IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-370
[2019] NZHC 190

BETWEEN	HANFANG LIU Appellant
AND	THE QUEEN Respondent

Hearing: 4 February 2019

Counsel: R P Chambers for Appellant
E Hoskin for Respondent

Judgment: 18 February 2019

JUDGMENT OF BREWER J

This judgment was delivered by me on 18 February 2019 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Crown Law (Wellington) for Respondent

Introduction

[1] Ms Liu established a company in 2012 called Headsun International Group Ltd ("Headsun"). Ms Liu was its director. She advertised Headsun as an educational placement service for international students looking to study in New Zealand. The services Ms Liu offered through Headsun necessarily involved giving immigration advice and assisting with applications for visas. Ms Liu, however, was not a licensed immigration adviser.

[2] In 2018 Ms Liu pleaded guilty to four charges of breaching the Immigration Advisers Licensing Act 2007 ("the Act"). The charges related to advice she gave to four Chinese nationals. Each charge carried a maximum sentence of seven years' imprisonment and/or a fine not exceeding $100,000.

[3] On 16 November 2018, Judge JM Kelly sentenced Ms Liu to nine months' home detention on all the charges.[1] Ms Liu now appeals the sentence on the ground it is manifestly excessive.

Judge Kelly's sentence

[4] Judge Kelly decided the purposes of sentencing were to denounce Ms Liu's offending and to deter her and others from offending in the same way. The Judge said:

> [11] I take into account that the Immigration Advisers Licensing regime, enacted in 2007, was intended to raise the standard of immigration advice in New Zealand and promote and protect the interests of migrants and potential migrants who receive immigration advice and enhance the reputation of New Zealand as a migration destination.

[5] As to aggravating factors:

> [14] The aggravating factors relating to your offending are:
>
> (a) There was a high degree of premeditation;
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> (b) Your offending was for commercial gain;
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> (c) There was an abuse of trust in that you gave the impression that your company was reputable and an approved education agent and able to offer immigration advice and assistance; and

1 *R v Liu* [2018] NZDC 25065.

(d) The vulnerability of the victims.

[6] Judge Kelly noted:

> [5] In the case of the students whose applications were not approved, you provided a refund of the fee. It is also accepted, on the basis of evidence you have provided today, (although that has not [sic] able to be verified by the Crown) that in respect of one of the charges you paid compensation of $10,000 to one of the students.

[7] The Judge adopted a starting point of two years' imprisonment and said:

> [15] … In setting that starting point I take into account that you refunded the fees to unsuccessful applicants and the $10,000 payment you made to one of the students.

[8] Judge Kelly allowed a discount of four months to account for remorse and previous good character. A further discount of 10 percent was given for "relatively late guilty pleas",[2] resulting in an end sentence of 18 months' imprisonment which the Judge commuted to nine months' home detention.

The appeal

[9] Mr Chambers puts the gravamen of the appeal as an omission by Judge Kelly to allow any particular discount to reflect the refund of fees and the payment of $10,000 in amends. He points to s 10 of the Sentencing Act 2002 which requires the Court to take into account any offer of amends and any agreement between the offender and the victim as to how the offender may remedy the wrong.

[10] In this case, Mr Chambers submits, and the Crown accepts, in 2016, at a time when Ms Liu knew she was going to be prosecuted, she entered into an agreement with the representatives of one of her clients to settle the complaint by the client by the refund of fees and the payment of $10,000 compensation.

[11] Some detail is necessary. The client, Ms Zhang, a resident of China, responded to Headsun's advertising online and engaged Headsun to secure a place for her child in a secondary school in New Zealand. Headsun, via Ms Liu, obtained a place in a secondary school for the child. However, the child expressed reluctance to leave home

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2 At [19].

and go to the other side of the world in order to go to school. Ms Liu suggested the child and her family apply for visitors' visas and come to New Zealand so the child could make a more informed decision. Assistance was given in obtaining the visitors' visas. The family came to New Zealand and the child decided to accept the offer of secondary schooling here. Ms Liu then advised Ms Zhang and her partner to apply for guardian visitors' visas and for the child to apply for a student visa. The necessary applications and covering letters were prepared by Headsun on the instructions of Ms Liu and lodged with Immigration New Zealand ("INZ"). INZ noticed the placement offer in the secondary school predated the applications for visitors' visas and declined the further applications. Ms Zhang, her partner and their child had to leave New Zealand. It was then that Ms Zhang complained to INZ, the investigation started and, as I have said, fees were refunded and the $10,000 payment made.

[12] The other three charges related to offending in which Ms Liu successfully obtained the student visas sought by the clients.

[13] Under these circumstances, Mr Chambers submits a sentence of nine months' home detention is manifestly excessive, and indeed a sentence of community detention was properly available.

The Crown's position

[14] Ms Hoskin for the Crown submits the sentence is not manifestly excessive. The Judge could be said to be in error in factoring the payments made by Ms Liu to Ms Zhang into the setting of the starting point, but that does not matter. The Judge specifically took the payments into account and that means her Honour must have had a higher starting point in mind which was reduced to two years because of the payments. The end result of nine months' home detention is within the range available to the Judge.

Analysis

[15] The appeal is brought under Part 6 of the Criminal Procedure Act 2011 as a first appeal against sentence. In order to succeed, Ms Liu must satisfy me there is an

error in the sentence such that a different sentence should be imposed. This test will be satisfied if the sentence is manifestly excessive.

[16] I have found no case where charges under s 67(1)(a) of the Act have been considered by this Court and only one relevant decision of the Court of Appeal.[3] I will come to it shortly. But, it seems to me there are two main components to be considered when assessing the gravity of offending under this provision. The first is the extent to which the policy behind this regulatory regime has been compromised by the offending. The second is the extent to which breaches have damaged the interests of migrants or potential migrants.

[17] In this case, as Ms Hoskin submits, Ms Liu incorporated Headsun as a commercial entity and actively marketed its services. Ms Liu never held herself out as a licensed immigration adviser but, at times, falsely represented that a licensed immigration adviser was checking or supervising applications. Furthermore, the services she offered and performed necessarily involved her breaching the Act. Indeed, Ms Liu's contracts for Headsun's services had titles referring to the client's application for visas.

[18] I agree with Judge Kelly that commerciality and premeditation are prime aggravating features of the offending. They represent serious breaches of the policy of the Act as described by the Judge and quoted by me at [4]. Put simply, Ms Liu's activities were exactly those which the Act sought to regulate and she knowingly operated outside the regulatory structure.

[19] So far as the second component is concerned, the effect on migrants or potential migrants, the offending is less serious. Three of the four complainants received the visas they wanted. The fourth, Ms Zhang, did not, and I have set out the circumstances already.

[20] The payments made by Ms Liu to Ms Zhang should not be considered in the assessment of the starting point for her offending. Rather, those payments should be considered as a mitigating factor when considering whether to reduce the starting

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3 *Hakaoro v R* [2014] NZCA 310.

point.[4] In this respect, Judge Kelly is in error, although it is the end sentence which matters.

[21] This brings me to the only authoritative decision, that of the Court of Appeal in *Hakaoro v R*.[5]

[22] Mr Hakaoro appealed a sentence of one year and eight months' imprisonment imposed in the District Court following his pleas of guilty to six charges of providing immigration advice without a licence and one charge of holding himself out as an immigration adviser without a licence.

[23] Mr Hakaoro's victims lost $13,300 and his culpable actions included giving untrue advice and falsely claiming to have filed applications.

[24] The Judge in the District Court adopted a starting point of two years' imprisonment, emphasising the aggravating factors of the harm to the victims and the commercial nature of the offending. A discount of 15 percent for the pleas of guilty brought the sentence down to one year and eight months. A $5,000 reparation order was made.

[25] The principal issue before the Court of Appeal was whether the sentence should have been one of home detention. The issues have no similarity with this case and I will not discuss them.[6] The Court of Appeal agreed with the starting point of two years and with the 15 percent discount.[7] However, there were no reasons given for the agreement.

[26] It seems to me that Mr Hakaoro's offending was somewhat more serious than Ms Liu's. The Headsun commercial model was more sophisticated than Mr Hakaoro's model, but he held himself out to be an immigration adviser, committed more offences and caused financial loss. The reparation order was toothless because Mr Hakaoro was insolvent. His sentence was not commuted to home detention.

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4 See *Gould v R* [2012] NZCA 284 at [30].
5 *Hakaoro v R* [2014] NZCA 310.
6 The Court of Appeal dismissed the appeal on the basis that home detention was not appropriate and the sentence not manifestly excessive.
7 At [25].

[27] To reach a starting point of two years' imprisonment taking into account the payments made by Ms Liu necessarily means the Judge's starting point would have been higher if the payments had not been made.

[28] Putting aside the payments, I cannot say the starting point of two years was outside the range available to the Judge, although towards the top of the available range. Headsun's commercial operation was quite sophisticated, used social media to target a vulnerable market and necessarily involved breaching the Act. It is the second component of culpability – the damage to the migrants or potential migrants – which is less serious than it was in Mr Hakaoro's case.

[29] Judge Kelly should have given a further discount to take account of the payments. Section 10 of the Sentencing Act 2002 requires the Court to take any offer of amends into account but does not say how. That is left to the discretion of the Judge.[8] Various factors will be relevant. These include how the offer corresponds to the offending in question, the extent to which it is accepted as expiating or mitigating harm done and the relative cost or penalty to the defendant.[9] Offers are also assessed in terms of whether they reflect genuine remorse or otherwise serve sentencing principles[10] – though are treated as a separate discounting factor.[11] Finally, it bears repeating that s 10 does not allow for defendants to simply buy their way into reduced penalties.

[30] In a situation like Ms Liu's, where harm to victims was limited and the payment appears to have effectively undone the victim's loss of money, the discount could properly have been at least 10 percent. The sentence of one year and six months' imprisonment should have been around one year and four months (rounded down). Given Ms Liu's circumstances (very different to Mr Hakaoro's), it was right to commute the sentence to one of home detention and that would have resulted in an end sentence of eight months' home detention.

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8 See Geoffrey Hall *Hall's Sentencing* (online loose-leaf ed, LexisNexis) at SA10.1; R *v Cui* CA33/05, 28 September 2006 at [108].

9 See *Hall's Sentencing* at SA10.1; *Bullen v* R [2017] NZCA 615; *Finlinson v Police* [2016] NZHC 224; *R v Rakich* [2014] NZHC 3287; *Gould v R* [2012] NZCA 284; *Burke v Police* HC Tauranga CRI-2006-470-32, 16 November 2006.

10 See *Finlinson v Police* [2016] NZHC 224; *McArthur v R* [2013] NZCA 600.

11 *Gould v R* [2012] NZCA 284 at [30].

Decision

[31] Appellate courts should not tinker with sentences. A sentence has to be manifestly excessive before it can be reduced.[12] Reducing a sentence of nine months' home detention to one of eight months' home detention could be said to be tinkering. However, because the starting point was severe and because a mitigating factor was not taken into account properly, I have decided it is necessary to reduce the sentence to this extent.

[32] The appeal is allowed. The sentence of nine months' home detention is quashed and a sentence of eight months' home detention is substituted.

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Brewer J

[12] See *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [35].