

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2024] NZIACDT 14

Reference No: IACDT 016/23

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **SC**
Complainant

AND **NIRMALA KRISHNA MURTHY**
Adviser

Decision on the papers

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 23 April 2024

REPRESENTATION:

Registrar: Self-represented

Complainant: R Small, counsel

Adviser: Self-represented

PRELIMINARY

[1] The complainant was a failed refugee claimant. He approached the adviser seeking assistance to renew a work visa. She made a work visa application for him. It failed.

[2] A complaint against the adviser was made to the Immigration Advisers Authority (the Authority). It has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged the work visa application was futile and hence the adviser was negligent and/or breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), both being grounds of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[3] Nirmala Krishna Murthy, the adviser, is a licensed immigration adviser and director of Immigration Consultancies Ltd (also known as ICL Immigration) of Auckland.

[4] SC, the complainant, is a citizen of Bangladesh. He arrived in New Zealand in 2018 on a false passport and with fabricated supporting documents. He made a refugee claim which was declined. An appeal to the Immigration and Protection Tribunal (the IPT) was dismissed on 30 November 2020.¹ His claim was found not to be credible. A second refugee claim was refused on 30 June 2022 and an appeal to the IPT was dismissed on 22 September 2022.²

[5] Meanwhile, on 24 August 2022, the complainant had been granted a work visa, expiring on 24 August 2023.

[6] The complainant then approached Ms Murthy. On 1 November 2022, they met. Later that day she sent him a summary of their discussion. She recorded that he had asked for assistance obtaining a work visa, with the support of his employer. Ms Murthy expressed concern that as he had made a refugee claim, Immigration New Zealand (Immigration NZ) would not usually consider another category of application. He requested her to try her best. She expressed to him that she was happy to present a case highlighting the shortage of chefs. Ms Murthy advised the complainant she would check his options, speak to his employer and then give feedback.

¹ *DJ (Bangladesh)* [2020] NZIPT 801725.

² *DZ (Bangladesh)* [2022] NZIPT 802090.

[7] On 2 November 2022, Ms Murthy and the complainant entered into a service contract covering a work visa. On the same day, she sent him an invoice for \$2,530, as well as a copy of the Code.

[8] Ms Murthy made an application to Immigration NZ on 11 November 2022 for a work visa for the complainant.

[9] Immigration NZ wrote to the complainant on 23 January 2023 stating that, as his refugee claim had been refused on 30 June 2022 and an appeal dismissed on 22 September 2022, it appeared he was not entitled to apply for a further visa of any type while in New Zealand (immigration instruction E8.10.15(a) and s 150(2) of the Immigration Act 2009). His comments were invited.

[10] On 24 January 2023, Ms Murthy entered into a service contract with the complainant for the work responding to Immigration NZ's letter. At the same time, she sent him an invoice for \$1,380.

[11] On the same day, the complainant emailed the refugee claim documents in his possession to Ms Murthy.

[12] On 26 January 2023, Ms Murthy wrote to the solicitor representing the complainant on his refugee claim seeking a copy of his file.

[13] Ms Murthy responded on 12 February 2023 to Immigration NZ's letter of 23 January 2023. She said that the complainant did not receive correct information about his eligibility, since when she rang Immigration NZ's helpdesk on 1 November 2022, the officer confirmed that any application lodged would be assessed. Ms Murthy added that the complainant was a chef, a skilled profession on the skill shortage list. He met the criteria for a visa.

[14] On 6 April 2023, Immigration NZ wrote to the complainant declining the visa application made on 11 November 2022, on the basis his refugee claim had been refused and an appeal dismissed on 22 September 2022 (pursuant to immigration instruction E8.10.15(a) and s 150(2) of the Immigration Act).

[15] With the expiry of his visa in August 2023, the complainant departed New Zealand in November 2023.

COMPLAINT

[16] On about 17 August 2023, the complainant made a complaint to the Authority, assisted by counsel. It was noted that Ms Murthy had:

1. Failed to obtain Immigration NZ's file for this high risk case.
2. Made a completely hopeless application which was statute-barred.

[17] The complainant sought a refund of the fees paid, compensation for his wasted costs and stress, together with cancellation of Ms Murthy's licence.

[18] The Authority formally wrote to Ms Murthy on 29 November 2023 setting out the particulars of the complaint and seeking her explanation.

[19] Ms Murthy provided her explanation to the Authority on 18 December 2023. She pointed out that at the time the complainant applied for the work visa, his appeal hearing was pending, having been scheduled for 16 November 2023. She said that she had consulted a helpdesk officer at Immigration NZ. As for the allegation that she had not lodged any information requests with Immigration NZ prior to filing the visa application, she said that as there was another adviser dealing with the refugee claim, it was inappropriate to request the complainant's refugee file from Immigration NZ or the other adviser.

Complaint referred to Tribunal

[20] On 22 December 2023, the Registrar referred the complaint against Ms Murthy to the Tribunal alleging negligence or alternatively breaches of the specified provisions of the Code:

Negligence

1. Failing to realise the complainant was ineligible for any type of visa, following the refusal of his refugee appeal.
2. Failing to request the complainant's complete file from Immigration NZ, the IPT or his previous solicitor, prior to filing the application.
3. Failing to recognise that the application was likely futile and obtaining the complainant's written consent before proceeding.

4. Failing to provide and explain the professional standards to the complainant, prior to being engaged.
5. Failing to provide the Authority with a complete client file and confirm material discussions in writing.

Breaches of the Code

6. Failing to conduct herself with professionalism, diligence and due care in failing to request the complainant's previous immigration records and therefore failing to recognise he could not submit another application, in breach of cl 1.
7. Failing to recognise that the complainant's application was likely futile and to obtain his consent in writing before proceeding, in breach of cl 9.
8. Failing to provide evidence that the complainant had been provided with the professional standards and had them explained to him prior to engagement, in breach of cl 17(a) and (b).
9. Failing to provide the Authority with a complete client file, including key communications with the client and other important parties, in breach of cl 26(a)(iii).

JURISDICTION AND PROCEDURE

[21] 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.

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

³ Immigration Advisers Licensing Act 2007, s 45(2) and (3).

[23] 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

[24] 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

[25] 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

[26] 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

[27] The Tribunal has received from the Registrar the statement of complaint (22 December 2023), with supporting documents.

From the complainant

[28] There is a statement of reply (10 January 2024) from counsel. He records the full fees and expenses incurred by the complainant.

From the adviser

[29] In her submissions (5 February 2024), Ms Murthy states that when engaged she conducted a thorough review of the relevant immigration policies and consulted with a helpdesk officer regarding the complainant's eligibility for a new visa. Given the pending refugee claim appeal, she advised him of his eligibility based on the information and guidance available. The complainant was well informed regarding his immigration matters and she did not need to step into the active management of his refugee appeal being handled by another professional.

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].

[30] As for the professional standards and the Code, she explained them at the meeting on 1 November 2023 and provided him with a copy on the following day. As for the client file, she maintains an accurate and complete file, including all relevant communications.

[31] In conclusion, Ms Murthy submits that her services to the complainant were executed with due diligence, in good faith and in alignment with the immigration instructions and the professional standards.

ASSESSMENT

[32] The Registrar relies on s 150 of the Immigration Act and the following provisions of the Code:

150 Special provision relating to claimants granted temporary visas

- (1) This section applies to any person who—
 - (a) is a claimant to whom a temporary entry class visa has been granted, whether before or after the person became a claimant; or
 - (b) having been a person to whom paragraph (a) applies, ceases to be a claimant by virtue of his or her claim being declined.
- (2) A person to whom this section applies may not, either before or after the expiry of the temporary entry class visa,—
 - (a) apply for a further visa of any class or type while in New Zealand; or
 - (b) while in New Zealand, request a special direction or make a request for the grant of a visa under section 61; or
 - (c) bring any appeal under section 187 to the Tribunal.
- (3) Despite subsection (2)(a), a claimant may apply for a further temporary visa for such period as may be required for the claimant to be lawfully in New Zealand while his or her claim is determined.
- (4) Nothing in this section prevents a person from bringing an appeal to the Tribunal under section 206.
- (5) This section ceases to apply to a person if and when—
 - (a) the person is recognised as a refugee or a protected person; or
 - (b) the person leaves New Zealand; or
 - (c) the person is granted a visa (other than a temporary visa granted under the exception referred to in subsection (3)).

*The Code***General**

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Futile immigration matters

9. If a proposed application, appeal, request or claim is futile, grossly unfounded, or has little or no hope of success, a licensed immigration adviser must:
 - a. advise the client in writing that, in the adviser's opinion, the immigration matter is futile, grossly unfounded or has little or no hope of success, and
 - b. if the client still wishes to make or lodge the immigration matter, obtain written acknowledgement from the client that they have been advised of the risks.

Code and complaint documents

17. Before entering into a written agreement with the client, a licensed immigration adviser must:
 - a. provide the client with the summary of licensed immigration advisers' professional responsibilities, as published by the Registrar of Immigration Advisers
 - 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:
 - a. maintain a hard copy and/or electronic file for each client, which must include:
 - ...
 - iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation
 - ...

[33] The heads of negligence and breaches of the Code alleged overlap. The overlapping heads will be considered together, with the breach of a specific professional obligation considered first.

1. *Failing to realise the complainant was ineligible for any type of visa, following the refusal of his refugee appeal*
3. *Failing to recognise that the application was likely futile and obtaining the complainant's written consent before proceeding*
6. *Failing to conduct herself with professionalism, diligence and due care in failing to request the complainant's previous immigration records and therefore failing to recognise he could not submit another application, in breach of cl 1*
7. *Failing to recognise that the complainant's application was likely futile and to obtain his consent in writing before proceeding, in breach of cl 9*

[34] The second part of the sixth head, concerning the failure to recognise the complainant could not lodge another application, overlaps with the first, third and seventh heads.

[35] Counsel for the complainant correctly contends that the visa application made on 11 November 2022 was hopeless. Section 150(2)(a) of the Immigration Act prohibited the complainant (to whom s 150(1)(b) applied) from applying for any visa while he remained in New Zealand, given the two failed refugee claims. This is clear from Immigration NZ's letter declining the visa on 6 April 2023, as well as its earlier letter of 23 January 2023 drawing this provision to his attention and seeking comments.

[36] Ms Murthy appears to blame a helpdesk officer from Immigration NZ but it is apparent from her response of 12 February 2023 to Immigration NZ that the officer merely said any application would be assessed. This is not, self-evidently, any confirmation of eligibility. She also told the Authority that at the time of the application, there was a pending appeal. This is not correct. The complainant's second refugee appeal had been dismissed more than a month earlier.

[37] Ms Murthy did not exercise professionalism, diligence or due care in failing to recognise that the complainant was ineligible for any visa and that his application was doomed, a breach of cl 1. Whether or not she realised it, the application was futile. Her failure to advise the complainant in writing of its futility and obtain his written acknowledgement that he had been so advised and she could proceed, was a breach of cl 9.

[38] The failure to recognise the futile nature of the application amounts to a lack of reasonable or due care and therefore negligence, in addition to the breaches of the Code.

[39] The first, third, sixth (partial) and seventh heads of complaint are upheld.

2. *Failing to request the complainant's complete file from Immigration NZ, the IPT or his previous solicitor, prior to filing the application*

6. *Failing to conduct herself with professionalism, diligence and due care in failing to request the complainant's previous immigration records and therefore failing to recognise he could not submit another application, in breach of cl 1*

[40] At their meeting on 1 November 2022, the complainant told Ms Murthy that he was a failed refugee claimant. She appropriately expressed concern, but should have realised his more complex immigration history mandated a request of Immigration NZ and the complainant's solicitor for his immigration and refugee files. She should not have relied on what he told her, though clearly he told her enough to alert her to a probable barrier to another visa.

[41] Ms Murthy says she did not need to step into the active management of the refugee claim being handled by another professional. Plainly, requesting a copy of the file (for the purpose of possibly seeking another type of visa) is not interfering in the running of the refugee claim. This is not an adequate reason for her inaction. The complainant's immigration file would, or at least should, have alerted Ms Murthy to the futility of another work visa application.

[42] The failure to request the immigration and refugee files is a further instance of a lack of professionalism, diligence and due care.¹⁰ It is a breach of cl 1 and amounts to negligence as well.

[43] The second and sixth (partial) heads are upheld.

4. *Failing to provide and explain the professional standards to the complainant, prior to being engaged*

¹⁰ While not the subject of this complaint, the Tribunal notes that Ms Murthy even appears not to have asked the complainant for his refugee documents until after the visa application had been filed (see his email to her on 24 January 2023); Registrar's bundle at 55.

8. *Failing to provide evidence that the complainant had been provided with the professional standards and had them explained to him prior to engagement, in breach of cl 17(a) and (b)*

[44] Prior to the client engaging the adviser, the latter must provide and explain a summary of the adviser's professional responsibilities. The Registrar has published such a document, headed "Professional Standards". It is a very truncated version of the Code, together with a broad list of the work of the Authority and its contact details.

[45] The Registrar says Ms Murthy did not do so. According to the Registrar, reference to the professional standards was absent in the service contract of 2 November 2022 and there was no reference (the Registrar does not say where) to Ms Murthy providing or explaining her professional responsibilities. It is alleged she has failed to produce evidence that she provided to the complainant and explained the professional standards prior to engagement.

[46] It is true that the service contract does not expressly refer to the Registrar's document, "Professional Standards", but cls 2.1 and 12.4 refer to the Code (though regrettably to a long expired version of the Code). Furthermore, Ms Murthy did provide a copy of the current Code to the complainant on the same day he signed the contract, though it was after he had signed it (not before, as the Code requires of the professional standards). Given her evidence that she mentioned the Code and the professional standards at the meeting before he signed the contract and it is proven she sent him the full Code, her failure to give him the professional standards document before he signed is only a minor breach of cl 17(a).

[47] Turning then to the obligation in cl 17(b) to explain the summary, Ms Murthy says she explained her responsibilities and the Code at the meeting. While Ms Murthy has no file note of the discussion and did not record giving the explanation in her email that day to the complainant, these heads of complaint must fail as the Registrar has produced no evidence from the complainant that there was no mention of the professional standards. This failure to provide the professional standards or explain them was not a matter of complaint from the complainant.

[48] Additionally, it is not correct that Ms Murthy failed to provide evidence of compliance (or at least substantial compliance) with her obligation, as her own assertion of an explanation at the meeting is good evidence in the absence of any contrary evidence from the complainant.

[49] There is evidence that Ms Murthy has substantially complied with her obligation to provide and explain her professional responsibilities. The fourth and eighth heads are dismissed.

5. *Failing to provide the Authority with a complete client file and confirm material discussions in writing*

9. *Failing to provide the Authority with a complete client file, including key communications with the client and other important parties, in breach of cl 26(a)(iii)*

[50] The Registrar notes that Ms Murthy's phone call to Immigration NZ's helpdesk on 1 November 2022 is not mentioned in any written communication with the complainant. However, it is apparent from Ms Murthy's letter to Immigration NZ on 12 February 2023 that the officer told her nothing beyond the obvious observation that any application would be assessed. This is not a material communication requiring written notification to the complainant.

[51] Furthermore, the Registrar has cited the wrong provision of the Code. It is cl 26(c) which requires written confirmation of material discussions. Clause 26(a)(iii) merely requires that a copy of any such communication (if it exists) be kept on the file.¹¹

[52] The Registrar further notes that on receipt of Immigration NZ's letter of concern of 23 January 2023, Ms Murthy's office tried to phone the complainant to arrange a meeting, but the call could not be connected. In an email to the complainant from Ms Murthy's office, he was asked whether he could come in on 25 January. Then on 24 January, Ms Murthy sent an email to the complainant attaching a new service contract and a further invoice. The Registrar contends a "meeting" took place, either by telephone or email. It is contended that Ms Murthy did not confirm that discussion in writing to the complainant.

[53] There is no evidence an in-person meeting or a telephone discussion ever took place. If there was an email exchange, plainly it would be in writing.

[54] The fifth and ninth heads are dismissed.

OUTCOME

[55] The first, second, third, sixth and seventh heads of complaint are upheld. Ms Murthy has breached cls 1 and 9 of the Code. Her conduct amounts to negligence.

¹¹ *BC v Lawlor* [2022] NZIACDT 10 at [87]–[88].

SUBMISSIONS ON SANCTIONS

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

[57] A timetable for submissions is set out below. In setting the sanctions, the Tribunal will take into account Ms Murthy's lengthy disciplinary history. 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, supported by invoices, receipts and the like.

Timetable

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

- (1) The Registrar, the complainant and Ms Murthy are to make submissions by **15 May 2024**.
- (2) The Registrar, the complainant and Ms Murthy may reply to submissions of any other party by **29 May 2024**.

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.¹² It must balance the public interest in knowing of the Tribunal's work, with the privacy of the individuals involved.

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

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

D J Plunkett
Chair

¹² Immigration Advisers Licensing Act, s 50A.