

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2020] NZIACDT 23

Reference No: IACDT 003/19

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

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

**BETWEEN** **Y (O) R**  
Complainant

**AND** **YING TIAN (aka TINA QIN)**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION**  
**Dated 8 June 2020**

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: Self-represented  
Adviser: Self-represented

## **PRELIMINARY**

[1] Ms Ying Tian (aka Tina Qin), the adviser, acted for Ms Y (O) R, the complainant, in regard to multiple visa applications. There were numerous professional failures by Ms Tian in her relationship with the complainant and her record keeping, including a failure to disclose a conflict of interest.

[2] The complainant made a complaint against Ms Tian to the Immigration Advisers Authority (the Authority). It was referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar), the head of the Authority. The Registrar alleges Ms Tian's conduct amounts to negligence, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act), and also breaches the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Ms Tian largely admits her wrongdoing, acknowledging that her conduct was unprofessional. Her explanation is that she had treated the complainant as a family member.

## **BACKGROUND**

[4] Ms Tian, a licensed immigration adviser, is a director of Abstract Solution Limited, of Auckland. She has been licensed since May 2009.

[5] The complainant, a national of China, first travelled to New Zealand in 2012. The records of Immigration New Zealand show that she had used Ms Tian's services from about February 2014.

### *Entrepreneur visa application*

[6] On 30 September 2014, Ms Tian lodged an entrepreneur work visa application for the complainant, including her husband and their dependent son. An adult son was not migrating with them.

[7] The entrepreneur visa was declined by Immigration New Zealand on 7 August 2015. That letter was addressed to Ms Tian and sent to her by email and by post. She did not advise the complainant of the decision.

[8] On 14 July 2016, Ms Tian sent an email to the complainant's husband asking him to prepare a long list of documents. This is alleged by the complainant to relate to the already declined entrepreneur application.

[9] The complainant sent an email to Immigration New Zealand on 30 August 2017 enquiring about her entrepreneur application filed in September 2014, three years previously. She explained that her adviser had told her many times to wait as there had been no decision. The agency replied on 31 August 2017 stating that the adviser had been informed that the application had been declined by letter dated 7 August 2015.

[10] The complainant immediately sent a text to Ms Tian expressing her shock and anger at being told by Immigration New Zealand that the visa had been declined. According to the complainant, the visa was declined because Ms Tian had failed to lodge by the deadline documents requested by the agency. Ms Tian was accused of even asking the complainant for documents after the decline. The complainant asked her why she had not been told of the decline.

#### *Visitor visa application*

[11] Meanwhile, on 31 March 2017, Ms Tian had filed a visitor visa application for the complainant.

[12] Immigration New Zealand sent a letter to Ms Tian on 6 April 2017 advising that if the visa was granted, the complainant's stay in New Zealand would be longer than permitted under the immigration instructions. Furthermore, no police certificate from China had been provided, as required. Her comments were invited.

[13] In the reply of 12 April 2017, Ms Tian asked the agency to consider issuing the complainant with an additional temporary visa as an exception to the criteria, so she could remain for a short time. She was in New Zealand to manage her children's education. Her husband in China was supporting her.

[14] Immigration New Zealand declined the visitor visa on 14 April 2017, for the reason set out in the earlier letter of 6 April. If granted, the complainant's stay would be longer than permitted under the instructions. There was no special circumstance justifying an exception to the instructions.

[15] The complainant's immigration status became unlawful as a result of the decline of the visitor visa. However, the complainant says she was unaware of the decline and of her unlawful status, as Ms Tian did not inform her.<sup>1</sup>

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<sup>1</sup> Complaint letter (9 May 2018) at 3–4.

*Discretionary visa application*

[16] On 15 May 2017, Ms Tian requested Immigration New Zealand to issue the complainant with a discretionary “visitor visa under guardian visa” in accordance with s 61 of the Immigration Act 2009, as she was unlawfully in the country.

[17] A discretionary visitor visa was issued on 10 June 2017.

**COMPLAINT**

[18] On 9 May 2018, the complainant made a complaint against Ms Tian to the Authority. She said she was not given a written agreement or any invoices, but just paid what was demanded. She was never given a copy of any completed application, nor had she ever seen them. She was not told of the decisions on two applications, only knowing when she enquired of Immigration New Zealand herself.

[19] In regard to the entrepreneur application, the complainant said that Ms Tian actively led her to believe that it was being processed, even after the agency had declined it. Nor had Ms Tian told her of the decline of the visitor visa application and her subsequent unlawful status. Furthermore, the discretionary s 61 application was made without her knowledge.

[20] The complainant sought the clearance of her name with the agency and an apology from Ms Tian. She did not seek compensation.

[21] The complaint was sent with a covering letter (9 May 2018) from another licensed adviser instructed by the complainant. It stated that Ms Tian had acted for the complainant from 2013 until February 2018. Ms Tian’s unprofessional conduct was not an isolated incident. When confronted by the complainant more recently, Ms Tian refused to acknowledge her wrongdoing or to apologise.

[22] It was alleged in the letter that Ms Tian was negligent and incompetent, that her behaviour was dishonest and misleading, and that she had breached the Code.

[23] In a further letter from the new adviser to the Authority on 7 June 2018, it was alleged that Ms Tian had on multiple occasions requested documents and information from the complainant for the entrepreneur application, even after it had been declined.

[24] The Authority requested Ms Tian’s file concerning the complainant.

[25] On 1 October 2018, Ms Tian sent an email to the Authority’s investigator stating that she could not find a record of any communication between herself and the

complainant. She had treated the complainant as a family member, which she recognised was not excellent practice. For most applications, she did not charge any service fee or even Immigration New Zealand's fee. She acknowledged, however, that was no excuse to be unprofessional.

*Explanation from Ms Tian*

[26] On 29 November 2018, the investigator interviewed Ms Tian. She said she had been an immigration adviser since 2001. After she had been introduced to the complainant, they came to know each other very well, like family. She did not treat the complainant as a client and even helped her school age son. Ms Tian said that she could not recall charging the complainant a service fee on any application, seeking payment only of the fees payable to Immigration New Zealand or the tuition fees payable to the son's schools.

[27] Ms Tian advised that she was also an education agent who received commissions from the schools. She had disclosed the commissions to the complainant.

[28] Ms Tian told the investigator that most of the communication with the complainant was by phone or in person. She did not record phone calls, but emails and text messages were recorded.

[29] On 22 January 2019, the Authority formally advised Ms Tian of the particulars of the complaint and invited her explanation.

[30] Ms Tian wrote to the Authority on 14 February 2019. She said she did not think she should argue with the points mentioned. She did not do right by the complainant. Ms Tian said she would be enrolling in the graduate diploma, with the course starting in June. She had been in the industry for 20 years and had to improve her standards. She asked for advice as to what to do next.

*Complaint referred to the Tribunal*

[31] The Registrar referred the complaint to the Tribunal on 21 February 2019, alleging Ms Tian's conduct satisfies the statutory ground of negligence and breaches the following provisions of the Code:

- (1) Being negligent by—
  - (i) failing to inform the complainant that the entrepreneur application had been declined;

- (ii) lodging a visitor visa application which had little chance of success;
- (iii) failing to inform the complainant that the visitor visa application had been declined and she was unlawfully in New Zealand;
- (iv) not recording communications with the complainant;
- (v) not providing written agreements to the complainant;
- (vi) not disclosing in writing to the complainant that she had a conflict of interest by receiving commissions from the son's schools and not gaining written permission to continue representing her or her family; and
- (vii) failing to issue invoices for fees and disbursements to the complainant.

(2) Alternatively–

- (i) failing to conduct herself with due care and diligence in relation to client engagement and processing the complainant's visa applications, in breach of cl 1;
- (ii) failing to disclose to the complainant in writing a conflict of interest (commissions from schools) and failing to obtain her written consent to continue representing her and her family, in breach of cls 5 and 6;
- (iii) failing to advise the complainant in writing that her visitor visa application had little chance of success and failing to obtain written acknowledgment from her that she had been advised of the risks, in breach of cl 9(a) and (b);
- (iv) failing to provide the complainant with written agreements, in breach of cl 18(a);
- (v) failing to provide the complainant with invoices for fees and disbursements, in breach of cl 22;
- (vi) failing to confirm in writing to the complainant when applications were lodged and to make on-going timely updates, in breach of cl 26(b); and

- (vii) failing to maintain a well-managed filing system (including copies of all written communications and records of material oral communications) and to confirm material discussions to the complainant in writing, in breach of cl 26(a)(iii), (c) and (d).

## **JURISDICTION AND PROCEDURE**

[32] 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.

[33] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>2</sup>

[34] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.<sup>3</sup> It has been established to deal relatively summarily with complaints referred to it.<sup>4</sup>

[35] 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.<sup>5</sup>

[36] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>6</sup> The focus of professional disciplinary proceedings is not punishment but the protection of the public.<sup>7</sup>

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<sup>2</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

<sup>3</sup> Section 49(3) & (4).

<sup>4</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

<sup>5</sup> Section 50.

<sup>6</sup> Section 51(1).

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

[37] 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.<sup>8</sup>

[38] The Tribunal has received from the Registrar the statement of complaint (21 February 2019), with a file of paginated supporting documents.

[39] There are no submissions from the complainant.

[40] There is a statement of reply from Ms Tian (25 April 2019). She partially agrees with the statement of complaint. Having breached the Code, she would undertake the advisers' "program" in June. Ms Tian said she had dealt with the family for four years and tried her best to help them settle. She had a phone call or coffee catch up or other communication almost every day with the complainant. The applications were done free of charge. They were not cheated. While the visitor visa application "should not be granted", she had a few applications in similar situations which were successful "with explanation".

[41] No party has requested an oral hearing.

## **ASSESSMENT**

[42] 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.

### **Conflicts of interest**

5. Where a licensed immigration adviser is aware that there is a potential or actual conflict of interest relating to the client, including the existence of any financial or non-financial benefit the adviser will receive as a result of the relationship with the client, the adviser must disclose the potential or actual conflict to the client in writing.
6. Where a licensed immigration adviser is aware that there is a potential or actual conflict of interest relating to the client, the adviser may only represent or continue to represent the client where the client gives written consent.

### **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:

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<sup>8</sup> *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].



- 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.

### **Written agreements**

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
  - ...

### **Invoices**

22. A licensed immigration adviser must, each time a fee and/or disbursement is payable, provide the client with an invoice containing a full description of the services the fee relates to and/or disbursements that the invoice relates to.

### **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
    - ...
  - b. confirm in writing to the client when applications have been lodged, and make on-going timely updates
  - c. confirm in writing to the client the details of all material discussions with the client
  - d. maintain a well-managed filing system
  - ...

[43] Since Ms Tian has breached the Code in numerous respects, as she admits, it is appropriate to assess her conduct in terms of the Code, rather than negligence. There is no need to assess the alternative complaint of negligence.

[44] I will consider separately each item of the second head of the complaint.

(2)(i) *Failing to conduct herself with due care and diligence in relation to client engagement and processing the complainant's visa applications, in breach of cl 1*

[45] This item duplicates the more specific breaches of the Code identified in the rest of the second head. There is no need to assess it.

(2)(ii) *Failing to disclose to the complainant in writing a conflict of interest (commissions from schools) and failing to obtain her written consent to continue representing her and her family, in breach of cls 5 and 6*

[46] The receipt of commissions from the son's schools is a financial benefit from the relationship with the complainant and therefore a conflict of interest under the Code. Ms Tian told the Authority's interviewer that she had disclosed the receipt of commissions from the schools to the complainant. There is no evidence to the contrary. However, the Code required Ms Tian to make that disclosure in writing and to obtain written consent to continue representing the complainant. She has presented no evidence of doing so.

[47] This item of the complaint is upheld. Ms Tian has breached cls 5 and 6 of the Code.

(2)(iii) *Failing to advise the complainant in writing that her visitor visa application had little chance of success and failing to obtain written acknowledgment from her that she had been advised of the risks, in breach of cl 9(a) and (b)*

[48] The Registrar alleges that the visitor visa application of 31 March 2017 had "little" chance of success, thereby triggering cl 9(a). The adjective "little" quantifying the threshold of chance (below which an adviser must warn the client) takes its colour from the other adjectives (futile, grossly unfounded, no hope). It does not mean small, but so small as to be futile or hopeless. In other words, very small indeed.

[49] The application was unsuccessful, which means it did not satisfy the criteria set out in the immigration instructions. But that does not mean it was hopeless. It is apparent from Ms Tian's letter of 12 April 2017 to Immigration New Zealand that she realised it did not meet the criteria, so she sought a visa as an exception to the criteria due to what she described as the complainant's "exceptional circumstances". The agency ultimately decided otherwise, finding that the circumstances were not "special".

[50] An application cannot be described as hopeless merely because it was unsuccessful. What happened here is that Immigration New Zealand was prepared to

consider the circumstances advanced, but found against the complainant. It would be futile to advance an application contrary to the instructions if there was no discretion to consider an exception, but that was not the position here. It is not uncommon for advisers to seek an exception to the instructions and they are occasionally successful. I gather that is what Ms Tian is saying in her statement of reply to the Tribunal, namely that similar applications of hers have sometimes been successful “with explanation”.

[51] It would have been prudent for Ms Tian to have advised the complainant in writing of the low chance of success as the application did not satisfy the instructions, but cl 9 of the Code was not breached because it has not been shown that the application was futile or hopeless.

[52] I dismiss item 2(iii) of the complaint.

*(2)(iv) Failing to provide the complainant with written agreements, in breach of cl 18(a)*

[53] The complainant alleges that she was not given any written agreement. A new agreement, or addendum to an existing agreement, is required for every new visa application instructed. Ms Tian’s file discloses no agreements. She generally admits the complaint, but whether this specific allegation is admitted or not, I find that Ms Tian had no written agreement with the complainant.

[54] This omission is a serious breach of the Code. The obligation to enter into a written agreement, complying with the prescriptive requirements of the Code, is important. It is not just a paper shuffling, bureaucratic requirement. A compliant agreement protects both the client and the adviser.

[55] This item of the complaint is upheld. Ms Tian has breached cl 18(a) of the Code.

*(2)(v) Failing to provide the complainant with invoices for fees and disbursements, in breach of cl 22*

[56] The complainant says she received no invoices. Ms Tian has not produced to the Authority or the Tribunal any invoices issued to the complainant. Her explanation is that she did not charge any fees. There is no evidence to the contrary. However, the Code requires an invoice for a disbursement. Since Ms Tian sought the payment of application and tuition fees, she was required to send an invoice each time. It is important to have a paper trail in relation to money, so that there is transparency as to what sums an adviser has taken from the client.

[57] Item 2(v) of the complaint is upheld. Ms Tian has breached cl 22 of the Code.

*(2)(vi) Failing to confirm in writing to the complainant when applications were lodged and to make on-going timely updates, in breach of cl 26(b)*

[58] Ms Tian presents no evidence of any written advice to the complainant that the various visa applications were lodged or of written updates as to their status. Notably, she failed to inform the complainant of the outcome of the entrepreneur or visitor visa applications.

[59] It is plain that Ms Tian knew about the decline of the entrepreneur application. It was sent to her by email and by post. She declared the adverse decision in the visitor visa application filed on 31 March 2017 and in the discretionary application of 15 May 2017, yet she had still not informed the complainant.<sup>9</sup>

[60] Ms Tian misled the complainant by continuing to seek further documents in support of that application on 14 July 2016 after it had been declined. The complaint alleges that Ms Tian was deliberately misleading the complainant into believing the application was still being processed.<sup>10</sup> Ms Tian does not deny this allegation. I do not know whether she had forgotten the visa had been declined or was deliberately misleading the complainant. There is no need to make a finding as to her motive in requesting further documents.

[61] In respect of the visitor visa application, Ms Tian's failure to tell the complainant about its outcome and the consequences of the negative outcome, meant that the complainant was unaware of her unlawful status. That can potentially have serious consequences for a client.

[62] This item of the complaint is upheld. Ms Tian has breached cl 26(b) of the Code.

*(2)(vii) Failing to maintain a well-managed filing system (including copies of all written communications and records of material oral communications) and to confirm material discussions to the complainant in writing, in breach of cl 26(a)(iii), (c) and (d)*

[63] Ms Tian does not dispute having a poorly managed file, including a lack of file records of material oral discussions with the complainant, failing to confirm those discussions in writing to her, and failing to keep on the file copies (whether in hard copy or electronic) of all texts and emails from/to the complainant.

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<sup>9</sup> Visitor visa application (31 March 2017) at 145 of the Registrar's supporting documents; Discretionary visa application (15 May 2017) at 130.

<sup>10</sup> Complaint (9 May 2018) at 2–4 of the Registrar's documents.

[64] In Ms Tian's email of 1 October 2018 to the Authority, she acknowledged that it was not excellent practice to fail to keep a record of communications, and indeed that it was unprofessional. When interviewed by the Authority's investigator on 29 November 2018, Ms Tian stated that she did not record telephone calls. I would add that, if calls are not recorded (with the client's consent), a file note should be made and the discussion later confirmed by writing to the client (which communication could double as the file note).

[65] Ms Tian's approach illustrates the danger of mixing personal and professional relationships. None of the professional obligations regarding records of communications or otherwise are reduced or qualified because of a personal relationship with the client or because no fee is charged.

[66] I uphold item 2(vii) of the complaint. Ms Tian breached cl 26(a)(iii), (c) and (d) of the Code.

## **OUTCOME**

[67] I uphold items 2(ii), (iv)–(vii) of the complaint. Ms Tian has breached cls 5, 6, 18(a), 22, 26(a)(iii), (b), (c) and (d) of the Code.

## **SUBMISSIONS ON SANCTIONS**

[68] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act. An earlier complaint was upheld by the Tribunal.<sup>11</sup> It is very similar. It will be taken into account in determining the sanctions.

[69] A timetable is set out below. Any requests that Ms Tian undertake training should specify the precise course suggested. She is asked to send the Tribunal the certificate of completion of the "program" undertaken in June 2019. Any requests 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.

### *Timetable*

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

- (1) The Registrar, the complainant and Ms Tian are to make submissions by **30 June 2020**.

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<sup>11</sup> *Xu v Tian* [2018] NZIACDT 42 & 49.

- (2) The Registrar, the complainant and Ms Tian may reply to submissions of any other party by **14 July 2020**.

### **ORDER FOR SUPPRESSION**

[71] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>12</sup>

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

[73] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

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D J Plunkett  
Chair

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<sup>12</sup> Immigration Advisers Licensing Act 2007, s 50A.