

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

Decision No: [2015] NZIACDT 73

Reference No: IACDT 014/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

K L

Complainant

AND

Mijin Kim

Adviser

**THE NAME AND ANY INFORMATION IDENTIFYING THE COMPLAINANT IS NOT TO BE
PUBLISHED**

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 4 June 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts on which the complaint is based are:
- [1.1] Mr Kim's client went to his practice to get advice on applying for a work visa.
- [1.2] An unlicensed person generally provided the services; Mr Kim set out in his agreement the unlicensed person would provide the professional services. Mr Kim was aware the unlicensed person was providing services, and dealt with Immigration New Zealand in the course of the process.
- [1.3] The unlicensed person advised Mr Kim's client he did not have to disclose his immigration history in another country, which included overstaying visa and arrest. He then submitted a forged application for Mr Kim's client, using a person other than Mr Kim's client to sign the application as though they were the applicant. Immigration New Zealand discovered the irregularities, and they had serious consequences for Mr Kim's client.
- [2] Mr Kim did not file a response to the allegations. Accordingly, the Tribunal has evaluated the facts against Mr Kim's professional duties and upheld his client's complaint as Mr Kim failed to meet his professional obligations.

The complaint

- [3] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [3.1] The complainant came to New Zealand in February 2013. He had an offer of employment, and required a work visa. He went to Mr Kim's immigration consulting practice. Mr Kim is a licensed immigration adviser, and operates his practice using a company A Plus Imin Ltd. Mr Kim and Mr Brian Lee are directors of that company.
- [3.2] The complainant discussed his immigration situation with Mr Lee, believing he was a licensed immigration adviser. Mr Lee is not a licensed immigration adviser, or exempt from holding a licence. The complainant had overstayed his visa in the United States of America (USA), been arrested and granted voluntary departure. He told Mr Lee of this history.
- [3.3] Mr Lee advised the complainant regarding his arrest for overstaying his visa in the USA. He said it was not necessary to disclose that information to Immigration New Zealand, as the USA authorities had not departed him from the USA.
- [3.4] On 1 May 2013, the complainant's employer entered into a written agreement with Mr Kim for services relating to a work visa application; the agreement said, "all immigration assistance will be provided by Brian Lee".
- [3.5] Mr Lee prepared the application for a visa by having the complainant's partner provide documents, and getting her to sign the application form as the complainant was in the South Island. Mr Lee submitted that application under Mr Kim's licence number.
- [3.6] On 17 June 2013, the Immigration New Zealand case officer contacted Mr Kim because of a problem with the credit card number provided to pay for the application fee. Mr Kim responded with further credit card information so the application could progress. The visa application was successful.
- [3.7] On 7 April 2014, the complainant submitted an application to alter the conditions on the complainant's work visa, with the assistance of a new adviser. On 15 May 2014, Immigration New Zealand said it had information regarding the complainant's immigration history and arrest in the USA, which he did not declare on either his original application, or the application to vary his visa conditions. Accordingly,

Immigration New Zealand considered the complainant might have withheld material information. The complainant's new adviser explained that Mr Lee had told the complainant it was not necessary to disclose the information.

- [3.8] Immigration New Zealand declined the complainant's application to vary his visa due to him withholding information, rather than seeking a character waiver; and took the view the original application was a forgery, as it used the complainant's partner as the signatory.
- [4] The Registrar identified potential infringement of professional standards during the course of Mr Kim's engagement, the allegations were that potentially:
- [4.1] Mr Kim breached clauses 1.1(a), 1.1 (b) and 2.1(b) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). Clause 1.1 required him to act with due care, diligence, respect and professionalism in performing his services and to carry out the lawful informed instructions of his clients. Clause 2.1 required him to act in accordance with immigration legislation. The circumstances were:
- [4.1.1] Only licensed immigration advisers, or persons who are exempt can provide immigration advice without breaching the Immigration Advisers Licensing Act 2007 (the Act).
- [4.1.2] The complainant believed he engaged Mr Lee as his adviser, he did not know he was not licensed, and not exempt. Mr Lee advised the complainant, and reviewed the documents in preparation for submission to Immigration New Zealand.
- [4.1.3] Mr Lee told the complainant he did not need to declare his arrest and adverse immigration history in the USA; and had another person sign his immigration application. The result was Immigration New Zealand considered the complainant's application withheld information, and his application was a forgery.
- [4.1.4] Mr Kim was required to carry out the complainant's lawful informed instructions; he neither gained informed instructions nor carried out his client's instructions. Mr Lee instead had an unlicensed person provide immigration advice and services to his client.
- [4.1.5] He accordingly breached clause 1.1(a) and (b) by failing to take charge of the instructions, and provide advice and services professionally; and breached clause 2.1(b) by having an unlicensed person provide immigration advice and services unlawfully.
- [5] The grounds of complaint were wider; the complainant has not filed a statement of reply seeking to pursue the wider grounds of complaint. Accordingly, the Tribunal will only consider the grounds the Registrar considered to have potential support.

The responses

- [6] The complainant filed a statement of reply, and agreed with the contents of the Statement of Complaint. He added that neither he, nor his partner, has ever seen Mr Kim.
- [7] Mr Kim did not file a statement of reply, and he was not required to do so if he accepted the Statement of Complaint accurately set out the material information.

Discussion

The standard of proof

- [8] The Tribunal determines 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 at [55].

The facts

- [9] The Registrar provided a chronology and supporting documentation; and Mr Kim has not filed a statement of reply or challenged the facts set out in the Statement of Complaint. I am satisfied the facts set out in the Statement of Complaint are consistent with, and supported by the material filed with it. The facts set out in the Statement of Complaint are accordingly established.

Allowing unlicensed personnel to provide immigration services

- [10] In many areas of professional and licensed practice, extensive use is made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots, and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.
- [11] If there was no legislative direction, a licensed immigration adviser could conduct their practice using unqualified people, and the case would not be easily made out they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [12] However, the Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.
- [13] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people from being engaged in the delivery of professional services to a degree that is far from universal in the regulation of professional service delivery.
- [14] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person “rubber stamp” their continuing activity in the industry. Unfortunately, this Tribunal’s work demonstrates that was a well-founded apprehension and an area where enforcement action has been necessary.
- [15] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [16] Section 63 of the Act provides that a person commits an offence if they provide “immigration advice”, without being either licensed, or exempt from the requirement to be licensed.
- [17] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [18] The scope of “immigration advice” is defined in section 7 very broadly. It includes:
- using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...
- [19] There are exceptions to consider. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. Accordingly, the question arises as to whether the work in issue came within that exception.
- [20] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [21] *Clerical work* is defined in section 5 of the Act in the following manner:

clerical work means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:

- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:
- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

- [22] The definition is directed to administrative tasks, such as keeping records, maintaining financial records and the like.
- [23] The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information “on any form, application, request, or claim on behalf and under the direction of another person”.
- [24] The natural meaning of those words is that the unlicensed person relying on the “clerical work” exception may type or write out what another person directs.
- [25] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.
- [26] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [27] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application as they may only provide information, not advice. This exception is not an issue for the Tribunal on the facts in this complaint.
- [28] Mr Kim has not provided a response to the Statement of Complaint, which states Mr Lee provided immigration services. The material supporting the complaint establishes:
- [28.1] Mr Kim was fully aware Mr Lee was going to provide the immigration services unlawfully; he acknowledged that in the agreement for the provision of services. He knew Mr Lee filed the application, as he intervened at the point of filing by communicating with Immigration New Zealand regarding credit card details.
- [28.2] The consequences for Mr Kim’s client were very serious. Due to wrong advice from Mr Lee he withheld information from Immigration New Zealand, having been told that was the correct procedure. Not only was that a dishonest course of action, it would likely disadvantage the complainant:
- [28.2.1] Immigration New Zealand does not necessarily reject applications due to adverse information; withholding adverse information is a more serious situation.
- [28.2.2] It becomes very difficult to gain a character waiver when a person has to deal with, not only the original issue, but also dishonestly withholding the information from Immigration New Zealand.
- [28.3] Mr Lee then created what Immigration New Zealand correctly identified as a forged application. The application contains various declarations, and is obviously a personal document that the person completing it must fully understand, and the consequences of making false declarations are harsh. The consequences for the complainant were of course very serious, as withholding the information regarding his immigration history in the USA was not consistent with the declarations on the form; and he procured a visa with a forged application.

[29] Accordingly:

[29.1] Mr Kim breached clauses 1.1(a), 1.1 (b) of the 2010 Code; he failed to act professionally, as he failed to perform services for his client, and take informed instructions; instead, he handed over his client to an unlicensed person who would provide the services by engaging in a criminal enterprise. Consequently, Mr Kim's client was the victim of an unlicensed person delivering services in breach of the Act triggering the offence provisions; and given advice that was obviously wrong, and had a forged application lodged on his behalf.

[29.2] I am also satisfied Mr Kim breached clause 2.1(b) of the 2010 Code. He had to act in accordance with the Act, and allowing or requiring unlicensed persons to provide immigration services to his client made him a party to the breach of the Act.

Decision

[30] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Kim breached the 2010 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act.

[31] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

[32] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.

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

[34] 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

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

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

[35.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.

[35.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

Order prohibiting publication of the complainant's name or identity

[36] As the complainant is a victim of offending against the Act, the Tribunal orders that his name and any information that may identify him is not to be published.

[37] This order recognises that persons who are the victims of offending are entitled to complain regarding professional misconduct, without fear of publication that may adversely affect them.

[38] The Tribunal reserves leave for the complainant or the Registrar to apply to vary this order. The order does not prevent:

[38.1] The complainant disclosing the decision to his professional adviser, or any authority he considers should have a copy of the decision, or

[38.2] Mr Kim disclosing the decision to any barrister or solicitor of the High Court of New Zealand in its original form for the purpose of obtaining legal advice.

DATED at Wellington this 4th day of June 2015

G D Pearson
Chair