IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 54

Reference No: IACDT 039/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**THE REGISTRAR OF IMMIGRATION ADVISERS** Complainant
AND	**SIEW POH (SHARON) HO** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 31 July 2019

REPRESENTATION:

Registrar/complainant: In person
Adviser: In person

PRELIMINARY

[1] Ms Siew Poh (Sharon) Ho, the adviser, is based in Australia. Her client, [client] was based in Malaysia. The client instructed a Malaysian migration consultancy to obtain residence in New Zealand for her and her family. Ms Ho is a contractor to the consultancy, which largely represents those seeking residence in Australia.

[2] The client was left to deal with staff at the consultancy and had no direct contact with Ms Ho. In due course, an application with Immigration New Zealand was filed in Ms Ho's name.

[3] The Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority), alleges that Ms Ho has breached the Immigration Advisers Licensing Act 2007 (the Act) and the Licensed Immigration Advisers Code of Conduct 2014 (the Code), by permitting unlicensed people to provide immigration services. Ms Ho denies these breaches of the Code.

BACKGROUND

[4] Ms Ho was at the relevant time a licensed immigration adviser working as a contractor to Austral Migration Consultancy Sdn Bhd (the consultancy), a Malaysian company. As a renewal of her licence was refused by the Authority on 26 June 2017, Ms Ho is no longer licensed.

[5] The client approached the consultancy in order to migrate to Australia, but was advised she would not qualify. The client must have been given Ms Ho's name, as on 9 April 2014 she then sent an email to Ms Ho (using the consultancy's email address) enquiring about migrating to New Zealand. Ms Ho says she then spoke to someone at the consultancy about the client's eligibility for New Zealand migration.[1]

[6] There followed a series of emails between the client and (Mr C) of the consultancy in which she provided information about herself, in answer to queries from him. He met her at the consultancy's offices on 10 April 2014. In an email to her that day, Mr C advised that "we feel" she would be eligible to migrate to New Zealand under the general skills migration program. Some general advice was provided to her as to the criteria, the process and its expected duration, as well as the consultancy's fees.

[1] Ms Ho's email to the Authority on 14 April 2017.

[7] A “Cost Agreement” was entered into between the client and the consultancy on 26 April 2014. Mr C signed on behalf of the latter. The consultancy agreed to prepare and file with Immigration New Zealand an application in the skilled migrant category.

[8] On 28 April 2014, Mr C sent an email to the client requesting detailed information covering listed topics for the purpose of her expression of interest application. He advised that “we believe” she met the minimum requirements and had a good chance of being accepted.

[9] The expression of interest was duly filed with Immigration New Zealand. An employee of the consultancy sent an email to the client on 3 July 2014 advising that her expression of interest had been selected, but that Immigration New Zealand would still need to check the accuracy of the documents filed.

[10] On 5 August 2014, Mr C sent the client additional forms to be signed, together with a detailed list of the information and documentation required. Ms Ho was copied in on some of the email communications in August 2014, but did not send any herself.

[11] An employee of the consultancy twice asked the client for further documents on 15 September 2014. The client was given information by the employee on 20 October 2014 concerning her police clearance and the payment of certain expenses. She was advised by the employee on 11 November 2014 of the result of the assessment of her qualifications by the New Zealand Qualifications Authority and of additional fees to pay.

[12] There were further communications in November 2014 between the client and Mr C concerning the documentation and information necessary for the application.

[13] On 17 November 2014, the residence application for the client was filed with Immigration New Zealand. The covering letter and application form were signed by Ms Ho. She was identified on the form as the person providing immigration advice.

[14] Mr C sent an email to the client on 19 March 2015 informing her that Immigration New Zealand required more information. He advised what sort of evidence was needed. Mr C asked the client various questions. He told her that she would need to talk to another employee about one of the items of required information, but she could contact him in relation to the other items.

[15] The client replied to Mr C on 24 March 2015.

[16] The additional documents and information were sent by courier to Immigration New Zealand by an employee of the consultancy on 31 March 2015. Further documents were sent by the employee on 14 May 2015.

[17] As the client did not have an offer of skilled employment in New Zealand, Immigration New Zealand invited her on 21 July 2015 to attend a formal interview by telephone to assess her ability to settle in and contribute to New Zealand. That interview went ahead on 4 August 2015.

[18] There were then further communications between the consultancy (Mr C and the employee) and both Immigration New Zealand and the client. These concerned the revision of the interview transcript and the status of the residence application. There were also internal communications between Mr C and the employee. Ms Ho was copied into some of these emails in July and August 2015, but did not send any herself.

[19] On 12 October 2015, Mr C advised the client that Immigration New Zealand had invited her to apply for a job search visa. The nature of the visa and the impact on her existing application were explained. In reply to a query from the client, Mr C advised her the same day that the visa had not been granted, but only approved in principle. Ms Ho was not a party to any of the communications in October or November 2015.

[20] The client then sent a list of questions to Mr C on 14 October 2015, to which he responded on the following day. She had another question for him on 16 October 2015, to which he replied on 29 October 2015.

[21] The client advised Mr C on 10 November 2015 that she had decided not to proceed with the application.

[22] On the following day, 11 November 2015, Mr C advised the client that the rules had changed since she had applied. As her occupation was no longer on the critical skills shortage list, she would not be able to meet the requirements.

[23] Mr C gave further advice to the client by email on 18 November 2015 as to how to obtain a residence visa for herself and other visas for her husband and child.

[24] The employee advised Immigration New Zealand on 14 December 2015 that the application was withdrawn. The agency wrote to the client, care of the employee, to confirm the withdrawal of the application the same day.

COMPLAINT

[25] On an application by Ms Ho to the Authority to renew her licence, an investigator inspected her file concerning the client. The Authority then wrote to her on 29 March 2017 advising that the inspection had identified concerns regarding her lack of client communication and involvement in the client's application, as well as the involvement of unlicensed individuals in the application. Her submissions were invited.

[26] Ms Ho sent an email to the Authority on 14 April 2017 advising that the client obtained consumer protection under Malaysian law by engaging with the consultancy and not with a registered migration agent. Ms Ho said she had, however, been part of the engagement process. As she was based in Australia, the client first met a representative of the consultancy who spoke to her about her eligibility. Ms Ho made sure that the client was eligible and had sufficient points to apply. She provided instructions to the consultancy in matters such as the assessment of her qualifications. According to Ms Ho, it was her own knowledge that had resulted in the planning of the application and its lodgement.

[27] As the client had been based in Malaysia, she preferred face-to-face meetings with someone there. Ms Ho was made aware of all the communication between the client and the consultancy. She oversaw the entire application and was culturally sensitive to the fact that Malaysians like to deal with individuals they can meet and call at a moment's notice. Ms Ho's colleague, Mr C, an Australian registered migration agent, was effective and had the ability to establish the eligibility criteria from the information which had been gathered.

[28] Ms Ho stressed that the client engaged the consultancy and that the agreement did not make provision for a licensed migration agent to attend to the processing. Ms Ho did not personally deal with the file and the client, but it was the entire office at the consultancy which met the standard of a registered agent. She took note that the Authority wanted the registered agent to be directly involved, so all future applications would be processed to the required standard.

Refusal of licence

[29] A letter was sent to Ms Ho by the former Registrar on 26 June 2017 refusing a renewal of her licence. The Registrar was not satisfied that she met the standards of competence for a full licence. In particular, an adviser was required to represent clients throughout the immigration process. There was no evidence in the file inspected that Ms Ho had assessed the client's immigration situation in a detailed manner. The only

eligibility advice had been provided by unlicensed staff. There was no evidence in the file suggesting that Ms Ho was involved in the planning of the client's application process or had coordinated its preparation.

[30] It was clear from the file that unlicensed colleagues had planned the process, communicated the requirements, coordinated the preparation of the application and then lodged it. Ms Ho had not provided any evidence showing that she had been involved in the application process at all. Nor was there any evidence of communication between Ms Ho and the client throughout the process. It was evident that the staff of the consultancy were the main advisers involved in the client's application process.

[31] It appeared to the Registrar that Ms Ho did not comprehend the requirements of providing immigration advice or the significance of prohibiting unlicensed immigration advice. This raised serious concerns regarding her ability to manage her business in accordance with the Act and the Code.

[32] As for the written agreement with the client, it must contain the name and licence number of the adviser, a full description of the services to be provided, state the fees and set out the refund policy. The written agreement with the client did not include such information. Instead, it listed the details of unlicensed staff members. It was apparent from Ms Ho's response to the Authority's letter of concern that she did not understand the obligations of a licensed immigration adviser.

[33] On 14 September 2017, the Authority formally advised Ms Ho of the complaint and set out the details. Her explanation was invited.

[34] Ms Ho did not respond to the letter of complaint.

[35] The Registrar referred the complaint to the Tribunal on 6 December 2017. It alleges breaches of the Code in the following respects:

(1) by facilitating the provision of immigration advice by unlicensed individuals, Ms Ho may not have acted professionally, in breach of cl 1;

(2) by failing to personally engage with the client in order to obtain her lawful instructions, Ms Ho may have breached cl 2(e);

(3) by facilitating the provision of immigration advice by unlicensed individuals contrary to the Act, Ms Ho may have breached cl 3(c);

(4) by not signing the written agreement when being a party to it, Ms Ho may have breached cl 18(c); and

(5) by not tailoring the written agreement to the client, Ms Ho may have breached cl 19(e).

JURISDICTION AND PROCEDURE

[36] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Act:

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the code of conduct.

[37] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[2]

[38] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[3] It has been established to deal relatively summarily with complaints referred to it.[4]

[39] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.[5]

[40] The sanctions that may be imposed by the Tribunal are set out in the Act.[6] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[7]

[41] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.[8]

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[2] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[3] Section 49(3) & (4).
[4] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[5] Section 50.
[6] Section 51(1).
[7] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[8] *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

[42] The Tribunal has received from the Registrar the statement of complaint, dated 6 December 2017, with supporting documents.

[43] Ms Ho filed a statement of reply, dated 3 January 2018, with supporting documents. Her submissions are considered later.

[44] Ms Ho has produced an undated email from the client, who says she engaged the consultancy and obtained great help. She met them several times during the process. She chose not to proceed with the application but had a good experience with the consultancy. It is noted by the Tribunal that Ms Ho is not mentioned in the email.

[45] Ms Ho does not request an oral hearing.

ASSESSMENT

[46] The Registrar relies on the following provisions of the Code:

> **General**
>
> 1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.
>
> **Client Care**
>
> 2. A licensed immigration adviser must:
>
> …
>
> e. obtain and carry out the informed lawful instructions of the client, and
>
> …
>
> **Legislative requirements**
>
> 3. A licensed immigration adviser must:
>
> …
>
> c. whether in New Zealand or offshore, act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any applicable regulations.
>
> **Written agreements**
>
> 18. A licensed immigration adviser must ensure that:
>
> …
>
> c. all parties to a written agreement sign it, or confirm in writing that they accept it, and

…

19. A licensed immigration adviser must ensure that a written agreement contains:

…

e. a full description of the services to be provided by the adviser, which must be tailored to the individual client.

…

[47] The first, second and third heads of complaint are interconnected and will be dealt with together.

(1) By facilitating the provision of immigration advice by unlicensed individuals, Ms Ho may not have acted professionally, in breach of cl 1

(2) By failing to personally engage with the client in order to obtain her lawful instructions, Ms Ho may have breached cl 2(e)

(3) By facilitating the provision of immigration advice by unlicensed individuals contrary to the Act, Ms Ho may have breached cl 3(c)

General principles

[48] The Tribunal has adversely commented in previous decisions on the practice which developed in the immigration advisory industry of what is known as "rubber stamping".[9]

[49] Typically, this occurs where a licensed immigration adviser uses agents or employees sometimes in another country to recruit the clients, prepare the immigration applications and send them to the licensed adviser to sign off and file with Immigration New Zealand. There is little, if any, direct contact between the licensed adviser and the client.

[50] The practice is illegal. A person commits an offence under the Act if he or she provides "immigration advice" without being licensed or exempt from licensing.[10] A person employing as an immigration adviser another person who is neither licensed nor

[9] *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].
[10] Immigration Advisers Licensing Act 2007, s 63.

exempt also commits an offence.[11] A person may be charged with such an offence even where part or all of the actions occurred outside New Zealand.[12]

[51] The statutory scope of "immigration advice" is very broad:[13]

> **7 What constitutes immigration advice**
>
> (1) In this Act, **immigration advice**—
>
> (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
>
> (b) does not include—
>
> (i) providing information that is publicly available, or that is prepared or made available by the Department; or
>
> (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
>
> (iii) carrying out clerical work, translation or interpreting services, or settlement services.
>
> (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
>
> (a) the Ombudsmen Act 1975; or
>
> (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[52] The words "advise", "advice" and "assist" are not to be given restrictive meanings.[14]

[53] The exclusion from the scope of "immigration advice" potentially relevant here is subs (1)(b)(iii) concerning clerical work, translation or interpretation services.

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[11] Section 68(1).
[12] Sections 8 & 73.
[13] Section 7.
[14] *Yang v Ministry of Business, Innovation and Employment* [2015] NZHC 1307 at [22]–[23]. While the Court was considering s 63(1)(a) of the Act, it is plain it also had in mind the use of the words in s 7(1).

[54] "Clerical work" is narrowly defined in the Act:[15]

> **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[55] In *Immigration New Zealand (Calder) v Ahmed*, the Tribunal set out the principles applicable to distinguishing clerical work from immigration advice.[16]

[56] Persons who are not licensed (or exempt) are permitted to undertake clerical work only. In essence, such a person can do no more than retrieve and then record or organise information, enter data on a computer database or hard copy schedule, or record information on a form or other like document under the direction of another person, who must be a licensed adviser or a person exempt from licensing, or the client.

[57] Activities which do not meet the narrow definition of clerical work but which involve the use of immigration knowledge or experience to advise or assist another person on an immigration matter, "whether directly or indirectly", amount to providing immigration advice. That is the exclusive domain of the licensed adviser.

[58] The obligations set out in the Code are personal to the licensed immigration adviser and cannot be delegated.[17]

Application of general principles to Ms Ho

[59] While Ms Ho in her submissions to the Tribunal denies these breaches of her professional obligations, there is overwhelming evidence, even from her, that these breaches are made out.

[60] It is accepted by Ms Ho that she did not have direct contact with the client. All communications were through the unlicensed staff of the consultancy. Ms Ho was not even an employee of that company. She was a contractor based in another country. It is apparent she had no control over the process.

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[15] Section 5, definition of "clerical work".
[16] *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [55]–[59], [65]–[70].
[17] *Sparks*, above n 4, at [29], [34] & [47].

[61] I do not accept Ms Ho's statement to the Authority that she was made aware of all communications between the client and the consultancy. She was copied into only a limited number of emails. Even then, Ms Ho is not the author of any communication. Nor is she referred to in any of the emails. If she had been active, I would expect Mr C or the employee to have said to the client at some point that the client's query would be put to Ms Ho, or that Ms Ho had advised the author of the answer.

[62] In her email of 14 April 2017 to the Authority, Ms Ho says she spoke to someone in the consultancy about the client's eligibility at the time the client first contacted her. I suspect this is correct, given the client's email to her of 9 April 2014. Aside from this and signing the cover letter and residence application form, there is no evidence at all in the file of any involvement by Ms Ho. Ms Ho has provided no evidence of communications between her and the unlicensed staff in Malaysia showing her active engagement with the client, preparation of the application or its filing with Immigration New Zealand.

[63] Indeed, in her email to the Authority on 14 April 2017, Ms Ho admits not personally dealing with the file or the client.[18]

[64] All the work in communicating with the client, obtaining the information and documents, preparing the expression of interest (the file does not disclose who filed it) and then preparing the residence application, was done by the consultancy's unlicensed staff. The residence application was filed in the name of Ms Ho, but as there is no evidence of her involvement in the file at that time, notably in the internal communications, I find on the balance of probabilities that it was sent to Immigration New Zealand's Shanghai branch by the staff in Malaysia and not by Ms Ho. Her involvement was limited to signing the letter and form prepared by others.

[65] The work of communicating with the client, advising on eligibility, collating the supporting documents, preparing and filing the application falls within the broad statutory definition of immigration advice and is therefore work exclusively reserved for Ms Ho. While she contends that there is no evidence Mr C and the other employees provided advice within the statutory definition, I find that the provision of unlicensed advice is starkly illustrated by Mr C's emails to the client on 28 April and 5 August 2014, and on 19 March, 12 October, 15 October, 11 November and 18 November 2015.

[66] The information provided by Mr C and his advice on eligibility go well beyond what Ms Ho attributes to clerical work and publicly available information. I do not accept that the information given by Mr C or the employee to the client was done as a result of

[18] Registrar's supporting documents at 16.

Ms Ho's direction, apart from the first email of 10 April 2014. Nor did they collate the supporting documents in accordance with her instructions.

[67] Not only are the staff in breach of the Act for carrying out work amounting to immigration advice, but so is Ms Ho in effectively employing them to do so in her name. All the unlicensed immigration work was done in her name. The client would not have instructed the consultancy if the application could not have been filed with Immigration New Zealand. The application could only be filed in the name of Ms Ho, unless the client had done it herself. Ms Ho has therefore facilitated the unlawful conduct of the staff.

[68] Ms Ho has completely misunderstood her obligations under the Code. She contends that the client engaged the consultancy and was not motivated to engage her personally. Furthermore, she says the agreement did not envisage contracting with the adviser, as protection under Malaysian consumer law came with engaging the consultancy.

[69] It may well make sense under Malaysian law for the client to contract with the consultancy, but that is irrelevant to Ms Ho's obligations under the Act and the Code. They are imposed on Ms Ho irrespective of the party with whom the client chooses to contract. Nor is it relevant to her obligations that the client may have been content to deal with the staff of the consultancy.

[70] Both the Code and the Act compel Ms Ho to be personally involved and to control the process, irrespective of the consultancy's contractual obligations to her.

[71] In her submissions to the Tribunal, Ms Ho complains about the Registrar's failure to give her the opportunity to correct her faults under s 44(3)(c) of the Act. That provision only requires the complainant to state whether attempts have been made to resolve the complaint using the adviser's own complaints procedure. The failure to do so is not an impediment to a complaint. In any event, the provision does not apply to a complaint by the Registrar to the Tribunal.

[72] I find that Ms Ho has failed to personally engage with the client in order to obtain her lawful instructions, so is in breach of cl 2(e) of the Code.

[73] As Ms Ho has facilitated the work of the unlicensed staff who provided services amounting to immigration advice and has therefore conducted herself contrary to the Act, she is in breach of cl 3(c) of the Code.

[74] While it adds little to the breaches of cls 2(e) and 3(c), Ms Ho is also in breach of cl 1 of the Code. By facilitating the provision of advice by unlicensed individuals and thereby conducting herself contrary to the Act, she has acted unprofessionally.

(4) By not signing the written agreement when being a party to it, Ms Ho may have breached cl 18(c)

[75] The Registrar alleges that Ms Ho is in breach of cl 18(c) of the Code as she did not sign the client agreement (described as a cost agreement) despite being a party to it.

[76] There is no requirement under the Act or the Code for the adviser to be a party to the agreement or to sign it. It would be best practice for the adviser to sign it, but the Code only requires that the adviser be named and identified by licence number.[19]

[77] This head of complaint is dismissed.

(5) By not tailoring the written agreement to the client, Ms Ho may have breached cl 19(e)

[78] I agree with the Registrar that the agreement, apparently designed for Australian migration, has been inadequately modified for New Zealand. Paragraph 8 of the agreement refers to the "Migration Agents Code of Conduct", an Australian document and not the New Zealand equivalent for licensed immigration advisers, though the latter was in fact provided to the client. One section of the agreement is titled, "Australian Authorities and Disbursements". Many of the mandatory provisions required by the Code to be contained in the agreement are missing.

[79] However, a generally Code compliant agreement is not what cl 19(e) requires. It is quite specific. It requires that a "full description of the services to be provided by the adviser", which must be tailored to the client, is set out. The Registrar does not identify what is missing from the description of the services in this agreement. It certainly specifies an application in New Zealand's skilled migration category. While it does not expressly state that it is a residence application which is to be prepared, that is obvious from the stages of the application and steps to be undertaken by the consultancy which are set out in the agreement.

[80] This head of complaint is dismissed.

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[19] Code of Conduct 2014, cl 19(a).

OUTCOME

[81] I uphold the complaint. Ms Ho is in breach of cls 1, 2(e) and 3(c) of the Code.

SUBMISSIONS ON SANCTIONS

[82] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[83] A timetable is set out below. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

Timetable

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

(1) The Registrar and Ms Ho are to make submissions by **22 August 2019**.

(2) The Registrar and Ms Ho may reply to the submissions of the other party by **5 September 2019.**

ORDER FOR SUPPRESSION

[85] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[20]

[86] There is no public interest in knowing the name of Ms Ho's client or Mr C.

[87] The Tribunal orders that no information identifying the client or Mr C is to be published other than to the parties and Immigration New Zealand.

D J Plunkett
Chair

[20] Immigration Advisers Licensing Act 2007, s 50A.