IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 28

Reference No: IACDT 006/23

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

Decision on the papers

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 08 November 2023

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	S Laurent, counsel

PRELIMINARY

[1] The complainant engaged the adviser to seek residence. The application was unsuccessful. The complainant says she was not properly advised by the adviser who did not know the immigration criteria.

[2] A complaint against the adviser made to the Immigration Advisers Authority (the Authority) has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged that the adviser 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] MM, the adviser, is a licensed immigration adviser and is self-employed with G Ltd (the consultancy).

[4] The complainant, YI, is a national of China. Her partner and visa sponsor is HG, a New Zealand citizen. She arrived in New Zealand in January 2020 and holds a work visa.

[5] The complainant lodged a partnership resident visa application herself with Immigration New Zealand (Immigration NZ) on 23 August 2022, but sent a letter to the government agency (dated 27 September 2022) withdrawing the application. In her letter, she said she had been in a genuine and happy relationship with her partner for two and a half years and they had been living together for almost two years. Their relationship had started to collapse in September due to various factors set out. They were hoping to work it out, but on 25 September they came to the difficult decision that the relationship could not continue. She was devastated but wanted to be honest. Their relationship ended on 25 September 2022.

[6] The couple resumed living together in late November or early December 2022.

[7] On about 9 January 2023, the complainant approached the adviser for immigration advice. This was followed by a telephone discussion between them on the same day. The adviser then sent an email to the complainant on 10 January 2023 relevantly stating (*verbatim*):

> Based on the information provided, it should meet the minimum requirements of lodgement. However, due to the withdrawal of your previous resident visa, INZ will certainly have concerns whether your relationship is stable. High quality documents are required to collect through daily life to convince INZ your relationship being genuine and stable and likely to endure.

[8] On 19 January 2023, the complainant and the consultancy entered into a service agreement. The adviser would prepare and lodge a partnership resident visa application. The fee was $5,500.

[9] The complainant appears to have paid a total of $5,175 between 20 January and 22 February 2023.

Adviser files residence application

[10] A resident visa application was prepared by the adviser and filed with Immigration NZ on about 20 February 2023.

[11] A visa officer rang the complainant on 12 May 2023 to discuss the withdrawal of the previous application. She advised the officer that she and her partner first began living together in December 2020. They had temporarily separated in September 2022 due to a lack of communication. They moved back together in December 2022.

[12] On the same day, Immigration NZ wrote to the adviser stating that it was not satisfied the couple had been living together for 12 months or more in a genuine and stable partnership. The complainant's previous residence application was withdrawn, as the relationship had ended on 25 September 2022. It therefore appeared they had been living together for under three months from 28 November 2022 (the date of their joint tenancy) until 20 February 2023 (lodging the application). They did not meet the criterion of living together for 12 months prior to lodgement. Further evidence was invited.

[13] The adviser presumably sent Immigration NZ's letter by email to the complainant that day, 12 May 2023. She also sent another email that day to the complainant. It is partially in Chinese (untranslated) and partially in English. The text in English reads as if it was an explanation from the complainant about the separation.[1] It stated that the break happened when the two of them were under huge pressure from work and study. They did not have the experience to handle the conflicts. It was not because they did not love each other or because they were cheating on each other. They did not have relationships with others. The break was only for three months and did not affect their long-term relationship. It was normal for relationships to go up and down. They were confident their relationship was genuine and stable and would endure long-term.

[1] Registrar's bundle of documents at 46. The Tribunal speculates that the email was intended by the adviser as the basis of a statement to be provided by the couple to Immigration NZ. Indeed, such a statement along the lines outlined in the email (dated 22 May 2023) was provided to Immigration NZ; see the Registrar's bundle at 11–14.

[14] A response to Immigration NZ's letter was sent to the government agency by the adviser in a letter on 24 May 2023. She said that by the time the application was filed in February 2023, the couple had been living together for one year and 11 months. According to Immigration NZ's immigration instructions, the government agency had to determine whether there were genuine and compelling reasons for any period of living apart. They had not lived together for three months, which was a short break rather than a complete end to the relationship. They had kept their joint bank account and remained in contact with each other. They did not enter into relationships with others.

[15] A statement (22 May 2023) signed by both the complainant and her partner, along with supporting documents, were sent to Immigration NZ.

[16] In their statement, the couple record having had an exclusive and genuine relationship since June 2020. They moved in together in December 2020. The relationship was stable until a break in September 2022. They were both under tremendous stress due to the factors set out. There was a lack of communication. They had no experience in handling the situation. The separation was not because they did not love each other. While separated, they did not have relationships with others. They continued to contact each other.

[17] According to the statement, the break was three months long, but it did not affect their relationship long-term. It was a great learning and growing opportunity and taught them how to handle conflicts and stress. During this time, their joint bank account remained valid. The break was not a full stop on their relationship. They grew closer to each other, as the relationship developed through these ups and downs. They had confidence it was strong, genuine and stable for the long-term.

Immigration NZ declines residence

[18] Immigration NZ declined the resident visa on 29 May 2023 on the basis that the couple had not been living together for 12 months or more in a genuine and stable partnership. The complainant had declared in her previous application that the relationship had ended on 25 September 2022 and later re-commenced on 28 November 2022. There was no mention of a temporary agreement to pause the relationship. They were not in a genuine and stable relationship between 25 September and 28 November 2022. Hence, they had lived together in a genuine and stable relationship between 28 November 2022 and 20 February 2023, a period of less than three months.

COMPLAINT

[19] On about 31 May 2023, the complainant made a complaint against the adviser to the Authority. She said the adviser was not able to identify the minimum requirements for residence. The adviser made her believe her application had a chance of success. This was not correct. It was important to note that Immigration NZ regarded her move out of the couple's home as a reset of the 'living together' requirement. The adviser was not honest and did not warn them that the best option was to wait for 12 months. The application was declined because they did not meet the requirement of living together for 12 months.

[20] Furthermore, according to the complainant, there was a lack of communication. She was not briefed before the phone call with the immigration officer on the important strategy regarding what to say. The adviser simply told her to be honest about what had happened.

[21] The adviser provided an explanation to the Authority on 25 June 2023. She said she had provided the correct advice as to how to demonstrate the stability of their relationship and that it was not affected by the previous "argument" (which had led to their earlier separation). For example, there was a further statement from the complainant and her partner and other supporting documents (this is presumably a reference to the materials sent by the adviser to Immigration NZ on 24 May 2023). The adviser said she should not be blamed for Immigration NZ's incorrect assessment of the application. The immigration instructions did not require the 12 months of 'living together' to be consecutive.

[22] The adviser provided an additional explanation to the Authority on 15 September 2023:

(1) As for whether she discussed the '12 months living together' criterion, the adviser said the reset was not a correct assessment by Immigration NZ, as could be seen from the decisions of the Immigration and Protection Tribunal.[2] The criterion did not require a continuous period of 12 months of living together. There was no separation agreement. The couple did not cancel their joint account. What happened was simply that two young people did not know how to handle stress from work and exams. This was part of the development of their relationship. The short period of separation made them realise they could not live without each other. It was an emotional move and was not the complete end of their relationship. The

[2] *OL (Partnership)* [2023] NZIPT 206530.

adviser said she had in fact identified the risk of Immigration NZ regarding the relationship as unstable, in her email of 10 January 2023 to the complainant.

(2) The adoption by the immigration officer of a reset was not a risk based on the complainant's situation. The adviser contended she should not have to predict the risk of, or be blamed for, an incorrect assessment by Immigration NZ.

Complaint referred to the Tribunal

[23] On 2 October 2023, the Registrar referred the complaint against the adviser to the Tribunal alleging breaches of the specified provisions of the Code:

(1) Failing to discuss the key requirements of the partnership resident visa, in particular the '12 months living together' criterion and resetting the clock, in breach of cl 1.

(2) Failing to carry out the complainant's informed instructions before lodging the resident visa application, in breach of cl 2(e).

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

(4) Failing to confirm in writing to the complainant the details of all material discussions about the resident visa application, in breach of cl 26(c).

JURISDICTION AND PROCEDURE

[24] 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.

[25] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[3]

[26] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[4] It has been established to deal relatively summarily with complaints referred to it.[5]

[27] 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.[6]

[28] The sanctions that may be imposed by the Tribunal are set out in the Act.[7] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[8]

[29] 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.[9]

From the Registrar

[30] The Tribunal has received from the Registrar the statement of complaint (2 October 2023), with supporting documents.

From the complainant

[31] There is a statement of reply (5 October 2023) and submissions (24 October 2023) from the complainant, with supporting documents.

From the adviser

[32] There is a statement of reply (16 October 2023) and memorandum (19 October 2023) from Mr Laurent, counsel for the adviser.

[33] No party has requested an oral hearing.

---

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

ASSESSMENT

[34] 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.
>
> **Client Care**
>
> 2. A licensed immigration adviser must:
>
> …
>
> e. obtain and carry out the informed lawful instructions of the client, and
>
> …
>
> **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
>
> …
>
> **File management**
>
> 26. A licensed immigration adviser must:
>
> …
>
> c. confirm in writing to the client the details of all material discussions with the client
>
> …

(1) Failing to discuss the key requirements of the partnership resident visa, in particular the '12 months living together' criterion and resetting the clock, in breach of cl 1

[35] This head of complaint is focused on the adviser's communication with the complainant, but it is necessary first to review whether Immigration NZ correctly declined the resident visa.

[36] The key immigration requirement the complainant had to meet was establishing that she and her New Zealand partner "have been living together for 12 months or more in a partnership that is genuine and stable".[10] An application "will" be declined if they have not lived together for 12 months or more "at the time the application is lodged".[11] The onus of proof lay with the complainant.

[37] Where there are periods of separation, applications are not automatically declined.[12] Instead, immigration officers have to determine whether there are genuine and compelling reasons for the separation. This depends on the circumstances in each case and certain factors are listed in the immigration instructions as relevant.[13] Mr Laurent correctly submits that the period of 12 months need not be continuous and while it must be prior to lodgement, it need not be immediately prior to lodgement.[14]

[38] Immigration NZ declined the resident visa on 29 May 2023 because it was not satisfied the couple had lived together in a genuine and stable relationship for 12 months prior to lodgement. The officer found that the relationship had ended on 25 September 2022 and re-commenced on 28 November 2022. The officer counted only the period from 28 November 2022 until 20 February 2023 (the date of lodgement).

[39] Mr Laurent contends that Immigration NZ did not decline on the basis of broken cohabitation and says there was no indication that the question of a consecutive (continuous) period was the issue from Immigration NZ's perspective. This is not correct. While the officer perpetually referred in the decline letter to the combined criteria – "living together… genuine and stable", it is clear that it was the lack of continuity over the full period of 12 months immediately prior to lodgement which was the reason for the decline. The officer did not use the word "reset", but plainly regarded the resumption of living together on about 28 November as the commencement of a new relationship and discounted the earlier period of living together.

[40] The officer did not deal with the adviser's point made in her letter to Immigration NZ on 24 May 2023 that the instructions required an assessment of the reasons for separation. The couple had been living together since December 2020, so the officer should have assessed the period of separation of less than three months in the light of the total period of the relationship of about 26 or 27 months (December 2020 until February 2023).

---

[10] Immigration Instructions, F2.5.a (effective 8 May 2017).
[11] At F2.5.d.iii.
[12] Immigration Instructions, F2.30.1 (effective 29 November 2010).
[13] At F2.30.1.b.
[14] *ZK (Partnership)* [2019] NZIPT 205319 at [35].

[41] It is not strictly the role of this Tribunal to assess the correctness of residence decisions made by Immigration NZ and the Tribunal is not in any position to determine whether the relationship is genuine and stable, but it would appear that the officer overlooked F2.30.1 of the instructions (a provision expressly cited by the adviser in her letter of 24 May 2023 to Immigration NZ). The Tribunal agrees with the adviser's submission to the Authority that she should not be blamed for an apparently incorrect decision by the agency (at least in terms of the 'living together' criterion). There was evidence before the officer that during the separation they had maintained their relationship (the joint account and communication),[15] even if they were not living together. There was no assessment of this evidence.

[42] Turning then to the adviser's communication with the complainant, the focus of this head of complaint, the Registrar alleges that the adviser failed to discuss with her the requirement of 'living together' (for 12 months) and the possibility of a reset. The Registrar is correct. There is no evidence of any notification by the adviser of any risk around the 'living together' criterion or of a reset. The failure to draw attention to this requirement means that the adviser did not expressly notify the complainant that Immigration NZ might discount the earlier period of cohabitation and count only the latest period they were together, which would be fatal to the application.

[43] However, the adviser did state in her email to the complainant of 10 January 2023, before the visa application was filed, that the withdrawal of the earlier application raised a risk that the stability of the relationship might be questioned. Hence, she said, there was a need to collect evidence of "daily life". This is a reference, albeit somewhat oblique, to the 'living together' criterion.

[44] Plainly, the adviser was aware of the risk of a decline as a result of the separation. The adviser saw the separation in terms of the stability criterion, whereas the officer used the 'living together' criterion to decline the application. As a matter of common sense, separation undermines both criteria.

[45] While the adviser did not expressly draw to the complainant's attention the 'living together' criterion, she did identify to her the risk of decline based on the separation. The complainant must have been aware of the risk of decline from the separation. Whether or not the notification of risk by the adviser was in terms of the 'living together' or the

[15] The complainant has informed the Tribunal that the couple did not use the joint account during their period of separation. That is not, however, the importance of the information. Having been informed by the adviser of its continued existence, the immigration officer should have made enquiries as to the extent the relationship continued during the period of separation, including the extent (if at all) of the use of the joint account. Similarly, their continued communication.

stability criteria (or preferably both), is less important. Notwithstanding the adviser's failure to notify the requirement of living together, as she should have, the complainant was expressly notified of the key risk of separation. In concluding that there was no breach by the adviser in failing to expressly draw attention to the living together criterion, the Tribunal takes into account that on the evidence, the decline of the application on the basis of that criterion was wrong.

[46] The first head of complaint is dismissed.

(2) Failing to carry out the complainant's informed instructions before lodging the resident visa application, in breach of cl 2(e)

[47] The allegation here is that by failing to inform the complainant of the 'living together' criterion and of the risk of Immigration NZ adopting a reset approach, the complainant's instructions to proceed with the application were not fully "informed".

[48] The Registrar is correct, but as the adviser notified the key risk (separation), the complainant was adequately informed. Even if there was a breach of cl 2(e), the gravity of the adviser's fault is not sufficient to justify a disciplinary response.[16] While the adviser's fault (the failure to notify the requirement to live together for 12 months/the risk of reset) can be causatively linked to the decline, the decline on that ground was wrong.

[49] The second head is dismissed.

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

[50] The consultancy's service agreement used by the adviser states at clause 12 (last sentence) that:

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

[51] The Registrar expresses the view that this does not sufficiently inform the complainant how best to access the Code. It is noted by the Registrar that the adviser did not provide a website link to the Code on the Authority's website, nor a copy of the Code.

[52] This issue is dealt with in a recent decision of the Tribunal.[17] The best way for advisers to provide access to the Code would be to provide a hard or electronic copy, or

---

[16] *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [60] (footnote omitted).
[17] *BT v Li* [2023] NZIACDT 27 at [36].

a link to the Code on the Authority's website. However, the Code does not actually require an adviser to provide such access. It merely requires that the client be advised how to access the Code. The provision of a copy on request is plainly a viable way to access the Code.

[53] The third head is dismissed.

(4) Failing to confirm in writing to the complainant the details of all material discussions about the resident visa application, in breach of cl 26(c)

[54] The Registrar alleges there is no evidence showing that the adviser confirmed in writing to the complainant all the material discussions concerning the visa application. Mr Laurent contends that the statement of complaint does not give any particulars of the alleged material discussions not committed to writing. He says the adviser is entitled to have a clear case to answer.

[55] Mr Laurent is correct. The Registrar has not identified any material matter discussed between the adviser and the complainant which the adviser did not commit to writing. The Tribunal declines to speculate. The adviser certainly advised in writing her opinion that the complainant should meet the criteria (see the email of 10 January 2023). There should have been fuller and clearer advice as to the potential consequences of the separation, but the Tribunal has found notification of that risk (in the same email) to be adequate. Additionally, as Mr Laurent states, the adviser provided written advice to the complainant by email on 12 May 2023 as to how to deal with Immigration NZ's letter of concern of the same day (the form of that advice appears to be listing the points to make in a statement from her to be given to the government agency).

[56] The written advice is brief and rather limited in scope, but it has not been shown that any material discussions were not confirmed in writing.

[57] The fourth head is dismissed.

OUTCOME

[58] The Tribunal concludes that while the adviser's advice to her client and communication was not of the highest standard, it was adequate. It has not been established that the adviser breached any provision of the Code. The complaint is dismissed.

ORDER FOR SUPPRESSION

[59] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[18]

[60] There is no public interest in knowing the name of the complainant or her partner and, given the outcome, of the name of the adviser or her consultancy.

[61] The Tribunal orders that no information identifying the complainant, her partner, the adviser or her consultancy is to be published other than to Immigration NZ.

_____

D J Plunkett
Chair

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