

**IN THE DISTRICT COURT
AT AUCKLAND**

CIV-2013-004-000019

UNDER The Immigration Advisers Licensing Act
2007

IN THE MATTER OF of an appeal against the decision 2012
NZIACDT 85 by the Immigration Advisers
Authority Complaints and Disciplinary
Tribunal

BETWEEN RICHARD UDAY PRAKASH
Appellant

AND DIP CHAND AND SANT KUMARI
Respondents

Hearing: 22 April 2013

Appearances: N King for the Appellant
K England for the Respondent

Judgment: 7 May 2013

JUDGMENT OF JUDGE D M WILSON QC

Introduction

[1] Mr Prakash appeals against a decision of the Immigration Advisers Complaints and Disciplinary Tribunal (“the Tribunal”) dated 3 December 2012 which imposed disciplinary sanctions against him:

- cancelling any immigration adviser licence held by him
- preventing him applying for any category of licence as a licensed immigration adviser for two years.

Background¹

[2] The appellant as a licensed Immigration Adviser made a work permit application on the instructions of a Mr Dip Chand pursuant to a written fee arrangement. The application was declined on 30 September 2010. As his current permit expired on 29 December 2010 Mr Chand prepared to leave New Zealand and booked a flight to Fiji.

[3] He instructed Mr Prakash to challenge the decision and provided further information for that to proceed but no new fees document was completed. In order to leave New Zealand before 29 December Mr Chand needed his passport to enable him to depart and thus avoid being in New Zealand unlawfully.

[4] Mr Prakash advised Mr Chand by letter of 16 December 2010 that he could uplift his passport from Mr Prakash’s office. The letter noted there was an outstanding balance of fees of \$517.50 for “which prompt payment is required [you] will appreciate that this payment is made when uplifting your passport”. In breach of the Licence Immigration Advisers’ Code of Conduct (“the Code”) there was no agreement to pay a further \$517.50 or any further fee.

¹ The background circumstances which were not challenged before me are sourced from the Tribunal’s decisions.

[5] On 20 December 2010 Mr Chand and his partner Ms Kumari, returned to Mr Prakash's office to get the passport at 11.45am. They waited for two hours by which time Ms Kumari had to leave for work. Mr Prakash saw Mr Chand at 2pm and told him he was required to pay the fees in full and only then would his passport be released. Mr Chand pointed out he had not agreed to pay further fees but would do so if he could have time to pay. He left without his passport as Mr Prakash would not release it.

Complaint lodged

[6] Ms Kumari and Mr Chand contacted the Police. Mr Prakash told police that there was a financial dispute and that the passport would not be released. Ms Kumari finally uplifted the passport on 23 December 2010.

Tribunal's involvement

[7] Mr Chand lodged a complaint with the Authority on 22 December 2010 Mr Prakash responded to the complaint without addressing the principal issues.

[8] The Tribunal issued a minute dated 27 June 2012 which identified the grounds of complaint, and the issues arising and indicated conclusions that might be reached on the basis of the information held at that point by the Tribunal. The Tribunal advised the parties that they could provide further information which would be considered by the Tribunal and could also apply for the Tribunal to conduct an oral hearing. Importantly, Mr Prakash was put on notice as to the seriousness of the complaint and of the potential that the complaint would be upheld and if so that the status of his licence could be potentially affected.

[9] The Tribunal's minute raised key issues with Mr Prakash including:

- The imperative on Immigration Advisers to ensure that travel documents are never withheld from clients.

- An acknowledgement of the obvious temptation but that it was “utterly unacceptable” to enforce payment of fees through withholding travel documents.
- That there were few things so universally understood to be unprofessional and dishonest conduct by professionals providing immigration services.

[10] The Code of Conduct which has the force of law (see sections 37-39 and 44 of the Immigration Advisers Licensing Act 2007) provides at clause 1.3:

A licenced immigration adviser must:

- (b) Return passports and other personal documents to clients on request without delay and in a secure manner.

Potential finding notified

[11] The Tribunal advised Mr Prakash of the potential finding that he had failed to comply with the Code in relation to fees and then withheld Mr Chand’s passport knowing that it was impeding him from complying with New Zealand immigration law and that he did so for the purpose of attempting to cause Mr Chand to pay fees to which he was not entitled.

Appellant’s response to Tribunal minute

[12] In his response of 17 July 2012, Mr Prakash claimed that Mr Chand and Ms Kumari had called at his office but simply neglected to uplift the passport that was available. In the Tribunal’s view this did not address the “coherence” of Mr Chand’s complaint and commented on the “implausibility” of that response. It was concerned that the focus of the response by Mr Prakash was to impugn Mr Chand’s credibility and assert his own high standards. He also presented a number of testimonials from a range of people.

Complaint upheld

[13] In its decision upholding the complaint the Tribunal recognised that the complaint included elements at the highest end of the scale and that Mr Prakash was “on notice that upholding this complaint will require the Tribunal to consider whether it will be necessary to cancel his licence. Accordingly the findings are made with the standard of proof applied on the most stringent basis”.² The Tribunal was satisfied that Mr Prakash withheld Mr Chand’s passport, that he knew Mr Chand required it for travel to comply with New Zealand law and that his motivation for doing so was to get Mr Chand to pay fees. Mr Prakash did not challenge these findings.

Submissions invited on sanctions

[14] The decision invited submissions on sanctions and set out s 51 of the Immigration Advisers Licensing Act 2007 (“the Act”) which detailed the disciplinary sanctions that the Tribunal might impose. The decision set a timetable for submissions.

Decision on Sanctions and Appeal

[15] The Tribunal imposed sanctions on the appellant including cancelling his licence (paragraph 117) and preventing him from reapplying for any category of licence for two years from the date of cancellation (paragraph 118). On 9 January 2013 the appellant applied to this Court to appeal against those sanctions and also sought a provisional licence under s 19 of the Immigration Advisers Licensing Act 2007.

Interim arrangements pending appeal³

[16] While the hearing of the appeal was awaited counsel for the appellant and the

² See paragraph [65] of the decision of the Immigration Advisers Complaints and Disciplinary Tribunal issued 28 September 2012, [2012] NZIACDT 60.

³ An interim order of this kind is expressly provided for in section 82 of the Act.

Immigration Advisers Authority filed a consent memorandum and obtained an order:

- (i) Staying the orders imposed by the Tribunal until the date of this appeal is determined subject to conditions:
 - (a) Mr Prakash may only give immigration advice under the direct supervision of a named fully licensed immigration adviser; and
 - (b) Is not to have sole position or control of any client passports; and
 - (c) He must ensure all client passports are returned promptly upon request and/or upon completion of each matter.

The appeal hearing

[17] Mr King for the appellant submitted that the sanctions were inappropriate, excessive and wrong in imposing the maximum sentence and that the sanctions were particularly severe upon the appellant⁴.

[18] Mr King sought a continuation of the existing licence and interim conditions for a period of two years with a view to the appellant applying for a full licence without conditions.

Legal principles

[19] An appellant may appeal against sanctions⁵ imposed on him by the Tribunal pursuant to s 51(3) and s 81(1)(a) of the Act. Section 51(3) provides:

⁴ Counsel expressly abandoned earlier submissions effectively challenging the original upholding of the complaint.

⁵ This approach was confirmed by the High Court in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at para [46] per Priestley J.

A person subject to a sanction under this section has the right to appeal, under s 81, the Tribunal's decision to impose the sanction.

Section 81 details the rights of appeal and provides that a person may appeal to a District Court against any of the following decisions, including:

- (1)(c) A decision of the Tribunal to cancel or suspend the person's licence.

[20] Accordingly there is no statutory appeal against the substantive decision reached by the Tribunal.

[21] The purpose and scheme of the Act is set out in s 3 and 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 gave immigration advice.

[22] Under Part 9 of the District Court Rules 2009 every appeal is to proceed by way of a rehearing⁶.

Powers of District Court on appeal

[23] In determining an appeal a District Court may confirm, vary or reverse the decision of the registrar or the Tribunal and the District Court's decision in the determination of an appeal is final subject to rights to apply for judicial review or to appeal to the High Court on a question of law under s 85⁷.

Evidence

[24] The Court has a discretion to hear and receive further evidence on questions of fact by oral evidence or affidavit⁸. The appellant filed an extensive bundle entitled "evidence documents" most of which appear to be a duplication of documents filed by the Tribunal. The new factual material includes a letter dated 21 December 2012 attached both to the notice of appeal and the appellant's

⁶ Rule 14.17.

⁷ See s 84 of the Act.

⁸ DCR 14.18.3.

submissions from a former Minister of Immigration, Member of Parliament for New Lynn and describes the appellant as a constituent of his. This material is not affidavit or oral evidence and is disregarded by the Court. Furthermore, a former Minister's opinion on the exercise of judicial discretion by the specialist tribunal is irrelevant and inappropriate.

Basis of appeal

[25] The notice of appeal claimed that the Tribunal did not give adequate consideration to: (a) mitigating factors; (b) impact upon the appellant's family and staff; (c) rehabilitation alternatives; and (d) that the imposition of the maximum penalty for this matter is contrary to the above and the intention of the Immigration Advisers Licensing Act 2007.

The approach of the Court

[26] The question arises as to the degree of deference an appellate Court should give to the decision of a specialist tribunal. Where an appeal is against the Judge's exercise of discretion on the basis of findings of fact then "the judgment of the Court of Appeal in *May v May* and *Blackstone v Blackstone* apply and this Court will not interfere unless the appellant can show that the Judge "acted on a wrong principle, failed to take into account some relevant matter, took into account an irrelevant matter or was plainly wrong"⁹.

[27] That decision has to do with an appeal against a Family Court judgment. With respect I am significantly assisted by the reserved judgment of Justice Priestley in *ZW v Immigration Agents Authority*¹⁰. His Honour was hearing the first appeal under the Act to the High Court following the first appeal to the District Court under that Act.

⁹ *JG v CR* High Court Auckland CIV-2010-404-002559 judgment 31 August 2010.

¹⁰ [2012] NZHC 1069 judgment 17 May 2012.

[28] His Honour observed¹¹ that:

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 hitherto had been subject to much justified criticism. The registrar and Tribunal have a Parliamentary mandate to enforce standards. The Tribunal has the appropriate range of sanctions to deal with shortcomings.

[29] In that case the appellant made no attempt to express contrition. He did not produce to either the Tribunal or the District Court any information about how he might be able to accommodate concerns in the short term or other traditional mitigating factors. Instead he tried unsuccessfully to deny any culpability. In that situation His Honour found no basis on which to interfere with the Tribunal's decision on sanctions which were for cancellation and an order preventing the appellant from reapplying for a full licence for 18 months and a payment of \$3,000.00 penalty. His Honour noted that the appellant in the case before him had acted without legal advice.

[30] Mr Prakash did take legal advice but his attitude as demonstrated by the submissions he made at all stages, including in the appeal before me, demonstrated clearly his rejection as a matter of fact of the Tribunal's decision on the substantive issue, his continuing denigration of the respondents, their personal attributes and motives and made very serious allegations against them effectively of lies and forgery and absence of credibility.

[31] These attacks did not in any sense show any determination at all to address his own (ultimately and grudgingly) admitted shortcoming in failing to adhere to a critical aspect of the Code of Conduct. He thought it appropriate to file a reference from an associate of his who is a Justice of the Peace casting serious aspersions on the motives and conduct of the respondents, and then his then counsel complained that Ms Kumari had advised the referee of the actual decisions of the Tribunal.

¹¹ At paragraph [41].

[32] At each step the Tribunal had advised the appellant of the seriousness of the predicament that he was in, advised him of his rights to make further submissions, directed him to the possibility that the substantive decision would go against him and expressly that his licence would be in jeopardy in the sanctions phase. Notwithstanding those steps which were all carefully and consistently signposted in advance the appellant made no credible statement of regret, he made no suggestion as to mitigation, he did not commit himself to compliance with the Code of Conduct in the future, he made disparaging remarks about the clients whose interests his obligations required him to respect as a first priority.

[33] In those circumstances the appellant has failed to establish that the Tribunal was in breach of any considerations of fairness or natural justice. As the Tribunal said in upholding the original complaint the withholding of the travel document for the purpose of demanding fees was a “gross abuse of his position of trust as a licensed professional”¹². The complaint was upheld on the aspect of the breach of clause 1.3 of the Code of Conduct which was also characterised as dishonest.

[34] In its comprehensive sanctions decision of 3 December 2012 the Tribunal at paragraph [31] said:

It is intolerable for a licensed immigration advisor to be a party to making it impossible for a person to leave New Zealand and meet their obligations under New Zealand law.

And further in paragraph 32:

Such conduct is aggravated when the motive is to pressure a person to make payments to them.

[35] There is ample justification for the Tribunal determining that the appellant did not accept his professional obligation to respect clients and did not accept his own conduct placed him in the situation that he now found himself in¹³. The Tribunal observed that the offending was egregious and typical of the most serious misconduct the Act was intended to eradicate. It also observed that the statutory

¹² Decision 28 September 2012, paragraph [71].

¹³ Paragraph 79.

disciplinary process had brought Mr Prakash no insight or determination to rehabilitate himself. On the contrary he blames others for his behaviour and expresses the blame in a disrespectful and unprofessional manner¹⁴.

[36] The Tribunal gave full consideration to whether it would be realistic to expect him to respect, accept and learn from a mentor and concluded that it would not. There were ample grounds for the Tribunal's decision that rehabilitation was not realistic.

[37] I have formed the independent view that the sanctions imposed by the Tribunal were appropriate, not excessive and that they were correct in principle. The Tribunal acknowledged the effects upon the appellant of reaching that decision but in my view and with respect correctly concluded that only cancellation would be effective as a sanction in this case.

[38] Accordingly the Tribunal's sanctions are confirmed with immediate effect.

Dated at Auckland this 7th day of May 2013 at 4 ~~am~~ pm.



D M Wilson QC
District Court Judge

¹⁴ Paragraphs 98 and 99.