IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 57

Reference No: IACDT 042/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**LT** Complainant
AND	**SH** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 7 August 2019

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	P Moses, counsel

PRELIMINARY

[1] SH, the adviser, agreed to represent LT, the complainant, following Immigration New Zealand's decline of a visitor visa due to his failure to declare that he had previously been excluded from Australia. [The adviser] sought a character waiver, explaining to the agency that he had represented himself and made a mistake. The visa was declined again.

[2] In making a complaint against [the adviser], the complainant says that he had first been assisted by (Mr V) whom he alleges works as an unlicensed subagent for [the adviser]. She had therefore declined to blame Mr V in her explanation to Immigration New Zealand.

[3] It is alleged by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority), that [the adviser] intended to mislead Immigration New Zealand by misrepresenting who was responsible for the mistake. This would be a breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[4] [The adviser] admits making mistakes in representing the complainant, but denies Mr V is a subagent of hers or that she was told he was responsible for the failure to tell the agency of the complainant's Australian immigration problems.

BACKGROUND

[5] [The adviser] is a licensed immigration adviser based in New Delhi. At the relevant time, she traded under the name [trading name], but is now a director of [company].

[6] On 17 July 2015, the complainant filed with Immigration New Zealand an application for a visitor visa, as the partner of a person who held a student visa in New Zealand. On the application form, the "No" boxes were ticked in answer to the questions whether he had ever been excluded, or refused entry, or refused a visa by any country. The form did not record that anyone had assisted him in completing the form.

[7] An immigration officer telephoned the complainant on 22 July 2015. According to the officer's notes of the discussion, the complainant stated that his temporary residence application to Australia had been declined, but that he had not been excluded from Australia. When asked why he did not declare this, he said that he thought the question on the form only related to New Zealand.

[8] Immigration New Zealand wrote to the complainant on 13 August 2015 advising that he had failed to declare in his application that he had been excluded from Australia. Nor had he declared that he had been refused a student visa in September 2014. According to the immigration officer, in a discussion on 22 July 2015, he confirmed being refused residence, but denied being excluded from Australia. As he had been excluded from Australia, s 15 of the Immigration Act 2009 meant he was ineligible for a temporary class visa. There were two exceptions to that rule, including a special direction authorising the grant of a visa. Immigration New Zealand was therefore not satisfied he met the character requirements for temporary entry. He was invited to seek a character waiver.

[9] The complainant then engaged [the adviser], through Mr V, to assist him. Mr V is an education agent.

[10] On 19 August 2015, [the adviser] sent an email to Mr V:

> I am unable to work in this case as the client has overstayed in Australia. INZ will not approve any such case wherein the applicant has overstayed or has breached his visa conditions in any country as he is not a bona fide temporary resident.
>
> I am sorry I can not take up this case.

[11] Shortly afterwards, Mr V sent an email to [the adviser] pleading with her to assist the complainant. Mr V also telephoned her. On the following day, [the adviser] sent an authorisation letter, through Mr V, for the complainant to sign authorising her to act for him. He duly signed the letter.

[12] [The adviser] then sent an information request to Immigration New Zealand for the complainant's file.

[13] [The adviser] sent the complainant a memorandum of understanding (effectively a service agreement) expressed to have been made on 27 August 2015. The copy provided to the Tribunal shows that the complainant signed it on 28 August 2015, but there is no signature by or on behalf of [the adviser].

[14] On 4 September 2015, the complainant and Mr V met [the adviser]. According to [the adviser]'s notes of the meeting, she found it difficult to talk to the complainant as he did not even seem to understand "normal stuff". She informed him that he had overstayed and had no chance of getting a visa. She asked him why he did not tick the relevant box on the form, but he had no answer. Mr V said that he had not been informed about the visa declines, the removal or the overstaying. The complainant told [the adviser] she should continue to contact his agent, Mr V, only.

[15] On 25 September 2015, [the adviser] sent a letter to Immigration New Zealand responding to the concerns expressed by the agency. The Tribunal has not been sent the final version sent to Immigration New Zealand, but instead the Registrar relies on a draft which appears to have been provided to the Registrar by the complainant.[1]

[16] [The adviser] said in the letter that the complainant was a victim of ignorance and was not sure how to fill out the form correctly. His mistake was that instead of approaching a licensed adviser for help, he tried to do everything on his own. The complainant had not comprehended the significance of ticking the right boxes. He had not hidden his immigration history, as he had submitted his old passports to Immigration New Zealand.

[17] On 27 September 2015, [the adviser]'s fees were paid by Mr V.

[18] Immigration New Zealand declined the complainant's visitor visa on 1 October 2015. As he had been excluded from Australia, he was ineligible for a temporary class visa. A special direction had been considered but had not been granted.

[19] The complainant sent an email to [the adviser] on 6 February 2016 accusing her of taking money from Mr V, of bribing the immigration officer and of cheating him.

[20] [The adviser] replied by email the following day to say she never took undue fees from anyone and giving the complainant her phone number to get "a clear picture". The complainant duly telephoned her that day. A file note of [the adviser]'s recorded that he was "upset, incoherent and abusive".

COMPLAINT

[21] The complaint against [the adviser] was lodged with the Authority by the complainant on 21 April 2017. He stated that Mr V was an unlicensed adviser who had lodged the visitor visa under the complainant's name without informing him. When she applied for a character waiver, she blamed him for not filling out the application properly, but she knew that the application had been lodged by Mr V. As he was an unlicensed adviser, [the adviser] did not mention him. She wanted to keep him safe because he was her subagent. [The adviser] gave false and misleading information to Immigration New Zealand and she and Mr V together spoiled his case.

[22] The Authority formally wrote to [the adviser] advising her of the complaint and inviting her response on 21 September 2017.

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[1] Registrar's supporting documents at 12.

Response to complaint

[23] Counsel for [the adviser], Mr Moses, wrote to the Authority on 7 November 2017. He advised that [the adviser] had been led to believe that the complainant had filed the application for the temporary visa himself and was not aware that Mr V had acted as an unlicensed agent. She explored with the complainant the reasons for withholding the information in the meeting at her office, but was not given any explanation. This led her to conclude that he was ignorant of what needed to be disclosed, resulting in the incorrect information on the application form. This was the basis of her submissions to Immigration New Zealand.

[24] [The adviser] denied being dishonest. She may have made other mistakes but did not act with any lack of probity. She acknowledged not writing to the complainant concerning the futility of his request for a character waiver or special direction and omitting to obtain his written instructions that he wished to proceed. While she had identified the problem in her earliest email to Mr V and had explained it at the office to the complainant, she did not follow the Code by ensuring that it was all documented.

[25] Mr Moses questioned whether the complaint met the threshold for referral to the Tribunal. [The adviser] realised she did not do a good job in representing the complainant and should have maintained her initial response that she could not help him, but she had shown a very mature attitude to her professional obligations in response to the complaint.

[26] [The adviser] recognised inadequacies with her service agreement and in managing the application. She would in the future be more circumspect when engaging with agents like Mr V, so that she did not inadvertently provide cover for an unlicensed person. She was also prepared to refund the complainant's fees and would do so irrespective of the outcome of the complaint.

[27] Counsel provided an affidavit from [the adviser], sworn on 2 November 2017, explaining that she had first received a telephone call from Mr V, an education agent, on 13 August 2015. She then received some documents from him, so replied on 19 August 2015 advising that she was unable to work on the matter because, as a result of the complainant's overstaying, he would not be regarded as a *bona fide* applicant. In his reply email, Mr V asked her to assist the complainant. She also received a telephone call from Mr V asking her to do her best to obtain a visa for the complainant. She was persuaded to assist him.

[28] According to her affidavit, [the adviser] then had a meeting with the complainant and Mr V. She was not surprised that Mr V attended as many Punjabi applicants are unsophisticated people from rural areas, who are often accompanied to the big city by a friend or a former student agent.[2] She was led to believe that the complainant had filed the application himself. [The adviser] asked him why he did not tick the right boxes disclosing his Australian immigration past, but she could not get any answer from him. Perhaps, he was embarrassed and did not want to admit the mistake, or was even deliberately dishonest but did not want to admit that.

[29] [The adviser] said that the complainant did not tell her it was Mr V who had filed the application and therefore failed to disclose his Australian immigration history. Even if he had not wanted to blame Mr V in the latter's presence, he could have emailed or telephoned her later as he had her contact details. She had explained to him that he was an excluded person under s 15 of the Immigration Act 2009 and that it was very unlikely he would be granted a visa. However, he had wanted her to continue.

[30] Furthermore, as [the adviser] said in her affidavit, the complainant was happy for her to continue to communicate by email through Mr V. So she saw nothing wrong with Mr V being an intermediary, but was now more aware of the abuses of education agents providing immigration advice and would be more wary in the future.

[31] At the time the letter was sent to Immigration New Zealand, [the adviser] said she was not aware that it was Mr V who, according to the complainant, had not disclosed the information to Immigration New Zealand about Australia. She had not therefore been dishonest in her communication with the agency. Mr V was not her subagent. She did not have a regular working relationship with him and was not aware that he might be providing immigration services outside of the student visa work he was allowed to do.

Complaint referred to Tribunal

[32] The Registrar filed the complaint with the Tribunal on 13 December 2017. The following breaches of the Code by [the adviser] are alleged:

(1) by writing a document to Immigration New Zealand falling short of what was required to persuade it to grant a visa, there has been a lack of due care in regard to the complainant's circumstances, in breach of cl 1;

(2) by providing incorrect and potentially misleading information to Immigration New Zealand, in breach of cl 1;

[2] The complainant works in dairy farming.

(3) by failing to advise the complainant in writing that in her opinion his application had little hope of success, in breach of cl 9(a); and

(4) by failing to require the complainant to acknowledge in writing that he had been advised of the risks, in breach of cl 9(b).

JURISDICTION AND PROCEDURE

[33] 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 Immigration Advisers Licensing Act 2007 (the Act):

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the code of conduct.

[34] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[3]

[35] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[4] It has been established to deal relatively summarily with complaints referred to it.[5]

[36] 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.[6]

[37] The sanctions that may be imposed by the Tribunal are set out in the Act.[7] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[8]

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

[38] 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.[9]

[39] The Registrar has provided a statement of complaint, dated 13 December 2017, with supporting documents.

[40] The complainant has provided no submissions or other documents.

[41] There is a statement of reply, dated 11 January 2018, from Mr Moses on behalf of [the adviser]. Counsel records that [the adviser] admits breaching cls 1 and 9 of the Code, but contends that the severity of the breaches is at the low end of the spectrum and may not require the complaint being upheld. He confirms that the fees were refunded on 13 December 2017. [The adviser] has recognised her mistakes and can confirm that the deficiencies will not be repeated in the future.

ASSESSMENT

[42] 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.
>
> **Futile immigration matters**
>
> 9. If a proposed application, appeal, request or claim is futile, grossly unfounded, or has little or no hope of success, a licensed immigration adviser must:
>
> a. advise the client in writing that, in the adviser's opinion, the immigration matter is futile, grossly unfounded or has little or no hope of success, and
>
> b. if the client still wishes to make or lodge the immigration matter, obtain written acknowledgement from the client that they have been advised of the risks.

(1) By writing a document to Immigration New Zealand falling short of what was required to persuade it to grant a visa, there has been a lack of due care in regard to the complainant's circumstances, in breach of cl 1

[43] According to the Registrar, the letter of 25 September 2015 sent by [the adviser] to Immigration New Zealand made no mention of any unlicensed advice the complainant

[9] *Z v Dental Complaints Assessment Committee*, above n 8, at [97], [101]–[102] & [112].

may have received from Mr V and made no attempt to address the exclusion under s 15 of the Immigration Act 2009. Instead, [the adviser] advised that the complainant was a victim of ignorance and made a mistake by doing everything himself, rather than approaching a licensed adviser.

[44] I will assume that the draft version of the letter sent to the Tribunal is close to the final version.

[45] The Registrar is correct in contending that the letter made no mention of any unlicensed advice from Mr V, but that reflected what Mr V had told [the adviser] on 4 September 2015 in the presence of the complainant.

[46] The Registrar says the letter made no attempt to address the exclusion, but I am not sure how it could. It would appear the complainant had been excluded from Australia and therefore fell within s 15. She sought to portray him as an honest person who had made a mistake. She pointed out in the letter that he readily accepted in the discussion with the officer on 22 July 2015 that he had been declined residence in Australia. Moreover, when he lodged the application, he had submitted all his old passports. If he had wanted to hide his immigration history, he would not have done so. I assume it is from those old passports that the immigration officer discovered his Australian history.

[47] In the absence of any explanation from the complainant as to why he did not tick the correct boxes, [the adviser] did the best she could. I appreciate that [the adviser] admits she could have done better, but I do not find any lack of due care. The visa was not declined as a result of any carelessness by [the adviser], but because of the complainant's Australian immigration history exacerbated by his failure to declare that on the form.

[48] This head of complaint is dismissed.

(2) By providing incorrect and potentially misleading information to Immigration New Zealand, in breach of cl 1

[49] The Registrar again relies on the letter of 25 September 2015 which made no mention of Mr V's unlicensed advice, instead attributing the mistake to the complainant.

[50] As already noted, Mr V had denied at the meeting knowing of the complainant's exclusion from Australia. The complainant did not correct him. It would therefore have been untruthful of [the adviser] to blame Mr V for the mistake in explaining it to Immigration New Zealand, notwithstanding any unlicensed advice he may actually have given of which she was unaware.

[51] There is no evidence corroborating the complainant's accusations that Mr V was [the adviser]'s subagent or that he (Mr V) was responsible for the visa application and hence the non-disclosure. Indeed, the contemporary evidence supports [the adviser]'s version of the events. In addition to her file note recording Mr V's denial of any knowledge of the complainant's adverse Australian immigration history, the immigration officer's notes of the discussion with the complainant on 22 July 2015 also support [the adviser]. The complainant did not express surprise or blame Mr V when told of the non-disclosure. He offered an explanation based on his own misreading of the questions on the application form which he thought related to New Zealand only.

[52] This head of complaint is dismissed.

[53] The last two heads of complaint will be dealt with together.

(3) By failing to advise the complainant in writing that in her opinion his application had little hope of success, in breach of cl 9(a)

(4) By failing to require the complainant to acknowledge in writing that he had been advised of the risks, in breach of cl 9(b)

[54] An adviser is required to advise a client in writing of matters that are futile, grossly unfounded or have little or no hope of success, following which the adviser must obtain a written acknowledgement from the client that he or she is aware of the risks and wishes to proceed.

[55] [The adviser] did, in effect, advise the complainant in writing through Mr V of the almost hopeless nature of the proposed character waiver on 19 August 2015, and then orally in person at the meeting on 4 September 2015. She did not, however, obtain his express written acknowledgment of the risks and his instruction to proceed.

[56] The complainant should have been well aware that the application for a character waiver had little chance of success. The email of 19 August 2015 to his agent is clear. It is possible he did not understand what he was being told, but [the adviser] had twice (once in writing and once orally) sought to inform him of the difficulty he faced. There is no breach of cl 9(a).

[57] While [the adviser] did not obtain a written acknowledgment from the complainant and has therefore breached cl 9(b), her failure is not sufficiently serious to warrant upholding the fourth head of complaint. She had taken reasonable steps to advise him. This professional violation does not, in the circumstances here, cross the disciplinary

threshold. I note in this regard the voluntary refund of fees by [the adviser]. While she is not responsible for the failure of the complainant's visa application, that was the right thing to do given her failure to 'drive home' to him the risk by obtaining his written acknowledgement.

[58] The third and fourth heads are dismissed.

OUTCOME

[59] The complaint is dismissed.

ORDER FOR SUPPRESSION

[60] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[10]

[61] There is no public interest in knowing the name of the complainant or his agent, Mr V, or the adviser given the dismissal of the complaint.

[62] The Tribunal orders that no information identifying the complainant, his agent or the adviser is to be published other than to the parties and Immigration New Zealand.

D J Plunkett
Chair

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