

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 1

Reference No: IACDT 015/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **ZI**
Complainant

AND **JIALE WILLIAM WAN**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 19 January 2022

REPRESENTATION:

Registrar: In person
Complainant: J Cheng, counsel
Adviser: S Laurent, counsel

PRELIMINARY

[1] Jiale William Wan (the adviser) acted for ZI (the complainant) who sought a residence visa for herself and two sons. She was already in New Zealand on a visitor visa granted on the basis of guardianship of her younger son (her son), who was here on a student visa. This required her to remain in New Zealand while her son was here. An exemption to that condition was requested by Mr Wan to permit her to travel to China without him. It was declined by Immigration New Zealand (Immigration NZ), but Mr Wan did not tell her. She duly travelled to China, in breach of her visa.

[2] A complaint was made to the Immigration Advisers Authority (the Authority) on behalf of the complainant. It has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It alleges Mr Wan was negligent, or alternatively breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code). The misconduct is largely admitted by Mr Wan.

BACKGROUND

[3] Mr Wan, a licensed immigration adviser, is a director of P J Education & Immigration Services Ltd, of Auckland.

[4] The complainant, a national of China, is a businesswoman. She has little to no English. She arrived in New Zealand in January 2018 on a visitor visa as the guardian of her son, a student visa holder. The complainant desired to reside in New Zealand permanently.

[5] On 14 March 2018, the complainant and Mr Wan entered into an immigration service agreement. Mr Wan would assist in making a residence application for the complainant and her two sons. The fee was \$20,000 (incl. GST), payable in instalments according to certain steps in the process (with Immigration NZ's fees additional).

[6] Mr Wan lodged an expression of interest (EOI) for residence in the investor category on about 10 September 2018. An invitation to apply was issued by Immigration NZ on an unknown date. He filed the residence application on 14 January 2019, on behalf of the complainant and her two sons.

[7] Between 2018 and August 2020, Mr Wan assisted the complainant and her son with successful visitor and student visas. In particular, the complainant was issued a visitor visa as a guardian on 12 March 2019. It was a condition that she lived with her son.

First trip to China

[8] The complainant left New Zealand on 20 March 2019 without her son.

[9] The immigration officer processing the residence application rang Mr Wan the same day inquiring about the complainant's departure. He sent an email to the officer on 24 March stating that the complainant had received a phone call to say that her mother-in-law was close to death. She subsequently died. The complainant was arranging the funeral. The officer asked on 29 March as to who was looking after her son. Mr Wan sent the officer what he called a "guardian assign form" in favour of the complainant's friend, on about the same day (this may be a student guardianship agreement dated 18 March 2019).

[10] The complainant returned to New Zealand on 9 April 2019.

[11] The immigration officer sent an email to Mr Wan on 29 April 2019 raising certain issues concerning the residence application. Mr Wan sought clarification on one item on 16 May. The officer replied on 20 May.

[12] On 28 May 2019, Mr Wan replied to the officer's questions. As for evidence concerning how the complainant acquired her shares in the catering company, this would require the complainant to personally retrieve the documents in Beijing. No one else could access her bank transactions. Mr Wan asked if the complainant would have to apply for a variation of the conditions of her visa, giving her a temporary exemption from the requirement to be with her son so he could remain studying here. Mr Wan advised he would therefore need until 10 June to prepare the evidence.

[13] In an email to the officer on 31 May 2019, Mr Wan repeated the request for a variation or, he asked the officer, would the officer recommend a standard application.

[14] On 4 June 2019, Immigration NZ wrote to Mr Wan setting out three criteria which had yet to be satisfied for the residence application – business experience, investments legally earned and character (the complainant had stated in her EOI that her older son was single, but evidence had been provided showing he was in a serious relationship). Mr Wan had until 25 June 2019 to reply.

[15] On the same day, the officer sent an email to Mr Wan declining the variation requested as there was no emergency.

[16] Mr Wan then advised the complainant's PA in Beijing on 5 June 2019 of certain documents which had to be provided to Immigration NZ by 25 June.

Second trip to China

[17] The complainant went to China on 9 June 2019 without her son and without having been granted the variation, to gather the information required by Immigration NZ. She was in breach of the guardian visitor visa. She returned to New Zealand on 27 June.

[18] On 23 September 2019, Immigration NZ declined the residence application. It was not satisfied that the investment funds had been legally earned. The letter advised the complainant that she could appeal to the Immigration and Protection Tribunal (IPT) within 42 days of certain days.

[19] Mr Wan then filed a guardian visitor visa application on behalf of the complainant on 28 January 2020.

[20] Immigration NZ wrote to Mr Wan on 17 March 2020 raising certain issues with the guardian visitor visa application. One of the issues was that the complainant had left New Zealand twice without her son, from 20 March to 9 April 2019 and from 9 to 27 June 2019. Her son had been left without a guardian. This was the basis on which she had been granted a visa.

[21] Mr Wan replied to Immigration NZ on 1 April 2020. In relation to the travel, the first trip was due to her mother-in-law's critical condition (she passed away on 21 March 2019). This situation had been reported to the immigration officer by email. The second trip was to obtain information requested by the officer for the residence visa application. A request for a variation had been made for this. On both occasions, a named friend had been assigned as guardian. There were genuine reasons for leaving New Zealand for short periods to attend to urgent matters. They had been communicated to Immigration NZ and no objections were received.

[22] Immigration NZ declined the guardian visitor visa on 7 August 2020. The complainant did not meet the criteria. One of the reasons given was that she had twice left New Zealand without her son and without obtaining a variation. On the second occasion, she had chosen to travel in breach of her visa condition, having been refused the variation on 4 June 2019.

[23] The complainant allegedly became unlawful in New Zealand on about 30 August 2020.¹

¹ Complaint to Authority (22 March 2021) at [33].

[24] An application to Immigration NZ for a reconsideration of the decline of the guardian visa, made by the complainant's newly instructed solicitor, was declined on 6 October 2020. It was not satisfied she was a *bona fide* applicant as she had left New Zealand without her son, knowing that would breach her guardian visa.

[25] A humanitarian appeal to the IPT by the complainant was dismissed on 4 February 2021.

[26] The complainant's new immigration adviser sent an email to Mr Wan on 17 February 2021 raising a potential issue concerning the latter's role as an adviser to the complainant. It was alleged that he had failed to inform the complainant of the decline of her variation request. She was even unaware that she had to apply for a variation.

[27] Mr Wan replied to the new adviser on the same day. He stated that it was not his intention to withhold the outcome of the request, but he did not advise the complainant not to return to China "based on providing best interest to the client at that time". A higher priority was gathering the evidence for the residence application. If she failed to provide the evidence, her residence visa would have been declined. He apologised for any inconvenience caused for failing to inform her.

[28] The new adviser made a request to Immigration NZ for a discretionary visa, under s 61 of the Immigration Act 2009. The outcome of this request is not known to the Tribunal.

COMPLAINT

[29] On 22 March 2021, the complainant's then solicitor made a complaint to the Authority against Mr Wan on her behalf.

[30] According to the complaint, it was stated by Immigration NZ that the complainant had knowingly breached her guardian visa, but she had not been informed by Mr Wan that she did not have the necessary exemption from the condition (which had been refused on 4 June 2019). This was a failure to communicate a crucial decision. It was not a mere oversight but a conscious decision, or at the very least reckless.

[31] The solicitor set out the history of the matter at some length. Other alleged failings of Mr Wan were identified, but as they have not been referred to the Tribunal by the Registrar they will not be assessed. The complainant sought:

- (1) A formal apology and acceptance of responsibility.

- (2) A full refund of the service fee.
- (3) Reimbursement of legal fees for the reconsideration and appeal.

[32] The Authority wrote to Mr Wan on 10 August 2021 formally advising him of the complaint and seeking his explanation.

[33] Mr Wan replied to the Authority on 2 September 2021. He admitted:

- (1) Failing to inform the complainant of the rejection of the variation (exemption) request.
- (2) Failing to warn the complainant not to go back to China.
- (3) Failing to lodge a separate variation request for the complainant.

[34] Mr Wan set out the chronology. As for item 3 concerning the March/April 2019 visit to China, he had informed the officer on 24 March 2019 why the complainant left New Zealand. No further questions were asked by the officer, so it appeared to him that no objection had been raised.

[35] As for items 1 and 2 concerning the June 2019 visit to China, Mr Wan said he had asked the officer twice if a temporary exemption from the guardian condition was required for the complainant to return to China to collect the documents needed for the residence application. The officer did not directly answer this query, except on 4 June 2019 he advised he would not approve the exemption. The officer had neither recommended nor prevented the complainant from leaving New Zealand, so he believed he could rely on the officer's "treatment of the case so far". He had advised the complainant that if she was unable to get the required documents before the deadline, her residence application would likely be declined.

[36] In his letter to the Authority, Mr Wan apologised for any inconvenience and loss to the complainant. He had already personally done so. He would provide a full refund of the service fee, as well as compensation for legal fees.

[37] Counsel for Mr Wan is Mr Laurent. He wrote to the Authority on 3 September 2021. Mr Wan admitted breaching cl 1 of the Code (in respect of the three items set out in Mr Wan's own letter to the Authority). Alternatively, the breaches could be considered negligence. The complainant and Mr Wan were in the process of reaching a settlement, though it was understood this would not prevent the Authority from referring the complaint to the Tribunal.

[38] The Registrar filed a statement of complaint (17 September 2021) in the Tribunal. It alleges that Mr Wan was negligent, or alternatively breached cl 1 of the Code, by:

- (1) Failing to inform the complainant and explaining Immigration NZ's decision to reject the exemption made before the trip to China on 9 June 2019.
- (2) Failing to lodge a separate variation application for the complainant's trip to China.

JURISDICTION AND PROCEDURE

[39] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act):

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

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

[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.³ It has been established to deal relatively summarily with complaints referred to it.⁴

[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.⁵

[43] 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

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].

[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.⁸

[45] The Tribunal has received the statement of complaint (17 September 2021) and a bundle of paginated supporting documents from the Registrar.

[46] There are no submissions from the complainant.

[47] A statement of reply (27 September 2021) was filed by Mr Laurent on behalf of Mr Wan. In his covering letter (27 September 2021), Mr Laurent refers to the settlement agreement, which will be relevant to the later sanctions stage of the Tribunal's process.

[48] Mr Laurent produced a settlement agreement (24 September 2021) between Mr Wan and the complainant. In the agreement, Mr Wan apologised for his three failures in service delivery (as identified in his letter to the Authority). He agreed to pay \$30,000 to the complainant in full and final settlement of all civil claims. The agreement did not oust the jurisdiction of the Authority or the Tribunal to determine the complaint.

[49] No party has requested an oral hearing.

ASSESSMENT

[50] The Registrar relies on the statutory ground of complaint of negligence, alternatively cl 1 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.

(1) *Failing to inform the complainant and explaining Immigration NZ's decision to reject the exemption made before the trip to China on 9 June 2019*

[51] This concerns the second trip to China without her son, from 9 to 27 June 2019. The purpose was to gather documents needed for her residence application. In doing so, she breached the condition of her visitor visa requiring that she live with her son as his guardian. The breach is aggravated by departing after Immigration NZ had refused an exemption from the condition on 4 June.

⁸ *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

[52] However, the complainant had not been informed of the refusal by Mr Wan. Nor had he warned her of the consequences of departing in breach of the condition. As the immigration officer points out, one option might have been to take her son with her.

[53] Mr Wan accepts he should have informed the complainant of the decision and advised her of the consequences.

[54] Mr Wan's conduct is a clear breach of cl 1 of the Code. He has neither been diligent nor exercised due care. The first head of complaint is upheld. There is no need to consider the alternative of negligence.

(2) *Failing to lodge a separate variation application for the complainant's trip to China*

[55] The second head of complaint concerns the first trip without her son, from 20 March to 9 April 2019. The purpose was to visit her dying mother-in-law and then arrange the funeral. This trip was urgent.

[56] It is understandable that no variation application or consent was arranged before the departure, but Mr Wan could have made an application in parallel rather than leave it for the officer processing the residence application to notice the departure in breach of condition and raise it with him. It is not known whether Mr Wan knew about the trip beforehand, but he certainly knew on the day of departure as the officer told him. An immediate application should have been made. Mr Wan would have known of the gravity of a breach of a visa condition.

[57] It is plainly not enough merely to inform the officer and rely on the officer's failure to object. An officer is under no duty to notify an objection, after the breach, in such informal communications. Mr Wan should have known that in order to eliminate the breach as a potential obstacle to the residence application or even subsequent visitor visa application, a formal application for an exemption was necessary.

[58] Mr Wan admits he should have made the application and that he therefore breached cl 1 of the Code. His conduct was not diligent and nor did he exercise due care. The second head of complaint is upheld. There is no need to consider the alternative of negligence.

OUTCOME

[59] The complaint is upheld. Mr Wan has breached cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

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

[61] There are two factors to note:

- (1) Mr Wan readily admitted failing the complainant at the earliest opportunity, even before the formal complaint was made to the Authority. He has since refunded his fee and compensated the complainant, by way of a settlement agreement.
- (2) Mr Wan is not a stranger to the Tribunal. His previous disciplinary history will be taken into account.

[62] A timetable is set out below. Any request that Mr Wan undertake training should specify the precise course suggested.

Timetable

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

- (1) The Registrar, the complainant and Mr Wan are to make submissions by **Friday 11 February 2022**.
- (2) The Registrar, the complainant and Mr Wan may reply to submissions of any other party by **Friday 25 February 2022**.

ORDER FOR SUPPRESSION

[64] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁹

[65] There is no public interest in knowing the name of Mr Wan's client.

[66] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration NZ.

D J Plunkett
Chair

⁹ Immigration Advisers Licensing Act 2007, s 50A.