

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 21

Reference No: IACDT 07/21

IN THE MATTER of an appeal against a decision
of the Registrar under s 54 of
the Immigration Advisers
Licensing Act 2007

BY **BU**
Appellant

AND **THE REGISTRAR OF**
IMMIGRATION ADVISERS
Registrar

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 27 August 2021

REPRESENTATION:

Appellant: Self-represented

Registrar: S Watson-Hughes, counsel

INTRODUCTION

[1] This is an appeal against the decision of the Registrar of Immigration Advisers (the Registrar) of 30 April 2021 rejecting a complaint by BU (the appellant) against NS, a licensed immigration adviser (the adviser). The Registrar found it did not disclose any of the statutory grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act), or grounds under the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[2] The appellant instructed a law firm to seek residence. The adviser, an independent contractor to [Law Firm] (the law firm), completed and filed the application. However, a document request emailed by Immigration New Zealand (Immigration NZ) to the solicitor was overlooked for 39 days before the adviser became aware of it and responded.

[3] The essential issue is whether the solicitor's inaction shows any professional misconduct by the adviser warranting a disciplinary process.

BACKGROUND

[4] The appellant, a national of India, has lived in New Zealand for some years. He is a laboratory technician.

[5] The adviser is a contractor to the law firm, based in Auckland.

[6] The appellant says he first met the law firm's solicitor (and principal) in June 2018 to find out if he qualified for residence.

[7] On an unknown date, the appellant entered into a contract with the law firm for legal work relating to immigration (unseen by the Tribunal). Some or all of the work was assigned to the adviser.

[8] Between 2018 and 2020, the adviser represented the appellant on a work visa and expression of interest (for residence) applications. He received a work visa valid until 19 February 2020. The Tribunal notes that the invitation to apply for residence, arising out of the expression, was sent by email to the solicitor. It was the adviser who passed it onto the appellant by email.

[9] On 31 October 2018, a residence visa application was lodged with Immigration NZ. The application identified the adviser as the responsible immigration adviser, but it gave the solicitor's email address for email communications. The covering letter, on the

letterhead of the law firm, was signed by the adviser on behalf of both her (as the "immigration adviser") and the solicitor (as the "principal"). The letter gave the name and email address of the solicitor for contact purposes.

[10] The adviser sent an email to the appellant on 13 June 2019 stating that she had telephoned Immigration NZ's contact centre and had been notified that the application had been allocated to an immigration officer.

[11] On 12 September 2019, Immigration NZ emailed the adviser stating that the application had been assigned to an immigration officer. This appears to have followed requests on about 5 and 11 September by the adviser for an update on progress of the application (which in turn had been prompted by the appellant asking the adviser).

[12] On the same day, Immigration NZ sent an email to the solicitor requesting further documents concerning the appellant's employment. He was given until 19 September 2019 to respond. The solicitor, however, overlooked the email and did not action it or pass it on to the adviser.

[13] Another work visa application was made by the appellant himself (apparently saving money) on about 15 October 2019.

[14] The adviser telephoned Immigration NZ on 16 October 2019 requesting an update on the residence application and was informed that an email requesting further information had been sent to the solicitor on 12 September. She was not aware of this.

[15] The adviser obtained the email and passed it on to the appellant, who replied on 21 October 2019 complaining about their careless service. The adviser answered saying that it was a mistake by the solicitor who did not read the email.

[16] The appellant then met with the solicitor and the adviser on 22 October 2019 to discuss the circumstances around the delay and was informed that the request would be immediately actioned.

[17] The adviser appears to have emailed the missing documents to the immigration officer on 22 October 2019. She did not tell the officer the reason for the delay or apologise, as she was asked to do by the appellant.

[18] The appellant was advised by the adviser to file a new work visa application while waiting for the decision on the residence visa. The appellant personally filed the application which was granted.

[19] On 14 November 2019, the appellant sent an email to the immigration officer apologising for the failure to reply to his email of 12 September. He explained that it was a mistake by the solicitor and the adviser, who no longer acted for him. Further documents for the residence application were sent to Immigration NZ by the appellant the next day.

[20] The appellant was advised on 19 May 2020 by Immigration NZ that his application had been placed in a waiting queue.

[21] The Tribunal has not been informed of the outcome of the residence application, if indeed it has been determined.

Complaint to Authority

[22] On about 12 February 2021, the appellant made a complaint to the Immigration Advisers Authority (the Authority) against the solicitor and the adviser. The Tribunal notes that neither it nor the Authority has jurisdiction over solicitors giving immigration advice. The appellant alleged negligence, dishonest or misleading behaviour and a breach of the Code.

[23] In his complaint to the Authority, the appellant alleges that at the meeting on 22 October 2019, the solicitor (in an “angry tone”) said he was too busy to read every email and the appellant should talk to the adviser about any remedy. As for the adviser (who spoke in a “soft tone but lying or hiding facts”), she said it was not the fault of anyone, but just unfortunate the email was not read.

[24] According to the appellant, the main purpose of appointing an adviser was to ensure regular follow-up and more professional communications with Immigration NZ. He added that, when he met them on 22 October, their behaviour was shocking. Instead of apologising and accepting the mistake, they got angry and arrogant, blaming each other. If the solicitor and his team had not missed the email for 39 days, he would not be in his current situation.

[25] The appellant said he wanted the total fees (\$3,910) and costs (\$700) repaid, as well as compensation for delay, stress and unprofessional behaviour.

[26] The appellant raised other matters, particularly concerning a work visa for three years, but I do not consider they raise any professional conduct issues.

Registrar rejects complaint

[27] On 30 April 2021, the Registrar wrote to the appellant rejecting the complaint under s 45(1)(b) of the Act, on the ground that it did not disclose any of the statutory grounds of complaint nor any ground under the Code.

[28] According to the Registrar, the appellant had attributed the solicitor's failure (to forward the email to the adviser) to negligence on the part of both the solicitor and the adviser. It was alleged by him that this had delayed his residence application and resulted in him being stuck in India for 11 months due to Immigration NZ's border closure in March 2020.

[29] The Registrar found that the immigration officer sent two emails on 12 September 2019, the first to the adviser stating that the application had been assigned and the second to the solicitor seeking further information. The Registrar did not consider it was reasonable to expect the officer to send two separate emails to two different persons. The adviser was the only contact throughout the entire application. It was not clear to the Registrar why the email was sent to the solicitor.

[30] The Registrar found that the adviser, as a contractor to the law firm, did not have day-to-day access to the solicitor's emails. Furthermore, there did not appear to be any delay to the residence application, as a consequence of the miscommunication relating to the information request between 12 September and 16 October. Based on Immigration NZ's records, the adviser had maintained regular contact with the agency for progress updates. When she knew about the error, she took immediate action.

JURISDICTION AND PROCEDURE

[31] The grounds for a complaint against a licensed adviser are listed in the Act:

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the Code.

[32] Section 45(1) provides that on receipt of a complaint, the Registrar may:

- (a) determine that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly;
- (b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly;
- (c) determine that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued; or
- (d) request the complainant to consider whether or not the matter could be best settled by the complainant using the immigration adviser's own complaints procedure.

[33] In accordance with s 54 of the Act, a complainant may appeal to the Tribunal against a determination of the Registrar to reject or not pursue a complaint under s 45(1)(b) or (c).

[34] After considering the appeal, the Tribunal may:¹

- (a) reject the appeal; or
- (b) determine that the decision of the Registrar was incorrect, but nevertheless reject the complaint upon another ground; or
- (c) determine that it should hear the complaint, and direct the Registrar to prepare the complaint for filing with the Tribunal; or
- (d) determine that the Registrar should make a request under section 45(1)(d).

[35] The adviser against whom the complaint is made is not a party to the appeal and has not been served. The appeal itself cannot result in the Tribunal upholding the complaint against the adviser.

[36] The Tribunal issued directions on 2 June 2021 setting out a timetable for further submissions and evidence. This was revised by the Tribunal on 26 July 2021.

¹ Immigration Advisers Licensing Act, s 54(3).

Submissions of the appellant

[37] The appellant provided submissions with his appeal (form dated 24 May 2021). He enquired as to whether the solicitor was included in the appeal to the Tribunal (if not, he said he would deal with him separately). The appellant sought justice and compensation for the fees paid (\$4,610), for distress and for the financial impact of being stranded in India for 11 months due to the border closure. If the adviser had been in regular contact with Immigration NZ, he would have been to India and back before the lockdown.

[38] In a separate document sent to the Tribunal (undated), the appellant analysed in detail the Registrar's decision. He makes the following points (being those which are, to some extent, material):

1. The email requesting information was sent to the solicitor as that was the email address given on the application form;
2. The Registrar is wrong to state that the adviser was the only contact for Immigration NZ as the approval of the expression and invitation to apply were sent to the solicitor;
3. The adviser is an independent contractor and has to complete the entire process, so it is baffling why she recorded the solicitor's email address on the form and cover letter;
4. If the adviser did not have day-to-day access to the solicitor's emails, he asks for the reason she mentioned his email address;
5. Delays in providing requested information to an immigration officer can have a negative impact if there is no response within the given time;
6. A trip to India was planned by the appellant and his wife for the period from December 2019 to January 2020, but it could not happen because of "the issue";
7. The Registrar says the residence application was not delayed because of the delay in providing the requested information, but the email gave five working days to respond, so the application was put aside waiting for the documents and no action was recorded;

8. The solicitor and adviser did not take responsibility for the delay, instead blaming each other (posing the question as to who is responsible for the dispute); and
9. There was no apology by the adviser to the immigration officer on 22 October 2019, despite the delay.

Submissions of the Registrar

[39] Counsel for the Registrar is Ms Watson-Hughes. In her submissions of 13 August 2021, counsel notes that the main issue is the failure of the solicitor to pass on to the adviser the email of 12 September 2019 sent to the solicitor. The adviser did not have access to his emails. This resulted in a delay of 39 days.

[40] While the residence application recorded the solicitor's email address for contact purposes, it is submitted that it is unclear why Immigration NZ sent the email to him when the adviser had maintained regular contact with the agency. Furthermore, an email had been sent to her on the same day.

[41] The delay of 39 days is acknowledged, but apart from reallocating the application to another officer, no action was taken by Immigration NZ until 18 February 2020.

[42] It is submitted that the complaint had been properly considered by a specialist decision-maker. The delay was not within the control of the adviser and it is unlikely to have caused any delay in processing the appellant's residence application. A full assessment of the relevant information had been made. The adviser had demonstrated an appropriate level of knowledge of the immigration instructions and processes.

[43] Ms Watson-Hughes observes that a number of the issues raised by the appellant relate to the conduct of the solicitor.

ASSESSMENT

[44] I agree with Ms Watson-Hughes that the main complaint, and indeed only material complaint, is the delay in replying to the immigration officer's email of 12 September 2019 to the solicitor requesting documents.

[45] The answer as to who is responsible is plain. On the basis of the documents presented to the Tribunal, it was the solicitor who failed to either action the request or pass it on to the adviser to do so.

[46] The Registrar and the Tribunal have jurisdiction to assess the conduct of the adviser only. So, the issue is whether there is evidence of any breach of the Act or the Code by the adviser related to the solicitor's failing.

[47] The Registrar considered that Immigration NZ was unreasonable in sending two emails on the same day to two different people. I do not agree. Immigration NZ was given both names as people representing the appellant. The issue about the email addresses used by the agency is not about whether two addresses were used, but whether the agency was justified in using the solicitor's address. It was. The agency had been informed that the solicitor was the main email contact. According to the Registrar, the only contact used by the agency since lodgement was that of the adviser. This is not correct. The invitation to apply had been sent to the solicitor.

[48] No blame can be laid at the feet of Immigration NZ.

[49] That does not, however, mean that the adviser was at fault. As to this, I agree with the Registrar that there is no fault on the part of the adviser. It is likely that it was the adviser who completed the residence application and, while I do not regard it as desirable to identify multiple contacts, that could not be considered unprofessional. Nor is there any reason why the adviser should have access to the solicitor's emails.

[50] Perhaps, the adviser could have been more assiduous in querying progress with the immigration officer after being notified of his name on 12 September, which would have brought the unanswered request to her attention sooner. But Immigration NZ's prolonged delays are well known, so failing to contact him before 16 October, about six weeks later, is not unprofessional.

[51] It seems to me self-evident that the adviser was entitled to rely on the solicitor conducting himself as a professional by monitoring and actioning his emails, even if it was only to forward this one to her to deal with.

[52] The appellant also complains about his treatment at the meeting on 22 October 2019 with the solicitor and the adviser. Whether or not he was treated with courtesy and in a professional manner, I cannot say. He says the solicitor responded in an "angry tone" and the adviser in a "soft tone", though complains about both of them. He was the client of the law firm and paid the firm, so it primarily fell to the solicitor (the principal of the firm) to resolve the relationship problem, if not the immigration problem. The Registrar did not investigate the meeting, but given the presence of the solicitor, it is not likely any investigation of the adviser's role would uncover conduct justifying disciplinary action.

[53] The adviser responded appropriately, in terms of the appellant's immigration situation, by sending the requested documents on 22 October. She could have helpfully apologised to the officer for the delay and made it clear it was not the appellant's fault, as she had been asked to do by him, but her failure to do so is not unprofessional.

[54] The Registrar says the delay caused no harm because Immigration NZ did not take action anyway until 18 February 2020. That is rather speculative. It is not known if the original officer could have progressed the matter shortly after 19 September 2019 if he had received the documents on time. But I accept that there is no evidence that the delay of 39 days had any material effect on the application. I do not even know the eventual outcome of the application.

[55] The appellant cannot blame the effect of the border closure in March 2020, which apparently trapped him for some time in India, on the delay of 39 days to provide documents to Immigration NZ. That link is tenuous indeed.

Conclusion

[56] There is no evidence of any conduct of the adviser breaching her professional obligations.

[57] I agree with Ms Watson-Hughes that the complaint does raise issues regarding the conduct of the solicitor, not just his failure to action or forward the email of 12 September, but his response at the meeting on 22 October with the appellant. The latter may wish to consider a complaint to the Law Society.

OUTCOME

[58] The appeal is rejected.

ORDER FOR SUPPRESSION

[59] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.²

[60] There is no public interest in knowing the name of the adviser given the outcome of the appeal.

² Immigration Advisers Licensing Act 2007, s 50A.

[61] Nor is there any public interest in knowing the identity of the appellant.

[62] The Tribunal orders that no information identifying the adviser or appellant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair