

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 35

Reference No: IACDT 003/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **IMMIGRATION NEW
ZEALAND (DARREN
CALDER)**
Complainant

AND **MARAJ AHMED**
Adviser

**DECISION
(Sanctions)
Dated 23 May 2019**

REPRESENTATION:

Registrar: S Pragji, counsel
Complainant: No appearance
Adviser: Self-represented

INTRODUCTION

[1] The Tribunal upheld this complaint against Mr Ahmed, the adviser, in a decision issued on 2 April 2019 in *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18. It found that Mr Ahmed had facilitated the conduct of unlicensed persons to provide immigration advice, in breach of the Immigration Advisers Licensing Act 2007 (the Act) and the Code of Conduct 2014 (the Code).

BACKGROUND

[2] The narrative leading to the complaint is set out in the decision of the Tribunal upholding the complaint.

[3] Mr Ahmed is a licensed immigration adviser, based in Pakistan. He is a director of ISAS Consultants. The complaint upheld concerned four of his clients who sought residence in New Zealand.

[4] The Tribunal found that Mr Ahmed had permitted his unlicensed staff to give “immigration advice”, as defined in the Act. They had largely been responsible for engaging with the clients in compiling the information and documents necessary to lodge the residence applications for each. The staff were also found to have been responsible for most of the communications with Immigration New Zealand. Mr Ahmed had been involved with the clients and their applications only at what he regarded as the key stages of the immigration process.

[5] Mr Ahmed’s mode of conducting his business had allowed staff to perform substantive immigration services in their communications with the client and Immigration New Zealand. It is known in the industry as rubber stamping.

[6] The obligation of a licensed adviser is to be personally involved with the client and the application throughout the process. An adviser’s professional obligations are personal and cannot be delegated.¹ The adviser must actively control the entire process from accepting instructions to the conclusion of the matter. That is irrespective of the large volume of clients for whom the adviser acts. A busy adviser must either employ another licensed adviser or refrain from accepting more clients.

¹ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [32], [34] & [47].

[7] Accordingly, Mr Ahmed was found to be in breach of cl 1 of the Code in that he had not been professional and diligent. Moreover, he was in breach of cl 3(c) since he did not conduct himself in accordance with the Act. He facilitated the unlawful conduct of his staff. Furthermore, Mr Ahmed was found to be in breach of cl 2(e), as he had not personally taken charge of both obtaining and then carrying out the client's instructions.

SUBMISSIONS

[8] Counsel for the Registrar of Immigration Advisers (the Registrar), Ms Pragji, in her submissions (9 April 2019) contends that Mr Ahmed should be:

- (a) cautioned or censured;
- (b) ordered to pay a penalty not exceeding \$10,000; and
- (c) ordered to complete a New Zealand Immigration Advice Refresher Course available from Toi-Ohomai Institute of Technology.

[9] There were no submissions from the complainant.

[10] In his submissions (10 May 2019), Mr Ahmed states that his conduct was not a deliberate breach of the Code, but a misunderstanding of the statutory terms "immigration advice" and "clerical work". He tried his best to provide immigration advice to his clients directly and there was not any intention to gain any benefit by the use of unlicensed staff. Any fair sanction should consider the evolving process of understanding of the issue.

[11] Mr Ahmed contends that the Tribunal's decision lacks an understanding of the challenges of working in Pakistan, where he is the only adviser. He has no training support from the Authority or Immigration New Zealand and no other licensed adviser is available for mutual discussions.

[12] According to Mr Ahmed, he has safeguarded the interest of his clients and represented New Zealand with great pride and respect in his nine years of honest practice.

JURISDICTION

[13] The Tribunal's jurisdiction to award sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:²

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[14] The sanctions that may be imposed are set out at s 51(1) of the Act:

51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
 - (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
 - (f) an order for the payment of a penalty not exceeding \$10,000:
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
 - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

² Immigration Advisers Licensing Act 2007.

[15] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[16] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:³

It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[17] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.⁴

[18] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁵

³ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee* at [151].

⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[19] The most appropriate penalty is that which:⁶

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

DISCUSSION

[20] The starting point is the seriousness of the complaint. It was by using Mr Ahmed's name as a licensed adviser that the unlicensed staff could provide immigration advice in his name. Both Mr Ahmed and the staff may have committed criminal offences. That is not for me to determine, but it shows the gravity of the professional violation.

[21] Rubber stamping is insidious and robs clients of the protection to which they are entitled. Clients are entitled to have their immigration matters personally handled throughout the process by an adviser who is licensed and therefore both knowledgeable and subject to a code of professional standards.

[22] I accept that the mode of rubber stamping undertaken by Mr Ahmed is at the lower end of the spectrum. He did not use offshore agents, but his own on-shore staff presumably working at the same office he did and where he would therefore have some oversight. More importantly, I found that Mr Ahmed was involved with the clients and their applications at the initial eligibility stage and then from time to time while the applications were being compiled. He did not wholly offload the preparation of each application to his staff or off-shore agents, as some advisers have done.

⁶ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [49].

[23] I further accept Mr Ahmed's contention that his conduct was not a deliberate circumvention of his obligations, but a misunderstanding as to the scope of the "clerical work" exception to the prohibition against unlicensed staff undertaking "immigration advice" work. He is also correct in asserting that the boundaries of immigration advice and clerical work have been evolving in the jurisprudence of the Tribunal in recent years.

[24] Mr Ahmed relies on an email from the Immigration Advisers Authority (the Authority) of 12 March 2014 concerning whether staff can communicate with Immigration New Zealand. He says it is misleading. It is not. It says nothing more than staff can communicate with the agency so long as they operate within the definition of clerical work. The author gives examples such as seeking updates from the agency or passing on its message to the adviser or the client. I agree.

[25] Nor do I accept Mr Ahmed's contention that, based offshore, he has no training support from the Authority. As to this, the first point to make is that it is Mr Ahmed's duty as a professional to proactively update himself. It is an inherent aspect of being professional. In any event, the Authority does provide online webinars which can be accessed offshore. It is compulsory to view at least one annually and Mr Ahmed did so last year. Given that participation, his assertion that the Authority provides no training support is surprising.

[26] Furthermore, Toi-Ohomai Institute of Technology offers the Graduate Diploma in New Zealand Immigration Advice, the New Zealand Immigration Advice Refresher Course and even LAWS 7015 Professional Practice as a stand-alone paper, all of which can be completed online. There are also professional associations of advisers which regularly offer training, some of which can be accessed online. Both the New Zealand Association for Migration and Investment and the New Zealand Association of Immigration Professionals offer conferences and seminars, with the former offering some as webinars.

[27] I will deal with the potential sanctions in the order in which they appear in s 51 of the Act:

Caution or censure

[28] A censure is appropriate to mark the Tribunal's disapproval of Mr Ahmed's conduct. A caution would not reflect the seriousness of the breaches, nor that they concerned four clients.

Training

[29] Mr Ahmed needs educating in the boundaries of immigration advice and clerical work. I agree with the Registrar's counsel that Mr Ahmed should undertake the refresher course offered by Toi-Ohomai Institute of Technology. Mr Ahmed himself seems to accept the need for further training, given the complaint as to his perceived lack of access to it in Pakistan. As there are no wider concerns with his conduct or competence, he need not complete the full graduate diploma.

Cancellation of licence

[30] Mr Ahmed appears to acknowledge his wrong-doing, or at least a fresh understanding of the boundaries of immigration advice and clerical work. He does not expressly say he has changed the work practices within his firm, but I will assume that he has. Despite the seriousness of the professional violation, I do not therefore regard the cancellation of his licence as an appropriate remedy. It was not sought by the Registrar.

Prohibition from reapplying

[31] Mr Ahmed's current licence expires on 30 August 2019. For the same reason cancellation would not be appropriate, it would not be reasonable and proportionate to prohibit him from reapplying for a licence. It was not sought by the Registrar. I note also that he has been licensed since 31 August 2010 and has not appeared before the Tribunal before.

Penalty

[32] There have been a number of decisions of the Tribunal concerning advisers who permitted unlicensed people to give immigration advice. The penalty for rubber stamping is usually set at the upper end of the sanctions spectrum.

[33] More recent decisions include *Immigration New Zealand (Carley) v De'Ath* [2019] NZIACDT 1, where Mr De'Ath was ordered to pay a penalty of \$8,500 in respect of 11 clients. In *Immigration New Zealand (Foley) v Niland* [2019] NZIACDT 16, there was a penalty of \$4,000 against Ms Niland in respect of four clients.

[34] I recognise that other factors were relevant to the level of penalty in those decisions. In particular, the form of rubber stamping was more serious in those cases as the advisers had minimal, if any, engagement with their clients and the advisers relied on off-shore staff or agents. On the other hand, both Mr De'Ath and Ms Niland expressly acknowledged their wrongdoing and advised the Tribunal of changes to their business practices accordingly.

[35] An aggravating feature of Mr Ahmed's conduct is that four clients were involved. This was not just a one-off occurrence.

[36] The penalty will be set at \$4,000.

OUTCOME

[37] Mr Ahmed is:

- (1) censured;
- (2) ordered to enrol and complete the New Zealand Immigration Advice Refresher Course offered by Toi-Ohomai Institute of Technology at its next intake; and
- (3) ordered to immediately pay to the Registrar a penalty of \$4,000.

D J Plunkett
Chair