

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 3

Reference No: IACDT 016/16

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

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

**BETWEEN** **LL**  
Complainant

**AND** **JIANYA SUN**  
Adviser

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**DECISION**

**Date: 30 January 2019**

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**REPRESENTATION:**

Registrar: S Carr, counsel

Complainant: In person

Adviser: G Aulakh, counsel

## **PRELIMINARY**

[1] The complainant was a client of Mr Sun, the adviser, for the purpose of a residence application. Mr Sun lives in China. In accordance with Chinese law, he has no direct contact with any client, as all communications must be through a company registered under Chinese law to assist citizens to migrate.

[2] The complaint is that Mr Sun breached his professional obligations by not engaging directly with the complainant, as he is required to do under New Zealand law. Mr Sun's response is that he must comply with Chinese law. He says he did provide all the immigration advice, albeit through a local migration company acting as an intermediary. That company is independent of him.

[3] The essential issues are whether the company's staff, unlicensed under New Zealand law, have performed immigration services unlawfully and whether Chinese law qualifies Mr Sun's professional obligations.

## **BACKGROUND**

[4] Mr Jianya Sun, also known as Bill Sun, is a licensed immigration adviser. He is resident in Shanghai.

[5] In January 2010, Mr Sun entered into a memorandum of understanding with a Shanghai migration company. He says the company is independent of him. The company possessed the "Operation License of a migration intermediary approved by Ministry of Public Security". It agreed to actively promote migration to New Zealand.

[6] Under the agreement, the Shanghai company entered into an agency agreement with its client when Mr Sun confirmed that the client met the requirements to migrate. It was Mr Sun's responsibility to review whether a client met New Zealand's immigration criteria and to give directions as to the preparation of an application. The company would pass the client's documents onto Mr Sun. He was required to submit the visa application to the New Zealand immigration department and maintain contact with it. Mr Sun was prohibited from contact with the client, except through the company's staff. The company's scale of fees was set out in the agreement.

[7] The Shanghai company was issued by the Ministry of Public Security with a "Business License of Intermediary Agency for Overseas Affairs" in 2012.

[8] In September 2012, the complainant met with Ms C of the Shanghai company to discuss her immigration options.

[9] Ms C sought Mr Sun's advice as to whether the complainant was suitable for the New Zealand investment category on 15 September 2012. Mr Sun responded on 17 September advising that the complainant could meet three categories for immigration to New Zealand, but he would recommend the "Investment 2" category. Ms C passed this onto the complainant.

[10] On 13 May 2013, Ms C urged the complainant to file her application as Immigration New Zealand was tightening its policy. She was asked to prepare personal identification material. This included her company's background, which they could provide guidance on. The complainant was advised she should obtain her visa five months later. She could have a face-to-face talk if she had any problems.

[11] On 15 May 2013, the complainant entered into a written agreement with the Shanghai company for services relating to her residence application. The agreement stated that the company would provide intermediary services for a New Zealand investment immigration visa. It would guide the complainant in preparing the immigration application, hand over the application and keep in touch with the immigration office. It would instruct her as to legally remitting the funds into New Zealand, in accordance with the immigration requirements. After the complainant transferred the investment to New Zealand, the company would apply for residence on her behalf. There was no mention of Mr Sun or that the work would be undertaken by anyone outside the Shanghai company, though reference is made to the expense of a foreign lawyer.

[12] Mr T of the Shanghai company sought guidance from Mr Sun on 21 May 2013 concerning the complainant's application. Mr Sun replied on 22 May 2013 with some advice and sent him various forms and checklists. He invited Mr T to tell him the complainant's detailed information, as he would then be able to give specific suggestions.

[13] Mr T sought further guidance from Mr Sun on 1 July 2013. In his reply of 3 July, Mr Sun advised of the need for an audit report and information regarding the investment funds. He stated that the applicant should now prepare the formal residence visa documents in accordance with the checklist. She was to carefully check the contents of the form which was to be sent to him after signing.

[14] On 4 July 2013, Mr Sun filed with Immigration New Zealand an expression of interest in the investor category on behalf of the complainant. Mr Sun was identified as the immigration adviser and contact for communications.

[15] Mr T advised the complainant on 13 July 2013 that the application had entered the final stage and they would need further documents, as identified in his email. He set

out detailed information as to the documentary, medical and fee payment requirements for New Zealand. The email attached a number of documents, including sections of immigration application forms to be completed and signed by the complainant and her partner.

[16] Immigration New Zealand wrote to Mr Sun and the complainant on 25 July 2013 inviting her to apply for residence under the investor category.

[17] On 4 August 2013, Mr Sun filed an application for residence on behalf of the complainant and her family (signature of the complainant dated 29 July 2013). This included a statement from the complainant concerning her business experience (29 July 2013) and an audit report from a Chinese accountant (26 July 2013).

[18] Immigration New Zealand wrote to Mr Sun and the complainant on 7 February 2014 requesting further information, particularly concerning her assets and sources of income. Mr Sun appears to have emailed this to the company without comment.

[19] Mr Sun responded to Immigration New Zealand on 8 March 2014 providing a number of financial documents, including a statement allegedly signed by the complainant, dated 3 March 2014. The statement explained how she had earned the claimed income.

[20] On 12 June 2014, Immigration New Zealand sent a letter to Mr Sun and the complainant expressing concern that she had provided false or misleading information. The tax certificates and bank statements provided indicated an annual income significantly less than the amount claimed in the application. She needed to show the payment of taxes on her lawful income. The documents provided did not contain sufficient details of the legal origin of the funds and assets nominated in the expression of interest. She also needed further evidence of the transfer of some of the funds through the banking system. Her comments were invited.

[21] The complainant terminated her agreement with the Shanghai company on about 24 June 2014.

[22] At about the same time, the complainant engaged a new licensed immigration adviser, Mr Peter Luo, to assist with her immigration matters.

[23] In a declaration dated 30 June 2014, the complainant stated that she signed a blank page on both the expression of interest and "application" forms and that she had not been fully informed of the documents submitted to Immigration New Zealand.

[24] On 8 July 2014, Mr Luo informed Immigration New Zealand that Mr Sun had asked the complainant to sign blank application forms, had filed an audit report without her knowledge and had filed a statement allegedly signed by her but also without her knowledge. Mr Luo submitted the complainant should be cleared of any character concerns as she was the victim.

[25] Mr Luo wrote to Immigration New Zealand on 14 August 2014 advising that the complainant's previous adviser had seriously breached the advisers' code. Her application had been handled by unlicensed persons. She had been asked to sign the expression of interest and residence forms in blank. She was the victim of criminal activity. He went on to give information about the complainant's business experience, investment funds and properties.

[26] On 8 January 2015, Mr Luo filed with Immigration New Zealand declarations by the complainant (dated 11 December 2014) in which she stated (amongst other things):

- (1) The Expression of Interest form (4 July 2013) and the Residence Application form (29 July 2013) had been blank at the time she signed them.
- (2) The document headed "Personal Business Experience", dated 29 July 2013, was not signed by her.
- (3) Her statement of 3 March 2014 was not signed by her.

[27] Immigration New Zealand advised Mr Luo and the complainant on 30 January 2015 that false and misleading information as to the sources of income and assets had been provided in her expression of interest and residence application. Her comments were invited.

[28] Mr Luo replied on 21 May 2015 and set out at length information concerning the complainant's financial assets. She had made a genuine mistake in the expression of interest.

[29] On 13 August 2015, Immigration New Zealand advised the complainant that it was not satisfied she was eligible for a residence class visa. In particular, it was not satisfied she met the character requirements, since she had provided a misleading audit report. It was noted that she had said she knew nothing of the report until notified by Immigration New Zealand. She was given an opportunity to respond.

[30] Mr Luo responded to Immigration New Zealand on 1 September 2015. He stated that the complainant's former adviser, the owner of a large immigration consultancy with many branches, had little time to look after individual clients, with the work being handled by his employees. He had seriously breached the advisers' code. The complainant was told by him to sign blank forms. The audit report had not been obtained by her, nor had she signed her statement.

[31] Immigration New Zealand declined the complainant's residence application on 17 November 2015.

## **COMPLAINT**

[32] A complaint against Mr Sun was lodged by the complainant with the Immigration Advisers Authority (Authority) on about 31 August 2015. The complainant alleged Mr Sun was the "boss" of the Shanghai company.<sup>1</sup> According to her, she had no contract with Mr Sun, she had been asked to sign a blank application form, information had been supplied without her knowledge and her signature had been forged on documents.

[33] The Authority formally notified Mr Sun of the complaint on 27 May 2016 setting out the details.

[34] A comprehensive response to the complaint was provided by Mr Sun's counsel on 1 July 2016. In essence, it was accepted that Mr Sun had not engaged directly with the complainant due to restrictions imposed by Chinese law. The complainant knew about those restrictions and his engagement by the company. All the filed documents had been provided by the Shanghai company and Mr Sun had no knowledge of any fabrication or forgery. She was blaming others for her own misdeeds.

[35] A declaration from Ms C of the company, dated 24 June 2016, was produced. She had been assigned as the contact for the complainant. The company did not provide blank forms for signature. The Personal Business Experience document (29 July 2013), the statement (3 March 2014) and the audit report were all received from the complainant.

[36] The Registrar of Immigration Advisers (Registrar), being the head of the Authority, filed a statement of complaint with the Tribunal on 24 November 2016 (statement dated 21 November 2016).

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<sup>1</sup> Complainant's email to Authority, 23 December 2015.

[37] As Mr Sun was engaged with the complainant from September 2012 to June 2014, there are two applicable Codes of Conduct. The Code of Conduct 2010 (the 2010 Code) was replaced on 13 January 2014 by the Code of Conduct 2014 (the 2014 Code).

[38] The Registrar contends that Mr Sun has breached certain professional obligations in the following manner:

- (1) Allowing unlicensed individuals to provide services only a licensed immigration adviser can provide, contrary to cls 1.1(b) and 2.1(b) of the 2010 Code and cls 2(e) and 3(c) of the 2014 Code.
- (2) Failing to take charge of the client engagement and then failing to exercise the required level of due care and diligence when reviewing and filing documents with Immigration New Zealand, contrary to cl 1.1(a) of the 2010 Code and cl 1 of the 2014 Code.
- (3) Submitting an application to Immigration New Zealand which had further information added or attached after it had been signed by the complainant, in breach of cl 2.1(b) of the 2010 Code.

## **JURISDICTION AND PROCEDURE**

[39] The available 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.

[40] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>2</sup>

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<sup>2</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

[41] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.<sup>3</sup>

[42] 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.<sup>4</sup>

[43] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>5</sup> It may also suspend a licence pending the outcome of a complaint.<sup>6</sup>

[44] 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.<sup>7</sup>

[45] Following a telephone conference on 23 June 2017, the Registrar and the adviser agreed that the matter could be heard on the papers. The Tribunal advised in its minute of that date that it would give notice if it did not accept parts of Mr Sun's affidavit without hearing from him.

[46] A further minute was issued on 20 November 2018 stating that while the Tribunal accepted Mr Sun believed the company was merely performing clerical work, there remained a legal issue as to whether the company's work breached the Act. Submissions on this issue were invited.

[47] The Tribunal has received a statement of reply from Mr Sun (filed 25 January 2017), submissions from his counsel Mr Aulakh (24 January 2017) and an affidavit from Mr Sun sworn before a lawyer in China on an unknown date in January 2017, with supporting documents. These include an affidavit (sworn in China on an unknown date in January 2017) from the general manager of the Shanghai company. Submissions on the legal issue raised by the Tribunal were received from Mr Aulakh on 13 December 2018.

[48] There are no submissions from the complainant.

[49] Submissions on the legal issue from Ms Carr for the Registrar are dated 13 December 2018.

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<sup>3</sup> Section 49(3) & (4).

<sup>4</sup> Section 50.

<sup>5</sup> Section 51(1).

<sup>6</sup> Section 53(1).

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].



[50] The complainant has withdrawn her complaint to the Authority, but the Authority has not withdrawn the complaint filed in the Tribunal.

## **ASSESSMENT**

[51] I will deal with each head of complaint in the order in which it is presented in the statement of complaint.

- (1) *Allowing unlicensed individuals to provide services only a licensed immigration adviser can provide, contrary to cls 1.1(b) and 2.1(b) of the 2010 Code and cls 2(e) and 3(c) of the 2014 Code*

[52] The following provisions of the Codes are relied on:

### Code of Conduct 2010

#### **1. Obligations to clients**

##### 1.1 Care, respect, diligence and professionalism

A licensed immigration adviser must, with due care, diligence, respect and professionalism:

...

- b) carry out the lawful informed instructions of clients

#### **2. Obligations to the Minister of Immigration, the Department handling immigration matters, the Immigration Advisers Authority and the Immigration and Protection Tribunal**

##### 2.1 Legislation and operating requirements

A licensed immigration adviser must, at all times:

...

- b) act in accordance with immigration legislation, including the Immigration Act 2009 and regulations made under it, the Immigration Advisers Licensing Act 2007, and applicable international obligations

### Code of Conduct 2014

#### **Client Care**

##### 2. A licensed immigration adviser must:

...

- e. obtain and carry out the informed lawful instructions of the client

**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.

[53] The Registrar contends that the complainant met Ms C of the Shanghai company who evaluated the complainant's visa options, advised her in relation to the type of visa and then accepted her instructions to act on her behalf. The complainant never met Mr Sun, nor did she speak to him. He was not present at any meetings and he did not provide any immigration advice directly to her. Mr Sun has therefore relied on unlicensed persons to interview the complainant, assess her options and obtain her instructions.

[54] Mr Sun has explained his business practice and hence his relationship with the complainant in the affidavit produced to the Authority. He states that, while he is a citizen of New Zealand, he has been living and working in China since 2001. He confirms he is not the owner or an employee of the Shanghai company.

[55] Mr Sun further states that Chinese law prohibits foreign registered advisers from engaging directly with and advising Chinese citizens who are interested in migrating. Only intermediaries authorised by the Chinese government are allowed to directly speak and engage with prospective Chinese migrants. Therefore, he had a cooperation agreement with the Shanghai company, whereby it sought advice from him. The company provided him with the client information, which he assessed and on which he advised the company. His advice was then conveyed by the company to the Chinese citizen.

[56] In his affidavit, Mr Sun states that at the time he was asked to advise in relation to the complainant, the company told him she had been informed of the restrictions under Chinese law. Furthermore, she had been informed that the company was not a New Zealand registered adviser and could not provide the advice itself. He confirms that he thoroughly assessed and checked the documents filed on her behalf.

[57] According to Mr Sun, it appeared that, when accused of providing false information, the complainant denied knowledge and chose to level serious allegations against others. She is trying to portray herself as a victim.

[58] Mr Sun accepts he did not have direct contact with the complainant due to the restrictions under Chinese law. He says these were, in essence, also her instructions as she knew of the restrictions. Mr Sun does not accept that the Shanghai company

provided any advice. All the advice came from him to the company and was conveyed by the company to the complainant. She knew that the advice came from him and knew of his details. All of the documents filed came from the complainant and he had no knowledge of any fabrication or forgery. To the best of his knowledge, the company was doing clerical work only. No immigration services were provided by the company. It is not correct to suggest that he did not exercise due care and diligence.

[59] In his affidavit, Mr Sun requests that the Authority guide him in the future, so that he will not be in breach of New Zealand or Chinese law. Due to the lack of clarity as to his obligations as a result of the conflict between New Zealand and local Chinese law, he had not submitted any applications to Immigration New Zealand or advised any new clients lately.

[60] The general manager of the Shanghai company confirms in his affidavit that Chinese law prohibits foreign registered advisers from directly operating and advising Chinese citizens. His company acts as an intermediary on behalf of the Chinese citizens. Mr Sun is not an employee or owner of the company. The complainant was aware of the restrictions under Chinese law. At all times, the company's staff only conveyed to the complainant Mr Sun's evaluation and advice. No other New Zealand immigration advice was given to her. The complainant's statutory declarations are false. The company had no knowledge of the falsity of her documents.

[61] As the complainant has withdrawn her complaint and the Registrar does not contest the evidence filed on behalf of Mr Sun, I accept his assertions as to the factual circumstances giving rise to this complaint.

[62] Accordingly, for the purpose of this complaint, I accept that Mr Sun's existence was known to the complainant and that he:

- was independent of the Shanghai company,
- was consulted by the company on whether the complainant was eligible for any visa to New Zealand,
- advised the company on her eligibility and from time to time on other core criteria,
- filed the application with Immigration New Zealand based on the information and documents supplied by the company (which may or may not have come from the complainant),

- maintained contact with Immigration New Zealand on the complainant's behalf and,
- was not aware of any falsity or forgery of any document.

[63] I further accept that Mr Sun believed the company's work was only of a clerical or interpretation/translation nature. Of course, whether it was only clerical or fell within the scope of work that could only be performed by a licensed adviser is a legal issue involving interpretation of the Act and is not determined by Mr Sun's belief.

[64] Therefore, the question that arises is whether Mr Sun's failure to have any contact with the complainant puts him in breach of his professional obligations as a licensed adviser under New Zealand law. To answer this, I first have to assess whether the staff of the Shanghai company have violated New Zealand law by performing work reserved to a licensed adviser.

*Have the unlicensed company's staff undertaken licensed work?*

[65] I will start by looking at the statutory privileges of an adviser, the corollary being the prohibition on unlicensed persons undertaking such work.

[66] A licensed immigration adviser, and with limited exceptions no other person, is entitled to provide "immigration advice" to another person.<sup>8</sup> The statutory scope of "immigration advice" is very broad.<sup>9</sup>

## **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

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<sup>8</sup> Immigration Advisers Licensing Act 2007, s 6.

<sup>9</sup> Section 7.

- (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.

[67] The definition captures advising “directly or indirectly”. The High Court has determined that “advise” is not to be given a restrictive meaning and is not confined to conduct of a formal nature.<sup>10</sup>

[68] The exclusion from the scope of “immigration advice” advanced by Mr Sun to explain the work of the Shanghai company’s staff is subs (1)(b)(iii) concerning “clerical work, translation or interpreting services”.

[69] “Clerical work” is narrowly defined in the Act:<sup>11</sup>

**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

[70] It is common ground that Mr Sun had no direct contact or communication in any way with prospective migrants, including the complainant. Mr Sun says the restriction of his role was mandated by Chinese law. It is not my function to determine Chinese law, nor do I have the expertise. For the purpose of this complaint, I will accept Mr Sun’s contention. It could not be contested that Mr Sun must comply with the law of his country of residence. Indeed, this is even a professional obligation under the Codes.<sup>12</sup> The relevance, if any, of the source of the restriction to his other obligations under the Codes will be assessed shortly.

[71] The Shanghai company’s agreement with the complainant of 15 May 2013 does not mention Mr Sun or that its services will be undertaken by an outside adviser other than a foreign lawyer. However, I have accepted Mr Sun’s evidence that the complainant

<sup>10</sup> *Yang v Ministry of Business, Innovation and Employment* [2015] NZHC 1307 at [22]–[23].

<sup>11</sup> Section 5, “clerical work”.

<sup>12</sup> Clause 2.1(a) of the 2010 Code and cl 3(b) of the 2014 Code.

knew from September 2012 when she first engaged the company that Mr Sun, from outside the company, was the licensed adviser providing advice on New Zealand immigration law.

[72] There is evidence that Mr Sun provided advice in emails to the company. For example, he advised on 17 September 2012 as to the complainant's eligibility for a visa. He provided further advice on 22 May and 3 July 2013. I do not know in what form his advice was provided to the complainant. I do not know whether copies of his emails were provided to her or not. There is no evidence they were. If not, it is clear that in paraphrasing them, the staff will on occasion modify the advice or add some additional advice. Moreover, I regard it as obvious that the complainant would have had additional questions, which the staff would have answered themselves without seeking input from Mr Sun.

[73] It is highly unlikely, given the very broad statutory definition of immigration advice, that the company's staff did not on multiple occasions throughout the lengthy process of about 21 months involving two applications, use their knowledge or experience of New Zealand immigration to advise or assist the complainant, particularly regarding the content and form of the supporting information needed.

[74] This is a company which specialises in migration services to different countries, not just New Zealand. It is a large company which claims to have had "Tens of thousands of immigration customers".<sup>13</sup> Under the memorandum of understanding with Mr Sun, the company was required to promote migration to New Zealand. Plainly, this is a company with experience of New Zealand immigration and which claims such expertise in its communications with clients. It is inevitable that, in the absence of an ability to communicate with Mr Sun, the complainant would look to the company for advice from time to time.

[75] Indeed, there is evidence that the company's staff did advise the complainant.

[76] On 13 July 2013, Mr T sent a detailed email to the complainant concerning documentation and information missing from the residence application being prepared. There was advice as to how she should go about getting some of the information. There was detailed advice about fees and signatures required. Documents were attached for completion and signature. The documents were marked as to where the complainant should add information or sign. An invitation was extended to contact Mr T if there was any doubt in preparing the materials. There is no evidence that Mr Sun drafted this email or that precisely the same detailed advice from him had preceded Mr T's email.

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<sup>13</sup> Ms C email to the complainant, 20 April 2013.

[77] There is also the earlier 13 May 2013 email from Ms C sending attachments to be filled out and providing advice as to both Immigration New Zealand's tightening of policy and the five months' time frame. There is no evidence this email was sent at the instigation of Mr Sun.

[78] The "clerical work" exclusion from the scope of immigration advice relied on by Mr Sun to legitimise the company's work is very narrow. I accept Mr Sun believed this was all they were doing, but it is not at all likely that they were merely recording or organising information from either Mr Sun or the complainant, without adding, altering or deleting information using their own knowledge and experience of New Zealand immigration.

[79] The clerical work exception allowed the company's staff to record information on a form or application "on behalf and under the direction of another person". In the context here, that other person would have to be Mr Sun or even the complainant herself.

[80] Mr Sun says he received the expression of interest form and residence application from the company signed and completed (it will be recalled the complainant states she signed them in blank). According to Mr Sun, both forms were completed by the company after his advice as to the further information and supporting documents required. He has provided an email (dated 3 July 2013) preceding the signing of the expression of interest form containing some advice, but there is no evidence as to advice from him relating to the detailed information and documentation required for the residence application.

[81] As the forms have been completed in English, it will not have been the complainant who filled them in. If not Mr Sun, it must have been the company's staff. Whether that was done in the complainant's presence or not, or before or after she signed, it is clear that the information in the forms was not being recorded at Mr Sun's direction. He was not there. He acknowledges this. He says he received the forms for filing after they were completed and signed. Mr Sun's communications with the company are not so numerous and detailed as to show that the forms can be said to have been completed under his direction despite his absence. There is only limited information in the email of 3 July.

[82] After all, it is Mr Sun's complete absence from the completion and signing process, bar one email preceding the expression of interest, which is his defence to the accusation that he allowed or knew the complainant had signed them in blank or that some of the documents were false. Mr Sun has a valid defence to those allegations, but

it is the circumstances of his defence (namely his absence at completion/signing) which permitted the company to do more than clerical work.

[83] Nor was the recording of information on the forms done under the direction of the complainant, as she would not have known what information was required and is unlikely to have recorded it in English.

[84] I find that the work of the Shanghai company's staff cannot be described as "clerical work", as defined in the Act. They were not merely recording or organising information provided, dictated or under the direction of Mr Sun or the complainant. They have used their knowledge or experience of New Zealand immigration to advise and assist the complainant. The staff have therefore performed work falling within the statutory scope of "immigration advice" despite not being licensed. This is contrary to the Act and is an offence.<sup>14</sup> This law applies to acts outside New Zealand.<sup>15</sup>

[85] Mr Sun has permitted that contravention to occur. He knew the company's mode of operation and in particular that it holds itself out as a migration company, including to New Zealand. He knew the company's staff were unlicensed under New Zealand law. He knew they were interviewing the complainant and assisting her to put together the application and supporting materials. Mr Sun has enabled unlicensed persons to provide services only a licensed adviser is lawfully permitted to perform.

[86] The next question to be answered is whether this is a breach of Mr Sun's professional obligations.

*Is Mr Sun's arrangement with the company a breach of his professional obligations?*

[87] The obligations set out in the two Codes applicable here are personal to the licensed immigration adviser and cannot be delegated.<sup>16</sup>

[88] The Registrar relies on cls 1.1(b) and 2.1(b) of the 2010 Code for the period up to 12 January 2014.

[89] First, there is an issue as to who is Mr Sun's client. He contends that his client was the company. To the extent that Mr Sun has a commercial relationship with the company, that is correct. However, in terms of his obligations under the Act and the Codes, his client was the complainant. His role in respect of the instructions from the company was to "advise...assist, or represent another person in regard to an immigration

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<sup>14</sup> Immigration Advisers Licensing Act 2007, ss 6 & 63(1).

<sup>15</sup> Sections 8(1) & 73.

<sup>16</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].



matter”.<sup>17</sup> That person was the complainant. Whether or not Mr Sun owed the same professional obligations to the company’s staff concerning his advice to them relating to the complainant is not material.

[90] As to the obligation in cl 1.1(b) to carry out the lawful informed instructions of the complainant, I find that Mr Sun did not personally do so in relation to many, if not most, of the complainant’s instructions. I put to one side the complainant’s unlawful instructions, as Mr Sun did not know of the falsity of any document. Focusing on the lawful instructions, Mr Sun gave initial advice on eligibility, filed the documents, communicated with Immigration New Zealand and provided some advice on criteria from time to time. However, he did not complete the forms or compile the supporting documentation. That was carried out by the company, which was a breach of cl 1.1(b) of the 2010 Code.

[91] The next issue is whether Mr Sun violated the obligation in cl 2.1(b) of the 2010 Code to comply with all immigration legislation.

[92] Mr Sun says in his affidavit that to the best of his knowledge, the staff carried out only clerical work. I have accepted that Mr Sun believed the company’s staff were merely performing clerical work. It is apparent that he misunderstood the law.

[93] However, while Mr Sun misunderstood the scope of the statutory clerical work exclusion to the advisers’ exclusive immigration advice work, he did not misunderstand what the staff were doing. He must have known the company’s staff interviewed the complainant, completed the forms, arranged documents and supporting materials and were communicating with her concerning the voluminous information and documents required by Immigration New Zealand. It will have been obvious to him that she would have had many questions, as all applicants do. There is only limited evidence of those questions being passed back to him.

[94] The company could not have held itself out as being able to arrange and conduct immigration applications on behalf of clients without someone who was able to file them with Immigration New Zealand and be responsible for the relationship with that department, since the department would not have dealt directly with the unlicensed people within the company.

[95] Mr Sun excuses his business practice by reference to the restrictions under Chinese law. Without reviewing the evidence adduced on Chinese law, I have already accepted his contention that such restrictions exist. They are irrelevant to Mr Sun’s

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<sup>17</sup> Immigration Advisers Licensing Act 2007, s 7(1)(a).

obligations under the Act and Codes, which are not qualified in any way by Chinese law. The 2014 Code expressly makes this clear, but it is also a matter of general law.<sup>18</sup>

[96] Also immaterial is the complainant's knowledge of the restrictions at the time she engaged the Shanghai company. Mr Sun cannot operate in a way that is contrary to New Zealand law because his client authorised it.

[97] If Mr Sun wants to enjoy the rights and privileges of a licensed immigration adviser under New Zealand law then, irrespective of where he lives, he must comply with his professional obligations. I agree with Ms Carr's submission that Mr Sun cannot provide immigration advisory services to Chinese residents while he himself is resident in China. He must therefore relinquish his licence.

[98] Mr Sun requests the guidance of the Authority so that he will not be in breach of New Zealand or Chinese law. It is not for the Authority to interpret Chinese law or reconcile any conflict between the laws of the two countries. That is for Mr Sun. Otherwise, he must surrender his licence.

[99] It is contended by Mr Sun that all the immigration advice came from him to the company, which merely conveyed it to the complainant without adding advice of its own. While I accept that Mr Sun believed the company's work was confined to clerical work, I have already found that the company's staff must have crossed the boundary into giving immigration advice. But even if I accepted that Mr Sun had in effect dictated every item of immigration advice subsequently given by the company to the complainant, that would not comply with the Codes. The obligations are personal to the adviser. There cannot be a wholesale delegation of engagement with the client in the way that occurred here.

[100] Had the company conveyed Mr Sun's advice or given its own advice on isolated occasions only, particularly as to the form of supporting information or as to biographical information and the like, with Mr Sun directly providing to the complainant the bulk of the advice and assistance, permitting such occasional advice by others would not engage the disciplinary regime. However, that is not what happened here. There was a complete abdication of the obligation to personally engage with the client.

[101] I find that Mr Sun was in breach of cl 2.1(b) of the 2010 Code in permitting the Shanghai company's staff to engage exclusively with the complainant and to assist her in the immigration application, contrary to the Act. An adviser must personally discharge his or her professional obligations, which inevitably means taking charge of and personally undertaking communications with the client. Mr Sun knew the company's

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<sup>18</sup> Clause 3(c) of the 2014 Code.

staff were assisting the complainant. It is no defence that he believed this to be merely clerical work.

[102] As to the Registrar's specific allegation that the company's staff evaluated the complainant's visa options and advised her as to the type of visa, I do not find this occurred. The Registrar is relying on the complainant's evidence that Ms C advised her of such matters, but there is evidence Mr Sun was the source of Ms C's advice. On 17 September 2012, Mr Sun advised Ms C that the complainant met three categories of immigration but he would recommend "Investment 2". It is apparent that in this instance Ms C was merely passing on Mr Sun's advice.

[103] In respect of the later period, from 13 January 2014 onwards, the Registrar relies on cls 2(e) and 3(c) of the 2014 Code.

[104] Clause 2(e) is an obligation to obtain and carry out the complainant's informed lawful instructions. It is wider than cl 1.1(b) of the 2010 Code. The adviser now has the additional obligation to "obtain" such instructions.

[105] From 13 January 2014, Mr Sun continued the same arrangement with the Shanghai company, operating at arm's length from his client.

[106] From time to time, Mr Sun did seek certain information and instructions from the complainant through the company's staff, but it is clear the obtaining of information and instructions from her was largely the work of the staff. There is evidence of only limited communication between him and the staff.

[107] As was the case for the earlier period, Mr Sun continued to fail to carry out the bulk of the services for the complainant and hence most of her instructions.

[108] I find that Mr Sun did not personally obtain or carry out the bulk of the complainant's instructions. He left that to the company. Mr Sun thereby breached cl 2(e) of the 2014 Code.

[109] Turning then to whether Mr Sun complied with all immigration law from 13 January 2014, it is apparent the same arrangement with the Shanghai company continued. Accordingly, the unlicensed staff continued to give assistance to the complainant falling within the scope of immigration advice. For example, there is no evidence Mr Sun advised the complainant (through the company) in relation to Immigration New Zealand's request for information on 7 February 2014. He appears to have passed it onto the company's staff without comment. Indeed, he says he had

nothing to do with compiling the complainant's statement of 3 March 2014 sent in response to Immigration New Zealand.

[110] As was the case for the earlier period, Mr Sun's arrangement with the company means he was not acting in accordance with the Act or the 2014 Code from 13 January 2014, as his conduct enabled the company's staff to provide unlicensed immigration advice. He was a party to the unlawful conduct of the staff. The company could not have held itself out as facilitating New Zealand immigration without the use of his licence. This was a breach of cl 3(c) of the 2014 Code to conduct himself in accordance with New Zealand immigration legislation.

[111] I uphold the first head of complaint. Mr Sun allowed the company's staff to interview the complainant, take her instructions, complete the application forms and give her assistance from time to time, contrary to the Act. Mr Sun is in breach of cls 1.1(b) and 2.1(b) of the 2010 Code and cls 2(e) and 3(c) of the 2014 Code.

(2) *Failing to take charge of the client engagement and then failing to exercise the required level of due care and diligence when reviewing and filing documents with Immigration New Zealand, contrary to cl 1.1(a) of the 2010 Code and cl 1 of the 2014 Code*

[112] The following provisions of the Codes are relied on:

Code of Conduct 2010

**1. Obligations to clients**

1.1 Care, respect, diligence and professionalism

A licensed immigration adviser must, with due care, diligence, respect and professionalism:

- a) perform his or her services

Code of Conduct 2014

**General**

- 1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

[113] I accept that in failing to interview the complainant, take her instructions or advise her on all immigration matters directly, Mr Sun has failed to perform his services and in particular, has failed to perform them in a professional way.

[114] There is an additional allegation by the Registrar. It is contended that Mr Sun failed to exercise due care and diligence when reviewing and submitting documents to Immigration New Zealand on behalf of the complainant. Immigration New Zealand found certain documents to be false or misleading, which the complainant accepts. She says she did not sign her statement of 3 March 2014 concerning the sources of her income, nor the document headed "Personal Business Experience". Immigration New Zealand also state that an audit report was false, which the complainant accepts. These documents were submitted to Immigration New Zealand by Mr Sun.

[115] There are further Code provisions which are relevant to note, though the Registrar does not allege any breach of them. The 2010 Code states that advisers shall not knowingly provide false or misleading information.<sup>19</sup> The 2014 Code states that advisers must not deliberately or negligently provide false or misleading information.<sup>20</sup>

[116] These additional provisions set the standard of vigilance for advisers in respect of the possibility of fraud. In respect of the earlier period, there is no breach of the Code unless the adviser knew of the fraud. For the later period, the standard is one of reasonable care.

[117] I accept Mr Sun's contention that he did not know of the falsity of these documents. Whether the complainant or the staff of the Shanghai company were responsible for the falsity, I cannot know. While Mr Sun's business practice of operating at arm's length makes it easier for the visa applicant (or those assisting the applicant) to perpetrate forgeries, this does not of itself amount to a lack of reasonable care or due care or diligence on his part.

[118] The Registrar does not point to any information known to Mr Sun or irregularity with the documents filed which should have alerted him to a possible forgery prior to any of them being filed. The mere filing of false documents does not, of itself, amount to a lack of due care or diligence any more than the mode by which Mr Sun conducts his business.

[119] In respect of both the earlier and later periods, I find no knowledge of falsity and therefore no dishonesty by Mr Sun. Nor do I find any lack of due care or diligence on his part.

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<sup>19</sup> Code of Conduct 2010 at cl 5.2.

<sup>20</sup> Code of Conduct 2014 at cl 31(a).

[120] I uphold this head of complaint in relation to allowing the company to take charge of the client engagement, but dismiss it in relation to the failure to take due care or be diligent as to documents filed with Immigration New Zealand. Mr Sun is in breach of cl 1.1(a) of the 2010 Code and cl 1 of the 2014 Code.

(3) *Submitting an application to Immigration New Zealand which had further information added or attached after it had been signed by the complainant, in breach of cl 2.1(b) of the 2010 Code*

[121] The following provisions of the 2010 Code are relied on:

**2. Obligations to the Minister of Immigration, the Department handling immigration matters, the Immigration Advisers Authority and the Immigration and Protection Tribunal**

**2.1 Legislation and operating requirements**

A licensed immigration adviser must, at all times:

- b) act in accordance with immigration legislation, including the Immigration Act 2009 and regulations made under it, the Immigration Advisers Licensing Act 2007, and applicable international obligations

[122] The Registrar contends, relying on the complainant's declaration, that she signed the expression of interest and visa application form in blank, with details being added by unknown persons later. The expression of interest was filed in July 2013 and the residence visa application in August 2013, during the currency of the 2010 Code.

[123] It is an offence under s 348(a) of the Immigration Act 2009 to enter further information on a form after it has been signed by an applicant, or to attach any further material to it.

[124] Mr Sun says he provided the blank forms to the Shanghai company. He received them back completed and signed. In her declarations, the complainant does not say who invited her to sign them in blank.

[125] If the allegation made by the complainant is true, it is presumably the company's staff who completed the forms after her signature was added. Certainly, there is no evidence Mr Sun did it.

[126] I find that the obligation under cl 2.1(b) of the 2010 Code to comply with all immigration legislation to be an obligation not to knowingly or recklessly act contrary to the legislation. It cannot be strict liability. While a lack of knowledge of the law would be no defence, a lack of knowledge of the conduct would be. Given there is no evidence Mr Sun knew that information or materials had been added to the applications after the complainant had signed them or that he was reckless in this regard, the filing of them with Immigration New Zealand is not a breach of this obligation.

[127] I dismiss this head of complaint.

## **OUTCOME**

[128] I find that Mr Sun has 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.

## **SUBMISSIONS ON SANCTIONS**

[129] As the complaint has been partially upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act. A timetable is set below.

[130] As Mr Sun's business practice is in breach of the Act and the Codes, one of the options to be considered will be cancellation of his licence. The parties are invited to specifically address this. Any request that Mr Sun undertake training should specify the precise course suggested. 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*

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

- (1) The Authority and Mr Sun are to make submissions by **21 February 2019**.
- (2) The Authority and Mr Sun may reply to any submissions by the other party by **7 March 2019**.