IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 18

Reference No: IACDT 006/19

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 12 May 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	S Laurent, counsel

PRELIMINARY

[1] Mr UO, the complainant, was in New Zealand unlawfully. He and his wife instructed Ms Elena Nukulasi, the adviser, who advised him to apply for a discretionary visa. She did not make the application until more than one year after being instructed and even then, she sent it to the Associate Minister of Immigration, instead of Immigration New Zealand.

[2] The complainant made a complaint against Ms Nukulasi to the Immigration Advisers Authority (the Authority). The Registrar of Immigration Advisers (the Registrar), the head of the Authority, referred it to the Tribunal, alleging that her conduct was negligent, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act) and that it breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code). The Code breaches are admitted by Ms Nukulasi.

BACKGROUND

[3] Ms Nukulasi, a licensed immigration adviser, is a director of E & T Consulting Services Limited, based in Auckland.

[4] The complainant is a national of Samoa. Along with his wife and daughter, he was living in New Zealand unlawfully. Their visas had expired in 2016.

[5] On 26 September 2017, the complainant and his wife met Ms Nukulasi. She advised them to leave New Zealand and apply for visas from abroad, or to request discretionary visas under s 61 of the Immigration Act 2009. They would need genuine reasons and supporting documents for discretionary visas. She advised that their case was not strong. A fee of $50 was paid for the meeting.

[6] At a meeting on 29 September 2017, the complainant and his wife instructed Ms Nukulasi to make the discretionary visa request. She advised again that the case was not strong. The complainant's wife and Ms Nukulasi signed the latter's client agreement. She agreed to prepare a s 61 request. The fee was $2,000, of which $1,000 was immediately paid. Ms Nukulasi also gave the complainant a handwritten list of documents required for the application.

[7] The complainant took some of the required documents to Ms Nukulasi on 16 October 2017, who noted that most were not dated or addressed. She asked the complainant to provide all the documents on the list.

[8] Over a prolonged period, the complainant and Ms Nukulasi exchanged texts from time to time, largely being requests from the complainant for an update on the status of the application.

[9] On 13 December 2017, the complainant asked Ms Nukulasi whether she needed "any other thing" or money. There was no reply. The complainant asked again for an update in January 2018, but Ms Nukulasi did not reply.

[10] The complainant rang Ms Nukulasi on 2 March 2018 to ask if she had spoken to the immigration officer who had earlier contacted them, something she had told them she would do, but she replied that she had not.[1] Ms Nukulasi reminded him to provide the other documents on her list.

[11] There were further texts from the complainant to Ms Nukulasi in May and August 2018 seeking an update. There was no reply from Ms Nukulasi because, she told the Authority, he would telephone her if she did not reply.

[12] On 5 October 2018, the complainant sent another text to Ms Nukulasi pointing out that they had been waiting for more than one year and asking whether they should go to another person.

[13] On the same day, 5 October 2018, Ms Nukulasi sent the s 61 application to the Associate Minister of Immigration. In the letter, she set out the circumstances of the complainant and his family, and how they came to be in New Zealand. Their "strong ties" to New Zealand were explained, including the birth of their daughter here, along with the ability of the complainant and his wife to contribute to this country. A request for valid visas was made. Numerous supporting documents were sent with the application.

[14] The complainant and Ms Nukulasi met on 9 October 2018. By this time, the complainant wanted his documents back and was threatening to make a complaint against Ms Nukulasi to the Authority. According to Ms Nukulasi's notes of the meeting, she apologised for the delay, explaining that she did not have the solid supporting information needed. They had not provided most of the documents on the list she gave them. The complainant said their pastor was helping them and had arranged a job offer. Ms Nukulasi asked him why he had not told her about the offer. The complainant asked for a refund which she declined, referring him to the agreement and noting the work she had done.

[1] Ms Nukulasi's file note at 37 of the Registrar's supporting documents.

[15] In subsequent texts between the complainant and Ms Nukulasi, both claimed to have recorded the meeting. Ms Nukulasi said that he had not disclosed to her that he was working illegally. The texts became increasingly acrimonious. On 10 October 2018, the complainant called Ms Nukulasi a liar. He asked her to stop texting as they were no longer her clients.

[16] The Associate Minister's office wrote to Ms Nukulasi on 10 October 2018 advising that the Minister did not intervene where alternatives could be pursued through Immigration New Zealand or the Immigration and Protection Tribunal. Requests for Ministerial intervention should only be considered once all other options had been exhausted. A request under s 61 could be made to Immigration New Zealand.

COMPLAINT

[17] On 2 November 2018, the complainant made a complaint to the Authority against Ms Nukulasi. He said they had given her all the documents she had requested for a s 61 request. They had asked her on 8 October 2018 for a copy of the request or their money back. They wanted a refund and Ms Nukulasi to face penalties in the Tribunal. Their unlawful status had been extended by her.

[18] The Authority wrote to Ms Nukulasi on 15 May 2019 setting out the details of the complaint and inviting her explanation.

[19] On 7 June 2019, Mr Laurent, counsel for Ms Nukulasi, replied to the Authority. She acknowledged permitting the s 61 request to languish for more than one year before filing it, a breach of cl 1 of the Code. However, it was open to the Authority to determine not to proceed, due to the family's lack of cooperation. Ms Nukulasi also admitted that the prospects of success were low by the time she filed the request, though she had not regarded the situation as futile when she first saw them in September 2017. By October 2018, they had not held visas for two years and the supporting documentation was weak. A breach of cl 9 was admitted because Ms Nukulasi had not obtained the complainant's written consent to proceed.

[20] As for the allegation that the s 61 request should have been made to Immigration New Zealand, it was submitted that directing it to the Minister was the correct process. Section 61 made it clear that such requests were a matter for the Minister's absolute discretion. Ms Nukulasi acknowledged that the Minister had delegated his power to Immigration New Zealand and she would normally have sent it to the agency, but the merits appeared to be tenuous and she believed such difficult cases should be sent directly to the Minister. Whether or not she was mistaken, that was an exercise of

professional judgement and therefore an allowable incident of providing professional services.

[21] Ms Nukulasi provided an affirmation in support (affirmed 31 May 2019). She confirmed the facts as set out in Mr Laurent's submissions, as well as the truth of the file notes recording details of her meetings with the complainant and other activities on the file. She had stressed to the complainant at the first meeting that his chance of success was not high.

[22] Ms Nukulasi said in the affirmation that the documents they gave her were not enough. She believed they dropped more documents off but does not know when. In late 2017, she largely drafted the letter, which then sat on the file until finalised in October 2018. She tried to call them in December 2017 and again in October 2018. Ms Nukulasi believed they tried to call or text her on a couple of other occasions, but she had no record of this. Each time they contacted her, they asked how the case was going and she replied that they had not supplied enough information.

[23] Ms Nukulasi stated that she had lost track of the application and overlooked that it had not been filed. When she received a text on 5 October 2018, it reminded her of how long the case had sat there, so she sent the letter that had already been drafted. It was sent to the Minister, as the family had provided little supporting evidence and it had even less chance of success than when she had been instructed. It had not seemed futile when she accepted the instructions. She agreed that the delay of one year in filing the application was not professional. She should have made a greater effort to get them to provide the evidence or cancelled the agreement and offered some refund.

[24] In her affirmation, Ms Nukulasi agreed she should have notified the complainant of the very low chance of success and obtained his instructions before filing it.

[25] The Registrar referred the complaint to the Tribunal on 17 June 2019, alleging that Ms Nukulasi satisfied the statutory ground of complaint of negligence and had breached the Code in the following respects:

(1) lodging the s 61 request more than one year after the agreement was signed, thereby being negligent or alternatively failing to exercise diligence and act in a timely manner in breach of cl 1;

(2) failing to lodge the request with Immigration New Zealand, thereby being negligent or alternatively being in breach of cl 1; and

(3) failing to advise the complainant of the futility of the request and obtaining his written consent to proceeding given the risks, in breach of cl 9(a) and (b).

JURISDICTION AND PROCEDURE

[26] 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.

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

[28] 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]

[29] 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]

[30] 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]

[31] 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].

[32] The Tribunal has received from the Registrar the statement of complaint (17 June 2019) and supporting documents.

[33] There are no submissions from the complainant.

[34] Counsel for Ms Nukulasi refers to the submissions and supporting affirmation produced to the Authority.

[35] No party has requested an oral hearing.

ASSESSMENT

[36] 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) Lodging the s 61 request more than one year after the agreement was signed, thereby being negligent or alternatively failing to exercise diligence and act in a timely manner in breach of cl 1

[37] Ms Nukulasi was instructed on 29 September 2017, but did not send the s 61 request to the Associate Minister's office until more than one year later, on 5 October 2018. Her explanation is that the complainant did not provide to her all the supporting documents detailed in the list she gave him at the first meeting. However, aside from asking for them again on 16 October 2017 and 2 March 2018, Ms Nukulasi appears not to have made any real effort to remind them to produce the documents. She acknowledges this omission.

[38] The timing was critical as the immigration status of the family was already unlawful when they first saw her. She was aware that Immigration New Zealand had

contacted the complainant in December 2017 asking why they were still in the country. They were at risk of being deported, which would seriously harm their future travel and immigration prospects. The delays were prejudicing whatever chance of success they had in September 2017. The letter had been drafted in about October 2017 and should have been sent then, supported by whatever the complainant was able to produce.

[39] There is no justifiable reason for Ms Nukulasi's extraordinary delay of one year. That is particularly so, given that she appears to have done almost all the work about the time she was instructed. Her conduct was neither professional, diligent nor timely. She breached cl 1 of the Code, as she concedes.

[40] As Ms Nukulasi has been found to be in breach of cl 1, there is no need to assess whether the same conduct amounts to negligence.

(2) Failing to lodge the request with Immigration New Zealand, thereby being negligent or alternatively being in breach of cl 1

[41] It is alleged that addressing the s 61 request to the Associate Minister was wrong since the power had been delegated by that Minister to certain senior officers in Immigration New Zealand.

[42] As Mr Laurent points out, s 61 of the Immigration Act 2009 expressly gives the discretion to the Minister. The Minister's formal delegation does not delegate the power exclusively to the officers.[9] That would probably not even be lawful. In other words, the Minister retains a residual power to exercise the discretion personally.

[43] I do not find it at all surprising that Ms Nukulasi directed the request to the Minister, as she perceived it to have little chance of success. I would be more surprised to learn that the Minister has never personally granted, let alone entertained, a s 61 request. Sending it to his office turned out to be unsuccessful, but that was of no matter. The Minister's office had returned the request within five days, so had Ms Nukulasi still been instructed, she could have immediately sent the same letter readdressed to Immigration New Zealand. There was no prejudice to the complainant by a delay of five or so days.

[44] I do not find that sending the request directly to the Minister could be described as negligent or unprofessional. I suspect other practitioners have done the same. No evidence has been produced that the delegation is exclusive and that advisers will know that. The second head of complaint is dismissed.

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[9] Immigration New Zealand Circular 13/08, 30 September 2013.

(3) Failing to advise the complainant of the futility of the request and obtaining his written consent to proceeding given the risks, in breach of cl 9(a) and (b)

[45] There can be little doubt that the request, whether made to the Minister or Immigration New Zealand, had little, if any, chance of success. The family had been in New Zealand unlawfully for two years and there was no compelling reason supporting their stay here. Ms Nukulasi accepts that, by the time the application was made, it was very unlikely to be successful. Indeed, I find that even when she was first instructed, they had almost no hope of obtaining visas without returning home and applying from there.

[46] Ms Nukulasi should have advised the complainant in writing that the application had little chance of success and obtained his written instruction to proceed despite the risk. She has breached cl 9(a) and (b) of the Code. Ms Nukulasi admits this.

OUTCOME

[47] The complaint is upheld. Ms Nukulasi has breached cls 1 and 9 of the Code.

SUBMISSIONS ON SANCTIONS

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

[49] A timetable is set out below. Any request that Ms Nukulasi 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

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

(1) The Registrar, the complainant and Ms Nukulasi are to make submissions by **4 June 2020**.

(2) The Registrar, the complainant and Ms Nukulasi may reply to submissions of any other party by **18 June 2020.**

ORDER FOR SUPPRESSION

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

[52] There is no public interest in knowing the name of Ms Nukulasi's client.

[53] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

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