

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 21

Reference No: IACDT 003/16

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **MZ**  
Complainant

**AND** **JIANYA (BILL) SUN**  
Adviser

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**DECISION  
(Sanctions)  
Dated 15 April 2019**

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**REPRESENTATION:**

Registrar: R Garden, counsel  
Complainant: Self-represented  
Adviser: G Aulakh, counsel

## INTRODUCTION

[1] The Tribunal upheld this complaint in a decision issued on 4 March 2019 in *MZ v Sun* [2019] NZIACDT 12. It found that Mr Sun had breached his professional obligations under the Code of Conduct 2010 and the Code of Conduct 2014 (the Codes).

[2] This was the second complaint upheld by the Tribunal on similar grounds.<sup>1</sup>

## BACKGROUND

[3] The narrative is set out in the decision of the Tribunal upholding the complaint and will only be briefly summarised here.

[4] Mr Jianya (Bill) Sun was a licensed immigration adviser who, at all material times, resided in Shanghai. His licence has now expired.

[5] In January 2010, Mr Sun entered into a memorandum of understanding with a Shanghai migration company. He says the company was independent of him. The company possessed the (*verbatim* translation) “Operation License of a migration intermediary approved by Ministry of Public Security”.

[6] Under the agreement, the Shanghai company would enter into an agency agreement with the client when Mr Sun confirmed that the client met New Zealand’s migration requirements. Mr Sun was responsible for reviewing whether the client met the immigration criteria and would give directions to the company as to the preparation of an application. The company would submit the documents prepared by the client to Mr Sun. He would file the visa application with Immigration New Zealand and maintain contact with it. Mr Sun was not allowed to contact the client, except through the company’s staff. The company’s fees were set out in the agreement.

[7] On 22 December 2012, the complainant entered into an agreement with the Shanghai company for services relating to a long term business visa for New Zealand. The agreement stated that the company provided an “intermediary service” and would give assistance in handling the visa. It further stated that the company would prepare and submit the visa application, as well as handle the funding procedures. Mr Sun was not named.

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<sup>1</sup> *LL v Sun* [2019] NZIACDT 3, *LL v Sun* [2019] NZIACDT 14.

[8] Mr Sun provided advice to the Shanghai company in December 2012 as to the complainant's eligibility for a visa. The staff of the company then prepared a business plan and following an assessment of the relevant documents by Mr Sun, he lodged the application with Immigration New Zealand on about 22 March 2013. The plan was updated more than once with revised plans being lodged by Mr Sun.

[9] The complainant's visa was approved by Immigration New Zealand on 13 March 2014 and a visa was issued to him on about 8 April 2014.

[10] Following arrival in New Zealand, the complainant found the business plan did not match what he had approved. Immigration New Zealand declined a request, made through another licensed immigration adviser, to change the plan. The new adviser advised Immigration New Zealand that some of the supporting information provided was false. It was alleged the complainant had paid a large fee to Mr Sun to falsify certain documents.

#### *Complaint*

[11] The complainant filed a complaint against Mr Sun in January 2015 with the Immigration Advisers Authority (the Authority), headed by the Registrar of Immigration Advisers (the Registrar).

[12] It was alleged by the complainant that he had not been able to have even a single meeting with Mr Sun, as all communications were with the Shanghai company's staff. He had eventually come to learn that the business plan filed with Immigration New Zealand was not what he had approved and some of it had been altered without his knowledge. He admitted using false financial information in his visa application, but asserted it was on the advice of the company's staff. In his submissions to the Tribunal, he resiled from the admission as to falsity and blamed a grave linguistic mistake in the evidence he had given to the Authority.

[13] When the Authority notified Mr Sun of the complaint on 23 October 2015, his counsel, Mr Aulakh, replied in a lengthy letter on 26 November 2015.

[14] According to Mr Aulakh, Mr Sun was independent of the Shanghai company and only had a cooperation agreement with it. It was acknowledged that he had no direct communications with the complainant. This was a requirement of Chinese law which did not permit a foreign licensed immigration adviser to communicate directly with the client. It had to be done through an intermediary company licensed under Chinese law, such as the Shanghai company.

[15] As for the falsity of the documents, Mr Sun had no knowledge of this. He lodged the documents in good faith with Immigration New Zealand, being unaware that the complainant or any other person had fabricated them. He was not involved in putting together the supporting documents.

#### *Decision of Tribunal*

[16] In its decision on 4 March 2019, the Tribunal upheld the complaint and found that Mr Sun had breached cls 1.1(a), 1.1(b) and 2.1(b) of the Code of Conduct 2010 and cls 1, 2(e) and 3(c) of the Code of Conduct 2014. In particular, he had:

- (1) entered into an arrangement whereby at no point did he engage directly with the complainant to obtain his lawful instructions;
- (2) not properly discussed with the complainant the documents lodged with Immigration New Zealand; and
- (3) allowed unlicensed persons to provide services only a licensed adviser could provide.

[17] The Tribunal accepted that Mr Sun had not intentionally set out to circumvent the Immigration Advisers Licensing Act 2007 (the Act). While he must have been aware that unlicensed staff were assisting the complainant, he did not believe that was contrary to the Act. He genuinely believed they were carrying out only permitted clerical work. For the purpose of the complaint, the Tribunal accepted that Mr Sun was not aware of any falsity or forgery of any document filed with Immigration New Zealand.

#### **SUBMISSIONS**

[18] Counsel for the Registrar, Ms Garden, submits that Mr Sun should be:

- (1) cautioned or censured; and
- (2) prevented from reapplying for a licence for two years.

[19] There were no submissions from the complainant.

[20] Mr Aulakh adopts the submissions as to sanctions he filed on 21 February 2019 in the previous complaint made to the Tribunal. In those earlier submissions, it was stated that Mr Sun had admitted from the outset that he did not have direct engagement with the complainant since he was obliged to comply with Chinese law.

[21] According to Mr Aulakh, Mr Sun has always been mindful of his professional obligations, having had an unblemished record of providing competent advice concerning New Zealand for six years. As a layman, Mr Sun lacked the expertise to reconcile the conflict between the laws of China and those of New Zealand relating to his professional obligations. From the time that he was alerted to an alleged breach by the Authority, he did not accept instructions from the company nor did he lodge applications with Immigration New Zealand.

[22] Indeed, Mr Sun has not renewed his contract with the company. He is now resident in Australia and being over 65 years old, has retired from the profession. He will not be renewing his licence.

[23] Counsel contends that it would be fair and just to issue a caution only.

## **JURISDICTION**

[24] The Tribunal's jurisdiction to award sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:<sup>2</sup>

### **50 Determination of complaint by Tribunal**

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[25] The sanctions that may be imposed are set out at s 51(1) of the Act:

### **51 Disciplinary sanctions**

- (1) The sanctions that the Tribunal may impose are—
  - (a) caution or censure:
  - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
  - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
  - (d) cancellation of licence:

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<sup>2</sup> Immigration Advisers Licensing Act 2007.

- (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[26] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

### 3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[27] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>3</sup>

It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

[28] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.<sup>4</sup>

[29] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.<sup>5</sup>

[30] The most appropriate penalty is that which:<sup>6</sup>

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

## DISCUSSION

[31] It is relevant to note in the context of sanctions that this is the second complaint upheld by the Tribunal against Mr Sun on similar grounds. In respect of the first complaint, the sanctions were censure and an order prohibiting Mr Sun from reapplying for a licence for two years.

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<sup>4</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee* at [151].

<sup>5</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>6</sup> *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], relying on *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [49].

[32] Mr Sun's mode of professional practice enabled unlicensed persons, the Shanghai company's staff, to provide services only a licensed adviser is lawfully permitted to perform. The staff may have committed offences.<sup>7</sup> Mr Sun's misconduct is therefore serious. Not only did he facilitate the unlawful conduct of others, but he failed to personally discharge the contracted professional immigration services. Personal engagement with the client is a critical feature of the Codes.

[33] In saying that, I have the same view of Mr Sun's conduct as I did in the first complaint. I accept that there was no wilful violation of the Act or the Codes by Mr Sun. He did not personally engage with the complainant because he believed Chinese law did not permit him to do so. While Chinese law does not qualify his obligations under New Zealand law applicable to licensed advisers, it does explain his conduct. I found that he must have known what the staff were doing but he believed, albeit wrongly, that it was merely permitted clerical work.

[34] I recognise also that Mr Sun ceased representing potential migrants to New Zealand early after receiving the complaint filed in the Tribunal, pending clarification of the law as to his obligations. Furthermore, Mr Sun acknowledged early in the complaints process the underlying misconduct, the lack of engagement with the complainant, though he maintained it was lawful under the Act.

[35] I will deal with the sanctions sought by Ms Garden. I agree with her that no other sanctions are appropriate, as will have been clear from my sanctions decision on the first complaint.

#### *Caution or censure*

[36] It is appropriate to mark the Tribunal's disapproval of Mr Sun's conduct by censure. I do not accept that a caution is sufficient given the seriousness of the violations.

#### *Preventing licence reapplication*

[37] Mr Sun's licence expired two years ago in March 2017. He has retired and now lives in Australia. Furthermore, the Tribunal made an order on 12 March 2019 that Mr Sun be prohibited from reapplying for a licence for two years.

[38] The Registrar seeks an order that Mr Sun be prevented from reapplying for a licence for two years.

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<sup>7</sup> Immigration Advisers Licensing Act 2007, ss 8(1), 63(1) & 73.



[39] I have already noted the seriousness of Mr Sun's conduct. There is evidence the staff committed offences. Depending on the offence, each could be liable for a period of imprisonment not exceeding seven years and/or a fine not exceeding \$100,000.<sup>8</sup> It is only because Mr Sun held a licence that the staff could undertake such work. He therefore enabled their unlawful conduct.

[40] I said in the earlier decision that since Mr Sun asserts that a licensed adviser cannot have any direct contact with clients in China under Chinese law, a critical feature of the Act and the current Code, it is not appropriate for him to hold a licence. There is no evidence Mr Sun intends to resume practicing, but I will make an order preventing him from doing so for the maximum period of two years, as I did earlier.

[41] Mr Sun's breaches of the Codes are serious and there exists a risk that if he resumes practice, even from Australia, China-based Chinese citizens will seek to instruct him and the exigencies of practice could compel the use of unlicensed people in China to assist them. This is precisely what has occurred in many complaints upheld by the Tribunal against New Zealand based advisers.

[42] In reality, the further ban on holding a licence will be effective for an additional period of only about one month beyond 12 March 2021, the date of expiry of the existing ban.

## **OUTCOME**

[43] Mr Sun is:

- (1) censured; and
- (2) prevented from reapplying for a licence for two years.

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D J Plunkett  
Chair

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<sup>8</sup> Immigration Advisers Licencing Act 2007, s 63(5).