IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 26

Reference No: IACDT 002/23

IN THE MATTER	of an appeal against a decision of the Registrar under s 54 of the Immigration Advisers Licensing Act 2007
BY	**BL** Appellant
AND	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 10 October 2023

REPRESENTATION:

Appellant:	Self-represented
Registrar:	R Boyd, counsel

INTRODUCTION

[1] This is an appeal against a decision made on 23 June 2023 on behalf of the Registrar of Immigration Advisers (the Registrar) rejecting a complaint by BL (the appellant) against ET (the adviser), on the ground that it did not disclose any of the statutory grounds of complaint.

[2] The appellant had been declined a visa by Immigration New Zealand (Immigration NZ), but had sought reconsideration of that decision. She contacted the adviser for assistance one week before her interim visa was due to expire. The adviser informed her she could get another interim visa, but the appellant says this is incorrect. She also complains that the adviser undertook work without a written authority and that her communication was poor.

BACKGROUND

[3] The adviser is a licensed immigration adviser and director of [immigration agency].

[4] The appellant is a national of Bangladesh. In July 2022, the appellant applied for a student visa. On an unknown date, she was granted an interim visa by Immigration NZ due to expire on 8 February 2023. The Tribunal assumes the interim visa was granted pending a decision on the student visa application. That application was declined on 18 January 2023, as Immigration NZ was not satisfied the appellant met the financial criteria. The decline letter reminded her that the interim visa would expire on 8 February 2023. On 27 January 2023, the appellant sought reconsideration by Immigration NZ of the decline of the student visa.

Appellant contacts adviser

[5] The appellant first contacted the adviser by text on 1 February 2023 (at 10:26 am) requesting assistance with her immigration status as no decision had been made on a reconsideration application, but her interim visa would expire on 8 February 2023. On the same day (at 11:21 am), the adviser sent an email to the appellant asking her to fill out a questionnaire (information sheet) and book a consultation. They would advise her of her options. The cost would be $195.50. The adviser attached the information sheet. An invoice (1 February 2023) was provided to the appellant who paid the same day (at 3:14 pm). The appellant immediately completed the information sheet.

[6] A telephone discussion lasting about 40 minutes then took place between the appellant and the adviser that day (at 3:59 pm). The adviser told the appellant she would contact Immigration NZ to make enquiries.

[7] The adviser spoke to an immigration officer the following day, 2 February 2023 (at 10:06 am).[1] Immigration NZ's record stated that the enquiry related to the "Study product". The adviser then sent an email (at 11:30 am) to Immigration NZ inquiring about the appellant's reconsideration request submitted on 27 January 2023, but which had not been recorded in the system as lodged. The matter was urgent as the interim visa would expire on 8 February 2023.

[8] On the same day, 2 February 2023 (1:12 pm), the adviser sent an email to the appellant. Immigration NZ had told her that once the reconsideration request was lodged (not just received), she would get an interim visa until a decision was made. It was only when the documentation had been checked and entered into the system that it would be considered lodged. She had requested Immigration NZ to speed up consideration of lodgement. She would let the appellant know whether she could be issued with a new interim visa. It was important to get the reconsideration request lodged, so a new interim visa could be issued.

[9] In her email, the adviser also discussed what would happen if the appellant's immigration status became unlawful, requiring a s 61 request.[2] She set out the professional fee for such a request and the fee for making a humanitarian appeal. She also outlined a recommended course of action for the appellant (being that she remain in New Zealand to file a s 61 request or to appeal a declined reconsideration). The appellant was informed she had a good chance on appeal, but the fees would be higher. The adviser stated the appellant would need to request her terms of engagement for signing and returning before any further work could be done. She concluded by suggesting that the appellant wait and see whether another interim visa would be issued.

[10] The appellant replied by email on the same day (at 2:16 pm). She said she had been advised by Immigration NZ to leave New Zealand before the interim visa finished or to apply under s 61. She pointed out she had not yet signed any authority.

[11] Later that day (at 5:06 pm), the appellant sent a text to the adviser to say she had spoken with Immigration NZ and been advised that the application had been lodged that day. She could not get an extension on her interim visa and she would be unlawful until the decision was made. She did not know what was going on.

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[1] Immigration NZ record, bundle at 223.
[2] Immigration Act 2009, s 61 (discretionary visa).

[12] The adviser replied shortly later by text the same day (at 5:39 pm) to say she would step back as the appellant had not instructed her and had continued to talk to Immigration NZ. If she was to be instructed, she would need an authority to communicate with the government agency.

[13] This immediately prompted a text from the appellant (5:39 pm) stating she had not been sent an authority to sign. The adviser had not replied to her question about whether she had to sign an authority. The appellant had not told the adviser not to work on her application. She was informing the adviser of what Immigration NZ told her, which was that there would be no interim visa extension.

[14] The adviser replied by text on the same day (at 5:54 pm) stating, "We shall see [name of appellant]".

[15] The appellant then sent a text that day, 2 February 2023 (at 5:58 pm), asking the adviser what she meant. She had to answer to her employer, but she was "out of thought". She asked the adviser to talk to "them" (presumably Immigration NZ). She also asked for the authority, so the adviser could work on her behalf.

[16] The appellant sent an email to the adviser five days later, on 7 February 2023 (at 11:53 am), reminding her of the expiry of the interim visa the next day. She had clearly asked the adviser to send her the authority and had made an initial payment. The appellant said she required a clear, meaningful outline and update about the processing.

[17] The adviser replied immediately by email that day (at 11:54 am) attaching a copy of her "Authority & Instructions Terms Of Engagement & Client Care Rules", for the appellant's "immigration case" and a s 61 request if required. The appellant was advised she could also appeal to the Immigration and Protection Tribunal within 42 days of receiving the decline letter.

[18] In a further email on the same day (at 12:00 pm), the adviser stated that the initial consultation had consisted of an assessment of the appellant's situation and the provision of options, and "nothing more". The adviser confirmed she was aware of the visa expiry date, but they would need the signed contract back in order for the appellant to become a client.

[19] The appellant replied by email (at 12:14 pm) recording she knew the adviser required her authorisation, which was why she (the appellant) kept asking for the papers to sign.

[20] The adviser replied by email that day (at 12:36 pm and 1:37 pm) telling the appellant she would telephone Immigration NZ the same day.

[21] The appellant then completed the authority/terms of engagement electronically and sent them to the adviser on the same day, 7 February (at 12:52 pm).

[22] The adviser duly made the phone call to Immigration NZ that day (at 2:48 pm).[3] The government agency's file note stated that the contact related to the "Study product" and the required information was provided.

Appellant terminates engagement

[23] The appellant sent an email to the adviser that day (at 2:52 pm) informing her she would contact the adviser if she needed assistance, but at the moment to "just ignore this".

[24] The adviser responded by email (at 2:58 pm) to say she had spent one hour talking to the immigration officer trying to find a solution and most likely had found one. She added that the appellant would be invoiced and she would stop representing her after that. The invoice (for $287.50) was then emailed to the appellant (at 3:02 pm). It contained a description of the work:

> Contacted INZ at 2:05 pm – 40 mins phone call – 20 mins discussion of case internally – Client requested no further work to be done.

[25] On the same day, the appellant contacted Immigration NZ seeking an update. She was informed the adviser had not contacted the government agency.

[26] The appellant then sent an email to the adviser that day, 7 February 2023 (at 4:11 pm), requiring her to show proof of contact with Immigration NZ and of the conversation of one hour. The adviser replied stating she would no longer carry out any work and sending a final invoice (at 5:41 pm). The appellant sent a further email (at 5:57 pm) asking the adviser why Immigration NZ did not have any record of the conversation. The adviser replied (at 6:16 pm) stating she expected payment within seven days and requesting the appellant not to contact her again. The appellant then sent an email (at 6:33 pm) asking again why Immigration NZ did not have a record of the adviser's contact and questioning why payment should be made if there was no contact.

[27] On 8 February 2023, the appellant sent an email to the adviser saying she had tried to call her but the adviser hung up. The appellant again asked the adviser for proof

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[3] Immigration NZ record, bundle at 223.

she had communicated with Immigration NZ. The appellant wanted to know what service she had received from the adviser.

[28] The appellant paid the adviser $287.50 on 14 February 2023.

Complaint to the Authority

[29] On about 17 February 2023, the appellant made a complaint to the Immigration Advisers Authority (the Authority). It was alleged the adviser had breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code) and that her conduct satisfied various grounds of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

[30] The appellant complained that the adviser had worked without the appellant's authority and she did not receive progress updates from her. In an email (6 June 2023) to the Authority, the appellant said the adviser's communication was poor, as she hardly ever replied and her advice that the appellant could get an interim visa was absolutely wrong. She should know that an interim visa cannot be granted twice consecutively.

[31] The Registrar sought an explanation from the adviser, who replied on 25 May 2023. She said the completed information sheet was received before the consultation. The information sheet indicated that a fee would be charged for the consultation, which would include a written summary. It further stated that the information could be verified. The first phone call to Immigration NZ on 2 February was part of the "initial consultation research". The information had to be verified as she was given little to go on by the appellant.

Registrar's letter dismissing complaint

[32] On 23 June 2023, the Registrar's delegate wrote to both the appellant and the adviser rejecting the complaint under s 45(1)(b) of the Act because it did not disclose any of the statutory grounds of complaint.

[33] In respect of the allegation that the adviser did not have written authority to contact Immigration NZ, the Registrar noted that an information sheet completed by the appellant included a condition permitting information to be verified. The verification of information was found to be reasonable.

[34] In respect of the allegation of poor communication with the appellant, the Registrar found the adviser had sent an email to the appellant on 2 February 2023 informing her of the information ascertained from Immigration NZ. The adviser was not

obliged to communicate further as she had not been formally instructed. The adviser was not formally engaged until 7 February and then for less than one day. The appellant claimed the adviser had not contacted Immigration NZ, but the latter's records showed she did so on 2 and 7 February 2023. The adviser had informed the appellant of these calls.

[35] In respect of the allegation that the adviser gave incorrect advice (that another interim visa could be granted), Immigration NZ's instructions in the Operational Manual stated that an interim visa was a matter of absolute discretion for the Minister or immigration officer. There was no evidence suggesting the adviser had "inadvertently" given incorrect advice regarding an interim visa. Furthermore, it did not appear that the adviser had "intentionally" provided incorrect advice.

JURISDICTION AND PROCEDURE

[36] The grounds for a complaint against a licensed adviser are listed 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.

[37] Section 45(1) provides that on receipt of a complaint, the Registrar may:[4]

(a) determine that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly;

(b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly;

(c) determine that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued; or

[4] The Registrar must otherwise refer the complaint to the Tribunal for determination; see Immigration Advisers Licensing Act 2007, s 45(2).

(d) request the complainant to consider whether or not the matter could be best settled by the complainant using the immigration adviser's own complaints procedure.

[38] In accordance with s 54 of the Act, a complainant may appeal to the Tribunal against a determination of the Registrar to reject or not pursue a complaint under s 45(1)(b) or (c).

[39] After considering the appeal, the Tribunal may:[5]

(a) reject the appeal; or

(b) determine that the decision of the Registrar was incorrect, but nevertheless reject the complaint upon another ground; or

(c) determine that it should hear the complaint, and direct the Registrar to prepare the complaint for filing with the Tribunal; or

(d) determine that the Registrar should make a request under section 45(1)(d).

[40] The adviser against whom the complaint is made is not a party to the appeal and has not been served. The appeal itself cannot result in the Tribunal upholding the complaint against the adviser.

Submissions of the appellant

[41] In her submissions (undated attachment to appeal form dated 10 July 2023), the appellant says:

(1) The adviser did not have an authority to work on her behalf.

(2) She requested the contract from 1 February, not 7 February as the Registrar says. While the Registrar said in the decision that the adviser had not been formally instructed on 2 February, she (the appellant) had asked multiple times for the contract to sign. It was not provided until 7 February. The adviser did not reply to previous requests. Her communication was poor.

(3) The adviser knew the whole story from 1 February. She had eight days to work on the file, knowing there was very little time to work on it.

[5] Immigration Advisers Licensing Act, s 54(3).

(4) Under Immigration NZ's rules, a person holding an interim visa cannot be granted another one if the existing one expires before the decision to grant a temporary visa is made.

(5) The adviser is responsible for the misleading information she provided. Her wrong information has caused the problem.

(6) If the adviser thought there was too little time, she could have said she was not interested in accepting the work, instead of charging $287.50.

Submissions of the Registrar

[42] In his submissions (7 September 2023), counsel for the Registrar submits that the complaint was properly considered and rejected by a specialist decision-maker.

[43] In respect of the complaint concerning a written authority, the Registrar noted that prior to the initial consultation, the appellant had been sent an information sheet with a statement about verification. It was reasonable for the adviser to make further enquiries.

[44] Counsel contends that the services provided by the adviser occurred in two distinct periods, the first on 1 and 2 February, and the second on 7 February.

[45] As for the allegation of poor communication, the Registrar found there was no cogent evidence of poor communication. The Registrar traversed the exchange of written communications in the decision. The adviser clearly informed the appellant on 2 February that any future services would require her to request and sign the adviser's terms of engagement. She did not expressly request them. In any event, they were sent to her on 7 February. The adviser therefore communicated within a reasonable period of time and provided the necessary information.

[46] As for the complaint about incorrect advice, the Registrar found there was no evidence the adviser had inadvertently given incorrect advice. It was noted the granting of an interim visa was a matter for the absolute discretion of the Minister of Immigration. The Registrar further noted that it did not appear the adviser intentionally provided incorrect immigration advice.

[47] The appellant had also complained that the adviser had misled her as she had referred to contact with Immigration NZ, which the appellant believed did not occur. However, the Registrar was provided with Immigration NZ's records which showed such contact. The Registrar does not explicitly refer to this ground of complaint, but it was adequately considered.

ASSESSMENT

[48] The Registrar states in the decision that the Code has been considered, though does not expressly refer to any particular provision. The following are relevant to the complaint:

> **General**
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> 1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.
>
> **Initial consultations**
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> 16. A licensed immigration adviser:
>
> a. must, if charging a fee for an initial consultation, before the initial consultation, obtain the client's written consent to the fee and the payment terms and conditions for that fee, and
>
> b. when conducting an initial consultation with the client or potential client, whether charging a fee or not, is not required to meet the requirements at 17 and 18 below, but must adhere to all other requirements of this code of conduct.
>
> **Written agreements**
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> 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
>
> …
>
> c. all parties to a written agreement sign it, or confirm in writing that they accept it, and
>
> ...
>
> 19. A licensed immigration adviser must ensure that a written agreement contains:
>
> …
>
> b. where an adviser is representing the client, written authority from the client for the adviser to act on the client's behalf
>
> …

Whether adviser called Immigration NZ on 7 February

[49] The Tribunal will first determine whether the adviser phoned Immigration NZ on 7 February 2023 as the appellant accused the adviser of lying in claiming such a call. It would appear the appellant was told that day by an immigration officer that the adviser

had not called the government agency. Unfortunately, that information was incorrect. Immigration NZ's record shows that the adviser made such a call.

No authority

[50] The appellant says the adviser had no authority to work on her behalf. This is about what happened on 1 and 2 February 2023, as the appellant did sign a written authority on 7 February 2023 before any work was done that day.

[51] In his decision, the Registrar found there was no cogent evidence demonstrating any lack of compliance by the adviser because of a statement on an information sheet sent to the appellant on 1 February 2023 (before any work was done that day or the following day):

> I further understand and agree that all information furnished in this application and the application process may be verified as may be necessary.

[52] Rule 18(a) of the Code requires a signed written agreement before the adviser proceeds and r 19(b) requires that the agreement contains a written authority for the adviser to act. However, r 16(b) provides that r 18 (and hence r 19) do not apply to initial consultations.

[53] The adviser took instructions in a telephone call on 1 February, then communicated with Immigration NZ on 2 February by phone and email and finally gave written advice that day, all before obtaining the appellant's signature on the formal authority on 7 February.

[54] The Tribunal does not accept that a general power to verify authorises contact with a third party, but the Code does not require a formal written authority prior to an initial consultation. The appellant knew the adviser was proposing to contact Immigration NZ prior to that contact and the Tribunal accepts it was reasonable for the adviser to do so to verify information given by the appellant. While best practice would involve an express written authority to contact a third party, there is no specific requirement under the Code to do so. There was no unprofessional conduct by the adviser in contacting Immigration NZ on 2 February without the appellant's written authority.

Incorrect advice

[55] On 2 February 2023 (at 1:12 pm), the adviser sent an email to the appellant with her advice as to the options available. This is the adviser's principal advice to her (the Tribunal being unaware of what was discussed in their phone call on 1 February). The

adviser emphasised the need for the reconsideration application, already received by Immigration NZ, to be regarded by the government agency as "lodged" (involving the checking of documents). Once lodged, the appellant could get an interim visa. In the final sentence of the email, the adviser stated:

> For now, I suggest to wait and see if another interim visa will be issued.

[56] In her communications with the adviser, the appellant asserted that she could not be issued with another interim visa.[6] The appellant is correct. An interim visa may be granted to the holder of a temporary visa, but an interim visa is not a temporary visa for this purpose.[7]

[57] The Registrar's finding on this head of complaint is confusing. He says there is no evidence suggesting the adviser "inadvertently" gave incorrect advice, adding that it did not appear the adviser had "intentionally" provided incorrect advice. If the Registrar is saying there is no evidence the adviser provided incorrect advice, then he is wrong. The Registrar has overlooked the note to the relevant provision in the Operational Manual.

[58] This was a critical piece of advice for the appellant. She was holding an interim visa due to expire one week after she contacted the adviser, so waiting to see whether Immigration NZ might issue another interim visa (pending a decision on the reconsideration application) was not an option. She was in imminent danger of becoming unlawful and needed urgent advice which recognised that fact.

[59] Without having heard from the adviser, the Tribunal cannot make any definitive finding, but irrespective of what the adviser was told by the immigration officer on 2 February, there is evidence here of a breach by the adviser of cl 1 of the Code (a lack of diligence and due care).

Poor communication

[60] In order to assess the quality of the adviser's communication, it is necessary to first consider the Registrar's finding that there were two distinct stages in the adviser's instructions. According to the Registrar, the adviser's email of 2 February (at 1:12 pm) concluded the initial consultation and the adviser was not obligated to communicate with the appellant after this as she had not been formally instructed.[8] This occurred,

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[6] Texts appellant to the adviser (2 February 2023) at 5:06 pm and 5:39 pm.
[7] Immigration NZ Operational Manual (effective 1 December 2021), Note to I1.5.
[8] Registrar's decision (23 June 2023) at [5.6] and [7.2].

according to the Registrar, on 7 February (when the appellant signed the written agreement).

[61] While the Tribunal is in no position to make any definitive findings at this stage, the evidence before the Tribunal (being the evidence before the Registrar) shows that the appellant in her less than perfect English was seeking the authority from the adviser, as from 2 February (at 2:16 pm).

[62] It seems that the appellant, whose native language is clearly not English, conflated an authority with a written agreement or terms of engagement (indeed, the adviser has them in the same document). The adviser eventually sent the "Authority & Instructions Terms Of Engagement & Client Care Rules" document to the appellant on 7 February (at 11:54 am), in reply to yet another request that day from the appellant (at 11:53 am) for the authority ("paper to give you authorization").

[63] The appellant had even said to the adviser on 2 February (text at 5:39 pm) that she had not told the adviser not to work on her application.

[64] It was the responsibility of the adviser, faced with a client whose interim visa would expire in six days (from 2 February) and whose situation was plainly urgent, to send the authority/contract. The exchange between them shows that the appellant was looking to formally engage the adviser as from 2 February.

[65] On the evidence before the Tribunal, the Registrar wrongly found the adviser's obligations ceased on 2 February. Having made that finding, the Tribunal can now assess the quality of the adviser's communications.

[66] Upon receipt of the advice as to options from the adviser on 2 February (at 1:12 pm), the appellant sought further advice (at 2:16 pm) concerning what to do, since Immigration NZ had told her to leave New Zealand or make a s 61 request. The adviser did not respond with any substantive advice, but said she would step back and needed an authority (a document she had not sent the appellant).

[67] The appellant (at 5:39 pm) pointed out that the adviser had not sent an authority and she (the appellant) had not asked her to stop work. She repeated that Immigration NZ had said there would not be another interim visa. This prompted from the adviser the enigmatic and worthless reply, "We shall see…" The appellant then unsurprisingly asked the adviser what she meant. Again, there was no substantive immigration advice, yet it was apparent the appellant was looking for advice, particularly since the adviser had advised she should wait for another interim visa (advice which the appellant understood to be wrong).

[68] The appellant then waited until 7 February. There is no explanation for waiting five days. The adviser did send the authority on 7 February, in reply to the contact from the appellant that day. Six minutes later (at 12:00 pm), the adviser sent another email asking for the contract to be signed so the appellant could become a client. The middle paragraph of the adviser's email stated:

> It can also not be you who decides how we can allocate our workload. You could have avoided such a time pressure by simply contacting us earlier and not 1 week before your visa expires.

[69] In reply, the appellant (at 12:14 pm) said she would have contacted the adviser earlier if Immigration NZ had given her more time.

[70] The Tribunal will refrain from commenting at this point on the tone of the adviser's email and blaming the appellant's predicament on delay by her, but there does appear to be evidence in the exchange between them on 2 and 7 February 2023 of communications from the adviser which are less than professional. This might amount to a breach of cl 1 of the Code.

Conclusion

[71] There is evidence of incorrect advice on a material matter being given by the adviser and of unprofessional communications. Hence, there is evidence which might satisfy the statutory grounds of complaint of negligence and breach of the Code. At this stage, the Tribunal's findings can only be regarded as provisional. They will be revisited in light of all the evidence and the adviser's explanation when the complaint is referred to the Tribunal by the Registrar.

OUTCOME

[72] The Tribunal will hear the complaint. The Registrar is to prepare it for filing with the Tribunal.

ORDER FOR SUPPRESSION

[73] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[9] The Tribunal must balance the public interest in knowing of wrongdoing by advisers and the jurisprudence of the Tribunal, with the privacy of the individuals involved.

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

[74] There is no public interest in knowing the name of the adviser against whom the complaint is made at this stage. Nor is there any public interest in knowing the identity of the appellant.

[75] The Tribunal orders that no information identifying the adviser (or her firm) or the appellant is to be published other than to Immigration NZ.

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D J Plunkett
Chair