

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

Decision No: [2018] NZIACDT 47

Reference No: IACDT 010/16

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

BY **The Registrar of
Immigration Advisers**

Registrar

Between **Fan Zhang & Liyuan Cao**

Complainants

AND **Shu Chen**

Adviser

DECISION

REPRESENTATION:

Registrar: Ms T Thompson, lawyer, MBIE, Auckland

Complainants: Ms A Smith/Mr R Kennedy, Cooper Rapley Lawyers,
Palmerston North

Adviser: Mr S Laurent/Mr Turner, lawyers, Laurent Law, Auckland

Date Issued: 16 November 2018

Introduction

Preceding steps

- [1] This complaint has been the subject of an interim decision dated 5 April 2018,¹ and a minute that followed a telephone conference on 14 June 2018. The interim decision should be read with this decision.
- [2] The interim decision evaluated the grounds of complaint and facts, it sought the Registrar's views regarding the grounds of complaint. A telephone conference followed, at that point the Tribunal issued its minute recording the position.

How matters stood after the telephone conference

- [3] After the telephone conference, the Tribunal recorded that:

The live issues

- [3.1] In *Mizoguchi v Immigration Advisers Complaints and Disciplinary Tribunal*, the High Court said:²

... I doubt the Tribunal has power to make decisions on matters (including complaints) about immigration advisers that are **not** referred to the Tribunal by the Registrar under s 48. To the extent the Tribunal, by indicating it could change the grounds of complaint, is to be taken to be expressing a different view, I respectfully disagree.

- [3.2] It appeared, the Tribunal had no capacity to step outside of the specific grounds referred by the Registrar. These were incompetence or a breach of cls 1, 2, 18 and 26 of the Licensed Immigration Advisers Code of Conduct 2014 (Code of Conduct 2014), and a breach of cls 20 and 24 in relation to fees and refunds.
- [3.3] The complainant raised negligence, dishonesty or misleading behaviour as grounds for complaint. These grounds arise under s 44(2) of the Act. Accordingly, they are outside the scope of incompetence, and outside the elements of the Code of Conduct 2014 the Registrar referred to the Tribunal.
- [3.4] The interim decision discussed the evidential issues relating to the complainant's general allegation of systematic dishonesty, and the Registrar's contrary view that the issues arose from incompetence. Following that decision, the Registrar confirmed

¹ *Zhang v Chen* [2018] NZIACDT 11.

² *Mizoguchi v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 3198 at [45].

her view that incompetence is the underlying issue, while recognising on the current facts “dishonesty, misleading and negligence are potential grounds”. She has not undertaken the process that applied in the *Mizoguchi* case of referring additional grounds. Accordingly, they remain potential grounds, which were not referred to the Tribunal.

- [3.5] It accordingly appeared the Tribunal had no jurisdiction to go beyond the grounds the Registrar referred to the Tribunal. This decision would therefore be on the basis stated in the statement of complaint.

The findings the Tribunal expected to make

- [3.6] It appeared there was no justification for any further exploration of facts relating to negligence, dishonesty or misleading behaviour.

- [3.7] The Tribunal had no jurisdiction to find a lack of honesty under cl 1 of the Code of Conduct 2014, as cl 14.1 of the statement of complaint does not particularise that as a ground under cl 1.

- [3.8] For the reasons set out in the interim decision, on the facts before the Tribunal and the grounds of complaint referred to the Tribunal, the Tribunal would uphold the complaint on the basis that:

[3.8.1] the adviser was incompetent in the way she dealt with the complainant and her partner; and

[3.8.2] she also breached cl 20(a) of the Code of Conduct 2014, as she was not entitled to any fees.

- [3.9] However, the Tribunal would not uphold the complaint in relation to cl 24(c) as the adviser’s endeavours to repay the fees negated a potential adverse finding in relation to that provision.

- [3.10] The Tribunal gave all parties the opportunity to respond, the Registrar and the adviser elected not to respond. The complainant did present submissions.

The complainant’s submissions

- [4] The complainant opposed a final decision issuing. The grounds first addressed the scope of the complaint lodged with the Registrar, which included negligence, dishonest and misleading behaviour, and other grounds. The Registrar acknowledged the complaint was made on those grounds, and confirmed it would proceed.

- [5] The complainant contends that the Registrar without statutory authority omitted negligence and dishonest or misleading behaviour as grounds of complaint. The complainant says that the Registrar failed to discharge her statutory function; if grounds were to be omitted, she should have given notice of the right to appeal that decision pursuant to s 45(5) of the Act. The full grounds appeared in the statement of complaint, and the Registrar's failure should not limit the grounds.
- [6] In relation to the decision in *Mizoguchi v Immigration Advisers Complainants and Disciplinary Tribunal*,³ the complainant says:
- [6.1] Paragraph [33] of the decision indicates that unless a complaint is rejected, the whole complaint must be referred.
- [6.2] The decision confirms that any qualifying must be referred.
- [7] If the Authority does not have jurisdiction to amend the grounds of complaint, it should refer the complaint back to the Registrar.

Discussion

This Tribunal will not alter the grounds

- [8] The procedures for disciplinary tribunals vary greatly. In some cases, a "prosecution" authority brings charges analogous to a criminal charge. In this Tribunal, as far as I am aware, the particular process is not replicated precisely in any other disciplinary Tribunal. It is certainly true that typically a disciplinary Tribunal can, subject to adequate notice, amend "charges" and use its inquisitorial powers to investigate matters that may lie outside of the scope of the matters originally brought before the Tribunal.
- [9] For this Tribunal, the *Mizoguchi* decision has considered this Tribunal's processes. The Tribunal is bound by that decision.
- [10] The central argument for the appellant is that the statutory mechanism in s 45 of the Act requires a complaint as a whole to be referred to the Authority. The wording of s 45 and some observations in the *Mizoguchi* case are consistent with that view. However, what the High Court said in [45] of that case in relation to the grounds of complaint is clear. The Court questioned the Tribunal having power to change the grounds of complaint, the matter would have to be referred back to the Registrar to amend the grounds.

³ *Mizoguchi v Immigration Advisers Complainants and Disciplinary Tribunal*, above n 2.

- [11] It is necessary to consider the facts of the *Mizoguchi* case, it concerned a situation where the issue related to expanding the grounds. I accept the observations of the High Court may, strictly speaking, be obiter. The Tribunal had not sought to alter the grounds without referral to the Registrar, and at [45] of the decision is discussing a change of grounds without referral. However, in the absence of compelling logic, or demonstration that something was overlooked, I am not prepared to depart from the view of the High Court.

It is not appropriate to refer the matter back to the Registrar

- [12] In the interim decision, the Tribunal requested that the Registrar review the grounds of complaints. She affirmed the grounds. It is not appropriate to refer the matter back, she has taken a view after the Authority discussed potential findings in its interim decision.
- [13] During this proceeding, the Tribunal has identified it was willing to conduct an oral hearing. In an indication of potential sanctions issued on 20 July 2017, the Tribunal said:

It must be a matter for the parties to determine whether or not they wish to proceed to an oral hearing so that the Tribunal can make findings regarding a perspective other than incompetence, which is the finding that will be made if the matter is dealt with on the papers alone.

- [14] No party sought an oral hearing.
- [15] In these circumstances, I am satisfied it is not appropriate to refer the matter back to the Registrar at this point, there must be finality.

Complaint upheld

- [16] For the reasons expressed in the interim decision, the Tribunal finds:
- [16.1] The adviser was incompetent in the way she dealt with the complainant and her partner;
- [16.2] She also breached cl 20(a) of the Code of Conduct 2014, as she was not entitled to any fees; however,
- [16.3] The complaint is not upheld in relation to cl 24(c) as the adviser's endeavours to repay the fees negated a potential adverse finding in relation to that provision.

Decision

- [17] The Tribunal upholds the complaint pursuant to s 50 of the Act.
- [18] The adviser was incompetent, and breached the Code of Conduct 2014 in the respects identified. These are grounds for complaint pursuant to s 44(2) of the Act.

Submissions on Sanctions

- [19] The Tribunal has upheld the complaint. Therefore, pursuant to s 51 of the Act, it may impose sanctions.
- [20] The parties may provide submissions on sanctions.
- [21] The following timetable will apply:
- [21.1] The Registrar and the complainant may provide submissions on sanctions, within 10 working days of this decision.
- [21.2] The adviser may provide submissions within 15 working days of this decision.

DATED at WELLINGTON Wednesday, 06 March 2019

G D Pearson
Chair