



DECISION RECORD

FILE NUMBER	0962587
AGENT	Vivek Sivaraman
COMPLAINT NUMBER	CMP-29963
DECISION	Barring – five years
DATE OF DECISION	22 February 2018

Definitions

1. The following abbreviations are used in this decision:

“The Authority”	The Office of the Migration Agents Registration Authority
“The Former Agent”	Vivek Sivaraman
“The Department”	The Department of Home Affairs (and its former manifestations)
“The AAT”	The Administrative Appeals Tribunal
“The Act”	The <i>Migration Act 1958</i> (Cth)
“The MA Regulations”	The <i>Migration Agents Regulations 1998</i> (Cth)
“The Regulations”	The <i>Migration Regulations 1994</i> (Cth)
“The Code”	The Migration Agents Code of Conduct prescribed under Regulation 8 and Schedule 2 to the MA Regulations
“The Register”	Register of Migration Agents kept under section 287 of the Act
“ABN”	Australian Business Number
“VAC”	Visa Application Charge. A VAC is the amount of money, in Australian dollars that must be paid for the visa application. It is generally a non-refundable fee in the event of an unsuccessful visa application

STATEMENT OF REASONS

Background

2. The Former Agent was first registered as a migration agent on 11 December 2009 and was allocated the migration agent registration number 0962587. The Former Agent’s registration had been renewed annually since that date, with the most recent registration having expired on 10 December 2017.
3. While registered as a migration agent, the Register listed the Former Agent’s trading name as Atlas Australian Migration Office with an Australian Business Number of 47 145 099 332.

4. On 16 March 2017 the Authority received a complaint about the Former Agent's conduct as a registered migration agent from Mr AAF. The complaint about the Former Agent was in relation to his provision of immigration assistance within the meaning of section 276 of the Act.
5. In summary, Mr AAF alleged:
 - He engaged the Former Agent's services in 2014 to assist him with a Partner visa application for his spouse and child who were residing overseas and paid the agreed fee of \$1500 (AUD).
 - The Former Agent lodged the application in December 2014. From the outset, the Former Agent was negligent and careless in the management of visa matters. Approximately six months after lodgement the Former Agent incorrectly provided Mr AAF with the documents checklist for visa applicants from Pakistan, when he and his spouse are both *[removed]*.
 - The Former Agent failed to keep him informed regarding the progress of the application and to respond to his multiple email and text message enquiries regarding updates on the application. On the few occasions the Former Agent did respond, he made excuses for not being able to communicate with Mr AAF.
 - The two and a half years processing time is much longer than the standard processing time for a partner visa application of twelve months. Mr AAF does not know the reasons for the delay.
 - Due to the Former Agent's lack of communication and duty of care, Mr AAF decided to terminate his services and appoint a new migration agent.
 - He emailed the Former Agent a request to return his file by 12 February 2017. To date, he has not received the file and is unaware of what processing stage the application has reached.
 - As he believes the Former Agent breached his Service Agreement, Mr AAF has obtained the services of another migration agent to assist with the application, he requested a full refund of the professional fees paid.

Evidence provided in support of the complaint

6. In support of his complaint, Mr AAF provided the Authority with:
 - Email dated 12 February 2017 from Mr AAF requesting that the Former Agent provide him his client file and all documents so he can provide these to his new agent;
 - Email dated 7 January 2016 from Mr AAF requesting an update on the progress of the combined Partner visa application and expressing dissatisfaction with the lack of information provided by the Former Agent; and
 - Text message correspondence between 21 January and 28 February 2017 from Mr AAF's friend 'F' on his behalf, regarding Mr AAF's attempts to seek updates from the Former Agent.

Notice to give information pursuant to section 308

7. Two informal attempts were made by the Authority to contact the Former Agent in relation to the complaint prior to publication of the section 308 notice, the first by email on 21 July 2017, and then subsequently by phone on 2 August 2017 when a voicemail message was left requesting the Former Agent to contact the Authority. The Former Agent failed to respond or make any attempt to contact the Authority.

8. On 21 September 2017, the Authority wrote to the Former Agent and pursuant to section 308(1) of the Act requested that he provide written responses to specific questions by way of a statutory declaration, and provide a complete client file for Mr AAF in relation to his spouse's Partner visa application.
9. The complaint raised issues under clauses of the Code referred to in section 314(1) of the Act.
10. At the time the complaint was made, the Former Agent was informed that the conduct alleged by Mr AAF raised issues under clauses 2.1, 2.3, 2.4, 2.8, 2.19, 2.21, 3.4, 5.2, 5.5, 6.1, 6.3, 9.3 and 10.1B of the Code.

The Former Agent's response to the section 308 notice

11. On 22 October 2017 the Authority received the Former Agent's response to Mr AAF's complaint in the form of an informal one page letter with no statutory declaration, no client file, and no supporting documentation. In his response the Former Agent stated that:
 - He has "*no defensible comments*" in relation to the allegations put forward by Mr AAF and the supporting documentation he has provided the Authority.
 - He submitted the Partner visa application on behalf of Mr AAF in December 2014.
 - The Former Agent asserted that he had *[removed for privacy reasons]*. It has taken the Former Agent nearly three years to *[removed]*, only thereafter had he been able to resolve *[removed]*. The Former Agent believes he now *[removed]*. No relevant details of the Former Agent's *[removed]*, or evidentiary documentation to support these statements was provided with the section 308 submission.
 - The Former Agent's engagement and work on Mr AAF's matter occurred during the period of time he asserts he was *[removed]*. When the Former Agent realised what had gone wrong with the Partner visa application, he lodged another application on 29 June 2017 and paid the application fee out of his own pocket.
 - The Former Agent feared how Mr AAF and his friend would react if he advised them what had occurred with the Partner visa application, as he had previously experienced a few incidents where clients from refugee backgrounds have behaved violently in his office when informed of unfavourable outcome on their applications.

Department records

12. Records from the Department indicate:
 - On 2 December 2014, the Former Agent lodged an application for a combined Partner (Provisional) (Class UF) Subclass 309/ Partner (Migrant) (Class BC) Subclass 100 visa for Ms CRJ and dependent Master HD, with Mr AAF listed as the Sponsor.
 - On 6 May 2015 the Department sent the Former Agent an email requesting the following information and documents:
 - (a) Form 80
 - (b) *[Country]* Police Clearance
 - (c) Relationship statement
 - (d) Form 888
 - (e) Evidence of Sponsors current employment status
 - (f) Evidence of communication

- (g) Wedding and post wedding photographs
 - (h) Polio vaccination certificate
 - (i) Birth certificates
 - (j) National Identity card
 - (k) Marriage Certificate
 - (l) Evidence that the Sponsor is an Australian citizen or permanent resident
 - (m) Passport size photographs
 - (n) Receipt payment of application
- On 29 June 2015, the Department contacted the Former Agent to enquire about the outstanding information and medicals. In response, the Former Agent confirmed that both the applicants would undertake their medicals in the next week and the documents would be uploaded in the next two weeks.
 - On 27 October 2015, the Department sent an email reminder to the Former Agent that the outstanding information had not been uploaded on the ImmiAccount and a timeframe of 15 days was given for the information to be provided.
 - On 23 November 2015, the Department emailed the Former Agent again requesting the following information within the prescribed timeframe of seventy (70) days from the date of the request:
 - (a) Identity documents for both Ms CRJ and Master HD including [*national identity document*] with an attested English translation from the Ministry of Foreign Affairs, proof of residency cards and passport
 - (b) Passport
 - (c) Marriage Certificate
 - (d) Historical and recent photographs
 - (e) Statement of relationship
 - (f) Evidence of relationship – addressing all four aspects of relationship
 - (g) Form 956
 - (h) Form 80
 - (i) Form 40SP
 - (j) Form 888
 - Despite the aforementioned requests, the Department did not receive any of the requested information or documents. As a result, the application was found to not meet the criteria prescribed in the legislation and refused on 22 October 2016.
 - On 29 June 2017 a second combined Partner (Provisional) (Class UF) Subclass 309/ Partner (Migrant) (Class BC) Subclass 100 visa application was lodged for Ms CRJ and Master HD with Mr AAF listed as the Sponsor. The Former Agent was listed as representative agent at the time of lodgement.
 - The decision record in relation to the first combined Partner visa application identified irregularities with the date of marriage claimed in the application form. The first application indicated that Mr AAF and Ms CRJ were married on 4 December 2012 in [*overseas location*]. However, departmental records confirm Mr AAF was in Australia on this date. In the second application lodged by the Former Agent on 29 June 2017, the marriage is listed as 12 April 2012 in [*overseas location*]. Departmental records confirm that Mr AAF was also in Australia on this date.

Notice under section 309 of the Act (section 309 notice)

13. On 21 November 2017, the Authority sent the Former Agent a notice pursuant of section 309(2) of the Act, advising him that it was considering cautioning, or suspending or cancelling his registration under section 303(1) of the Act.
14. The Former Agent was notified that having regard to the information before the Authority, it was open to the delegate to be satisfied that he had engaged in conduct that breached his obligations under clauses 2.1, 2.4, 2.8, 2.9, 2.19, 2.21, 5.2, 5.5, 6.1, 6.1A, 7.4, 9.3, 10.1B, 10.2, 10.5 and 10.6 of the Code.
15. Pursuant to section 309(2) of the Act, the Authority invited the Former Agent to provide written submissions on the matter by 19 December 2017.

Response to the section 309 notice

16. The Former Agent's registration ceased on 10 December 2017. On 19 December 2017 the Authority received the Former Agent's submission in form of a written argument, which stated:
 - The Former Agent accepted full responsibility for the conduct outlined in the section 309 notice, as it was his failure to attend to Mr AAF and Ms CRJ's matter, which resulted in the application being refused, and subsequently his negligence in missing the refusal notification and opportunity to appeal.
 - The Former Agent believes that his decision to not disclose the application refusal to the client, and subsequently to proceed, without instructions, to lodge a fresh application in an attempt to mitigate the loss and conceal his negligence, has resulted in "*catastrophic consequences for [his] career*".
 - Further, the Former Agent conceded that his failure to attend to requisitions underpinning the complaint are a matter of deep shame and regret, and in hindsight believe this is broadly symptomatic of underlying depression and "*a propensity to procrastinate*".
 - The Former Agent accepts that his conduct was wrong and wishes to sincerely apologise to his professional colleagues for letting them down, but also the client who has had to bear the consequences of his actions, and the Authority for the time, trouble and inconvenience he has caused.
 - Under the circumstances, the Former Agent believes it is inevitable that his registration will be cancelled. He asserted that during the period of cancellation, he intends to recast and rehabilitate himself so that if he seeks to be registered as a migration agent in the future, he can demonstrate that he is a fit and proper person to provide immigration assistance and meet his obligations under the Code.

Notice pursuant to section 311D of the Act

17. Following the Former Agent's registration ceasing on 10 December 2017, the Authority sent a notice (section 311D notice) pursuant to subsection 311D(1) of the Act on 4 January 2018.
18. The section 311D notice informed the Former Agent that:
 - Having regard to the Authority's investigation of Mr AAF's complaint, and the previously issued section 309 notice and response from the Former Agent, the

Authority was considering whether to bar the Former Agent under subsection 311A(1) of the Act from being a registered migration agent for a period;

- that period could be up to five years; and
- the reasons for the proposed decision.

19. The section 311D notice invited the Former Agent to make a written submission to the Authority on the matter within 28 days, and also informed the Former Agent that subject to any written submission received within that period, it was open for the Authority to be satisfied that the complaint was made out.

The Former Agent's response to the section 311D notice

20. The Former Agent was requested to provide his response to the section 311D notice no later than 28 days after the notice had been given, being 1 February 2018.

21. To date, the Authority has not received a response from the Former Agent to the section 311D notice.

Evidence and other material

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

- Documents contained in the Authority's complaint file CMP-29963;
- Information provided by the Former Agent in the section 308 and section 309 submissions;
- Information held on the Department's databases in relation to the matters raised in the complaint the subject of this decision; and
- The registration files of the Former Agent held by the Authority.

Relevant legislation

Migration Act 1958

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 exercise of 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, 197A, 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.*

Section 311A Barring former registered migration agents from being registered for up to 5 years

- (1) The Migration Agents Registration Authority may decide to bar a former registered migration agent from being a registered migration agent for a period if, after investigating a complaint about him or her in relation to his or her provision of immigration assistance while he or she was a registered migration agent, it is satisfied that the subject matter of the complaint is made out.*

Note: Before making such a decision, the Authority must invite the former registered migration agent to make a submission: see section 311D

Subsection 316 (1B)

However, the Authority can investigate a complaint about a former registered migration agent only if the complaint is received within 12 months after he or she ceased to be a registered migration agent.

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 Regulations are the Minister for Home Affairs' functions and powers. The Minister has delegated his powers under Part 3 of the Act and the Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

25. The complaint which is the subject of this decision was received on 16 March 2017 whilst the Former Agent was registered as a migration agent.

DECISION AND REASONS FOR DECISION

Findings on material questions of fact

Provision of Immigration Assistance

26. While registered, the Former Agent was engaged to provide immigration assistance to Mr AAF in relation to an application for a Partner visa application for his wife Ms CRJ. In the application form submitted to the Department for the first Partner visa application lodged, the Former Agent is identified as the applicants' migration agent and acting as the authorised recipient of communication from the Department. In the Former Agent's section 308 and 309 responses, he acknowledged that Mr AAF was his client, and that he assisted him by preparing and lodging the first Partner visa application. I therefore find that Mr AAF's complaint relates to the Former Agent's provision of immigration assistance, as defined in section 276 of the Act.

The subject matter of the complaint

27. Having regard to the relevant evidence before the Authority I am satisfied that the subject matter of Mr AAF's complaint is made out. My findings in relation to this are set out below in more detail.

Negligent and careless conduct in the management of the client's visa matters

Lodgement of application and supporting documentation

The Code, as prescribed in Schedule 2, Regulation 8 of the MA Regulations, stipulates:

2.1 A registered migration agent must always:

- (a) act in accordance with the law (including, for an agent operating as an agent in a country other than Australia, the law of that country) and the legitimate interests of his or her client; and*
(b) deal with her or her client competently, diligently and fairly.

2.4 A registered migration agent must have due regard to a client's dependence on the agent's knowledge and experience

2.19 Subject to a client's instruction, a registered migration agent has a duty to provide sufficient relevant information to the Department or a review authority to allow a full assessment of all the facts against the relevant criteria. For example, a registered migration agent must avoid the submission of applications under the Migration Act or Migration Regulations in a form that does not fully reflect the circumstances of the individual and prejudices the prospect of approval.

2.21 A registered migration agent must not submit an application under the Migration Act or Migration Regulations without the specified accompanying documentation. For example, in a marriage case threshold documentation would include a marriage certificate and evidence that the sponsor is an Australian citizen, an Australia permanent resident, or an eligible New Zealand citizen, without which assessment of the case could not proceed (unless the agent has a reasonable excuse or the client has requested that agent to act despite incomplete documentation).

28. Mr AAF stated in his complaint that he believed the Former Agent had been negligent and careless in his management of his visa matters and at one stage provided him with a document checklist for Pakistani nationals instead of one for [removed] nationals for the first combined Partner visa application. A review of departmental records found that the application was lodged without the threshold accompanying documentation required,

including without Mr AAF's and Ms CRJ's marriage certificate. Departmental records also confirm that, despite numerous requests for information and documents throughout 2015, and assurances from the Former Agent that he would provide them, the Department did not receive any of the supporting information and documents needed to assess the application against the criteria in the Act and the *Migration Regulations 1994* (the Regulations).

29. In his section 308 response, the Former Agent conceded that he believes something had gone “*wrong*” with the combined Partner visa during the period of time from lodgement of the application in December 2014 until sometime after it was refused on 22 October 2016, on account of his medical condition. The Former Agent claimed that he had [removed] over the period of time that the application was being assessed by the Department. While the Former Agent provided some limited detail of the treatment he had received to address the [removed], he has not provided any documentation to support his claims. It would be expected that had the Former Agent [removed], he would have been able to produce a [removed] or similar documentation as evidence of [removed] during a period spanning in excess of two years.
30. However, despite having two opportunities to do so, the Former Agent has failed to provide any documentation to support his statements in the section 308 response. The information that has been provided is limited and does not contain relevant details such as when the Former Agent was [removed]. In addressing the allegations and the Authority's questions, the Former Agent stated that “*all the happenings of [removed] was during this time of my life*”, but failed to provide any detail of the first application or any mention of the Department's or Mr AAF's correspondence with him in relation to its processing. Given the lack of evidence to support his claims of [removed], I reject the Former Agent's statements in relation to [removed], which have been used to justify or exempt his conduct in relation to the first application. If the Former Agent did [removed], this also presents concerns as to whether he was fit to practice during the period he has purported to have [removed], and what potential impacts this [removed] may have had on other client matters during this substantial period of time.
31. The Former Agent received a number of requests from the Department to provide documents and information, including all specified accompanying documentation required to process the application. However, departmental records indicate that he failed to provide any documentation, despite the generous timeframes afforded. The Former Agent has not indicated that he experienced any difficulty or delay in obtaining these documents and information from the complainant or Ms CRJ, and there is no evidence to suggest that the Former Agent was instructed not to provide this documentation. As a result, the delegate was unable to make a full assessment of all the relevant facts of the first combined Partner visa application against the relevant criteria and the visa application was refused. In the Former Agent's section 309 submission, he conceded that “*it was [my] failure to attend to the matter*” which led him to miss the Department's notifications.
32. Given Mr AAF is a former refugee from [removed], it would be reasonable to expect that he would have limited understanding of Australia's migration program and legislation, and would have been heavily dependent on the Former Agent's experience and knowledge to provide advice and assistance with regards to the application process and supporting document requirements. It appears, however, that the Former Agent failed to deal with him competently, diligently and fairly on a number of occasions during the processing of the first application, and his inaction in providing the requested information and documents to the Department directly contributed to the refusal of the combined Partner visa application. While I acknowledge the Former Agent's written apology to Mr AAF in the section 309 submission for the negative impact of his actions, this does not diminish the gravity of the Former Agent's conduct or the significant adverse impact on Mr AAF and Ms

CRJ, and their intentions to reunite their family in Australia. Consequently, I am satisfied that the Former Agent was negligent and careless in his management of Mr AAF's visa matters, and in doing so breached his obligations under **clauses 2.1, 2.4, 2.19 and 2.21** of the Code in respect to the aforementioned matters, and whilst he was a registered migration agent.

Provision of false or misleading information

The Code, as prescribed in Schedule 2, Regulation 8 of the MA Regulations, stipulates:

2.9 A registered migration agent must not make statements in support of an application under the Migration Act or Migration Regulations, or encourage the making of statements, which he or she knows or believes to be misleading or inaccurate.

33. A review of the two Partner visa applications lodged by the Former Agent on behalf of Mr AAF and Ms CRJ, as well as the refusal decision record for the first application, identified that there was inconsistent information provided in the two applications with regard to the date of their marriage. The two dates provided in the applications are 4 December 2012 and 12 April 2012, respectively. Further, the delegate in the refusal decision record stated that departmental records confirmed Mr AAF was still in Australia in December 2012, and in April 2012. While it is unclear whether Mr AAF instructed the Former Agent to provide the incorrect date when preparing the first application, this does not account for the different date provided in the second application lodged without any instructions. Given that the Former Agent has conceded that he did not tell Mr AAF about the second application, it is unclear who directed him to change the date of marriage on the second application to approximately 8 months prior to the original date.
34. However, as the Former Agent had received the refusal decision, which concluded that the original date of marriage provided was not accurate, it appeared that the Former Agent provided an alternative date of marriage in the second application to attempt to rectify the date. Additionally, by selecting a date significantly earlier than the previous one provided, it also appears that the Former Agent was attempting to improve the prospects of the application by suggesting that Mr AAF and Ms CRJ had been married longer than previously indicated. As such, I am satisfied that Mr AAF did not instruct the Former Agent to provide a different date in the second application.
35. When this adverse information was put to the Former Agent in the section 309 notice, he did not provide any specific response, aside from stating that he accepted "*full responsibility for the conduct outlined in the Notice*". Therefore, I find that the Former Agent has accepted responsibility for altering the original date provided to the Department in an attempt to counter the adverse information in the refusal decision, and improve the prospects of the application. Accordingly, I am satisfied that the Former Agent acted in a negligent and careless manner, as alleged, and knowingly provided false or misleading information to the Department whilst he was a registered migration agent, in breach of his obligations under **clause 2.9** of the Code. Furthermore, the Former Agent's conduct in lodging the second Partner visa application, which was undertaken without instruction or consent from Mr AAF and Ms CRJ, was an attempt to mislead the Department that he was authorised and instructed to lodge the second application. As such, I am satisfied that the Former Agent's conduct in lodging the second application constitutes broader fraudulent behaviour.

Failure to keep client informed of the progress and outcome of the first visa application

The Code, as prescribed in Schedule 2, Regulation 8 of the MA Regulations, stipulates:

2.8 A registered migration agent must:

- (a) *within a reasonable time after agreeing to represent a client, confirm the client's instructions in writing to the client; and*
 - (b) *act in accordance with the client's instructions; and*
 - (c) *keep the client fully informed in writing of the progress of each case or application that the agent undertakes for the client; and*
 - (d) *within a reasonable time after the case or application is decided, tell the client in writing of the outcome of the client's case or application.*
36. Mr AAF alleged that the Former Agent had failed to keep him informed of the progress of the combined Partner visa over the two and a half year period, despite his attempts to contact him to seek updates. In the Former Agent's section 308 response to the allegations, he stated that he had "*no defensible comments*", but did not provide any documents to show that he had responded to Mr AAF's attempts to contact him.
37. In his section 308 response, the Former Agent also stated that he had chosen not to update Mr AAF on the outcome of the first combined Partner visa application, or advise him that he had lodged a second application eight months after the refusal decision as he feared Mr AAF may become violent. While the Former Agent indicated that other clients from refugee backgrounds had previously become violent when informed of negative migration outcomes, this appears to be a generalised statement. There is no evidence before the Authority that suggests that Mr AAF displayed any violent behaviour towards the Former Agent, nor do his written requests to the Former Agent for information and updates appear threatening. I therefore reject the Former Agent's statement as an attempt to justify his failure to act on his client instructions and keep him informed of the progress of his application. The Former Agent subsequently conceded in his section 309 submission that he had lodged the second combined Partner visa application without Mr AAF's knowledge or permission, to conceal his negligent conduct, which had resulted in the refusal of the first application. Such behaviour, which misleads the Department to believe that the application has been lodged by, or in accordance with, the client's instructions, is considered tantamount to fraud.
38. Accordingly, I am satisfied that the substance of the complaint is made out and that the Former Agent failed to keep Mr AAF informed of the progress or outcome of the first combined Partner visa application. I am also satisfied that the Former Agent did not act in accordance with Mr AAF or Ms CRJ's instructions when lodging the second application as he failed to inform them that he had made an unauthorised application on their behalf. As such, I find that the Former Agent breached his obligations under **clause 2.8** of the Code whilst he was a registered migration agent.

Failure to respond appropriately to clients' termination of services and request for documents

The Code, as prescribed in Schedule 2, Regulation 8 of the MA Regulations, stipulates:

10.1B Within 7 days of giving the written notice, the agent must:

- (a) *update the client's file to reflect the current status of each case or application undertaken by the agent for the client; and*
- (b) *deliver all documents to which the client is entitled to the client or to the appointed registered migration agent; and*
- (c) *ensure that all financial matters have been dealt with as specified in the contract.*

10.2 A client is entitled to ask a registered migration agent (orally or in writing) to return any document that belongs to the client. The agent must return the document within 7 days after being asked.

10.5 On completion of services, a registered migration agent must, if asked by the client, give to the client all the documents:

- (a) *given to the agent by the client; or*

(b) for which the client has paid.

10.6 If the client terminates the instructions, a registered migration agent must take all reasonable steps to deliver all documents quickly to the client or any Other person nominated by the client in writing. If the agent claims a lien on any documents, the agent must take action to quantify the amount claimed and tell the client in a timely manner.

39. Mr AAF has provided evidence that he emailed the Former Agent on 12 February 2017 to terminate his services and request all documents from his client file that he was entitled to, so that he could provide them to his new migration agent. To date, the Former Agent has not provided any information or documents to confirm he acknowledged this email, or that he acted in accordance with the Code for the termination of services and return of client documents. As such, I am satisfied that the subject matter of the complaint is made out as the Former Agent has continued to withhold Mr AAF's documents from him for a period longer than seven days after he terminated his services and requested their return. Subsequently, I am satisfied that Mr AAF's allegation is made out and find that the Former Agent has breached his obligations under **clauses 10.1B, 10.2, 10.5 and 10.6** of the Code whilst he was a registered migration agent.

Breach of the Service Agreement, and obligations and duty of care to client as a registered migration agent

The Code, as prescribed in Schedule 2, Regulation 8 of the MA Regulations, stipulates:

5.2 A registered migration agent must:

(a) before starting work for a client, give the client:

- (i) an estimate of charges in the form of fees for each hour or each service to be performed, and disbursements that the agent is likely to incur as part of the services to be performed; and*
- (ii) an estimate of the time likely to be taken in performing the services; and*

(b) as soon as possible after receiving instructions, obtain written acceptance by the client, if possible, of:

- (i) the estimate of fees; and*
- (ii) the estimate of the time likely to be taken in performing the services; and*

(c) give the client written confirmation (an Agreement for Services and Fees) of:

- (i) the services to be performed; and*
- (ii) the fees for the services; and*
- (iii) the disbursements that the agent is likely to incur as part of the services; and*

(d) give the client written notice of any material change to the estimated cost of providing a service, and the total likely cost because of the change, as soon as the agent becomes aware of the likelihood of a change occurring.

5.5 A registered migration agent must be aware of the effect of section 313 of the Act, and act on the basis that:

(a) the agent is not entitled to be paid a fee or other reward for giving immigration assistance to a client unless the agent gives the client a statement of services that is consistent with the services, fees and disbursements in the Agreement for Services and Fees mentioned in clause 5.2; and

(b) a statement of services must set out:

- (i) particulars of each service performed; and*
- (ii) the charge made in respect of each such service; and*

(c) a client is entitled by the Act to recover the amount of a payment as a debt due to him or her if he or she:

(i) made the payment to the agent for giving immigration assistance; and

(ii) did not receive a statement of services before making the payment; and

(iii) does not receive a statement of services within 28 days after a final decision is made about the visa application, cancellation review application, nomination or sponsorship to which the immigration assistance related.

6.1 A registered migration agent must maintain proper records that can be made available for inspection on request by the Authority, including files containing:

(a) a copy of each client's application; and

(b) copies of each written communication between:

(i) the client and the agent; and

(ii) the agent and any relevant statutory authority; and

(iii) the agent and the Department regarding the client; and

(c) file notes of every substantive or material oral communication between:

(i) the client and the agent; and

(ii) the agent and an official of any relevant statutory authority; and

(iii) the agent and the Department regarding the client.

6.1A A registered migration agent must keep the records mentioned in clause 6.1 for a period of 7 years after the date of the last action on the file for the client.

7.4 A registered migration agent must keep records of the clients' account, including:

(a) the date and amount of each deposit made to the clients' account, including an indication of the purpose of the deposit and the client on whose behalf the deposit is made; and

(b) the date and amount of each withdrawal made in relation to an individual client, and the name of each recipient of money that was withdrawn; and

(c) receipts for any payments made by the client to the agent; and

(d) statements of services; and

(e) copies of invoices or accounts rendered in relation to the account

25. In addition to failing to providing Mr AAF with a copy of his client file with all documents provided by him, or which he was entitled to receive, Mr AAF alleged that the Former Agent's conduct amounted to a breach of the Service Agreement or contract, and of his obligations and duty of care as a registered migration agent. However, there is no information nor any documentation before the Authority to suggest that the Former Agent issued Mr AAF with an Agreement for Fees and Services, any invoices, receipts, or a Statement of Service during the period of his engagement. When this information was put to the Former Agent in the section 309 notice, he did not address his administrative or financial recordkeeping practices in relation to Mr AAF and Ms CRJ's client file. As the Former Agent has not provided a copy of the client file, despite being given several opportunities to do so, there is no evidence to suggest he maintained proper records of his interactions and correspondence with the complainant or the Department.

26. As there is no evidence before me on the terms of any agreement between the Former Agent and Mr AAF for fees and services, I am not able to make a finding on whether the Former Agent was in breach of the Service Agreement. I am, however, satisfied that the Former Agent's failure to issue his client with the requisite documentation, including a

Service Agreement and other specified financial documentation such as invoices and receipts whilst he was a registered migration agent, constitutes a breach of his obligations and duty of care to his clients under **clauses 5.2, 5.5 and 7.4** of the Code. Accordingly, as the Former Agent has been unable to provide any documentation of his interactions, correspondence or work undertaken for Mr AAF, I am also satisfied that he breached his obligations under **clauses 6.1 and 6.1A** of the Code by failing to maintain proper client records in relation to this matter while registered as a migration agent. The Former Agent's failure to provide any client records to the Authority demonstrates a general indifference or disregard for the Authority and his client, and appears to be an attempt to conceal inconsistencies or inadequacies in his record-keeping and financial practices.

CONSIDERATION OF WHETHER OR NOT TO BAR THE FORMER AGENT

27. In reaching my conclusion with respect to being satisfied that the subject matter of the complaint is made out, I have considered the strength of the evidence and the level of satisfaction required in accordance with the grave and serious consequences for the person the subject of the decision in terms of his or her livelihood and reputation.
28. In deciding whether or not to bar the Former Agent under to subsection 311A(1) of the Act, I have been mindful of the High Court's guidance in relation to the appropriate standard of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362:

"The truth is that when the law requires the proof of any fact the Tribunal must feel an actual persuasion of its occurrence or its existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of fact exists may be held according to indefinite gradations of certainty: and this has led to what tends to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the allegation is made out to the reasonable satisfaction of the Tribunal. The reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, of the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences."

29. A decision to bar a former registered migration agent pursuant to section 311A may have grave and serious consequences for the person who is the subject of the decision in terms of his or her livelihood and reputation. As such, in deciding whether or not to bar the Former Agent under to subsection 311A(1) of the Act, I have taken into account all of the circumstances of the complaint, including aggravating and mitigating factors, including the following.

Seriousness of behaviour

30. In reaching a decision that a barring sanction under subsection 311A(1) of the Act is appropriate in this case, I have taken into account the judgement in *Narayanan v Migration Agents Registration Authority* [2006] AATA 353, in which the AAT stated:¹

*It is well established that the purpose of a power such as that given by s311A of the Act is not to punish for wrongdoing, but is to protect the public from wrongdoing: see, for example the decision of this Tribunal in *Donald and Australian Securities and Investments Commission* [2001] AATA 66 and the various authorities referred to therein at paragraphs*

¹ [2006] AATA 353 at para [131].

111 to 115 (inclusive), see also *Rich v Australian Securities and Investments Commission* [2004] HCA 42.

31. The Narayanan case listed factors that are often considered when determining whether, and how severe, a sanction should be imposed:²

- the nature of the professional's breach, particularly whether the professional is acting in good faith during the commission of the breach;
- whether there were any factors that were beyond the professional's control and could have reasonably contributed to the professional's breach;
- the professional's willingness to accept that a breach may have occurred;
- the professional's efforts to rectify or mitigate the effect of the breach, if possible;
- whether the client sustained any loss as a result of the professional's breach;
- the professional's actions, if any, to compensate the client for any loss arising out of the possible breach;
- the professional's record of prior disciplinary breaches;
- the professional's community and professional reputation;
- the extent to which any sanction may be harsh, unjust or oppressive in the circumstances taking into account the extent to which such a sanction would affect the professional's financial earning capacity and livelihood;
- the professional's co-operation with the disciplinary authority;
- whether a sanction, if any, would deter other professionals from similarly breaching their duties to a client; and
- whether a sanction, if any, will ensure that the public's confidence in the professional's industry will be maintained.

32. The Authority has identified behaviour that is of concern and which is likely to result in a decision to bar the Former Agent, including:

- Fraudulent behaviour;
- multiple breaches of the Code including those involving recordkeeping and financial management, which are demonstrative of the Former Agent's systematic poor practices;
- Dishonest and reckless behaviour, which has attributed to a negative visa outcome for the complainant;
- conduct that may result in reputational damage to the migration advice profession; and
- a blatant disregard for or a significant degree of indifference to the law.

33. Applying the factors that are considered relevant, I have determined that a barring decision is appropriate as the Former Agent has demonstrated a lack of competence, diligence and regard for migration law and procedure, and his obligations as a migration agent, which has resulted in an adverse visa outcome for the complainant. The Former Agent has also engaged in fraudulent conduct in an effort to conceal the aforementioned conduct.

34. I am satisfied that the Former Agent has breached clauses 2.1, 2.4, 2.8, 2.9, 2.19, 2.21, 5.2, 5.5, 6.1, 6.1A, 7.4, 10.1B, 10.2, 10.5 and 10.6 of the Code.

² Ibid, para [132].

Aggravating Factors

35. As noted throughout this decision, the Former Agent failed to properly respond to a section 308 notice that was issued to him on 25 November 2015, while he was still registered, in that he did not provide the required statutory declaration, and did not properly answer the questions put to him in writing by the Authority. The Former Agent also failed to provide any documents in response to the section 308 notice, including documentation that is expected to be retained on the client file in accordance with the Code, such as an Agreement for Fees and Services, file notes about the immigration advice given, confirmation of the client's instructions, copies of receipts and other financial information. These matters were brought to the Former Agent's attention in the section 309 notice, and he was given a second opportunity to provide the outstanding documentation, however his section 309 submission also did not include any supporting documents, nor the previously requested files.
36. A prudent migration agent would ensure that they responded to the Authority's questions accurately and in full, ensure that they provided a complete client file, and any additional documentation requested, or that supported the responses put forward. However, the Former Agent has repeatedly not provided any documents with any of his responses, which have been brief, and in the case of the section 308 notice,³ did not answer most of the questions asked. The Former Agent's actions in this regard appear to be an attempt to withhold information or to conceal his activities to prevent further investigation.
37. Subsection 308(1) of the Act gives the Authority the power to require a registered migration agent to:
- make a statutory declaration in answer to questions in writing by the Authority;
 - appear before an individual or individuals specified by the Authority and to answer questions; and
 - provide the Authority with specified documents or records relevant to an agent's continued registration.
38. A registered migration agent is required by the Code to adhere to certain professional standards, which include to:
- maintain a sound working knowledge of migration law and procedure
 - follow clients' instructions and inform clients of the progress in their cases
 - make and keep records relating to clients' immigration and financial matters
 - keep those records for a period of seven years after the last date of action on the client file and to make those records available to the Authority for inspection on request.
39. The obligation of an agent to keep records in accordance with the Code, and the power of the Authority under section 308 and section 311EA of the Act to access those records, is fundamental to the exercise of the Authority's regulatory and consumer protection functions. Access to records held by registered migration agents or former migration agents is integral to the Authority's consideration of a complaint as it allows an assessment of whether an agent or former agent has complied with their obligations under the Code in the course of providing immigration assistance.

³ The Former Agent was registered at the time of the request

40. The Former Agent has demonstrated behaviour of a serious nature by acting with a blatant disregard for his client's best interests. I am satisfied that the Former Agent has acted with a significant degree of indifference towards the Authority and his obligations as a member of the migration advice profession.
41. In the light of the Former Agent's conduct, I am satisfied that he has demonstrated an unwillingness to properly engage or comply with the regulatory system that governs the professional standards of registered migration agents. The Former Agent's conduct in this matter demonstrates a willingness to disregard the law, as well as to act contrary to the Code and the professional standards expected of a registered migration agent. Accordingly, if the Former Agent were to be registered again as a migration agent, it could be expected that his non-compliance with the migration agents' regulatory scheme may continue and that vulnerable consumers would be subject to future unprofessional and unlawful conduct.
42. I am further satisfied that the Former Agent's conduct has the potential to tarnish the reputation of the migration advice profession. I am satisfied that such conduct is not acceptable or to be tolerated within the migration advice profession, and that by acting in such a way, the Former Agent's conduct would be viewed with contempt by other registered migration agents in the profession.

Mitigating Factors

43. The Former Agent submitted in his section 308 notice response that he had experienced *[removed]* during the period of time he was engaged by Mr AAF, which affected his ability to perform his obligations as a registered migration agent. However, he did not make any mention of *[removed]*, or provide any supporting evidence in either his section 309 submission or response to the 311D notice, despite being provided the opportunity to respond to concerns as to the validity of his statements. To date, the Former Agent has provided only vague statements about *[removed]* when responding to all adverse information put to him, and has not been able to provide any supporting documentation to substantiate his statements. Consequently, I cannot be satisfied that the Former Agent *[removed]* during the period of time he was engaged by Mr AAF to prepare the Partner visa application. Regardless, I consider that the serious nature of the conduct in question, which occurred over a number of years, is more than a singular lapse of judgement resulting from *[removed]* experienced by the Former Agent. As the Former Agent has not advanced any other mitigating factors, I find there are no factors that were beyond the Former Agent's control, which could have reasonably contributed to the breaches of the Code that are the subject of this decision.
44. While the Former Agent has acknowledged the seriousness of his actions and expressed contrition for his conduct, he only did so following publication of the section 309 notice. In his section 308 notice response, the Former Agent attempted to deflect blame onto the complainant, by suggesting he had the potential to be violent, and *[removed]*, as a means to distance himself from the complaint allegations. Further, the Former Agent's refusal to properly respond to the Authority's questions or provide any documentation, may be considered as an attempt to withhold evidence of his conduct and practices from further scrutiny. Such behaviour also questions whether the Former Agent has genuine remorse for his actions, and a sound understanding of his obligations as a registered migration agent.
45. The Former Agent has not advanced any evidence with respect to hardship, and I am not satisfied that hardship would necessarily follow a decision by the Authority to bar the Former Agent from registration as a migration agent. The Former Agent has not sought to

apply for repeat registration since it ceased on 10 December 2017 and stated⁴ that he had accepted it was likely that his registration would be cancelled for five years. The statement indicates that the Former Agent was prepared for the possibility of not being able to work as a registered migration agent. On this basis, and as he has voluntarily ceased practicing, I am satisfied that barring the Former Agent from future registration would not further impact on the Former Agent's livelihood.

Consumer Protection

46. It is clear that the statutory scheme for the registration of migration agents and the supervision of their conduct is intended to protect persons seeking immigration assistance. A registered migration agent therefore fulfils an extremely important role in the implementation of the Act.
47. Consumers, particularly those of migration advice services, are often in a vulnerable position and have a right to place their trust and confidence in their agent to act in their best interests on their behalf. I am not satisfied that the Former Agent has demonstrated that he is capable of meeting these expectations. The behaviour demonstrated by the Former Agent falls well short of the reasonably expected standards of a registered migration agent. I am not satisfied that if the Former Agent were to practise as a registered migration agent in future, he would be able or willing to avoid engaging in a similar pattern of behaviour.
48. On this basis, while I am satisfied that barring the Former Agent from future registration may impact on the Former Agent's livelihood, I consider that this is outweighed by the Authority's consumer protection function and the severity of the Former Agent's conduct. Consequently, I am satisfied that a barring decision is appropriate in the circumstances.

Period of barring

49. In the Narayanan case the AAT stated:⁵

In fixing the appropriate period in which to ban the applicant, one needs to take account of the fact that Parliament has indicated that the maximum period is five years. That is obviously reserved for the most severe cases. The most severe cases would inevitably involve an element of fraud, dishonesty or incompetence.

50. The AAT further indicated that a barring period of two to three years was appropriate for conduct falling within the middle range of severity.⁶ Having regard to all the circumstances, however, I consider that the Former Agent's conduct falls within the higher end of this range of severity, as he has demonstrated:
- a failure to act in the best interests of the complainant who are the subject of this decision, and has resulted in an adverse visa outcome; and
 - a blatant disregard for, or a significant degree of indifference to the law as evidenced by his fraudulent conduct when lodging the second Partner visa application and his failure to respond properly to the Authority's section 308 notice.

Decision

I have decided to bar the Former Agent from being registered as a migration agent for a period of five (5) years, which ends on the five year anniversary of the day of my decision.

⁴ In his section 309 submission provided to the Authority on 19 December 2017

⁵ Paragraph 141, [2006] AATA 353.

⁶ Paragraphs 142 & 143, [2006] AATA 353

Professional Standards Officer
Professional Standards and Integrity Section
Office of the Migration Agents Registration Authority
Department of Home Affairs
Date of Decision: 22 February 2018