

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 25

Reference No: IACDT 008/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **RV**
Complainant

AND **SALESA (CHARLES)**
AIOLUPOTEA
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 12 June 2020

REPRESENTATION:

Registrar: Self-represented

Complainant: Self-represented

Adviser: No appearance

PRELIMINARY

[1] Mr Salesa (Charles) Aiolupotea, the adviser, acted for Mr [RV], the complainant. He undertook to seek a visitor visa and citizenship for the complainant. Mr Aiolupotea did seek a visitor visa, but not citizenship, despite taking a significant fee. In reality, the complainant was not eligible for citizenship.

[2] A complaint against Mr Aiolupotea was made by the complainant to the Immigration Advisers Authority (the Authority). The Registrar of Immigration Advisers (the Registrar), the head of the Authority, has referred it to the Tribunal. In addition to the alleged deception regarding citizenship, the Registrar identified concerns as to file management. It is alleged that Mr Aiolupotea's conduct was dishonest or misleading and was negligent, grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act). It is also contended that he has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Mr Aiolupotea has provided no explanation for his conduct to either the Authority or the Tribunal. The essential issue to consider is whether he has been dishonest or misleading.

[4] The complainant's brother made an identical complaint against Mr Aiolupotea, which has been referred to the Tribunal. It will be determined in a separate decision issued at the same time as this decision.

BACKGROUND

[5] Mr Aiolupotea was at the material time a licensed immigration adviser. He was a director of Breakthrough Consultancy Limited, of Auckland. His licence expired on 26 January 2019.

[6] The complainant, a national of Samoa, travelled to New Zealand with his brother in November 2017.

[7] Mr Aiolupotea's file summary (a log of file activities) records that he met the complainant and his brother on 13 and 15 January 2018, for discussions on citizenship, residence and a visitor visa. He recorded that citizenship was to be "outsourced". He met with them again on 18 January to discuss the support documents needed and his professional obligations.

[8] On 22 January 2018, the complainant and his brother attended another consultation with Mr Aiolupotea. They both entered into an agreement with him on that

day. He would prepare visitor visas for them. The total fee was \$1,190 (incl GST and Immigration New Zealand's fees) for the two visas.

[9] On 20 February 2018, Mr Aiolupotea wrote to Immigration New Zealand seeking an extension of the complainant's visitor visa for six months, since the family would like to spend more time together. This request appears to have been superseded by the online application made one week later.

[10] An invoice was issued to the complainant and his brother on 22 February 2018 for \$1,289, for two visitor visa applications.

[11] Two days later, on 24 February 2018, another invoice was issued to the brothers. It was for \$8,050 for the preparation and submission of "NZ Citizenship Application" for both of them.

[12] According to the complainant, the following payments were made by the brothers to Mr Aiolupotea without the issue of any receipts:

Visitor visas for both	\$	1,300
Deposit NZ citizenship	\$	4,000
Advice	\$	500
	\$	5,800

[13] No work was done by Mr Aiolupotea towards the citizenship applications.

[14] On 28 February 2018, Mr Aiolupotea filed an online visitor visa application for the complainant.

[15] Immigration New Zealand granted an interim visa on 3 March 2018, the day his then current visa was due to expire, pending a decision on the application.

[16] Mr Aiolupotea met the complainant and his brother on 5 March 2018 to discuss their options and provide them with their interim visas.

[17] Immigration New Zealand sent a letter to Mr Aiolupotea on 8 March 2018 raising a concern about the length of time the complainant was spending in New Zealand. His comments were invited.

[18] Mr Aiolupotea met the complainant on 9 March 2018 to discuss Immigration New Zealand's letter.

[19] As there was no response to the letter by the deadline of 14 March 2018, Immigration New Zealand declined the visa in a letter to Mr Aiolupotea on 15 March

2018. The interim visa therefore expired, so the agency stated that the complainant was in New Zealand unlawfully and was liable for deportation.

[20] According to the complainant, he was not told of the decline of the visa application or of his unlawful status. However, Mr Aiolutepa's file summary records that he met the complainant on 19 March 2018 to discuss Immigration New Zealand's decision letter. The summary states that he advised the complainant to leave New Zealand, or wait offshore on the outcome of the citizenship application ("NZ citizenship by [descent] (Ministerial Intervention)", is recorded on the summary). This conflicting evidence as to whether the complainant was informed of the decline of his visa application is reviewed later.

[21] The complainant remained unlawfully in New Zealand after its expiry.

[22] On 5 September 2018, Immigration New Zealand wrote directly to the complainant's brother noting that he did not have a visa and had to depart New Zealand immediately.

[23] The complainant and/or his brother then contacted Mr Aiolutepa, who advised them on an unknown date to return to Samoa so he (Mr Aiolutepa) could lodge work visa applications on their behalf.¹ However, they would have to pay the remaining \$4,000 in fees. Mr Aiolutepa said he would return their passports and pay their air tickets. He warned them not to speak to anyone about the matter.

[24] On 10 September 2018, another family member of the complainant contacted Immigration New Zealand to verify the letter of 5 September 2018. The agency's note of the discussion recorded that the brothers were having trouble with Mr Aiolutepa who was demanding money and retaining their documents. The family member was advised to contact the immigration officer named in the letter.

[25] On 11 September 2018, the complainant and his brother approached the Mangere Community Law Centre. The lawyer there called Immigration New Zealand who advised that the complainant's visa application had been declined on 15 March 2018. A copy of the decision of 15 March 2018 was sent by the agency to the centre. The complainant says he was not previously aware of the decline of the application. The lawyer then asked Mr Aiolutepa for the brothers' passports, which he promptly returned along with their air tickets back to Samoa.

¹ Complaint (27 September 2018); see Registrar's supporting documents at 3.

[26] The complainant and/or his brother were informed by the Department of Internal Affairs on an unknown date that no citizenship applications had been made and, in any event, they were not eligible.

COMPLAINT

[27] On about 27 September 2018, the complainant made a complaint against Mr Aiolupotea to the Authority. It was alleged, amongst other things, that he had been dishonest and misleading, as well as negligent. The complainant and/or his brother had been told by the Department of Internal Affairs that no citizenship applications had been filed, nor were they eligible. He wanted \$4,000 to be refunded and the return of original documents given to Mr Aiolupotea.

[28] On an unknown date, the complainant and his brother sent an email to the Authority responding to questions from the investigator. They said they were unaware of any eligibility for citizenship in New Zealand when they went to meet Mr Aiolupotea. He advised that it was better to apply for citizenship than residence. According to him, it was simple and the application would be made directly to the Minister. After the interim visa was issued, Mr Aiolupotea said it was easier to get citizenship. No receipts were issued for the money they paid him, despite requesting them.

[29] The Authority requested Mr Aiolupotea's file, which he provided on 25 October 2018. Further documents were sought from him on 23 January 2019, including copies of all file documentation and information concerning the proposed citizenship applications. He advised the investigator on 31 January 2019 by email that he had no more documents. He further advised that the "citizenship requests through Ministerial Intervention were done through a third party".

[30] The Authority wrote to Mr Aiolupotea on 19 February 2019 formally notifying him of the particulars of the complaint and inviting his explanation. There was no explanation from him. The Authority's investigator tried ringing Mr Aiolupotea and sent an email to him on 14 March 2019, but again there was no response.

[31] The Registrar filed a statement of complaint (4 July 2019) in the Tribunal. It alleges that Mr Aiolupotea's conduct was dishonest or misleading and was negligent, grounds of complaint under the Act, and breached the Code in the following respects:

- (1) dishonest or misleading, or alternatively negligent:
 - (i) failed to correctly inform the complainant of his citizenship eligibility;
 - and

- (ii) accepted payment for services which were not carried out.
- (2) negligent, or alternatively breached the identified provisions of the Code:
- (i) failed to provide a full description of his services, in breach of cl 19(e);
 - (ii) failed to confirm in writing material discussions, in breach of cl 26(c);
 - (iii) failed to provide the client file to the Authority, in breach of cl 26(e);
and
 - (iv) failed to return documents to the complainant, in breach of cl 27(b).
- (3) negligent, or alternatively was unprofessional and did not conduct himself diligently and with due care in breach of cl 1 of the Code:
- (i) failed to inform the complainant about Immigration New Zealand's letter of 8 March 2018;
 - (ii) failed to respond to the letter of 8 March 2018; and
 - (iii) failed to inform the complainant of the decline of his visa application or provide advice regarding his unlawful status.

JURISDICTION AND PROCEDURE

[32] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Act:

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the code of conduct.

[33] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

² Immigration Advisers Licensing Act 2007, s 45(2) & (3).

[34] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.³ It has been established to deal relatively summarily with complaints referred to it.⁴

[35] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.⁵

[36] The sanctions that may be imposed by the Tribunal are set out in the Act.⁶ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁷

[37] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.⁸

[38] The Tribunal has received from the Registrar the statement of complaint (4 July 2019), together with supporting documents.

[39] A minister of religion advised the Tribunal by email on 21 August 2019 that the complainant was overseas and had no statement to make as the investigations were correct.

[40] Despite inviting submissions from Mr Aiolupotea, he did not reply to the Tribunal.

[41] No party has requested an oral hearing.

ASSESSMENT

[42] The Registrar relies on the following provisions of the Code:

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Written agreements

19. A licensed immigration adviser must ensure that a written agreement contains:

³ Section 49(3) & (4).

⁴ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁵ Section 50.

⁶ Section 51(1).

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁸ *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

...

- e. a full description of the services to be provided by the adviser, which must be tailored to the individual client

...

File management

26. A licensed immigration adviser must:

...

- c. confirm in writing to the client the details of all material discussions with the client

...

- e. maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority,

...

Document security and return

27. A licensed immigration adviser must:

...

- b. when requested or required, return passports and other personal documents to the client without delay and in a secure manner.

(1) *Dishonest or misleading, or alternatively negligent:*

- (i) *failed to correctly inform the complainant of his citizenship eligibility; and*
- (ii) *accepted payment for services which were not carried out.*

[43] In the face of an allegation of dishonest or misleading conduct, which Mr Aiolutepotea was formally notified of by the Authority on 19 February 2019 and again upon being served with the statement of complaint filed in the Tribunal, he has chosen not to explain his conduct.

[44] According to the complainant, he and his brother were informed by the Department of Internal Affairs that they were not eligible for citizenship. Mr Aiolutepotea does not dispute this. He has not explained how the brothers could conceivably be eligible.

[45] Mr Aiolutepotea's unexplained lack of proper file documentation, particularly concerning citizenship, is suspicious and provides further evidence of dishonesty. His email to the investigator on 31 January 2019 explaining why he had no citizenship documents at all on file (that it was done through a third party) was vague and evasive.

Mr Aiolupotea provided no documentation showing he assessed eligibility, prepared an application or instructed any third party. He did not disclose the invoice for citizenship services to the Authority. Also requiring explanation was his advice to the brothers on about 5 September 2018 not to speak to anyone about “this matter”, which might refer to citizenship or the work visas.⁹ He did not provide receipts for monies received, whether for citizenship services or otherwise.

[46] In the absence of any file documents relating to citizenship and an explanation from Mr Aiolupotea as to a credible pathway to citizenship, his failure to correctly advise the complainant of his eligibility, as well as the acceptance of \$4,000 for an application which could not have been successful and for which no work was done, was dishonest. The first head of complaint is upheld.

(2) *Negligent, or alternatively breached the identified provisions of the Code:*

- (i) *failed to provide a full description of his services, in breach of cl 19(e);*
- (ii) *failed to confirm in writing material discussions, in breach of cl 26(c);*
- (iii) *failed to provide the client file to the Authority, in breach of cl 26(e); and*
- (iv) *failed to return documents to the complainant, in breach of cl 27(b).*

[47] Mr Aiolupotea has chosen not to deny his failings as to proper documentation.

[48] There was no full description in the written agreement of the services to be provided. Mr Aiolupotea did not mention the citizenship work. Item 2(i) of the complaint is upheld. Mr Aiolupotea breached cl 19(e) of the Code.

[49] Mr Aiolupotea did not produce to the Authority any written communication from him to the complainant setting out any advice on visitor or work visas, or returning to Samoa to apply for visas from there, or on citizenship. The complainant confirms that Mr Aiolupotea would meet them in person and ring them only. He never wrote, emailed or texted them.¹⁰ There was no written confirmation of oral advice given. Item 2(ii) of the complaint is upheld. Mr Aiolupotea breached cl 26(c) of the Code.

[50] The Authority sent a formal demand to Mr Aiolupotea for the complainant’s file on 8 October 2018 and he provided the file on 25 October 2018. He was asked by email on 23 and 29 January 2019 to confirm he had sent the full file, and to send all file documentation regarding citizenship. Mr Aiolupotea replied on 31 January stating he did not hold anything regarding the complainant.

⁹ Complaint (27 September 2018) at section 3, 5th paragraph.

¹⁰ Undated email to the Authority, Registrar’s supporting documents at 11.

[51] Mr Aiolupotea did not provide to the Authority the invoice of 24 February 2018. He was required by the Code to produce the full file. Item 2(iii) of the complaint is upheld. He has breached cl 26(e) of the Code.

[52] The complainant says in both the complaint and his undated email to the Authority that Mr Aiolupotea has retained some of the family's original documents (citizenship certificates of his grandfather, mother and two brothers; death certificate of his grandfather; marriage certificate of his brother; birth certificate of his father).

[53] However, there is no evidence of any request or demand for the return of the documents made of Mr Aiolupotea, by the complainant or his brother. The Registrar says the Authority's letter of 19 February 2019 urged Mr Aiolupotea to return them and drew to his attention the possibility he had breached cl 27(b) of the Code. I do not accept that a request from the Authority triggers the obligation to return documents held by an adviser. There was no breach of cl 27(b).

[54] Mr Aiolupotea's failure to return the documents most likely resulted from negligence. He probably overlooked returning them, or lost them. Whether or not they were requested by the complainant, Mr Aiolupotea should have returned them when his instructions ceased. He has chosen not to deny the allegation of negligence and has provided no explanation. I find Mr Aiolupotea has negligently failed to return documents to the complainant. Item 2(iv) of the complaint is upheld.

(3) *Negligent, or alternatively was unprofessional and did not conduct himself diligently and with due care in breach of cl 1 of the Code:*

- (i) *failed to inform the complainant about Immigration New Zealand's letter of 8 March 2018;*
- (ii) *failed to respond to the letter of 8 March 2018; and*
- (iii) *failed to inform the complainant of the decline of his visa application or provide advice regarding his unlawful status.*

[55] The evidence presented to the Tribunal concerning what the complainant knew about Immigration New Zealand's letters of 8 and 15 March 2018, is inconclusive.

[56] There is no allegation from the complainant that he was not informed about the letter of 8 March which had raised a concern about the length of time he was spending in New Zealand. According to the Registrar's statement of complaint, the complainant said that the only document Mr Aiolupotea discussed with him was the interim visa of 3 March 2018. This is not correct. What the complainant said was that the only document Mr Aiolupotea gave him was the interim visa. Mr Aiolupotea's file summary

records that he met the complainant on 9 March to “present and discuss” the letter of 8 March. Whether or not he actually handed a copy of the letter to the complainant, there is no evidence from the complainant contradicting Mr Aiolupotea’s record of the discussion on 9 March. I dismiss item 3(i) of the complaint.

[57] It is plainly correct that Mr Aiolupotea did not respond to the letter of 8 March 2018. This was unprofessional. He did not conduct himself diligently and with due care. Item 3(ii) of the complaint is upheld. He breached cl 1 of the Code.

[58] This brings me to the allegation that Mr Aiolupotea failed to inform the complainant of Immigration New Zealand’s letter of 15 March 2018 declining his visitor visa application and telling him that he was in New Zealand unlawfully.

[59] There is contradictory evidence concerning this allegation. The complainant says he was not notified of the letter until he visited the law centre on 11 September 2018 and the lawyer there was told by Immigration New Zealand about the letter and received a copy of it. The agency’s own file note of that discussion confirms that an enquiry had been made that day as to whether a letter had been issued telling the complainant about his unlawful status and then the letter was immediately sent to the centre. The letter sent is not identified, but it can only be the 15 March letter.

[60] On the other hand, Mr Aiolupotea’s file summary records a meeting on 19 March 2018 with the complainant to discuss the letter of 15 March and his advice to him to leave New Zealand.

[61] There is independent evidence corroborating the complainant’s version of the events. As noted above, Immigration New Zealand’s file note of the 11 September discussion records the enquiry as to the existence of any letter informing the complainant of his unlawful status. A copy of the letter of 15 March was sent to the lawyer. If the complainant knew about the letter, there would be no need for the enquiry or a copy to be requested.

[62] Since the complainant’s evidence (that he was not told by Mr Aiolupotea of the letter of 15 March 2018 and therefore of his unlawful status) is corroborated by the enquiry made with Immigration New Zealand on 11 September 2018, I find Mr Aiolupotea’s file record of the meeting on 19 March 2018 to be unreliable. The failure to inform the complainant of the decline of the visa application and of his immigration status or to give advice concerning this, was unprofessional. I uphold item 3(iii) of the complaint.

OUTCOME

[63] The complaint is upheld. Mr Aiolupotea was dishonest in failing to inform the complainant that he was not eligible for citizenship, and in accepting money for an application for which no work was done. He has also breached cls 19(e), 26(c) and (e) of the Code. Furthermore, he has been negligent in respect of failing to return original documents to the complainant.

[64] Additionally, Mr Aiolupotea was unprofessional in failing to inform the complainant of the decline of his visa application or his unlawful status, or to give advice concerning his status, in breach of cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

[65] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[66] A timetable is set out below. Any request that Mr Aiolupotea undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim. As Mr Aiolupotea has been found to be dishonest, the Tribunal will consider preventing him from reapplying for a licence. The parties are requested to address this possible sanction.

Timetable

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

- (1) The Registrar, the complainant and Mr Aiolupotea are to make submissions by **6 July 2020**.
- (2) The Registrar, the complainant and Mr Aiolupotea may reply to submissions of any other party by **20 July 2020**.

ORDER FOR SUPPRESSION

[68] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹¹

[69] There is no public interest in knowing the name of Mr Aiolupotea's client.

¹¹ Immigration Advisers Licensing Act 2007, s 50A.

[70] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.