

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 11

Reference No: IACDT 014/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **BU**
Complainant

AND **CHRISTOPHER MARK
McCARTHY**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 18 May 2022

REPRESENTATION:

Registrar: Self-represented

Complainant: Self-represented

Adviser: No appearance

PRELIMINARY

[1] The complainant is BU. Her daughter-in-law, MT, was in New Zealand unlawfully. Mr McCarthy was engaged to assist the complainant's daughter-in-law and there was a discussion as to a s 61 request for her.¹ Mr McCarthy took money from the complainant and represented that such an application had been made, but in fact he made no request.

[2] A complaint was made to the Immigration Advisers Authority (the Authority). The Registrar of Immigration Advisers (the Registrar) has referred it to the Tribunal alleging negligence and dishonesty by Mr McCarthy, grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act), as well as breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code). In the face of these allegations, Mr McCarthy admitted to the Authority failing to act, but has otherwise chosen not to deny or explain them.

BACKGROUND

[3] The complainant's daughter-in-law is a national of [Country] who was in New Zealand unlawfully.

[4] Mr McCarthy was a licensed immigration adviser and director of Corporate Migration NZ Ltd, of Masterton. His licence expired on 27 April 2022 and he is no longer licensed.

[5] The complainant's son, a New Zealand citizen and husband of the daughter-in-law, approached Mr McCarthy in about December 2017 requesting assistance with a s 61 request for his wife. There was an exchange of emails between them that month concerning the daughter-in-law. The son said that her visa had expired and they had been thinking of a s 61 request. He asked for advice on the appropriate strategy.

[6] On 20 March 2018, Mr McCarthy sent an information request to Immigration New Zealand (Immigration NZ) concerning the daughter-in-law. The information was copied to him on 17 April 2018. At this time, Mr McCarthy and the son continued their exchange of emails as the latter put together evidence for a s 61 request.

[7] On 18 April 2018, Mr McCarthy wrote a letter to the complainant (which he described as an agreement) stating that he had been instructed to intervene with Immigration NZ and seek a s 61 visa (partnership category). He set out his fees and certain other matters related to his engagement. The complainant was asked to sign the

¹ Immigration Act 2009, s 61 (discretionary visa for someone unlawfully in New Zealand).

agreement and return a copy to him. The Tribunal records that it has not sighted a copy signed by either Mr McCarthy or the complainant.

[8] A payment of \$4,025 was made in April 2018 by the complainant to Mr McCarthy.

[9] Through 2018 and into early 2019, the exchange of emails between Mr McCarthy and the complainant's son continued, as further evidence was gathered for the s 61 request.

[10] Mr McCarthy advised the son by email on 25 March 2019 that he might be able to move ahead with a s 61 application. In a further email to the son the next day, he advised that he thought the daughter-in-law needed to make a s 61 request for a temporary visa. He asked for copies of certain documents. He gave advice on what travel she could undertake. The emails concerning evidence continued in April 2019. Mr McCarthy and the son exchanged emails about photos in May 2019. Mr McCarthy said on 6 May 2019 he was reviewing the evidence and putting together a request under s 61.

[11] In an email on 14 October 2019, the son asked Mr McCarthy for news of progress with the application. He did not reply. The son then sent a text to Mr McCarthy on 16 October 2019 stating that he had sent an email a few days previously, but he had not heard from him. He wanted to know whether there was any news regarding his wife's application. Mr McCarthy replied:

No update as yet, but will be in contact again soon.

[12] Mr McCarthy did not update the son, so the latter asked him again on 25 November 2019. The son also queried the opening and closing dates of Immigration NZ over Christmas. Mr McCarthy replied as to the relevant dates. There was no update on progress, so the son asked one minute later whether there was any progress. Mr McCarthy did not reply. Then, on 24 April 2020, the son noted it had been some time since they had heard from him and asked as to where his wife "stands". There was no response by Mr McCarthy to this text.

[13] The complainant sent an email to Mr McCarthy on 27 February 2021 recording that she had rung him the previous week and left a message, but she had not heard from him. She stated that she had paid him "two or three years ago" for work on her daughter-in-law's immigration application. He had not updated her and the daughter-in-law was anxious to know her position. He was asked to let her know how far the application had proceeded.

[14] As there was no response from Mr McCarthy, the son contacted Immigration NZ on 7 April 2021. He was told that his wife's last visa had expired in March 2006 and there was no s 61 request from 2019 in the system.

COMPLAINT

[15] On 9 April 2021, a complaint against Mr McCarthy was made by the complainant to the Authority. It was stated that the family had understood that Mr McCarthy had filed an application in mid-2019, but Immigration NZ had told them no application had been filed. Her daughter-in-law was an overstayer and was now at risk of deportation. The main problem was that they could not get a response to emails or phone messages.

[16] The Authority sought Mr McCarthy's file on 24 May 2021. He did not provide it, so a reminder was sent on 1 June 2021. Mr McCarthy replied on 14 June 2021 to say he had provided the file to the family's new immigration adviser. He had suffered recent physical incapacity following an injury on 1 June 2021. He sought another seven days to respond.

[17] Mr McCarthy sent his file to the Authority on 22 June 2021. He said in his email to the Authority that, aside from the initial contact and various discussions which were not recorded, he had "largely failed to act". Mr McCarthy added that, as a result of his inaction on the matter and personal issues, he had decided to cease taking instructions, effective 1 July 2021. He would work only on those matters already with Immigration NZ, with a view to having decisions by April 2022. He would also reach agreement with the complainant's family as to any refund due.

[18] The Authority wrote to Mr McCarthy on 9 August 2021 setting out the details of the complaint and seeking an explanation by 24 August 2021. None was provided, so a reminder was sent to him on 25 August 2021. Mr McCarthy did not respond.

Complaint filed in the Tribunal

[19] The Registrar filed a statement of complaint (17 September 2021) in the Tribunal alleging negligence, or dishonest misleading behaviour, or alternatively breaches of the specified provisions of the Code:

- (1) Failing to lodge a s 61 request with Immigration NZ, in breach of cl 1.
- (2) Failing to keep the client(s) informed of developments in a timely manner, in breach of cl 1.

JURISDICTION AND PROCEDURE

[20] 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.

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

[22] 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

[23] 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

[24] 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

[25] 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

[26] The Tribunal has received from the Registrar the statement of complaint (17 September 2021), with supporting documents. There are no submissions from either the complainant or Mr McCarthy.

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

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].

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

ASSESSMENT

[27] The Registrar relies on cl 1 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.

(1) *Failing to lodge a s 61 request with Immigration NZ, in breach of cl 1.*

[28] Mr McCarthy was instructed in December 2017. The daughter-in-law's immigration situation was urgent, as she was unlawfully in the country. Even allowing some time for him to compile a fulsome s 61 request, with supporting documents, it should have been ready to lodge when he took the money from the family in April 2018. Yet, he essentially did nothing, except send an occasional email asking for more evidence.

[29] Mr McCarthy concedes he "largely failed to act" and that no s 61 request was made.⁹ He has provided no explanation to the Authority or the Tribunal. He does not say that the family did not provide him with the necessary documents in a timely way. The breach of cl 1 is clear. Mr McCarthy was unprofessional and lacked diligence. There is no need to consider the alternative complaint of negligence.

(2) *Failing to keep the client(s) informed of developments in a timely manner, in breach of cl 1.*

[30] It is equally plain from the few communications from Mr McCarthy to the family that he did not keep them informed of progress. It is a point they make in some of their communications.

[31] In fact, Mr McCarthy's last substantive communication, if it can be so described, was deliberately misleading and deceptive. On 16 October 2019, in answer to a query from the son regarding the application the family thought had been made, he replied that there was no update. He was pretending that an application had been made. Following this communication, Mr McCarthy was silent despite queries from the family until at least February 2021. He was consciously allowing the family to believe that an application had been made. He continued to mislead them. They thought the request had been made in mid-2019. It was not until April 2021 that the family came to realise something was wrong and contacted Immigration NZ directly.

⁹ Email McCarthy to Authority (22 June 2021).

[32] Mr McCarthy has an obligation to explain his conduct in the face of an allegation of dishonesty. He has chosen not to. The Tribunal will draw an adverse inference of misleading behaviour.¹⁰

OUTCOME

[33] The complaint is upheld. Mr McCarthy has breached cl 1 of the Code. Additionally, his behaviour has been misleading.

SUBMISSIONS ON SANCTIONS

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

[35] A timetable is set out below. Mr McCarthy no longer holds a licence. Given his misleading behaviour over a prolonged period and his refusal to engage with the Tribunal, it will consider preventing him from reapplying for his licence. The parties are asked to address this. 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.

Timetable

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

- (1) The Registrar, the complainant and Mr McCarthy are to make submissions by **2 June 2022**.
- (2) The Registrar, the complainant and Mr McCarthy may reply to submissions of any other party by **16 June 2022**.

ORDER FOR SUPPRESSION

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

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

¹⁰ *KX v Ji* [2020] NZIACDT 43 at [54], *TI v Malcolm* [2021] NZIACDT 13 at [42].

¹¹ Immigration Advisers Licensing Act 2007, s 50A.

[39] The Tribunal orders that no information identifying the complainant or her daughter-in-law is to be published other than to Immigration NZ.

D J Plunkett
Chair