BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 6

Reference No: IACDT 004/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**Darren Calder (Immigration New Zealand)** Complainant
AND	**Gaurav Soni** Adviser

DECISION

REPRESENTATION:

Registrar: Ms F Mohammed, lawyer, MBIE, Auckland.

Complainant: Ms C English, lawyer, MBIE, Wellington.

Adviser: In person.

Date Issued: 9 March 2018

DECISION

Preliminary

[1] This is a complaint against Mr Soni, a licensed immigration adviser who practises in Christchurch.

[2] Licensed immigration advisers are required to practise within a strict regulatory regime, which has some exceptional features. One feature is that New Zealand law makes it illegal for anyone to assist with New Zealand immigration processes unless they are a licensed immigration adviser, lawyer or included in certain other specific categories of persons. There are some limited exceptions to the general principle, but the restriction applies everywhere in the world.

[3] The regime requires licensed immigration advisers to perform the services personally. They are different from other professionals who can usually allow non-qualified staff to provide many services under the supervision of a qualified professional.

[4] This Tribunal, unfortunately, has been required to address a series of complaints concerning a practice known as "rubber-stamping". Typically, this has arisen where a licensed immigration adviser has used off-shore agents who recruit clients, prepare immigration applications, send them to the licensed immigration adviser to sign off, and then the adviser or agent files the applications with Immigration New Zealand (INZ). This Tribunal has made it clear the activity is unlawful, deprives potential migrants of the protections afforded by the Immigration Advisers Licensing Act 2007 (the Act) and accordingly raises serious professional conduct issues for any licensed immigration adviser involved in the practice. The gravity is underlined by the fact the activity involves committing offences against the Act under which the adviser is licensed.

[5] This complaint against Mr Soni alleges he engaged in "rubber-stamping". There are two elements to this, which the Registrar has particularised:

[5.1] First, that Mr Soni entered into arrangements with an offshore organisation. He allegedly allowed that organisation to obtain instructions, and undertake the initial work in immigration instructions.

[5.2] Second, that Mr Soni's employee provided immigration advice to a client in his office when he was absent from the office, and Mr Soni allowed that to happen.

[6] The Complainant also alleged a breach in relation to the client engagement process, though it is typically an inherent part of rubber-stamping of the kind alleged.

[7] The final allegation was a failure on Mr Soni's part to provide written confirmation of material discussions with clients.

[8] Mr Soni's response was to accept there were some irregularities in dealing with the offshore clients, but he had appropriate practices in place. The irregularities were no more than errors on the part of the personnel working for the offshore provider. He accepted responsibility for the irregularities. He also accepted he did not confirm discussions in writing adequately.

[9] Mr Soni did not accept he allowed his employee to do more than permitted and appropriate clerical work.

[10] There are two matters the Tribunal must determine:

[10.1] What in fact happened, as that is contentious; and

[10.2] How those facts sit in relation to the restrictions on unlicensed personnel providing immigration services.

[11] It is of course critical to bear in mind that any professional responsibility Mr Soni bears must be founded on what he did, or failed to do. He is not responsible for the conduct of other people, except to the extent it is a result of him breaching his professional obligations.

The Complaint

The background facts

[12] The Registrar filed a statement of complaint which set out a factual narrative. The main elements of the factual background were as follows:

Three clients

[12.1] The complaint concerns three clients, none of whom have brought the complaint. The Complainant is INZ. Each of the three clients was in the same situation in relation to the immigration application they were pursuing. Their spouse or life partner had a student visa, and they were studying or were planning to study in New Zealand. Each of the students engaged an offshore service provider to help them obtain their student visa. Mr Soni's clients were partners of the students and those partners wanted visitor visas to allow them to join their partners in New Zealand.

[12.2] Generally, only a licenced immigration adviser can provide immigration services. However, there is an exemption for student visas if a person:

[12.2.1] is located outside New Zealand; and

[12.2.2] only provides services relating to student visas.

[12.3] While the offshore service provider had dealt with the student visas, its personnel were not licensed and could not deal with visitor visas for the student's partners. Accordingly, Mr Soni was engaged to assist the partners in applying for visitor visas.

[12.4] As the clients are not parties to the proceedings, they will be referred to by their first names only.

Narinder

[12.5] On 18 March 2016, INZ received an information request from Mr Soni's practice, relating to Narinder's immigration matters. INZ requested that Mr Soni supply a form identified as an 1160 form. It is an Immigration New Zealand form, which identifies that a licensed immigration adviser is acting for a client, and gives authority for that adviser to engage with Immigration New Zealand on the client's behalf.

[12.6] An employee in Mr Soni's practice telephoned Narinder's wife. She was a student in New Zealand, and Narinder, her husband, was in India. She asked Narinder's wife to collect the form from the practice office.

[12.7] On 22 April 2016, the employee emailed the completed form to INZ. However, the form has been signed by Narinder's wife, signing in Narinder's name.

[12.8] INZ made inquiries on 27 April 2016 regarding the 1160 form, ascertaining:

[12.8.1] Narinder said he had not signed the form, but his wife had signed whatever had to be signed.

[12.8.2] Narinder's wife said Mr Soni's employee told her to sign the form using her husband's signature.

[12.8.3] Mr Soni's employee apologised to INZ and Mr Soni agreed to supply a properly signed form.

[12.9] A correctly completed form was then submitted.

Maninder

[12.10] An employee of the offshore services provider sent Mr Soni an email, which said it related to Maninder, who wanted to apply for a visitor visa under the partnership category. The email said Mr Soni had received the payment for the application that day and said that all the required documents were attached, except an English translation of his daughter's birth certificate and joint account statement. The email requested that Mr Soni assess the application as early as possible.

[12.11] On 2 May 2016, the employee of the offshore service provider sent Mr Soni a service agreement signed by Maninder. On the same day, Mr Soni telephoned Maninder to conduct an interview and discuss his circumstances; he also signed the service agreement on that day.

[12.12] On 5 May 2016, Mr Soni notified the offshore services provider of a list of pending documents required for the application, and on 10 May 2016 noted on his client's file that he had been sent a signed copy of a cover letter to be filed.

[12.13] INZ received Maninder's application on 12 May 2016 and it was approved on 19 May 2016.

Amandeep

[12.14] On 7 May 2016, an employee of the offshore service provider sent Mr Soni an email regarding Amandeep. The email said Amandeep wanted to apply for a visitor visa under the partnership category, and that all the required documents were enclosed with the email. The email asked Mr Soni to assess the application and advise if he needed other information.

[12.15] On 9 May 2016, both Amandeep and Mr Soni signed the service agreement. On 10 May 2016, Mr Soni conducted a telephone interview with Amandeep. On 11 May 2016, Mr Soni noted on his client's file that he had emailed the offshore service provider a cover letter, and some related documents to be attached to the applicant's application. On 16 May 2016, INZ received Amandeep's application and approved it on 5 September 2016.

Summary

[13] When the Registrar inspected the files kept by Mr Soni, she found that the records were inadequate. This aspect of the complaint has been admitted and accordingly it is not necessary to consider it further. The relevant factual issues raised by the statement of the complaint are accordingly:

[13.1] a claim that the employee in Mr Soni's office went beyond her proper functions when dealing with form 1160; and

[13.2] whether the offshore service provider's employees were engaged inappropriately in the process of taking client instructions, the client engagement process and delivery of immigration services.

[14] If so, then it is necessary to evaluate the actions or lack of actions that make Mr Soni responsible for some or all of those alleged irregularities.

The grounds of complaint identified by the Registrar

Breach of cl 1, 2(e) and 3(c) of the Code of Conduct

[15] The statement of complaint relates the rubber-stamping allegations to cl 1, 2(e) and 3(c) of the Licensed Immigration Advisers Code of Conduct 2014 (Code of Conduct). Clause 1 of the Code of Conduct requires that a licensed immigration adviser must be "honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner". Clause 2 materially provides that a licensed immigration adviser must obtain and carry out the informed instructions of their client. Clause 3 requires that a licensed immigration adviser must act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any application regulations.

[16] The statement of complaint alleges that Mr Soni breached his professional obligations in that he:

[16.1] Allowed unlicensed individuals to engage with Maninder and Amandeep in relation to obtaining instructions and the initial assessment and collection of documents required for submission to INZ.

[16.2] Allowed unlicensed individuals to carry out initial engagement, including payment of fees and providing service agreements to his clients for signature.

[16.3] Allowed an unlicensed person to provide immigration advice to Narinder's wife regarding the completion of form 1160 or, alternatively, failed to recognise that the form submitted to INZ had not been signed by Narinder himself.

Breach of cls 17(a), (b) and (c) and 18(a), (b) of the Code of Conduct

[17] Clause 17 requires that before entering into a written agreement with the client, a licensed immigration adviser must provide the client with a summary of the adviser's professional responsibilities as published by the Registrar, explain the summary of licensed immigration advisers' professional responsibilities and advise them how to access a full copy of the Code of Conduct. An adviser is also required to advise a client that there is an internal complaints procedure and provide a copy of it.

[18] Clause 18 of the Code of Conduct requires a licensed immigration adviser to ensure that when they decide to proceed with instructions, they provide the client with a written agreement, and before that agreement is accepted, they must explain significant matters in the written agreement to the client.

[19] The statement of complaint alleges in the case of Amandeep that he signed the service agreement without having any contact from Mr Soni and, accordingly, Mr Soni could not have met his obligations under cls 17 and 18 of the Code of Conduct.

[20] In the case of Maninder, the statement of complaint alleges that Maninder paid the fee for the services a week prior to entering into the service agreement, and prior to Mr Soni conducting an interview with Maninder.

[21] The Registrar alleges that this evidences a failure to maintain the obligations in cls 17 and 18 of the Code of Conduct.

[22] At the hearing, counsel for the Registrar and the Complainant identified the issues as at least partly related to the inadequacy of the records kept by Mr Soni. To some extent, whether Mr Soni had fulfilled these obligations turned on whether he provided information in his oral communications with clients, and had he done so he should have confirmed them in writing.

Breach of cl 26(c) of the Code of Conduct 2014

[23] A licensed immigration adviser is required pursuant to cl 26 of the Code of Conduct to confirm in writing to the client the details of all material discussions with the client.

[24] It is not necessary to elaborate on this aspect of the complaint as Mr Soni has accepted it has been made out.

Summary of the grounds of complaint

[25] In my view, the key grounds of complaint are respectively:

[25.1] clauses 1, 2(e) and 3(c) of the Code of Conduct, that is the primary rubber-stamping allegation; and

[25.2] the failure to keep proper records pursuant to cl 26(c).

[26] While breaches of cls 17 and 18 are part of the matrix of issues arising from rubber-stamping, they do not in themselves significantly add to the scope of the complaint. If rubber-stamping is made out, then there is some inevitability that breaches of cls 17 and 18 arise. Counsel for the Registrar and the Complainant acknowledged that to a significant extent whether or not breaches of cls 17 and 18 are made out turn on the inferences to be drawn from the absence of proper records. Mr Soni claimed he fulfilled the obligations in cls 17 and 18 in the course of his telephone discussions with Maninder and Amandeep.

Procedure

[27] The Tribunal hears complaints on the papers under s 49 of the Act but may in its discretion request information or request that persons appear before the Tribunal.

[28] In this case, it appeared that it was necessary to hear oral evidence. Mr Soni responded to the complaint with a statement of reply, a witness statement and legal submissions. The witness statement was from Mr Soni, and he sought to present the evidence in person. The Tribunal allowed Mr Soni to present his evidence at an oral hearing. As required by s 49, the hearing was on the papers, subject to Mr Soni presenting his oral evidence. The Tribunal provided the opportunity for the Registrar and the Complainant to call rebuttal evidence, but neither did so.

[29] Accordingly, the Tribunal directed that the documents on the Tribunal's record would form part of the record for hearing, and it was not necessary to produce that material through witnesses.

[30] The oral part of the hearing proceeded in the conventional way with Mr Soni giving evidence and being subject to cross-examination. The parties also presented oral submissions.

Mr Soni's answer to the complaint

General

[31] As noted, Mr Soni accepts he did not keep adequate records or communicate with his client in writing to the standard required. He accepts some technical breaches of his obligations, but primarily he contends that factually what occurred in each case was no more than minor irregularities. If he has any responsibility it is slight. It is necessary to consider the circumstances relating to the three clients separately.

Narinder

[32] Mr Soni says he was overseas when the request from INZ for a 1160 form came in. He had standard forms prepared that included his identity and particulars such as his licence number. The form included an electronic signature certifying that he had provided immigration advice.

[33] Accordingly, when asked for a 1160 form, he instructed his employee to print a form, give it to Narinder's wife anticipating she would arrange for Narinder to complete and sign it. Mr Soni says the employee printed the form, gave it to Narinder's wife, who returned it as a completed form. The employee sent the form to INZ without further intervention by Mr Soni.

[34] Mr Soni disputes that his employee admitted giving Narinder's wife advice she could sign the form. That was an implication the Complainant drew from a telephone discussion between Mr Soni, his employee and an INZ officer. Mr Soni says he and his employee apologised for not detecting Narinder had not signed the form. However, Mr Soni says he knew nothing of his employee saying anything about who could sign the form, and would have corrected any faulty advice if he knew that happened. He does not consider his employee made any admissions regarding giving advice to Narinder's wife to sign the form.

[35] From his perspective, Mr Soni says he delivered a simple form to his client through a routine process, and when his client completed it, the form was transmitted as a matter of course to INZ.

[36] Mr Soni did not think he needed to check the form, and regardless doubts he would have realised Narinder's wife signed using Narinder's signature if he had checked the form. In short, while not doubting the importance of the form, Mr Soni says he understood this was a routine clerical action by his employee, where a client completed a straightforward form provided on Mr Soni's instructions, and his employee sent it to INZ as soon as it was returned.

[37] Mr Soni says he neither authorised his employee to give advice regarding who could sign the form nor anticipated that would arise. Accordingly, from his perspective there was no issue of his employee giving immigration advice or being authorised to do so; she was authorised to do no more than provide clerical assistance in the form of handing over the form and sending it to INZ when it was returned.

Maninder

[38] Mr Soni said he had a standard process for engaging with the clients of the offshore service provider when they sought a visitor visa to join their partner. He had a list of documents necessary to support an application and those documents allow him to evaluate initially, the application's prospects of success. His standard business practice was to conduct a telephone conversation with the intending applicants; to make the conversation effective he would:

[38.1] Send the offshore service provider the list of documents, to give to the applicant with the explanation Mr Soni needed to see these documents in order to advise on their prospects of successfully applying for a visa.

[38.2] When the documents were gathered, he would then evaluate the prospects; if an application would potentially succeed, he would draft a service agreement, send it to the offshore service provider and have them arrange a telephone conference with the applicant.

[38.3] Typically, the applicants would attend the office of the offshore service provider and the telephone discussion would be conducted from that office. The client would sign the service agreement during that consultation if they wished to proceed.

[38.4] The offshore service provider would gather the fees and transmit them to Mr Soni, but only after he completed the work.

[39] Mr Soni said he was concerned that he did not have full control over what the offshore service provider did and that, at least in relation to Amandeep, there had been an irregularity (discussed below). He had accordingly ceased undertaking work of this kind.

[40] In relation to Maninder, he accepted he received an email dated 25 April 2016 as the Registrar said in her statement of complaint. However, he did not agree with the Registrar's construction of the document. The email said Maninder wanted to apply for a visitor visa, and told Mr Soni, "You have received the payment for this application today". He said that was not correct, and he pointed out the email goes on to say, "Kindly assess this application as early as possible". He said there would be no fee unless his assessment of the prospects was positive. The email also said the required documents were attached, with two exceptions. Mr Soni said this simply reflected the offshore service provider's collation of documents using his list, so that he could get advice. The offshore service provider did no more than note that two documents in the list were not yet available in the required form.

[41] In support of the position in relation to fees, Mr Soni produced an invoice dated 10 May 2016, and referred to notes of a telephone conversation of 2 May 2016 with Maninder, relating to client engagement. Mr Soni said while his notes were brief, he did undertake a proper process to take instructions; he said this was his invariable practice.

[42] In relation to the time the service agreement was signed, Mr Soni's evidence was:

[42.1] He made the telephone call to go through the client engagement processes at 3:30 pm on 2 May 2016 (New Zealand time), which was 8:00 am in India, where Maninder received the call.

[42.2] He emailed the service agreement to Maninder at 3:36 pm.

[42.3] The offshore service provider returned the signed agreement at 11:30 pm the same day.

[43] That progression of a personal consultation by telephone, after considering the background material he requested, and signing the service agreement only after the consultation was, Mr Soni said, his way of working.

Amandeep

[44] In respect of Amandeep, Mr Soni said the instructions did not proceed in the way he intended. On 7 May 2016, he received an email with a set of documents to evaluate Amandeep's circumstances. In anticipation of the usual telephone discussion on 9 May 2016, Mr Soni emailed a service agreement to the offshore service provider.

[45] However, rather than proceeding as intended, Amandeep did not present himself at the offshore service provider's office until very late New Zealand time on 9 May 2016. Accordingly, the telephone conference did not take place on 9 May 2016. However, contrary to the standard arrangements, staff at the offshore service provider presented the service agreement to Amandeep, and he signed it.

[46] The following day, Mr Soni had the discussion with Amandeep, and ensured that the issues relating to gaining instructions and client engagement were completed. Accordingly, the service agreement was ratified after the error. He spoke to Amandeep in his home village that day, rather than in the offshore service provider's office.

[47] Mr Soni explained Amandeep lived in a village some distance from the city where the offshore service provider's office was located. He said it appeared the staff of the offshore service provider did not appreciate the significance of allowing Amandeep to sign the document in anticipation of the telephone call. Accordingly, they apparently allowed him to sign the agreement for reasons of convenience.

Discussion

The standard of proof

[48] The Tribunal determines facts on the balance of probabilities. However, the test applies with regard to the gravity of the potential finding.[1]

[49] The allegations of rubber-stamping in this case involve the commission of criminal offences. The implications of being a party to such conduct for a licenced immigration adviser are obvious; accordingly, the gravity is at the high end. Accordingly, I make findings on the basis I must be sure the findings are supported on the evidence.

---

1 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The legal prohibition on "rubber-stamping"

[50] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice" without being either licensed, or exempt from the requirement to be licensed. As noted, s 11(h) of the Act exempts persons from holding a licence, if:

[50.1] they provide immigration advice offshore; and

[50.2] only in respect of student visas.

[51] Section 73 provides that a person may be charged with an offence under s 63, including where part or all of the actions comprising the offence occurred outside New Zealand.

[52] The scope of "immigration advice" is defined in s 7 very broadly. It includes:

> using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...

[53] There are exceptions to consider. Section 7 provides that the definition does not include "clerical work, translation or interpreting services".

[54] The scope of "clerical work" is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.

[55] "Clerical work" is defined in s 5 of the Act in the following manner:

> **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[56] The definition is directed to administrative tasks such as keeping records, maintaining financial records, and the like. The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information "on any form, application, request, or claim on behalf and under the direction of another person".

[57] The natural meaning of those words is that the unlicensed person relying on the "clerical work" exception may type or write out what another person directs.

[58] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.

[59] The definition does not give any authority for an unlicensed person to make inquiries and determine what is to be recorded on the form. Under "clerical work" they must do nothing more than "record" information as directed.

[60] The other exception in s 7 is that immigration advice does not include "providing information that is publicly available, or that is prepared or made available by the Department". This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application; they may only provide information, not advice.

[61] The High Court's decision in *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal*,[2] and this Tribunal's decisions in *Balatbat v Sparks*,[3] *Immigration Advisors Authority v Sparks*,[4] *Immigration Advisers Authority v Maerean*,[5] [2013] NZIACDT 6, and *Immigration Advisers Authority v Van Zyl*[6] discuss these principles.

Facts – evaluation of the evidence

[62] Only one witness gave oral evidence in this matter, that is Mr Soni. He supported his evidence with contemporaneous written material in relation to the timing of critical events. He produced emails to confirm what he said regarding his discussions with Maninder and Amandeep.

[63] The Tribunal is mindful of the observations of the Medical Practitioners Disciplinary Tribunal,[7] which applied this observation in *Bowen-James v Walten & Ors*:[8]

> In our opinion, there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal, is entitled to rely. Indeed, we would endorse the observations made by Hope AJA in Ibrahim. There is a public interest in the proper discharge by medical practitioners of the privileges which

---

2 *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376.

3 *Balatbat v Spark* [2016] NZIACDT 27.

4 *Immigration Advisors Authority v Sparks* [2013] NZIACDT 5.

5 *Immigration Advisers Authority v Maerean* [2013] NZIACDT 6.

6 *Immigration Advisers Authority v Van Zyl* [2012] NZIACDT 37.

7 *White* [1999] NZMPDT 87 (20 August 1999) at [5.13].

8 *Bowen-James v Walten & Ors* [1991] NSWCA 29 at 14.

> the community accords to them, and in the due accounting for the exercise of the influence which the nature of the occupation permits them, and indeed requires them, to exert over their patients. …. we are of the opinion that if a medical practitioner fails to answer by giving his or her account of the matters charged, there can be no complaint if the Tribunal draws the unfavourable evidentiary inference which absence from the witness box commonly attracts.

[64] In *Ithaca (Custodians) Ltd v Perry Corporation* the Court of Appeal considered what inferences may be drawn from the absence of witnesses.[9] The Court observed:

> [153] …The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
>
> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
>
> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) the absence of the witness is unexplained.
>
> [154] Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

[65] The principles are applicable to this complaint. I have considered whether there were other witnesses Mr Soni has not called. The obvious persons being his employee who dealt with Narinder's partner. However, the key issue is what Mr Soni did; that is whether he allowed the employee to give advice. The allegation in the statement of complaint against Mr Soni is not that the employee gave advice but that he allowed her to do so. If she did not give advice that does no more than support the claim she was not allowed to do so. There is a paucity of evidence that Mr Soni did allow his employee to give advice, and it is difficult to criticise his denial, in the absence of contrary evidence.

[66] Second, I am mindful of the Registrar's investigative powers under the Act. They include the power to inspect a practice under ss 56 to 62 of that Act. Accordingly, when Mr Soni asserted that his standard practice was to ensure he had a telephone discussion with clients before they signed service agreements, that was an assertion capable of verification through records of emails and telephone communications. I must have regard to the fact there is no evidence to refute what he said.

---

9 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA).

The evidence relating to Narinder

[67] The first contentious element in the evidence relating to the interactions between the employee in Mr Soni's practice and Narinder's wife is whether the employee gave advice regarding how to sign the form. Mr Soni says he did not allow her to give immigration advice, and she did not do so in relation to how to sign the form. Narinder's partner did, according to the written material before the Tribunal, say the employee advised her she could sign the form using Narinder's name. Mr Soni says that did not occur. There is evidence of a telephone conference with an employee of INZ, Mr Soni and Mr Soni's employee. However, the notes INZ kept relating to that do not take the matter a great deal further. The employee of INZ did not give evidence regarding the phone call, and Mr Soni says there was some misunderstanding based on the way he reads the notes and what he recalls being said. There is only one witness who has given evidence, that is Mr Soni. Mr Soni was not privy to what actually transpired between Narinder's wife and his employee. He says his employee did not admit to advising Narinder's wife to sign using Narinder's name.

[68] In my view, it is not critical to determine what did transpire between Narinder's wife and Mr Soni's employee. The allegation against Mr Soni is that he allowed his employee to give immigration advice. I am satisfied that the evidence does not provide any direct evidence of Mr Soni authorising his employee to give advice of any kind, including advice relating to how the form should be completed.

[69] I do not consider it is possible to infer that the employee was authorised to provide advice. Form 1160 is a relatively simple, and of course important, form. The key elements in the form are for an applicant to set out their identity and sign the form, and for the licensed immigration adviser to set out their details and also sign the form, certifying that they have provided advice to the applicant.

[70] In a professional practice, it would not be surprising for a professional person to leave a form of this kind with the receptionist expecting that a client would attend, fill in their details and sign the form. It would not be unusual for that to occur when the professional person was not in attendance at the office. It could be debated what level of scrutiny should be exercised when a form of this kind is returned by a client. In this case, the form that Narinder's wife returned to Mr Soni's office, on its face, is a routine document. The only apparently unusual feature is that immediately before the signature which appears to be Narinder's signature, there is the beginning of another signature which has been crossed out. Had Mr Soni contacted Narinder or Narinder's partner, there would be little doubt he would have readily ascertained that it was Narinder's partner who had signed the form. However, I am not satisfied that enquiries of that kind could be

elevated to an essential and invariable requirement to maintain professional standards.

[71] I am satisfied that a routine form was provided to a client, it was returned on an apparently regular basis and an employee as a matter of routine forwarded the document to INZ. That was clerical work, as I find the evidence establishes no more than the employee handed over the form to Narind er's wife, received it back and sent it to INZ.

[72] The complaint did not allege Mr Soni failed to give advice about electronic signatures, or other matters relating to completion of the form, only that he allowed his unlicensed employee to do so. Accordingly, I make no finding regarding whether Mr Soni took adequate steps before his employee handed over the form to Narinder's wife.

The evidence relating to Maninder

[73] The evidence provided by Mr Soni relating to Maninder is that his initial action concerning the offshore service provider was to provide his list of required documents. The offshore service provider delivered Mr Soni's written information request to Maninder, and requested he gather the documents. None of the records indicate the offshore service provider did more than collect the documents, and transmit them to Mr Soni. The Registrar and the Complainant suggest that it can be inferred that the offshore service provider or its employees embarked upon giving immigration advice in the sense identified by the Act. There is, however, no evidence that this was the case. To the extent that there is circumstantial evidence, that points in the contrary direction. It points to Mr Soni arranging a telephone conference so he could personally provide advice relating to the prospects of obtaining a visa. The email from the employee of the offshore service provider refers to a payment having been made but also requests an evaluation. Mr Soni says he would not receive payment unless he proceeded with an application.

[74] Factually and legally, it is important to be cautious when drawing inferences regarding payments being made to the offshore service provider. It is important to remember the offshore service provider was legitimately providing immigration services to the partner of Mr Soni's prospective client. Mr Soni said he was not sure how that offshore service provider managed fees. He speculated that potentially fees had been gathered as part of the financial arrangements relating to the original application for a student visa, and he had no part in that. Regardless, it would not be particularly surprising if there was a relationship of trust and confidence between the potential applicant and the offshore service provider and the potential applicant may well have paid a sum of money to the offshore service provider as a stakeholder or as their agent. These circumstances do not establish that the offshore service provider was Mr

Soni's agent. The situation may be quite different where an offshore agent is not providing other services and is identified as the agent of the licensed immigration adviser in New Zealand.

[75] The timing of the emails is consistent with Mr Soni's claim that:

[75.1] he provided instructions as to what documentation he required to evaluate the potential applicant's ability to obtain a visa;

[75.2] he then had a telephone discussion in which he undertook the full client engagement process and obtained informed instructions from the prospective client; and

[75.3] only then, did he have the prospective client sign the service agreement.

[76] I am conscious Mr Soni has admitted he did not keep notes or confirm in writing the telephone discussions that he had, and that is in itself a lapse from the required professional standards. However, it would not be appropriate to simply reject his evidence out of hand. I must bear in mind this is not a situation where Mr Soni's evidence is challenged by contrary evidence from any of the applicants and it is not inconsistent with the written record. The most that can be said is that the written record is less than satisfactory. In these circumstances, I have no basis to reject Mr Soni's evidence as false.

[77] It is important to recognise that before reaching this conclusion I have had careful regard to what amounts to an overt mission in writing from Mr Soni that he engaged in rubber-stamping. He sent an email on 1 June 2016 to INZ. In this email, amongst other things, he stated:

> Please note as explained over phone we work in full legitimate fashion. Wherever the client comes from any of associate educational agencies (only good ones), they send me documents. We sent our service agreement and invoice etc to be paid by the PA which gets paid by them. Once this part is done and payment is made only then I talk to anyone otherwise I am too busy to talk for free to anyone. I review and do my own interviews with couple or the PA and I send them an email detailing my concerns and documents required.

[78] That is, apparently, an admission that Mr Soni's business practices were not as he described in his evidence. On the contrary, he clearly says that he would not communicate with prospective clients until he had a service agreement and had been paid. There are obvious concerns with drafting a service agreement before having a discussion with the client. Arguably, it would be possible to do so given the relatively standard nature of the visitor visas in issue in these cases; but the agreement could not be signed properly without advice from a licensed adviser. The statement also undermines the view that the offshore service provider was the client's agent; it casts the offshore service provider as Mr Soni's agent who

was collecting his fees after presenting a service agreement to them on his behalf.

[79] Mr Soni's explanation for this description of his work practices is:

> Unfortunately at the time I wrote to INZ I had become frustrated in my dealings with some of the visa staff at the New Delhi branch, one or more of whom were copied into the email. This may be apparent from the tone of the email itself. When I said I would not talk to clients until after we had a signed agreement and payment of fees, what I had meant to say is I would not work on preparing the case until after that time. When I wrote the email, I wanted to get across the sense that I was very busy and that questions raised about the way it was dealing with my applications were troublesome. As a result, and in my haste, I did not express myself accurately.

[80] Inevitably I must have a great deal of scepticism regarding Mr Soni's attempts to retract this admission of rubber-stamping. What he said in his email of 1 June 2016 suggests that at best Mr Soni was oblivious to the consequences of rubber-stamping. It is difficult to accept that any properly informed licensed immigration adviser would make such a statement. It is very difficult to pass off the description as merely a less than satisfactory description of acceptable business practices.

[81] The best construction I can put on the admission is that Mr Soni did not understand what his professional obligations were in relation to rubber-stamping on 1 June 2016. That, however, does not mean that he was in fact engaging in rubber-stamping. While Mr Soni, to his credit, has acknowledged what he said implies that there was a signed agreement before he would do any work that is not in fact what he wrote. He, in fact, wrote that he would send the agreement and money would be paid before he entered discussions with the prospective client.

[82] I am satisfied that what Mr Soni wrote is consistent with him expecting the offshore service provider to ensure that the prospective clients had paid them the money, and that he had sent a draft service agreement to discuss. That is not inconsistent with Mr Soni's evidence of his practices. That accordingly leads me to rely heavily on what his business records in fact show, rather than the 1 June 2016 email.

[83] Mr Soni's business records before the Tribunal concern the two clients in relation to whom this aspect of the complaint is related; Maninder and Amandeep. For the reasons already discussed in relation to Maninder, I am satisfied that those records are consistent with Mr Soni's sworn testimony, and his practice was to undertake a proper client engagement process before clients entered into a written agreement. For the reasons discussed under the following heading, I am also satisfied that the aberration that occurred in relation to

Amandeep is not a justification for rejecting Mr Soni's sworn testimony regarding his business practices.

The evidence relating to Amandeep

[84] Generally, what I have said in relation to Mr Soni's dealings with Maninder applies to Amandeep. The distinction is that Amandeep attended the office of the offshore service provider on a day when Mr Soni and Amandeep anticipated having a discussion. Before he left, without having that discussion, Amandeep signed the service agreement. The telephone discussion with Mr Soni in fact took place the following day, after Amandeep returned to his home village. The communication was through a cell phone.

[85] While there was an irregularity, I cannot, given the recently understandable circumstances, regard that as evidence that justifies rejecting Mr Soni's testimony as to his usual business practices. It would be understandable for an employee of the offshore service provider to accommodate Amandeep by allowing him to sign a document in anticipation so that he could return to his village. It would be unsurprising if an employee of the offshore service provider understood Amandeep could sign, and affirm with Mr Soni later. As it transpired, the evidence is that the written agreement was in satisfactory, affirmed at the telephone interview, and instruction proceeded without any irregularities developing. This is accordingly a departure from proper procedure by a person outside Mr Soni's office, followed by corrective steps on Mr Soni's part. It cannot justify rejecting Mr Soni's evidence of his practices.

Rubber-stamping in relation to Narinder

[86] The factual conclusions I have reached in relation to Mr Soni's employee and her dealings with Narinder's wife are inconsistent with finding that ground of the complaint established. The specific allegation is that Mr Soni allowed an unlicensed person to provide immigration advice to Narinder's wife regarding the completion of form 1160. I have found that the evidence does not:

[86.1] establish Mr Soni provided any express authorisation to his employee to provide advice relating to completion of form 1160; or

[86.2] that he put her into a role beyond the clerical role of a receptionist.

[87] Mr Soni did no more than provide a document for a client to complete, and authorised the recipient in his office to transmit the completed form to INZ. It is not a set of circumstances from which I can infer that there was any authority given to the employee to provide advice regarding completion of the form.

[88] The alternative allegation is that Mr Soni failed to recognise that the form submitted had not been signed by Narinder. In fact, Mr Soni did not see the form before the employee transmitted it to INZ. Accordingly, he did not in fact fail to

identify the wrong signature in the sense of not being sufficiently observant. I also considered the allegation from the point of view of whether the failure to recognise the form had been signed by someone else was because Mr Soni did not ensure he looked at the form, and he should have done so. The form was routine in nature, not a complex form that would necessarily require further checking.

[89] Furthermore, the unexpected situation where Narinder's wife signed using Narinder's name was the cause of the problem. It was not a hazard Mr Soni can reasonably be expected to foresee. Accordingly, I cannot make an adverse finding against Mr Soni based on failing to examine the form after it was completed incorrectly. The highest the matter could be put is that ideal practice may be that a licensed immigration adviser should inspect every form before it is submitted to INZ. However, even if that were correct, the relatively simple nature of this form is such that any lapse from ideal standards would fall below the threshold for a disciplinary response.

[90] Whether Narinder's wife decided to sign using Narinder's name of her own volition or Mr Soni's employee inexplicably gave her advice she should do so, Mr Soni cannot reasonably be expected to have foreseen or been vigilant to guard against what occurred. Narinder did authorise his wife to deal with the matter and they both intended that the form be signed properly. This was not a situation where Narinder or his wife were intending to engage in any deceptive practice. There was no more, nor less, than a surprising and serious misunderstanding as to the formality that was required and it was the product of human frailty with no intent to do wrong.

[91] Accordingly, I do not find there was a breach of cls 1, 2(e) or 3(c) of the Code of Conduct in relation to Narinder.

Rubber-stamping in relation to Maninder and Amandeep

[92] The first question to consider is whether the facts are consistent with concluding that staff of the offshore service provider did provide immigration advice as defined by the Act. For the reasons discussed the concept is a very broad one, limited by the exception for clerical services. There are three matters that could potentially be considered to fall within the prohibition on providing immigration advice:

[92.1] The actions relating to gathering of documentation.

[92.2] Receiving money to be used to pay fees.

[92.3] The process of completing and signing the service agreements.

[93] For the reasons discussed, I am satisfied the evidence establishes:

[93.1] Mr Soni prepared a list of documents he needed to advise on the prospect of obtaining a visa;

[93.2] the offshore service provider communicated the contents of that list to prospective applicants; and

[93.3] when they got the documents the offshore service provider then sent copies of the documents to Mr Soni.

[94] These facts do not take the assistance provided beyond the merely clerical. The preparation of the list of necessary documents would not be merely clerical work; however, Mr Soni undertook that work. The process of delivering that list to prospective applicants, then receiving the documents and transmitting copies of them to Mr Soni is routine clerical work. It is the sort of work that could well have been carried out by a receptionist in Mr Soni's office if it occurred onshore.

[95] I now consider the arrangements relating to fees. There are important provisions in the Code of Conduct relating to the receipt of fees for immigration services. If Mr Soni arranged for a third party to receive his fees, then he would be obliged to ensure that he undertook the measures appropriate under the Code of Conduct.

[96] In the present case, the evidence before the Tribunal indicates that in each case Mr Soni had a telephone consultation with prospective applicants. Only after the point when Mr Soni advised an application was viable and a client instructed him to proceed in a written agreement, would he charge fees. As far as the evidence goes, the indications are that the offshore service received fees and remitted them to Mr Soni after he performed the work and rendered an invoice. In this case, the offshore service provider provided immigration services to the prospective applicant's spouse, and Mr Soni's work was derivative from that client relationship. I am satisfied that it is appropriate to regard the offshore service provider as an agent or stakeholder for the prospective applicants in relation to the fees they paid. This view is very fact-dependent, but on the evidence before me I am unable to exclude that construction of the circumstances. Accordingly, in the particular circumstances, I cannot conclude the receipt and transmission of the fees amounted to "immigration advice". It was a financial service that did not involve "knowledge of or experience in immigration", as s 7 of the Act requires.

[97] The remaining element that could potentially be regarded as the provision of immigration services by the offshore service provider is the process for signing the service agreements. I have found on the evidence the facts are that Mr Soni's usual way of working was to have a telephone conversation, undertake the usual process of client engagement and taking of instructions. The assistance provided to the prospective applicants by the offshore service

provider was only of a clerical nature. They provided a venue where the prospective applicant could attend to have a telephone conversation, they printed out the draft service agreement, it was Mr Soni who provided the advice and took instructions. Those facts are no different in principle to an office administrator undertaking routine clerical functions had the events taken place within Mr Soni's office.

[98] Clearly, there was a breach of the standard arrangements in relation to Amandeep. In his case, staff of the offshore service provider allowed Amandeep to sign a client service agreement. I am not satisfied that this did in fact amount to the provision of immigration advice under the Act. It seems unlikely that a valid contract was formed at that point. There was no "meeting of the minds", merely a procedural error on the part of a staff member of the offshore service provider. Regardless, the facts established on the evidence are that Mr Soni was unaware of that at the time, and it was contrary to his expectations. From Mr Soni's point of view, the following day he engaged in a client consultation where he undertook the client engagement process and affirmed the services agreement. This is very different from the rubber-stamping cases where offshore unlicensed persons have given advice on service agreements.

[99] Accordingly, I must conclude that the facts do not establish either that the offshore service provider provided immigration advice to prospective clients or, if they did so, that this was something that Mr Soni either agreed to or condoned.

[100] The allegation against Mr Soni is made in respect of cls 1, 2(e) and 3(c) alleging he:

[100.1] Allowed unlicensed individuals to engage with Maninder and Amandeep "in regard to obtaining instructions and the initial assessment and collection of the documents required".

[100.2] Allowed unlicensed persons to carry out the initial engagement regarding payment of fees and providing the service agreement to clients for signature.

[101] For the reasons identified, I am satisfied that unlicensed persons did not obtain instructions or make an assessment of the prospective applicants' immigration prospects. In relation to the collection of documents and provision of the service agreement to prospective applicants for signature, I am satisfied the functions were only clerical outside of Mr Soni's role.

[102] In relation to the payment of fees, I am satisfied that at the point in time when Mr Soni rendered an invoice and sought the payment of fees the only function was the clerical one of remitting the funds, otherwise the offshore service provider was not acting on behalf of or under the direction of Mr Soni.

[103] The other dimension of the allegation in relation to Maninder and Amandeep is a breach of cls 17(a), (b), (c) and 18(a), (b) of the Code of Conduct. This is an allegation that Mr Soni failed to undertake the client engagement process. For the reasons identified, I have accepted Mr Soni's evidence that during the telephone interview process he did undertake the client engagement process, including providing a summary of a licensed immigration adviser's professional responsibilities, explaining those responsibilities and directing them on how to access full copy of the Code of Conduct, and providing the appropriate information relating to the internal complaints procedure. I also accepted his evidence that he had provided written agreements during telephone conversations and explained significant matters in the agreement to the prospective applicants, and only then had the prospective applicants signed the agreement. In the case of Amandeep, Mr Soni sought to correct a clerical error by arranging a telephone conversation the day after the service agreement was erroneously signed, and having Amandeep confirm he accepted the agreement. The evidence relating to Maninder was that the process was a regular one.

Failure to confirm the details of material discussions in writing

[104] Mr Soni admitted he failed to confirm in writing the details of material discussions. I accordingly find he breached cl 26(c) of the Code of Conduct.

Decision

[105] The Tribunal upholds the complaint pursuant to s 50 of the Act.

[106] The adviser breached cl 26(c) of the Code of Conduct in the respects identified. That is a ground for complaint pursuant to s 44(2) of the Act.

Observation

[107] Mr Soni should recognise this decision is a product of the evidence, and the allegations against him. The decision is not a vindication of his practices, and he should be aware that he faced these allegations due to his own conduct.

[108] As observed, Mr Soni's 1 June 2016 email to Immigration New Zealand raises grave concern that he was engaging in rubber-stamping. I have only been able to prefer his subsequent sworn testimony on the basis he lacked an adequate knowledge of his professional obligations when he wrote that email.

[109] Further, Mr Soni's written communications with his clients were deficient, to the extent of attracting an adverse disciplinary finding. His files did not contain the sort of record that should have been maintained to support his sworn evidence regarding his practices. Fundamental to the outcome of this decision is the fact he gave sworn evidence which must be accepted to the extent is plausible, and consistent with other evidence before the Tribunal. Narinder's wife, Maninder, Amandeep and Mr Soni's employee did not give evidence. The Registrar and

the Complainant elected not to call rebuttal evidence. Mr Soni should appreciate that given the lack of adequate documentation, to the extent of breaching his professional obligations, had those persons given evidence that challenged his account, the Tribunal may well have drawn an inference from the lack of documentation and preferred the evidence of other persons.

[110] Accordingly, while the most serious elements of this complaint have been dismissed, Mr Soni should reflect on the grave risk to his professional future that resulted from his lack of understanding regarding his professional obligations when dealing with offshore clients, and his lax record keeping.

Submissions on Sanctions

[111] The Tribunal has upheld the complaint. Therefore, pursuant to s 51 of the Act, it may impose sanctions.

[112] The Authority and the Complainant may provide submissions on the appropriate sanctions. Whether they do so or not, Mr Soni is entitled to make submissions and respond to any submissions from the other parties.

[113] Any application for an order for the payment of costs or expenses under s 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

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

[114.1] the Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision;

[114.2] Mr Soni is to make any submissions (whether or not the Authority or the complainant makes submissions) within 20 working days of the issue of this decision; and

[114.3] the Authority and Complainant may reply to any submissions made by the adviser within five working days of Mr Soni filing and serving those submissions.

DATED at WELLINGTON this 9th day of March 2018

_____

G D Pearson
Chair