

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

Decision No: [2015] NZIACDT 59

Reference No: IACDT 012/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Lingchao Kong**

Complainant

**AND**

**Yangyang (Paul) Li**

Adviser

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**INTERIM DECISION  
IMPOSING SANCTIONS**

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**REPRESENTATION:**

**Registrar:** Mr M Denyer, lawyer, Ministry of Business, Innovation and Employment, Auckland

**Complainants:** In person.

**Adviser:** Mr J Macdonald, lawyer, MBC Law Ltd.

Date Issued: 15 May 2015

**INTERIM DECISION****This Complaint**

[1] This interim decision addresses sanctions, following a decision upholding a complaint against Mr Li (*Kong v Li* [2015] NZIACDT 33; see [www.justice.govt.nz](http://www.justice.govt.nz)).

[2] The Tribunal determined the following complaints:

[2.1] That Mr Li allowed an unlicensed person to provide immigration advice. This allegedly breached his duty to carryout lawful informed instructions from the complainant, with due care, diligence and professionalism (clauses 1.1(a) and (b) of the Licensed Immigration Advisers Code of Conduct 2010 “the Code of Conduct”). It also potentially constituted a breach of clause 2.1(b) of the Code of Conduct, if Mr Li failed to act in accordance with immigration legislation. Further, he potentially breached clause 3 of the Code of Conduct in failing to maintain professional business practices relating to finances, records, documents, contracts and staff management.

[2.2] That he also failed to comply with the Code of Conduct’s requirements relating to client engagement. He did not have a written agreement setting out payment terms, the fees and disbursements, a full description of the services, confirmation of acceptance in writing, and it lacked an explanation of all significant matters (clauses 1.5 and 8 of the Code of Conduct).

[3] The Tribunal determined:

*Provision of immigration advice by unlicensed personnel*

[3.1] The Code of Conduct (clause 2.1(b)) required that Mr Li act in accordance with immigration legislation including the Immigration Act 2009.

[3.2] He failed to do so in that:

[3.2.1] He allowed an unlicensed person to provide immigration advice in the course of engaging the complainant, and to provide assistance with his application for a visitor visa.

[3.2.2] With Mr Li’s knowledge, the unlicensed person performed actions that breached section 6 of the Act.

[3.3] The Code of Conduct (clause 3) required that Mr Li maintain professional business practices relating to contracts and staff management.

[3.4] He failed to do so in that:

[3.4.1] He was not usually present in the Auckland office of his practice, and had to manage that situation.

[3.4.2] He allowed staff in his Auckland office to engage a client when he was not present, and did not use a means such as a telephone or video link to communicate with his client.

[3.4.3] He allowed the unlicensed staff to provide immigration services.

[3.4.4] He had an obligation to ensure he properly managed the staff in his practice. That required that he put reasonable practices in place to ensure that staff did not provide immigration advice or engage clients without a licensed immigration adviser providing the essential advice and disclosure required. He permitted them to do so.

*Failure to commence the professional engagement in accordance with the Code of Conduct*

[3.5] Mr Li failed to personally engage with his client and make him aware of all significant matters relating to the agreement to provide professional services to apply for a visitor visa; he accordingly breached clause 1.5(a) of the Code of Conduct in that respect.

**The gravity of the complaint**

[4] The substantive decision sets out the unusual regulatory mechanism where the provision of immigration advice by a person who is not licensed or exempt is a criminal offence; and the policy reasons for that. It also refers to the High Court's decision in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, which explores some of that history; and upholds the cancellation of a full licence held by a licensed immigration adviser because he was a party to an unlicensed person providing immigration advice.

[5] The substantive decision on this complaint discusses the comprehensive prohibition in the Act against unlicensed persons providing immigration advice. The scope of the prohibition follows from the definition in section 7 of the Immigration Advisers Licensing Act 2007 (the Act) which 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 ...”

[6] In short the Act prohibits doing any work to facilitate an immigration process, though there is some relaxation in relation to purely administrative tasks. Only a licenced immigration adviser or a person who is exempt may engage with or take instructions from a client or do any work to provide immigration services. Only purely administrative or mechanical matters are excepted.

[7] This bright line test is, as the substantive decision notes, reinforced by making infringements a criminal offence. It is important to note breaches are not low end regulatory offending. Section 63 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.

[8] 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 have treated 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 Court.<sup>1</sup>

[9] In relation to this complaint, the Tribunal is required to impose sanctions on Mr Li for professional offending, where he “instructed his unlicensed employee, ... to deal with the Complainant's immigration affairs”<sup>2</sup>. In short, he was a party to serious criminal offending against his client. I emphasise however, that this Tribunal does not make findings of criminal liability, it operates using a different standard of proof, and is solely concerned with professional disciplinary matters. Regardless, where a professional person commits acts that are proscribed as criminal, and they are committed in the course of their professional activities; that is relevant to the gravity of the professional offending.

[10] The criminalisation of unlicensed persons providing immigration services is intended, to exclude unlicensed persons from providing immigration services; whether operating under the umbrella of a licence holder or otherwise. The profession is well aware of this restriction.

[11] A person seeking a licence under the Act is required to demonstrate that they understand this essential principle of immigration practice before they obtain a licence. There are numerous decisions of this Tribunal addressing licensed immigration advisers being a party to unlicensed persons providing immigration advice, the *ZW* case affirmed the principles, and recent criminal sentencing decisions further affirm the effect of the Act. Since the Act has regulated the

<sup>1</sup> [2014] NZSC 169

<sup>2</sup> The allegation in the Registrar's Statement of Complaint

profession, the Immigration Advisers Authority has publicised these obligations and the decision of the Tribunal and the Courts relating to the issue.

- [12] The consequences of a professional person allowing serious criminal offending to occur in their practice are obvious. The starting point for sanctions for Mr Li's offending is:
- [12.1] Cancellation of his licence;
  - [12.2] Prohibition against applying for any licence for two years (though he could have no expectation the Registrar would then, or potentially ever, regard him as a fit and proper person to hold a licence);
  - [12.3] A financial penalty of \$7,500;
  - [12.4] A refund of fees paid for the services provided unlawfully;
  - [12.5] Compensation for any consequent loss; and
  - [12.6] Costs.

### **Mr Li's response**

- [13] Mr Li's responded to the Tribunal's decision, which found he facilitated serious criminal offending to occur in his office is set out in the submissions presented by his counsel:
- [13.1] He says "this is an occasion on which the Tribunal could exercise its discretion to take no further action".
  - [13.2] The "object and purpose of the Act can be achieved by the Tribunal's findings and its decision", he said there is no "need to consider or impose any further sanction."
  - [13.3] He admits his "staff completed the visitor visa application"; but says he has processes in place that require unlicensed staff not to provide advice.
  - [13.4] He excused the situation as arising due to time pressures, and placed some responsibility on the complainant.
- [14] Subsequently Mr Li's counsel presented a further submission it says:
- The adviser has gone to great lengths to ensure that his immigration business is conducted in a proper, and professional and business-like manner and to the letter and spirit of the law and the Code of Conduct and wishes to assure the Tribunal that he would be vigilant to ensure that a similar situation will never occur.
- The failure by Mr Li's employee could be seen as being at the lowest level of failure. While she failed to explore the nature of the relationship in greater detail she nevertheless only confirmed the complainant's relationship and recorded what she was told and, of course the complainant refused to provide his friend's surname. Even if Mr Li's employee had gone on to explain the significance of a partner as opposed to a friend nevertheless the complaint would in all probability have failed to obtain the later visa for the reasons already given.
- [15] The employee referred to in the preceding quote was not a licensed immigration adviser. Mr Li says his staff knew their obligations under the Act regarding providing immigration advice. Accordingly, the submission is apparently discussing the employee committing a criminal offence punishable by 7 years imprisonment, and a \$100,000 fine. It is far from obvious that Mr Li has any comprehension of that, notwithstanding the Tribunal's substantive decision and that it includes a review of the relevant provisions in the Act. He appears not to appreciate the gravity of the situation lies in his employee committing a criminal offence by providing professional services; and the quality of her illegal services is beside the point.
- [16] The submissions presented by Mr Li fail to address the realities of his professional offending, and its gravity.

**Further opportunity to be heard**

- [17] Mr Li's view that his offending is at the lowest level, and there should be no consequences are potentially matters that aggravate his offending or limit the opportunity to regard rehabilitation as an option (refer: *McHugh v Wiezoreck* DC CHCH CIV-2013-085-001004 [28 January 2015]).
- [18] The Tribunal will give Mr Li the opportunity to reconsider his position, and requests that he appear before the Tribunal to explain his offending, the circumstances in which it arose, the steps he has taken since, and what steps he proposes to take in the future. This request is made pursuant to section 49(4)(b) of the Act. The Tribunal will not summon Mr Li to appear, however it will take account of his response to the request when imposing sanctions.
- [19] The Tribunal requests that Mr Li provide evidence on oath, if he does so he will be subject to cross-examination. He may also present submissions. The procedure will be in accordance with the following timetable.

**Timetable**

- [20] Mr Li is to provide any briefs of evidence and submissions on or before 1 June 2015.
- [21] If Mr Li does not provide briefs of evidence or submissions, the Tribunal will issue a decision on sanctions without further notice.
- [22] The complainant and the Registrar may provide briefs of evidence and submissions in reply on or before 11 June 2015.
- [23] If Mr Li has filed briefs of evidence or submissions; an oral hearing will take place in Auckland, commencing at 10:00 am on 18 June 2015 (at a place to be notified to parties).
- [24] Leave is reserved to any party to vary the preceding directions.

**DATED** at WELLINGTON this 15<sup>th</sup> day of May 2015

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**G D Pearson**  
Chair