IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1859
[2019] NZHC 1898

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	IMMIGRATION ADVISERS AUTHORITY Applicant
AND	DISTRICT COURT AT AUCKLAND First Respondent
AND	APURVA KHETARPAL Second Respondent

On the papers

Appearances:	R Warren and A Dumbleton for the Applicant S Wimsett for the Second Respondent GM Illingworth QC, counsel appointed to assist the Court as Contradictor
Judgment:	7 August 2019

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 7 August 2019 at 2.00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] Apurva Khetarpal was a licensed immigration adviser under the Immigration Advisers Licensing Act 2007 (the IAL Act or the Act). In giving immigration advice, she was bound by the Licensed Immigration Advisers Code of Conduct 2010, developed by the Registrar of Immigration Advisers (the Registrar) under s 37 of the Act, and published by the Registrar under s 38.

[2] This appeal concerns the disposition of three complaints made by the Registrar to the Immigration Advisers Complaints and Disciplinary Tribunal (the Tribunal) alleging breaches of the Code of Conduct. In each case the Tribunal upheld one or more of the particular complaints.[1] In separate sanctions decisions,[2] the Tribunal made orders which included:

(a) censure;

(b) payment of penalties, compensation and reimbursements; and

(c) cancellation of Ms Khetarpal's licence and an order preventing her from applying for any category of licence until she complied with certain conditions.

[3] Ms Khetarpal appealed against the sanctions to the District Court under s 81 of the IAL Act. Pending the hearing of the appeal, the District Court made interim orders under s 82 allowing Ms Khetarpal to engage in providing immigration advice subject to certain conditions, the effect of which was to require Ms Khetarpal to provide advice under supervision, and to enrol in and meet the course and attendance requirements in a course of training.[3] Those conditions and others that were also imposed are discussed more fully below.

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1 *Khan v Khetarpal* [2015] NZIACDT 45; *OJ v Khetarpal* [2015] NZIACDT 95; *Prajapati v Khetarpal* [2016] NZIACDT 5.

2 *Khan v Khetarpal* [2016] NZIACDT 6; *OJ v Khetarpal* [2016] NZIACDT 7; *Prajapati v Khetarpal* [2016] NZIACDT 23.

3 *Khetarpal v Immigration Advisers Authority* [2016] NZDC 4864.

[4] Ms Khetarpal's appeals under s 81(c) of the IAL Act against the Tribunal's decisions to cancel her licence were heard together by Judge GM Harrison in the District Court at Auckland. On 27 September 2017, the Judge issued a decision in which he held that the three complaints were justified, and that the Tribunal was entitled, in the exercise of its statutory discretion, to impose the sanctions it did, including cancellation.[4]

[5] Notwithstanding his recognition that those conclusions would normally lead to dismissal of the three appeals, with the result that the cancellation of Ms Khetarpal's licence would stand, the Judge concluded that the conditions imposed in the sanction decisions were "clearly tailored to providing [Ms Khetarpal] with an opportunity to re-enter the profession".[5] He considered that that opportunity was echoed in the interim conditions imposed pending the hearing of the appeals. The Judge said:[6]

> It would be completely pointless for the interim orders to have been made, and then lapse on dismissal of the appeals.

[6] The Judge said that, since the issuing of the Tribunal's sanctions decisions on 22 January 2016 and 3 May 2016, Ms Khetarpal had complied with all of the conditions capable of compliance and that the two-year limitation on any re-application for a licence imposed by the Tribunal's most recent decision would have expired in May 2018. Some factual assumptions underlying that statement of the position are challenged by the Authority in this proceeding. At any rate, the Judge deferred making a final decision on the appeal, pending receipt of advice from the Immigration Advisers Authority about the outcome of any application made by Ms Khetarpal for a licence. The Judge said that if the licence application was granted, there would be no need for a continuation of the interim orders and the appeals would be formally dismissed. The terms of the orders made by the District Court are:

> [5] … the appellant [is allowed] to engage in providing immigration advice subject to and in accordance with the following conditions:
>
> (a) All such immigration advice shall be provided to the standard required by and in accordance with the Act and the relevant… Code of Conduct and all relevant requirements of the…

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4 *Khetarpal v Immigration Advisers Authority* [2017] NZDC 21262 at [35] and [37].
5 At [38].
6 At [39].

Authority as if the appellant were at all times a licensed adviser subject to the Act and the Code.

(b) The appellant must first, on terms approved by the Registrar, enter into and remain subject to a supervision agreement with an immigration adviser approved by the Registrar who has a full licence under the Act.

(c) Without limiting the discretion or rights of the Registrar or the Authority… the appellant must forthwith provide for inspection by the Registrar any client file that may periodically be requested by the Registrar.

(d) The appellant must not provide any immigration advice to any person unless the appellant has advised that person in writing, on terms approved by the Registrar, that the appellant is providing immigration advice pursuant to an interim order of the Court pending disposition of appeals to the Court and subject to a supervision agreement with another immigration adviser.

(e) The appellant must pay the sum of $10,450.00 (being the total amount the appellant was ordered by the Tribunal to pay in the two decisions appealed) into the trust account of Laurent Law by 29 April 2016. Those amounts will be held by Laurent Law on behalf of the intended recipients pending further order of the Court.

(f) The appellant must enrol in and meet the course and attendance requirements of the Bay of Plenty Polytechnic Graduate Certificate in Immigration Advice course.

(g) The appellant must pursue in good faith with all due diligence the judicial review proceedings in the High Court to facilitate early hearing in this Court of the appeals.

[7] Although s 85 of the IAL Act provides a right of appeal from a decision of the District Court on a question of law, the Authority commenced this proceeding by way of judicial review of the District Court's decision under the Judicial Review Procedure Act 2016 (JRPA). That may have been a cautious approach: although I do not need to decide the point, it is arguable that a decision not to bring an appeal to an end after a determination of its merits and to adjourn the proceeding is a decision susceptible to appeal. In this case, the nature of the proceeding in this Court, whether judicial review or an appeal on a question of law, is not material to the determination of the issues or the outcome.

Result

[8] The Authority has asked this Court to direct the District Court to make a final determination of the appeal that is consistent with its findings. For the reasons given below, I have concluded that the District Court Judge made reviewable errors in the exercise of his powers on appeal, and I have granted relief.[7]

Representation

[9] The Authority pursued the review application represented by Crown counsel; both the District Court and Ms Khetarpal, the named respondents, abide the decision of the Court. To achieve balance in the legal argument on what I am told may lead to a judgment that has some value as a precedent, I appointed Mr GM Illingworth QC as counsel to assist the Court in the role of Contradictor, to argue the case, on the papers, as if he were counsel for the second respondent. Specifically, Mr Illingworth was requested:

(a) to respond to the submissions on behalf of the applicant and to indicate, in respect of each of the issues raised, whether he agrees with the submissions or not, providing his reasons; and

(b) to consider the relief sought and provide his submissions on whether, in the circumstances, the relief sought is appropriate.

[10] Mr Illingworth was directed to base his submissions on the background evidence provided by the documents comprising the common bundle. He was also asked to identify for the Court whether there were any unresolved evidential issues that the Court should address before determining the application. I have considered Mr Illingworth's helpful submissions gratefully. He did not indicate that it would be necessary for any evidence to be given.

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7 At [74]-[79].

The statutory scheme regulating the conduct of immigration advisers

[11] To understand the issues arising on the review application, it is necessary to know something about the legislative scheme for regulating the conduct of immigration advisers in New Zealand.

[12] Section 3 of the IAL Act provides that the purpose of the legislation

> ... is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[13] The responsibility for administering the licensing regime for immigration advisers falls on the Immigration Advisers Authority (the Authority), established under s 34(1) of the Act as a body within the Ministry of Business, Innovation and Employment. It consists of a Registrar of Immigration Advisers and other members.[8]

[14] The relevant functions of the Authority are:[9]

> (a) to establish and maintain a register of licensed immigration advisers:
>
> (b) to administer the licensing regime for immigration advisers:
>
> (c) to develop and maintain competency standards and a Code of Conduct for immigration advisers:
>
> ...
>
> (f) to investigate and take enforcement action in relation to offences under this Act.
>
> ....

[15] Section 19 addresses the granting of licences and provides, so far as is relevant:

> **19 Granting of licence**
>
> ...
>
> (2) When determining to grant a licence, the Registrar must determine whether the applicant is to be granted—
>
> (a) a full licence; or

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8 Immigration Advisers Licensing Act 2007, s 34(2).
9 Section 35(1).

(b) a limited licence; or

(c) a provisional licence.

(3) The Registrar may grant a full licence if satisfied that the applicant has overall competence in all areas of immigration advice.

(4) The Registrar may grant a limited licence that authorises the applicant to provide immigration advice only in relation to specified matters, if satisfied that the applicant has competence only in relation to those matters.

(5) The Registrar may grant a provisional licence that requires the applicant to work under the direct supervision of a fully licensed immigration adviser for 12 months or such other lesser period as may be specified by the Registrar, if satisfied that the applicant is a new entrant to the industry or that for any other reason supervision is required or appropriate.

....

[16] Full and limited licences are effective for a period of 12 months from the date of grant; a provisional licence is effective for the period or until the expiry date stated in it.[10]

[17] In the exercise of the powers and duties of enforcement provided by the IAL Act, the Registrar may either act upon his or her own motion or in response to a complaint received from another person.[11] Complaints are determined by the Immigration Advisers Complaints and Disciplinary Tribunal established under s 40, which comprises a Chair and other members each exercising the jurisdiction of the Tribunal on their own. It is a function of the Tribunal to hear appeals against decisions of the Registrar to cancel an immigration adviser's licence.[12]

[18] The grounds for a complaint to the Tribunal may be any one or more of: [13]

(a) negligence;

(b) incompetence;

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10 Section 22(1) and (2).
11 Sections 45 and 46.
12 Section 41(c)(i).
13 Section 44(2).

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the Code of Conduct.

[19] After hearing a complaint, the Tribunal may:[14]

(a) determine to dismiss the complaint;

(b) uphold the complaint but determine to take no further action;

(c) uphold the complaint and impose one or more of the available sanctions.

[20] The available sanctions, so far as they are relevant, are set out in s 51:

> **51 Disciplinary sanctions**
>
> (1) The sanctions that the Tribunal may impose are—
>
> (a) caution or censure:
>
> (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
>
> (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
>
> (d) cancellation of licence:
>
> (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
>
> (f) an order for the payment of a penalty not exceeding $10,000:
>
> (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
>
> (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the

[14] Section 50(a).

licensed immigration adviser or former licensed immigration adviser:

(i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

….

[21] It is the practice of the Tribunal to issue separate liability and sanctions decisions in respect of any complaint.[15] There is a right of appeal to the District Court against a decision of the Tribunal to cancel or to suspend an immigration adviser's licence,[16] or any other decision of the Tribunal imposing a sanction.[17] In determining an appeal, the District Court may confirm, vary, or reverse the decision of the Tribunal.[18] A party dissatisfied with a decision of the District Court as being wrong in law may appeal to the High Court on a question of law only.[19] Rights of judicial review are preserved by the Act.[20]

The three complaints

[22] The merits of the Tribunal's decisions and the District Court Judge's findings are not in dispute in this proceeding, but it is necessary to provide a brief summary of each of the complaints and how they were handled by the Registrar and the Tribunal. It is convenient simply to adopt the summary helpfully provided by Judge Harrison in his decision:

> ***The OJ complaint***
>
> [5] This complaint was lodged with the Registrar of Immigration Advisers on 26 September 2014. It alleged essentially that in the course of her professional relationship with the complainant the applicant failed to carry out her instructions properly, that she was dishonest or engaged in misleading behaviour, and failed to deal properly with fees.
>
> [6] In its decision of 5 November 2015 the Tribunal held:

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15 See Immigration Advisers Complaints and Disciplinary Tribunal Practice Note "An Adviser's Guide to Proceedings before the Tribunal", 26 October 2016 at [27]-[28].
16 Section 81(1)(c).
17 Section 81(1)(d).
18 Section 84(1).
19 Section 85(1).
20 Sections 84(3).

[44] Accordingly, I find Ms Khetarpal did dishonestly mislead her client, taking fees, causing him to understand his request was managed properly, while knowing she was not progressing it using her professional skills and in accordance with the 2010 code.

The Khan complaint

[7] This complaint was to the effect that Ms Khetarpal accepted instructions to lodge an expression of interest application on behalf of the complainant when there was no proper basis for doing so and that she did not encourage the complainant not to lodge it, nor advise in writing that the application was unfounded. The Tribunal concluded:

> [29] For the reasons discussed I am satisfied Ms Khetarpal should have identified the expression of interest was grossly unfounded and had no hope of success. She failed to do so. As she failed to do so, it followed she did not:
>
> [29.1] encourage her client not to lodge it; and
>
> [29.2] did not advise her client in writing it was grossly unfounded.

...

The Prajapati complaint

[8] This complaint was to the effect that Ms Khetarpal took $2,200 from the complainant. This was paid to Ms Khetarpal's practice and not to a separate client funds account.

[9] The Tribunal said:

> [23] Accordingly, the $2,200 the complainant paid to Ms Khetarpal's practice was paid in advance as fees and disbursements; it was in advance in the sense Ms Khetarpal had no contractual or other basis for treating the money as other than fees paid:
>
> [23.1] In advance of services being provided, and
>
> [23.2] In advance of her practice being entitled to take the fees when she had provided the services.
>
> [24] Accordingly, Ms Khetarpal failed to establish a client funds account, took the complainant's money, did not deposit it in a client funds account, and used the money for a purpose other than the purpose it was paid to her, namely expending it on practice expenses.
>
> [25] I accordingly find Ms Khetarpal breached clauses 4(a) and (c) of the 2010 code.

[23] Judge Harrison also usefully summarised the sanction imposed by the Tribunal in these terms:

> **The sanctions**
>
> [10] On 22 January 2016 the Tribunal imposed sanctions on the Khan matter as follows:
>
> (a) Censure;
>
> (b) Cancellation of licence with effect from 16 February 2016;
>
> (c) Restraint from reapplying for a full licence for two years from the date her licence was cancelled;
>
> (d) Restraint from applying for any class of licence until she has enrolled in and completed a graduate diploma in New Zealand Advice, has submitted to a supervision regime approved by the registrar, and has complied with all the orders made by the Tribunal;
>
> (e) Penalty of $1,000 payable to the Crown.
>
> [11] In respect of OJ, by further decision issued the same day the Tribunal imposed the same sanctions as in Khan except that the penalty was $2,500, the complainant was awarded compensation of $2,500 and a third party was awarded $3,450 and $1,000 as costs.
>
> [12] Ms Khetarpal does not challenge the sanctions except for the cancellation of her licence in each case.
>
> [13] On 3 May 2016, on the Prajapati complaint, the Tribunal ordered:
>
> (a) Censure;
>
> (b) Immediate cancellation of licence if the appellant still held one;
>
> (c) Restraint from applying for any category of licence until the appellant has enrolled for the graduate diploma in New Zealand Advice (Level 7) course and obtained that qualification, which at minimum will take 12 months;
>
> (d) Further restraint from applying for a provisional licence until the registrar has approved a supervision regime;
>
> (e) Further restraint from applying for a full licence for two years, until at least 2 May 2018 and until the appellant has practised under supervision for two years with a provisional licence;
>
> (f) Penalty of $5,000 to be paid immediately;
>
> (g) Compensation of $2,200 to be paid to a third party.

[24] The effect of the legislative scheme is that, although there is a right of appeal to the District Court from sanctions decisions of the Tribunal under s 81, a decision upholding a complaint may be challenged only in judicial review proceedings in the High Court.[21] Ms Khetarpal did not challenge any of the Tribunal's substantive findings about the complaints in the Khan and Prajapati matters, but an application to this Court for judicial review of the Tribunal's decision upholding the complaint in the *OJ* matter was dismissed by Collins J on 2 November 2016.[22] In that judgment, Collins J held that the Tribunal was entitled "to draw the ultimate inference" that Ms Khetarpal acted dishonestly in her dealings with OJ and his employer.[23]

The central issues in this proceeding

[25] The central issues in this proceeding concern the exercise of the District Court's power to make interim orders pending the determination of appeals before it. The District Court's power to make interim orders allowing an immigration adviser who has appealed against the cancellation of a licence to continue to engage in providing immigration advice is expressed in the IAL Act as follows:

> **82 District Court may make interim order**
>
> (1) At any time before the final determination of an appeal, the District Court may make an interim order allowing the appellant to engage in providing immigration advice.
>
> (2) An interim order may be subject to any conditions that the District Court thinks fit.
>
> (3) If a District Court refuses to make an interim order, the person who applied for the order may, within 1 month after the date of the refusal, appeal to the High Court against the decision.

[26] Although an order under s 82(1) may be made at any time before the final determination of the appeal, the statute does not provide expressly that any interim order shall expire upon the final determination of the appeal. Because of the interim nature of the order, however, that must be the case by implication. Judge Harrison's decision not to issue a determination of the appeal but to further adjourn the proceeding in the District Court must have been predicated on that assumption, in

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21 *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [15], [36] and [40].
22 *Khetarpal v Immigration Advisers Complaints and Disciplinary Tribunal* [2016] NZHC 2624.
23 At [49].

acknowledgement of the express direction of Judge Hinton when he made the interim orders.[24]

[27] The principal objection of the Authority to the approach taken by the District Court Judge is that it has resulted in an outcome which the Authority says defeats both the purpose of the Tribunal's determinations and what ought to have been the consequence of the Tribunal's decisions to cancel Ms Khetarpal's licence. Counsel for the Authority submit that, despite upholding the sanctions imposed by the Tribunal, Judge Harrison's orders had the opposite effect, essentially overriding the Tribunal's decisions with respect to the cancellation of Ms Khetarpal's immigration licence, and the conditions that regulated when she would become eligible to apply for a new licence.

[28] Indeed, it is an unusual outcome that the District Court Judge, having held that the appeal had failed and that the Tribunal was entitled to impose the sanctions, including cancellation, nevertheless adjourned the proceeding with a view, in due course, to dismissing the appeals in a manner that renders the cancellation of the licence nugatory.

Timeline

[29] This is the timeline of the relevant decisions of the Tribunal and the District Court:

24 April 2015	Immigration Advisers Complaints and Disciplinary Tribunal decision on *Khan* complaint, [2015] NZIACDT 45.
5 November 2015	Tribunal decision in *OJ* complaint, [2015] NZIACDT 95.
22 January 2016	Tribunal decision on *Prajapati* complaint, [2016] NZIACDT 5. Tribunal decision imposing sanctions on the *Khan* complaint, [2016] NZIACDT 6. Tribunal decision imposing sanctions on the *OJ* complaint, [2016] NZIACDT 7.

[24] At [8].

16 February 2016	Notice of appeal and application for interim orders by Ms Khetarpal (*OJ).* Notice of appeal and application for interim orders by Ms Khetarpal (*Khan*).
22 March 2016	Directions of Judge LI Hinton, including interim orders under s 82, [2016] NZDC 4864.
3 May 2016	Tribunal decision imposing sanctions on the *Prajapati* complaint, [2016] NZIACDT 23.
31 May 2016	Notice of appeal and application for interim orders by Ms Khetarpal (*Prajapati*).
14 June 2016	Decision of Judge PA Cunningham dismissing application to set aside interim orders, [2016] NZDC 10583.
27 September 2017	Appeal decision of Judge GM Harrison, [2017] NZDC 21262.

The Authority's submissions

[30] The Authority relies on four grounds in support of its application, some of which overlap to a degree. They are:

(a) The District Court's purported variation of the Tribunal's sanctions regarding the length of prohibition was ultra vires.

(b) The District Court's purported deferral of its final decision was ultra vires.

(c) The District Court's order reserving leave to apply further was ultra vires.

(d) The District Court's orders were based upon errors of fact.

[31] It is argued that, in purporting to rely on the Court's power to make "any other order" after hearing an appeal under r 18.24(1)(c) of the District Court Rules 2014 to:

(a) vary the Tribunal's sanctions regarding the length of prohibition;

(b) defer its final decision; and

(c) reserve leave to apply further,

the District Court was acting for the improper purpose of avoiding the cancellation of Ms Khetarpal's licence as imposed by the Tribunal. It is said that was a reviewable error because the decisions were outside the ambit of r 18.24 and ultra vires the IAL Act.

[32] The Authority argues also that the District Court Judge assumed, incorrectly, that, by the time he issued his judgment on 27 September 2017, Ms Khetarpal had completed all of the requirements necessary to reapply for a licence. Under that misapprehension, the Judge amended the Tribunal's decision to fix the expiry of the time periods restricting her application for a new licence to the date of the judgment. On that basis, the Judge directed that any application for a licence should be made by 31 October 2017 and reserved leave to apply further if such an application was dismissed.

[33] In fact, although Ms Khetarpal applied for a new licence on 25 October 2017, she had not begun the diploma course. In a memorandum to the District Court on 13 November 2017, her counsel Mr Wimsett informed the Court that she was due to begin her study during that month. On 13 March 2018, Judge Harrison issued a Minute in which he directed that Ms Khetarpal was to complete the Graduate Diploma course that was due to end in November 2018.

[34] Because Ms Khetarpal had completed the course by the time this matter came before this Court, I do not regard the Judge's misunderstanding of the position about the diploma course as material. There remains, however, a conflict between counsel for the Authority and Mr Wimsett about whether the Tribunal's orders, if upheld, would entitle Ms Khetarpal to apply for a full licence immediately or whether she is required to apply for a provisional licence. I return to that matter below.[25]

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[25] At [65]-[72].

[35] For the Authority, Ms Warren refers to the findings of the District Court Judge that:

(a) there was no basis to interfere with the decision of the Tribunal;[26]

(b) adopting the submissions of counsel for the Authority, the cancellation of the licence by the Tribunal was arrived at after a careful weighing up of Ms Khetarpal's conduct, including her attitude to the disciplinary proceedings and her personal circumstances;[27]

(c) cancellation was within the range of disciplinary responses open to the Tribunal;[28]

(d) there was no error in the Tribunal's approach;[29] and

(e) such circumstances would normally lead to the dismissal of the appeals.[30]

[36] Ms Warren says those findings are inconsistent with the approach the District Court Judge then took, which was to override:

(a) the Tribunal's decision to cancel Ms Khetarpal's licence;

(b) the order requiring her to complete the diploma course before applying for a provisional licence; and

(c) the determination that it would not be appropriate for Ms Khetarpal to practice under supervision before obtaining the diploma.

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26 At [35].
27 At [36].
28 At [36].
29 At [37].
30 At [38].

[37] Counsel for the Authority say that the Judge's erroneous approach was motivated by the misconception that it would be[31]

> … completely pointless for the interim orders to have been made [pending the appeal], and then lapse on dismissal of the appeals.

[38] Ms Warren says the lapsing of the interim orders on the dismissal of the appeals was precisely the point of the orders, which state as much explicitly.[32]

[39] Moreover, the Authority points out that, because of the delays since the interim orders were made, Ms Khetarpal has continued to provide immigration services without a licence, albeit on a supervised basis. She has not been required to comply with the annual relicensing and auditing requirements and has benefited unjustly from the discount in the financial penalties that were imposed by the Tribunal, in part, because of the hardship which the Tribunal considered would follow from her loss of income after cancellation of her licence. Still further, the money Ms Khetarpal was ordered to pay to the victims of the *OJ* complaint has been sitting in a trust account since April 2016, notwithstanding the Tribunal's recognition in the *OJ* sanctions decision that payment to them was a priority.[33]

[40] It is submitted on behalf of the Authority that these outcomes result from the District Court having used its decision-making power for an improper purpose in the sense that the Court's purpose was inconsistent with that for which the power was confirmed.[34] Ms Warren emphasises that the legislative purpose as set out in s 3 of the IAL Act is to promote and protect the interests of consumers and to enhance New Zealand's reputation as a migration destination. In that regard, Ms Warren refers to Priestley J's observations in *ZW v Immigration Advisers Authority:*[35]

> ... In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which

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31 At [39].

32 At [8] where Judge Hinton said: "This interim order ceases to have effect on the final determination of the appeals in this Court."

33 At [69].

34 *New Zealand Milk Corp v McDonald* [1993] 2 NZLR 543 (CA) at 549, applying *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 per Lord Reid, *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107 (HC) at [86] and *Lumbar Specialties Limited v Hodgson* [2000] 2 NZLR 347 (HC) at [63].

35 *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [41].

> hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.

[41] Ms Warren argues that the Tribunal had regard to these purposes in determining the sanction for the OJ complaint, which the Tribunal held:[36]

> ... involved a sustained failure to provide the most elementary aspects of professional service delivery; her conduct mirrored the type of fraudulent deception that led to Parliament passing the Act. She took a substantial sum, kept the money without providing the services she promised, instead she reported her client to Immigration New Zealand, which was calculated to trigger a deportation, and did not take any steps to address his predicament. She was deceptive both in failing to disclose the likely futility of the services at the outset, and in providing assurances that were not justified ... Her conduct was wholly unacceptable.

[42] The Tribunal was also highly critical of what was described as Ms Khetarpal's indefensible conduct in regard to that complaint by asserting it was acceptable and that it met the required standards of delivery. In taking that position, the Tribunal said, she appeared "bereft of insight and understanding".[37]

[43] Moreover, the Tribunal concluded that the evidence provided "a compelling picture of gross deficiency in Ms Khetarpal's competence"[38] and that it was clear that the Tribunal considered, at best, Ms Khetarpal should not provide immigration advice under supervision until she had completed the Diploma course and that she would then have to complete two years post-diploma supervision under a provisional licence before being eligible to apply for a full licence.

[44] The Tribunal expressed a rather pessimistic view of the likelihood of Ms Khetarpal satisfying the Registrar in future that she was a suitable person to receive either a provisional or full licence, noting that she could "have no confidence that she will ever be entitled to a licence under the Act".[39]

[45] Ms Warren also submits that it was clear that, in approving the interim orders to which the Authority consented, Judge Hinton intended that they should be short-lived. That submission is said to be supported by:

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36 At [59].
37 At [60].
38 At [61].
39 At [64].

(a) the condition that the judicial review proceeding in the High Court challenging the substance of the findings on the *OJ* complaint was required to be pursued with all due diligence;

(b) the Authority's consent to the orders notwithstanding its firm position that cancellation of the licence was appropriate; and

(c) the condition that the financial sanctions, including payment of compensation to the victims of the *OJ* complaint were to be held in trust notwithstanding the Tribunal's stated priority that the victims be paid.

[46] Independently of these submissions, counsel for the Authority also submit that the District Court Judge's order reserving leave to Ms Khetarpal to apply further if her fresh application for a new licence was not granted demonstrated that the Judge wished to retain some control over the issuing of a licence to Ms Khetarpal. In that way, the Judge was asserting the ability to somehow intervene with a prospective decision by the Registrar not to grant a licence. In counsel's submission, that could not be a power reasonably available on an appeal against the Tribunal's decisions.

[47] I intend no disservice to Mr Illingworth QC's comprehensive submissions by focusing on the issues on which he expresses contrary or alternative views to those argued on behalf of the Authority. Without resiling from their criticisms of the District Court's decision and advocating the important statements of principle which she invites the Court to make, counsel for the Authority agree in general terms with the remedy proposed by the Contradictor if I should decide that the District Court erred.

[48] Mr Illingworth accepts that, because the High Court is the superior court of general jurisdiction, it is responsible for determining the jurisdiction and legality of the decisions and conduct of the inferior courts and tribunals.[40] That supervisory or judicial control, being of constitutional importance in maintaining the proper observance of the law, is maintained under the JRPA. Mr Illingworth acknowledges the application of the *Padfield* principle that a power must be exercised to promote the policy and objects of legislation under which it has been conferred. He refers to the

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[40] *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA) at 132.

Supreme Court's endorsement of the principle in *Unison Networks Ltd v Commerce Commission*,[41] where the Court said:

> A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act" [citing *Padfield*]. A power granted for a particular purpose must be used for that purpose….

[49] Mr Illingworth identified in his submissions that the argument advanced by the Authority was founded on a division of the District Court's decision into two parts; namely:

(a) a primary decision to the effect that the Tribunal's decision should be upheld; and

(b) a secondary decision, constituting the exercise of a discretion, to defer making a final decision on appeal and to make an interim order pending the making of a final decision.

[50] Mr Illingworth submitted that, while that division was tenable, it was also possible to view Judge Harrison's decision "more holistically". The view of the District Court Judge's decision which Mr Illingworth sought to promote in his submissions is that the Judge was troubled about an apparent inconsistency between the intent of the Tribunal's decision and the severity of the outcome. He argued that the Judge appeared to have considered that there was an inherent contradiction in the Tribunal's decision because:

(a) the Authority had sought, and obtained, a decision from the Tribunal that appeared to make some allowance for the future rehabilitation of Ms Khetarpal;

(b) the Authority had originally consented to an interim order pending the appeal which appeared to have a similar objective; and

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41 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

(c) the effect of the Tribunal's decisions, applied literally, provided little or no hope for the future rehabilitation of Ms Khetarpal.

Suggesting that, viewed in that way, the Tribunal's decision was internally inconsistent, Mr Illingworth argued on *Erebus* principles that the decision could be viewed as unreasonable, irrational or contrary to natural justice.[42]

[51] Mr Illingworth invited me, therefore, to interpret the District Court Judge's decision as including a finding that the Tribunal's decision was prima facie within the scope of its discretion but that, on closer analysis, there was an implicit inconsistency in the reasons given. In other words, the Judge had identified a problem with the Tribunal's decision which he thought he should rectify, despite its apparent correctness.

[52] Taking that approach, Mr Illingworth submitted that this Court should view the decision under appeal as a whole and interpret it as a decision to vary the Tribunal's decision by amending the conditions for Mr Khetarpal's return to practice. On that basis, it could be held that the District Court was acting within its powers under s 84(1). Mr Illingworth submitted that it could be concluded that the District Court Judge acted on the basis of a serious concern that the sanctions decision should be varied to ensure that the right balance was created between professional discipline and the need to encourage the rehabilitation of Ms Khetarpal.

Discussion

[53] I accept that, as Mr Illingworth suggests, the District Court Judge felt considerable disquiet about the consequences of following what he acknowledged would be the normal course after having decided that there was no basis upon which the Tribunal's decision should be overturned. Taking what Mr Illingworth described as an holistic view, Judge Harrison plainly considered that it was unreasonable simply to confirm the Tribunal's decisions and dismiss the appeals. That would have the following consequences:

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42 *Re Erebus Royal Commission* [1983] NZLR 662 (PC).

(a) Ms Khetarpal's licence would be cancelled notwithstanding that, since the making of an interim order in March 2016 with the consent of the Authority, she had been allowed to engage in providing immigration advice subject to supervision and other conditions.

(b) Having completed a diploma course designed to re-train her to comply with the obligations of a licensed immigration adviser, including adherence to the Code of Conduct, Ms Khetarpal would cease to be entitled to continue in practice.

(c) In effect, having taken the opportunity to re-train and pass the requirements for the issuing of a diploma, Ms Khetarpal would have to take a backward step and begin the process of qualifying for a licence anew.

[54] Except to the extent that the Judge made an express variation at [44], I consider it would be artificial to say that the Judge had concluded that the appeals should be allowed in part and varied. Noting the language he used at [35] to [37] and [47], I agree with Ms Warren that Judge Harrison adopted a two-stage process rather than a broader, holistic assessment. The Judge took an orthodox approach to addressing the issues on appeal, as a result of which he concluded that the Tribunal was entitled to make the decisions it did both as to liability and sanction. As he said, the consequence of making those findings was that the appeals should be dismissed. It was then that the Judge turned his attention to the consequences of that outcome in the light of the interim orders which had been made 18 months earlier and relied on the subordinate legislation of the District Court Rules 2014 as the source of a power to ameliorate them.[43]

[55] Rule 18.24 provides, relevantly:

> **18.24 Powers of court on appeal**
>
> (1) After hearing an appeal, the court may do any 1 or more of the following:

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43 At [45].

(a) make any decision it thinks should have been made:

(b) direct the decision-maker—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the court directs; or

(iii) to enter judgment for any party to the proceedings the court directs:

(c) make any order the court thinks just, including any order as to costs.

…

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it….

[56] The authority for the promulgation of the District Court rules is derived from s 228 of the District Court Act 2016.[44] Extensive rule-making powers are conferred by this section. In general, however, rules are required to regulate practice and procedure. They may not extend or limit the jurisdiction of the Court. A rule may accordingly be found to be ultra vires and therefore invalid.[45]

[57] I am not persuaded that the general power under r 18.24(1)(c) can be read as entitling a judge on appeal not to take one of the steps required by s 84 of the Act in determining the appeal. The section reads:

84 Determination of appeal

(1) In determining an appeal, the 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.

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44 Previously s 122 of the District Courts Act 1947; see sch 3(6) of the modern Act for the relevant transitional provision.

45 *Barraud & Abraham Ltd v Fitzherbert* (1915) 34 NZLR 1098 (SC) and *Kenton v Rabaul Stevedores Ltd* (1990) 2 PRNZ 156.

[58] The powers of the Court on appeal conferred by r 18.24 must be interpreted and applied in accordance with the objective of the rules which is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.[46]

[59] Section 84 and r 18.24 are focussed on implementing the determination of the correctness or otherwise of Registrar's or Tribunal's decision and making orders related to the decision that is the subject of the appeal. I do not think the combined effect of these powers can be harnessed to effectively negate a decision that has been found to be correct.

[60] In any case, I consider that the Judge was wrong to hold that the purpose of some of the conditions in the sanctions and the interim orders was to provide the appellant with an opportunity to re-enter the profession. The purpose of the interim orders which had been agreed to by the Authority was not to provide Ms Khetarpal with a long-term opportunity to continue providing authorised immigration advice while retraining. The purpose was to preserve her position pending disposition of the appeal so that she would not be unduly prejudiced if the appeals were upheld and the licence cancellation quashed.

[61] It is understandable that the District Court Judge had concerns about the implications of Ms Khetarpal having applied herself in apparent good faith to meeting the conditions of the interim orders only to face the prospect of those orders being terminated by the dismissal of her appeal. But the Judge appears to me to have misunderstood the Tribunal's reasons for the conditions about a return to practice, the purpose of the interim orders and why the Authority agreed to them.

[62] The effect of the Tribunal's orders, which will remain in force upon the dismissal of the appeal, is that Ms Khetarpal is prevented from applying for any category of licence until she has:

(a) complied with all of the Tribunal's orders for the payment of penalties, compensation and reimbursements;

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[46] Rule 1.3.

(b) enrolled in and completed the requirements for the issue of the Graduate Diploma in New Zealand Immigration Advice (Level 7); and

(c) implemented a supervision regime approved by the Registrar.

[63] She may then obtain a provisional licence but must practice under that licence in full compliance with the supervision regime for a period of two years before becoming eligible for a full licence.

[64] The interim orders did not have the effect of staying the operation of the Tribunal's orders. It follows that, as a result of the cancellation of Ms Khetarpal's licence, she remains unlicensed, albeit that she has been permitted to provide immigration advice, as Judge Hinton's order at [5](a) indicates, "... as if [she] were at all times a licensed adviser subject to the Act and the Code". The interim orders to which the Authority agreed were intended to preserve her ability to earn an income during what was expected to be a relatively short period up to the disposition of the appeal.

[65] I do not consider the Authority to have conceded, in consenting to the interim orders, that Ms Khetarpal was being granted an opportunity to continue providing authorised immigration advice while retraining, with a view to a fresh licence being issued. The Authority's view, endorsed by the Tribunal, was that Ms Khetarpal was wholly unsuited to continuing to work as an immigration adviser and that she should not have been encouraged to think that she would be granted a provisional licence after re-training.

[66] Since the making of the interim orders, there have been exchanges of views between counsel for the Authority and counsel for Ms Khetarpal over whether Ms Khetarpal is entitled to apply for a licence, having practised under the interim orders for more than two years after the orders were made on 16 March 2016. As I understand it, Mr Wimsett's proposition is that once the appeal is disposed of, Ms Khetarpal will be entitled to apply immediately for a full licence. The Authority's position is that compliance with the orders means that, before obtaining a new full

licence, she will be required to demonstrate that she had practised "under a provisional licence" and that she cannot yet meet that criterion.

[67] A provisional licence would have required Ms Khetarpal to work under the direct supervision of a fully licenced immigration adviser for 12 months or such other lesser period as may have been specified by the Registrar if he was satisfied that supervision was required or appropriate for Ms Khetarpal. It is apparent that the supervision that Ms Khetarpal has received under the terms of the interim orders is equivalent to that that she would have received if granted a provisional licence.

[68] I accept that, if the Tribunal's decision had simply been confirmed by the District Court in dismissing the appeals, Ms Khetarpal would have been required:

(a) first, to apply for a provisional licence to meet the current condition as specified at [75.5.2] of the *OJ* sanction decision and the equivalent conditions in the *Khan* and *Prajapati* decisions, and

(b) second, to then practice in compliance with that condition for a further period of two years.

[69] The Authority's position is that there is nothing in the Tribunal's decision that guarantees Ms Khetarpal the grant of a provisional licence, let alone anything that guarantees her the right to a full licence at any stage; the Tribunal said as much.

[70] If Ms Khetarpal is refused a provisional licence on application to the Registrar, she will have a right of appeal to the District Court.[47] If granted a provisional licence, she would not be restricted in the nature of the work that she is entitled to undertake as an immigration adviser. The only condition would be that she would be required to carry it out under the direct supervision of a fully licensed immigration adviser for the period of the licence.[48] Licences are granted for 12 months at a time.[49]

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47 Section 81(1).
48 Section 19(5).
49 Section 22(1).

[71] The sanction at [75.5.2] of the OJ decision provides that Ms Khetarpal is:

> (p)revented from applying for a full licence until she has over a two year period (after this decision), practised under a provisional licence in full compliance with a supervision regime approved by the Registrar.

[72] I do not read the sanction as granting Ms Khetarpal a right to apply for a full licence after two years from the date of the Tribunal's decision; namely, after 22 January 2018. The prohibition on Ms Khetarpal applying for a full licence is that she must first have practised under a provisional licence over a two-year period, that period beginning after the Tribunal's decision.

[73] On behalf of the Authority, Ms Warren expressed some exasperation that the combined effect of the interim orders and the delays which have occurred since they were made has meant that Ms Khetarpal has not ceased to practice as an immigration adviser despite strong findings that she was unsuitable to do so. That may be so, but the purpose of the Act is to promote and protect the interests of consumers receiving immigration advice. Consumer protection has been provided under the interim orders by the requirement for supervision. If Ms Khetarpal has in fact undergone something of a reformation through obtaining her Graduate Diploma and acting under close supervision over the three-and-a-half years since the Tribunal condemned her behaviour and character in trenchant terms, the interests of consumers will have been served to that extent at least. While it is true that the penalties were reduced on the assumption that Ms Khetarpal would lose income through the loss of her licence, I do not think that aspect needs to be revisited.

[74] In summary, the Judge made the following errors:

(a) First, by considering that r18.24(1)(c) could be used to defer the appeal after reaching a view on its merits; and

(b) Second, by misunderstanding the purpose of the interim orders made by Judge Hinton.

[75] I also consider that Judge Harrison overreached in purporting to maintain some control over what might happen once Ms Khetarpal received her diploma.

Relief

[76] Mr Illingworth QC submitted that it would be appropriate, if the Court found that the District Court had erred, to make an order in the nature of mandamus under s 16(1)(a)(i) of the JRPA and, in the circumstances, the Authority accepts that such an order would be appropriate.

[77] The review jurisdiction of this Court at common law, under the Judicature Amendment Act 1972 and now under the JRPA enables the Court to grant remedies for the improper exercise of a statutory power that are tailored to the particular circumstances. The jurisdiction can include, in rare cases, the power not only to quash the decision under review but to make substantive orders on the subject-matter of the reviewed decision. I do not think the present circumstances warrant such intervention, but I propose to grant relief in terms that will require the District Court to take the reasons for this judgment into account. In that event, the District Court and the parties may find some further observations helpful.

[78] In my view, an outcome which recognises:

(a) the validity of the Tribunal's decision;

(b) the error of the District Court Judge's approach to the determination of the appeal; and

(c) the objective of consumer protection

would be met fairly by directing the District Court to hear further submissions from the parties without delay and determine the appeal in accordance with its findings at [35] to [37] of the September 2018 decision and this judgment.

[79] The District Court's findings included recognition that the Tribunal was entitled to impose the sanctions set out, but the District Court is invested with powers on appeal that are sufficiently broad to enable it to acknowledge that there have been relevant changes in circumstance since the Tribunal's January 2016 decision. In that

regard, r 18.24 of the District Court Rules could be applied consistently with the statutory authority under the IAL Act to vary the Tribunal's decision.

[80] In my view, it would be a proper exercise of the District Court's powers under s 84(1), in determining the appeal, to allow it in part and vary the decision of the Tribunal by deleting the requirement that Ms Khetarpal must not apply for a full licence until she has practiced for two years under a provisional licence. That would not guarantee that a new licence of any type would be granted, but it would mean that, after considering evidence of Ms Khetarpal's performance under the interim orders, the Registrar would have the power to determine whether to grant a provisional licence (for what period) or a full licence. Ms Khetarpal's rights of appeal against any decision of the Registrar would be preserved. In other words, any licence application by Ms Khetarpal would be subject to proper scrutiny and determination in accordance with the legislative regime.

Orders

[81] Accordingly:

(a) I declare that, in refusing to determine the appeals against the Tribunal's decision and instead deferring final disposition pending further events, the District Court made an error of law regarding the purpose of the interim orders made on 22 March 2016.

(b) I declare that, having upheld the Tribunal's findings, the District Court Judge could nevertheless have exercised the Court's power under s 84(1) to vary the Tribunal's decision, not because the Tribunal had erred but because the circumstances and the lapse of time up to the hearing of the appeals had overtaken, in part, the intent and effect of the Tribunal's findings and orders.

(c) I direct that the District Court shall make a final determination of the appeals as soon as is reasonably possible, after hearing from counsel, taking into account its findings at [35] to [37] of the September 2018 decision and the reasons for this judgment.

Costs

[82] Although I have found in favour of the Authority, Ms Khetarpal has had a measure of success. The Authority was particularly concerned to obtain the views of this Court on issues not previously considered, so it would be appropriate to acknowledge also that there is a public interest element in the proceeding. In those circumstances, I hold that the Authority should bear its own costs in the proceeding in this Court. Mr Illingworth QC's fees will be met in accordance with the usual rules applying to counsel appointed to assist the Court. Questions of costs in the District Court are for that court to determine.

[83] I am grateful to all counsel for their assistance.

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Toogood J