

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

Decision No: [2015] NZIACDT 108

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**THE NAME AND ANY INFORMATION IDENTIFYING THE COMPLAINANT IS NOT TO BE
PUBLISHED**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
(IMPOSING SANCTIONS)

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 19 January 2016

DECISION

BACKGROUND

- [1] This is one of two complaints the Tribunal upheld against Ms Kim, the respective grounds for the complaints the Tribunal upheld were:
- [1.1] In *Carley v Kim* [2015] NZIACDT 47 (IACDT 034/14) the Tribunal upheld the complaint on the basis Ms Kim:
- [1.1.1] Lodged a visitor visa application treating it as if it allowed her client to work in New Zealand.
- [1.1.2] Arranged for an unlicensed person to provide immigration services in breach of the Immigration Advisers Licensing Act 2007 (the Act), and
- [1.1.3] Failed to maintain proper records, and client communication as required by the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
- [1.2] In this complaint, *L v Kim* [2015] NZIACDT 73 (IACDT 014/15)¹, the Tribunal upheld the complaint on the basis:
- [1.2.1] Ms Kim allowed an unlicensed person to provide immigration services, and that person submitted a forged application to Immigration New Zealand.
- [1.2.2] Accordingly, she failed to act professionally, failed to perform services for her client, failed to take informed instructions, and handed over her client to an unlicensed person who provided the services by engaging in a criminal enterprise.
- [2] The circumstances are set out fully in the respective decisions (www.justice.govt.nz).
- [3] Given the similarity of the two complaints, I will discuss both the positions taken by the respective complainants, Ms Kim, and the Registrar for each complaint. I will also apply the totality principle.

The Registrar and the Complainant's positions in relation to the Carley complaint

- [4] The Registrar and the complainant took no position in relation to specific sanctions.

Ms Kim's response to the Carley complaint

- [5] Ms Kim said she was honest and did her best. She accepted she did not understand the restrictions relating to visitor visas. She said she operated her practice with her husband Mr Lee who unlawfully provided immigration services.
- [6] Ms Kim said she and Mr Lee were "well aware" Immigration New Zealand would not provide information to an unlicensed person. She excused her conduct in terms of Mr Lee doing no more than seeking information from Immigration New Zealand.
- [7] She said she would ensure there were no further lapses. She also provided a number of testimonials.

The Registrar and the Complainant's positions in relation to this complaint

- [8] The Registrar and the complainant took no position in relation to specific sanctions.

¹ This decision incorrectly refers to the adviser as Mr Kim, as her gender was not evident in the material filed.

Ms Kim's response to this complaint

- [9] Ms Kim said her former client was dishonest, and the issues were her client's fault not her fault.
- [10] She accepted the unlicensed person, Mr Lee, should not have acted like an immigration adviser, and it was her mistake "trying to cover his work". She said Mr Lee was her husband and she trusted him at the time. She said she has since separated from Mr Lee, and has suffered hardship as a result.

Discussion

The key factor

- [11] Ms Kim, it appears, has little understanding of her professional responsibilities, and even now shows no appreciation of the gravity of the grounds of complaint.
- [12] Immigration New Zealand expects any person coming to New Zealand under a visitor's permit to understand the limitations on it, particularly in relation to working in New Zealand. Persons who breach those provisions act improperly and their character becomes an impediment to any further immigration applications. It is an elementary requirement that licensed immigration advisers understand the privileges attaching to different categories of visa. It is also a very simple and obvious principle that visitor visas do not allow a person to take up indefinite employment in New Zealand.
- [13] Ms Kim's failure to understand the limitations of a visitor visa point to her wholly lacking the capacity to provide immigration services to the public.
- [14] Ms Kim allowed Mr Lee to provide immigration services. Understanding who can lawfully provide immigration services is an elementary feature of practising as a licensed immigration adviser. It is a serious criminal offence where an unlicensed person provides immigration services. However, not only did Ms Kim allow criminal offending to occur by permitting her husband to act as a licensed immigration adviser, he lodged what Immigration New Zealand correctly identified as a forged application. Accordingly, the complaint is not only that she allowed Mr Lee to act as a licensed immigration adviser, but she failed to supervise the professional services delivered to her client.
- [15] Ms Kim's apparent failure to, even now, understand the gravity of the obvious and gross errors, indicates she does not have the skills to practise as a licensed immigration adviser. When upholding the Carley complaint, the Tribunal put Ms Kim on notice of the gravity of the professional offending, and said if she contended she should remain in the profession "the Tribunal expects her to present a case to justify that outcome." She has not done so.

The starting point

- [16] For the two complaints, as they involve allowing an unlicensed person to provide immigration advice, and were accompanied by other failures to maintain professional standards, the starting point would be:
- [16.1] Censure,
- [16.2] Cancellation of her licence;
- [16.3] Prohibition against applying for any licence for two years (though she could have no expectation the Registrar would then, or potentially ever, regard her as a fit and proper person to hold a licence);
- [16.4] A financial penalty of \$7,500;
- [16.5] A refund of fees paid for the services provided unlawfully;
- [16.6] Compensation for any consequent loss; and

[16.7] Costs.

- [17] However, the Tribunal has taken a very flexible approach where complaints arise out of a licensed immigration adviser's lack of awareness, and provided opportunities for restoration to practising. None-the-less, the consumer protection afforded by the Act is always an important factor.
- [18] In this case, I approach the matter on the basis Ms Kim does not comprehend the issues. Serious as the matters are, they appear to result from ignorance and gross incompetence rather than defiance and wilfulness. The primary focus of this decision will be protection of consumers, and ensuring Ms Kim does not expose herself to further risk without the necessary skills to practise as a licensed immigration adviser.

Ms Kim's licence

The principles

- [19] The authorities indicate it is a "last resort" to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence: *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC) at 13-14.
- [20] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007 at [30]-[31], the Court stressed, when imposing sanctions in the disciplinary process applicable to that case, that it was necessary to consider the "alternatives available short of removal and explain why lesser options have not been adopted in the circumstances of the case".
- [21] In *ZW v Immigration Advisers Authority* [2012] NZHC 1069, Priestley J observed at [41]:
- In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.
- [22] As already discussed, the Act has established a regime in which, with limited exceptions, licensed advisers have an exclusive right to provide immigration advice. That exclusive right is enforced by criminal sanctions.

The options

- [23] In relation to licences the disciplinary sanctions in section 51 allow three options:
- [23.1] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(d) & (e)); or
- [23.2] suspension (s 51(c)); or
- [23.3] cancellation of a full licence and the holder of the licence permitted to apply for a different class of licence. In this way a person may be prevented practising on their own account and put in a situation where they are practising under supervision while they hold a provisional licence (s 51(b) & (d)).
- [24] Other possibilities to assist rehabilitation include training and specified conditions (s 51(b)). There are also powers relating to imposing costs and compensation (s 51(g)-(i)).

The circumstances of the offending and Ms Kim's circumstances

- [25] When looking at the options, the first factor to consider is the gravity of the professional offending, it is not appropriate to deprive a person of membership of a profession unless their offending is sufficiently serious. The most serious element of this complaint is that Ms Kim allowed Mr Lee to provide immigration advice unlawfully. Section 63 of the Act provides a

person commits an offence if they provide immigration advice without being licensed to do so, or exempt; knowing that they are required to be licensed or exempt. There is also an offence where the person does so without knowledge of the Act's terms.

[26] The range of penalties is imprisonment for up to 7 years, a fine of \$100,000 or both for knowing offending, and a fine of up to \$100,000 if the knowledge element is absent. The Courts treat the offending as having a gravity that reflects the range of penalties. In *Hakaoro v R* [2014] NZCA 310 the Court of Appeal dealt with an appeal against a sentence of one year and eight months imprisonment on charges under the Act. Mr Hakaoro's appeal was unsuccessful, as was his application for leave to appeal to the Supreme Court².

[27] The other elements of the complaints evidence a general failure to understand both immigration law and practice, and professional standards.

Weighing the options

[28] It is necessary to consider alternatives short of exclusion from the profession. The full range of possibilities to weigh are:

[28.1] a prohibition on reapplying for a licence for a period of up to two years;

[28.2] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);

[28.3] training requirements;

[28.4] a financial penalty on its own or in combination with the preceding directions.

[29] Suspension has a potential role in ensuring that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].

[30] In making this decision, the Tribunal is required to weigh the public interest against Ms Kim's interests (*A v Professional Conduct Committee* at [82]).

[31] This Tribunal must carefully weigh the circumstances. It is appropriate to place an element of considered trust in a practitioner who has shown the capacity and willingness to rehabilitate. Ms Kim has previously had that opportunity.

[32] Dishonesty points to the need to remove a practitioner from a profession. In *Shahadat v Westland District Law Society* [2009] NZAR 661. I have not found dishonesty in the sense of Ms Kim being a party to Mr Lee submitting forged documentation. However, her failure to be familiar with her obligations allowed criminal offending to occur in her practice.

[33] The most generous view is Ms Kim was and is uncomprehending of her professional obligations. I cannot be satisfied Ms Kim is in a position to discharge the professional responsibilities of a licensed immigration adviser. I am satisfied she would require full re-training, and mentored re-entry to the profession. The training would require two years to complete.

[34] Accordingly, I am satisfied the proper order is to cancel any licence Ms Kim holds, and to prevent her applying for any licence for a period of two years. After that point, she will have to qualify for the profession and satisfy the Registrar she otherwise meets the statutory requirements. I note that while it is entirely a matter for the Registrar, not the Tribunal, the fact the order operates for only two years does not indicate Ms Kim can expect to get a licence after that time. Aside from other standards, section 17(b) of the Act allows the Registrar to take account of Ms Kim's history of professional offending when deciding if she is fit to hold a licence.

[35] None-the-less I expressly note I have not found any dishonesty on Ms Kim's part, notwithstanding the gravity of what occurred.

² [2014] NZSC 169

The financial penalty on this complaint

- [36] Given it is in addition to excluding Ms Kim from the profession, I impose a financial penalty of \$2,000 on each complaint. That is a substantial discount, that also takes account of both the personal hardship Ms Kim has identified, and my finding the professional offending was the result of lack of comprehension rather than deliberate wrong-doing.

Compensation

- [37] The complainants have not sought compensation, so no orders will be made.

Refund of fees

- [38] The complainants have not sought a refund of fees, so no orders will be made.

Costs and Expenses

- [39] Neither the Registrar nor the Complainant sought costs, so there is no order.

Censure

- [40] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction.

Orders

- [41] The Tribunal orders that any licence Ms Kim holds under the Act is cancelled with immediate effect, and this order prevents her from reapplying for a licence for a period of two years from the date her licence is cancelled.

- [42] Ms Kim is also:

[42.1] Censured, and ordered

[42.2] To pay a penalty of \$2,000.

Order prohibiting publication of the complainant's name or identity

- [43] 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.

- [44] 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.

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

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

[45.2] Ms 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 22nd day of December 2015

G D Pearson
Chairperson