

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

Decision No: [2013] NZIACDT 15

Reference No: IACDT 014/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Zi Chen

Complainant

AND

Bae Lian Loh

Adviser

DECISION

REPRESENTATION:

Complainant: Mr Tuariki Delamere, Licensed Immigration Adviser, Auckland

Adviser: Mr S Laurent, Laurent Law, Lawyer, Auckland

Date Issued: 19 March 2013

DECISION

Introduction

- [1] This complaint relates to Mr Loh's conduct in relation to his client, Mr Chen.
- [2] The same circumstances have resulted in a complaint against both Mr Loh and another licensed immigration adviser, Ms Gu-Chang. Both Mr Loh and Ms Gu-Chang were working in the same organisation and dealing with the same instructions from Mr Chen.
- [3] The events for each complaint involved both Ms Gu-Chang and Mr Loh and did not arise in circumstances giving rise to confidentiality as between them, or in relation to Mr Chen. Their respective roles are discussed in this decision, although separate decisions have been issued in respect of each of them. There are important differences between them in relation to the Tribunal's jurisdiction. Ms Gu-Chang was not a licensed immigration adviser for all of the material time.
- [4] The central element of the complaint is that Mr Loh and Ms Gu-Chang charged Mr Chen \$29,600 for the renewal of a passport and an application for ministerial discretion. The allegation is that this sum was grossly in excess of what the fee ought to have been, and that it was taken dishonestly.
- [5] In addition, the complaint alleges that the professional relationship was not established in accordance with the Licensed Immigration Advisers Code of Conduct, the excessive fees were not refunded, there was a failure to report properly, and a failure to return the file when required.
- [6] The issues are primarily factual matters. The Tribunal has found the allegation of gross overcharging made out; that it was done so dishonestly and the fees were not returned.
- [7] In relation to the other elements, the Tribunal has found the professional relationship was not established correctly. The Tribunal has not upheld the complaint in respect of a failure to report and return the file.

The Complaint

Background

- [8] Mr Chen's complaint presented the following allegations and supporting factual propositions.
- [9] Mr Loh and Ms Gu-Chang worked with Advantage Global Consultants Ltd (AGC).
- [10] Ms Gu-Chang was the person in charge of AGC during the whole of the time to which the complaint relates. However, Ms Gu-Chang only became a licensed immigration adviser on 19 October 2010, which was part-way through the period to which the complaint relates.
- [11] Mr Loh was contracted to provide services through AGC but was generally employed by another company. He held a licence from 27 February 2009, so he was licensed throughout the time to which the complaint relates.
- [12] Mr Chen first contacted AGC in December 2009. At that time he was in New Zealand unlawfully; his former adviser had lodged an application for a permit under section 35A of the Immigration Act 1987 ("the 1987 Act") and it had been declined. Mr Chen's initial contact at AGC was with Ms Gu-Chang. She introduced him to Mr Loh. Mr Chen understood Mr Loh was working for AGC. He did not sign any written authority for Mr Loh to act for him.
- [13] Mr Chen entered into an agreement with AGC for the provision of immigration services, dated 16 December 2009. The services are described as to apply for "[Section] 35A Work Visa (under partnership)". The fee for this service is identified as \$22,800. In addition, Mr Chen agreed to pay a further \$8,800 to assist him to apply for a Chinese passport, as he was a Chinese national living in New Zealand and his passport had expired.

- [14] The agreement identified AGC as the provider of immigration services and did not identify any licensed immigration adviser.
- [15] Mr Chen says he was in an emotionally vulnerable state and exploited when he signed the agreement. He also says the agreement failed to adequately describe the services and was misleading. Section 35A was an open discretion, which has no relationship to “partnership”. This, he says, was important as he was told the fee for applying for the visa was \$18,800, but a further fee of \$4,000 was required as his wife was a New Zealand resident.
- [16] The agreement provided that the fee could be paid in instalments and AGC could defer lodging an application until \$10,000 had been paid in instalments. Mr Chen complains that he was not told such delay could be prejudicial to making an application under section 35A and he was not told of the nature of a section 35A application or the prospects of it being successful.
- [17] On 17 December 2009 Mr Chen paid Ms Gu-Chang \$8,800 in cash in relation to his Chinese passport. He was told to inform the Chinese embassy staff he was applying for a student visa. Ms Gu-Chang provided a letter of offer of a place at an English language school she and her husband owned and also supplied receipts, which appear not to have been genuine.
- [18] Mr Chen was told by Ms Gu-Chang that if the Chinese embassy officials knew he was in New Zealand without a permit, the police would be called and he would be arrested. For that reason, he needed the assistance of AGC’s personnel.
- [19] Mr Chen paid the sum of \$29,600 in instalments, which is the total amount in the agreement and the further payment relating to the renewal of Mr Chen’s passport.
- [20] At the time the agreement was entered into, Mr Chen’s immigration status was that he was in New Zealand unlawfully, as the permit he previously held had expired. Accordingly, he was not in a position to apply for a permit while he remained in New Zealand. However, section 35A of the Immigration Act 1987 provided that the Minister of Immigration could grant a permit to a person who was in New Zealand and did not hold a permit. The power was delegated to Immigration New Zealand officers.
- [21] The material supporting the complaint includes information that shows Mr Chen’s material immigration history and AGC’s initiatives were as follows.

Immigration history prior to AGC’s involvement

- [22] Mr Chen’s immigration situation in New Zealand had been complicated by a history that involved him making applications under more than one name. In a letter dated 6 July 2007 Immigration New Zealand had raised concerns regarding that issue.
- [23] Mr Chen’s former adviser lodged an application for a work permit under section 35A, dated 25 March 2009. The application addressed Mr Chen’s then circumstances and the issue of him changing his name.
- [24] On 22 October 2009 Immigration New Zealand prepared a report regarding Mr Chen’s circumstances. This report was in the period immediately prior to AGC commencing representing Mr Chen. The report reviewed Mr Chen’s application under section 35A, which had presented a detailed history to explain the reasons for his change of name and his circumstances. The report indicated that Immigration New Zealand had fully considered that material.

The agreement with AGC

- [25] At this point in the narrative, Mr Chen signed the agreement with AGC. The agreement is dated 16 December 2009.

The initial application by AGC under section 35A

- [26] On 18 December 2009, Mr Loh wrote to Immigration New Zealand requesting Mr Chen's file. The letter appeared to have been sent under cover of a facsimile of the same date by Ms Zhang of AGC (also a licensed immigration adviser). After receiving Immigration New Zealand's history of Mr Chen's previous dealings, including the very recent section 35A application, Mr Chen and Ms Gu-Chang were fully informed of that history.
- [27] Mr Loh, after receiving Mr Chen's file from Immigration New Zealand, wrote to Immigration New Zealand by letter dated 10 March 2010. It appeared this letter was shown to Mr Chen by Mr Loh before it was sent. This letter advanced an application under section 35A of the 1987 Act, but does not refer to the statutory basis.
- [28] Mr Loh's letter contained information that was, largely, what was already known by Immigration New Zealand prior to AGC's involvement. The submissions to explain the circumstances were, to a significant extent, the same as the earlier section 35A application, which had already been canvassed in Immigration New Zealand's report of 22 October 2009.
- [29] A letter dated 18 August 2010 from Immigration New Zealand gave Mr Chen notice the application had been declined. Ms Zhang telephoned Mr Chen to inform him of that development.
- [30] Mr Loh submitted a further letter to Immigration New Zealand on 13 September 2010. Mr Chen saw and approved this letter before it was sent. The letter requested a review of a decision to decline the section 35A application, but added little to what was already before Immigration New Zealand. Immigration New Zealand said the request for a review would not be considered. Mr Chen was told of this at the end of October 2010.

The application by AGC under section 61

- [31] In a letter dated 25 November 2010, Ms Gu-Chang lodged another application with Immigration New Zealand. Mr Chen did not see or approve of this letter before it was sent. This letter appears to be an application under section 61 of the Immigration Act 2009. That section is the current form of the discretion previously provided in section 35A of the 1987 Act.
- [32] Over Christmas 2010 Mr Chen wrote a long letter explaining his circumstances and supplied it to Ms Gu-Chang in January 2011. She said she would read it and consider sending it to Immigration New Zealand.
- [33] Mr Chen has seen the letter that was sent to Immigration New Zealand by Ms Gu-Chang after he provided her with his letter. He found that the page of his letter with his signature had been retained and the earlier part of the letter rewritten and presented as his letter. It was submitted to Immigration New Zealand by Ms Gu-Chang and Mr Loh, without Mr Chen being aware it had been changed.
- [34] On 24 February 2011 the application under section 61 was declined, as it contained no new information. About this time, Ms Gu-Chang told Mr Chen the fees he had paid to date only covered the two letters Mr Loh had written; she had written the further letter out of generosity.
- [35] About a week after Immigration New Zealand said it would decline the section 61 application, Mr Loh advised Mr Chen he had no option but to return to China, as any further applications would not have any different result.

Access to record

- [36] Mr Chen approached AGC on 3 March 2011 and asked for his file. He was refused and told it was AGC's property. However, he could see it if he signed a waiver of liability.
- [37] He returned the following day and was again refused his file. The waiver he was asked to sign stated he confirmed "there is no dispute or other outstanding issues with money or work performed by AGC". He refused to sign this, but signed a modified waiver saying he had

received all documents and said he would sign the full waiver later. He was then given part of his file. Mr Chen was told by Ms Gu-Chang in relation to the file:

“They are not your documents as they are my work. They are my notes. How can I give them to you? My notes are certainly not your property”

[38] Mr Chen’s wife attended and she was told:

“It is company policy not to allow clients to have a copy of letters (submissions) made on their behalf.”

[39] Mr Chen had approached another licensed immigration adviser and in a letter that adviser requested a copy of Mr Chen’s file. The letter was directed to Ms Gu-Chang. Lawyers acting for AGC provided the balance of Mr Chen’s file on 11 March 2011.

The Response – Mr Loh’s Initial Response to the Complaint

[40] Mr Loh responded through his counsel to the initial complaint made by Mr Chen, and also responded to the Authority personally. The key elements of Mr Loh’s response, from both himself and his counsel, were as follows.

[41] Mr Loh had a contractual relationship with AGC and provided professional services on a case-by-case basis for AGC’s clients.

[42] Mr Loh accepted he was fully aware of the terms of engagement with Mr Chen, and responded to the complaint on the basis that he was the immigration adviser responsible for dealing with Mr Chen.

[43] Mr Loh said Mr Chen was not emotionally vulnerable as he claimed; rather he was confident, intelligent, capable in the use of English and familiar with New Zealand law and facilities. He was not capable of being exploited.

[44] The fees paid by Mr Chen were in accordance with the “market rate”, and they were also agreed and accepted. Mr Chen had used other immigration advisers, so had an awareness of the services and their value.

[45] A fee of \$8,800 for renewing Mr Chen’s passport properly reflected the process which was not straightforward “in the circumstances” (Mr Loh did not explain why).

[46] \$20,800 was a fair and reasonable fee for the other services. The work involved went far beyond drafting letters to send to Immigration New Zealand.

[47] Professional service delivery had been of the highest standard. Mr Loh reported all developments and obtained instructions before taking any significant action. The service of applying for a “visa” under section 35A was accurately described in the agreement for the provision of professional services.

[48] The complaint, which had input from by Mr Chen’s current licensed immigration adviser, was motivated by that adviser’s personal gain, and the motive of retaining Mr Chen as a client.

[49] Mr Loh complains that Mr Chen had made an audio recording of his second attempt to gain access to his file. He denied AGC had any irregular practice in relation to files after the completion of work. On the contrary, all documents would be returned and in some cases a copy would be kept for AGC’s record. Mr Chen was never refused access to his file.

The Tribunal's First Minute

- [50] On 17 September 2012 the Tribunal issued a Minute. The Minute explained that it followed a review of the material then before the Tribunal and identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond as the Tribunal had reached no conclusions at that point. The key elements of the complaint and the response identified in the Minute were as outlined above.
- [51] The Tribunal is an expert inquisitorial body, which receives complaints and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. The Authority and the complainant do not lay charges and prove them. Accordingly, the Minute identifies issues and potential conclusions on the material presented, to give the parties the opportunity to consider their positions and provide submissions and further proof if they wish to do so.

The issues to be determined

- [52] The Tribunal's Minute identified the following allegations and issues as appearing to arise at that point.
- [53] The central feature of the complaint was the allegation that Ms Gu-Chang and Mr Loh grossly overcharged Mr Chen for services, to the point where it involved a dishonest deception of the proper cost and likely benefit of the work.
- [54] Further, they failed to establish a professional relationship on a proper basis. In particular, they failed to explain to Mr Chen there was little prospect of a further section 35A application being successful, and accordingly did not have informed instructions to act. In addition, relevant disclosure and consent processes in the Licensed Immigration Advisers Code of Conduct were not complied with.
- [55] The complaint also alleges they:
- [55.1] Failed to properly inform their client as matters progressed.
- [55.2] Dishonestly represented to Immigration New Zealand that a letter Mr Chen had not written or approved was his own written statement.
- [55.3] Withheld Mr Chen's file.
- [56] The allegations were identified as substantially issues of fact for the Tribunal to determine; however it is necessary to consider the facts against the Immigration Advisers Licensing Act 2007 ("the Act") and the Licensed Immigration Advisers Code of Conduct ("the Code") established pursuant to sections 37–39 and section 44 of the Act. They determine the standards of behaviour required.
- [57] The Minute noted that the Tribunal had no jurisdiction over Ms Gu-Chang until she became a licensed immigration adviser on 19 October 2010.
- [58] The original form of the Code and the 2010 revision govern stages of the engagement with Mr Chen; however for present purposes the Minute indicated the two versions were not materially different. The parties have not taken a different view.
- [59] Clause 1 of the Code of Conduct requires:
- [59.1] A licensed immigration adviser to act with professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.
- [59.2] That a client engagement be established with an agreement that is in writing and accepted in writing; the client must be made aware of all significant matters relating to the agreement, and a copy of the Code must be supplied to the client.

- [59.3] That a licensed immigration adviser discharge professional engagements with due care, diligence and respect. That requires them to ensure that their professional service delivery meets proper standards.
- [60] Clause 2 of the Code of Conduct requires licensed immigration advisers to uphold the integrity of New Zealand's immigration system. It also requires that a licensed immigration adviser must at all times hold written authority from clients to act on their behalf.
- [61] Clause 3 of the Code of Conduct requires written records and communications, which ensure both that clients are fully informed and that there is a record of the professional engagement and how it was discharged.
- [62] Clause 4 of the Code of Conduct treats receipts, to the extent they are held on behalf of clients, as trust funds, and a licensed immigration adviser must bank them separately.
- [63] Clause 8 of the Code of Conduct prohibits a licensed immigration adviser setting a fee that is not "fair and reasonable".
- [64] Clause 9 of the Code requires that complaints procedures are disclosed to the client.
- [65] Section 44 of the Act provides breaches of the Code, dishonesty and misleading behaviour are all grounds for complaint.
- [66] The overarching issue for the Tribunal to determine is whether Mr Loh and Ms Gu-Chang breached any of these professional standards.

Potential Conclusions

- [67] The Minute gave notice of the potential conclusions on the material then before the Tribunal, emphasising that the preliminary views were subject to a consideration of any further material presented.
- [68] The Minute emphasised that Mr Loh would have every opportunity to present evidence, including evidence from appropriately qualified people who could address the work Mr Loh and Ms Gu-Chang performed, the fees charged for that work and the prospects the applications they lodged had of success. The Minute emphasised that all elements of the complaint could be addressed on the basis of evidence from expert witnesses, Mr Loh, Ms Gu-Chang and others able to provide material evidence.

Failure to establish a client relationship in compliance with the Code

- [69] The Minute identified that the view was open, on the material then available, that Mr Loh and Ms Gu-Chang failed to establish a client relationship in accordance with the Code of Conduct, as:
- [69.1] Ms Gu-Chang dealt with Mr Chen when he entered into the agreement. She was not a licensed immigration adviser at that time and she undertook that work unlawfully.
- [69.2] Mr Loh then "took over" the client relationship, and did so in breach of the Code as he had no written authority to do so.
- [69.3] Further, Mr Loh was aware of Ms Gu-Chang's role where she unlawfully engaged with Mr Chen in relation to his immigration status and the services he procured.
- [69.4] Neither Ms Gu-Chang nor Mr Loh:
- [69.4.1] Gave advice to Mr Chen allowing him on an informed basis to evaluate his immigration prospects.
- [69.4.1] This information was a significant matter relating to the immigration services he agreed to procure (Code, clause 1.5(a)).

[69.4.1] This precluded Mr Chen from giving informed instructions (Code, clause 1.1(b)).

[69.4.2] Set fees that were fair and reasonable in the circumstances.

[69.4.3] Provided a copy of the Code of Conduct and complaints procedures to Mr Chen.

[70] In relation to the level of fees demanded and received, the view was identified as open that the fees were so excessive that Ms Gu-Chang and Mr Loh dishonestly misrepresented the value of the services they were to provide. They did so at the inception of the instructions and continued the deception throughout the instruction.

[71] To the extent that Ms Gu-Chang and Mr Loh were not fully aware of Mr Chen's immigration history, their lack of knowledge appeared to be cured when they requested and received his record from Immigration New Zealand. At that point, at the latest, they should have been aware that all (or nearly all) the points that could be advanced were already before Immigration New Zealand and there was little or no prospect that a further application under section 35A, on the grounds they advanced, could succeed.

[72] The Minute referred Mr Loh and Ms Gu-Chang to the Authority's published information regarding the cost of immigration services. The median fee for applying for a work permit was \$1,200; the highest category of fee is for a business investor residence application, with a median fee of \$10,000.

[73] The fees charged in the present case were:

[73.1] \$22,800 to make an application under section 35A; and

[73.2] \$8,800 to assist Mr Chen to apply for a Chinese passport.

[74] The Minute indicated that typically there was more work involved in making an application for a work permit than an application under section 35A. That is because an application for a work permit will usually require a significant body of information to be obtained, eligibility determined, and the information presented in various documents. An application under section 35A in most cases follows after Immigration New Zealand has all of the essential factual information before it. The person would have come to New Zealand after having been issued a visa, which for a person in Mr Chen's situation necessarily involved gathering a body of information that Immigration New Zealand required.

[75] The critical work involved in a section 35A application is to identify a point which makes an exception to policy justified, support that with a letter identifying the reasoning, describing the facts, and possibly some documentation to substantiate potentially contestable facts.

[76] The Minute indicated the Tribunal had examined the record, and in the present case it appeared the work required was less than usual, as there had already been a competent application made under section 35A before Mr Chen approached Ms Gu-Chang and Mr Loh.

[77] The Minute found a potential view was that the record showed there was no substantial new material provided by Mr Loh or Ms Gu-Chang. They did little or no more than re-present the failed case, and that view is supported by the fact that Immigration New Zealand found the application to lack merit.

[78] There was no indication in the material that Mr Chen was warned that after having made a failed section 35A application, if a further application was to succeed it would likely need to make a case of some substance, showing either:

[78.1] that the previous decision was founded on wrong information; or

[78.2] presenting a new and different circumstance.

It appeared on the record there was no such case that Mr Loh or Ms Gu-Chang could present. The applications they made would inevitably fail, or were highly likely to fail; and in fact they did fail.

- [79] If not answered, the view was identified as open that Ms Gu-Chang and Mr Loh charged a fee that was more than 10 times as much as would have been reasonable and they knew it was most unlikely they would be able to deliver a successful result from the section 35A application.
- [80] The Minute indicated it was also necessary to consider the fee of \$8,800 for renewing Mr Chen's passport. The view appeared open that it was within the jurisdiction of the Tribunal, as:
- [80.1] Mr Chen's evidence was that he was persuaded to pay the fee to protect his immigration status in New Zealand. He was, he claimed, told that when he presented himself at the Chinese embassy, the embassy staff, if they knew he had no permit, would call the New Zealand Police to deal with him as a person unlawfully in New Zealand.
- [80.2] He was told that to protect his immigration status in New Zealand he needed to pay \$8,800 for AGC's assistance, and they provided documents which they said would make it appear he was in New Zealand lawfully. Accordingly, it appears Mr Chen was induced to pay the fee on the basis he was receiving "immigration advice" pursuant to the Act, as he was avoiding being removed from New Zealand. That was the principal objective of the service "sold" to him.
- [81] To renew an expired passport is usually uncomplicated, and something that can be arranged by a person without professional assistance. The view was potentially open that:
- [81.1] Ms Gu-Chang and Mr Loh dishonestly misrepresented to Mr Chen that he could not renew his own passport, as the process was likely to lead to him being removed from New Zealand; whereas in fact the Chinese embassy does not seek to involve itself in New Zealand's immigration regime or its enforcement.
- [81.2] The fee of \$8,800 was grossly excessive, as the process for renewing a passport is uncomplicated. A reasonable fee, if a person did seek assistance for the services, would have been likely to be less than one-tenth of the fee charged.
- [82] The material before the Tribunal indicated that Mr Loh and Ms Gu-Chang were both parties to the actions described. However, as only Mr Loh was a licensed immigration adviser before 19 October 2010, it appeared he was solely responsible for managing the professional relationship as there was no other licensed immigration adviser responsible for professional service delivery.
- [83] While Ms Gu-Chang was not subject to the jurisdiction of this Tribunal until 19 October 2010, at that point she was required to put her professional relationship with Mr Chen on a footing that complied with the Code.
- [84] She provided immigration advice after 19 October 2010, from which time she was required to hold written authority from Mr Chen, which she did not obtain.
- [85] Further, she had been a party to soliciting payments from Mr Chen, potentially unlawfully and by dishonest means. Those fees were client funds, and Ms Gu-Chang was potentially liable to account for the fees, as was Mr Loh. She chose to enter into a client relationship with Mr Chen as a licensed immigration adviser; the view is open that she was obliged to then account for all client funds held.

Failure to account for client funds

- [86] The Minute indicated that on the information presently before the Tribunal, it appeared all or some of the money paid by Mr Chen was potentially taken by Mr Loh and Ms Gu-Chang without any entitlement, as a proper professional relationship had not been established. When a licensed immigration adviser receives funds from a client, they must be held in a separate bank account as client funds, and accounted for.
- [87] Clause 3(d) of the Code required Mr Loh and Ms Gu-Chang to refund fees payable when their engagement ended. Given the minimal work undertaken, the failure to engage Mr Chen as a client in accordance with the Code, and that all the fees may have been procured through dishonest misrepresentation; the view was open that they were required to refund all of the money they received as client funds.

Dishonest or misleading behaviour

- [88] The Minute indicated the view was potentially open that Ms Gu-Chang and Mr Loh procured all the fees paid by Mr Chen dishonestly, by misrepresentation, in the circumstances considered above.
- [89] Mr Chen had alleged that Ms Gu-Chang altered a letter without his knowledge and submitted it to Immigration New Zealand, purporting to be Mr Chen's own statement.
- [90] The Tribunal is required to determine complaints on the balance of probabilities, but on a basis that reflects the gravity of the allegation. Clearly this allegation was at the most serious end of the scale. The parties were requested to provide further information.
- [91] If made out on the facts, it would be a serious example of dishonesty, which was calculated to undermine the integrity of New Zealand's immigration system (section 44(2) of the Act and clause 2.1(f) of the Code).

Failure to allow access to the file

- [92] The Minute indicated the view was open that Mr Chen's file belonged to him and he was entitled to be provided with it, though Ms Gu-Chang and Mr Loh were entitled to retain a copy. It appeared Mr Loh and Ms Gu-Chang acknowledged that was the position.
- [93] The material before the Tribunal indicated Mr Chen twice attempted to get his file and was refused unless he signed a document purporting to absolve Mr Loh and Ms Gu-Chang from liability for the professional services he received.
- [94] The view was open that such conduct was unprofessional and part of an endeavour to avoid detection of a dishonest enterprise where the file would provide evidence of the professional wrongdoing or failing.
- [95] Such conduct could potentially be viewed as a breach of the requirement on Mr Loh and Ms Gu-Chang to act with professionalism, honesty and to return documents that are the client's property (clauses 1 and 1.3(b) of the Code and section 44(2)(d) of the Act).

Failure to report on progress of instructions

- [96] The Minute indicated the complaint included a claim that reporting was inadequate.
- [97] However, Mr Chen had accepted key developments were reported to him, and that he approved at least the section 35A application and the request that the decline of the section 35A application be reviewed.
- [98] On the basis of the information then available, the Minute indicated the view was open that the Tribunal cannot be satisfied that this aspect of professional service delivery was deficient.

Response to the Tribunal's Minute

Mr Chen's response

- [99] Mr Chen indicated that he was content with the material he had provided in support of the complaint and consented to information being obtained from Immigration New Zealand if Mr Loh wished to do so.
- [100] Mr Chen also indicated he had arranged for a translation of a recording of his meeting at Mr Loh and Ms Gu-Chang's office; however it was not provided to the Tribunal.

The Authority's response

- [101] The Authority indicated that the information gathered regarding the level of fees charged by licensed immigration advisers was collated from a voluntary form completed on the renewal of licences. The Authority recognised that fees vary depending on circumstances in individual cases.

Mr Loh and Ms Gu-Chang's response

- [102] Mr Loh and Ms Gu-Chang responded to the respective complaints against them jointly, through their counsel Mr Laurent.
- [103] Mr Laurent produced:
- [103.1] A memorandum (with attachments).
 - [103.2] An affidavit of Mr D J Ryken, a lawyer experienced in immigration matters.
 - [103.3] An affidavit of Mr D N Cooper, a licensed immigration adviser.
 - [103.4] A letter from Mr Matsumoto, a licensed immigration adviser.
 - [103.5] A chart comparing information provided to seek the exercise of discretion by Mr Chen's former adviser, and that provided by Mr Loh and Ms Gu-Chang.
 - [103.6] A customer interaction record from Immigration New Zealand's records dated 31 August 2007.
 - [103.7] A letter of 18 September 2007 in which Immigration New Zealand informed Mr Chen an application for a student permit would be declined.
 - [103.8] A letter of 6 August 2008 in which Immigration New Zealand informed Mr Chen an application for a student permit under section 35A would be declined.
 - [103.9] Part of an immigration service agreement dated 19 August 2008 with an unidentified client in which AGC agreed to provide services relating to an "Appeal to Minister" for a fee of \$4,800.
 - [103.10] The Authority's letter of 8 November 2012 notifying Ms Gu-Chang of the renewal of her licence.
 - [103.11] An undated letter from Mr Chen to Immigration New Zealand.
 - [103.12] A letter dated 1 February 2011 from Mr Chen to Immigration New Zealand (two copies with notes).
 - [103.13] A confidentiality warning dated 8 March 2011 directed to Mr Chen.

Discussion

Alleged failure to establish a client relationship in compliance with the Code

- [104] Mr Laurent contended that while the documentation relating to establishing the professional relationship may not have been ideal, it was substantially compliant; indeed, to the extent that essentially identical documentation had been accepted by the Authority on the renewal of licenses.
- [105] However, the issue identified in the Minute was not the deficiencies in the documentation, but rather it was that Mr Loh had not initially engaged with Mr Chen and informed him of his immigration prospects. Ms Gu-Chang had unlawfully initiated the professional engagement when she was not licensed.
- [106] An important issue was giving Mr Chen the advice he required to gain his informed instructions (clause 1.1(b) of the Code).
- [107] Mr Loh was also required to set fees that were fair and reasonable, and provide a copy of the Code and his internal complaints procedure (clauses 8 and 9 of the Code) at the commencement of the professional engagement. Mr Loh did not attend to any of these matters and to the extent they were complied with, Ms Gu-Chang did so as an unlicensed person.
- [108] The Minute put Mr Loh on notice of these issues and he has provided no material answer. The concern is not with the form of the agreement.
- [109] Accordingly, I am satisfied Mr Loh failed to engage with his client as required by the Code (clause 1.5 – communication of all significant matters; clause 1.1 – not informing his client of material matters, so lacking informed instructions; clause 9 – not providing a copy of the internal complaints procedure).
- [110] I cannot be satisfied of the extent to which Ms Gu-Chang undertook any of the preliminary steps of establishing a professional relationship. Regardless, as she was not licensed at the time, it would have been unprofessional conduct pursuant to clause 1.1 if Mr Loh permitted Ms Gu-Chang to undertake that role.
- [111] The Tribunal has no jurisdiction in relation to Ms Gu-Chang over her conduct prior to her becoming a licensed immigration adviser.

Allegation of Gross Overcharging

- [112] The Minute identified the issue before the Tribunal concerning whether Ms Gu-Chang and Mr Loh grossly overcharged Mr Chen for services; and if so, whether it involved a dishonest deception.
- [113] The Minute emphasised that Mr Loh would have every opportunity to present evidence, including evidence from appropriately qualified people who could address the work he and Ms Gu-Chang performed, the fees charged for that work and the prospects the applications they lodged had of success.
- [114] Mr Loh has produced evidence from three experts. They do not review the work he and Ms Gu-Chang performed, or express any opinion on what time and effort was required or what a fair cost for the work might be. Mr Ryken said:

“I make no comment on substantive aspects of the circumstances of the complaint per se.”

- [115] Mr Cooper said:

“I do not presume to make any comment on the circumstances of the complaint itself.”

- [116] Mr Matsumoto made no comment on the complaint and only discussed fees generally.
- [117] Accordingly, the Tribunal does not have any evidence produced by an expert that the fee charged was fair and reasonable, either from the perspective a person setting a fee for the anticipated work or based on the work in fact performed.
- [118] I accept the evidence provided by the three experts; however it does not answer the complaint. The Tribunal indicated in the Minute that it had reviewed the work as it appeared in the papers presented, and the fee appeared grossly excessive for the work performed. Mr Ryken has presented himself as an expert in evaluating costs, noting he is a cost assessor for the Lawyers Complaints Service and has some 12 years experience in such a role.
- [119] The Minute indicated the view was open that the fees were so grossly excessive that they pointed not merely to excessive fees, but potentially evidenced a dishonest deception.
- [120] Despite the Tribunal clearly identifying that issue, none of the experts offered evidence that the fees fell within the range of fair and reasonable fees that might be charged. Two of them expressly excluded that issue from their evidence.
- [121] Accordingly, the Tribunal as an expert Tribunal must evaluate the reasonableness of the fee as disclosed by the record, approaching the matter in the same way as a cost revision. The principles the expert witnesses have advanced will be applied when doing so, as they are sound.
- [122] Both Mr Ryken and Mr Cooper express the view that the Authority's figures for the range of fees charged for various processes should be viewed with scepticism. I have no difficulty in accepting the fees are only broadly indicative and that caution is required in applying them to a particular case. The point is properly made that the information-gathering process to generate the figures is not rigorous, and relies on self-reporting.
- [123] However, the fee range for various types of work can be accepted as a starting point, which usefully points to a case such as this that appears to fall far outside the normal range. The facts of the case must then be examined.
- [124] It is necessary first to identify what work was done. There are views expressed by the experts regarding issues such as whether typically a section 35A application requires more work than a work permit. That is of little assistance, as the work in fact required and performed in the present case is the issue, and the experts have not considered that. Mr Laurent instead produced submissions, comprising an analysis of four stages:
- [124.1] *Zhang Ministerial*
- [124.2] *Section 35A*
- [124.3] *Section 35A (No.2)*
- [124.4] *Section 61*
- [125] Mr Chen's former adviser completed the first of those processes, the "Zhang Ministerial". The remaining three are Mr Laurent's analysis of the work Mr Loh and Ms Gu-Chang completed.
- [126] Mr Laurent submitted that it was evident that Mr Loh and Ms Gu-Chang obtained and constructively applied information from the Immigration New Zealand file to develop each application, and the fees were justified. However, this submission is not supported by expert evidence and is not supported by the record.
- [127] In my view, the submissions Mr Loh and Ms Gu-Chang drafted lacked merit, which is supported by the decisions made in respect of them, each being declined.
- [128] The information presented beyond what Mr Chen's previous adviser had submitted was of little substance and unlikely to be a basis for securing a different outcome. In Mr Laurent's analysis, the following topics in addition to what his former adviser presented were:

- [128.1] “Adviser’s perspective about family’s poor judgment in arranging name change.”
- [128.2] “Discussion of prevalence of superstition and relativism of NZ and Chinese norms.”
- [128.3] “Other personal details of applicant unchanged when applying for visas.”
- [128.4] “Client’s failure to check information submitted on his behalf by prior agent.”
- [128.5] “Addressed issues in 2007 Character Waiver Assessment.”
- [128.6] “Addressed issues in Ministerial recommendations by INZ Resolutions 2009.”
- [128.7] “Couples contribution to New Zealand.”
- [128.8] “Wife’s enrolment in MBA”; Wife’s enrolment in Bachelor of International Business.”
- [128.9] “Reference to Ministerial address about need to welcome qualified people.”
- [128.10] “Difficulties in re-establishing lives in China after tenure in NZ.”
- [129] None of those matters were complex, and I find they would not require substantial investigation, analysis or difficulty in presentation.
- [130] To take the first point as an example, Mr Chen’s former adviser had competently outlined the issues relating to Mr Chen’s change of name in his letter to the Associate Minister. The letter contained all of the material information on the point. In my view, Mr Loh’s submissions were an inferior restatement of what was already on record.
- [131] Ms Gu-Chang and Mr Loh have to respond to a prima facie case that they charged fees that were grossly excessive. I am satisfied that having fully considered Mr Laurent’s analysis and submissions, the potential for further submissions that could advance the issue beyond where Mr Chen’s former adviser had taken the matter was very limited; the record indicates Mr Loh and Ms Gu-Chang undertook a limited amount of work.
- [132] The fee they charged for this work was \$22,800. Lacking expert evidence of reasonableness, time engaged and hourly rates, the Tribunal’s evaluation of this fee is as follows:
- [132.1] Mr Laurent contends that the Authority’s figures for fees in the industry are unreliable. I accept the evidence that they cannot substitute for analysis in the particular case and that the range of fees for particular processes may be broad. In my opinion, the present case was not one at the complex end; it was certainly not a case where Mr Loh or Ms Gu-Chang brought any new insight into the relevant policy, law, or factual circumstances.
- [132.2] They commenced the instructions with the benefit of facts and analysis from a competent application that had already been submitted by another licensed immigration adviser. The letter to the Associate Minister of 25 March 2009 drafted by that former adviser is, in my view, superior to each of the three initiatives of Mr Loh and Ms Gu-Chang.
- [132.3] The instructions accepted were effectively to present the same case again, to seek the exercise of discretion outside of policy. Immigration New Zealand had all the facts that are time-consuming to gather. In the circumstances, I am satisfied that the fee should have been less than the typical fee for applying under section 35A or section 61.
- [132.4] Mr Ryken appropriately referred to how he would assess a lawyer’s fee in a similar situation. He said he would regard the Authority’s fee information (as far as it points to the fee customarily charged) as one factor, and carefully consider:
- [132.4.1] the importance of the work to the client;
- [132.4.2] urgency and the circumstances;

[132.4.3] the time and labour involved;

[132.4.4] the complexity;

[132.4.5] any quote or estimate given;

[132.4.6] the reasonable costs of running a practice.

[132.5] I apply those principles to this situation as follows:

[132.5.1] Mr Chen was in a difficult situation; it was unlikely anything could be done to change the outcome.

[132.5.2] I can accept that if Mr Chen was fully informed of the limited prospects of success, a substantial fee could be negotiated to undertake one final exhaustive review of his situation.

[132.5.3] The urgency and circumstances were not exceptional.

[132.5.4] The time and labour were limited. Mr Loh and Ms Gu-Chang produced nothing of real significance. There is no evidence of them undertaking any exceptional research. It is of no surprise as Mr Chen's circumstances were not complex or exceptional. There were some obvious humanitarian elements that could be developed, but with limited prospects of them being persuasive.

[132.5.5] The reality was that three relatively simple letters were written. There is little evidence of any extensive interview process (which would occupy a fairly short period of time, even if done thoroughly).

[132.5.6] Mr Chen's immigration record was examined; however that is not an unduly complex process.

[132.6] A competent licensed immigration adviser, even taking an approach of completing a final exhaustive review, would not have required more than, say, 18 hours of work (three days at six chargeable hours per day). This estimate is high, given that the original expectation was to write two letters and Mr Loh and Ms Gu-Chang claimed that the third letter was outside the original instructions.

[132.7] In my view, 18 hours should be sufficient to take instructions, including commencing the professional engagement, interviewing Mr Chen, gathering and reviewing the records relating to Mr Chen's immigration history, drafting each of the three submissions and reporting to Mr Chen. They were routine matters for a licensed immigration adviser.

[132.8] On the basis of my evaluation of the time that would be reasonably engaged, the fee would exceed an hourly rate of \$1,200, which is far beyond any reasonable fee for the work.

[133] I am satisfied that the fee charged was grossly excessive and explicable only in terms of exploitation of a client.

[134] Mr Laurent submitted that as Mr Chen agreed to the fee he should be bound by it, contending:

“... he is one of the parties entitled to make such a determination of his own free will.”

[135] I do not accept that submission. Mr Ryken's approach is the correct one; a quote or estimate given is only a factor. That accords with the Code, which requires fees to be “fair and reasonable”. Licensed immigration advisers are required to set fees that are fair and reasonable; they are not entitled to fees that a person accepts independent of that requirement.

Was the gross overcharging dishonest?

- [136] Mr Loh was put on notice that he should respond to the potential view that not only did he grossly overcharge his client, but did so dishonestly.
- [137] Mr Chen claimed that he was vulnerable and his emotional state was not good. Mr Laurent commented on the lack of forensic psychological evidence; however the allegation is essentially one of dishonest misrepresentation and it is unlikely that such evidence would be relevant.
- [138] The excessive fee is at such a high level that I give weight to that as evidence that Mr Loh and Ms Gu-Chang were not acting honestly.
- [139] Mr Laurent correctly identified that Mr Chen had a lengthy history of engagement with the New Zealand immigration regime, and it involved numerous failed attempts to gain permits to remain in New Zealand. I accept Mr Chen must have been aware his immigration status was very problematic and he could have no guarantee of success.
- [140] However, I do not accept that Mr Chen could be assumed to have agreed to pay a very high fee for a process that would add little to what he had already done and in all likelihood would fail, as it did. Clause 3 of the Code requires that all material discussions with clients are confirmed in writing. There is no evidence before the Tribunal that Mr Chen received any information that would give him an informed appreciation of his immigration prospects.
- [141] The Tribunal is required to determine facts 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). I am mindful that a finding that excessive fees have been charged dishonestly is at the most serious end of the scale.
- [142] The evidence satisfies me beyond reasonable doubt that Mr Loh was well aware the fees he charged Mr Chen were grossly excessive. The degree of overcharging leaves no room to infer this was an innocent error. Mr Loh has had every opportunity of explaining or justifying how the situation came about and he has not been able to do so.
- [143] This is a situation where I would make the finding of dishonesty on the basis of the amount of the fee alone. The absence of a professional record of Mr Chen being warned that the process was not very likely to be successful reinforces my conclusion.
- [144] I find Mr Loh acted dishonestly and exploited his client.

Misrepresentation of immigration prospects

- [145] Integral with the allegation of dishonestly charging excessive fees is an implication that the overrepresentation of the efficacy of a further application was used to solicit fees.
- [146] I am satisfied the likelihood of Immigration New Zealand or the Minister taking a different view of Mr Chen's situation, relying on the factors presented by Mr Loh and Ms Gu-Chang, was remote. His previous adviser had already put forward the points of real significance. The submissions in fact failed to produce a different result.
- [147] Mr Loh has not presented any material in which he warned Mr Chen of the limited potential for success, and he was required to record such discussions in writing (clause 3(f) of the Code). However, there is no positive evidence of active misrepresentation of immigration prospects.
- [148] Accordingly, I find only that Mr Loh failed to give Mr Chen the advice he required to get informed instructions. In doing so, Mr Loh failed to meet the requirements of care and professionalism in clause 1 of the Code. That is an important aspect of establishing the professional relationship.
- [149] There will be no additional adverse finding based on misrepresentation.

Fee of \$8,800 for renewal of Passport

- [150] Mr Laurent contended that the work relating to renewing Mr Chen's Chinese passport was outside the scope of Mr Loh and Ms Gu-Chang's professional responsibility for which they are accountable.
- [151] His contention was that only "Immigration Advice" as defined in section 7 of the Act is governed by professional standards. I cannot accept that argument. The converse is true; if a licensed immigration adviser provides "Immigration Advice", then there is some certainty that they do so as part of their professional work.
- [152] Section 7 defines work that reserved to Licensed Immigration Advisers, but it is commonplace for licensed professionals to have only part of their work reserved exclusively. For, example, in representing a client before this Tribunal a lawyer is undertaking work that is not reserved to lawyers; however that lawyer is nonetheless bound by the standards required of lawyers. The lawyer has taken on the work as part of their legal practice and implicitly represented themselves as undertaking the work on the basis they will do so in accordance with the standards of the profession they identify with.
- [153] Mr Laurent has referred to no authority in support of a licensed professional being entitled to disclaim the obligation of maintaining professional standards for work accepted in the course of their professional practice.
- [154] I am satisfied the work relating to the renewal of the Chinese passport was undertaken as part of the practice AGC operated; it represented its services would be provided by a licensed immigration adviser.
- [155] Further, Mr Chen was induced to pay the fee on the basis he was taking steps to avoid being removed from New Zealand. That was the principal objective of the service "sold" to him. Accordingly, it does come within the definition of "Immigration Advice" in the Act.
- [156] Mr Laurent's submissions relied on the argument that the Tribunal has no jurisdiction over the fees charged or the conduct of misrepresenting the difficulties Mr Chen would have renewing his passport. Having found the Tribunal has jurisdiction to deal with Mr Loh's conduct in relation to the Chinese passport renewal, I am satisfied that the potential findings signalled in the Minute must follow.
- [157] I am satisfied that Mr Loh, in a joint enterprise with Ms Gu-Chang:
- [157.1] Persuaded Mr Chen to pay the fee of \$8,800 to protect his immigration status in New Zealand. He was told that when he presented himself at the Chinese embassy, the embassy staff, if they knew he had no permit, would call the New Zealand Police to deal with him as a person unlawfully in New Zealand.
- [157.2] Told Mr Chen that to protect his immigration status in New Zealand he needed to pay \$8,800 for AGC's assistance, and they provided documents which they said would make it appear he was in New Zealand lawfully.
- [158] To renew an expired passport is usually uncomplicated, and something that can be arranged by a person without professional assistance. I am satisfied:
- [158.1] Ms Gu-Chang and Mr Loh dishonestly misrepresented to Mr Chen that he could not renew his own passport, as the process was likely to lead to him being removed from New Zealand; whereas in fact the Chinese embassy does not seek to involve itself in New Zealand's immigration regime or its enforcement.
- [158.2] The fee of \$8,800 was grossly excessive, as the process for renewing a passport is uncomplicated.

[159] Mr Loh has produced no evidence to support the fee. In the absence of such information, I must assess the fees on the same basis as discussed above. There is no evidence this was anything more than a simple process undertaken routinely without the need for professional assistance. The fee of \$8,800 was grossly excessive and bore no relationship to the value of the services or the cost of providing them.

[160] The excessive fee, the dishonest misrepresentations outlined, and the further excessive fee satisfy me this was a further element in the dishonest exploitation of Mr Chen.

Failure to account for client funds

[161] For the reasons outlined, I am satisfied Mr Loh was responsible for fees of \$29,600 that he had solicited from Mr Chen. The fees were obtained without a proper client relationship being established, they were grossly excessive, and solicited without Mr Chen being informed of the prospects of success.

[162] Mr Loh was entitled to take no more fees than were "fair and reasonable" (clause 8 of the Code), and at the end of his instruction he was required to make any refunds payable (clause 3(d)); to the extent fees had not been earned, they were client funds that had to be banked separately (clause 4).

[163] My view is that given the dishonest representations used to solicit the payment of \$8,800 for services relating to renewing Mr Chen's passport and the dishonesty involved in taking the further fees of \$22,800, Mr Loh never became entitled to any of the fees; they were all solicited dishonestly.

Falsification of letter

[164] Mr Laurent responded to the claim that Ms Gu-Chang had falsified Mr Chen's letter and presented it to Immigration New Zealand. The allegation did not appear necessarily to involve Mr Loh. It is sufficient to note that the material before the Tribunal does not establish the claim.

Failure to allow Mr Chen access to his file

[165] The material supporting the complaint indicated Mr Chen twice attempted to obtain his file and was refused unless he signed a document purporting to absolve Mr Loh and Ms Gu-Chang from liability for the professional services he received.

[166] The Minute put Mr Loh on notice that such conduct was potentially unprofessional and part of an endeavour to avoid detection of a dishonest enterprise where the file would provide evidence of the professional wrongdoing or failing. If so, Mr Loh and Ms Gu-Chang would potentially be found to have acted with a lack of professionalism, honesty, and failed to return documents that are the client's property (clause 1 and clause 1.3(b) of the Code and section 44(2)(d) of the Act).

[167] Mr Loh and Ms Gu-Chang did not provide an affidavit and relied on Mr Laurent's submissions. There is a recording of one of the encounters, however it is not in the English language, and no translation has been provided.

[168] Mr Laurent contends that there was confusion, and in a relatively short space of time the file was delivered.

[169] I cannot be satisfied that this aspect of the complaint is made out and I am not able to exclude confusion as a potential explanation for the period of delay in delivering the material. Accordingly, this aspect of the complaint will not be upheld.

Failure to report on progress of instructions

[170] The Minute indicated this aspect of the complaint may not be upheld, as the material before the Tribunal did support the view that reporting had been adequate.

[171] There has been nothing presented that would alter that view. Accordingly, this aspect of the complaint will not be upheld.

Decision

[172] Pursuant to section 50 of the Act, the Tribunal upholds the complaint in the following respects:

[172.1] Mr Loh failed to engage with his client at the commencement of the professional relationship so as to obtain informed instructions, and breached the Code. This aspect of the complaint is upheld under section 44(2)(e) of the Act (breaches of the Code: clause 1.5 – communication of all significant matters; clause 1.1 – not informing his client of material matters, so lacking informed instructions; clause 9 – not providing a copy of the internal complaints procedure).

[172.2] Mr Loh dishonestly overcharged his client in relation to fees of \$22,800. This aspect of the complaint is upheld under clause 8 of the Code and section 44(2)(d) and (e) of the Act.

[172.3] Mr Loh dishonestly overcharged his client in relation to fees of \$8,800, and did so using dishonest misrepresentations. This aspect of the complaint is upheld under clause 8 of the Code and section 44(2)(d) and (e) of the Act.

[172.4] Mr Loh failed to account for the fees he had taken improperly, and thereby failed to account for client funds. This aspect of the complaint is upheld under clause 8, clause 3(d) and clause 4 of the Code, and section 44(2)(e) of the Act.

[173] In other respects, the complaint is dismissed.

Submissions on Sanctions

[174] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.

[175] The Authority and Mr Chen 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 Loh is entitled to make submissions and respond to any submissions from the other parties.

[176] 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

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

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

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

[178] 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 19th day of March 2013

G D Pearson
Chair