

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 78

Reference No: IACDT 020/18

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

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

**BETWEEN** **IMMIGRATION NEW ZEALAND  
(DARREN CALDER)**  
Complainant

**AND** **KHIENG (KEVIN) CHIV**  
Adviser

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**DECISION  
(Sanctions)  
Dated 4 December 2019**

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**REPRESENTATION:**

Registrar: M Denyer, counsel  
Complainant: Self-represented  
Adviser: S Ravindra, counsel

## INTRODUCTION

[1] The complainant is Immigration New Zealand (Mr Darren Calder). The complaint concerns a number of clients of Mr Chiv, the adviser. Most were offered employment by companies of Mr Chiv. The Tribunal upheld the complaint against him in a decision issued on 21 October 2019 in *Immigration New Zealand (Calder) v Chiv*.<sup>1</sup>

[2] The Tribunal found Mr Chiv had committed multiple breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code), as noted below. He has failed to acknowledge his wrongdoing.

[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 decision of the Tribunal upholding the complaint and will only be briefly summarised here.

[5] Mr Khieng (Kevin) Chiv was at the relevant time a licensed immigration adviser. He is a director of New Zealand Success Immigration Limited. As the Authority refused to renew his licence on 22 December 2017, Mr Chiv is no longer licensed.

[6] The complaint largely concerns seven clients of Mr Chiv, all from the Philippines. Six were offered employment by companies of Mr Chiv, whether as nail technicians for a beauty company or one as a job placement program administrator for his immigration company. The seventh client was offered employment as a driver for a company unrelated to Mr Chiv. He represented these clients on 10 unsuccessful visa applications.

[7] Sixteen work visa applications for these seven and other clients were declined because Mr Chiv did not provide to Immigration New Zealand with the visa applications the required standard information, such as valid medical or police certificates. He filed invalid documents, including out-of-date certificates, which could have been easily checked. The Tribunal regarded the assessing of documents provided by a client against Immigration New Zealand's specific criteria as an important part of an adviser's role. Mr Chiv was found to have failed to exercise diligence and due care in filing multiple visa applications which were unsuccessful because of a failure to provide standard valid documents or information. This was a breach of cl 1 of the Code.

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<sup>1</sup> *Immigration New Zealand (Calder) v Chiv* [2019] NZIACDT 73.

[8] It was further found that the Code clearly contemplates, and the Competency Standards expressly require, that an adviser provides accurate information to Immigration New Zealand in applications. This not only requires the careful review by an adviser of information provided by the client, but that the client be given the opportunity of personally reviewing draft applications. Mr Chiv had not given three of his clients the opportunity to review their draft applications.

[9] Mr Chiv was found to have been neither professional nor diligent nor to have conducted himself with due care in affirming the adviser's declaration on the visa application form (that the client agreed the information was correct) and then in filing the applications of those three clients, without giving the client the opportunity of reviewing the information set out on the applications before they were lodged. This was also a breach of cl 1 of the Code. Furthermore, there had been a failure to carry out the client's instruction to file the application (as completed with the specific information filled out by the adviser), in breach of cl 2(e) of the Code.

[10] In addition, it was found that there was overwhelming evidence that the bulk of the communications between Mr Chiv's immigration company and the client was undertaken by his unlicensed staff or by unlicensed people in another company. The evidence of personal engagement of the clients by Mr Chiv was minimal. He had unlawfully delegated the bulk of client engagement to his staff or the staff of another company. This was a systemic failure. It was a breach of cls 1 and 2(e).

[11] It was further found that Mr Chiv had the unusual practice of communicating with clients *en masse* providing a range of information, which included information specific to each client. This was patently a breach of each client's confidentiality and contrary to the fundamental obligation to keep his clients' circumstances strictly confidential. This was a breach of cl 4(a) of the Code.

[12] Mr Chiv was also found to have failed to provide his clients with written confirmation of advice given orally, in breach of cl 26(c) of the Code.

[13] Accordingly, the Tribunal found Mr Chiv had breached cls 1, 2(e), 4(a) and 26(c) of the Code, in respect of at least seven clients.

## **SUBMISSIONS**

[14] Counsel for the Registrar of Immigration Advisers (the Registrar), Mr Denyer, in his submissions of 12 November 2019, contends that Mr Chiv should be censured,

ordered to pay a penalty in the vicinity of \$5,000 and prevented from reapplying for a licence for a period not exceeding two years.

[15] Mr Denyer notes that Mr Chiv had failed to fulfil basic duties such as lodging applications with valid documentation, communicating directly with the clients in obtaining their instructions, giving them the chance to review applications filed on their behalf, preserving client confidentiality and confirming in writing details of material discussions. Counsel advises that since Mr Chiv's licence was refused more than 12 months ago, he will have to complete a refresher course before reapplying for a licence. It is further noted by Mr Denyer that Mr Chiv has already completed the Graduate Certificate in New Zealand Immigration Advice.

[16] There are no submissions from the complainant.

[17] On behalf of Mr Chiv, there is a one sentence email from his counsel, Ms Ravindra, dated 12 November 2019, requesting a minimum sanction by way of a relevant re-education or refresher course.

## **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:

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

- (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:
- (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.

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

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 good, but also to protect 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 Chiv has been found to have breached a number of fundamental obligations of an adviser. The wrongdoing was systemic. It concerned at least seven clients and numerous visa applications. There are breaches of four different professional obligations.

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<sup>4</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *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].

[26] A particularly serious breach is his failure to personally and directly engage with his clients. This is a critical aspect of an adviser's services. Instead, he delegated communications with his clients to unlicensed people, including people working in another company over which he had no direct control.

[27] In responding to both the Authority and the Tribunal, Mr Chiv has shown a lack of understanding of his obligations. He has failed to acknowledge his wrongdoing, express any remorse or identify any new practices put in place to ensure no repetition of his misconduct. I cannot be satisfied that Mr Chiv has learned any lesson from this complaint.

[28] I will now deal with the potentially appropriate sanctions.

#### *Caution or censure*

[29] I agree with Mr Denyer that censure would be appropriate given the gravity of the professional misconduct.

#### *Retraining*

[30] I will deal with this as a condition of relicensing.

#### *Order preventing reapplication*

[31] Mr Chiv presently does not have a licence as renewal was refused by the Registrar in December 2017.

[32] Mr Denyer contends that Mr Chiv should be prohibited from reapplying for a licence for a period of up to two years. I agree with Mr Denyer that, given the multiple serious breaches of the Code which Mr Chiv has failed to acknowledge or remedy, a further period of prohibition from the profession is warranted.

[33] The maximum period of prohibition is two years. As this is Mr Chiv's first appearance before the Tribunal and the breaches do not involve fraud or dishonesty, the maximum period of prohibition would be harsh. This is particularly so, given that his licence was not renewed as a result of this complaint almost two years ago. I intend to take into account that he has already been deprived of a licence for almost two years. Mr Chiv will be prevented from reapplying for a licence for a further period of one year.

[34] However, as Mr Chiv has given the Tribunal no confidence that he has learned anything as a result of this complaint, there remains the risk that he will return to his unprofessional practices once he is able to renew his licence. Despite having attained the Graduate Certificate in New Zealand Immigration Advice, he needs further training. I will therefore order that he undertake the full Graduate Diploma in New Zealand Immigration Advice available from Toi-Ohomai Institute of Technology before returning to the profession. This will be a condition of any reapplication. It is not enough that he undertake merely the refresher course, given the broad range of breaches and his apparent lack of understanding of the professional obligations even today.

#### *Financial penalty*

[35] The maximum financial penalty that can be imposed is \$10,000. Mr Denyer submits that a penalty in the vicinity of \$5,000 would be appropriate.

[36] The most serious misconduct was the unlawful delegation of his obligation to personally engage with his clients and take their instructions. This is known as “rubber stamping”. The range of penalties has been assessed in a number of decisions recently.<sup>7</sup> Mr Chiv’s conduct was not the most egregious form of this practice, as there was insufficient evidence of the unlicensed staff performing “immigration advice” work.<sup>8</sup> His misconduct was confined to delegating the bulk of client communications to unlicensed people. It was a systemic practice affecting many clients.

[37] To that professional failure must be added the other breaches of the Code. This included the extraordinary practice of communicating *en masse* to groups of clients in breach of their right to confidentiality, another important professional obligation of an adviser. These breaches were not isolated incidents. They concerned at least seven clients.

[38] The penalty will be \$7,000.

#### **OUTCOME**

[39] Mr Chiv is:

- (1) censured;

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<sup>7</sup> *Immigration New Zealand (Calder) v Shearer* [2019] NZIACDT 52 at [50]; *XN v Ji* [2019] NZIACDT 67 at [38] & [44]; *Immigration New Zealand (Calder) v Ji* [2019] NZIACDT 68 at [36].

<sup>8</sup> As defined in s 7(1) of the Immigration Advisers Licensing Act 2007.



- (2) prevented from reapplying for a licence for one year from today's date;
- (3) prevented from reapplying for a licence until he has enrolled and completed the Graduate Diploma in New Zealand Immigration Advice; and
- (4) ordered to immediately pay to the Registrar the sum of \$7,000.



D J Plunkett  
Chair

