

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2012] NZIACDT 60

Reference No: IACDT 006/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Dip Chand and Sant Kumari

Complainants

AND

Richard Uday Prakash

Adviser

DECISION

REPRESENTATION:

Complainants: In person

Adviser: In person

Date Issued: 28 September 2012

DECISION

Introduction

- [1] Mr Prakash is a licensed immigration adviser, and assisted Mr Chand with immigration services. It is only the final part of the professional relationship that is in issue.
- [2] Matters had reached the point where Mr Chand had to leave New Zealand as he had not been able to obtain a further visa. Mr Prakash made some further attempts to assist Mr Chand, but they were not successful.
- [3] Mr Prakash had not complied with the Licensed Immigration Adviser's Code of Conduct ("the Code") in relation to an agreement to provide the additional services.
- [4] Close to the time Mr Prakash was required to leave New Zealand, Mr Chand says Mr Prakash withheld his passport, in order to force him to pay the fee claimed to be owing.
- [5] Mr Prakash accepts he did not comply with the Code in relation to having a written agreement. However, he disputes Mr Chand's claim that he withheld Mr Chand's passport.
- [6] The issue for the Tribunal to determine is whether Mr Chand or Mr Prakash's claims are correct.
- [7] The evidence supported Mr Chand's complaint when it was lodged with this Tribunal, and the reasons for that were put to Mr Prakash in a Minute issued by the Tribunal.
- [8] Mr Prakash has not effectively challenged the evidence against him.
- [9] I am satisfied the complaint is made out on the evidence, and uphold it. That is both in relation to the failure to comply with the Code in respect of the additional services, and withholding Mr Chand's passport.

The Complaint and the Response

The complaint

- [10] Mr Chand engaged Mr Prakash as a licensed immigration adviser. His partner Ms Sant Kumari was also a party to the agreement engaging Mr Prakash.
- [11] They required assistance to apply for a work permit for Mr Chand. Mr Prakash was engaged under a written agreement dated 5 May 2010. The agreement indicated the total fees and disbursements would be \$1,686.25. They paid the full amount in instalments.
- [12] The application was declined on 30 September 2010. Mr Chand subsequently prepared to leave New Zealand and booked a flight to Fiji, as his current permit expired on 29 December 2010.
- [13] Mr Chand requested that Mr Prakash challenge the decision to decline the application. He supplied further information for that to proceed.
- [14] On 16 November 2010 Mr Chand went to Mr Prakash's office with a support person from the temple he attended. They saw Mr Prakash, and he told them Mr Chand could pick up his passport on 3 December 2010. Mr Chand made further telephone calls to Mr Prakash's office, but could not establish contact with him.
- [15] Mr Chand's support person contacted Mr Prakash and was told Mr Chand should uplift his passport from Immigration New Zealand's Manukau office. He contacted Immigration New Zealand and was told the application was still in progress, and he could either pick up the passport or remain in New Zealand until 29 December 2010. He changed his ticket to leave on 27 December 2010, hoping for a favourable response from Immigration New Zealand to the review of the decision to decline.

- [16] At this point Mr Prakash sent Mr Chand a letter dated 16 December 2010, which said he could uplift his passport from Mr Prakash's office. The letter noted there was an outstanding balance of fees of \$517.50 "for which prompt payment is required and [you] will appreciate that this payment is made when uplifting your passport".
- [17] There was no agreement to pay a further \$517.50, or any further fees, as required by the Code.
- [18] On 20 December 2010, Mr Chand and his support person returned to Mr Prakash's office to get his passport. They arrived at 11:45 am, and after waiting for two hours Mr Chand's support person had to leave to go to work. Mr Prakash saw Mr Chand at 2:00 pm in the afternoon.
- [19] Mr Prakash told Mr Chand he was required to pay the fees in full, and only then would his passport be released. There was a discussion in which Mr Chand pointed out he had not agreed to pay further fees, but would do so if he could have time to pay.
- [20] Mr Chand left without his passport as Mr Prakash would not release it; he was in a difficult situation as he had to travel before 29 December 2010 or he would be in New Zealand unlawfully.
- [21] On 21 December 2010, as Mr Chand could make no further progress, he set out his complaint in full and forwarded it to the Authority. It contained all of the above information. Mr Chand concluded his letter by referring to his meeting with Mr Prakash the previous day:

"... I called and spoke to Mr Parkash [sic] at 11:15 and was told that his trustees and accountant have ordered me to pay 50% then only passport will be released. Again I explained that the money is used in new ticket and I can't pay any more at this stage. Mr Parkash now is asking me to sign an agreement to pay this money then he will release my Passport. I asked to send the documents via courier and he refused.

I need to travel on 27th Dec as I don't want to be classed as an overstayer just because of an Immigration Advisor's Negligence and a dishonest behaviour.

Please note that only agreement I signed was for \$1687.25 and this has been paid in full as final payment receipt attached.

I understand that this complain[t] will take a routine BUT MY PRIORITY IS TO GET MY PASSPORT AS SOON AS POSSIBLE."

- [22] Ms Kumari and Mr Chand then contacted the police and lodged a complaint with the Authority on 22 December 2010. The police officer called Mr Prakash and was told there was a financial dispute and the passport would not be released.
- [23] Someone from Mr Prakash's office then telephoned Mr Chand, and said the passport had not been uplifted from the office. The following day the police advised Mr Chand to go to Mr Prakash's office and endeavour to uplift the passport. Ms Kumari went to the office that day with a support person, and Mr Prakash handed over the passport but asked Ms Kumari to sign a service agreement consenting to pay \$526, which she refused to sign.
- [24] In early January 2011, Ms Kumari was given part of Mr Chand's file after requesting it.
- [25] The Authority confirmed it received the complaint on 22 December 2010, and gave Mr Prakash the opportunity to respond.

The initial response

- [26] Mr Prakash responded to the complaint dealing with the two issues raised:
- [26.1] the circumstances in which he claimed the additional fees were incurred; and
- [26.2] the response to the claim that the passport was retained as leverage to extract fees.

- [27] Mr Prakash said the initial application failed, and Immigration New Zealand sent notification which he received on 2 September 2010. His advice was to seek to have Immigration New Zealand reconsider its decision. He said Mr Chand insisted on an application under section 35A of the Immigration Act 1987 (the Act in force at the time). His advice was that as Mr Chand held a current permit he was better to use the reconsideration option.
- [28] Mr Prakash's explanation proceeds as though Mr Chand had the option of applying under section 35A. That would only have been possible after Mr Chand ceased to have a valid permit to be in New Zealand, as a person lawfully in New Zealand could not apply under that section. Mr Prakash did not indicate that Mr Chand was either in New Zealand unlawfully, or intended to put himself in that position.
- [29] The process stalled as Mr Prakash would not undertake the work without receiving a deposit first. Eventually, in a discussion with Mr Chand and his support person, Mr Prakash agreed to seek an informal review of the decision, as the support person promised Mr Chand would pay for the service.
- [30] On 20 October 2010 Mr Chand came to Mr Prakash's office and paid the final balance of the original fees due under the service agreement. Mr Prakash tried to get Mr Chand to sign a new service agreement, but he avoided Mr Prakash and did not do so, though he insisted Mr Prakash should proceed with the application for a review. Mr Prakash proceeded with the letter to Immigration New Zealand despite the absence of a service agreement for the work.
- [31] Immigration New Zealand received the application on 16 November 2010 as a "complaint" rather than an application for a review or section 35A application. Mr Prakash said a review or section 35A application was not possible as Immigration New Zealand required fees to be paid.
- [32] On 6 December 2010 Mr Chand rang Mr Prakash's office and said he needed his passport to travel. The following day there was communication with Immigration New Zealand and Mr Chand's support person. The result was a new arrangement, and Mr Chand would not travel until 21 December 2010. Accordingly, Mr Prakash's steps to get the passport from Immigration New Zealand were put in abeyance.
- [33] Mr Prakash said he received a response from Immigration New Zealand on 14 December 2010, and sent that with an invoice to Mr Chand. These documents were not attached to his response to the Authority.
- [34] On 15 December 2010 Mr Prakash received Mr Chand's passport from Immigration New Zealand. He wrote to Mr Chand in a letter dated 16 December 2010. The letter said:
- "Further to your instruction to our telephone message of 15 December 2010 we advise that your passport is in our Office for collection.
- Please you are welcome to come and collect your passport between 10.00am and 5pm from our office.
- We also remind you of the outstanding balance of \$517.50 for which prompt payment is required and will appreciate that this payment is made when uplifting your passport. We hope that you will understand as your work has been completed, we expect to be paid for the services that we have provided.
- Thank you for your attention and look forward to seeing you at your earliest."
- [35] On 20 December 2010 Mr Chand came to Mr Prakash's office with his support person, and said they would return the following day with the money. They left without the passport.
- [36] The same day Mr Chand's support person rang and arranged for the fees to be paid off over time, with Mr Prakash's agreement.
- [37] The following day Mr Chand rang and said Ms Kumari would collect the passport, and was told by a staff member he should give written authority to her.

- [38] On 22 December 2010, Ms Kumari contacted Mr Prakash's office and said she would collect the passport. Someone in Mr Prakash's office called Mr Chand, and confirmed he authorised Ms Kumari to collect the passport.
- [39] On 23 December 2010 Mr Prakash received a call from the police, and was told by the officer that Ms Kumari had lodged a complaint. A person in Mr Prakash's office told the police officer that the passport was not being withheld, rather Ms Kumari had failed to collect it, and they also said Mr Chand owed money to Mr Prakash.
- [40] Later that day Ms Kumari and a support person uplifted the passport.

The Issues

- [41] The issues to resolve are:

Fees

- [41.1] Did Mr Prakash comply with Code in relation to setting and recovering fees?
- [41.2] Clause 8 of the Code requires that a licensed immigration adviser set out fees before commencing work incurring costs. Clause 1.5 requires that before any agreement is entered into, the terms of the agreement and all significant matters must be communicated in writing.
- [41.3] There appears to be no dispute that Mr Prakash failed to comply with that obligation.

Withholding passport

- [41.4] Did Mr Prakash return Mr Chand's passport on request without delay?
- [41.5] Clause 1.3 of the Code requires that a licensed immigration adviser must "return passports and other personal documents to clients, on request, without delay and in a secure manner."
- [41.6] It is necessary to resolve the factual dispute as to whether Mr Prakash complied with that obligation.
- [41.7] There is an allegation that he did not, and his motivation was to pressure his client to pay fees he was not entitled to under the Code, knowing his client required his passport to avoid being in New Zealand unlawfully. That, too, is a factual matter in dispute.

The Tribunal's Minute

- [42] The Tribunal issued a Minute dated 27 June 2012, which identified the grounds of complaint, response, and the issues arising, and indicated conclusions that may be reached on the basis of the information held at that point by the Tribunal.
- [43] The Minute made it clear to the parties they could provide further information which would be considered by the Tribunal. The Minute also gave notice the parties could apply for the Tribunal to conduct an oral hearing, and particularly put Mr Prakash on notice how serious the complaint was. The Minute informed Mr Prakash the complaint would potentially be upheld on the basis of the information then before the Tribunal and, if so, that would potentially affect the status of his licence.
- [44] The Minute gave notice of the following potential views on the material before the Tribunal.

Fees

[44.1] Mr Prakash had not complied with the Code in relation to fees beyond the original service agreement. He had accordingly breached clause 8 and clause 1.5 of the Code.

Withholding passport

[44.2] The allegation against Mr Prakash was that he had no entitlement to recover fees, as he had not complied with the Code. He knew his client was attempting to comply with New Zealand law and required his passport to leave the country. He deliberately withheld the passport to force the payment of fees, by impeding his client from complying with New Zealand law.

[44.3] The material then before the Tribunal did not support Mr Prakash's explanation that his client's passport was available and simply not uplifted. The evidence supporting that view was drawn to Mr Prakash's attention.

Potential finding

[44.4] A potential consequence was that the Tribunal would conclude that Mr Prakash failed to comply with the Code in relation to fees; and then withheld Mr Chand's passport, knowing that it was impeding him from complying with New Zealand immigration law, and that he did so for the purpose of attempting to force Mr Chand to pay fees he was not entitled to.

Mr Prakash's Response

- [45] Mr Prakash responded to the Minute with a written submission dated 17 July 2012.
- [46] The submission was accompanied by a number of documents, and subsequently followed by an additional testimonial.
- [47] Mr Prakash's response, while extensive, largely ignored the key credibility issues raised in the Minute, and instead had a significant focus on impugning Mr Chand's credibility, and asserting his own high standards.
- [48] Mr Prakash's response traversed the uncontested history of the professional engagement, criticised Mr Chand, and asserted there was no evidence of Mr Prakash withholding Mr Chand's passport. It did very little to address the evidence identified in the Tribunal's Minute.
- [49] The response was very critical of Mr Chand; essentially claiming he was dishonest and that his complaint was founded on false statements and lies.
- [50] It also said that Mr Chand should have uplifted his passport from Immigration New Zealand.
- [51] The response said the fees were justified, but admits Mr Prakash made a mistake in doing further work without a service agreement.
- [52] In relation to withholding the passport, Mr Prakash absolutely denies that, and asserts Mr Chand had every opportunity to uplift his passport, and the complaint is simply dishonest.
- [53] Mr Prakash takes issue with various details of the complaint, including such matters as what the police said in a telephone call, what was said at Mr Prakash's office, and other details.
- [54] However, these details did not address the material issues.

[55] The Minute had explained that the important issues were Mr Chand's claim that he was denied access to his passport, and the evidence of him then recording the events and complaining to the Authority and the police. Mr Prakash's response did not address the coherence of what Mr Chand said, and the implausibility of Mr Prakash's existing explanation.

[56] Mr Prakash also presented a number of testimonials from a range of people.

Mr Chand's Response

[57] Mr Chand replied to Mr Prakash's response to the Minute and said Mr Prakash's response was not correct.

Decision

Withholding passport

[58] The Tribunal's Minute raised the key issues with Mr Prakash; namely there is an imperative on immigration advisers to ensure that travel documents are never withheld from clients. There is an obvious temptation to enforce the payments of fees through withholding travel documents; it is utterly unacceptable to do so. There are few things so universally understood to be unprofessional and dishonest conduct by professionals providing immigration services.

[59] The Code of Conduct, which has the force of law (see sections 37–39 and 44 of the Act), provides at clause 1.3:

“A licensed immigration adviser must:

...

(b) return passports and other personal documents to clients, on request, without delay and in a secure manner.”

[60] This is a positive duty on the adviser to ensure travel documents are returned.

[61] That is the context in which Mr Prakash's conduct has to be considered. It was striking that Mr Prakash found himself in a position where his client complained to his office, then the police, and then the Authority.

[62] Mr Prakash says there was no need for any of that, as Mr Chand's passport was at his office and he was free to uplift it at any time.

[63] The evidence is uncontested that Mr Chand was at Mr Prakash's office and left without his passport.

[64] Mr Prakash says he chose not to take the passport. That claim is inherently implausible, and cannot be accepted in the light of Mr Chand's subsequent conduct. Having failed to get his passport, he pursued official channels. He did so very articulately, and explained exactly why he wanted his passport and the urgency involved.

[65] The Tribunal is required to determine the complaint on the balance of probabilities; however the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1). The complaint includes elements which are at the highest end of the scale, and Mr Prakash is on notice that upholding this complaint will require the Tribunal to consider whether it will be necessary to cancel his licence. Accordingly, the findings are made with the standard of proof applied on the most stringent basis.

[66] After considering the evidence, I am sure Mr Prakash did withhold Mr Chand's passport and did so in an endeavour to seek payment of fees. As it happens, this was for fees he was not entitled to, but that is secondary.

[67] I have reached this conclusion on the basis set out in the Minute, and it is accordingly only necessary to refer to the reasoning briefly.

[68] Mr Prakash's explanation is implausible for the following reasons:

20 December 2010 visit to Mr Prakash's office

[68.1] Mr Prakash accepted Mr Chand and his support person went to the trouble of attending his office for the purpose of uplifting his passport on 20 December 2010. He says they voluntarily left without the passport, as it was their wish to return with payment the following day.

[68.2] Mr Prakash's claim is both implausible and rejected by Mr Chand. It is implausible, as:

[68.2.1] Mr Chand did not have the funds to pay, as he had spent his money on travel, so he could leave New Zealand before the date he was required to leave.

[68.2.2] Mr Prakash admitted he was told later that day that Mr Chand could not make immediate payment and agreed to payment by instalments.

[68.2.3] Mr Prakash cannot explain why two people would attend his office with the objective of getting a passport and then leave without it.

[68.2.4] Leaving without the passport is entirely consistent with Mr Chand being refused access to it.

[68.2.5] Mr Prakash had a positive duty under the Code to return the passport. If he was fulfilling that obligation by offering Mr Chand his passport, and it was refused; given his professional obligations Mr Prakash ought to have been very concerned, and recorded the event. He did nothing of that kind.

[68.2.6] Mr Chand's subsequent conduct is entirely consistent with him being refused access to his passport, as he claims.

Complaint to the Authority

[68.3] On 21 December 2010, the day following the visit to Mr Prakash's office, Mr Chand set out in writing a clear and articulate account of his passport being withheld, and said he believed that this was for the purpose of demanding fees.

[68.4] It makes no sense that Mr Chand would go to that trouble unless Mr Prakash had withheld his passport when they met the previous day. It also confirms that Mr Chand knew what he wanted and why he wanted it, and he was not likely to have left Mr Prakash's office without his passport if it was available to him.

[68.5] The Authority has confirmed the complaint was committed to writing. This is a contemporaneous record of the refusal to deliver the passport, and consequent complaint.

Complaint to the police

[68.6] When a passport is withheld with the intention of preventing a person complying with New Zealand law, a complaint to the police is fully justified.

[68.7] Mr Prakash characterised the complaint made to the police by Ms Kumari as "not in good taste and made without any basis".

[68.8] For the same reasons as it was implausible that Mr Chand would lodge a complaint with the Authority unless he understood he could not uplift his passport, it was implausible Ms Kumari would lodge a complaint with the police if she could have uplifted the passport from Mr Prakash's office.

- [68.9] Mr Prakash admits his office told the police “Mr Dip Chand owes money to [Mr Prakash’s company] for the work we had done for him”. It is not obvious what relevance fees had in a discussion with the police, unless as Mr Chand claimed, Mr Prakash was withholding the passport for the purpose of forcing the payment of fees.
- [69] I have considered Mr Prakash’s assertions impugning Mr Chand and proclaiming his own high standards of conduct. However, they are assertions that can carry little weight against the evidence before the Tribunal. I have also considered the testimonials. They can carry little weight in relation to whether the evidence supporting the complaint is sufficient to find it proved; they are not statements from people who are acquainted with the facts on which the complaint is based. The Tribunal is required to deal with the evidence before it and the status and reputation of people can carry only limited weight when there is evidence from the participants.
- [70] I am satisfied Mr Prakash withheld Mr Chand’s passport, that he knew Mr Chand required it for travel to comply with New Zealand law, and that his motivation for doing so was to get Mr Chand to pay fees.
- [71] It follows this aspect of the complaint is upheld. Mr Prakash breached clause 1.3 of the Code as he failed to return the passport; he also failed to uphold the integrity of New Zealand’s immigration system, and breached clause 2.1(f) of the Code. The conduct was also dishonest. This was not a situation where Mr Prakash misunderstood his obligations; he chose to misuse his access to Mr Chand’s travel documents for the purpose of demanding fees. It was a gross abuse of his position of trust as a licensed professional. Breaches of the Code are grounds for complaint under section 44(2)(e), and dishonesty is a ground for complaint under section 44(2)(d) of the Code.

Absence of written agreement to pay the disputed fee

- [72] Mr Prakash claims the fee he demanded from Mr Chand was fair and appropriate. It is not necessary to determine whether it was. Mr Prakash did not have a written agreement in respect of the relevant services, and had not set out the fee before commencing work. He has admitted that.
- [73] He was required by clause 1.5 of the Code to have a written agreement, and clause 8 required that he set out the fees.
- [74] Accordingly Mr Prakash breached clauses 1.5 and 8 of the Code of Conduct. Breaches of the Code are grounds for complaint under section 44(2)(e), and the complaint is upheld in this respect also.

Submissions on Sanctions

- [75] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions. The section provides:

“Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are —
- (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding two years or until the person meets specified conditions:

- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.”

[76] The Authority and Mr Chand have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Mr Prakash is entitled to make submissions and respond to any submissions from the other parties.

[77] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

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

[78.1] The Authority and Mr Chand are to make any submissions within 10 working days of the issue of this decision.

[78.2] Mr Prakash is to make any further submissions (whether or not the Authority or Mr Chand make submissions) within 15 working days of the issue of this decision.

[79] The parties are notified that this decision will be published with the names of the parties after five working days, unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 28th day of September 2012.

G D Pearson
Chair