

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 1

BETWEEN

MR AI

Applicant

AND

MR ZO

Respondent

DECISION

The names and identifying details of the parties in this decision have been changed.

[1] The Auckland Standards Committee 1 declined to uphold a complaint by Mr AI against law practitioner Mr ZO (the Practitioner). Mr AI sought a review of the Committee's decision.

[2] An Applicant-only hearing was scheduled. This type of hearing may be scheduled where it appears from the existing file that all information necessary for the review is already available, but can also show whether further enquiry is needed. In this case Mr AI attended, accompanied by his wife and a relative who attended in support. The Practitioner had an opportunity to attend but elected not to do so.

[3] Mr AI was asked to bring the file with him (he had previously uplifted his file from the Practitioner and it is now held by his new lawyer). From the file Mr AI provided further information which was pertinent to the complaints. Having heard from Mr AI at the review, and considered the information he provided, I discerned that some of this information appeared to be inconsistent with some parts of the Practitioner's responses to the Standards Committee.

[4] In relation to those matters the Practitioner was asked to provide further comments for the review. I received the Practitioner's comments, and having considered them I formed a view that they did not wholly address all of the discrepancies and that some further inquiry was likely to be needed in order to resolve them.

[5] The Practitioner was informed that I was contemplating referring the matter back to the Standards Committee for such further inquiry, but before doing so his comments were invited. The Practitioner did not wish to add anything further.

[6] Having considered all of the issues arising in the complaint, and the evidence provided, I remained of the view that further inquiries should be made into certain issues, and I have decided that it is appropriate to refer the matter back to the Standards Committee.

Background

[7] A brief background is that the complainant, Mr AI, and his family are Fijian Indians who immigrated to New Zealand in 2006. Since that time Mr AI has been trying to get permanent residency for himself and his family. The main stumbling block is that Immigration New Zealand (INZ) has formed the view that his IELTS Certificate was forged. This is the English language certificate that must accompany all applications for permanent residency. Although Mr AI insists that his IELTS Certificate is genuine, enquires made by INZ have failed to satisfy, and as a result Mr AI's work permit and subsequent application for permanent residency were declined.

[8] In relation to these matters Mr AI sought the assistance of the Practitioner, who assisted Mr AI (and family members) with various applications. This included Mr AI's application for renewal of his work permit which was declined in June 2010. Mr AI's application for a residency permit was also declined in August 2009.

[9] Mr AI wanted to appeal the INZ decision declining his residency permit. An appeal had to be made in the manner prescribed by the Immigration Act 1987, which requires an application to appeal be received by the Board (the Residence Review Board) within 42 days of notification of the INZ decision to decline the application. This would have required the appeal application to be filed on 5 October. However, the application was filed on 6 October 2009, a day late, and was statute-barred. The Residence Review Board informed the Practitioner that it had no discretion in the matter, and there was no option but to decline the application.

[10] Mr AI blames the Practitioner for the delay in filing the appeal application. This was his main complaint to the New Zealand Law Society. Mr AI holds the view that he would have been successful on the appeal. Whether or not he is right cannot be guessed, but he was entitled to have the residency application reconsidered on appeal and lost this right because the application was filed after the closing date.

[11] The other complaint alleged that the Practitioner had not included all necessary information when filing the work permit renewal application and had told him it was all right to work while the application was under consideration.

[12] A final complaint alleged that the Practitioner had forged his (Mr AI's) signature on a document.

[13] The Practitioner provided a lengthy response to the complaints, essentially denying all the allegations. He set out the background events, making his view clear that Mr AI's application was declined because his IELTS test result was not accepted as being genuine.

Standards Committee decision

[14] Mr AI's complaint was considered by the Standards Committee which, in its decision, referred to the essence of the complaint, and the information provided by the Practitioner. In the discussion part of the decision, the Committee wrote that the complaints lacked credibility, were not supported by any corroborating information and therefore could not be sustained.

[15] The Committee noted that Mr AI had his residency application declined because he lied about the result of his IELTS exam and had produced a forged certificate to INZ. The Committee considered that Mr AI could not adequately explain or disprove the allegation of fraud and as a result he and his family faced deportation.

[16] The Committee accepted the Practitioner's description of Mr AI as a:¹

desperate man who would try anything to remain in New Zealand. Mr AI has himself to blame for the predicament he is in and his attempt to attribute that to Mr ZO is not supported by the evidence.

Accordingly the Committee decided that any further action was inappropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act.

¹ Standards Committee decision dated 29 August 2011.

[17] The review application was filed because Mr AI challenged certain information that the Practitioner had given to the Standards Committee, and he was of the view that the Committee had made the wrong decision.

Further enquiry

[18] As noted above Mr AI came to the review with the file he had uplifted from the Practitioner at an earlier time. Mr AI identified certain information from his file and explained why he considered the Practitioner had misled the Committee. His explanations suggested that some of the information appeared to be inconsistent with information that the Practitioner had given to the Standards Committee when he responded to the complaint. This suggested, in turn, that further explanation should be sought.

[19] I had noted that at the time of the Standards Committee enquiry the Practitioner did not have access to the file when he had responded to Mr AI's complaints.

[20] My further enquiry took the form of identifying the issues that needed further explanation with reference to particular documents that were provided at the review, and the Practitioner's responses to the Committee. These matters were put to the Practitioner for comment, with copies of documents where relevant.

[21] The following sets out my observations; it also sets out the scope of my further enquiry, the responses of the Practitioner, and my observations arising from that enquiry. I record that aside from the information sent to the Practitioner by my Office during this review, the Practitioner still has not had access to the file that he handed to Mr AI some time ago. I have taken this into account

Advice relating to work permit

[22] It appears that the Practitioner had not included all necessary information with his application to renew the work permit. Mr AI's view was that as an Immigration Specialist the Practitioner ought to have been aware that each application was considered to be a fresh application and all documentation needed to be included regardless of whether it had been provided at any other time.

[23] The main missing document was an employer supplementary form. However, it appears that this was sent later. Mr AI's work permit was subsequently declined, but not for any reason relating to the late provision of the employer form. Even if it is the case that the form was omitted from the original posting, the circumstances

surrounding the work permit application do not give rise to professional conduct concerns.

[24] The further issue concerns Mr AI having continued to work after his permit was declined. The Practitioner had informed the Standards Committee that Mr AI disregarded his advice to stop working at that point in time. Mr AI rejected the Practitioner's explanation to the Committee. He said that the Practitioner told him it was possible to continue working while the application was under consideration, and that this was possible because of a new law which allowed this.

[25] In his response to my Office the Practitioner denied having any discussion about a new law, and contended that the Applicant (Mr AI) was advised "in no uncertain terms that as his visa had expired he was not eligible to work."² The Practitioner understood that Mr AI had continued to work illegally well after he had uplifted his file from the Practitioner.

[26] There is conflicting evidence from the parties on these matters which is not readily resolvable in a review forum. It is not clear whether there was a gap in time between the work permit expiring, and the INZ decision on whether to renew it, which may explain why Mr AI continued working (a legislative amendment now apparently allows an individual to continue working in such a gap period).

[27] The conflicting evidence also might be explained if there had been some sort of misunderstanding between the Practitioner and Mr AI concerning his work status. The information provided by Mr AI at the review indicated that the work permit that had expired had previously been renewed for a date that was inconsistent with his original work permit. That is to say, I understood that the original permit issued to him had not expired.

[28] Whether or not the Practitioner told Mr AI he could continue to work cannot be resolved. It would seem unlikely that the Practitioner would have deliberately informed his client that it was all right to work when the work permit had already expired. Overall I do not find enough evidence to indicate any further enquiry would be useful.

[29] In the course of my looking through the file at the review hearing I was unable to find anything to indicate that the Practitioner had advised Mr AI about his right to appeal the decision declining his work permit. The right to appeal is stated on the

² Letter from Mr ZO to LCRO dated 14 May 2013.

declining letter, which was on the file. As part of my review the Practitioner was asked to respond to this observation.

[30] The Practitioner informed me that the Applicant was advised on all occasions of his legal position and his legal rights, and that he was “well aware that if his work visa was still valid and current, then he had the right to appeal that decision to INZ.”³ The Practitioner could not recall the full extent of the discussions at the time, but he was certain that he would have advised the complainant to appeal the decision. He wrote:⁴

I was obviously not convinced with INZ’s logic and reasoning at the time and given that Mr AI was known to me personally, there is no doubt that I would have asked him to appeal (if his visa was valid).

[31] My review of the file yielded no clue as to whether advice about the appeal had been given. Mr AI denied any knowledge or awareness of a right of appeal in respect of the work permit application.

[32] The Standards Committee is directed to undertake an enquiry into this matter, and consider afresh whether there was any professional failing on the part of the Practitioner in respect of the work permit appeal, and any related matters.

Appeal to Residency Review Board

[33] When Mr AI’s application for permanent residency was declined, the matter of appeal was discussed between the Practitioner and Mr AI. The appeal application was indeed lodged but this was done a day late, and it was declined by the Residency Review Board (RRB) for that reason. It is undisputed that the appeal application was filed on 6 October 2009; it should have been filed on 5 October 2009.

[34] The Practitioner had informed the Standards Committee that his instructions to file the appeal had come after the expiry of the last filing day which was the reason for the application being filed late.

[35] At the review hearing Mr AI provided evidence which challenged the Practitioner’s advice to the Committee. A copy of the appeal application form was on the file. On its face it had been signed by Mr AI on 30 September 2009. The form also shows that the Practitioner paid the application on 5 October; the Practitioner’s signature as “card holder” for a visa payment (the \$700 appeal fee) shows as having been transacted on 5 October 2009. Also on file were submissions that the

³ Above n2.

⁴ Above n2.

Practitioner had prepared for the appeal, these having been done in September and had been shown to Mr AI. The final submissions document (copy on the file) is dated 4 October 2009 and bears the Practitioner's signature. From this it would appear that all was in order for the appeal to have been filed within the statutory time frame of 5 October 2009. It was in fact faxed from the Practitioner's office the next day at around noon.

[36] The above information was provided to the Practitioner who was asked to comment. In reply the Practitioner wrote that he steadfastly adhered to the position he had given to the Standards Committee in his letter of 13 June 2011 particularly with reference to paragraph 25 in which the Practitioner had written that he was waiting for the final instruction from the complainant to file the appeal and this did not eventuate before the last filing day. The Practitioner agreed that the appeal application was ready for filing and that he had gone to the extent of using his credit card to pay for Mr AI's application fee, adding that if he (presumably Mr AI) had acted promptly and given him firm instructions, the Practitioner would have filed his appeal to the RRB on time.

[37] In relation to the RRB appeal the Practitioner provided information to the Standards Committee about the extent of his contact with Mr AI prior to the expiry of the appeal date, during which time, the Practitioner said, Mr AI had indicated that he could find another lawyer if the Practitioner declined to act for him. The Practitioner advised the Committee that "a few days before the date to file the appeal"⁵ he spoke to Mr AI to ascertain whether another lawyer had been engaged and was told by Mr AI that the file would be uplifted by the new lawyer. The Practitioner said that he reminded Mr AI about the short time left to file an appeal.

[38] The Practitioner informed the Committee that he did not hear back from Mr AI until after the expiry of the appeal date. At that stage, wrote the Practitioner, Mr AI instructed him to file the appeal and threatened suicide if he did not.

[39] Mr AI vigorously denied the Practitioner's account concerning the filing of the appeal (this being his main complaint), and also denied having threatened suicide.

[40] The Practitioner's explanation to the Standards Committee would appear to be inconsistent with the appeal application form which shows that it was signed by the Applicant several days before the closing date. I question why the form would have been signed on 30 September if Mr AI was consulting another lawyer, and why the

⁵ Mr ZO's letter to NZLS in response to complaint dated 13 June 2011 at para [24].

Practitioner would, in that event, have been preparing submissions for the appeal and signed them on 4 October. The further question is why the Practitioner would have used his credit card, on 5 October, to pay for the appeal if he was expecting the file to be uplifted, or if no firm instructions had been given by Mr AI to file the appeal until after the expiry date.

[41] This is the main complaint raised by Mr AI and in light of the above observations, it is my view that further inquiries should be made into this issue.

[42] There is also other information on the file that appears to me to have relevance to this particular matter. I refer to a letter that the Practitioner drafted for signing out by another lawyer, Mr in this case, on Mr 's letterhead. The letter intended to appeal to the Ombudsman in respect of the late filing of the RRB appeal.

[43] The content of the letter records the Practitioner taking upon himself the full responsibility and blame for the RRB appeal having been filed out of time. Such is made clear from the following extracts from that letter:⁶

- ... principal at ZO Legal left instructions with his office staff to file his appeal but that was not duly followed.
- Given the mistakes made by ZO Legal, it is unfair and unjust that Mr AI and his family be punished for it. ZO Legal has accepted that it was their mistake (as explained in their letter dated 13 October 2009 to the RRB) in not filing the appeal on time.
- it is simply not fair that a hardworking, law abiding family should have to suffer from allegations of fraud which have been emphatically dismissed and the mistake made by their former lawyer in whom they placed their complete trust.
- From allegations of fraud to their lawyer, ZO Legal, not lodging an appeal to the RRB on time, Mr AI and his family had suffered a lot emotionally and mentally

[44] The above is, on its face, the clearest possible statement, drafted by the Practitioner, that he (or his firm) was responsible for the late filing. To the Standards Committee, the Practitioner had explained the content of his letter in terms of:⁷

It was decided that we (ZO Legal) would take full blame and responsibility for

⁶ Letter signed by Mr , written by ZO to Ombudsman (Immigration) dated 23 August 2010.

⁷ Above n 5 at para [28].

apparently not filing the appeal on time thereby opening the door to file further appeals with the Minister of Immigration and if needed the Ombudsman.

[45] Given the further information that has come to light in the course of this review, there appears to be a proper basis for further investigation into the filing of the appeal. This issue is central to Mr AI's complaints and I consider that further enquiry should be made.

[46] The Standards Committee is directed to reconsider the complaint concerning the late filing of the appeal to the Residency Review Board.

Involvement of Mr

[47] Mr AI complained that the Practitioner had, without his consent or knowledge, involved another lawyer in his affairs. Mr AI said he found out about Mr 's involvement when he uplifted his file from the Practitioner's office.

[48] The Practitioner informed the Committee that the complainant was well aware of Mr 's involvement in connection with appealing to the Ombudsman. Information provided by the Practitioner to the Standards Committee included an explanation of the role of lawyer, Mr , who had written on Mr AI's behalf to the Ombudsman.

[49] In response to my office, the Practitioner accepted that Mr AI had not met Mr and that there was no need for that to have happened. The Practitioner said that the submissions to the Ombudsman had been prepared by him, but forwarded to Mr to merely endorse the same on Mr 's own letterhead to be forwarded to the Ombudsman's office. He repeated his original assertion that Mr AI was aware that he would engage Mr to appeal to the Ombudsman.

[50] This is not a matter that is readily resolved in a review forum. There is nothing on the file to indicate that there had been a discussion with Mr AI about appealing to the Ombudsman or involving another lawyer. It is not clear that an invoice was sent by Mr for his attendance, but that is not necessarily relevant. The different accounts of the Practitioner and Mr AI concerning Mr AI's knowledge of Mr 's involvement, are irreconcilable.

[51] It would not be at all unusual that another lawyer who is instructed by the first lawyer would not meet the parties personally, but act on the instructions of the first lawyer.

[52] There are, however, aspects of the letter which may call for further enquiry. The

letter, signed by Mr , informed the Ombudsman that he was now acting for Mr AI and his family; the second paragraph stating:⁸

we have now been approached by Mr AI to act on his behalf in relation to all his immigration matters. We are instructed to write to you and request your intervention into our client's application.

[53] It is undisputed that Mr AI did not meet with Mr who acted at the request of the Practitioner. On the basis of the Practitioner's own explanation it would seem he drafted a letter that included misleading information. There may be differing views about the significance of this.

[54] However, there is clearly inconsistent information insofar as Mr AI contends that he was wholly unaware of the Practitioner's approach to Mr , and had discovered this from information he found on the Practitioner's file. There is nothing on the file to indicate that Mr 's involvement was known to, or discussed with, Mr AI.

[55] In light of my previous observations, and in particular those arising in connection with the content of the letter drafted by the Practitioner for Mr to sign out, it is my view that this complaint requires further investigation. It may be seen as being pertinent to the above issues.

[56] The Standards Committee is directed to include this complaint in its further enquiries.

Allegation of forgery

[57] The appeal application form shows Mr AI (as applicant) having signed it on 30 September 2009. A further allegation made by Mr AI is that his signature on the appeal form is forged. He thinks or assumes this has been done by the Practitioner, or by someone else at the Practitioner's direction. The Practitioner claims the signature had been done by Mr AI himself.

[58] To add to the confusion, Mr AI claims to have personally signed an application form for the appeal in the Practitioner's office well before the expiry of the appeal, and that the form which he eventually found in the Practitioner's file (after uplifting it) was a different form to that which he had signed. That is to say, Mr AI claims to have signed an appeal form, but not the one that was sent to the RRB.

⁸ Above n 6.

[59] A similar allegation was made by Mrs AI. At the review hearing Mr AI also produced a copy of another application made by the Practitioner for his wife, ostensibly signed by Mrs AI but which she claims is a forged signature.

[60] Mr and Mrs AI produced copies of their signatures as they appear on their passports and there is little doubt that the signatures as appearing there are noticeably different from those appearing on the application forms.

[61] All of these matters were put to the Practitioner with the request for a reply. He wrote that the allegations were “absolutely ridiculous”⁹, adding that wherever and whenever required, Mr AI had signed forms himself either in front of the Practitioner in his office, or had taken the forms home to complete and sign and return it the next day.

[62] I am unable to resolve the matter of variations in signatures on these different documents. On the face of the various documents the signatures are difficult to reconcile. This is an important issue. Given the apparent discrepancies above, and those existing in the documents themselves, this matter ought to be further investigated.

[63] The Standards Committee is directed to reconsider the complaint alleging forgery, including that relating to an application by Mrs AI.

Fees

[64] In his response to the complaints the Practitioner had informed the Standards Committee that from the time he started working for Mr AI and his family the most he had been paid was \$200 for the INZ application fee for his work permit. The Practitioner claimed that the INZ fees for Mr AI’s other applications, his wife’s applications and those of his children, as well as the fee for Mr AI’s appeal to the RRB, were all paid by the Practitioner himself. In short, the Practitioner claimed he had charged no professional fees and had met all application fees except for that concerning the work permit application.

[65] The Practitioner further claimed that Mr AI had sought financial assistance from him and that not only had he paid for the application fees but on several occasions had loaned money to Mr AI, ranging from \$100 to \$500, adding that “to date obviously [I] have not charged him a single cent in fees for all the work that I did for him and his

⁹ Above n 2.

family.”¹⁰

[66] Mr and Mrs AI vigorously denied the Practitioner’s claim that they had not paid fees and costs. They claim to have paid not only the application fees for various applications for family members, but also the professional fees charged by the Practitioner. They said all payments were made in cash.

[67] At the review hearing Mr AI produced a page from the Practitioner’s file which he said recorded (in the Practitioner’s handwriting) two payments noted to be for “fees”, each of \$350, a total of \$700. Mr AI also claimed that he paid the Practitioner \$700 in cash for the appeal to the RRB, confirmed payment of the \$200 filing fee for the renewal of the work permit (also in cash), and contended that he had paid the Practitioner fees for all professional attendances and for the various applications, at all times in cash.

[68] All of these matters were put to the Practitioner (with a copy of the page from the file), with a request to respond. The Practitioner explained that at the time he wrote to the Standards Committee he did not have the file and was not aware of all of the information on it, and hence advised the Committee that he had received only approximately \$200 from Mr AI. He accepted that this was not true and apologised for any perceived misrepresentation in that regard.

[69] The Practitioner accepted that the file note showed that payment was made to him in the sum of \$600 in total, \$300 in March 2009 and then \$300 on 20 April 2009 being fees towards the INZ applications. (This is not correct because the note records two payments each of \$350). The Practitioner claimed that no other payment was received from Mr AI, and certainly nothing for the RRB appeal. The Practitioner contended that it was clear that all payments were recorded and file notes were made by him and if any further payments had been made, then these too would have been recorded. He also referred to money he loaned the AIs, although I found no record of such loans on the Practitioner’s file.

[70] It was apparent from the file that the Practitioner had filed a good many applications to the INZ, as well as the appeal to RRB, for the AI family, all of which would have involved considerable legal work and a large sum by way of disbursement for various applications. The Practitioner’s contention is that for the most part he did this work for no fee, and also met the considerable disbursements himself. The

¹⁰ Above n 5 at para [36].

Practitioner also advised that on various occasions he loaned money to Mr AI, ranging from \$100 to \$500. I could find no record of loans on the file.

[71] There are clear inconsistencies between the evidence provided by Mr AI and the information given by the Practitioner to the Standards Committee. The file note inevitably raises questions about the Practitioner's account. I am also left with questions about why the Practitioner would have provided such extensive legal work for virtually no payment at all, including paying the not insignificant disbursements from his own pocket.

[72] The RRB application form shows that the Practitioner used his own credit card to pay the RRB application (I understand that Mr AI does not have this facility) but Mr AI's explanation is that he had paid the Practitioner in cash. These matters are relevant to the reliability of evidence considered by the Committee, and upon which its decision was based. In my view this matter requires further investigation.

[73] The Standards Committee is directed to undertake such further enquiry as it considers appropriate in respect of the Practitioner's information concerning his professional fees, payment of application fees and loans.

Concluding comments

[74] My decision to refer this matter back to the Standards Committee for further inquiry essentially arises because of the significant inconsistencies between the accounts of the Practitioner and Mr AI, and evidence which, at least to some extent, provides support for Mr AI's complaints.

[75] The Standards Committee's decision clearly indicates that the Committee was persuaded by the Practitioner's account of Mr AI's dishonesty in connection with his IELTS results, upon which doubts were raised about his credibility more generally. The Practitioner's emphasis on Mr AI's dishonesty concerning the IELTS result is largely the basis for his suggestions that no part of Mr AI's account is to be believed.

[76] Whether or not Mr AI provided a forged IELTS certificate to INZ does not mean that his complaints are unfounded. Nor should this deflect attention from an enquiry into complaints about the Practitioner's conduct in respect of the professional services he provided to Mr AI.

[77] My review has given rise to questions about some of the Practitioner's responses to the Standards Committee. Not all of the Practitioner's comments were necessary to answer the complaints. For example the information about working for no fees/paying

all disbursements, and lending money to Mr AI was gratuitous information, and one might ask why this information was included at all. But having made certain statements to the Standards Committee, Mr AI was entitled to challenge the Practitioner's evidence, and it is clear from the above discussion that there remains a number of unresolved questions about information provided by the Practitioner to the Standards Committee.

Redirection pursuant to s 209 of the Lawyers and Conveyancers Act 2006

[78] Pursuant to s 209 of the Lawyers and Conveyancers Act the Standards Committee is directed to undertake further enquiry into Mr AI's complaints. The decision of the Committee is hereby quashed to clear the way for that to happen.

[79] I have indicated the areas (underlined) where the Standards Committee is required to reconsider Mr AI's complaints and undertake further enquiry. The Committee is then to issue a new decision following such enquiry that the Committee considers appropriate.

[80] Should the Committee's further enquiries yield information that calls into question some of the Practitioner's information, the Committee is, in that event, also directed to commence an own-motion investigation into the Practitioner's responses to the complaints and any other matters that the Committee may consider relevant to this enquiry.

[81] The Committee will be aware of its obligation to comply with natural justice and it may be necessary that a copy of the Practitioner's file be made available to him so as to allow him to fairly respond to any enquiry.

[82] It is open to the Committee to consider appointing an investigator if it is unable to resolve the matters itself, or to consider whether any outstanding disputed evidence should ultimately be dealt with in the Disciplinary Tribunal. These are matters for the Standards Committee to decide.

Summary of outcome.

- (a) The decision of the Standards Committee is quashed.
- (b) The Standards Committee is directed to reconsider the complaint, and any other matters arising from the complaint, as indicated in the above decision.

DATED this 21st day June of 2013

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr AI as the Applicant
Mr ZO as the Respondent
The Auckland Standards Committee 1
The New Zealand Law Society