IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 27

Reference No: IACDT 005/23

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**BT** Complainant
AND	**LI JOYCE LI** Adviser

Decision on the papers

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 1 November 2023

REPRESENTATION:

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

PRELIMINARY

[1] The complainant's husband (who will be known as the client) was in New Zealand unlawfully. The adviser was engaged to make a discretionary request to Immigration New Zealand (Immigration NZ) for a visa. It was duly made and declined, so a second discretionary request was made, which was also unsuccessful.

[2] A complaint against the adviser was made to the Immigration Advisers Authority (the Authority). It has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged the second request was futile, but the complainant and her husband were not properly advised of this. The adviser is alleged to have breached various provisions of the Licensed Immigration Advisers Code of Conduct 2014 (the Code), which is a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[3] Li Joyce Li, the adviser, is a licensed immigration adviser and is self-employed with Fayo Ltd (Fayo), of Auckland.

[4] The complainant is BT, a New Zealand citizen. Her husband, XC, is a national of Samoa. They had married in September 2020. At the relevant time, he was in New Zealand unlawfully. Prior to engaging Ms Li, a s 61 request[1] had been refused by Immigration NZ on 25 August 2020 and a request for Ministerial intervention lodged on 22 October 2020 had been declined on 22 February 2021.

[5] It is understood that the complainant approached Ms Li. The client signed a service agreement with Fayo on 23 March 2021. Fayo undertook to file a s 61 request for a partnership work visa and later an application for a partnership resident visa. The fee for the s 61 request was $2,500. If the work was terminated, the fee would be based on the hours worked at $300 per hour.

[6] On 10 May 2021, Ms Li filed with Immigration NZ a request for a partnership work visa under s 61 on behalf of the client. It was based on his relationship with the complainant. Evidence was provided of the couple living together in a genuine and stable relationship. It was declined by Immigration NZ on 28 May 2021.

[7] Ms Li then made another s 61 request on 10 August 2021, based again on the client's relationship with the complainant. It was declined on 13 October 2021.

---

[1] Immigration Act 2009, s 61 (absolute discretion to grant a visa in a special case).

Complaint made to Ms Li

[8] The complainant wrote to Ms Li on 23 May 2023 seeking clarification of the decision to pursue two s 61 requests, following a Ministerial appeal. According to the complainant, a request under s 61 was likely to be futile.

[9] Ms Li replied the next day, 24 May 2023. She said using s 61 was a proper approach as the client did not want to leave New Zealand. He agreed to it before the procedure started. Ms Li asked the complainant to identify the policy indicating that a failed Ministerial intervention prevented a s 61 request.

[10] The complainant responded on the same day. She stated that unless there was new compelling information, the Minister was highly unlikely to consider a case that he had already refused to act on. She wanted a refund.

[11] On the following day, Ms Li repeated that there was no policy indicating s 61 was not a legal option after a failed Ministerial intervention. The intervention request had been filed in October 2020 without well prepared documents. The request under s 61 was made in May 2021 after the client's circumstances had changed. She could not make any refund as she had worked 12.3 hours on the request, at $300 hourly.

COMPLAINT

[12] On about 30 May 2023, the complainant made a complaint against Ms Li to the Authority. She said that the first s 61 request had followed a failed Ministerial intervention request which her husband had composed himself. Ms Li did not indicate to them that the s 61 request would be unlikely to succeed, as a Ministerial intervention request had been rejected only two months previously. There was no significant change of circumstances. Furthermore, Ms Li did not declare in writing that the second s 61 request was likely to be futile. The request did not draw attention to any significant change of circumstances.

[13] A preliminary explanation was provided by Ms Li to the Authority on 6 June 2023. She said the client lodged the Ministerial appeal himself in October 2020 without professional assistance. The documents were not well prepared and there was a lack of documentation showing the couple was living together. His circumstances were different in May 2021, compared to October 2020. Section 61 was the correct option for him.

[14] On 16 August 2023, the Authority formally advised Ms Li of the details of the complaint and sought an explanation.

[15] A detailed explanation from Ms Li was given on 19 August 2023:

(1) Ms Li said she provided a checklist with all the detailed documents. She went through it with them. The client was fully aware of the content lodged. She had since amended her service agreement to ensure clients had an opportunity to review documents before lodging an application.

(2) Ms Li explained to the client during their meeting that s 61 involved an absolute discretion and could be declined without any reason given. He agreed to proceed. The second request was necessary to show that he had made a continuous effort to correct his unlawful status. Furthermore, at the time of the first request in May 2021, the couple lived at two addresses (though with a joint tenancy at the second) but by August 2021, there was solid evidence that they had been living in the second address for 12 months. She gave the client the option to leave New Zealand and apply for a visa offshore. In the future, she would make sure clients confirmed their awareness of the risks by email.

(3) After the first s 61 request was declined, she offered to do the second for $800. A new agreement was not signed since the second request was under the same conditions as those set out in the signed agreement. It was the same client and the same strategy.

(4) Ms Li stated she had not intended to breach any clauses in the Code. She was willing to make an effort to improve her practice and take the action mentioned.

Complaint referred to the Tribunal

[16] On 29 September 2023, the Registrar referred the complaint against Ms Li to the Tribunal alleging breaches of the specified provisions of the Code:

(1) Failing to provide the client with an opportunity to review the s 61 requests before lodgement, in breach of cl 1.

(2) Failing to indicate whether the second s 61 request was likely to be futile and/or to notify the client of such risks, in breach of cl 9.

(3) Failing to provide the client with viable access to the Code, in breach of cl 17(b).

(4) Failing to have a second written agreement in place for lodging the second s 61 request, in breach of cl 18(a).

JURISDICTION AND PROCEDURE

[17] 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.

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

[19] 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]

[20] 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]

[21] 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]

[22] 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]

---

[2] Immigration Advisers Licensing Act 2007, s 45(2) and (3).
[3] Section 49(3) and (4).
[4] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[5] Immigration Advisers Licensing Act, s 50.
[6] Section 51(1).
[7] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [151].
[8] at [97], [101]–[102] and [112].

From the Registrar

[23] The Tribunal has received from the Registrar the statement of complaint (29 September 2023), with supporting documents.

From the complainant

[24] There are no submissions from the complainant.

From the adviser

[25] There is a statement of reply (16 October 2023) and memorandum (16 October 2023) from Mr Laurent, counsel for Ms Li. The adviser admits the first, second and fourth heads of complaint.

[26] As for the first head, it is contended the complainant could not have been unaware of most of the evidential content of the requests. The material was supplied by the couple and there was some correspondence with Ms Li.

[27] In respect of the second head, it is admitted that neither cl 9(a) nor cl 9(b) of the Code were met. Ms Li says that she did point out to the couple that such requests were a matter of broad Ministerial discretion, so there was no certainty of outcome. Ms Li did not try to gloss over the risk of refusal.

[28] As for the fourth head, it is clear the second s 61 request was not contemplated within the terms of the service agreement. It amounted to an additional service, for which there was an additional fee and there should have been a separate agreement. There was though no intention on Ms Li's part to take advantage of her client. There was a misunderstanding by her, as she thought the further request was a continuation of the same service.

[29] In respect of the third head of complaint, it is disputed that a breach of the Code has taken place. Clause 17(b) does not require advisers to give a copy of the Code to clients. Ms Li did in fact tell the client how to access the Code. The service agreement stated that it was available on request. This is at least as reliable as the suggestion in the Authority's toolkit for the Code, of putting a link to the online version in an email or letter. Any breach is of a technical nature.

[30] The adviser does not request an oral hearing.

ASSESSMENT

[31] 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.
>
> **Futile immigration matters**
>
> 9. If a proposed application, appeal, request or claim is futile, grossly unfounded, or has little or no hope of success, a licensed immigration adviser must:
>
> a. advise the client in writing that, in the adviser's opinion, the immigration matter is futile, grossly unfounded or has little or no hope of success, and
>
> b. if the client still wishes to make or lodge the immigration matter, obtain written acknowledgement from the client that they have been advised of the risks.
>
> **Code and complaint documents**
>
> 17. Before entering into a written agreement with the client, a licensed immigration adviser must:
>
> …
>
> b. explain the summary of licensed immigration advisers' professional responsibilities to the client and advise them how to access a full copy of this code of conduct, and
>
> …
>
> **Written agreements**
>
> 18. A licensed immigration adviser must ensure that:
>
> a. when they and the client decide to proceed, they provide the client with a written agreement
>
> …

(1) Failing to provide the client with an opportunity to review the s 61 requests before lodgement, in breach of cl 1

[32] The first head is admitted. While the information used in compiling each of the requests may have come from the complainant and the client, they were entitled to check

the accuracy and sufficiency of the completed applications prior to their lodgement.[9] The omission to do so shows a lack of diligence and due care, in breach of cl 1 of the Code.

(2) Failing to indicate whether the second s 61 request was likely to be futile and/or to notify the client of such risks, in breach of cl 9

[33] The second head is admitted. Whether or not the first request was worthwhile, the second request made less than three months after the first request failed, was likely futile. Ms Li told the Authority the second request was to show the client was making continuous efforts to regularise his immigration status. The Tribunal agrees that making such efforts is helpful, but a futile immigration application traversing the same grounds as those recently dismissed would be of no value in seeking lawful status. It is accepted that Ms Li was not trying to hide the risk of failure from the client. Both requirements of cl 9 have been breached.

(3) Failing to provide the client with viable access to the Code, in breach of cl 17(b)

[34] The Registrar says Ms Li did not provide the client with "viable" access to the Code.

[35] While Ms Li did not provide the client with a copy of the Code, she did draw attention to the Code at cls 7 and 12 of the service agreement. Clause 12 stated:

> A full copy of the Code of Conduct is available upon request.

[36] The Registrar says this does not appear to be sufficient to inform the client how best to access the Code. The Tribunal observes that the best way to facilitate client access to the Code would be to provide a hard or electronic copy, but the Code does not require that. The Authority's Code toolkit apparently recommends sending an electronic link. The Tribunal agrees such a method would likely provide more convenient access than to require the client to contact the adviser for a copy. However, the Code merely requires advice as to how to access the Code, so the offer to provide a copy upon request meets this minimal requirement. It is a viable way to access the Code. There is no breach of cl 17(b).

---

[9] *NG v Murthy* [2023] NZIACDT 6 at [35].

(4) Failing to have a second written agreement in place for lodging the second s 61 request, in breach of cl 18(a)

[37] The fourth head is admitted. There is no reference to two s 61 requests in the service agreement. An additional service requires another agreement or an addendum to the existing agreement, signed by the parties. This is a breach of cl 18(a).

OUTCOME

[38] The first, second and fourth heads of complaint are upheld. Ms Li has breached cls 1, 9(a) and (b), and 18(a) of the Code. The third head is dismissed.

SUBMISSIONS ON SANCTIONS

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

[40] A timetable is set out below. Any request that Ms Li 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.

Timetable

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

(1) The Registrar, the complainant and Ms Li are to make submissions by **24 November 2023**.

(2) The Registrar, the complainant and Ms Li may reply to submissions of any other party by **8 December 2023.**

ORDER FOR SUPPRESSION

[42] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[10]

[43] There is no public interest in knowing the name of Ms Li's client, or the complainant.

---

[10] Immigration Advisers Licensing Act, s 50A.

[44] The Tribunal orders that no information identifying the client or the complainant is to be published other than to Immigration NZ.

_____

D J Plunkett
Chair