcome of their request for visas.

### *The standard of proof*

[17] The Tribunal determines 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 facts*

[18] The Registrar provided a chronology and supporting documentation; Mr Tan has not generally challenged the information. Mr Tan admits he failed to comply with the client engagement process, and particularly, that he failed to have a written agreement for the provision of professional services.

[19] In respect of the second ground, the requirement under clause 3(a) of the 2010 Code is that a licensed immigration adviser is obliged to provide "confirmation in writing" with timely updates. Mr Tan says he told Mr Feng, an unlicensed person in his office to inform his clients when Immigration New Zealand declined their request. Mr Feng swore a statutory declaration saying he did so, but he did not say that it was in writing; Mr Tan admits he failed to follow up.

[20] In the absence of an oral hearing to test the evidence, I find on the balance of probabilities on the material before me:

[20.1] Mr Tan told Mr Feng to inform Mr Peng that Immigration New Zealand declined the requests;

[20.2] Mr Feng told Mr Peng, but that communication was not understood by Mr Peng (the papers suggest there were communication issues as Mr Peng did not have English as a first language); and

[20.3] Mr Tan did not provide any written notice regarding the outcome of the request.

***Failure to comply with the client engagement process***

[21] Mr Tan admits he did not have a written agreement. The 2010 Code is prescriptive regarding the client engagement process. Mr Tan could not become a licensed immigration adviser without demonstrating he understood that process; for every client engagement, he had to complete the process. The process is both to protect him, and his clients. When he received a licence, he had an obligation to ensure he had an agreement in writing, even if he provided services before he held a licence.

[22] One of the very important elements in the client engagement process is that the licensed immigration adviser must obtain informed instructions, and the adviser must record them in the agreement. That requires an evaluation of the available immigration options, and the benefits and risks of the potential choices. Then the adviser must then record the scope of work, and terms of engagement in writing.

[23] As Mr Tan had no agreement, he breached clauses 1.5(a), (b) and (d) of the 2010 Code:

[23.1] He failed to make his clients aware in writing and in plain language of the terms of the agreement and all significant matters relating to it;

[23.2] He did not have an agreement with a full description of his services; and

[23.3] His clients did not confirm in writing that they accepted the terms of an agreement.

[24] Mr Tan's excuse that busyness precluded him attending to his professional obligations aggravates rather than mitigates his failure to maintain minimum professional standards. His client relied on him; it is no justification or excuse to say he had time to accept the instructions but not enough time to comply with his professional obligations.

***Failure to notify of the outcome***

[25] I considered requesting that Mr Tan and Mr Feng attend before the Tribunal. The evidence they provided is contestable, and potentially inconsistent with what Mr Peng says. However, the issues only go to degree. This complaint is one of a series that the Tribunal has upheld in relation to Mr Tan. In the circumstances, the resources required to resolve this element of the complaint further cannot be justified. It is unlikely to have an effect on any sanctions.

[26] Accordingly, the facts regarding notification are as set out above in paragraph [20]. The failure is that Mr Tan did not follow up to make sure that Mr Peng and his parents had notice that the requests for visas had failed, and Mr Tan did not give notice in writing.

- [27] The requirement to give adequate notice concerns a failed request under section 61 of the Immigration Act 2009. As a minimum, Mr Tan had an obligation to review the request Ms Aasa lodged, evaluate whether it adequately pursued all the options, or whether some other option was open. Then Mr Tan had to explain to Mr Peng's parents that there were options, or that their options were exhausted. That communication would have to include ensuring they understood their obligations to leave New Zealand, and the consequences of not doing so. Mr Feng, as an unlicensed person, could not address these matters. Accordingly, whatever Mr Feng did, at most it could be an interim step. Professional business practices would include a written communication. Clause 3(f) of the 2010 Code requires written communication, even if the initial discussion is an oral communication. Mr Tan had an important professional task when his clients' requests failed, and he did not perform it.
- [28] Accordingly, Mr Tan failed to maintain professional business practices in relation to documents and staff management, and did not provide a proper update regarding the outcome of the section 61 request. It follows that I uphold the ground of complaint that Mr Tan breached clause 3(a) of the 2010 Code.

### **Decision**

- [29] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Tan breached the 2010 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [30] In other respects, the Tribunal dismisses the complaint.

### **Submissions on Sanctions**

- [31] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [32] The Registrar and Mr Peng have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Mr Tan is entitled to make submissions and respond to any submissions from the other parties.
- [33] If Mr Peng seeks orders for the refund of fees and compensation, he and Mr Tan should consider that:
- [33.1] sanctions, including compensation and the refund of fees must relate to the Tribunal's findings.
- [33.2] the Tribunal expects Mr Peng to identify any additional costs he or his parents claim as compensation, and provide documentation to support them; Mr Tan should identify whether or not he challenges any of the claims.
- [34] 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.

[35] The parties are free to provide submissions on the approach the Tribunal should take to imposing sanctions; the preceding comments are for guidance only.

**Timetable**

[36] The timetable for submissions will be as follows:

[36.1] The Authority and Mr Peng are to make any submissions within 10 working days of the issue of this decision.

[36.2] Mr Tan is to make any submissions (whether or not the Authority or Mr Peng make submissions) within 15 working days of the issue of this decision.

[36.3] The Authority and Mr Peng may reply to any submissions made by Mr Tan within 5 working days of him filing and serving those submissions.

**DATED** at WELLINGTON this 29<sup>th</sup> day of September 2016.

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**G D Pearson**  
Chair