IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 8

Reference No: IACDT 02/22

IN THE MATTER	of an appeal against a decision of the Registrar under s 54 of the Immigration Advisers Licensi Act 2007
BY	**IF**
	Appellant
AND	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 2 May 2022

REPRESENTATION:

Appellant: Self-represented
Registrar: J Barlow, counsel

INTRODUCTION

[1] This is an appeal against the decision of the Registrar of Immigration Advisers (the Registrar) of 26 January 2022 not to pursue a complaint made by IF (the appellant) against BL (the adviser). The Registrar considered that the complaint disclosed only a trivial or inconsequential matter.

[2] The adviser had wrongly assumed that the visa expiry dates of the appellant and his wife were the same, as a result of which the wife's immigration status became unlawful as her visa expired earlier. The adviser was subsequently successful in achieving a new visa for the wife and residence for the whole family. Nonetheless, the appellant says residence was delayed and the whole episode was very stressful.

BACKGROUND

[3] The adviser is a licensed immigration adviser and a director of [agency] (the agency), of [City, Country].

[4] The appellant contacted the adviser and was sent some information about the agency and New Zealand's immigration rules on 13 October 2017.

[5] On 9 January 2018, the appellant and the adviser signed the agency's service agreement. The agency agreed to prepare for the appellant's family – one visitor visa, one work visa, one partner work visa, one dependent child visitor visa and three residence visas. The fee was $6,000 payable in instalments. The person authorised to act was the adviser.

[6] It is understood the adviser successfully sought the temporary work and visitor visas enabling the family to come to New Zealand on an unknown date. The wife's visa was due to expire on 3 June 2021. The appellant's visa was apparently due to expire on 14 November 2021.

[7] On 15 October 2020, in an email to the appellant, the adviser stated that no action was required at that stage, as their visas were valid until approximately 14 November 2021.

[8] A visa officer gave the wife the wrong information on 12 April 2021 and failed to advise her that she would need to file a further temporary visa application to remain lawfully in the country.

[9] On 3 June 2021, the wife's immigration status became unlawful.

[10] A visa officer informed the adviser by email on 30 June 2021 that the appellant's wife had been unlawfully in New Zealand since 3 June 2021 and was liable for deportation.

[11] The adviser sent an email to the appellant and his wife that day informing them of this and asking her to stop working immediately if she was doing so. He stated that a s 61 application would have to be filed as soon as possible.[1]

[12] On 1 July 2021, the adviser filed a s 61 request. In his letter of explanation to Immigration New Zealand (Immigration NZ), the adviser admitted his error.

[13] By this stage, the appellant was in direct communication with Immigration NZ. A visa officer informed him on 2 July 2021 that the residence application could not be completed until his wife's legal status had been updated.

[14] On 12 July 2021, Immigration NZ granted the wife a work visa.

[15] On 20 October 2021, the residence visas for the family were approved by Immigration NZ.

Complaint to adviser

[16] The appellant had earlier, on 13 July 2021, made a complaint to the adviser using the agency's internal complaints procedure.

[17] The principal complaint was that on 15 October 2020, the adviser had informed them that no action was required as their visas did not expire until 14 November 2021. They were extremely shocked to learn on 30 June that his wife's visa expired on 3 June and she was unlawfully in the country. Due to this misinformation, their residence application was put on hold. His wife had to immediately stop work and lost nine days' wages. She was embarrassed to inform her manager that she was working unlawfully. It made her look incompetent. His wife feared deportation and separation from them in New Zealand. This was on top of the stress from a possible negative effect on the residence application.

[18] Furthermore, the adviser had not been timely in some of his work, a few examples of which were given.

[19] On 20 July 2021, the adviser sent an email to the appellant and his wife. He apologised for the events leading to the wife being unlawful and for the undue stress.

[1] Immigration Act 2009, s 61 (discretionary visa available for a person unlawfully in the country).

He acknowledged the areas where they had failed to act diligently. The adviser noted that they had taken immediate steps under s 61, which were successful. They had taken on financial responsibility for the application. He offered to reimburse them for the nine days of lost income. They had put in place measures to ensure it would never happen again.

[20] The appellant replied the next day. He said that the complaint did not just concern his wife's illegality, but also the overall experience due to mistakes the adviser had made. Even responding to the complaint had required prompting from him.

[21] The adviser did not reply until 18 August 2021. He apologised for the delay in replying, due to the effect of COVID-19 on family and friends. He noted that it was an obligation of visa holders to be fully aware of their visa status at any time. They had taken steps to amend the visa at their own cost. The adviser could not offer a full refund, as they had completed the temporary visas, which the appellant and his family were using in New Zealand, and they had assisted with the residence application, the outcome of which was unknown. He offered a refund for the balance of the residence work to be done, in which case they would no longer represent the appellant.

Complaint to Authority

[22] The appellant made a complaint to the Authority on about 23 August 2021. He set out a chronology of events from 13 October 2017 until 18 August 2021, with many of the entries containing criticisms of the adviser. The principal matter was his wife's unlawfulness advised on 30 June 2021. He sought an investigation and a refund of his fees.

Decision of the Registrar

[23] On 26 January 2022, the Registrar wrote to the appellant advising that the complaint would not be pursued under s 45(1)(c) of the Immigration Advisers Licensing Act 2007 (the Act), on the ground that it disclosed a trivial or inconsequential matter.

[24] According to the Registrar, the information established that the adviser had failed to check the expiry date of the wife's visa, assuming it aligned with that of the appellant. This was exacerbated by information given on 12 April 2021 by Immigration NZ. Upon being made aware of this on 30 June 2021, the adviser discussed it with them and lodged a s 61 request on 1 July 2021. In his covering letter to Immigration NZ, he had admitted his own error. She was granted a work visa on 12 July 2021. The family's residence visas were then approved on 20 October 2021.

[25] The Registrar found the adviser's failure to check the expiry date to be a potential breach of cl 1 of the Licensed Immigration Advisers Code of Conduct 2014 (the Code), being a failure to exercise diligence and due care.

[26] Furthermore, there were some delays with the adviser reviewing documents and responding to emails, which the Registrar considered might also disclose a breach of cl 1. He set out three examples.

[27] The Registrar then listed a number of matters diminishing the potential breaches, including:

1. The adviser's error did not appear to have any adverse impact on the wife's immigration prospects.

2. The adviser apologised and offered to cover the lost wages.

3. The adviser admitted his error to Immigration NZ.

4. The adviser took immediate steps to lodge a s 61 request and covered the cost.

5. The delays in reviewing documents and responding to emails did not appear to have any adverse consequences and the adviser's other communications were timely.

JURISDICTION AND PROCEDURE

[28] The grounds for a complaint against a licensed adviser are listed 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.

[29] 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.

[30] 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).

[31] After considering the appeal, the Tribunal may:[2]

(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).

[32] 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.

[33] The Tribunal issued directions on 16 February 2022 setting out a timeframe for further submissions and supporting information.

Submissions of the appellant

[34] The appellant's reasons for appealing are set out on the appeal form (31 January 2022). He disagrees with certain findings of the Registrar:

[2] Immigration Advisers Licensing Act, s 54(3).

1. There was no dishonest or misleading behaviour—

   The appellant notes that the adviser stated in an introductory letter that the Auckland branch assists with all aspects of migration procedure. This is false as the only licensed adviser is based in [Country].

2. The error regarding the wife's visa had no adverse effect on her migration prospects and the adviser took immediate action to lodge s 61 request—

   The appellant rejects this. There were months of delays in approving residence because of the error. They suffered financial loss more than the wages offered. His wife's work environment changed. It affected the whole family's mental state and stresses.

3. The appellant did not accept the offer to terminate the relationship and refund the fees paid for the residence process to date, instead continuing to use the appellant's services for their residence application—

   As to this finding of the Registrar rejected by the appellant, he says that the adviser did not follow step 3 of his complaint procedure (bringing in a third-party arbitrator to facilitate a resolution). The appellant did not want to breach the contract.

[35] In replying on 10 April 2022 to the Registrar's submissions, the appellant says that immigration is a very big life decision and immigrants do not know the processes involved. They therefore use immigration advisers who are supposed to be experts. The adviser said his Auckland office could assist if needed, but it turned out the office could not help with advice as the person there is not a licensed adviser. This was just one example of lying which caused severe delays in getting documents to the adviser or getting answers from him.

[36] The appellant accepts that the adviser's actions did not have an impact on their residency outcome, but the path was made a lot more difficult than needed because of the adviser. There was also the mental strain on him and his family, especially from the mistake about his wife's visa.

Submissions of the Registrar

[37] In his submissions (29 March 2022), Mr Barlow, counsel for the Registrar, sets out the history of the processing of the complaint by the Registrar. This led to the reasoned decision of 26 January 2022. It is submitted that the complaint was properly considered and rejected.

[38] In support of the Registrar's submissions, there is an affidavit (25 March 2022) from Simon van Weeghel, principal investigator of the Authority. He records the history of the processing of the complaint. It included obtaining the adviser's full file. He states that he did not find evidence of negligence, incompetence, or dishonest or misleading behaviour. However, he did identify certain potential breaches of the Code. As for the breach concerning the wife's visa date, it was diminished by the adviser's professional response and the absence of any long-term adverse consequence. There were also some delays in reviewing documents and responding to communications, but these were minor.

ASSESSMENT

[39] The appellant's principal complaint is the adviser's failure to check the expiry of the wife's visa some time after they were granted visas. He assumed it expired at the same time as that of the appellant (14 November 2021). Instead, it expired earlier on 3 June 2021. This led to the wife's immigration status in New Zealand becoming unlawful. This was shortly afterwards picked up by an immigration officer who notified the adviser on 30 June 2021. He immediately contacted the couple and a s 61 request for a visa was promptly made by the adviser on 1 July 2021. It was successful and a work visa was granted to her on 12 July 2021.

[40] The adviser plainly breached cl 1 of the Code in failing to identify the correct visa expiry date and notify the wife well beforehand of the need for an extension. He was unprofessional and lacked diligence and due care.

[41] The appellant is right to emphasise the potentially serious immigration consequences for not just the wife, but the whole family. Her immigration status became unlawful. That jeopardised the family's residence application. They had already given up their life in [Country] and moved to New Zealand. I accept the news about her unlawful status would have been very stressful to them.

[42] Does the adviser's potentially serious mistake therefore justify a formal disciplinary process?

[43] There is a well-known principle of professional disciplinary jurisprudence that not every professional wrongdoing warrants a formal process. There is a certain threshold as to the gravity of the wrongdoing in order to attract a sanction for the purpose of protecting the public.[3]

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[3] *Liston v The Director of Proceedings* [2018] NZHC 2981 at [42]–[45], *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [60].

[44] For the reasons given by Mr van Weeghel, which are duplicated in the Registrar's decision, this mistake is mitigated by the following factors:

1. The adviser apologised.

2. The adviser immediately set about rectifying the mistake, by filing a s 61 request.

3. The adviser readily admitted the mistake to Immigration NZ.

4. The adviser offered to reimburse the wife's lost wages.

5. There were no adverse immigration consequences for the family.

[45] To the Registrar's mitigating factors, I would add another. I agree with the adviser that a migrant bears an obligation to ensure he or she is aware of the expiry date of their visa and maintains a lawful status. The appellant and his wife contributed to the wife's unlawful status, as indeed apparently did Immigration NZ (giving the wife the wrong advice on 12 April 2021).

[46] The appellant contends there were "months of delays" to residence due to the error.[4] The delays appear to have been minimal. The unlawfulness was discovered by Immigration NZ on 30 June, a rectifying request was lodged on 1 July, it was approved on 12 July and residence was granted on 20 October 2021. In the context of the usual periods taken by Immigration NZ, particularly in the current pandemic, that is timely decision-making.

[47] The appellant also contends there were financial losses, other than the lost wages. They are not particularised. No evidence of such losses has been presented.

[48] Turning then to the other complaints, the Registrar found some delay in reviewing documents and responding to emails. He found such matters did not warrant a formal process. In his submissions to the Tribunal, the appellant does not identify any specific delay, beyond the delay to residence said to be caused by the error (which I do not accept).

[49] Finally, it is contended that the adviser falsely claimed that his office in Auckland could assist with all matters, yet there was no licensed adviser there. The absence of a licensed adviser would restrict the services and advice that could be performed at the premises, but a licensed adviser in [Country] may have been readily contactable (subject

[4] Notice of Appeal (31 January 2022) at Part 3.

to time differences). In any event, I agree with Mr van Weeghel that the services available from the Auckland office do not pertain to this matter. The appellant has not explained what, if any, experiences he had with the Auckland office.

Conclusion

[50] I find that the complaint does not reach the threshold justifying a reference to the Tribunal.

OUTCOME

[51] The appeal is rejected.

ORDER FOR SUPPRESSION

[52] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[5]

[53] There is no public interest in knowing the name of the adviser against whom the complaint is made. Nor is there any public interest in knowing the identity of the appellant.

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

D J Plunkett
Chair

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