

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2023] NZIACDT 10

Reference No: IACDT 014/22

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **NG**  
Complainant

**AND** **NIRMALA KRISHNA MURTHY**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION**  
**Dated 15 March 2023**

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**REPRESENTATION:**

Registrar: Self-represented

Complainant: R Small, counsel

Adviser: Self-represented

## PRELIMINARY

[1] The complainant, NG, was in New Zealand unlawfully at the time he engaged the adviser, Nirmala Krishna Murthy. She made two unsuccessful s 61 requests for him.<sup>1</sup> In doing so, she committed a number of breaches of her professional obligations.

[2] A complaint by the complainant against Ms Murthy to the Immigration Advisers Authority (the Authority) has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged she has been negligent, or alternatively has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), both being grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act).

## BACKGROUND

[3] The complainant, a national of Tonga, first arrived in New Zealand in 2012. His visa had expired on 26 April 2021, so his presence became unlawful after this date. He made s 61 requests himself on 19 May and 3 June 2021 which Immigration New Zealand (Immigration NZ) refused on 2 and 21 June 2021 respectively.

[4] Ms Murthy is a licensed immigration adviser. She is a director of Immigration Consultancies Ltd, of Auckland.

[5] On 21 July 2021, the complainant and Ms Murthy entered into a written service agreement. Ms Murthy would lodge a s 61 request on the ground of his relationship with a New Zealand resident with whom he had a child. The fee was \$ 4,600 (incl. GST).

[6] On 19 October 2021, Ms Murthy wrote to Immigration NZ requesting a partnership-based work visa for the complainant under s 61 of the Immigration Act 2009. He had been unable to apply before the expiry of his last visa due to his financial circumstances. Various support documents were enclosed with her letter. Immigration NZ refused the request on 5 November 2021.

[7] On 24 December 2021, Ms Murthy lodged a second s 61 request. It was refused by Immigration NZ on 4 February 2022.

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<sup>1</sup> Section 61 of the Immigration Act 2009 permits the Minister of Immigration to grant a discretionary visa to those unlawfully in the country.

[8] There was a meeting between Ms Murthy and the complainant on 8 April 2022. The complainant terminated her services and requested that the file be forwarded to the new adviser. She confirmed in a later email to him that day that he had terminated her services and she would transfer the file to his new adviser, Mr Vanisi, as soon as possible. In another email Ms Murthy sent to the complainant on 8 April, she advised that the file had been sent to the new adviser.

[9] Ms Murthy sent one or perhaps two emails to Mr Vanisi on 8 April 2022 attaching the complainant's file. She invited him to let her know if any other information was needed. He said on 12 April that he had received only one email containing certain specified documents, but not the rest of the two s 61 requests. Ms Murthy then sent about six emails to him on 12 and 13 April with further documents. The email sent on 13 April could not be delivered as it was too large.

[10] On 26 May 2022, Mr Small, the complainant's counsel, advised Ms Murthy he was acting for the complainant and his partner. He requested a copy of the second s 61 request and the disclosure of all personal information, including the service agreement, her notes and communications from/to the complainant or Immigration NZ. The request was urgent because of the complainant's unlawful status and other pressing circumstances of the family.

[11] Ms Murthy replied to counsel's email on 27 May 2022. She said she had sent the documents to the complainant and counsel could deal with him. Due to past comments by counsel, she did not wish to deal with him. Counsel responded on the same day noting her obligation to provide all personal information held concerning the complainant.

[12] Ms Murthy also sent an email to the Authority on 27 May 2022, seeking guidance relating to her obligations when a second lawyer takes over a client's file and requests documents. She said that the documents could be obtained direct from the client. Additionally, the information had been passed to the first new adviser.

[13] The Authority replied to Ms Murthy on 31 May 2022. It referred her to a number of clauses of the Code, namely cls 1 (being professional), 3(a) (complying with the law, including the Privacy Act 2020), 4(a)(i) (preserving confidentiality, except where the client consented otherwise), 26(f) (releasing all applications and correspondence to a new adviser on request) and 27 (returning a client's personal documents on request or the completion of services).

## COMPLAINT

[14] On 14 June 2022, the Authority received a letter from counsel dated 30 May 2022. It was treated as a formal complaint made on behalf of the complainant.

[15] Counsel raised a number of concerns relating to Ms Murthy which the Authority was asked to investigate. This included her obligation under the Privacy Act 2020 to provide a copy of all records held regarding the complainant, which he had requested on 26 May 2022. She had previously sent a small number of items to the client and also to another adviser who had been briefly consulted, but this was not the full record. He sought the Authority's assistance to encourage Ms Murthy to disclose the personal information held.

[16] In response to the complaint, the Authority requested information from Ms Murthy on 7 September 2022. She replied on the same day stating that the complainant's partner asked her to process a second s 61 request in an email. She agreed to do so without any additional fee. The complainant had up to that date paid \$3,600 of her fee. He had asked her to forward the file to another adviser and she had done so.

[17] On 22 September 2022, the Authority formally advised Ms Murthy of the particulars of the complaint and sought her explanation.

[18] Ms Murthy provided an explanation to the Authority on 20 October 2022. It will be considered in the Tribunal's later assessment.

### *Complaint referred to the Tribunal*

[19] The Registrar filed a statement of complaint (25 October 2022) in the Tribunal alleging negligence on the part of Ms Murthy or alternatively breaches of the specified provisions of the Code:

- (1) Failing to lodge an information request with Immigration NZ seeking the complainant's immigration records, in breach of cl 1.
- (2) Failing to provide the complainant with the opportunity to review either of the s 61 requests prior to their lodgement, in breach of cl 1.
- (3) Failing to provide a written agreement for the second s 61 request, in breach of cl 18(a).

- (4) Failing to comply with requests to release her full file to the complainant's new representative, in breach of cl 26(f).

## **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.<sup>2</sup>

[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.<sup>3</sup> It has been established to deal relatively summarily with complaints referred to it.<sup>4</sup>

[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.<sup>5</sup>

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

[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.<sup>8</sup>

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<sup>2</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

<sup>3</sup> Section 49(3) & (4).

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

<sup>5</sup> Section 50.

<sup>6</sup> Section 51(1).

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

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

[26] The Tribunal has received from the Registrar the statement of complaint (25 October 2022), with supporting documents.

[27] There is a statement of reply (8 November 2022) from the complainant's counsel. It will be assessed later.

[28] There is an undated statement of reply from Ms Murthy (received on 24 November 2022). It will also be assessed later.

## **ASSESSMENT**

[29] 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**

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

### **File management**

26. A licensed immigration adviser must:
  - ...
  - f. when requested by the client or their new licensed or exempt immigration adviser, release a copy of all applications lodged on behalf of the client and all correspondence relating to the client.

*Negligence, or alternatively breach of the specified provisions of the Code:*

*(1) Failing to lodge an information request with Immigration NZ seeking the complainant's immigration records, in breach of cl 1*

[30] Ms Murthy did not lodge an information request with Immigration NZ when she was instructed and before filing the first s61 request. She has said to the Tribunal (24 November 2022) that it is her normal practice to do so, but the complainant did not tell her of the previous declined s 61 requests. In her earlier explanation to the Authority (20 October 2022), she said that the complainant's circumstances were time sensitive

as he had already overstayed his visa, adding that she was aware it could take 20 working days to obtain a client's file.

[31] The complainant presented to her as a person with an immigration history in New Zealand of about nine years and whom she knew to be unlawful. That being the case, she should have lodged an immigration request to find out accurately and comprehensively his immigration history. An adviser cannot rely on a client's memory and often inadequate records of their own history.

[32] According to the Registrar, Immigration NZ had previously expressed concern about the *bona fides* of the relationship on which the s 61 requests made by Ms Murthy were based. Had she known, she could have addressed that in the requests. As for Ms Murthy's explanation about the time sensitive nature of the s 61 requests, it must be seen in the context of the three months it took her to make the first request.

[33] The failure to lodge an information request shows a lack of diligence and due care, a breach of cl 1. The first head of complaint is upheld.

(2) *Failing to provide the complainant with the opportunity to review either of the s 61 requests prior to their lodgement, in breach of cl 1*

[34] The Registrar alleges that Ms Murthy did not give the complainant any opportunity to review the prospective s 61 requests before their lodgement. Ms Murthy says (24 November 2022) she kept him informed and he had ample opportunity to provide information. She told the Authority (20 October 2022) that she had several phone calls with him to discuss what was included in the requests and the points being made. She had discussed the supporting documents with him.

[35] In addition to the discussions Ms Murthy has with a client as to the content of any application or submission to Immigration NZ, she should send the draft application/ submission to the client to review, in order to ensure it is accurate and complete. If the matter is urgent, that may not be practical. Ms Murthy took three months to make the first request, so there was time for the complainant to review it first. Similarly, the second request was not so urgent that it could not have been reviewed by the complainant.

[36] The failure to give the complainant the opportunity to review the requests before they were lodged shows a lack of diligence and due care, in breach of cl 1. The second head is upheld.

(3) *Failing to provide a written agreement for the second s 61 request, in breach of cl 18(a)*

[37] Ms Murthy accepts that she did not have a written agreement for the second s 61 request. She agrees it was a mistake and apologises. She thought she did not need a fresh agreement as she was not charging an additional fee.

[38] The service agreement of 21 July 2021 entitled Ms Murthy to act for the complainant on the first s 61 request, not for any subsequent requests or applications. They require a new agreement or an addendum to the existing agreement adding the new service, the fee (specifying no additional fee, if so), any changes to the original conditions and the parties' signatures.

[39] The lack of a written agreement for the second s 61 request is a breach of cl 18(a). The third head is upheld.

(4) *Failing to comply with requests to release her full file to the complainant's new representative, in breach of cl 26(f)*

[40] The complainant terminated Ms Murthy's engagement at a meeting on 8 April 2022. He advised her of the new adviser, Mr Vanisi. On the same day, she sent one or two emails to him attaching the complainant's file, which she described as large. She invited the new adviser to let her know if he needed any other information. As he received only certain documents, he sought the balance of the file. Ms Murthy then sent him multiple emails with attachments on 12 and 13 April.

[41] Later, on 26 May 2022, counsel sent a letter to Ms Murthy advising he acted for the complainant and requesting a copy of all personal information held concerning him and his partner. Ms Murthy replied the next day to say she had sent all the documents to the complainant and counsel could get them from him. She made a number of allegations regarding her dealings in the past with counsel. She did not therefore wish to deal with him. Counsel replied on the same day, 27 May, stating that any phone call years ago was not a justification for requiring him to deal directly with the client. He sought the file.

[42] In her submissions to the Tribunal (24 November 2022), Ms Murthy said the tone and comments of counsel were inappropriate. She felt like she was being bullied by him.

[43] In her earlier explanation to the Authority (20 October 2022), Ms Murthy said she provided the complete file to the new adviser at the complainant's request. She repeated that her previous experience dealing with counsel made her hesitant to communicate



with him. As the Code did not clarify how many times she was required to provide the file, she had asked the Authority on 27 May for guidance. According to her, the Authority did not respond.<sup>9</sup> Ms Murthy did not feel she had failed her duty under the Code. She did not understand why counsel did not ask the new adviser.

[44] Clause 26(f) of the Code requires an adviser to release copies of all lodged applications and correspondence to a new adviser or lawyer when requested by the client or the new adviser or lawyer. An adviser would only be required to do that once. Ms Murthy discharged that duty (at least substantially) when she sent the file to Mr Vanisi within a few days of the termination of her engagement, at the request of the complainant. She was not required, under the Code, to send it to counsel when he requested it about six weeks later. The Tribunal has not been asked to address whether she had any obligation to do so under the Privacy Act 2020 or any other law.

[45] The Registrar states that the file sent to Mr Vanisi was not the “full” file. It contained no email communications or file notes. The lists of the attachments to the various emails Ms Murthy sent to Mr Vanisi on 8, 12 and 13 April do not specifically mention emails. She should have included them. Mr Vanisi did not, however, request them. He may have obtained them from the client.

[46] As for the file notes, Ms Murthy has no obligation under the Code to disclose them to the new adviser or lawyer (though she would be required to disclose them to the Authority under cl 26(e) on request).

[47] In the complainant’s statement of reply (8 November 2022), it is alleged that Ms Murthy made handwritten notes of the first meeting, which she appeared to have destroyed. These notes may now exist as the typed notes of that meeting on 21 July 2021.<sup>10</sup> Ms Murthy says she transferred the notes to “Hub Spot”.<sup>11</sup> There is no evidence that the absence of the handwritten record is sinister, which in any event is not the subject of any head of complaint.

[48] Ms Murthy has breached cl 26(f) in apparently failing to send all the correspondence to Mr Vanisi. This perhaps raises the question as to whether she was therefore required to send all the applications and correspondence to counsel, the second person *prima facie* entitled to request it. Any such breach, whether failing to send all such documents to Mr Vanisi or to counsel, is not sufficiently serious to justify a

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<sup>9</sup> Ms Murthy has overlooked the Authority’s email of 31 May 2022.

<sup>10</sup> See the Registrar’s bundle at 20–21.

<sup>11</sup> See Ms Murthy’s statement of reply (24 November 2022) at Part 3 (items 1–2).

disciplinary response. Ms Murthy made a considerable effort to send the file to Mr Vanisi and he did not seek anything further. The fourth head is dismissed.

[49] For the sake of completeness, the Tribunal notes that Ms Murthy's personal dislike of counsel, whether for reasons real or imagined, is no justification for avoiding her obligations under the Code. There was nothing unprofessional in the language or content of Mr Small's request for her file. Nor is the ability of the new adviser or lawyer to obtain many, if not all, of the documents from the client a justification for non-compliance with the Code.

### *Negligence*

[50] Finally, there is no need to deal with the Registrar's allegation of negligence as the Tribunal has upheld the alternative breaches of the Code. Arguably, Ms Murthy's apparent failure to send the full file to Mr Vanisi or Mr Small might also be seen as negligent, in addition to breaching cl 26(f), but any such negligence would not justify a disciplinary response in the circumstances here.

## **OUTCOME**

[51] The first, second and third heads of complaint are upheld. Ms Murthy has breached cls 1 and 18(a) of the Code.

## **SUBMISSIONS ON SANCTIONS**

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

[53] A timetable is set out below. Any request that Ms Murthy 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*

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

- (1) The Registrar, the complainant and Ms Murthy are to make submissions by **6 April 2023**.

- (2) The Registrar, the complainant and Ms Murthy may reply to submissions of any other party by **20 April 2023**.

### **ORDER FOR SUPPRESSION**

[55] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>12</sup>

[56] There is no public interest in knowing the name of Ms Murthy's client.

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

D J Plunkett  
Chair

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<sup>12</sup> Immigration Advisers Licensing Act 2007, s 50A.