

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2023] NZIACDT 7

Reference No: IACDT 09/22

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

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

**BETWEEN** **EQ**  
Complainant

**AND** **CHRISTOPHER MARK  
McCARTHY**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION  
(Sanctions)  
Dated 20 March 2023**

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: B N Feschiev, representative  
Adviser: W Calvert, counsel

## INTRODUCTION

[1] Christopher Mark McCarthy, the adviser, was engaged by EQ, the complainant, to file an investor residence visa application. He filed three expressions of interest on her behalf. The second and third expressions were made without instructions. Mr McCarthy also failed to communicate with Immigration New Zealand (Immigration NZ) or the complainant for long periods.

[2] A complaint against Mr McCarthy to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 19 December 2022 in *EQ v McCarthy*.<sup>1</sup> Mr McCarthy was found to have breached a number of provisions of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] It is now for the Tribunal to determine the appropriate sanctions.

## BACKGROUND

[4] The narrative leading to the complaint is set out in the earlier decision of the Tribunal and will only be briefly summarised here.

[5] At the relevant time, Mr McCarthy was a licensed immigration adviser. His licence expired on 27 April 2022. He is a director of Corporate Migration NZ Ltd, of Masterton.

[6] The complainant and her family (her husband and daughter) are nationals of Bulgaria. Their representative is Mr Feschiev, a New Zealand based friend and business partner of the complainant and her husband.

[7] Mr Feschiev approached Mr McCarthy on 20 November 2019 asking him to represent the family in migrating to New Zealand under Immigration NZ's investor category. An expression under the investor category was filed by Mr McCarthy with Immigration NZ on 17 December 2019. It was successful with Immigration NZ inviting the complainant to apply for residence on 19 December 2019. The invitation was valid for four months. However, the collection of supporting documents in Bulgaria became problematic due to the COVID-19 pandemic lockdowns in that country. No residence application was filed by the deadline.

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<sup>1</sup> *EQ v McCarthy* [2022] NZIACDT 29.

[8] Mr Feschiev continued communicating with Mr McCarthy to compile the application on the understanding that Mr McCarthy had sought an extension from Immigration NZ and/or an application had eventually been made.

[9] On 14 July 2021, Mr McCarthy filed another expression with Immigration NZ, without informing the complainant or Mr Feschiev or seeking their instructions.

[10] Mr Feschiev continued to seek updates. Immigration NZ attempted to contact Mr McCarthy but was unsuccessful. It wrote to him on 4 November 2021 concerning missing information, but he did not respond. The expression was declined on 18 November 2021 for lack of mandatory information.

[11] Mr McCarthy then filed a third expression on 11 March 2022, also unknown to the complainant or Mr Feschiev and with no instructions. It was successful, with Immigration NZ writing to Mr McCarthy on 29 March 2022 inviting the complainant to apply for residence. By this time, Mr McCarthy was no longer acting for the complainant. It is not known by the Tribunal whether a residence application was filed.

#### *Decision of the Tribunal*

[12] The Tribunal found Mr McCarthy breached numerous provisions of the Code:

- (1) Failed to exercise due care and diligence in ensuring the second expression was completed correctly and failed to carry out the complainant's instructions, in breach of cls 1 and 2(e).
- (2) Failed to inform the complainant that he could not continue to provide services and advise her where she could get further assistance, in breach of cl 28(c).
- (3) Failed to provide a fair and reasonable refund, in breach of cl 24(c).
- (4) Failed to maintain a relationship of confidence and trust by failing to engage with the complainant, in breach of cl 2(a).
- (5) Failed to update the complainant regarding communications with Immigration NZ on the second expression, in breach of cl 26(b).
- (6) Failed to follow his internal complaints procedure, in breach of cl 15(b).
- (7) Failed to provide the client file to the Authority on request, in breach of cl 26(e).

- (8) Failed to provide a copy of the applications and return all documents following decline of the second expression, in breach of cls 26(f) and 27(b).
- (9) Failed to obtain instructions for the second and third expressions, in breach of cl 2(e).

## **SUBMISSIONS**

### *Submissions from the Registrar*

[13] There are submissions on behalf of the Registrar (Ms Issar) dated 17 January 2023. It is contended that Mr McCarthy's conduct fell well short of maintaining professional standards and caused significant adverse consequences for the complainant.

[14] The Registrar notes that the complainant paid Mr McCarthy a total of \$16,056.66, being \$10,366.66 for Mr McCarthy's fee and \$5,690 for Immigration NZ's fees. Of Immigration NZ's fees, \$620 was for the expression. Mr McCarthy lodged the expression but failed to complete the follow-up work. He should be required to refund the remainder of Immigration NZ's application fees (\$5,070) in light of his failure to complete the work instructed. He should also be required to give a full refund of the fees paid for the provision of immigration advice (\$10,366.66) or should only be permitted to retain a nominal amount for the limited service provided.

[15] This is Mr McCarthy's second appearance before the Tribunal (see details of the first complaint later in this decision). It is noted that Mr McCarthy has been unwell.

[16] The Registrar would usually seek a higher penalty for repeated misconduct, but a penalty of \$4,000 appears appropriate here as the focus should be on refunding the significant amounts paid by the complainant. It is therefore submitted that the appropriate sanctions would be:

- (1) Censure.
- (2) A penalty in the vicinity of \$4,000.
- (3) A full refund of \$10,366.66, or retention of a nominal amount.
- (4) An order for a refund of \$5,070 for Immigration NZ's application fees.

*Submissions from the complainant and adviser*

[17] The Tribunal records that in its decision (19 December 2022) upholding the complaint, it set a timetable for the parties to produce submissions on sanctions. Only the Registrar complied with the timetable. Despite granting extensions to both the complainant and the adviser and then further extending the timetable on 2 March 2023 as a final deadline, no submissions were received from either the complainant or the adviser. No reason was given by either party for failing to comply with the final deadline. The parties were advised on 2 March that a decision would be issued whether or not they had produced submissions.

## **JURISDICTION**

[18] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:<sup>2</sup>

### **50 Determination of complaint by Tribunal**

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[19] The sanctions that may be imposed are set out at s 51(1) of the Act:

### **51 Disciplinary sanctions**

- (1) The sanctions that the Tribunal may impose are—
  - (a) caution or censure:
  - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
  - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
  - (d) cancellation of licence:
  - (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:

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<sup>2</sup> Immigration Advisers Licensing Act 2007.

- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[20] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

### 3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[21] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>3</sup>

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[22] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

good, but also to protect the collective reputation and public confidence in the profession itself.<sup>4</sup>

[23] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.<sup>5</sup>

[24] The most appropriate penalty is that which:<sup>6</sup>

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

## DISCUSSION

[25] Mr McCarthy was found to have committed no less than nine unprofessional acts comprising the breach of 10 provisions of the Code. The most significant breaches involved a lack of due care and diligence, coupled with a failure to communicate with the complainant (or her representative) and Immigration NZ.

[26] It is not known whether Mr McCarthy's unprofessional conduct had any real effect on the complainant's ability to seek residence in New Zealand, apart from delaying what might have been a successful decision from Immigration NZ. The residence application invited on the first expression could not be made because of the pandemic in Bulgaria,

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<sup>4</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

<sup>5</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>6</sup> *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

a matter Mr McCarthy is plainly not responsible for. The fact the first and third expressions were successful does not mean any subsequent residence application would have enjoyed success. The current immigration status of the complainant and her family is unknown. There is no evidence before the Tribunal that Mr McCarthy's failings had any serious effect on the complainant's immigration prospects, beyond delay.

[27] The Registrar observes that this is Mr McCarthy's second appearance before the Tribunal. An earlier complaint against him was upheld in *BU v McCarthy*.<sup>7</sup> He was found to have been unprofessional and lacked diligence in failing to lodge a request with Immigration NZ under s 61 of the Immigration Act 2009. Furthermore, he had consciously allowed a family to believe that a request had been made, having pretended that an application had in fact been made. A communication was found to be deliberately misleading and deceptive. The latter amounted to dishonest or misleading behaviour. The sanctions imposed were censure, prevention from reapplying for a licence for two years, a financial penalty of \$4,000, a refund to his client of \$4,025 for the fee paid, and \$2,000 compensation for emotional distresses.

[28] In the Tribunal's decision upholding the current complaint, it remarked that Mr McCarthy's mental ill-health at the relevant time would be an important mitigating factor in assessing the appropriate sanctions.

[29] There is a report from Dr Faisandier, a clinical psychologist, of 27 September 2022. Mr McCarthy has in the past suffered from [redacted] and has developed a number of chronic stress-related health problems. During much of 2021, he was feeling entirely overloaded, burnt out and was consumed with stress and anxiety. An accident had left him with chronic pain and other symptoms. Dr Faisandier described him as remorseful, confused and blaming himself. She said he had shown good insight in not renewing his licence and deciding not to work as an immigration adviser. She recommended various forms of therapy.

#### *Caution or censure*

[30] Mr McCarthy is censured to mark the Tribunal's disapproval of his conduct.

#### *Financial penalty*

[31] The Registrar submits that \$4,000 would be appropriate. There are no submissions from the complainant or the adviser. Having regard to the multiple

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<sup>7</sup> *BU v McCarthy* [2022] NZIACDT 11 and *BU v McCarthy* [2022] NZIACDT 13.



breaches, Mr McCarthy's disciplinary record and his health, the Tribunal agrees \$4,000 would be an appropriate penalty.

#### *Refund / compensation*

[32] In her original complaint, the complainant sought a full refund of all monies paid to Mr McCarthy (\$16,056.66). The complainant has declined to address the Tribunal on the issue of a refund. Plainly a full refund would not be appropriate as the first expression was successful and the failure to file a follow-up residence application was not Mr McCarthy's fault. He appears to have done considerable work on the application.

[33] While the Tribunal found that Mr McCarthy did not provide a fair and reasonable refund, the complainant has made no argument or produced any evidence as to what would be a fair and reasonable refund. The Tribunal declines to speculate. The exception will be the monies Mr McCarthy took in advance for Immigration NZ's fees. The Registrar says this is \$5,070 and Mr McCarthy does not deny this. He should not be allowed to keep this windfall, being fees for an application which was never made. There will be a refund of \$5,070.

[34] No compensation has been sought by the complainant.

#### **OUTCOME**

[35] Mr McCarthy is:

- (1) Censured.
- (2) Directed to pay to the Registrar within 21 days the sum of \$4,000.
- (3) Directed to pay to the complainant within 21 days the sum of \$5,070.

#### **ORDER FOR SUPPRESSION**

[36] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>8</sup>

[37] There is no public interest in knowing the name of Mr McCarthy's client, the complainant. Certain medical information concerning Mr McCarthy will also be redacted in the public decision to protect his privacy.

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<sup>8</sup> Immigration Advisers Licensing Act 2007, s 50A.

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

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D J Plunkett  
Chair