

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

Decision No: [2017] NZIACDT 1

Reference No: IACDT 008/16

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

BY **The Registrar of
Immigration Advisers**

Registrar

BETWEEN **Tuariki Delamere**

Complainant

AND **Yang (Jerry) Jiang**

Adviser

DECISION

REPRESENTATION:

Registrar: Ms Terri Thompson, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: Mr Todd Simmonds, Barrister, Auckland.

Date Issued: 17th day of February 2017

DECISION

Preliminary

- [1] Mr Jiang was a licensed immigration adviser employed by Sea Consultants Ltd. He represented Ms Wang, who was seeking a student visa. She is a mature woman, whose adult son and his family live in New Zealand. She sought the student visa to take a suitable course to develop her English language skills; she had in mind that she might later be able to get a visa to live in New Zealand permanently if she had adequate English language skills.
- [2] The critical point in Mr Jiang's instructions occurred when Immigration New Zealand responded to Ms Wang's application and requested additional information. Prior to the end of the time allowed to supply the information Ms Wang gave it to Mr Jiang. However, Immigration New Zealand only received part of the information. The result was that Immigration New Zealand declined Ms Wang's application, and she did not have a current visa.
- [3] When confronted with this issue, Mr Jiang contacted Immigration New Zealand, but could not persuade them to alter the outcome. He took two formal steps:
 - [3.1] Lodging a request under section 61 of the Immigration Act 2009 for the discretionary issue of a visa; and
 - [3.2] Lodging an appeal on humanitarian grounds with the Immigration and Protection Tribunal.
- [4] Both actions failed.
- [5] Ms Wang filed a complaint against Mr Jiang, which the Registrar evaluated. She exercised her statutory powers to obtain Mr Jiang's file to assess properly what had happened.
- [6] However, Mr Jiang did not supply his file. His former employer provided what Mr Jiang says is part of his file. He said that when he left his employment the file was in order, complete, and showed he met all of his professional obligations.
- [7] The Registrar evaluated the information she had, including the partial file, and concluded:
 - [7.1] It appeared that Mr Jiang did not have a written agreement for the provision of services, which was required for all his professional engagements.

- [7.2] He failed to provide the information Immigration New Zealand requested, so he was responsible for Ms Wang's application failing.
- [7.3] The appeal Mr Jiang lodged with the Immigration and Protection Tribunal had no grounds to justify the appeal.
- [7.4] Mr Jiang failed to tell Ms Wang when the Immigration and Protection Tribunal declined Ms Wang's appeal.
- [7.5] Mr Jiang failed to keep a file available for inspection by the Authority.
- [8] Mr Jiang's answer to much of the complaint was that as an employee he, reasonably, left his file with his former employer Sea Consultants Ltd. That company employed another licensed immigration adviser, so that was appropriate. However, he could not be responsible for what happened to the file, so it was not his fault it was incomplete. If he could get his complete file it would show he had a written agreement, he had tried to tell Ms Wang when the Immigration and Protection Tribunal declined her appeal, and that he had kept a proper file. He also said the grounds for the appeal were reasonable, though possibly not strong. He also provided evidence from his former assistant that he delivered the documents Immigration New Zealand required. Accordingly, the Tribunal should make no adverse findings.
- [9] The Registrar challenged Mr Jiang's credibility as to his claim he had no control over the file, and was not responsible for his failure to produce a complete file. She took the position that his claim that he could not produce his file was false, and that the Tribunal should assess his explanation in that light.
- [10] Accordingly, the Tribunal is required to evaluate the evidence regarding Mr Jiang's claim that he could not produce his file, which he says would exonerate him. It must then evaluate the respective elements of the complaint on the evidence available; considering the reasons a complete file is not available.
- [11] The absence of a complete file has little bearing on the merits of the appeal to the Immigration and Protection Tribunal, the information bearing on that is available. It simply requires an assessment of the merits of the appeal, measured against professional standards. The issue of the absence of the file is also only of marginal relevance to the question of what steps Mr Jiang took to make sure Ms Wang's information was

provided to Immigration New Zealand in time; there is direct evidence on that issue.

The Complaint

[12] The Registrar filed a Statement of Complaint. It set out a factual narrative and identified two potential grounds for complaint. The main elements of the factual background in the Statement of Complaint were:

[12.1] On 12 October 2011, Mr Jiang first represented Ms Wang. Sea Consultants Ltd employed Mr Jiang; he was a licensed immigration adviser. Mr Jiang lodged a student visa application for Ms Wang so she could undertake English language study.

[12.2] On 27 October 2011, Immigration New Zealand sent Mr Jiang an email requesting further information, due to concern that Ms Wang may not have been a genuine student visa applicant. The request required information regarding Ms Wang's travel in New Zealand before she lodged the application, and bank records.

[12.3] On 22 November 2011, Immigration New Zealand declined Ms Wang's application, due to failure to comply with the 27 October 2011 notice requiring information.

[12.4] On 24 November 2011, Mr Jiang emailed Immigration New Zealand saying he had provided the documents Immigration New Zealand sought. However, Immigration New Zealand claimed it had not received the information and Ms Wang should either apply for a visa under section 61 of the Immigration Act 2009, or leave New Zealand.

[12.5] On 28 November 2011, Mr Jiang lodged a request for a visa under section 61, which Immigration New Zealand refused on 15 December 2011. Immigration New Zealand gave no reasons, which is a lawful response to a section 61 request in the circumstance Ms Wang made her request.

[12.6] Mr Jiang lodged an appeal under humanitarian grounds to the Immigration and Protection Tribunal, against deportation on 22 December 2011. That Tribunal declined the appeal on 26 December 2012, as the grounds failed to meet the test of "exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported

from New Zealand.” The Immigration and Protection Tribunal gave Mr Jiang notice of its decision.

[12.7] On 4 February 2013, Immigration New Zealand issued Ms Wang with a deportation order, sent to both her and Mr Jiang. Ms Wang was required to leave New Zealand by 11 February 2013 if she wished to avoid a two-year ban on applying for a New Zealand visa. She left voluntarily on 9 February 2013.

[12.8] On 22 July 2015, Mr Jiang’s license as an immigration adviser expired; he did not renew it. On 17 September 2015, the complainant, who is a licensed immigration adviser, was acting for Ms Wang. He requested that Sea Consultants Ltd provide the full client file for Ms Wang, however, Sea Consultants Ltd failed to supply the file.

[12.9] On 8 December 2015, the Authority requested that Mr Jiang provide Ms Wang’s file, making the request under section 57(1)(c) and (d) of the Immigration Advisers Licensing Act 2007 (the Act).

[12.10] On 14 January 2016, Mr Hallett, Mr Jiang’s former colleague and employee of Sea Consultants Ltd, provided an incomplete copy of the relevant client file. He said, “I have got together all the information I can find regarding this client.”

[12.11] Mr Jiang stated in an email addressed to the Authority dated 4 May 2016:

As I am no longer employed by Sea Consultants, I do not believe I have any power now to submit any files for inspection. In addition, I cannot comment on the maintenance of files after my departure from the company.

...

... I am uncertain whether I am permitted to inspect Ms Wang’s file and check it against the documents you have sent me.

[12.12] On 19 May 2016 through his counsel he said:

Mr Jiang has not worked for Sea Consultants Limited in any capacity since July 2015 but he is nonetheless doing what he can to obtain the relevant file documentation so that a complete response may be provided to the complaints outlined in your letter.

[12.13] On 26 May 2016 through his counsel Mr Jiang said:

I am instructed by Mr Jiang (consistent with his email to you dated 4 May 2016) that his immigration adviser licence expired in July 2015 and that he has not worked for Sea Consultants in any capacity since July 2015. Given that Mr Jiang ceased his employment with Sea Consultants as at July 2015, he had no knowledge of the Authority's request in December 2015 for Ms Wang's file, and obviously no capacity to comply with that request.

... given that Mr Jiang no longer works for Sea Consultants, he is unable to provide you with evidence of any written agreement relating to Ms Wang.

[13] Arising out of the circumstances, the Registrar identified five grounds for complaint. They are:

[13.1] *Breach of clause 1.5(a) (b) (c) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) in relation to agreements* – The essence of the allegation under this head is that Mr Jiang did not have a written agreement for any of his services, as the 2010 Code required.

[13.2] *Breach of clause 1.1(a) and (b) of the 2010 Code in relation to care, respect, diligence and professionalism* – This ground relates to the alleged failure to provide information Immigration New Zealand requested, with the consequence that Ms Wang's visa application failed. Immigration New Zealand's request was by email dated 27 October 2011, it required:

[13.2.1] Evidence of travel around New Zealand;

[13.2.2] Bank statements dated 1/4/2011 to 27/10/11 showing funds in and out, with a running balance;

[13.2.3] A chest x-ray.

Immigration New Zealand received the x-ray and passport, but not the other documents. The Registrar alleges Mr Jiang failed to provide the evidence of travel and bank statements, and should have done so.

[13.3] *Breach of clause 2.2(a) (b) and (c) and Clause 1.1(a) of the 2010 Code in relation to unfounded immigration matters and due care* – This ground relates to an allegation that the appeal to the Immigration and Protection Tribunal did not present humanitarian issues, or explain why deportation would be unduly harsh.

Accordingly, having regard to the jurisdiction of the Immigration and Protection Tribunal, the appeal lacked merit. Mr Jiang should have taken care to identify the lack of merit, and gained written acknowledgement from his client that the appeal was unfounded.

[13.4] *Negligence* – This ground relates to the alleged failure of Mr Jiang to inform his client of the Immigration and Protection Tribunal's decision, which resulted in enforcement action.

[13.5] *Breach of clause 3(e) of the 2010 Code in relation to maintaining client records* – This ground relates to an allegation that Mr Jiang failed to take steps to create a file, and maintain it for seven years in a form that was available for inspection by the Authority.

Mr Jiang's response to the complaint

[14] Mr Jiang filed a statement of reply, and supported it with an affidavit of Mr Xu, a personal assistant whom Sea Consultants Ltd employed. Mr Jiang's response to the five potential grounds the Registrar identified were:

The failure to have a written agreement

[14.1] Mr Jiang said he could not recall the meeting he had with Ms Wang in October 2011 when he received instructions, as it was more than five years earlier. He said, however, that he did have an invariable practice when taking instructions that included completing the professional engagement process in the 2010 Code, and securing a signed written agreement was part of that process.

[14.2] Mr Jiang addressed the fact that the 2010 Code required proper record keeping, and that he had not provided the Authority with a copy of the agreement, which he says he must have created. He said:

... I have not worked for Sea Consultants Limited in any capacity since July 2015 and therefore I have not had access to the file relating to Ms Wang.

...

... and I have not had access to her file since becoming aware of this complaint, ...

Failing to provide requested information to Immigration New Zealand

[14.3] Mr Jiang said he did provide all the information requested to Immigration New Zealand. He said he had gathered the information by the due date, inspected the documents and gave

them to his personal assistant Mr Xu to file. Mr Xu swore an affidavit stating that:

I can recall that Mr Jiang handed me Ms Wang's evidence of travel in New Zealand, medical certificate, passport, and also a number of bank statements.

Mr Jiang asked me to personally deliver this material to the Auckland office of INZ, that office being located at 280 Queen Street, Auckland Central.

Mr Jiang explained to me that it was important that this material reached INZ as soon as possible and I recall hand-sealing the material in an envelope and hand-dropping it to the drop box of the INZ Auckland Central office on the same day I was given it.

- [14.4] When Immigration New Zealand declined the application less than a month later, Mr Jiang became aware of the problem. He made inquiries of Mr Xu and saw copies of the documents in the file, and notified Immigration New Zealand. Accordingly, Mr Jiang says he did all he could have reasonably done to ensure the documents were filed on time.

Lodging an unfounded appeal with the Immigration and Protection Tribunal

- [14.5] Mr Jiang said he does not accept the appeal lodged with the Immigration and Protection Tribunal was "completely without merit". He said he was acting in good faith at all times.

Failure to notify Ms Wang of the Immigration and Protection Tribunal decision

- [14.6] Mr Jiang says it appeared he had been negligent, but in fact, that was not the case. He said numerous attempts were made to contact Ms Wang by telephone and letter, so it was not his fault she was not aware of the decision.

The failure to maintain complete client records

- [14.7] Mr Jiang responded to the allegation he failed to maintain a client file for the period he was a licensed immigration adviser by saying Sea Consultants Ltd had the material, and he had no control or responsibility. He said (refer paragraph [30.4] below) he ceased working for Sea Consultants in July 2015, and had not worked for them in any capacity since; he did not previously know of the request for the file and had "no capacity to comply with that request". In short, the matter was in the hands of a former employer, and he had no ability to involve himself in providing the file.

Procedure

- [15] The Tribunal hears complaints on the papers under section 49 of the Immigration Advisers Licensing Act 2007 (the Act), but may in its discretion request information or request that persons appear before the Tribunal. It also has powers to summons witnesses. In this case, Mr Jiang's explanation challenged elements of the factual allegations, and his explanations required scrutiny.
- [16] The Tribunal, accordingly, requested that Mr Jiang attend in person so that the Tribunal could conduct a limited examination with the other parties having the opportunity to cross-examine on the issues raised by the Tribunal. However, the Registrar requested the opportunity to conduct her own cross-examination of Mr Jiang's evidence. She gave notice Mr Jiang would face a challenge to his explanation on the grounds of credibility. The Tribunal gave the Registrar leave to do so. A hearing proceeded in which Mr Jiang, and his witness Mr Xu both gave evidence.

Discussion

The standard of proof

- [17] The Tribunal determines facts on the balance of probabilities. However, the test must be applied with regard to the gravity of the potential finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.
- [18] The grounds did include allegations of poor documentation, lack of judgment and carelessness or negligence. While significant, they are not matters at the highest end of the scale in terms of professional disciplinary issues. Importantly, they did not go to honesty. However, in this case, the issues are not as simple as flexibly applying the standard of proof measured by the gravity of the matters giving rise to the complaint.
- [19] As noted, prior to the oral hearing, the Registrar gave notice she wished to conduct "an examination on matters concerning Mr Jiang's credibility". She lodged an application to cross-examine Mr Jiang on that issue.
- [20] Mr Jiang had told the Authority's investigator he had no ability to access the file, as it was with Sea Consultants Ltd. Accordingly, he denied he could be responsible for failing to comply with the Registrar's statutory requirement to deliver the file. Furthermore, he suggested parts of it were missing; and that if they were available, then they would exonerate him. He claimed he was in the disadvantageous position of having to rely on evidence of invariable practice and the like; and lack of access to records hampered him advancing his explanation. In the course of

cross-examination, it became evident the credibility of Mr Jiang's explanation was a very real issue.

[21] Mr Jiang stated on oath:

[21.1] that he had "not worked for Sea Consultants in any capacity since July 2015"; and

[21.2] that he "had no capacity to comply with" the Registrar's statutory demand to deliver the whole file.

[22] In the course of cross-examination, the Registrar established that Mr Jiang's claims were not true because Mr Jiang was the sole director of Sea Consultants at all material times, including when he gave his evidence affirming the truth of those statements.

[23] Furthermore, his mother was the sole shareholder in Sea Consultants Ltd. Plainly, my findings regarding Mr Jiang's response to the complaint will have serious repercussions if I make adverse credibility findings on these matters. That potentially goes to Mr Jiang's fitness to be a licensed immigration adviser. Furthermore, Mr Jiang is now a lawyer practising in New Zealand. Accordingly, I will make the findings regarding Mr Jiang's credibility on a basis that equates with the criminal standard of proof. I recognise that in a professional disciplinary proceeding the standard always remains the civil standard, founded on the balance of probabilities¹. However, I must apply the standard flexibly with regard to the seriousness of the allegations. I regard the seriousness of this point as at the very highest end, and Mr Jiang is entitled to have me make the finding on that basis.

Whether Mr Jiang's claim regarding the loss of part of the written record is false

[24] The 2010 Code is clear, a licensed immigration adviser is required to maintain a complete file recording steps in the process and client communications. That includes confirming in writing the details of material discussions with clients. Clause 3 of the code sets out an extensive set of requirements.

[25] Accordingly, if Mr Jiang maintained the file he was required to maintain pursuant to the 2010 Code, an examination of the file would leave little doubt as to whether he:

[25.1] did have a written agreement with the prescribed elements;

¹ Z v CAC [2007] NZCA 91 at [26]-[28], and also Z v Dental CAC [2008] NZSC 55

[25.2] lodged the information Immigration New Zealand claims it did not receive (assuming there was a cover letter as would be expected);

[25.3] was negligent in failing to notify his client of the Immigration and Protection Tribunal's decision; and

[25.4] maintained a proper file.

[26] Information held by third parties would allow an assessment of the merits of the Immigration and Protection Tribunal appeal, subject to potentially relevant information regarding Mr Jiang's instructions from his client.

[27] It follows that when the Authority notified Mr Jiang of the complaint, it must have been obvious to him, and any informed observer, that his file would either exonerate him or prove the complaint in relation to most of the elements of the complaint. There was nothing obscure about the importance of disclosing the contents of Mr Jiang's file to the Authority.

[28] The Authority also ensured Mr Jiang could not fail to understand that the law required him to disclose his file. In that regard, the following steps are relevant:

[28.1] On 14 January 2016, Mr Hallett of Sea Consultants Ltd wrote to the Authority and provided what he described as "all the information I can find regarding this client."

[28.2] On 28 April 2016, the Authority wrote a pivotal letter to Mr Jiang. This letter:

[28.2.1] gave him notice of the failure to provide a complete file, drawing his attention to the fact that requests were made to his nominated email address by Mr Delamere (Ms Wang's new immigration adviser who first requested the file), and the Authority.

[28.2.2] drew his attention to the fact that clause 3(e) of the 2010 Code required him to maintain a file, section 57 of the Act gave the Registrar inspection powers which she had exercised, and section 69 of the Act made it an offence to fail to comply with the Registrar's request.

[28.2.3] The letter expressly said to Mr Jiang:

On 08 December 2015 the Authority made a request under section 57 (1) (c) and (d) of the Immigration Advisers Licensing Act 2007 to submit Ms Wang's client files for inspection,

which you have not yet done. By not submitting this file for inspection you may be in breach of this section 69 of the Act.

[28.2.4] The letter also set out the potential grounds of complaint including the failure to respond to Immigration New Zealand's information request, the absence of a written agreement, the unfounded Immigration and Protection Tribunal appeal, and the failure to notify the result of the Immigration and Protection Tribunal appeal.

[29] Mr Jiang was aware of this letter and its contents. He responded to it. Put simply, in a series of steps he endeavoured to cause the Authority and this Tribunal to believe he had ended his relationship with Sea Consultants Ltd by ceasing employment with the company. He said he left his file with the company, and implied that was a reasonable thing to do. He claimed he had no ability to influence the company, and the fact Sea Consultants Ltd did not provide the complete file was a matter over which he had no influence or control, and he could not effectively inquire into the circumstances. The explanation is, on its face, plausible; a relationship with a former employer could potentially be problematic.

[30] The actions Mr Jiang took to persuade the Authority and this Tribunal to accept his explanation regarding the absence of critical parts of the file were:

[30.1] He personally wrote an email dated 4 May 2016, which referred to the Authority's letter of 28 April 2016. I have already referred to this email (paragraph [12.11] above). He said, "I do not believe I have any power now to submit any files for inspection", and "cannot comment on the maintenance of files after my departure from the company".

[30.2] His counsel in a letter of 19 May 2016 amplified these comments. Mr Simmonds on Mr Jiang's instructions said:

Mr Jiang has not worked for Sea Consultants Limited in any capacity since July 2015 but he is nonetheless doing what he can to obtain the relevant file documentation so that a complete response may be provided to the complaints outlined in your letter [of 28 April 2016].

[30.3] Mr Simmonds followed up the comments in his letter of 26 May 2016. Materially, he said on Mr Jiang's instructions:

I am instructed by Mr Jiang (consistent with his email to you dated 4 May 2016) that his immigration adviser license expired in July 2015. Given that Mr Jiang ceased his employment with Sea Consultants as at July 2015,

he had no knowledge of the Authority's request in December 2015 for Ms Wang's file, and obviously no capacity to comply with that request.

- [30.4] On 3 November 2016, through his counsel, Mr Jiang filed a statement of reply. It included a statement of material facts regarding the complaint that was, by that time, before the Tribunal. Mr Jiang signed the statement and initialled each page. His statement included:

... I have not worked for Sea Consultants Limited in any capacity since July 2015 and therefore I have not had access to the file relating to Ms Wang.

...

I understand ... that part of the requested file, but not all of it, was provided to the Authority by an employee of Sea Consultants, Mr Hallett.

Your letter states that the requested file has not been submitted for inspection and suggests that Mr Jiang may therefore be in breach of section 69 of the Immigration Advisers Licensing Act 2007 (the Act).

I confirm that my immigration adviser license expired in July 2015 and I have not worked for Sea Consultants in any capacity since July 2015. Given that I ceased employment with Sea Consultants as at July 2015, I had no knowledge of the Authority's request in December 2015 for Ms Wang's file and I have no capacity to comply with that request..

The Authority's request for the file belonging to Ms Wang was made approximately five months after I ceased acting as an immigration adviser, and equally, some five months after my employment with Sea Consultants had come to an end. I do not accept that up until July 2015 I failed to ensure that Ms Wang's file was maintained or that I failed up until July 2015 to ensure that Ms Wang's file was available for inspection.

- [30.5] At the oral hearing, Mr Jiang swore he would tell the whole truth, and he affirmed that the statement he signed on 3 November 2016 was true.

- [31] When cross-examined, Mr Jiang admitted he was the sole director of Sea Consultants Ltd, and that his mother was the sole shareholder. Mr Jiang admitted that as the sole director of Sea Consultants Ltd, he did have the power to deal with the company's files. His explanation for telling the Authority and the Tribunal that he could not do so was that he had forgotten he was a director of the company.

- [32] Given the gravity of the admissions, the Tribunal gave Mr Jiang the opportunity to consult with his counsel. The Tribunal made it clear to Mr Jiang that despite him being under cross-examination, the consultation with his counsel was unrestricted.

[33] The key elements of Mr Jiang's final explanation are:

- [33.1] When the initial requirement to provide the file was sent to his nominated email address, his mother intercepted it and withheld the information from him. Accordingly, he says it was true that he did not know of the request until he received the Authority's letter of 28 April 2016. When he received that letter, he accepts it gave notice of potential criminal offending in relation to failing to disclose the file, and did not seek to distance himself from either his personal reply of 4 May 2016, or the subsequent material supplied through his counsel.
- [33.2] While he accepted that as the director, he had the power to control the company's response to the Authority's statutory requirement, he had entirely forgotten he was a director. Accordingly, his responses regarding his lack of capacity to do anything were genuine. He accepted he had personally signed consent to be a director on 25 July 2014, less than two years before his email to the Authority of 4 May 2016 stating "I do not believe I have any power now to submit any files for inspection". However, he said he had no recall of signing the consent, but accepted he had done so.
- [33.3] In relation to the fact that his mother owned 100% of the shares in Sea Consultants Ltd, he was required to explain why he could not have sought her support and authority. He said he had not sought that because he understood Mr Hallett had complied with the Registrar's statutory request. He also said he did not consider it appropriate to approach his mother regarding his duty to comply with the Registrar's statutory requirement for ill-defined reasons. They appeared to concern his mother, the company and himself being separate legal persons. He said the fact that his mother owned the company was just a family relationship, not a legal relationship requiring her to disclose information. He never suggested there were any personal reasons for his mother to obstruct him exonerating himself.
- [33.4] Mr Jiang emphasised that he did not intend to attempt to deceive the Registrar and the Authority. He said he was a barrister and solicitor, and understood how serious misrepresentation was in these circumstances. He said that because his status as a director was in the public record, that showed he would not attempt to mislead by falsely claiming he had no control over the company.

- [34] I now evaluate the evidence regarding Mr Jiang not producing a complete file. There are essentially two possibilities the first Mr Jiang's account, and the second the Registrar's challenge to his credibility:
- [34.1] Mr Jiang believed the file existed, if disclosed it would exonerate him and he did all he could in the circumstances as he believed them to be. However, he believed he was in a position of having to report to the Authority and the Tribunal he had no ability to produce either the file, or material information as to what happened to it.
- [34.2] Alternatively, Mr Jiang was aware full disclosure of the file would not support his claims regarding his standards of service delivery, and he embarked on a dishonest attempt to pretend he could not access the entire file, and constructed a false account that material parts of the file were missing.
- [35] I evaluate this evidence at a standard equating to beyond reasonable doubt. I cannot make an adverse finding on the issue at a lower standard flexibly applying the balance of probabilities; given the gravity of the finding. Unfortunately, I have determined Mr Jiang did embark on a sustained course of action where he misrepresented the power he had to access the file and information relating to it.
- [36] I have already set out the series of representations where Mr Jiang claimed he had no ability to access the file.
- [37] The first issue is that Mr Jiang says he forgot he was the sole director of the company. The claim is inherently implausible. There are cases where such confusion is understandable; for example, where a person holds directorships in a number of companies in a complex structure or a naive person may not understand the significance of being a company director. In contrast, Mr Jiang is a lawyer, this is a small family company, he is the sole director; and he was a licensed immigration adviser. He could not qualify as a licensed immigration adviser without understanding the serious obligations the company had to clients, and the licensed immigration advisers it employed. He must have understood the significance of being a director of this company, when he signed the documentation to take on that role.
- [38] The second element is that Mr Jiang admits he did know his mother was the sole shareholder, and claims nothing adverse in his relationship with her. It is unbelievable that Mr Jiang thought that if his mother held documents, and he had not asked her for access to them he could honestly say he "is nonetheless doing what he can to obtain the relevant

file documentation". That statement is false and misleading on any view; and, Mr Jiang must have known that was so when he made the representation to the Authority through his counsel. This was at a time when the Registrar had issued a statutory notice to him, and told him that: "By not submitting this file for inspection you may be in breach of this section 69 of the Act".

[39] I must evaluate Mr Jiang's statements and conduct as a whole. He said:

[39.1] That he did "not believe [he had] any power ...to submit the files for inspection" (above para.[30.1])

[39.2] He instructed his counsel to say "he is nonetheless doing what he can to obtain the relevant file documentation" (above para.[30.2])

[39.3] He also instructed his counsel to say "Given that Mr Jiang ceased his employment with Sea Consultants as at July 2015, he had no knowledge of the Authority's request in December 2015 for Ms Wang's file, and obviously no capacity to comply with that request."

[39.4] He prepared a statement for this Tribunal saying "I had no knowledge of the Authority's request in December for Ms Wang's file and I have no capacity to comply with that request" (above para.[30.4]).

[40] They are the key elements in a series of statements crafted to cause the Authority and the Tribunal to believe Mr Jiang's only relationship with Sea Consultants Ltd was as an employee. Further, that he ceased employment with the company, and had no ability to influence it. I am left in no doubt that Mr Jiang crafted this false impression to hide the reality that he and his mother could exercise complete control over the company. When he instructed his counsel to say he was "doing what he can to obtain the relevant file"; he must have known he had not done that, as he had not even taken the obvious step of asking his mother. That evidence is independent of his memory as to being the sole director of the company.

[41] Given Mr Jiang's misleading statements regarding his lack of access to the company and efforts to provide the file, I am satisfied Mr Jiang did know he was the sole director of the company. The claim is inherently implausible, and independent evidence establishes Mr Jiang was deceptive regarding other matters regarding his inability to produce his file. I must, accordingly, conclude the implausible explanation that he could not recall he was the director of the company is false.

- [42] I have fully considered Mr Jiang's claim that as his role as sole director and his mother's as sole shareholder were a matter of public record, he would not have knowingly attempted to mislead the Tribunal and the Authority, due to risk of detection. I have also considered his claim the Authority knew of their roles.
- [43] I accept at least some people in the Authority did know about Mr Jiang and his mother's roles in Sea Consultants Ltd. Certainly, the Authority's counsel had the information required to cross-examine Mr Jiang by the time of the hearing. However, I find the claim Mr Jiang could not have attempted to mislead due to the risk of detection unpersuasive. The evidence that Mr Jiang deliberately misrepresented his ability to access his file, and that he was doing his best to do so is overwhelming. With the benefit of hindsight, it is very common to see that detection of misrepresentation was likely, if not inevitable. In this case, and many others, risking discovery can only be explained by folly, not innocence.
- [44] The reason it has been necessary to make these findings regarding Mr Jiang's deception regarding his file, is that a number of the grounds of complaint would be determined with certainty if a full record of his file were available. It is not available. I must reject Mr Jiang's explanation that he is not responsible for what others did with the file after his employment ended. Instead, Mr Jiang failed to produce his file, and provided deceptive reasons for not doing so. I must, now weigh Mr Jiang's evidence of invariable and compliant practice. His unavailable file would almost certainly disclose whether his evidence is true or not, given the strict record-keeping obligations. Accordingly, the plausibility of claims regarding his professional conduct is greatly affected by the lack of credibility of his reasons for not having his whole file available.

The first ground of complaint – no written agreement

- [45] The first ground of complaint is a breach of clause 1.5(a), (b), (c) and (d) of the 2010 Code in relation to agreements. The short point is that Mr Jiang faces an allegation that he did not have a written agreement.
- [46] Mr Jiang says he did have an agreement, as that was his invariable practice; he claims if his entire file were available, it would have a copy of the agreement. He was required pursuant to clause 3 of the 2010 Code to maintain records.
- [47] I have found Mr Jiang failed to produce his file, and that he provided a false explanation regarding his ability to access the file. Essentially, I only have Mr Jiang's assertion there was an agreement; he provided no proof beyond claiming he did always have a written agreement. Having found at a level equating to beyond reasonable doubt (at the highest end of the civil balance of probabilities) that Mr Jiang provided a false explanation for his inability to produce a copy of the file; I must consider on the simple balance of probabilities whether there was a written agreement. I am satisfied that if there was a written agreement Mr Jiang would have probably produced a copy, not provided a false explanation as to why there was no copy. There is no satisfactory explanation for the absence of an electronic or paper copy of an agreement, so I conclude the probable explanation is there was no such document.
- [48] Accordingly, I uphold this ground of complaint the Mr Jiang breached clause 1.5(a), (b), (c) and (d), as he failed to have a written agreement.

The second ground of complaint – lack of care

- [49] The second ground of complaint is that Mr Jiang breached clause 1.1(a) and (b) of the 2010 Code in relation to care, respect, diligence and professionalism, in that he failed to provide information Immigration New Zealand requested.
- [50] The only matter in dispute is whether Mr Jiang failed to take adequate steps to file the documents; it is not in dispute that he had the documents available. It would be surprising that Immigration New Zealand could only locate one document, if it received all the documents at the same time. However, documents can go missing for a range of reasons.
- [51] Mr Xu gave evidence he received the documents, and delivered them, and Mr Jiang says he arranged that with Mr Xu. Surprisingly, there is no record of a cover letter identifying the documents filed, and Mr Xu regarded that as unusual.

[52] On the balance of probabilities, given Mr Xu's direct evidence, I am satisfied he probably delivered the complete set of documents. Accordingly, I accept on this evidence that some of the documents were probably lost in Immigration New Zealand. I have considered the absence of a cover letter, however, that is not sufficient to reject Mr Xu's and Mr Jiang's evidence. There was some urgency, so that factor is only an irregularity.

[53] Accordingly, I dismiss this ground of complaint.

The third ground of complaint – unfounded matters and lack of care

[54] The third ground is a breach of clause 2.2(a), (b) and (c) and clause 1.1(a) of the 2010 Code in relation to unfounded immigration matters and due care. This ground relates to an allegation that the appeal to the Immigration and Protection Tribunal did not present humanitarian issues, or explain why deportation would be unduly harsh. The Immigration and Protection Tribunal could not have allowed the appeal unless satisfied Ms Wang established those criteria.

[55] In essence, the issue is whether Mr Jiang lodged the appeal when it had no realistic prospect of success, having regard to the relevant jurisdiction of the Immigration and Protection Tribunal.

[56] Clause 2.2 concerns appeals that are "vexatious or grossly unfounded" or have "no hope of success". Clause 1.1 relevantly concerns lack of care and professionalism.

[57] The first issue to consider is the grounds of appeal. The essential grounds of appeal were:

[57.1] Ms Wang was in New Zealand and sought a student visa, her only child was living in New Zealand permanently, and she needed to learn English to be able to have a chance of living permanently in New Zealand in the future;

[57.2] She provided documents Immigration New Zealand requested, but through no fault of her own Immigration New Zealand did not receive or lost the documents;

[57.3] She had sought all redress available short of the appeal;

[57.4] She was now facing deportation.

[58] As noted, the only available grounds for the appeal were "exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand". The

Tribunal found no such grounds. However, I accept that in some cases the irretrievable loss of a critical opportunity through official error could meet the test.

- [59] The difficulty with the appeal Mr Jiang filed for Ms Wang is that he failed to make out a case supporting that. While English language may have been essential or important for Ms Wang's future, there is no evidence she would lose her one and only opportunity of learning English, with irretrievable family separation following. The reality was that she was a failed visa applicant, who should have left New Zealand, and could apparently make any appropriate visa applications after doing so. That is not an exceptional humanitarian circumstance; and, does not establish an unduly harsh or unjust outcome.
- [60] The only exceptional thing was that Ms Wang provided the information to Mr Jiang that Immigration New Zealand needed, and without fault on Ms Wang's part, Immigration New Zealand did not consider the information. That was a matter best pursued under Immigration New Zealand's complaint process, or by seeking discretionary relief under section 61 of the Immigration Act 2009.
- [61] The wording in clause 2.2 of the 2010 Code appropriately targets patently defective applications and appeals, using words such as "grossly unfounded" and "no hope of success". It does so because it would be wrong to exert a chilling effect on applications with modest prospects of success, immigration processes do involve significant elements of discretion. The outcome is often uncertain, and practitioners should not be fearful of robustly pursuing processes if their clients understand the risks. Accordingly, I am satisfied, that the appeal fell well short of ideal, but there were sufficient humanitarian elements not to engage clause 2.2. It was particularly weak in failing to establish the consequences were unjust or unduly harsh.
- [62] The other element that is part of the grounds of complaint is a potential lack of care and professionalism. While there is room for criticism that the appeal fails to contain evidence to show that leaving New Zealand would lead to an unjust or harsh outcome, I am not satisfied it reaches the threshold for lack of care or professionalism.
- [63] Accordingly, while in my view the appeal was neither likely to succeed, nor well crafted, it does not fall into the grounds of complaint identified. In saying that, this finding should not be seen as requiring less than a rigorous approach. The key professional responsibility is gaining informed instructions for an appeal or other process; ultimately, the decision is usually for a client to make, after receiving adequate notice of the risks,

and range of approaches. In this case, that is not a ground of complaint, only the higher standard in clause 2.2 of the Code.

[64] Accordingly, I dismiss the third ground of complaint.

The fourth ground of complaint – negligence

[65] The fourth ground of complaint is negligence, under section 44(2)(a) of the Act. The allegation is that Mr Jiang failed to notify Ms Wang of the Immigration and Protection Tribunal's decision. He accepts that happened, but says his office made adequate attempts to do so; accordingly, it was not negligence but simply an inability to contact his client.

[66] Mr Jiang was required to keep proper records. He has not been able to provide records to support his claim he or staff of Sea Consultants Ltd attempted to contact Ms Wang, or show some reason why they could not do so. In the absence of such records, I find that on the balance of probabilities there are no records because there were no attempts to inform Ms Wang. Notifying Ms Wang of the outcome of the Immigration and Protection Tribunal appeal was very important, because of her legal status in New Zealand without a visa. Mr Jiang should have been very concerned to ensure he met with Ms Wang and explained her circumstances. Accordingly, the absence of records is not consistent with Mr Jiang's claim. There should be records of communications, and if impossible, some record as to why that was the case on the file. For the reasons discussed, I have rejected Mr Jiang's explanation for not being able to produce a complete file.

[67] Accordingly, I uphold the complaint that Mr Jiang negligently failed to take adequate steps to inform Ms Wang the Immigration and Protection Tribunal dismissed her appeal.

The fifth ground of complaint – failing to maintain client records

[68] The final ground is that Mr Jiang breached clause 3(e) of the 2010 Code in relation to maintaining client records. The requirement was that he:

... maintain professional business practices relating to finances, records, documents, contracts ... including:

...

- e) maintaining complete client records that track all transactions for a period of seven years and making those records available for inspection on request by the Authority;

- [69] Mr Jiang claimed he maintained a proper file, and that when he left his employment with Sea Consultants Ltd, he lost control of the file, and could not be accountable for what happened to it.
- [70] For the reasons discussed, I am satisfied that, in fact, Mr Jiang did have control of the file because he was at all material times the sole director of Sea Consultants Ltd, and his mother the sole shareholder. Mr Jiang chose not to exercise his authority as director or ask his mother's permission to deliver the file. He misled the Authority and the Tribunal regarding his ability to access the file.
- [71] It follows that I must uphold this ground of complaint on the basis that Mr Jiang failed to maintain a complete record available for inspection by the Authority when it requested the file.

Decision

- [72] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [73] Mr Jiang was negligent, and breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [74] The Tribunal has upheld the complaint. Therefore, pursuant to sections 50(c) and 51 of the Act, it may impose sanctions.
- [75] The gravity of the findings against Mr Jiang are obvious. His failure to produce a file, and his conduct when the Registrar requested his file put this complaint into a category where Mr Jiang's fitness to be a member of the profession is in issue. In professional disciplinary matters, a practitioner's response to the complaint may well have a bearing on the options available for their continued and future participation in the profession.
- [76] The timetable for submissions will be as follows:
- [76.1] The Authority and Ms Wang are to provide any submissions within 10 working days of the issue of this decision.
- [76.2] Mr Jiang is to make any submissions (whether or not the Authority or Ms Wang make submissions) within 25 working days of the issue of this decision.

[76.3] The Authority and Ms Wang may reply to any submissions made by Mr Jiang within 5 working days of him filing and serving those submissions.

[77] A decision on the papers will follow, unless any party requests an oral hearing, in which case the Tribunal will convene a telephone conference to discuss the request.

DATED at WELLINGTON this 17th day of February 2017.

G D Pearson
Chair