BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2017] NZIACDT 2

Reference No: IACDT 015/16

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**T E** Complainant
AND	**Q S** Adviser

DECISION

REPRESENTATION:

Registrar: Ms Claire English, Lawyer, MBIE, Wellington

Complainant: No appearance at the hearing.

Adviser: Mr Chris Lahatte, Lawyer, Wellington.

Date Issued: 13 March 2017

DECISION

Introduction

[1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.

[2] Mr S (the adviser) is a licensed immigration adviser and the complainant consulted him regarding his immigration situation. At the time, he was in New Zealand unlawfully as he did not hold a current visa. He had some significant history in relation to his immigration affairs in New Zealand prior to that point in time.

[3] The adviser agreed to assist the complainant by seeking a student visa under s 61 of the Immigration Act 2009. That provision is a discretionary provision that allows a visa to be issued to a person who is in New Zealand unlawfully.

[4] The Registrar has alleged two elements that potentially justify an adverse disciplinary finding against the adviser:

[4.1] When he lodged the s 61 request, the adviser failed to adequately particularise the grounds for the request; and

[4.2] The adviser was not sufficiently expeditious in either filing the request or reporting to his client.

[5] There is no significant factual dispute regarding the matter. The issue essentially turns on a question of judgement as to whether the adviser's actions in the circumstances were appropriate, both in terms of the substance of his approach, and its timeliness.

[6] Accordingly, the Tribunal's task is to evaluate the circumstances and then measure them against the adviser's professional obligations.

The complaint

[7] The Registrar's statement of complaint put forward the following background as the basis for the complaint:

[7.1] On 30 April 2015, Immigration New Zealand declined the complainant's skilled migration category application for a visa, on the grounds the relevant employment not meeting the criteria. On 5 August 2015, he applied for a student visa. Immigration New Zealand sent a letter requesting a response to potentially prejudicial information to the lawyers acting for him at that time. However, Immigration New Zealand declined the application on 19 October 2015. At that point, the complainant was in New Zealand unlawfully without a visa.

[7.2] On 30 October 2015, the complainant engaged the adviser and paid a fee for his services.

[7.3] The adviser submitted the s 61 request for a visa on 18 January 2016, and Immigration New Zealand declined that request on 2 February 2016 and sent a letter to the advisor notifying him of the decision.

[7.4] On 22 April 2016, the complainant applied for refugee status in New Zealand. The adviser was not involved in the refugee status application.

[8] The Registrar identified potential infringements of professional standards during the course of the adviser's engagement. The allegations were that the advisor potentially:

[8.1] breached Clause 1 of the Code of Conduct 2014 (2014 Code), in relation to being professional; and

[8.2] breached Clause 26(b) of the 2014 Code in relation to file management, in particular, confirming in writing when applications have been lodged and making ongoing and timely updates.

[9] Neither the complainant nor the Registrar sought to widen the grounds.

Their responses

[10] The complainant did not take any active role in the hearing of the complaint.

[11] The adviser responded to the complaint through a statement of reply, and also provided an extensive series of testimonials.

[12] The Tribunal requested the adviser's attendance at an oral hearing. The request was made pursuant to s 49 of the Immigration Advisers Licensing Act 2007. The format for the hearing was for the Tribunal to conduct a brief inquisitorial examination of the adviser's response to the complaint, and then allow the parties to cross examine and re-examine in the usual way. The scope of the hearing was confined to the matters explored by the Tribunal and beyond that remained a hearing on the papers.

Discussion

The facts

[13] In relation to the form of the s 61 request, the adviser says it was important to understand the circumstances in which he found himself. His perspective is that he was paid a modest fee for a difficult and problematic attempt to take a final step to improve the complainant's immigration situation in New Zealand. The complainant was in a very difficult situation; he had come to New Zealand as a student and had relied on family money, which had been borrowed, to provide him with that opportunity. The objective had been to secure residence in New Zealand after study, and then repay his family. For various reasons, the appellant had failed to obtain a residence visa in New Zealand. He had been assisted by a firm of immigration lawyers who had presented a comprehensive case to support his immigration objectives.

[14] The adviser very frankly accepted that with hindsight he would have approached the matter differently. In essence, he would not have accepted the instructions. At the heart of the appellant's difficulties was the need to obtain a character waiver because of some irregularities relating to an earlier application he had made to Immigration New Zealand.

[15] The adviser said that the appellant was, understandably, in a somewhat fragile emotional state, given his predicament. He had suggestions from friends and while the only visa potentially open to him was a student visa, that was not the objective that he really sought. The complainant wanted

to at least obtain the right to work lawfully in New Zealand. That was the only way he could repay his family, and a student visa, rather than achieving that objective, would result in him having to meet tuition fees. He was trying to find a job offer that might give some prospect of seeking a work visa instead of a student visa.

[16] The adviser said that given an ongoing series of meetings and communications, it was not until 12 December at the very earliest that he could lodge a request for a visa, and he had made it clear to the complainant that his prospects of the request being successful were very low. Until then, the complainant had vacillated over whether to apply for a student visa, or hold off in the hope he could make a reasonable request for a work visa supported by a job offer. While the adviser had said in his letter of engagement that the request under s 61 would be lodged within 15 working days, it was not lodged until 14 January 2016. Contributing to the delay was the period of vacillation and the need to obtain information which took until 12 December 2015, the application was not in fact lodged until after Christmas. The application was quite brief; however, the adviser says that the reason for that was that the lawyers previously acting for the complainant had lodged a very comprehensive set of submissions. In his view, the situation was one where there was little that he could likely achieve, and a brief identification of the circumstances was the best approach in this case. A reiteration of matters already on record would not assist, so a brief appeal on the strongest grounds was most likely to be successful.

Evaluation of the circumstances

[17] The adviser quite frankly accepted that ideally he might have lodged the request sooner; he was not convinced that there was anything, or very much, that he could have done to improve the request. The Registrar took the view that the request should have been fuller and more detailed, and the adviser should have acted more promptly.

[18] As with many professional engagements with the advantage of hindsight, there are elements of the adviser's work that could have been improved. He acknowledges that. However, in my view, it is very difficult to conclude that anything that the adviser could have done would have made a material difference to either the outcome or the process.

[19] If there is room for criticism as to the delay in lodging the application, it relates to a matter of days in the busy period leading up to Christmas. Had the application been lodged before Christmas rather than after Christmas, it is unlikely it would have been processed any sooner, or the difference would have only been a matter of days. There is no question of the adviser having misled the complainant regarding when he lodged the application. As the adviser accepts, he intended to lodge it sooner, but due to his dealings with the complainant there was some delay. The adviser did inform the complainant that the application failed reasonably promptly after that occurred.

[20] I accept the Registrar's submission that the adviser could and should have developed the grounds more fully. The grounds he raised did require some amplification; some were quite significant contentions that should have been supported by clear references to evidence. However, the Registrar has not identified anything that could have improved the appellant's circumstances. The key information was already on Immigration New Zealand's file. The fundamental problem was the character waiver issue, and there is nothing that was likely to change Immigration New Zealand's view of that matter.

[21] Accordingly, in my view:

[21.1] In terms of timeliness, there was no question of any deception and any lapses were essentially minor ones.

[21.2] The substance of the application was not developed as fully as it should have been; but the shortcomings did not alter the inevitable result. If there were to be any change, it could only have resulted from Immigration New Zealand reviewing its existing conclusions. The form of the request achieved the objective of a "last ditch" attempt to have Immigration New Zealand reconsider the positive elements of the complainant's record, with a slender prospect of a favourable reconsideration. It invited a sympathetic response to the Appellant's good record as a student, and understanding over the events since that time.

Does my conclusion justify an adverse disciplinary finding

[22] It the adviser delayed for a long period of time, deceived his client, or had failed to present a coherent reason for Immigration New Zealand to review the appellant's circumstances; then I would have no hesitation in upholding the complaint. None of those things occurred; there was no more than minor lapses by an adviser who I accept was trying to assist a vulnerable migrant.

[23] Not every lapse is sufficient to uphold a complaint in a professional disciplinary context. In a decision of the Health Practitioners Disciplinary Tribunal, *Re Tolland* No 325/Mid10/146P, 9 September 2010 at para [39], the HPDT observed:

> Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances... This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers.

[24] While directed to negligence, the analysis is of wider application. Typically, a professional disciplinary issue will involve finding whether there has been a breach of duty in a professional setting, by measuring the breach against real world standards where perfection is not attainable. A responsible body of a practitioner's peers gives weight to the realities of day-to-day professional practice and human error. Accordingly, a necessary element of the test is to determine whether any lapse is sufficiently serious to warrant upholding the complaint as a professional disciplinary matter. Though the statutory context is quite different, a relevant discussion of the underlying policy issues to be weighed can be found in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

[25] Section 50 contemplates the Tribunal upholding a complaint without necessarily imposing a sanction. However, section 45(1) of the Act provides that the Authority may treat a complaint as trivial or inconsequential and not pursue it, or treat an issue as best settled between the parties. I am satisfied the proper course is to apply the usual principles to complaints in this jurisdiction and require a level of gravity before making an adverse disciplinary finding.

[26] The Act does not attempt to prescribe where the boundary is, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[27] In the present case, I am satisfied any lapses fall short of the disciplinary threshold.

[28] Furthermore, the allegations relating to the sufficiency of the request and timeliness of filing are made under clause 1 of the code, in relation to failing to be professional rather than due care and timeliness. Generally, lack of professionalism is regarded as a higher threshold than mere lack of care or timeliness; accordingly, even if the conduct passed the disciplinary threshold, I would not find it reached the standard of amounting to a lack of professionalism.

[29] I do not find in the circumstances that the timeliness of reporting was a breach of clause 26(b) of the 2014 Code; as the delays were too slight to engage the clause. I make that decision in the circumstances of this case, where critical time limits were not involved.

Decision

[30] The Tribunal dismisses the complaint.

DATED at Wellington this 13th day of March 2017.

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G D Pearson
Chair