IN THE DISTRICT COURT
AT AUCKLAND

CIV-2009-004-000400

BETWEEN	MARILYN VINEETA TAUFA Appellant
AND	REGISTRAR OF IMMIGRATION ADVISERS Respondent

Hearing: 4 April 2010

Appearances: Mr D T Thwaite counsel for the Appellant
J H Hopkins and R A Denmead counsel for the Respondent

Judgment:

RESERVED JUDGMENT OF JUDGE G V HUBBLE

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[1] The present application is an appeal by Mrs Taufa against the decision of the Registrar of Immigration, refusing to grant her a full licence to practise as an immigration adviser, pursuant to the Immigration Advisers Licensing Act 2007.

[2] The Act has only recently come into force. There has been one prior decision on appeal, namely, *Austin v The Registrar of Immigration Advisers*, 15 February 2010, Auckland District Court, oral judgment of Judge M E Sharp. That appeal, however, was confined to the issue of fitness to apply. The present application is the first appeal on the issue of refusal of the licence because of a finding by the Registrar that minimum standards of competence have not been met, as required by

s 19(1)(c) of the Act.

[3] The purpose of the Act is described in s 3 as follows:

> "3 **Purpose and scheme of the Act**
>
> The purpose of this Act is to promote and protect the interest 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."

[4] In past years there were no restrictions on who could act as an immigration adviser. Many complaints concerning fees charged, failure to act professionally and even fraudulent dealing emerged without any appropriate avenue for redress of complaints. This situation inspired the passing of the Act.

THE SCHEME OF THE IMMIGRATION ADVISERS LICENSING ACT 2007

[5] The Act prohibits the giving of immigration advice by any person who is not the holder of a valid licence issued pursuant to the Act. The sanction for breach can result in seven years imprisonment or a $100,000 fine. Section 11 exempts certain persons from requiring to have a licence. For example, a qualified lawyer, i.e. a barrister or barrister and solicitor does not require a licence.

[6] "Immigration advice" is defined in s 7 as follows:

> "7 **What constitutes immigration advice**
>
> In this Act, **immigration advice –**
>
> (a) means 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, whether directly or indirectly and whether or not for gain or reward; but
>
> (b) does not include –
>
> (i) providing information that is publicly available, or that is prepared or made available by the Department; or
>
> (ii) directing a person to the Minister or the Department, or to an immigration officer, a visa officer, or a refugee status officer

(within the meaning of the Immigration Act 1987), or to a list of licensed immigration advisers; or

(iii) carrying out clerical work, translation or interpreting services, or settlement services."

[7] To be eligible to have an application for licence heard, the applicant must first comply with all requirements of s 10 which provides as follows:

> **"10 Who may be licensed as immigration adviser**
>
> A person may be licensed as an immigration adviser only if –
>
> (a) the person is a natural person who applies for a licence under section 18; and
>
> (b) the Registrar is satisfied that the person meets the competency standards set under section 36; and
>
> (c) the person is not prohibited from holding a licence under section 15, and, in the case of a person to whom section 16 and 17 applies, is determined by the Registrar to be a fit and appropriate person to hold a licence; and
>
> (d) the person is not a category 2 exemptee or a lawyer.

[8] Fitness and competency are the two principal issues, ss 15, 16 and 17 clearly set out the "Fitness" issues including such things as prior bankruptcy or criminal convictions, or disciplinary proceedings by any professional body. None of those matters are germane to the present appeal which focuses solely on the issue of competence.

[9] It is the Registrar's function to determine competence and the Act assists by providing in section 36 that the Registrar must develop and maintain competency standards to be met by licensed immigration advisers and under s 37 he "must" develop and maintain a code of conduct to be observed by licensed immigration advisers.

[10] Obviously the "Code of Conduct" applies only to advisers who have been granted a licence and are practising as immigration advisers. New applicants must however demonstrate a knowledge of the Code.

[11] The Registrar has, accordingly, developed both the Competency Standards and the Code of Conduct and has followed the appropriate procedure set out in ss 36 and 37 for the standards and code to take legal effect as a regulation pursuant to s 39 of the Act. These Standards and the Code are contained in a booklet which has been presented to the Court.

[12] An argument advanced by Mr Thwaite on behalf of the appellant to the effect that the Competency Standards and Code of Conduct are ultra vires the Act but this is an issue outside the jurisdiction of this Court.

[13] As far as this Court is concerned, evidence has been given that all appropriate procedures and approvals required by ss 36 and 37 have been complied with and to the extent that the Act requires it, they must be complied with by applicants.

[14] I do not accept Mr Thwaite's submission that "competence" should be measured on some general basis rather than with reference to the published Competency Standards. The basis of this argument was that under s 19(1)(c) the Registrar must grant the licence to an applicant if satisfied that:

> "(c) The person meets minimum standards of competence set under s 36."

[15] Mr Thwaite sought to draw a distinction between standards of competence referred to in that section and the competency standards which are specifically referred to in s 36. He emphasised also that the word "minimum" appears, whereas this is absent from s 10.

[16] I accept Ms Denmead's submission that s 10 puts the issue beyond doubt, namely that a licence can be granted to a person "only if" the Registrar is satisfied that the person meets competency standards set under s 36. I accept also that the standards which the Registrar, in consultation with the Immigration Advice Authority has fixed and published, are intended to be the "minimum standards".

[17] Mrs Taufa is seeking a full licence but it is open to the Court to grant either a full licence or a limited licence or a provisional licence and clearly the appropriate

licence to grant may be depend upon different competency standards. Section 36(3) provides:

> "Competency standards may differ according to whether a person holds or is seeking a full licence, a limited licence or a provisional licence."

[18] In order for an applicant to receive a full licence, the Registrar must be satisfied that an applicant has overall competency in all areas of immigration advice i.e. Competencies 1 to 7 inclusive of the published standards (s 19(3)).

[19] The limited licence would authorise an applicant to provide immigration advice only in relation to specified matters. In such a case the Registrar must be satisfied that the applicant has competence only in relation to those matters (s 19(4)).

[20] The provisional licence would require an applicant to work under the direction supervision of a fully licensed immigration adviser for 12 months or such other lesser period as may be specified by the Registrar, if the Registrar is satisfied that the applicant is a new entrant to the industry or that for any other reason supervision is required or appropriate. I was advised from the bar that in future, it is contemplated that all new applicants will have to sit an examination and in most cases this will result in a provisional licence only.

[21] It is one of the functions of the Immigration Advisers Authority and the Registrar to facilitate the education and professional development of immigration advisers (s 35(1)(d)) but at present there is no examination procedure in existence and accordingly Mrs Taufa has been assessed by other procedures recognised by s 20 which provides as follows:

> **"20 Method of determining competence**
>
> The Registrar may satisfy himself or herself on an applicant's competence by all or any of the following means:
>
> (a) consideration of the application material supplied by the applicant:
>
> (b) an examination:
>
> (c) an interview:

(d) review of any work carried out by the applicant relevant to the application:

(e) consideration of information provided by an overseas or international person, body, or agency:

(f) carrying out an inspection under section 57:

(g) consideration of any other matter relevant to the application."

[22] I accept Ms Denmead's submission that the word "meets" in ss 10(b) and 19(1)(c) refers to demonstrating a knowledge of the published Competency Standards. In future this may be tested by examination but until that occurs the other areas of enquiry (s 20, (a) and (c) to (g) inclusive) apply.

[23] I do not accept Mr Thwaite's submission that s 3 (the purposes of the Act) confines an assessment of competence only to the area of giving "advice". The focus of the Act is on the suitability, honesty and competence of the persons giving that advice. Nor do I accept that the Registrar, in assessing competence, cannot take into account office procedures, clerical work and settlement services based on s 7(b)(iii) which provides that immigration advice does not include:

> "Carrying out clerical work, translation or interpreting services or settlement services."

[24] This section is plainly included to exclude immigration advisers' employees or persons called in to interpret.

[25] I do not see any merit in Mr Thwaite's submission that the Competency Standards impose an undue limitation on an individual's right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990. Nor do I accept Mr Thwaite's submission that the competency standards as "regulations" do not have the protection of s 4 of the Bill of Rights Act 1990 because they are not within the definition of "an enactment". Section 29 of the Interpretation Act clearly includes "regulations" as an "enactment". Furthermore, Mr Thwaite's arguments based on a breach of principles of natural justice could only have currency if the appellant was able to establish that the Competency Standards were ultra vires. As already

indicated, that is not an issue within the province of this Court and on the evidence presented there has clearly been no breach of natural justice.

[26] It will be apparent from the foregoing that in my judgment the present appeal will turn on whether or not the Registrar's decision to decline a full licence was wrong in principle or based on an inaccurate assessment of the evidence.

THE APPEAL

[27] The Act advises that the appeal is to be determined pursuant to s 84 which provides:

> "**84 Determination of appeal**
>
> (1) In determining an appeal, a District Court may confirm, vary, or reverse the decision of the Registrar or the Tribunal.
>
> (2) The District Court's decision in the determination of an appeal is final.
>
> (3) To avoid doubt, nothing in this section affects the right of any person –
>
> (a) to apply, in accordance with law, for judicial review; or
>
> (b) to appeal to the High Court on a question of law under section 85."

[28] There is also power to remit the matter back to the Registrar for further consideration and determination pursuant to District Courts Rules 561(2). (now r 14.23 of The district Court Rules 2000)

[29] Rule 561 of the District Court Rules 1992 provided that:

> "Unless provided otherwise in any enactment, every appeal shall be by way of rehearing."

I accept, however, that although the Court on appeal does, in some circumstances have jurisdiction to rehear evidence or permit new evidence to be adduced, this is not an appeal *de novo* and does not permit the introduction of evidence which is little more than an improvement on or revised version of material that was before the Tribunal.

[30] The leading decision on the nature of a rehearing on appeal is *Pratt v Wanganui Education Board* [1977] 1 NZLR 476. In that case Somers J said at page 490:

> "But the direction that an appeal shall be by way of rehearing does not mean that there is to be a complete rehearing as, for example, in the case of a new trial. Under such a direction the appeal is to be determined by the court whose members consider for themselves the issues which had to be determined at the original hearing and the effect of the evidence then heard as it appears in the record of the proceedings but applying the law as it is when the appeal was heard and not as it was when the trial occurred."

[31] In this case, I accept the appeal should be conducted on the basis of the evidence contained in the Rule 555 bundle of documents including the respondent's decision. This is in keeping with *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 to the following effect:

> "[4] ...Similar rights of general appeal are provided by statute in respect of the decisions of a number of tribunals. The appeal is usually conducted on the basis of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a *de novo* hearing of the evidence is envisaged."

[32] The decision of the Registrar of Immigration Advisers involves the exercise of a discretion and this Court ought, therefore, be reluctant to interfere. This Court should intervene only if the appellant shows that the Registrar acted on a wrong principle, failed to take into account some relevant matter, took account of some irrelevant matter or was plainly wrong. The appellant must accept an onus of establishing one or more of these factors.

[33] There is no application or attempt to introduce fresh evidence in the present case but affidavits which gave a history of the application and procedures adopted under the new Act were considered.

THE ASSESSMENT PROCESS

[34] The stages of assessment are as follows:

i) An individual lodges an application in the prescribed form accompanied by prescribed documentation depending on

whether the applicant is seeking a full licence, limited licence or provisional licence. For example, for a full licence four client files are required and for a limited licence three client files. Within the application there is a list of the type of documents which would be expected to be in a client file. For the provisional licence no client files are required to be submitted, however, there are three case studies in the application and the supervision arrangement which must be completed.

[35] The full licence and limited licence at the present stage appear to assume that the applicant has been practising in previous years whereas the provisional licence examines a new entrant to the industry or a person already practising who does not fulfil the requirements for a full licence.

(ii) Once documentation is lodged, a licensing administration officer checks it, loads it into the computer system and an initial licence fee is payable and processed.

(iii) Once the application is lodged, it is then passed to an assessment team and an allocated assessor is then responsible for viewing the documentation, carrying out a telephone interview with the applicant and producing an Assessors Summary Report and recommendation to the Registrar. Any gaps or questions arising out of the documentation will result in the assessor arranging a further telephone conversation to discuss those issues which are identified and forwarded to the applicant prior to the interview.

(iv) The assessor completes the summary for the Registrar once all this procedure has been concluded. It is then submitted to the team leader of the assessors for review before being forward to the Registrar for a final decision.

THIS APPLICATION

[36] Mrs Taufa applied for a full licence in July 2008 completing a lengthy questionnaire concerning her knowledge of the Competency Standards. She was educated in Fiji until 1987 when she attended Form 6 at Otahuhu College and followed this with a year at the Auckland Technical Institute studying care of the elderly and children. Her work history then shows that from 1988, for the next 10 years she practised as a caregiver at various rest homes and private hospitals but in the year 2000 she became an immigration consultant and started her own immigration business. She filed several character references. She has no previous convictions.

[37] What followed were two telephone conversations with an assessor. One on 17 September 2008 and a second on 14 October 2008. Subsequently, further information was sought in a letter of 3 December 2008.

[38] The application was declined and Mrs Taufa was advised in a letter of 28 January 2009. An appeal was lodged against that decision but when the matter came before me in November 2009, further negotiations had taken place and it was agreed that the Registrar would have a further look at Mrs Taufa's situation. What followed was another two personal interviews with her and her lawyers and finally the decision which is now appealed against is dated 26 December 2009. It declines the application and sets out the grounds for declining.

[39] I have read the transcript of the telephone interviews, the letters exchanged and the first decision of 28 January 2009. At that stage of the proceedings I agree with the findings and the reasons given. The four files submitted disclosed an unintelligible system in relation to fees, and unprofessional practices such as trade-offs against fees for baby-sitting, exchange of a car and plastering work. There was also a lack of any proper paper trail demonstrating an invoice followed by a receipt. The impression one gets from reading the transcript of the telephone conversations is that the need for a clear contract, an invoice and receipt system and other paperwork were regarded as something of a nuisance.

[40] The assessor also asked to sight a contract in relation to the car and invoices but these were never provided.

[41] Following this set back, Mrs Taufa employed both accounting and legal advice and as indicated, two further interviews took place on 26 November and 10 December. Each meeting was approximately two hours in duration.

[42] The issue therefore is whether, having been given this additional opportunity to come up to standard, the Registrar can properly conclude that Mrs Taufa has not demonstrated competence to a level justifying the issue of a full license.

[43] There are a number of matters in favour of Mrs Taufa's application, as follows:

> "1. There are no issues as to her fitness to act as an immigration adviser, whether as a result of criminal convictions, suspensions or complaint. She must be accepted as a person of integrity who is committed to and using her best endeavours to comply with the competent standards.
>
> 2. She has been in practice as an immigration consultant for almost 10 years and has had a reasonable measure of success.
>
> 3. She is supported by character references and is fluent in English.
>
> 4. During her years in practice she was, of course, not subjected to competency standards or requirements. For example,. that she provide a written contract. She nevertheless endeavoured to draft her own contract.

[44] On the negative side it must be said that presumably she selected four of her best files to submit to the assessor and these were found wanting in many respects as regard running of a professional practice. Certainly, she was not running a practice which would "promote the reputation of New Zealand as a migration destination".

[45] The question now is whether the Registrar was right in his finding that now that she has been given an additional opportunity to remedy her business practices and has employed a lawyer and an accountant to assist, she nevertheless should not obtain any licence.

DISCUSSION

[46] There is a measure of unfairness in judging Mrs Taufa on her practice at a time when there were no rules or competency standards. She is entitled to demonstrate changed attitudes and new professional systems provided of course, she understands these new systems created by her professional adviser so that she does not ignore those new systems and revert to old practices.

[47] There is a considerable measure of protection to the public in the fact that the licence must be renewed every 12 months and the Registrar has very considerable powers to enter premises, search and inspect documents in order to ensure that standards are being complied with. In the case of someone like Mrs Taufa who has been in practice for 10 years and would be completely deprived of her livelihood, there ought to be some leeway in assessing her compliance with competency standards. There is also some protection in the new mechanisms for filing complaints. Bearing these factors in mind, I now turn to consider the Registrar's decision of 22 December.

[48] The decision of 22 December 2009 begins by acknowledging that Mrs Taufa has gone to considerable effort to come up to standard.

[49] I respectfully agree with the Registrar that the first two telephone interviews disclosed such shortcomings in business practice and competency standards that it was appropriate to decline the initial application.

[50] Since then, however, Ms Taufa has been given considerable leeway in the form of two subsequent interviews occupying two hours each. She employed both a lawyer and an accountant to re-organise her systems and documentation to present a final case for consideration by the Registrar.

[51] It is the Registrar's conclusion that these additional assessment opportunities continue to highlight a number of deficiencies in her ability to demonstrate her competence towards becoming licensed.

[52] To obtain a full licence it is necessary to demonstrate compliance with the Competency Standards and the Code of Conduct in all areas but the Registrar has found that Mrs Taufa lacked this competency in respect of Competency Standards 4.2, 4.4, 6.1 and 6.3.

[53] These standards are expressed in the Code as follows:

> **Competency 4: Prepare, lodge and administer immigration applications, appeals, requests and claims**
>
> Performance Indicator 4.2 Develop and maintain professional relationships with clients. Includes but not limited to providing advice and information before, during and after the immigration application process.
>
> Performance Indicator 4.4 Agree on terms of appointment. Includes but not limited to agreeing on services to be provided and fees to apply; outlining refund policy and any other key terms of agreement; establishing performance expectations; entering into a formal agreement with clients.
>
> **Competency 6: Conduct business professionally, ethically and responsibly**
>
> Performance Indicator 6.1 Demonstrate professional, ethical, and socially responsible behaviour and practice. Includes but not limited to demonstrating understand of and commitment to the Licensed Immigration Advisers Code of Conduct; acting in clients' best interests; providing honest advice; preserving client confidentiality; ensuring client complaints are handled in the correct manner; handling conflicts with clients and other parties in a constructive a professional manner; recognising and managing conflicts of interest; disclosing any financial and non-financial interests in goods or services recommended or supplied to clients.
>
> ...
>
> Performance Indicator 6.3 Apply business management disciplines to immigration matters in accordance with New Zealand law and best practice. Includes but not limited to providing client services; managing the financial aspects of immigration business; applying immigration knowledge as appropriate and in a manner that protects clients' immigration status and entitlement."

[54] The Registrar then sets out nine examples upon which he arrived at the following conclusion:

> "SUMMARY
>
> The points outlined above mean that you fail to satisfy me that you are competent in performance indicators 4.2 and 4.4, to develop and maintain professional relationships with clients and agree on terms of appointment. Your vague responses, the need to be prompted and coached, unfamiliarity

with your contract, especially, and your inability to explain each clause of the document and with fluency, evidenced your overall lack of knowledge and ownership of your business processes.

You have also failed to satisfy me that you are competent in performance indicators 6.1 and 6.3. You have been unable to demonstrate understanding of and commitment to the Licensed Immigration Advisers Code of Conduct, especially regarding clauses pertaining to the Code of Conduct, written agreements, business management, client funds, and fees. You have failed to demonstrate hour ability to apply business management disciplines in accordance with New Zealand law and best practice by your inconsistent and lack of understanding of managing financial aspects of your immigration business.

You have been unable to demonstrate that you can:

i) Develop and maintain professional relationships with clients;

ii) Agree on terms of appointment;

iii) Demonstrate professional, ethical, and socially responsible behaviour and practice. Includes but not limited to demonstrating understanding of and commitment to the Licensed Immigration Advisers Code of Conduct;

iv) Apply business management disciplines to immigration matters in accordance with New Zealand law and best practice.

You have therefore, not been able to satisfy me that you meet Competency 4 and 6 overall."

THE BASIS FOR REFUSING IN THE DECISION

(i) Finding

"You were asked to talk us through an example of your business processes with a new client from the point of the first contact to closure.

Instead of freely demonstrating your familiarity with your own business process you read directly from the document entitled "Check list for first interview".

This indicated to me you did not understand nor were knowledgeable about your own business process."

[55] The Registrar's concern was that Mrs Taufa appeared to read a document which had been prepared for her by professionals but the concern remained that she did not have a full understanding of what was required.

[56] Mr Thwaite argued that this was somewhat of a tall order given that she was not yet licensed. Further it showed that she had at least drawn up a check list. In my judgment this could clearly not on its own be a disqualifying issue. However, it is fair to observe that Mrs Taufa, although not licensed, had been some 10 years in practice, should have shown an easy familiarity with this initial and important step.

(ii) Finding

> **"You were asked to state at which particular stage you would issue an invoice to a client.**
>
> - You responded that you would issue the first invoice when the client paid you 25% as in the contract. There were several other occasions when you stated during the interview that you would issue an invoice after the client had paid you the amount.
>
> *This indicated to me that you were unaware of clause 8(e) requirements of the Code of Conduct.*
>
> To better gauge your understanding regarding issuance of invoices, you were asked at which stage you would issue an invoice for the second (50%) payment. As you appeared confused, to assist, the Authority gave you examples such as *two weeks before, one week before or right at that point in time.*
>
> - You responded "right at that point of time".
>
> *Overall, your responses regarding the purpose and issuance of invoices indicated to me that you were unaware of clause 8(e) requirements of the Code of Conduct. You therefore do not meet performance indicators 4.2, 4.4, 6.1 and 6.3."*

[57] The concern the Registrar had here was that the early telephone interviews with Ms Taufa indicated little understanding of the nature of an invoice as against a receipt, however, I agree with Mr Thwaite that it appears, at the time of the personal interviews, that the transcript of that interview, on pages 406 and 408, demonstrate that Ms Taufa would issue an invoice and a receipt for the first 25% of the fee simultaneously when the contract was signed. When questioned about the second 50%, in my judgment she correctly answered that once she got all the various forms ready and lodged them, she would then issue an invoice "right at that point in time". This, in my judgment, appears to accord with proper practice.

(iii) Finding

"You were asked, as an example, to state the actual dollar figure that would be stated on the invoice issued, reflective of the percentage amount in the contract.

- You were prompted by your accountant several times as to what the amount would be, "($3000 times 0. 25), which you simply repeated after her.

  This indicated to me that you were unable to provide a response regarding simple calculation of fees for clients without being coached.

  You were then asked how you would calculate this.

- Instead of your response, your accountant stated "use a calculator".

  This indicated to me that you were unable to provide a response independently and would therefore be unable to apply business management disciplines as per the terms of appointment of your business process. You therefore do not meet performance indicators 4.2, 4.4, 6.1 and 6.3.

[58] I accept there is substance in this finding by the Registrar, particularly bearing in mind the very poor quality of fee statements on the four files submitted for consideration. These are set out in the affidavit of Mr B J Smedts, of 15 July, at paragraph 17 onwards. The cost of taking accountancy advice when each invoice was issued would be prohibitive. I accept that Mrs Taufa should be able to clearly describe how fees were calculated without reference to a third party.

(iv) Finding

"You were asked to state your understanding of a client (trust) account.

- You responded that all the client fees, including consultation fee and Immigration New Zealand (INZ) fee and disbursements would be put into the trust account. INZ fee would be withdrawn at the point of the application being lodged, while other fees in the account would not be withdrawn until the application was complete.

  This indicated to me that you were unaware of clause 4(a) requirements of the Code of Conduct.

(a) You were then asked to clarify why your initial consultation fee of 25% would be put into the trust account if it fell due on the signing of the contract and would therefore not be considered an advance.

- **You did not understand this particular point nor were able to articulate a response.**

  Again, this indicated to me that you were unaware of clause 4(a) requirements of the Code of Conduct.

(b) The authority pointed you to clause 4(a) of the Code of Conduct regarding client funds and asked to state your understanding of what fees paid in advance meant to you in this context.

- **You responded that the initial 25% and 50% of the fees from the contract related to what in advance meant in clause 4(a).**

  This is incorrect. The fees would not be considered an advance as your contract stipulates that the payments fall due at those particular stages. This also indicated to me your lack of understanding regarding clause 4(a) even though you were pointed to the clause by the Authority and explained its purpose.

(c) You were asked if the 25% of the fees was paid after the initial consultation.

- You respected, "yes". Your accountant prompted you to say "before", which you then did. You then went on to say that 25% of the fees were paid before the consultation and 50% on the day of the application being lodged, so, 75% in advance.

  Your responses indicated to me your lack of familiarity with your contract and business processes. The fees would not be considered an advance as your contract stipulates that the payments fall due at those particular stages.

(d) You were asked why the 25% and 50% of the fees would be considered to be taken in advance if the contract stipulated that those amounts fell due and became payable at those particular stages.

- You responded that because it was written in your contract.

You were advised by the Authority that those amounts did not appear to be paid in advance and that it should be paid into your business account instead of your trust account.

Your response indicated to me your lack of understanding regarding clause 4(a) requirements of the Code of Conduct

(e) You were asked whether you would ever refund the initial 25% of the fees.

- You responded that you would not but that the final 25% of the fees would be refunded if the application were declined.'

The latter part of your statement contradicts your contract. The contract states that the final 25% of the fees would be payable upon completion of

your services, that is, upon the approval of the application by INZ. Therefore, if an application were declined, the final 25% of the fees would not be payable by the client according to your contract. Hence, a refund would not be in question.

Your responses indicated to me your lack of familiarity with your contract and business processes.

(f) You were asked again if you would consider the initial 25% of the fees to be an advance.

- You were prompted with a response, both, by your lawyer and accountant that it was not an advance and your lawyer pointed to a sentence for you to read out. Your accountant also continued to offer responses on your behalf.

This indicated to me that you were unable to offer responses without being coached or to walk us through your business processes independently and lacked familiarity with your contract and business processes.

You were advised by the Authority that the initial amount was not considered an advance and should therefore not be deposited into your trust account.

Overall, your responses regarding your client (trust) account indicated to me that you were unaware of clause 4(a) requirements of the Code of Conduct. You were also unable to independently explain your contract and talk through your business processes. You therefore do not meet performance indicators 4.2, 4.4, 6.1 and 6.3."

[59] I agree with the Registrar that it is essential that an applicant demonstrate a clear understanding of the appropriate use of the "client account" which is, in effect, a trust account. She must demonstrate an understanding of what is her money that she can immediately access, and what is the client's money which can only be accessed once proper invoicing has been carried out at various stages of the service rendered. I do not accept Mr Thwaite's submission that it is trivial having regard to the advice of her legal advisers that she should simply deposit everything into the trust account, even the initial 25% fee, which was immediately due and payable when the contract was signed. This does support misgivings as to a knowledge of what is her money and what is the clients.

[60] I agree with Mr Thwaite that there is nothing wrong in referring for advice to a professional when one is uncertain, but in an interview of this nature where the whole purpose is to ascertain the client's personal knowledge, an applicant must be

clear how things operate because she will not have an accountant or lawyer with her during most of her client's meetings and dealings.

[61] I agree with Mr Thwaite that the criticism in paragraph (e) may be a matter of semantics. The Registrar's concern is that it demonstrated that Mrs Taufa thought the final 25% must have been paid to her before the final result, whereas, it does not become payable until the result indicates a success. There ought not, therefore, to have been a reference to a refund, rather, a rebate or an understanding that the 25% was not payable at all until success.

[62] With regard to the criticism in paragraph (f), although it must be said that it is always appropriate to refer to professionals for advice, in the particular interview situation it did not assist Mrs Taufa's case that many of the answers did not come from her but rather from her professional advisers. This, in itself, in my judgment justifiably reinforced the Registrar's view that Mrs Taufa was hazy in the area of accounting procedures.

(vi) Finding

"You were asked to explain the difference between clauses 5.2 and 14.2 of your contract.

- You responded that clause 5.2 was like 14.2 in relation to your hours of work and additional charges after hours.

This is incorrect. Your lawyer also corrected you several times regarding the individual purpose of both these clauses. This indicated to me that you did not understand your contract nor were knowledgeable about your own business.

(a) To assist, you were asked to explain just clause 5.2

- Your lawyer prompted you that it was to do with additional research, but you went on to state that it was to do with clients when they came in for variation of condition of their permits.

This indicated to me your lack of understanding regarding the purpose of this clause. It also indicated to me that you did not understand your contract nor were knowledgeable about your own business processes.

- Your lawyer prompted you again with a lengthy explanation that it was to do with research on particular issues, which you followed with on this occasion.

This indicated to me that you were unable to talk us through your business processes independently and lacked familiarity with your contract and business processes. You, therefore, do not meet performance indicators 4.2, 4.4, 6.1 and 6.3.

[63] I agree with Mr Thwaite that the Code of Conduct and Competency Standards require a contract to be in writing but I do not agree that that alone is sufficient. An applicant must be able to talk a client through the terms of the contract and particularly in the area of fees or extra fees, have the ability to explain when these would arise and how. In this case, Mrs Taufa did not establish an understanding of the two different clauses and again, the Registrar's hesitation is that although she has presented a satisfactory and competent contract in writing, her ability to put it into effect and to explain it to potential immigrants was not established.

(vii) Finding

You were asked if a client agreed to the additional charges, what your next step would be in terms of your business processes.

- You responded that if they agreed and paid you, you would issue them with a receipt and pointed to your meetings and telephone call sheet to record meetings and calls.

Your response indicated to me your lack of knowledge regarding clause 1.5(e) requirements of the Code of Conduct.

You were prompted by the Authority and asked if you would issue an invoice as well. You responded in the affirmative.

This indicated to me that you were unable to talk us through your business processes independently and were unfamiliar with the requirements of clause 8(e) of the Code of Conduct.

You were prompted by the Authority and asked if there would be any changes to the contract.

- You responded that the contract would remain the same.

Again, your response indicated to me your lack of knowledge regarding clause 1.5(e) requirements of the Code of Conduct.

You were prompted again by the Authority and asked if you would have anything in writing with the client to outline their agreement regarding the additional charges.

- You were prompted by your lawyer, who pointed you directly to the *Variation of Agreement for Services* form on your business processes folder.

This indicated to me that you were unable to talk through your business processes independently and were unfamiliar with the requirements of clause 1.5(e) of the Code of Conduct. You, therefore, do not meet performance indicators 4.2, 4.4, 6.1 and 6.3.

[64] The Registrar's main concern here was again, that you seemed dependent on explanations by your professional advisers. The answer the Registrar was seeking was that you would attend to a written variation of the contract as required by the Code of Conduct clause 1.5(e) and a "Variation of Agreement for Services" form had been prepared for you but operating independently you did not go straight to this as the appropriate answer.

[65] Again, everything in your programme and set up is in place but the concern is whether or not you knew how to make proper use of it.

(viii) Finding

You were asked if you were familiar with your service agreement which you had submitted and each clause stated therein.

- You responded that you had your old contract and that your lawyer had drawn up the new one for you, and that you had read it through and thought it was okay.

You were asked to take the Authority through each clause in your contract as you would a new client, if licensed. By undertaking this exercise, it was evident that you were:

- unable to explain clause 4 and stated that your "lawyer had done that part, that's why";

- unable to explain the essence of clause 5.1. When you were questioned about this clause, your lawyer prompted you to respond by pointing to the words *not required to spend excessive time* in the clause, which you then read out;

- unable to explain clause 5.2 accurately, as your lawyer prompted you again that it was in relation to additional research. Yet you continued to state that clauses 5.2 and 14.2 were "nearly similar, similar explanation";

- unable to explain your statement in relation to clause 6, where you stated that the GST would be deposited into the trust account because it did not belong to you;

- unable to explain clause 8.1;

- unable to explain clause 8.2;

- unable to explain clause 11. You stated that you would still have to collect your outstanding fees of 50%. Again, this statement is in direct contradiction to the terms of your contract regarding payment of fees. If the 50% of the fees are to be collected at the particular point as stated in the contract, fees would not be outstanding.

  You were asked what clause 11 allowed you to do. You struggled to respond and were prompted by your lawyer to state "go to Baycorp", which you followed;

- unable to explain clause 15;

- unable to demonstrate the purpose of having an internal complaints procedure. Instead of making an initial attempt to resolve the complaint directly and internally with the client, you stated that you would refer the client to a lawyer. The Authority had to prompt you in several different ways and refer you to the relevant clauses in your contract to obtain some response regarding your understanding and process of your complaints process;

- unable to explain the essence of clause 18

Your inability to explain clauses in your contract indicated to me that you were unable to talk through your contract without being prompted or coached. It evidenced your gross lack of familiarity and understanding of the document and your overall business processes. You therefore do not meet performance indicators 4.2, 4.4, 6.1 and 6.3.

[66] Although I accept Mr Thwaite's submission that some of the Registrar's adverse findings in relation to Mrs Taufa's explanations were not justified (for example Clause 15). However, the Registrar is justified in requiring an applicant to explain clauses of the contract in very clear terms. It is fair, also, to emphasise that this must particularly be so where the client has limited English. The Registrar's concern here is that Mrs Taufa was given many opportunities to present herself in the best possible light and although she has done this on paper with the assistance of professionals, her personal understanding was required and was not demonstrated in the judgment of the Registrar.

[67] Mrs Taufa is a person of good character who has had extensive experience in handling immigration matters. There is no complaint about her fitness and no evidence of complaints about her administrative systems. Nevertheless, the whole thrust of the recent legislation is to set a much higher standard of what was acceptable in the past. In my judgment, the Registrar is justified in having continuing misgivings about Mrs Taufa's ability to demonstrate competency with regard to competency provisions 4.2, 4.4, 6.1 and 6.3. This places her in much the same category as a new applicant who would be granted a provisional licence to work under supervision for a term.

[68] In the circumstances, Mrs Taufa should be granted a provisional licence for a period fixed by the Registrar so that she can demonstrate that she can put into practice the professional structures which have been created for her. To that extent the decision of the Registrar is varied.

Dated at Auckland this 14 day of May 2010 at 9 am/~~pm~~

G V Hubble
District Court Judge