

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 32

Reference No: IACDT 007/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **BV**
Complainant

AND **SALESA (CHARLES)**
AIOLUPOTEA
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 27 July 2020**

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: No appearance

INTRODUCTION

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

[2] A complaint by the complainant to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar), to the Tribunal. It was upheld in a decision issued on 12 June 2020 in *BV v Aiolupotea*.¹

[3] It is now for the Tribunal to determine the appropriate sanctions.

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

BACKGROUND

[5] The narrative leading to the complaint is set out in the decision of the Tribunal upholding the complaint and will only be briefly summarised here.

[6] 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.

[7] The complainant and his brother, both nationals of Samoa, travelled to New Zealand in November 2017. They met Mr Aiolupotea a number of times in January 2018 to discuss visitor visas, citizenship and residence. They both entered into an agreement with Mr Aiolupotea on 22 January 2018, for the preparation of visitor visas. Invoices were then issued by Mr Aiolupotea for the visa applications and for citizenship applications.

[8] The total payment made by the brothers to Mr Aiolupotea was:

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

¹ *BV v Aiolupotea* [2020] NZIACDT 24.

[9] Online visitor visa applications for the brothers were filed by Mr Aiolupotea and Immigration New Zealand granted them interim visas on 3 March 2018. A visitor visa was then granted by Immigration New Zealand to the complainant on 23 March 2018, due to expire on 6 June 2018.

[10] The complainant was advised by Mr Aiolupotea to leave New Zealand before the visa expired and to wait offshore for the outcome of the citizenship application. However, the complainant, who says he was not advised by Mr Aiolupotea of the expiry date of the visa, remained unlawfully in New Zealand after its expiry.

[11] On 5 September 2018, Immigration New Zealand wrote to the complainant informing him that he had to depart New Zealand immediately. Mr Aiolupotea then advised the complainant and his brother to return to Samoa so that work visa applications could be lodged on their behalf. However, they would have to pay the remaining \$4,000 fee for the citizenship applications.

[12] The complainant and his brother approached the Mangere Community Law Centre on 11 September 2018 and were told that the complainant's visa had expired on 6 June 2018. The lawyer assisted the brothers to obtain from Mr Aiolupotea their passports, as well as the air tickets to Samoa he had promised them.

[13] The Department of Internal Affairs advised the complainant and/or his brother on an unknown date that no citizenship applications had been filed on their behalf and nor were they eligible for citizenship.

Decision of the Tribunal

[14] The Tribunal found that Mr Aiolupotea had dishonestly failed to inform the complainant that he was not eligible for citizenship and dishonestly accepted money for an application for which no work was done. He had also breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code) in the following respects:

- (1) failed to provide in the client agreement a full description of his services, in breach of cl 19(e);
- (2) failed to confirm in writing material discussions, in breach of cl 26(c); and
- (3) failed to provide the full client file to the Authority, in breach of cl 26(e).

[15] Furthermore, Mr Aiolupotea had been negligent in failing to return certain original documents to the complainant.

SUBMISSIONS

Submissions from the Registrar

[16] The Registrar notes that Mr Aiolupotea has been found to be dishonest, which is conduct at the serious end of the spectrum. Where a practitioner has been dishonest, it will often lead to him or her being struck off. While this may adversely affect the practitioner, the Tribunal has a significant responsibility to uphold professional standards and mitigate the risk to the public.

[17] This is Mr Aiolupotea's first appearance before the Tribunal. It is noted by the Registrar that he was formally notified twice by the Authority of the breaches alleged against him, but he chose not to explain his conduct.

[18] Mr Aiolupotea's licence expired on 26 January 2019 and he has not applied for a renewal of the licence.

[19] The Registrar submits that the appropriate sanctions would be:

- (1) caution;
- (2) an order to refund the \$2,000 deposit paid by the complainant for the citizenship application;
- (3) an order for payment of a penalty in the vicinity of \$2,500;
- (4) an order preventing Mr Aiolupotea from reapplying for a licence for one year; and
- (5) an order requiring Mr Aiolupotea to complete the post-graduate professional practice module (LAWS7015) offered by Toi-Ohomai Institute of Technology prior to reapplying for a licence.

[20] While a penalty in the range of \$5,000 – \$6,000 would be appropriate, the Registrar has taken account of the totality of penalties in both this case and that of the brother in seeking an order for \$2,500.

Submissions from the complainant

[21] The complainant asks for a refund of \$2,000, as compensation for negligence, unprofessional conduct, incompetence, breaches of the Code and dishonest or misleading behaviour.

Submissions from Mr Aiolupotea

[22] There are no submissions from Mr Aiolupotea.

JURISDICTION

[23] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (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.

[24] 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:

² Immigration Advisers Licensing Act 2007.

- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[25] 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.

[26] 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.

[27] 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

[28] 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] (citations omitted).

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

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

[29] 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

[30] The starting point is the seriousness of Mr Aiolupotea's misconduct. He has been found to have been dishonest in failing to inform the complainant that the latter was not eligible for citizenship and in accepting money for such an application yet undertaking no work. In addition, Mr Aiolupotea breached a number of provisions of the Code in the way identified above. He also negligently failed to return original documents to the complainant when his instructions ceased.

[31] Mr Aiolupotea's dishonesty strikes at the very heart of what it is to be professional. Professionals are trusted by the public. They are expected to have integrity. People from overseas countries without knowledge of New Zealand's immigration or citizenship system or even as to how to obtain official information about it are vulnerable to exploitation from those who hold themselves out as professionals in the area. Mr Aiolupotea advised the brothers to make applications for citizenship and took from them a substantial sum of money, yet the promised applications were hopeless. They had no entitlement to citizenship. Mr Aiolupotea presumably knew this as he undertook no work on the applications.

[32] I will now consider the appropriate sanctions.

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, [2013] NZAR 320 at [49].

Caution or censure

[33] Mr Aiolupotea's conduct is to be denounced. He will be censured.

Licence renewal

[34] Mr Aiolupotea's misconduct is aggravated by his approach to the complaint. He has chosen not to answer it. No explanation has been provided to the Authority or the Tribunal. The Tribunal cannot be satisfied he has learned from the complaint and will not repeat his misconduct. The removal of an adviser from the register and depriving him of his livelihood is a sanction of last resort.⁷ In respect of Mr Aiolupotea, however, the public must be protected from a dishonest practitioner without remorse for the maximum period permitted. Mr Aiolupotea will be prevented from reapplying for any licence for two years.

Financial penalty

[35] The Registrar submits that the financial penalty should be \$5,000 – \$6,000. However, having regard to the totality of penalties, including that ordered against Mr Aiolupotea in respect of the complainant's brother, it is submitted that the penalty in this case should be \$2,500, making a total of \$5,500 across both complaints.

[36] Mr Aiolupotea's dishonesty was for personal gain. He sought \$8,050 for the two futile citizenship applications, on which he did no work. There is no explanation, no remorse and no apology. For such blatant dishonesty involving two vulnerable clients, the penalty will be \$7,000.

Refund

[37] The brothers paid \$5,800. Mr Aiolupotea was successful in obtaining a visitor visa for the complainant, but not for his brother. He will therefore be directed to refund half the fee for the visitor visas, being \$650. He must also refund the full deposit paid for the citizenship applications, being \$4,000. As for the advice fee of \$500, that is also tainted by the discussion about citizenship so must also be refunded.

[38] It is appropriate that Mr Aiolupotea refund \$5,150. It is not clear how much each brother paid Mr Aiolupotea, so I will order a full refund in respect of the complainant.

⁷ *KBN v Wharekura* [2020] NZIACDT 15 at [47].

OUTCOME

[39] Mr Aiolupotea is:

- (1) censured;
- (2) prevented from reapplying for any licence for a period of two years from today's date;
- (3) ordered to immediately pay to the Registrar \$7,000; and
- (4) ordered to immediately pay to the complainant the sum of \$5,150.

[40] Mr Aiolupotea need only pay the penalty and make the refund once. A full payment to the Registrar of \$7,000 in respect of either brother will discharge the order made here. Similarly, a full payment by him to either brother of \$5,150 will discharge the refund ordered here.

ORDER FOR SUPPRESSION

[41] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁸

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

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

D J Plunkett
Chair

⁸ Immigration Advisers Licensing Act 2007, s 50A.