



DECISION RECORD

AGENT	Richard TAN
COMPLAINT NUMBER	CMP-48614
DECISION	Caution – 6 Months
DATE OF DECISION	14 December 2021

Terms used for reference

1. The following abbreviations are used in this decision:

<i>ABN</i>	Australian Business Number
<i>AAT</i>	The Administrative Appeals Tribunal
<i>MARN</i>	Migration Agent Registration Number
<i>PIC</i>	Public Interest Criteria
<i>Section 308 notice</i>	Notice issued by the Authority under section 308 of the Act
<i>Section 309 notice</i>	Notice issued by the Authority under section 309 of the Act
<i>The Act</i>	<i>The Migration Act 1958</i>
<i>The Regulations</i>	<i>The Migration Regulations 1994</i>
<i>The Agent</i>	Mr Richard TAN
<i>The Authority</i>	The Office of the Migration Agents Registration Authority
<i>The Code</i>	The Migration Agents Code of Conduct prescribed under Regulation 8 and Schedule 2 to the Agents Regulations
<i>The Department</i>	The Department of Home Affairs
<i>The Agents Regulations</i>	<i>Migration Agents Regulations 1998</i>

STATEMENT OF REASONS

Background

2. The Agent was first registered as a migration agent on 17 April 1998 and was allocated the MARN 9896875. The Agent's registration had been renewed annually to date, with the most recent registration commencing on 17 April 2021.
3. The Register lists the Agent's business name as Come to Australia Immigration Consultants with the ABN 80303264896.

Prior Disciplinary action

4. The Agent does not have a history of prior disciplinary actions.

Complaint

5. On 30 November 2019, the Authority received a complaint about the Agent's conduct as a registered migration agent from Mr CS, CMP-48614, on behalf of his family unit, alleging the following:
 - a) The Agent did not keep Mr CS and his family unit fully informed, nor confirmed their instructions, prior to submitting a Contributory Parent (Migrant) (CA 143) visa application with the Department.
 - b) The Agent was complicit in providing inaccurate and misleading information to the Department, in support of a CA 143 visa application for Mr KS, Mrs SL and Ms YS.
 - c) The Agent was complicit in lodging Mr ZS's Remaining Relative (Residence) (subclass 835) visa application, knowing he would not meet the health requirements under PIC 4005.¹

Documentary evidence provided by the complainant

6. In support of the complaint, Mr CS provided the following documents:
 - i. Complaint summary
 - ii. Email correspondence between the Agent and the complainant
 - iii. Payment confirmation for Professional Service Fees

Departmental Records

7. Records held by the Department of Home Affairs (and its former manifestations) indicate that:
 - a) On 22 February 2013, the Agent lodged a class CA subclass 143 (Contributory Parent) visa application on behalf of Mr KS with the following details:
 - i. Mr KS – Main Applicant
 - ii. Mrs SL – Dependant Applicant – Spouse
 - iii. Ms YS – Dependant applicant
 - iv. Mr CS – Sponsor

¹ Public Interest Criteria 4005 (PIC 4005) is a health requirement criterion. In respect of the CA 143 visa, if one applicant fails this criterion, the rest of the applicants will not be granted a visa.

- b) Question 55 of the application form, 47PA – *Application for a parent to migrate to Australia* (Form 47PA), asks the applicant to:

“Give details of ALL your and/or your partner’s dependent children aged 18 years or over and other dependants (including dependent children of a dependant).”

To this question the Agent provided details of Ms YS. The other available spaces for additional dependants were left blank.

- c) Question 58 on Form 47PA asks the applicant:

“Give details of ALL your OTHER family members.”

To this question, the Agent provided the following members of the family unit under “Your Children”:

- i. Mr CS
- ii. Ms YXS
- iii. Mr ZS

- d) Included with the application was a Form 47A – *Details of child or other dependent family member aged 18 years and over* (Form 47A), completed by Ms YS. No other Form 47A was provided to declare any other children, aged 18 years or over, who were dependant on Mr KS or Mrs SL.
- e) On 15 December 2014, the CA 143 visa application was approved and all members of the family unit listed (Mr KS, Mrs SL and Ms YS) were granted a visa. Mr ZS was not listed as a dependant, and he was not considered for the grant of a CA 143 visa.
- f) On 15 January 2015 Mr KS, Mrs SL and Ms YS entered Australia.
- g) On 5 February 2015 Mr ZS entered Australia as a holder of an Electronic Travel Authority (ETA).
- h) On 27 February 2015, the Agent lodged an application on behalf of Mr ZS, for a Class BU, Subclass 835 Remaining Relative (Residence) visa (subclass 835 visa), on the basis of being the only remaining relative in the family unit to not have residence in Australia. Mr ZS did not meet the health requirements required under PIC 4005 and the visa was refused on 31 August 2015.
- i) The Agent was recorded as the registered migration agent representing Mr ZS on this application.
- j) On 28 February 2017, Mr KS’s CA 143 visa was cancelled under section 109 of the Act, due to incorrect information being provided in the visa application by not including Mr ZS in the application. Consequently, both Mrs SL and Ms YS’s visas were also cancelled.
- k) The cancellation decision record referred to the extent of Mr ZS’s medical condition and his dependency on his parents. It was deemed by the Department that, as a result of his medical condition he was a dependant of Mr KS and Mrs SL, despite being over the age of 18 years. It was also noted that if he had been included on the CA 143 visa application as a dependant, it is likely the application would have been refused in respect of all applicants, on the basis of Mr ZS not meeting PIC 4005.

Notice under section 308 of the Act (“the section 308 notice”)

8. On 13 April 2021 the Authority published the complaint to the Agent, advising the Agent that it raised concerns regarding the Agent’s compliance with clauses 2.1, 2.3, 2.4, 2.6, 2.9 and 2.19 of the Code.
9. Pursuant to section 308 of the Act, the Authority requested the Agent to provide the following information:
 - i. A written response to specific questions asked by the Authority, and
 - ii. A copy of his client file

The Agent’s response to the Authority’s section 308 notice

10. On 26 April 2021, the Authority received the Agent’s response to the complaint by way of a statutory declaration. The Agent made the following claims/submissions:
 - a) The Agent represented Mr CS and his family members in a range of visa applications, including the CA 143 and subclass 835 visas, referred to in the section 308 notice.
 - b) The Agent was first approached by Mr CS and his sister, Ms YXS, in early 2012, for advice in relation to applying for a CA 143 visa on behalf of their parents, Mr KS and Mrs SL.
 - c) At the initial consultation, the Agent explained to Mr CS and Ms YXS the requirements for applicants and sponsors under the CA 143 visa. The Agent also explained the ‘balance of family’ principle. The Agent was advised that Mr KS and Mrs SL have four children, two who were Australian permanent residents. Based on this information, the Agent informed them that the ‘balance of family’ principle had been met.
 - d) The Agent explained to Mr CS and Ms YXS the definitions of a family unit, dependency/non-dependency and migrating/non-migrating members of a family unit. The Agent also explained the requirements for health and character checks for both migrating and non-migrating members of the family unit. The Agent advised if “one fails, all fail”, in relation to the health and character requirements. At no stage did the Agent ever state that a visa grant was “definitely achievable”.
 - e) Based on the information provided at the consultation in relation to the requirements of a CA 143 visa, Mr CS and Ms YXS advised that the applicants would be their parents, Mr KS and Mrs SL, as well as their sister, Ms YS, who is a dependant of their parents, over the age of 18 years.
 - f) Mr CS and Ms YXS further stated that their brother, Mr ZS, had an intellectual impairment and needed assistance on a daily basis. In response to this information the Agent reminded them of the definition of a family unit and explained that Mr ZS would be considered a dependant of his parents given his condition. The Agent advised that Mr ZS should be listed on the CA 143 visa application, regardless of whether or not he was migrating with his parents to Australia.
 - g) In response to the Agent’s advice, both Mr CS and Ms YXS explained that Mr ZS is not a dependant of their parents, rather he was dependent on them and should not be listed in the visa application as a non-migrating dependant. Mr CS and Ms YXS provided full financial support for Mr ZS, which included hiring a fulltime, live-in domestic helper to assist with his physical needs, and money for his day to day living expenses. Mr CS also advised that he was paying off the mortgage on the family home where Mr ZS and other family members resided. Furthermore, the Agent was informed that there was no intention for Mr ZS to migrate to Australia, and arrangements had been put in place to ensure he would be cared for in <<removed for privacy>> if their parents were granted a visa.

- h) For the reasons stated by Mr CS and Ms YXS, the Agent accepted that Mr ZS was not a dependant of his parents.
 - i) The Agent followed Mr CS and Ms YXS's instructions and did not include Mr ZS on the visa application as a dependant aged 18 years or over.
 - j) Throughout the entire process, Mr CS and Ms YXS were fully informed about the process and the information provided to the Department, including Mr ZS not being listed as a dependant aged 18 years or over.
 - k) In early 2015, Mr CS approached the Agent and informed him that Mr ZS had entered Australia on an Electronic Travel Authority (ETA) visa. Mr CS asked for the Agent's assistance with lodging a subclass 835 visa application on behalf of Mr ZS.
 - l) The Agent was surprised by this request as he understood that there was never any intention for Mr ZS to migrate to Australia. The Agent also explained to Mr CS that given Mr ZS's medical condition, there is a likelihood he would not pass the health requirements for the subclass 835 visa.
 - m) In response, Mr CS explained how Mr ZS travelled to Australia to visit his family shortly after their departure from <<removed for privacy>>. It was during this visit that Mr ZS conveyed his wishes to remain in Australia, after enjoying the environment and being around his family. The family decided that they wanted to try and fulfil Mr ZS's request and do what is best for him.
 - n) Following Mr CS's explanation, the Agent agreed to assist with Mr ZS's subclass 835 visa application, with the caveat that Mr ZS may not pass the health requirements.
 - o) Mr CS acknowledged that Mr ZS may fail the health check, however they would rather leave the decision up to a Medical Officer of the Commonwealth to evaluate his condition, with the hope that he will pass.
 - p) On 31 August 2015, Mr ZS's subclass 835 visa application was refused. Mr CS approached the Agent to recommend a practising lawyer to represent Mr ZS at the Administrative Appeals Tribunal (AAT). The Agent referred Mr CS to Ms CC. However, before the hearing, Ms CC declined the appointment and the Agent attended as Mr ZS's representative.
 - q) Following the cancellation of Mr KS, Mrs SL and Ms YS's CA 143 visas, Mr CS approached the Agent to represent the family before the AAT. As the Agent had no prior experience with the AAT in relation to visa cancellations, the Agent referred Mr CS to Mr LO, a competent lawyer/registered migration agent, for representation.
 - r) In support of the matter before the AAT, the Agent provided a statutory declaration detailing Mr CS and Ms YXS's explanation that Mr ZS was dependent on them, rather than on his parents, and therefore he was listed correctly in the CA 143 visa application.
11. On 22 June 2021, the Authority sought further information from the Agent including information about evidence of Mr ZS's dependency and advice provided to the client.
12. On 25 June 2021, the Authority received a written submission and supporting documentation from the Agent's legal representative.
13. In summary, the written submission stated:
- a) Mr CS and Ms YXS deliberately misled the Agent to believe that Mr ZS was dependent on Mr CS. Two AAT Decision Records, dated 22 December 2017 and 26 June 2020, were submitted to the Authority to support these statements.

- b) The Agent advised that the original handwritten CA 143 visa applications for Mr KS, Mrs SL and Ms YS, were completed by Mr CS and were used as a draft to transfer information to the final applications. The Agent stated that he disposed of these draft applications roughly three years ago, whilst moving houses, noting that the visas had all been granted by that time.
 - c) During the AAT proceedings, Mr CS was asked to provide financial documentation to support his claims that Mr ZS was dependent upon him. Mr CS was unable to provide such evidence, claiming bank records were no longer available.
 - d) The Agent claimed that if Mr CS and Ms YXS had provided accurate and honest information from the beginning, he would have advised them that none of the applicants would have qualified for the visas they were seeking.
 - e) In the e-medical referral letter provided to the Department when Mr ZS was applying for the subclass 835 visa, the medical conditions specified were serious and there was no real prospect of Mr ZS passing the health requirements.
 - f) The Agent claimed that he verbally advised both Mr CS and Ms YXS that Mr ZS would not pass the health test, however he followed their instructions to lodge the application despite the slim chance of success.
14. For completeness, although Mr CS was not the visa applicant in respect of whom the Agent lodged a visa application, it does not appear to be in dispute that Mr CS was authorised by his family members to represent them and seek the Agent's assistance in respect of their immigration matters. Mr CS was also the sponsor in relation to the CA 143 application.

Evidence included in the section 308 notice response

15. In support of the response, the Agent provided two AAT decision records for the CA 143 visa cancellations. In summary, the AAT decision records stated the following:
- a) The AAT Decision Record, case number 1703831, dated 22 December 2017, found that the Tribunal did not accept the evidence before them and it was deemed that Mr ZS was partly dependent upon his parents at the time they completed their CA 143 visa applications.
 - b) The AAT also found that the decision to grant the CA 143 visas for Mr KS, Mrs SL and Ms YS, was based on incorrect information and that the breach was made knowingly and deliberately. The AAT concluded that Mr KS did not refer to Mr ZS in the application, because he knew that Mr ZS's medical condition could affect his own visa application. The AAT therefore affirmed the decision of the Minister to cancel Mr KS, Mrs SL and Ms YS's CA 143 visas.
 - c) Furthermore, the AAT Decision Record, case number 1826526, dated 26 June 2020, stated that the AAT did not accept that Mr CS and Ms YXS did not intentionally mislead the Department by providing misleading information and instructions to the Agent. The AAT also did not accept that Mr CS and Ms YXS genuinely believed that Mr ZS was dependent on Mr CS.

16. The Agent also provided:
 - i. Numerous email exchanges between the Agent, Mr CS and Ms YXS in relation to the CA 143 visa application.
 - ii. Complete client files for Mr KS, Mrs SL and Ms YS
17. In the Agent's response to further information requested by the Authority, the following documents were provided:
 - i. Statutory Declaration from the Agent, dated 25 June 2021.
 - ii. AAT Decision records dated 22 December 2017 and 26 June 2020.
 - iii. Health Check Referral Letter for Mr ZS.
 - iv. Statutory Declaration from Ms YS, dated 5 June 2015.

Notice under section 309 of the Act

18. On 23 July 2021 the Authority sent to the Agent a notice pursuant to section 309(2) of the Act, advising the Agent that it was considering cautioning him, or suspending or cancelling the Agent's registration under section 303(1) of the Act.
19. The Agent was notified that having regard to the information before the Authority, it was open to the delegate to be satisfied that the Agent had engaged in conduct that breached the Agent's obligations under clauses 2.6, 2.9 and 2.17 of the Code.
20. Pursuant to section 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter by 20 August 2021.

The Agent's response to the Authority's section 309 notice

21. On 17 August 2021 the Authority received a written submission from the Agent's legal representative, stating:
 - a) The Agent recognised he made an error of judgement whilst carrying out his client's instructions in regards to their visa applications, and that he has not followed best practice in terms of the importance of having written records of conversations with his clients.
 - b) The Agent denied he was complicit in providing false and misleading information to the Department in support of the CA 143 visa application.
 - c) The Agent believed he was deceived by his clients into thinking that Mr ZS was dependent on his brother Mr CS, rather than his parents.
 - d) The Agent always communicated with Mr CS and Ms YXS in regards to both the CA 143 and subclass 835 visa applications. He advised that both Mr CS and Ms YXS were fully aware and understood the definition of a dependant. He explained that dependency was not only a question of financial dependency, but also work capacity for a child over the age of 18 years.
 - e) Mr CS and Ms YXS advised that Mr ZS did not intend on moving to Australia, rather he was going to try looking after himself in <<removed for privacy>>, to learn new life skills. For this reason, the Agent was under the impression that although Mr ZS was a "slow learner", he was still able to work.

- f) At the time of lodging the CA 143 visa application, the Agent was not aware that Mr ZS was fully incapacitated for work. He only became aware of the extent of Mr ZS's medical condition in 2015, when he was asked to prepare the subclass 835 visa application.
- g) The Agent was aware of provisions under the Procedures Advice Manual (PAM) in respect of the health requirement at the time, which specified that each member of the family unit was required to satisfy the health requirement, irrespective of whether they were migrating or not. He understood that the criteria for a member of the family unit, not only included dependent children of the family head, but also a child who has turned 18, but is dependent on the family head or is incapacitated for work, due to the total or partial loss of bodily or mental functions. Mr CS and Ms YXS were made aware of this criteria and continued to lead the Agent to believe Mr ZS did not fall under this category.
- h) At the AAT proceedings, a statutory declaration signed by the Agent was presented to reflect the Agent's version of events and to confirm that he believed that Mr ZS was dependent on his brother, Mr CS, based on the information provided to him. The statutory declaration was drafted by Mr CS's lawyer, Mr LO, based on discussions with Mr CS and Ms YXS. The Agent was overseas at the time, however he agreed that the information was accurate and signed the document.
- i) Further at the AAT proceedings, the Tribunal did not accept that Mr CS and Ms YXS did not intentionally mislead the Department by providing misleading information and instructions to the Agent.
- j) The Agent believed it was an error of judgement for him to accept the representations of Mr CS and Ms YXS in relation to Mr ZS's medical condition and financial dependence. He acknowledged that he failed to insist a health check be conducted, or request independent medical evidence in relation to Mr ZS's condition.
- k) The Agent accepted that he failed to make an attempt to verify the claim of financial dependence on Mr CS.
- l) The Agent agreed that it was advantageous to Mr CS, to avoid the criteria required to be satisfied for the CA 143 visas, by not including Mr ZS in the application. However, the Agent said he was deceived by Mr CS and Ms YXS, and that he did not knowingly assist the deception.
- m) The Agent denied complicity in providing false information to the Department and insisted that there is no evidence of any financial inducement, which would make an agent complicit with any deception.
- n) On a number of occasions, Mr CS advised the Agent that he was seeking independent migration advice from other sources.
- o) In regards to Mr ZS's subclass 835 visa application, The Agent advised that he was approached by Mr CS, who explained that Mr ZS had entered Australia on a Tourist visa, and decided he did not want to go back to <<removed for privacy>>. They asked the Agent if he would apply for a subclass 835 visa application on behalf of Mr ZS. The Agent explained that Mr ZS would not pass the health criteria for the visa application, noting that Mr ZS arrived in Australia in a wheelchair.
- p) The Agent claimed that Mr CS and Ms YXS insisted he lodge the visa application, despite the potential refusal on medical grounds.
- q) Following the subclass 835 visa refusal, the Agent advised Mr CS of Mr ZS's limited chances of success if they were to appeal the refusal decision at the AAT. The Agent requested that Mr CS acknowledge his advice prior to proceeding with the lodgement. To

support these claims, the Agent submitted to the Authority an email addressed to Mr CS, dated 19 September 2015, stating,

“You acknowledge that chances of success of this case with the AAT are slim if the review case is handled by a representative who is not a trained lawyer and therefore is not able to provide a strong legal argument based on research on case law and other areas of literature a lawyer is competent to access and utilize.

You acknowledge that chances of success of this application for review will be greatly enhanced by engaging a trained lawyer with experience in this field.”

- r) The Agent accepted he made an “error of judgement” in both the CA 143 visa application and the subclass 835 application, by not keeping written file notes of oral exchanges with the clients, nor providing the clients with written advice on the prospects of success of the visa applications.
- s) Noting he made an “error of judgement”, the Agent submitted that he should not bear the responsibility of his client’s deception. The Agent relied heavily on the AAT findings that his clients deliberately deceived him throughout their dealings.
- t) The Agent has provided the following submissions to be taken into account in making this decision.
 - i. In his 23 years as a registered migration agent, he has only had two previous complaints made against him to the Authority. Both related to file management. One complaint was dismissed by the Authority and the other was addressed and finalised by the Authority with no sanction decision.
 - ii. His work life has been centred on providing help and assistance to the community which he lives in. He has been serving as a Justice of the Peace since 2002, and is part of the CW Association, an ethnic community association, for 11 years.
 - iii. As a registered migration agent, he has never submitted any sponsorship, nomination or visa application, knowing in advance that they would most likely be refused. Mr ZS’s application was the first in his career where he allowed his emotions to override his work practices.
 - iv. Any sanction decision will have an impact upon his livelihood, as his migration income accounts for 90% of his work income. He has no other means to financially support his commitments and obligations.
 - v. Being 69 years of age, it will be unlikely for him to obtain employment in any other job.
- u) The Agent also put forward an “altered practices and procedures” plan to ensure that there is no repeat of the circumstances in this matter. These include:
 - i. The Agent will never let his personal values and emotions over-ride his obligations under the law;
 - ii. The Agent will always investigate the client’s background thoroughly, whenever there is doubt;
 - iii. The Agent will not take up the case if the doubt cannot be cleared;
 - iv. The Agent will not be swayed by the client’s persuasions and emotional pressures;

- v. The Agent will always keep good written records and file notes of all conversations with clients and will ensure that if a client requests him to proceed with an application that does not have merit, that he will decline to do so and provide the client with written advice;
- vi. The Agent will attend more continuing professional development (CPD) sessions, forums and discussions to improve his knowledge in the interpretation and application of relevant legislation and learn from peers in relation to best practice, rules and habits.

Evidence included in the section 309 notice response

22. In the Agent's response to the section 309 notice, the following documents were provided:
- i. Response to section 309 Notice by the Agent's legal representative, dated 17 August 2021.
 - ii. Email exchanges between the Agent and Mr LO.
 - iii. Email exchanges between the Agent, Mr CS and Ms YXS in relation to the CA 143 and subclass 835 visa applications.
 - iv. Service Agreement between the Agent and Mr ZS for the subclass 835 visa.
 - v. Copy of the Form 80 for Mr ZS, dated 8 May 2015.
 - vi. Character Reference from Justice of the Peace, Mr TN, dated 5 August 2021.
 - vii. Complete client files for Mr KS, Mrs SL and Ms YS.

Jurisdiction

23. The Authority performs the functions prescribed under section 316 of the Act.
24. The functions and powers of the Authority under Part 3 of the Act and Agents Regulations are the functions and powers of the Minister. The Minister has delegated the powers under Part 3 of the Act and the Agents Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

Relevant legislation

25. The functions of the Authority under the Act include:
- to investigate complaints in relation to the provision of immigration assistance by registered migration agents (paragraph 316(1)(c)); and
 - to take appropriate disciplinary action against registered migration agents (paragraph 316(1)(d)).
26. The Authority may decide to cancel the registration of a registered migration agent by removing his or her name from the register, or suspend his or her registration, or caution him or her under subsection 303(1), if it is satisfied that:
- the agent's application for registration was known by the agent to be false or misleading in a material particular (paragraph 303(1)(d); or
 - the agent becomes bankrupt (paragraph 303(1)(e); or

- the agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance (paragraph 303(1)(f); or
 - an individual related by employment to the agent is not a person of integrity (paragraph 303(1)(g); or
 - the agent has not complied with the Code prescribed under subsection 314(1) of the Act (paragraph 303(1)(h)).
27. Subsection 314(2) of the Act provides that a registered migration agent must conduct himself or herself in accordance with the Code. Regulation 8 of the Agents Regulations made under the Act prescribes a Code.
28. Before making a decision under subsection 303(1) of the Act, the Authority must give the agent written notice under subsection 309(2) informing the agent of that fact and the reasons for it, and inviting the agent to make a submission on the matter.

Migration Act 1958 (Cth)

Section 276 Immigration assistance

(1) *For the purposes of this Part, a person gives **immigration assistance** if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by:*

- (a) preparing, or helping to prepare, the visa application or cancellation review application; or*
- (b) advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or*
- (c) preparing for proceedings before a court or review authority in relation to the visa application or cancellation review application; or*
- (d) representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.*

(2) *For the purposes of this Part, a person also gives **immigration assistance** if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by:*

- (a) preparing, or helping to prepare, a document indicating that the other person nominates or sponsors a visa applicant for the purposes of the regulations; or*
- (b) advising the other person about nominating or sponsoring a visa applicant for the purposes of the regulations; or*
- (c) representing the other person in proceedings before a court or review authority that relate to the visa for which the other person was nominating or sponsoring a visa applicant (or seeking to nominate or sponsor a visa applicant) for the purposes of the regulations.*

(2A) *For the purposes of this Part, a person also gives **immigration assistance** if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by:*

- (a) preparing, or helping to prepare, a request to the Minister to exercise his or her power under section 351, 391, 417, 454 or 501J in respect of a decision (whether or not the decision relates to the other person); or*
 - (aa) preparing, or helping to prepare, a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person); or*
- (b) advising the other person about making a request referred to in paragraph (a) or (aa).*

- (3) *Despite subsections (1), (2) and (2A), a person does not give immigration assistance if he or she merely:*
- (a) does clerical work to prepare (or help prepare) an application or other document; or*
 - (b) provides translation or interpretation services to help prepare an application or other document; or*
 - (c) advises another person that the other person must apply for a visa; or*
 - (d) passes on to another person information produced by a third person, without giving substantial comment on or explanation of the information.*
- (4) *A person also does not give immigration assistance in the circumstances prescribed by the regulations.*

The Code of Conduct, under section 314 of the Act

1.10 The aims of the Code are:

- (a) to establish a proper standard for conduct of a registered migration agent;*
- (b) to set out the minimum attributes and abilities that a person must demonstrate to perform as a registered migration agent under the Code, including:*
 - (i) being of good character;*
 - (ii) knowing the provisions of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, in sufficient depth to offer sound and comprehensive advice to a client, including advice on completing and lodging application forms;*
 - (iii) completing continuing professional development as required by the Migration Agents Regulations 1998;*
 - (iv) being able to perform diligently and honestly;*
 - (v) being able and willing to deal fairly with clients;*
 - (vi) having enough knowledge of business procedure to conduct business as a registered migration agent, including record keeping and file management;*
 - (vii) properly managing and maintaining client records;*
- (c) to set out the duties of a registered migration agent to a client, an employee of the agent, and the Commonwealth and its agencies;*
- (d) to set out requirements for relations between registered migration agents;*
- (e) to establish procedures for setting and charging fees by registered migration agents;*
- (f) to establish a standard for a prudent system of office administration;*
- (g) to require a registered migration agent to be accountable to the client;*
- (h) to help resolve disputes between a registered migration agent and a client.*

1.11 *The Code does not list exhaustively the acts and omissions that may fall short of what is expected of a competent and responsible registered migration agent.*

1.12 *However, the Code imposes on a registered migration agent the overriding duty to act at all times in the lawful interests of the agent's client. Any conduct falling short of that requirement may make the agent liable to cancellation of registration.*

Migration Agents Regulations 1998, regulation 9

Complaints

For paragraphs 316 (c) and (e) of the Act, any person or body may make a complaint, including:

- (a) a client of the registered migration agent or lawyer;*
- (b) an official;*
- (c) an employee or member of the Institute;*
- (d) an employee of the Authority;*

- (e) a parliamentarian;*
- (f) a tribunal or court;*
- (g) a community organisation;*
- (h) the Department.*

Evidence and other materials

29. In reaching the following findings of fact the Authority considered the following evidence:

- Documentation contained in the Authority's complaint file for CMP-48614;
- Information held on Departmental records in relation to visa applications lodged by the family unit;
- Information held by the Authority in relation to the Agent; and
- The supporting documentation provided by the Agent in response to the section 308 notice and the 309 notice, being:
 - i. A Statutory Declaration in response to the section 308 notice;
 - ii. A Submission from the Agent's legal representative, dated 25 June 2021;
 - iii. A Submission from the Agent's legal representative, dated 17 August 2021; and
 - iv. Extracts from the Agent's client files for the CA 143 as application and the subclass 835 visa application.

DECISION AND REASONS

Finding on material questions of fact

- 30. Pursuant to paragraph 303(1)(h) of the Act, the Authority may caution a registered migration agent or suspend or cancel their registration if the agent has not complied with the Code.
- 31. Having regard to the findings I have made, I am satisfied that the Agent has engaged in conduct in breach of the Agents obligations under clauses **2.6, 2.9, 2.17, 6.1 and 6.1A** of the Code.
- 32. My findings and full reasons for the decision are set out below.

Providing misleading or inaccurate statements to Department

- 33. A registered migration agent is expected to not make statements, or encourage the making of statements, in support of an application, which they know or believe to be misleading or inaccurate, pursuant to clause 2.9 of the Code.
- 34. The complainant, Mr CS, alleged that the Agent was aware of Mr ZS's medical condition, the severity of which was such that he could not satisfy the health requirements of a permanent visa. The complainant further alleged that the Agent did not confirm his instructions in respect of the CA 143 application, and to circumvent the health requirement, the Agent orchestrated a deception on the Department that Mr ZS was not a member of the family unit and not dependent on his parents, allowing his parents and sister to be granted a permanent parent visa. This was possible due to the fact that Mr ZS was over 18 years of age at the time, and the Department was not aware of his medical condition.

35. Registered migration agents have in-depth knowledge of the requirements for various applications, and are aware of what evidence is generally sought by the Department to enable assessment of those applications against the relevant criteria.
36. The regulations in place at the time in respect of the CA 143 visa required that each member of the family unit satisfied PIC 4005. A member of the family unit is defined in Regulation 1.12, and includes a “dependent child of the family head.” Further, a “dependent child” includes a child who has turned 18 but is dependent on the family head or “is incapacitated for work due to the total or partial loss of the child’s bodily or mental functions.”
37. The Procedures Advice Manual (PAM) in respect of the health requirement at the time specified that each member of the family unit was required to satisfy the health requirement, irrespective of whether they were migrating or not. The PAM in effect at the time stated:
- “non-migrating family members are generally required to complete full health examinations in order to deter visa applicants from concealing matters that would result in failure of the health criterion for their family members as well as themselves”;*
- and:
- “if a migrant to Australia decides after a period of time that they want to sponsor to Australia a family member who remained offshore, difficulties can arise if the family member has a major health concern that could lead to significant costs being incurred or Australian access to health care services being prejudiced. It is therefore important for the s65 delegate to know in advance that the other family members do not have a health condition which would be of concern.”*
38. The Agent should have been aware of both the requirements in the Regulations and the relevant policy guidance in place at the time, in particular the explicit intention to “deter applicants from concealing matters that would result in failure of the health criterion.”
39. In support of the allegation, Mr CS provided an email addressed to the Agent, dated 30 October 2012, detailing his family composition and enquiring about visa options. In this email, Mr CS advised:
- “My brother, 22 years old, special kid.”*
40. Mr CS was referring to Mr ZS as being a “special kid”, however no detailed explanation of what this meant was provided to the Agent, nor was there any evidence of the Agent seeking clarification of such.
41. Departmental records indicate that on 22 February 2013, the Agent lodged the CA 143 application on behalf of Mr KS. In this application, Mrs SL and Ms YS were listed as dependants. Mr ZS was not included in this application. On 15 December 2014, the application was approved and all members of the family unit listed were granted a CA 143 visa.
42. In response to the section 309 notice, the Agent’s legal representative stated that the Agent’s decision to not include Mr ZS as a dependant on his parent’s CA 143 application was in accordance with Mr CS and Ms YXS’s verbal instructions.² The Agent accepted their explanation that Mr ZS was financially dependent on Mr CS and not his parents.
43. The Agent provided the Authority a copy of an email sent to Mr CS on 13 June 2013, stating that Mr ZS did not require an overseas police clearance because he would not be listed as a

² Legal Representative Response to s 309 Notice, page 1, dated 17 August 2021.

dependant in the CA 143 visa application, and he was over 18 years. I acknowledge that the Agent was informed by the family that Mr CS was responsible for costs associated with Mr ZS's care. However, the Agent has not provided any substantial records or file notes as evidence in support of the information he claims was provided by Mr CS and Ms YXS in regards to Mr ZS's dependency. Nor is there any evidence that Mr CS and Ms YXS understood the meaning of a "member of a family unit" or a dependant over the age of 18 years.

44. The relevant requirements of the CA 143 visa were that each member of the family unit must satisfy PIC 4005, irrespective of whether they were also an applicant for the CA 143 visa.³ Further, as discussed above, a member of a family unit included a child who has turned 18 and "is incapacitated for work due to the total or partial loss of the child's bodily or mental functions." It is noted that in order to satisfy the requirements of the CA 143 visa application, all applicants must pass the medical assessment to satisfy PIC 4005. Failure to satisfy PIC 4005 by any applicant would result in a visa refusal outcome for all, irrespective of whether they passed their medical assessment or not.
45. The Agent stated that he was under the impression that although Mr ZS was a "slow learner," he was still able to work and that he was not aware of the full extent of Mr ZS's medical condition. However, the Agent provided no written evidence to the Authority which could suggest how he came to this conclusion or to substantiate his claims. The Agent acknowledged that he failed to verify the claims about Mr ZS's financial dependence and work capacity, yet argued that he was deceived by Mr CS and Ms YXS, who knowingly provided him with inaccurate information.
46. In response to the section 308 notice the Agent stated that Mr CS and Ms YXS informed him they provided full financial support for Mr ZS, which included hiring a fulltime, live-in domestic helper to assist with his physical needs, and money for his day to day living expenses. The information about the extent of support required by Mr ZS, including a full time live-in domestic helper in itself should have alerted the Agent to the full extent of Mr ZS's medical condition and lack of capacity to work.
47. The Agent stated that the Department never requested evidence of Mr ZS's dependency on his siblings. The Agent acknowledged that, in hindsight, if he had asked Mr CS for such evidence, he most likely would have advised that he was unable to provide this information. However, , the Agent should have been aware of the definition of a member of a family unit and regardless of whether or not the Department requests evidence, the Agent still had a duty to ensure that there is sufficient and accurate information to meet the visa criteria prior to lodging an application. Further, the Department trusts that information provided by registered migration agents is accurate and not misleading. The Agent has not provided any evidence to explain how he accepted that Mr ZS was not a member of the family unit in spite of conceding that he was aware of Mr ZS's disability. Instead, the Agent claimed he relied solely on information provided to him verbally by Mr CS and Ms YXS.
48. The Agent also stated that there was no intention for Mr ZS to migrate to Australia and that arrangements were put in place for him to remain in <<removed for privacy>>. The very fact that arrangements had to be made for his care should have alerted the Agent to the seriousness of his disability and therefore, in spite of the fact that he was over 18 years of age, he was a member of the family unit.
49. On 17 January 2015, Mr KS, Mrs SL and Ms YS arrived in Australia. Three days later, on 20 January 2015, Mr KS and Mrs SL departed the country. On 5 February 2015, Mrs SL returned with Mr ZS, who was travelling on an ETA. With the Agent's assistance, Mr ZS lodged a subclass 835 visa application almost immediately after his arrival, to remain permanently in the country. This undermines the veracity of the Agent's statement that there was no intention for Mr ZS to migrate with the family.

³ Regulations 143.229 and 143.230 refer.

50. On the basis of the available evidence I am satisfied that the clients sought to circumvent the requirements of the CA 143 visa by not including Mr ZS as a family member in the application thereby allowing the CA 143 visa to be granted to the other family members.
51. Given the above, I find that not including Mr ZS on the CA 143 visa application as a member of the family unit, was a deliberate means to circumvent the PIC 4005. The fact that three days after arriving in Australia, Mrs SL left and returned with Mr ZS, amply demonstrates that the family had no intention of leaving Mr ZS on his own. However, it is unlikely that Mr CS and Ms YXS could have orchestrated this plan without the Agent's guidance as an experienced migration agent, despite non substantiated claims from the Agent that they sought independent advice from numerous migration agents. I accept that the family unit were complicit with the plan, however it was the Agent's responsibility to ensure he upheld his obligations under the Code.
52. The Agent's knowledge and experience enabled him to create an illusion that the applicable requirements were met. I am satisfied that the Agent failed to provide all relevant and accurate information to the Department, in order to achieve a positive visa outcome, thus breaching clause 2.9 of the Code. However, I accept that the Agent appears not to have derived any special benefit from this deception, and as such I am satisfied that he was acting on the instructions of his clients.

Lodging vexatious or unfounded applications

53. Clause 2.6 of the Code requires a registered migration agent to take into account objective criteria to make an application under the Act or Migration Regulations. An agent must be frank and candid about the prospect of success when assessing a client's request for assistance in preparing a case or making an application.
54. Furthermore, under clause 2.17 of the Code, if an application is grossly unfounded or has no chance of success, an agent must not encourage their client to lodge the application, or if the client still wishes to lodge the application, the agent must obtain written acknowledgement from the client.
55. It was put to the Agent in the section 309 notice that he lodged the subclass 835 visa on behalf of Mr ZS, knowing there was a significant chance that he would not meet the health requirements under PIC 4005, which would likely result in a visa refusal. As such, the application was grossly unfounded or had no prospect of success.
56. In his response to the section 309 notice the Agent claimed⁴ that he was instructed by Mr CS and Ms YXS to lodge Mr ZS's application, despite his advice that it will be very difficult for Mr ZS to pass the health requirements. The Agent also stated that they instructed him that they would rather leave the decision up to a Medical Officer of the Commonwealth to evaluate Mr ZS's condition, with the hope that he will pass. The Agent has not provided evidence of these instructions or Mr CS and Ms YXS's awareness of the risks associated with the application.
57. As a registered migration agent, the Agent had an obligation to act on his clients' instructions but the Agent was also required under the Code to advise his client in writing that he considered the that subclass 835 visa application for Mr ZS unlikely to be granted. Moreover, the Agent was required to obtain written acknowledgement from the client that his advice has been received. It would also be considered necessary to obtain the clients' instructions in writing if they wish to proceed with the visa application, despite the Agent's advice to the contrary. There is no evidence that the Agent took any of these steps. The Agent claimed he made an "error of judgement" in respect of the subclass 835 application, by not keeping written file notes of oral exchanges with the clients, nor providing the clients with written advice on the prospects of success of the visa application.

⁴ Legal Representative Response to s 309 Notice, dated 17 August 2021.

58. Further, following the refusal of the subclass 835 visa, evidence before the Authority indicates that the Agent proceeded to lodge an appeal for the review of the application with the AAT. It is unclear why the Agent assisted Mr ZS to apply for review of the visa refusal decision, given that he thought the initial application had poor prospects of success based on Mr ZS's inability to pass the health requirement. The Agent claimed he advised Mr CS and Ms YXS in writing that Mr ZS's application had a limited chance of success and requested their acknowledgement of this advice prior to proceeding with lodgement of review at the AAT. To substantiate his claims, the Agent provided an email addressed to Mr CS, dated 19 September 2015. The email stated, of relevance:

"You acknowledge that chances of success of this case with the AAT are slim if the review case is handled by a representative who is not a trained lawyer and therefore is not able to provide a strong legal argument based on research on case law and other areas of literature a lawyer is competent to access and utilize.

You acknowledge that chances of success of this application for review will be greatly enhanced by engaging a trained lawyer with experience in this field."

59. I find that the email submitted to the Authority, contradicts the Agent's version of events, as chances of success discussed in the email are not in relation to the merits of the case and Mr ZS not meeting health requirements under PIC 4005. Rather, the Agent requests acknowledgment that the chances of success are limited due to his representation, and a legal professional was more suited to represent the clients in an AAT setting. The Agent has not provided any evidence of the client's instructions or written acknowledgement of their acceptance of the advice that the review application was unlikely to succeed based on the merits of the case.
60. Given the lack of evidence to substantiate the Agent's claims in response to the section 309 notice, I find that in respect of both the subclass 835 visa application and subsequent AAT review application:
- i. The Agent failed to obtain written acknowledgement confirming that Mr CS and Ms YXS understood his advice or reservations with respect to the prospects of a successful visa application;
 - ii. The Agent lodged the two applications even though he was aware that they were highly unlikely be successful.

61. I am therefore satisfied that the Agent has breached clauses 2.6 and 2.17 of the Code.

Recordkeeping

62. Under clause 6.1 of the Code, a registered migration agent must maintain proper records that can be made available for inspection on request by the Authority. Further, pursuant to clause 6.1A, these records must be kept for a period of seven years.
63. In response to the section 309 notice, the Agent stated that the original handwritten CA 143 visa applications for Mr KS, Mrs SL and Ms YS, were completed by Mr CS and were used as a draft to transfer information to the final, online applications. The Agent further stated that he disposed of the draft applications, roughly three years ago whilst moving houses, noting that the visas had all been granted by that time. The CA 143 visas for Mr KS, Mrs SL and Ms YS were granted on 15 December 2014. Therefore, by destroying the documents less than seven years after the date of the last action on file, I find that the Agent has breached his obligations under 6.1 and 6.1A of the Code.
64. In respect of the subclass 835 application, the Agent claimed he made an "error of judgement" by not keeping written file notes of oral exchanges with the clients. Additionally he admitted

that although they were verbally advised, he failed to provide the clients with written advice about the poor prospects of success of the visa application. However, I find that the Agent has downplayed his failure to comply with his record keeping obligations under the Code, and an "error of judgement" is not a reasonable excuse to permit such failures.

65. Furthermore, the Agent has made numerous claims in relation to Mr CS and Ms YXS's deceitful conduct, but has failed to provide any evidence to the Authority to substantiate his version of events. The client file provided by the Agent did not contain many documents which would usually be expected to form part of a client file, including client file notes, records of client instructions or letters of advice. The lack of written communication detailing his advice to his clients, or instructions given to him, is in breach of the Code. It appears that the Agent has relied on his claimed memory of events some years later and his belief in what transpired during the dealings with his clients.
66. I am therefore satisfied that the Agent has failed to maintain proper records that could be made available for inspection on request by the Authority, thus breaching his obligations under 6.1 of the Code.

Consideration of Appropriate Disciplinary Action

67. In deciding to discipline the Agent under section 303 of the Act I have taken into account all of the circumstances of the case, including the following:
- (a) Whether the Agent's behaviour is of a minor or serious nature. The Authority has identified the following behaviour as extremely serious and therefore likely to result in discipline at the higher end of the scale:
 - i. criminal behaviour;
 - ii. fraudulent behaviour;
 - iii. behaviour that demonstrates fundamental lack of knowledge of the law; or
 - iv. involves a blatant disregard for or a significant degree of indifference to the law;
 - v. repeated occurrences of the conduct described in subsection 303(1) (d)-(h) and/or;
 - vi. agent behaviour that has resulted in significant harm or substantial loss to clients.
 - (b) Any aggravating factors that increase the Agent's culpability including but not limited to previous conduct.
 - (c) Any mitigating factors that decrease the Agent's culpability including but not limited to evidence that the Agent's health has contributed to the Agent's culpability or where the Agent has undertaken steps to remedy the situation.

Seriousness of behaviour

68. In deciding to discipline the Agent under section 303 of the Act, I have taken into account all of the circumstances of the case, including the severity of the Agent's behavior and any mitigating or aggravating circumstances which may exist.

69. Having regard to the Complaint Classification Matrix, I have considered that the Agent's conduct falls within the Moderate classification for the following reasons:
- i. The Agent has breached multiple clauses of the Code, indicating systemic poor practices.
 - ii. The Agent was complicit with providing inaccurate and misleading information to the Department.
 - iii. The Agent has attempted to take limited responsibility for his actions.
 - iv. The Agent has failed to maintain proper records in relation to material conversations with his clients.
 - v. The Agent's actions may result in reputational damage to the migration advice profession.
70. I consider the Agents conduct falls short of the standard expected of a registered migration agent.
71. The Agent has not made a meaningful attempt to explain or rectify his conduct. Although the Agent has accepted some responsibility for his actions, he has sought to apportion blame onto his clients and accused them of misleading him. The evidence discussed in this decision indicates that the Agent knowingly misled the Department by lodging the CA 143 visa application which sought to obtain visa outcomes to which the clients were not entitled. I am satisfied that the clients were willing participants and sought to benefit from this deception.

Mitigating Factors

72. The Agent provided the following submissions to be taken into account in making this decision.
- i. In his 23 years as a registered migration agent, he has only had two previous complaints made against him to the Authority. Both related to file management. One complaint was dismissed by the Authority and the other was addressed and finalised by the Authority with no sanction decision.
 - ii. His work life has been centred on providing help and assistance to the community which he lives in. He has been serving as a Justice of the Peace since 2002, and is part of the CW Association, an ethnic community association, for 11 years.
 - iii. As a registered migration agent, he has never submitted any sponsorship, nomination or visa application, knowing in advance that they would most likely be refused.
 - iv. Any sanction decision will have an impact upon his livelihood, as his migration income accounts for 90% of his work income. He has no other means to financially support his commitments and obligations.
 - v. Being 69 years of age, it will be unlikely for him to obtain employment in any other job.
73. I have considered that the Agent has been registered since 17 April 1998 and that no previous disciplinary action has been taken against the Agent. I have considered that the clients in this case were likely aware of and complicit in the Agent's actions, and would be the main beneficiaries of a positive visa outcome.
74. I have also taken into account that a disciplinary decision would affect the Agent's financial earning capacity and livelihood. However, a caution on the Agent's registration not prevent the Agent from working as migration agent continuing to provide immigration assistance.

Consumer Protection

75. Consumers of professional services of registered migration agents are often vulnerable and place a high degree of trust in their registered migration agent. Consumers are therefore entitled to a high level of professional service from their registered migration agent.
76. The behaviour demonstrated by the Agent falls short of the reasonably expected standards of a registered migration agent. I consider that a disciplinary decision is warranted and that the Agent requires further education and training to address the conduct which is the subject of this decision, and in the interests of consumer protection.

DECISION

77. Following consideration of the information before me, I have decided to **caution** the Agent under paragraph 303(1)(c) of the Act. The caution is to remain on the Register for a period of **six (6) months** and until the Agent has met the following conditions:

- a) Evidence that the Agent has successfully completed Continuing Professional Development courses which cover:
- i. Ethics and professional practices;
 - ii. Visa health requirements; and
 - iii. Determining dependency in the migration program.
- b) Evidence that the Agent has successfully completed 4 hours of private face-to-face tuition with an Accredited Specialist in Immigration Law on Ethics and Professional Practice. The private tuition must cover the registered migration agent's obligations under Part 2 (Standards of Professional Conduct) and Part 6 (Record Keeping and management) of the Code and include a discussion of the issues that are the subject of this decision:
- i. The Agent must commence the private tuition within two months from the date of this decision and provide a copy of this decision to the tutor.
 - ii. Upon commencement of the private tuition, the Agent must provide to the Authority in writing, details of the individual providing the tuition and the date of commencement of the private tuition.
 - iii. The individual providing the Agent with the tuition must provide a report to the Authority confirming the tuition provided.

Yours sincerely

Senior Professional Standards Officer
Office of the Migration Agents Registration Authority
Department of Home Affairs

Date of Decision: 14 December 2021