BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2017] NZIACDT 14

Reference No: IACDT 024/15

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**Manjeet Singh** Complainant
AND	**Harjeet Golian** Adviser

DECISION

REPRESENTATION:

Registrar: Ms C Pendleton, Lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 12 September 2017

DECISION

Introduction

[1] The complainant consulted the adviser regarding his immigration status. At that point in time, Immigration New Zealand had declined the complainant's application for a work visa and his subsequent application for reconsideration of that decision. The complainant was in New Zealand unlawfully, because he did not have a current visa.

[2] The complainant's proposal was that the adviser would assist him to make an application for a student visa under s 61 of the Immigration Act 2009 ("Section 61"). In anticipation of that approach, the complainant had already lodged fees for a particular course that he wished to pursue.

[3] The adviser recommended that the complainant pursue a different approach to the one the complainant proposed. Instead, he suggested that the complainant should lodge an appeal on humanitarian grounds with the Immigration Protection Tribunal ("IPT"), and make a formal complaint to Immigration New Zealand ("INZ") regarding its decision to decline his application for a work visa. After those approaches failed, the adviser recommended that the complainant lodge an application under s 61 for a student visa.

[4] The Registrar alleges that the adviser failed in his duty to provide his services and carry out his client's instructions with "due care, diligence, respect and professionalism". The essence of the complaint is that the adviser failed to ensure his client had a full understanding of the options available to him, and the advantages and disadvantages of the respective options. The Registrar also alleges that the adviser recommended a course of action that was not best suited to the circumstances of the complainant.

[5] The key issues for the Tribunal to determine are:

(a) whether the adviser took adequate steps to ensure that the complainant did have a full understanding of his options and the course of action pursued; and

(b) whether the course of action pursued was appropriate in the circumstances.

[6] As a question of fact, the Tribunal has found that it is not in a position to reach the conclusion that the complainant's understanding (based on what the adviser said) was so inadequate that it is a ground for complaint. Accordingly, the focus when evaluating this complaint has

been to determine whether the course of action pursued by the adviser was one that he could have pursued if that adviser was acting with due care, diligence and professionalism (whether or not adequately explained to the complainant).

[7] The Tribunal has concluded that the actions taken by the adviser, on the complainant's behalf, to address the complainant's immigration situation were plainly wrong. Furthermore, the adviser persisted with those actions to a point that leaves no room for the Tribunal to conclude his actions were a lapse falling short of the disciplinary threshold. He persisted with his errors of judgement, notwithstanding responses from the IPT and INZ that ought to have caused him to pause and reflect and identify why his actions were ill-advised.

The complaint

[8] While the professional judgements exercised by the adviser are very much in dispute, the essential facts are not. Accordingly, it is not necessary to do more than give a relatively brief outline of the circumstances.

[9] The complainant first approached the adviser in August 2012. At this point, without the adviser being involved, INZ had already declined the complainant's application for a work visa and his request for a reconsideration of that decision. He was in New Zealand without a current visa; therefore, he could not apply for a visa without first leaving New Zealand. The only available exception was to apply for a visa under s 61 of the Immigration Act 2009. An application under s 61 is wholly discretionary and INZ is not required to give reasons for, or justify, the decision it makes. Accordingly, a request under s 61 may not be ideal if there are appropriate alternatives.

[10] The adviser engaged with the complainant and ascertained that he wished to complete a National Diploma in Business (a NZQA level 6 course of study) and that he had already paid tuition fees to the New Zealand Institute of Technical Training so that he could enrol in this course.

[11] On 6 August 2012, the adviser and the complainant settled on terms of engagement, which involved a total professional fee of $5,000; the complainant paid $2,400 of that fee the same day.

[12] The adviser recommended to the complainant that he should withdraw from the diploma course he had enrolled in. Instead, he recommended the complainant should submit a formal complaint to INZ regarding the

decision to decline his work visa application. He also recommended that the complainant should pursue an appeal on humanitarian grounds against deportation with the IPT. The complainant accepted the advice and the adviser pursued both courses of action; he lodged the appeal with the IPT on 24 August 2012 and the formal complaint with INZ on 27 August 2012.

[13] INZ refused to consider the complaint on the basis that the decision to decline the application for a visa had already been reconsidered, and the original decision upheld. This notification informed the adviser that the complaints process was not intended as an avenue for persons to use when they were unhappy with a decision.

[14] On 25 September 2012, the adviser wrote to the Deputy Chief Executive of INZ requesting that the complaint be escalated within the department as the decision regarding the complaint was "unfair and harsh". On 27 September 2012, the adviser received a further letter from INZ reiterating the position that the complaints process was not an avenue to review decisions, but rather to consider genuine service or process-related complaints against INZ. Accordingly, on 5 October 2012, INZ notified the adviser that the complaint would not proceed to the next stage as no appropriate grounds for complaint had been articulated.

[15] On 18 October 2012, the adviser submitted a complaint against INZ to the Office of the Ombudsman. On 8 February 2013, the Office of the Ombudsman rejected the adviser's complaint against INZ on the basis that the complaint did not appear to raise any grounds for investigation.

[16] On 18 December 2013 the IPT declined the appeal against deportation; it found that the complainant had not shown that he had exceptional circumstances of a humanitarian nature which would make it unjust or unduly harsh to deport him — those were the grounds that had to be established for the appeal to succeed.

[17] After the complaint to INZ and the appeal to the IPT had failed, the adviser advised the complainant to lodge a request for a student visa under s 61.

[18] The Registrar alleges that the adviser has breached clause 1.1(a) and (b) of the Code of Conduct 2010. That clause provides:

> A licensed immigration adviser must, with due care, diligence, respect and professionalism:

(a) Perform his or her services; and

(b) Carry out the lawful informed instructions of clients;

[19] Th Registrar alleges that the adviser has breached clause 1.1(a) and (b) on the grounds that he:

[19.1] undertook a strategy which the complainant did not fully understand;

[19.2] failed to follow the complainant's instructions to apply for a student visa under s 61 of the Immigration Act 2009; and

[19.3] undertook a strategy that as not best suited to the complainant's circumstances.

The responses

[20] The complainant did not file a statement of reply. He was not required to do so unless he disagreed with the statement of complaint.

[21] The adviser did file a statement of reply. Overall, the effect of the adviser's response was to say that he had acted appropriately and professionally throughout the period that he had been engaged by the complainant. He alleged that the complainant had not provided correct information to the Registrar. He challenged various factual matters, with a particular emphasis on making allegations against the complainant.

[22] In these circumstances, the Tribunal requested that the adviser appear to provide a further explanation regarding what he said in response to the complaint. The format of the hearing was structured, principally, to give an opportunity for the adviser to explain his perspective, give evidence on oath to the extent necessary, and generally advance his response to the complaint.

[23] The Authority confined the other parties to issues raised by the Tribunal or the adviser; it was not a full oral hearing. The process was under section 49, which allows the Tribunal to regulate its own procedures, directs it must hear matters on the papers, but allows the Tribunal to request an appearance by any person to provide an explanation.

[24] In the course of that process, it became clear that while the adviser in his statement of reply had apparently disputed essential facts alleged by the Registrar; he in fact largely accepted the narrative of events in the statement of complaint.

[25] There were disputed issues as to the complainant's understanding of the advice. However, the complainant and the adviser did not both give oral evidence subject to cross examination; accordingly, there are limits as to how far contentious issues regarding communications between the complainant and the adviser can and should be resolved. One of the grounds of complaint is that the complainant was not adequately informed of the course of action pursued by the adviser. The parties did not seek to call further evidence on the communications between the adviser and the complainant. In any case, that aspect of the complaint was somewhat incidental.

[26] The real essence of the complaint was whether or not the course of action pursued by the adviser was a departure from a reasonable and appropriate course of action that was sufficient to engage the disciplinary process. Those issues are well documented, and were explored with the adviser in oral evidence. There was no dispute that the adviser told the complainant that the best approach was to:

[26.1] Make a formal complaint to Immigration New Zealand, and

[26.2] Pursue an appeal against the decline of the work visa under the humanitarian jurisdiction of the IPT.

[27] There is no dispute that once those options had failed, the adviser continued the complaint process with the Ombudsman's office, and, ultimately, recommended an application under s 61 — as the complainant had requested in the first instance. Each of those steps is documented; the adviser did not dispute that the documented course of action was the one he advised. Furthermore, he says that with the benefit of hindsight he would still take the same course of action if the same circumstances presented themselves.

[28] Accordingly, the key matter in issue was not a factual dispute, but rather the evaluation of the appropriateness of the adviser's professional judgement. The material circumstances surrounding that professional judgement must, of course, be taken into account.

Discussion

The standard of proof

[29] 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], [102], [105], [116]-[118] and [145].

The facts

[30] As discussed, the primary facts are not contentious. Accordingly, I discuss the relevant facts to the extent that it is necessary under each of the grounds of complaint.

Undertaking a strategy which the complainant did not fully understand

[31] There can be no doubt that the adviser did discuss the strategy he proposed to pursue with the complainant. That involved oral communications as well as some more limited written records. The adviser is entitled to the benefit of the doubt. The written records may not have been a comprehensive explanation of the strategy he pursued; however, I cannot be satisfied that he failed to adequately inform the complainant of what that strategy was or review the reasons for his strategy and the risks associated with it. As noted, the parties did not seek to pursue an oral hearing that explored these issues.

[32] For the reasons discussed below, the adviser's strategy was clearly wrong. If fully explained, a wrong strategy is not likely to be pursued by an informed client. In this case, the complainant himself presented an appropriate strategy and the adviser persuaded him to do something that was not appropriate. The real issue is the error with the strategy; the communications could only be derivative.

[33] Accordingly, I dismiss the ground of complaint that the adviser pursued a strategy which the complainant did not fully understand. It does not add to this complaint, and the evidence is not sufficiently clear to make the necessary findings.

Failing to follow the complainant's instructions to apply for a student visa

[34] The second ground of complaint alleged by the Registrar is that the adviser failed to follow the complainant's instructions to apply for a student visa. There appears to be no doubt that the complainant had enrolled in a course, he wanted the adviser to assist him to apply for a student visa, and that both parties clearly understood the complainant did not hold a current visa. To follow the course the complainant sought, the only available option was to make a request under s 61 of the Immigration Act 2009 (other than leaving New Zealand before making an application from outside New Zealand).

[35] The adviser says that he did not consider that applying for a student visa under s 61 was an appropriate strategy. In his view, Immigration New Zealand was not likely to exercise the discretion under s 61 favourably, when a person was seeking to obtain a visa to pursue a

low level course. The adviser said that that was his experience, and he remains firmly of the view that an application would not have been successful.

[36] Inevitably, the Tribunal must view that explanation with some scepticism. One reason for that scepticism is that later, when the alternative course of action failed, the adviser did in fact recommend a request under s 61 for a student visa. The discretion under s 61 is an open discretion; the decision maker is not obliged to give any reasons when making the decision. Regardless, there can be no policy against the exercise of the discretion to allow persons to apply for a student visa to pursue a course of study in New Zealand. The exercise of the discretion is typically a question of weighing the significance of the non-compliance. Typically, the person is unlawfully in New Zealand without a visa; that failure to comply with New Zealand law is balanced against the consequences of requiring the person to leave New Zealand before making a further application. It is the experience of this Tribunal that the full range of visas can be the subject of a successful request under s 61. Indeed, it could well be a valid ground of complaint if a decision maker in INZ approached a request with a closed mind on the basis of the class of visa being sought.

[37] Accordingly, I am satisfied that the adviser had no justification for failing to accept the instruction to lodge a request under s 61 for a visa to take up the course of study identified by the complainant. However, this ground of complaint is very much tied to the remaining ground of complaint, namely, that the adviser's alternative recommendation that the adviser presented to the complainant. If the alternative courses of action were appropriate, and the complainant accepted the advice to follow them, there could be no criticism of the adviser. In this case, for the reasons discussed below, I am satisfied that the adviser's approach was wholly misguided and devoid of merit.

[38] It follows that I uphold the ground of complaint that the adviser failed to follow the complainant's instructions to apply for a student visa. The instruction was an appropriate one, and the adviser failed to follow it; he pursued a plainly inappropriate strategy and breached clause 1.1(b) of the 2010 Code. However, it does not add materially to the following finding regarding the approach the adviser did take, which is the critical error in this complaint.

Undertaking a strategy not best suited to the complainant's circumstances

Scope of issues

[39] This ground of complaint involves three different dimensions:

[39.1] the appeal to the IPT;

[39.2] the decision to pursue a formal complaint against the decline of an application for work visa; and

[39.3] the proposed request under s 61 for a student visa, after other approaches failed.

The appeal

[40] The adviser recommended lodging an appeal with the IPT and did so. The adviser has variously sought to explain this approach as a device to avoid the complainant being deported while the complaint was pursued and an appeal that had at least some significant prospect of success. The appeal is founded on establishing humanitarian grounds for being permitted to remain in New Zealand. A successful appeal will usually result in the issue of a temporary visa, but there are other possibilities. The threshold to succeed in such an appeal is substantial. The adviser claimed that the consequences of failing to gain qualifications in New Zealand and the lost costs of attempting to do so were serious for the complainant — to the level that they engaged this humanitarian jurisdiction.

[41] On any view, the appeal did not provide a right of appeal against the merits of the decision not to grant the complainant a work visa. The IPT heard the appeal and issued a decision. The Authority pointed out:

> For an appeal of this type to succeed, the statutory requirement is for an appellant to show that they have exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for them to be deported from New Zealand.

[42] The IPT concluded:

> The families of the appellant and his wife remain in India. The appellant's desire to remain in New Zealand with his wife (who was only entitled to stay until April 2014), and to obtain employment that might eventually provide him with a pathway to residence, does not generate any humanitarian reason for him to stay on.

[43] The decision was predictable; the appeal simply failed to raise circumstances that the IPT could regard as a humanitarian reason not to deport the complainant. Understanding the threshold required to support a successful appeal to the IPT on humanitarian grounds is an elementary professional skill for any licensed immigration adviser receiving instructions to lodge an appeal with the IPT under that part of its jurisdiction.

[44] In my view, the error of judgement in lodging the appeal was not a matter where competent practitioners might have different views. The appeal lacked a foundation. In my view, bringing the appeal was an obvious error due to the lack of grounds and it was pursued notwithstanding the client's far more sensible instruction to apply under s 61 for a student visa. Furthermore, the adviser has persisted with maintaining that the decision to lodge the appeal was correct, notwithstanding the clear conclusions of the IPT. He repeated his view that the appeal was appropriately pursued when appearing before the Tribunal. Accordingly, I must conclude that this approach crossed the disciplinary threshold and find that the adviser failed to act with due care, diligence and professionalism in performing these services. This was not an isolated lapse where an adviser made an error of judgement; he wholly failed to consider the scope of the IPT's jurisdiction, and still persists with his erroneous evaluation.

The complaint to Immigration New Zealand

[45] INZ has a formal complaints process. In some cases, parties also have a right to pursue appeals against decisions where applications for visas fail. Unsurprisingly, the complaints process is not intended to be a substitute for an appeal against the merits of a decision. A complaint made to INZ must be in relation to something other than the merits of the decision. The adviser lodged a complaint saying that the decision was not fairly and justly considered. He said that the decision to decline the application appeared to be inconsistent with other decisions. The complaint then went on to make it clear that the complaint was simply directed at the merits of the decision, and was generally supported by the effects on the complainant of not granting the visa.

[46] INZ responded to the complaint by pointing out the complaints process is not intended as an avenue for people to use when they were unhappy with the decision relating to their case, noting the decision had already been reconsidered after it was first made. The adviser sought to re-litigate the complaint with INZ and then he complained to the Ombudsman. In each case, he received the same response. There can be no surprise that he received the response that he did. The complaint never raised any grounds to justify making the complaint in the first place. The instructions to request a student visa pursuant to s 61, which the complainant gave to the adviser had far more prospect of success than the formal complaint.

[47] Inevitably, practitioners make errors of judgement and not every error of judgement is a foundation for an adverse disciplinary finding. In

relation to this ground, I have been left in no doubt that the error of judgement was clear and obvious. I take that view because:

[47.1] The complainant's own instructions were far more sensible than lodging the complaint.

[47.2] The complaint to INZ was both inapt as a response to the complainant's circumstances, and it failed to articulate any foundation that could engage the complaints process.

[47.3] In addition to making the initial error of judgement, the adviser compounded it by seeking to re-litigate the complaint with INZ.

[47.4] When INZ had twice explained why a complaint was not appropriate, the adviser then pursued the same approach with the Ombudsman's office.

[47.5] When he appeared before the Tribunal, the adviser still asserted that he would make the same decision if the same circumstances arose again.

[48] Viewed together, these circumstances leave me in no doubt that the adviser is either:

[48.1] so lacking in judgement and skill that he is unable to appreciate the error he made; or

[48.2] he is unwilling to consider that he may be wrong.

[49] Professional people must re-evaluate their decisions as further information comes to hand, and particularly when that information includes reasoned views coming from informed persons.

The ultimate recommendation to request a student visa under section 61

[50] The final element of the course pursued by the adviser was to recommend a request under s 61 for a work visa; this is the approach the complainant asked for in the first place. By the time the adviser suggested a s 61 request, he had created a significant adverse history for the complainant. The complainant had requested a review of the original decision to decline a work visa, lodged a complaint, pursued it to the point of demonstrating it was frivolous, and pursued an appeal to the IPT which was demonstrably without merit. At this point, the request for the issue of the work visa was simply a third form of re-litigating the same point.

Conclusion on the course of action the adviser pursued

[51] The decision to pursue an appeal and lodge a complaint rather than follow the instructions that were proposed by the complainant was entirely ill-conceived. What the complainant requested was sensible and appropriate. That is the view of the Tribunal after considering the factual circumstances in which the complainant first presented his situation to the adviser. The view is reinforced by the fact that the adviser himself came back to ultimately recommend a request under section 61. However, by that time, given that the request is decided on a wholly discretionary basis, the intervening events had seriously compromised any prospects of success.

[52] If the complainant had lodged a request for a student visa under section 61 after the failed complaint and appeal, INZ would have had concerns. The apparent picture is that the complainant was a person who was in New Zealand unlawfully, who was abusively wasting INZ's time and money to extend his time in New Zealand. He had a motive to do so, as his wife was studying in New Zealand, and no doubt wished to remain in New Zealand with her. Compliance action is costly to New Zealand, and INZ has a duty to give significant weight to any failure to leave New Zealand before a temporary visa expires. INZ may give weight to ill-founded applications and complaints used as a device to remain in New Zealand.

[53] INZ would have assumed that it was the complainant, not the adviser, who developed the strategy of lodging the ill-founded appeal and complaints.

[54] It is impossible to be sure whether a request under s 61 for a student visa lodged when the complainant first consulted the adviser would have succeeded; however, the prospects of success then would have been far higher than after the adviser's strategies had failed.

[55] Accordingly, the decision to pursue the meritless appeal and the formal complaints were decisions that were costly to the complainant, both in terms of professional fees and in terms of his immigration prospects. The complainant and his wife were pursuing immigration opportunities in New Zealand and they invested a considerable amount in doing so. Because the complaint and the appeal to the IPT were both entirely without foundation, the potential for serious harm to the complainant and his wife was significant. For that reason, the adviser had a duty to very carefully weigh the circumstances before pursuing the appeal and the complaint. The risks of the strategy were

far greater than simply not being successful with the complaint and the appeal.

[56] I have already expressed the view that no competent licensed immigration adviser should have recommended to the complainant that he lodge the appeal and complaints. The adviser has not advanced any plausible justification for doing so. Accordingly, I am satisfied the adviser:

[56.1] failed to exercise sufficient care and diligence to understand how misguided his advice was, and

[56.2] did not apply the professionalism required to determine what his client's best interests were, and pursue them. He failed to do that when he advised against pursuing the instructions his client presented to him, when he recommended the ill-advised course of action, and repeatedly when he was confronted with the compelling responses from INZ, the IPT and the Ombudsman's office stating why he was wrong.

[57] In these circumstances, I am satisfied that the conduct of the adviser lies well beyond the threshold for a disciplinary response, and he failed to perform his services with due care, diligence and professionalism. Accordingly, he breached clause 1.1(a) of the 2010 Code; the complaint is upheld in that respect.

Decision

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

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

Submissions on Sanctions

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

[61] 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, the adviser is entitled to make submissions and respond to any submissions from the other parties.

[62] 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

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

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

[63.2] 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.

[63.3] 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.

DATED at Wellington this 12th day of September 2017.

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G D Pearson
Chair