



## **DECISION RECORD**

<b>AGENT</b>	Ms Jaruwan Tangsilsat
<b>COMPLAINT NUMBERS</b>	CMP-23563
<b>DECISION</b>	Suspension
<b>DATE OF DECISION</b>	8 May 2017

Terms used for reference

1. The following abbreviations are used in this decision:

“AAT”	Administrative Appeals Tribunal
“ABN”	Australian Business Number
“Agreement”	Agreement for services and fees
“CPD”	Continuing Professional Development
“ENS”	Employer Nominated Scheme (subclass 186) visa
“FOI”	Freedom of Information
“MARN”	Migration Agents Registration Number
“NAATI”	National Accreditation Authority for Translators and Interpreters
“The Act”	The <i>Migration Act 1958</i> (Cth)
“The Agent”	Jaruwan Tangsilsat
“The Authority”	The Office of the Migration Agents Registration Authority
“The Code”	The Migration Agents Code of Conduct prescribed under Schedule 2 of Regulation 8 of the Regulations
“The Department”	The Department of Immigration and Border Protection
“The Migration Regulations”	The <i>Migration Agents Regulations 1998</i>

“The Tribunal”	Migration Review Tribunal (as it was known at the relevant time)
“The Register”	Register of Migration Agents kept under section 287 of the Act
“The Regulations”	The <i>Migration Regulations 1994</i>

## STATEMENT OF REASONS

### Background

1. The Agent was first registered as a migration agent on 29 May 2009 and was allocated the MARN 0957519. The Agent’s registration had been renewed annually. On 30 March 2017 the Agent’s registration was automatically continued pursuant to subsections 300(4) and (5) of the Act. The Agent made an application for renewal of registration on 28 April 2017. The current application is under assessment.
2. The Register lists the Agent’s business name as Thai-Oz Migration Services with the ABN 89 935 839 988.
3. The Agent is the current holder of a legal practising certificate in NSW.

### Complaint

4. The Authority received a complaint about the Agent’s conduct as a registered migration agent from PN, complaint reference CMP-23563, on 24 March 2016.
5. The complainant alleges that:
  - he requested the Agent provide him with advice and assistance to lodge a Temporary Work (subclass 401) visa under the Religious Worker stream
  - the complainant accepted the Agent’s advice to lodge an application for an ENS visa, but she did not explain the reasons for lodging an ENS visa rather than a Temporary Religious Worker visa as originally contemplated by the applicant
  - the Agent lodged an ENS nomination application on behalf of SP, a Buddhist religious organisation, without sufficient documentation and this caused the Department to refuse the nomination
  - the Agent arranged for him to withdraw the first ENS visa application without explaining the reasons for doing so
  - the Agent lodged a second ENS nomination application on 8 February 2016, nominating him as a Minister of Religion despite a change on 1 July 2015 to the Regulations which required an Industry Labour Agreement between the Department and the religious organisation to be in place before an ENS nomination application and visa application could be made.
6. In a further statement made to the Authority on 11 November 2016, the complainant alleged that:
  - on 13 October 2014 he sent the Agent an email to seek advice about ‘extending’ his Temporary Religious Worker visa (this email has not been provided to the Authority)
  - the Agent verbally agreed to provide immigration assistance and did not provide him with a written Agreement
  - the Agent did not advise him of the first nomination refusal of 23 November 2015 until he contacted the Agent on 30 November 2015 enquiring about the progress of the application
  - the Agent did not advise him of his bridging visa status following the withdrawal of his ENS visa application

- the Agent lodged the second ENS visa application on 8 February 2016 without first giving him adequate advice or obtaining instructions from him
- the Agent did not advise him on the prospects of success in relation to the first and second visa applications

### **Information held by the Department**

7. Departmental records show that PN previously held a temporary Religious Worker Stream GB (subclass 401) visa granted on 26 August 2013, and which remained valid until 12 February 2015.
8. On 11 February 2015 the Agent made an online application on behalf of SP to nominate PN for an ENS visa in the position of Minister of Religion.
9. On 11 February 2015 the Agent also made an online application on behalf of PN for an ENS visa application.
10. The nomination application was refused by the Department on 23 November 2015.
11. Following the refusal of the nomination, the Agent submitted a Form 1446 (Withdrawal of a visa application) on 4 January 2016 with respect to the ENS visa application. The application was withdrawn on 11 January 2016.
12. The Agent made a second online nomination on 8 February 2016 on behalf of SP, again nominating PN for an ENS visa in the position of Minister of Religion. The Department refused the nomination application on 7 December 2016.
13. The Agent made a second online ENS visa application for PN on 8 February 2016. At the time of lodgement, PN's Temporary Religious Worker visa had already expired on 12 February 2015. Consequently, on lodgement of the second ENS visa application he was granted, and holds, a Bridging visa C (subclass 030).
14. On 31 January 2017 the Department refused PN's application for a subclass 186 visa application. The visa application is currently before the AAT.

### **Changes to the Regulations**

15. From 1 July 2015 changes to the Regulations were introduced with respect to the nomination of the occupation of Minister of Religion. After 1 July 2015 all religious organisations must first have an Industry Labour Agreement in place before an employer nomination and visa application for an ENS visa can be lodged. After 1 July 2015 applications for ENS visas could no longer be lodged under the 'Direct Entry' stream.

### **The Authority's communications with the Agent**

16. On 5 April 2016 the Authority published the complaint to the Agent. The Agent was requested to provide a response within 14 days after the date of the email, or to contact the Authority if the Agent had questions regarding the complaint or response timeframe.
17. On 26 April 2016 the Authority wrote to the Agent as no response had been received.
18. On 26 April 2016 the Agent wrote to the Authority by email advising:

*'I assist PN lodging his application without consideration NOT AS THE CLIENT but in voluntary basis due to the facts that PN is buddhist monk and it is Thai traditional way to help buddhist monk without consideration. PN from my recollection has become concerned with his application and organised someone to pick up all his documents from my office weeks ago to have the matter continue with other migration agent. I do not recall any more facts regarding PN.'*

19. On 27 April 2016 the Authority wrote to the Agent by email advising that:

- the Agent prepared and lodged a subclass 186 visa application for PN
  - the Authority viewed PN to be the Agent's client as defined in regulation 3(1) of the Migration Regulations which states a "client", of a registered migration agent, means a person to whom the agent agrees to provide immigration assistance
  - the Agent is bound by clause 9.1 of the Code which states that a registered migration agent must respond properly to a complaint by a person (whether or not the person is a client) about the work or services carried out by the agent or the agent's employee
  - the Agent is still required to respond to the complaint and was requested to do so by 16 May 2016.
20. On 13 May 2016 the Agent made an application to the Authority for re-registration.
  21. On 14 June 2016 the Agent advised the Authority by email '*... since I never consider PN as client, as my assistance to him is as a Buddhist assist in lodging his visa application without any consideration, I have not keep any record. If you require answer to any of your questions, please ask PN to return his documents to my office; otherwise, please close the enquiry...*'
  22. On 2 July 2016 the complainant's new representative emailed documents obtained under FOI regarding PN's applications to the Agent for the purpose of providing the Agent with information to respond to the complaint. On 28 June 2016 PN's new agent arranged for a copy of the documents the Agent returned to PN to be posted to the Agent for the same purpose. Tracking shows that these documents were delivered to the Agent on 4 July 2016.
  23. On 20 July 2016 the Agent requested the Authority provide a 'certificate of interpretation issued by a qualified NAATI interpreter' in relation to the complaint declaration signed by PN dated 23 March 2016. The complainant declaration is a statement signed by PN authorising his new representative to act on his behalf.
  24. The Authority advised the Agent by email on 20 July 2016 that it did not require a certificate of translation to pursue its investigation of the complaint, and that it was satisfied that the complainant had authorised his new agent to act on his behalf. It also advised the Agent that the complaint raised potential concerns regarding the Agent's compliance with clauses 2.1, 2.3, 2.19, 2.8, 2.6 and 5.2 of the Code.
  25. On 28 July 2016 the Agent requested an extension of time to provide the response '*due to my solicitor is on holiday until second week of next month*'. Given the extended period provided already, the Agent was given until 19 August 2016 to respond.
  26. On 1 August 2016 the Authority wrote to the Agent requesting a response to the complainant's allegations that the Agent pressured him to withdraw his complaint.
  27. To date, the Agent has not provided a substantial response to the allegations contained in the complaint.

#### **Notice under section 309 of the Act ("the section 309 notice")**

28. On 21 September 2016 the Authority sent to the Agent a notice pursuant to section 309(2) of the Act, advising the Agent that it was considering cautioning, or suspending or cancelling the Agent's registration under section 303(1) of the Act.
29. 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 2.1, 2.3, 2.8, 2.15, 2.19, 6.1, 6.1A, 6.3 and 9.3 of the Code.

30. Pursuant to section 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter.
31. To date the Authority has not received the Agent's submission in response to the section 309 Notice.

### **Jurisdiction**

32. The Authority performs the functions prescribed under section 316 of the Act.
33. The functions and powers of the Authority under Part 3 of the Act and Regulations are the Minister for Immigration and Border Protection's 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.

### **Relevant legislation**

34. 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)).
35. 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)).
36. 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 Migration Regulations made under the Act prescribes a Code.
37. 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.
38. Further legislation relevant to this decision is detailed at Attachment 'A'.

### **Evidence and other material**

39. In reaching the following findings of fact the I have considered the following evidence:
  - Documents contained in the Authority's complaint file CMP-23563
  - Information held by the Department
  - Information provided by the Agent to the Authority by email and telephone.

## **DECISION AND REASONS**

### **Finding on material questions of fact**

### The client-agent relationship

40. Departmental records show that the Agent:
- lodged the first nomination application on 11 February 2015 on behalf of PN's nominator, SP
  - lodged the second nomination application on 8 February 2016 on behalf of SP
  - lodged the first ENS visa application on 11 February 2015 on behalf of PN
  - lodged the second ENS visa application on 8 February 2016 on behalf of PN.
41. The Agent has not denied that she prepared and lodged the above applications. She has also not denied that she provided immigration assistance to PN. She contends that because she did so on a pro bono basis, or "without consideration" as she puts it, she did not keep client records and that PN was not her client. For this reason, she also implies that she was not bound by the Code in her dealings with PN.
42. On the basis of the testimony of the Agent and PN, in addition to the available departmental records, I am satisfied that the Agent agreed to provide PN with immigration assistance in relation to SP's two ENS nomination applications and PN's ENS visa applications and that SP and PN were the Agent's clients at all relevant times, as defined in Section 276 of the Act and Regulation 3(1) of the Migration Regulations. I am also satisfied that the Agent was bound by the Code in her provision of services to PN.
43. Whether or not the Agent charged PN professional fees is not relevant to whether or not the Agent provided immigration assistance to him, and therefore I am satisfied that he was the Agent's client at the relevant time.

### **Breaches of the Code**

44. 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.
45. Having regard to the findings I have made, which are set out below, I am satisfied that the Agent has engaged in conduct in breach of the Agents obligations under clauses 2.1, 2.3, 2.15, 5.2, 6.1, 6.1A, 6.3 and 9.3 of the Code. The relevant extracts from the Code are set out at Attachment "B" to this notice.

### Clause 2.3 – the Agent's knowledge of legislation and procedure

46. At the time PN first sought the Agent's advice, he was the holder of a temporary Religious Work visa and he was sponsored by a different religious organisation. He alleges that he requested the Agent provide him with advice on a subclass 401 visa in the Religious worker stream or in his words 'apply for an extension of the 401 visa'. I accept that this is the advice which PN sought. Whilst there is no evidence submitted to the Authority regarding his initial request for advice, I consider it reasonable and consistent with the fact that he proposed to work in the same occupation, albeit with a different sponsor, that he would seek advice on how to extend the visa he already held.
47. The Agent has provided no evidence that she advised PN regarding the suitability of an ENS in light of his circumstances. There is also no evidence that the Agent considered the ability of SP to meet the nomination requirements for a subclass 186 visa. If this was the case, the Agent should have been able to provide a record of her advice either in the form of a file note, Agreement or correspondence with the client. It is not in dispute that the Agent did not lodge a temporary Religious Worker visa but an ENS visa on behalf of PN.
48. In support of the nomination application the Agent submitted to the Department:

- a) SP's Australian Business Number details on the ASIC register

- b) A profit and loss statement for the year 2013-2014
  - c) A business bank statement
  - d) A rent statement for PN
  - e) A certificate of SP's incorporation as an association
  - f) SP's tenant ledger
  - g) A letter of support for the nomination and nominee from the Buddhist Council of Australia
  - h) An employment contract for PN stating that SP would be responsible for all expenses including general living, lodging, board, accommodation, medical, insurance, legal, travel expenses and other.
49. In refusing SP's nomination application, the Department's decision record states that '*at the time of application, the nominator provided insufficient evidence to support the application towards satisfying regulation 5.19(4). In particular, no evidence that the business needs a paid employee, a detailed employment contract, a position description or other supporting documents...*'. In reviewing the supporting documentation accompanying the nomination, I find that the Agent failed to provide detailed and substantial evidence of the need for a paid employee, a detailed position description, contract or other documents which would have assisted the Department to make a full assessment of all the facts against the relevant criteria. I am satisfied that it was the Agent's failure to provide complete information which was fatal to the application. Accordingly, I find that the Agent did not have a sound working knowledge of the evidentiary requirements to satisfy regulation 5.19(4).
50. The Agent lodged a second ENS visa nomination and application on 8 February 2016. The Agent failed to lodge a labour agreement with this application, which was required as a result of changes to the Regulations and policy introduced on 1 July 2015. As there was no labour agreement accompanying the second nomination application and the Agent has not explained the reason for lodging the second nomination without this vital component, I find that the second nomination and visa application held no prospects of success and further demonstrates that the Agent does not have capacity to provide accurate and timely advice. I note that this second nomination was refused on 7 December 2016 on the grounds that the nominated occupation of Minister for Religion is not able to be approved within the Direct Entry stream.
51. Lastly, the Agent withdrew the first visa application on 4 January 2016, after the associated nomination was refused on 23 November 2015. At the time of the nomination's refusal the legislation had already changed, preventing a future nomination to be able to be lodged without an approved labour agreement. If the Agent had sought a review of the first nomination refusal and not withdrawn the visa application, allowing it to be refused, PN would have retained the opportunity for the nomination and visa refusal to be appealed to the relevant Tribunal and be considered further. However, as the visa application was withdrawn, there was no decision for PN to appeal.
52. The Agent has not provided any evidence that she advised her clients about the risks and benefits of withdrawing the applications with regards to appeal rights, despite being requested by the Authority to do so. I find that the Agent did not give timely and accurate advice regarding PN's options following the nomination refusal.
53. For the reasons stated above, I find that the Agent breached clause 2.3 of the Code.

Clause 2.1- the Agent's competence, diligence and fairness

54. Clause 2.1 of the Code requires an Agent to deal with his or her client competently, diligently and fairly. I consider that in PN's matter, the Agent was obliged to, amongst other things, explain to him the reasons for lodging an ENS visa over another suitable visa, explain the risks, benefits and prospects of potential applications, and prepare the nomination and visa applications in a manner which had reasonable prospects of success in order to comply with clause 2.1 of the Code. The complainant alleges that the

Agent did none of the abovementioned things.

55. The Authority has provided several opportunities to the Agent to respond to the complaint allegations.
56. The Agent has not properly responded to either of the statutory notices sent to her in relation to the complaint. Accordingly, she has not made any submissions regarding her conduct in this matter, nor provided any evidence which counters the complainant's allegations. On the basis of the Agent's failure to respond to the allegations in the complaint and the evidence before me from the complainant and departmental records, I am not convinced that the Agent could have provided any evidence which would have assisted her case.
57. I have carefully considered the totality of this evidence and I am satisfied, in the balance of probabilities that the Agent:
- failed to provide advice on the suitability of the ENS visa over the temporary Religious Worker visa
  - lodged an application for a nomination that did not contain the required documents to meet the criteria, as evidenced by the Department's refusal decision record
  - failed to notify PN that the nomination application had been refused on 23 November 2015 until he contacted the Agent on 30 November 2015 enquiring about the progress of the application
  - failed to provide advice on his bridging visa status following the withdrawal of his visa application
  - withdrew and re-lodged the visa application, rather than exercising review rights, which resulted in the client being granted a less advantageous Bridging visa C, rather than remaining on the client's existing Bridging visa A
  - lodged a second nomination and visa application after significant regulation and policy changes impacting the nominated occupation, which meant that the new applications held no prospect of success
  - failed to enter into a written Agreement with PN.
58. I note that there is no evidence before me to be concerned with the complainant's credibility as a witness. Furthermore, the complainant has been consistent in his testimony of what occurred throughout the investigation of his complaint.
59. The Agent has stated that she did not consider PN to be her client. I note that the findings I have made above concerning the Agent's diligence, competence and fairness in her dealings with her client are consistent with the Agent's erroneous view that PN was not her client.
60. On the basis of my findings above, I am satisfied that the Agent has breached clause 2.1 of the Code.

Clause 2.15 – placing undue pressure on complainant to withdraw complaint

61. On 26 July 2016 the complainant's representative provided to the Authority records of emails and notes of a telephone call that the Agent made to PN and SP. The correspondence indicates that on 20 July 2016 the Agent:
- attempted to contact PN twice but he did not answer the phone calls
  - wrote to PN stating *'Did you intend to make this formal complaint against me with MARA and LAW society? Does your new lawyer...explain to you what you have signed and the effects of your signing your declaration, please confirm receipt of this email and reply ASAP thanks..'*, despite the fact that the Authority had accepted the



validity of the complaint and expressed this by first publishing the complaint to the Agent on 5 April 2016 and then by advising the Agent by email on 20 July that it accepted PN's complainant declaration

- contacted PS (a monk associated with SP) to advise PN to withdraw his complaint with the Authority, or otherwise the Agent would report PN to the 'official Thai monks head office in Thailand'
- contacted PN's representative and requested confirmation that PN used a qualified NAATI interpreter when communicating with his representative.

The evidence of the Agent's contact with PS regarding the withdrawal of PN's official passport is recorded in an email from the Secretary of SP to the complainant's new representative. Whilst there is no evidence directly from the parties involved that this conversation occurred, I am prepared to accept the written notes of the conversation prepared in English by the Secretary because the message is consistent with the record of the Agent's attempts to contact PN, despite his repeated avoidance of her contact. The secretary's record of the conversation is also consistent with an email she later sends to the new representative asking for advice on the likelihood that the official passport could be withdrawn, on the basis of the Agent's threats.

62. In considering whether the Agent's actions in contacting the complainant amount to placing undue pressure on PN to withdraw the complaint against her, I have considered that the Agent had already received advice from the Authority that the complaint was valid and that a NAATI translation of the complaint declaration was not required and therefore these issues, as far as the Authority was concerned, should not prevent her from responding properly to the complaint. I find that the Agent contacted the complainant in an attempt to undermine the validity of the complaint and to pressure him to withdraw. I find that the Agent's persistent attempts to contact PN, directly, and through his associates was a deliberate attempt to place undue pressure on PN to withdraw the complaint. Accordingly I find that she has breached clause 2.15 of the Code.
63. I also find that the Agent's conduct in placing undue pressure on the complainant to withdraw the complaint was a result of failed efforts made by the Agent to avoid obligations to respond to it. I am satisfied that the Agent has deliberately delayed and prevented the Authority from properly investigating the complaint, including placing undue pressure on the complainant to withdraw the complaint.

#### Clause 5.2 – the Agent's failure to provide an Agreement for Services and Fees

64. PN claims that the Agent did not enter into a written Agreement with him. The Agent was requested to provide a copy of the client Agreements with respect to the ENS visa application made on 11 February 2015 and the second application made on 8 February 2016. The Agent has not done so.
65. My finding that the Agent did not enter into a written Agreement with PN is consistent with her belief that he was not her client.
66. On the basis of the complainant's testimony, the Agent's failure to respond to the complaint and to provide evidence of an Agreement, I am satisfied that the Agent has breached clause 5.2 of the Code.

#### Part 6 – Record Keeping

67. The Agent stated that from her recollection of PN's matter, he became concerned with his application and organised someone to pick up all his documents from the Agent's office, to have the matter continued with another registered migration agent. The Agent further stated '*I do not recall any more facts regarding PN.*'
68. Email correspondence from PN's new representative shows that the Agent agreed to release the client file on 20 March 2016. The representative's email of 22 March 2016 to

the Agent indicates that the client documents which were provided by her did not include:

- a) A copy of the visa application form, nor a screen shot of what was lodged with it
- b) A copy of the nomination (form), nor a screenshot of what was lodged with it.

Based on evidence provided by the complainant's representative that a copy of the electronic application and nomination were not on the client file returned by the Agent, I am satisfied that the Agent did not maintain proper records including keeping a file which included a copy of the client's application, in breach of Clause 6.1(a) of the Code.

69. I have not sighted a copy of the client file. Therefore, other than the client documents which are noted by the new representative as missing from the client file I have not made findings about whether the Agent kept a record of other required client documents within the client file.

70. Clause 6.1A of the Code specifies that an agent is obliged to keep a copy of the file which can be made available for inspection on request by the Authority for a period of 7 years after the date of last action on the client file, and which can be relied upon in responding to requests for information from the Authority. As per the Agent's own admissions, she has not done so.

71. I note that a copy of the file was provided to Agent by the complainant's representative by registered post on 28 June 2016 to enable the Agent to respond to the Authority's questions. The Agent has not, however, utilised this to respond to the Authority's request for information. On the basis of the above, I find that she has breached Clause 6.1, 6.1A and 6.3 of the Code.

#### Clause 9.3 – Obligation to respond properly to the Authority

72. As the Agent has not provided a substantive response to the allegations made by PN I am satisfied that the Agent has breached clause 9.3 of the Code, in that she has not responded properly to the Authority within a reasonable time.

#### Previous complaint history

73. On 23 July 2015 the Authority made adverse findings regarding the Agent's handling of AN's subclass 457 visa application.

74. In finalising AN's complaint the Authority found that:

- the Agent was not aware that in order for AN to remain lawfully in Australia on a bridging visa pending the review of the decision to refuse the business sponsorship application, she needed to lodge a separate review application for the refusal of the subclass 457 visa
- the Agent did not advise AN of the option to lodge a review application for the subclass 457 visa application
- the Agent's apparent lack of understanding resulted in AN remaining unlawfully in Australia for about seven months and potentially subject to a three year exclusion period
- the Agent did not advise her that her subclass 457 visa application had been refused
- the Agent's conduct in handling AN's matter breached clauses 2.1, 2.3 and 2.8 of the Code.

75. In finalising AN's complaint, the Authority recommended that in future the Agent provide:

- written advice to clients on significant processing events and on the outcome of their applications
- accurate advice to clients on their visa status particularly following the refusal of an application

- appropriate advice on a client's options, particularly following the refusal of an application.

### **Integrity, fitness and propriety**

76. Pursuant to paragraph 303(1)(f) of the Act, the Authority may caution a registered migration agent, or suspend or cancel their registration, if the Authority becomes satisfied that the agent is not a person of integrity or otherwise not a fit and proper person to give immigration assistance.
77. There is a degree of overlap between 'fit and proper' and 'integrity' to the extent that fitness and propriety include consideration of the honesty of the actions of an individual.
78. 'Integrity' means 'soundness of moral principle and character, uprightness and honesty'.<sup>1</sup>
79. Whether a person is a 'fit and proper person to give immigration assistance' is an enquiry which looks broadly at three factors – honesty, knowledge and competency.
80. At common law, the basic test to determine whether a person is “fit and proper” is known as the “Allinson test”. A person is not fit and proper person if his or her conduct “would be reasonably regarded as disgraceful or dishonourable by his professional colleagues of good repute and competency”.<sup>2</sup>
81. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Toohey and Gaudron JJ indicated several factors that could be taken into account in determining whether a person was 'fit and proper'. These included, but were not limited to, conduct, character and reputation. Their Honours stated (at 380):
- [D]epending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*
82. The formula 'fit and proper' (and 'person of integrity') must be construed in light of the particular legislative context at the registration scheme underpinning the migration advice profession.<sup>3</sup>
83. The context in which the reference to 'fit and proper' person occurs in section 290 of the Act is the applicant's giving of immigration assistance. The context also includes:
- (a) the Act which creates offences for misleading statements and advertising, practising when unregistered and misrepresenting a matter; and
  - (b) the Code contained within the Regulations which refers to the applicant being able to perform diligently and honestly, being able and willing to deal fairly with clients, having knowledge of business procedure and properly managing and maintaining client records and maintaining client confidentiality.
84. Key elements of the fitness test are:
- the honesty of the person; and
  - the person's knowledge of the migration scheme and ability to fulfil the position of a migration agent.
85. The requirement in section 290 that the applicant also be a 'person of integrity' is not concerned with the person's knowledge of the migration scheme or ability as a migration

<sup>1</sup> See *Re Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12 at paragraph [26].

<sup>2</sup> See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

<sup>3</sup> See *Cunliffe v Commonwealth* (1994) 182 CLR 272

agent, but is primarily concerned with a person's reputation, moral principle and character, including their honesty.

86. Having regard to the body of case law cited above, a consideration of whether the Agent is a fit and proper person or a person of integrity to provide immigration assistance can legitimately include the following:

- that the Agent's past conduct can be an indicator of the likelihood of the improper conduct occurring in the future
- the Agent's honesty and competency towards clients, the Department and the Authority
- a consideration of the context in which the agent works, i.e. the provision of immigration assistance to migration clients
- the Agent's knowledge and competency in immigration law and practice
- the reputation of the Agent as a result of their conduct and the public perception of that conduct
- the perception of the conduct by the Agent's "professional colleagues of good repute and competency"<sup>4</sup>.

87. Having regard to the totality of the Agent's conduct in relation to the complaint, my findings above, and her complaint history, I am satisfied that the Agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance.

The evidence and reasons on which I rely to make this finding are set out in detail below.

88. I am satisfied that the Agent's conduct in handling the visa matters and her manner in responding to his complaint (as outlined in paragraphs 16-27) demonstrates a lack of honesty and integrity. In making this finding, I specifically refer to the following factors:

- that the Agent's attempts to avoid responding to the complaint, including but not limited to questioning the jurisdiction of the Authority and attempting to influence the client to withdraw the complaint, demonstrate a complete disregard for her former client and the Authority. Even when PN's current agent and legal representative provided her with documents to enable her to respond, she still failed to do so
- a failure to understand a fundamental concept about the creation of an agent – client relationship, thus not understanding that PN was her client and her obligations towards him
- a poor, if not flawed, understanding of the regulatory framework which underpins the migration advice profession and an Agent's responsibilities within the framework. This demonstrates that she has not taken the time to consider what her obligations as a registered migration agent are and has not taken her role seriously

89. The Authority has raised concerns with the Agent and provided recommendations to her in one previous complaint. The Agent does not appear to have taken active steps to rectify her practices, which were previously drawn to her attention by the Authority and I am of the view that the deficiencies identified in this current complaint reflect the Agent's continued disregard for her professional responsibilities.

90. I also note that in the Agent's initial response to the previous complaint to the Authority she queried the Authority's jurisdiction without foundation, in an attempt to avoid responding to the complaint. This is an important factor which demonstrates that rather than properly respond to complaints, the Agent has on two occasions attempted to avoid responding to complaints by questioning the Authority's jurisdiction. While the Agent has every right to raise legitimate concerns she may have with regard to jurisdiction, it is not an appropriate strategy for her to use purely for the purpose of avoiding her obligations and/or attempting to dissuade the Authority from investigating matters relating to her practice.

---

<sup>4</sup> *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

91. I have considered that the Agent works in a professional context where potentially vulnerable clients rely on her to provide immigration assistance that is fair, diligent and competent. I am satisfied that the Agent is 'not a person of integrity or is otherwise not a fit and proper person to give immigration assistance for the following reasons:

- She caused detriment to the client through her lack of diligence, competence and knowledge of legislative requirements
- She has demonstrated a lack of honesty and integrity
- Issues with the Agent's diligence and competence have been drawn to the Agent's attention in a previous complaint investigated by the Authority and it appears that she has not taken those recommendations seriously
- She has indicated in her response to this complaint that where she provides services on a pro bono basis she does not consider that she is bound by the Code. This indicates that she considers pro bono clients to not merit the same level of diligence, care and attention which the Authority can only assume she provides to other clients.

92. Accordingly, I find that the Agent should be cautioned, or have her registration suspended or cancelled, pursuant to subparagraph 303(1)(f) of the Act.

### **Consideration of Appropriate Disciplinary Action**

93. 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 behaviour and any mitigating or aggravating circumstances which may exist.

94. I have also considered the PPM to ensure my decision is consistent with these guidelines.

95. Having regard to the Complaint Classification Matrix in the PPM, I have considered that the Agent's conduct falls within the Moderate classification for the following reasons:

- the Agent has demonstrated disregard of her professional responsibilities;
- I have found that the Agent is not a person of integrity, nor a fit and proper person to provide immigration assistance; and
- the Agent has engaged in repeated breaches of the Code causing significant disadvantage to her client.

96. I have considered whether there are any indicators of future risk that the Agent would engage in similar conduct in the future, which appear on the Complaint Classification Matrix of the PPM and note that the following indicators are present:

- the Agent has breached the Code in her handling of PN's matter
- the Agent has been unwilling to rectify the conduct
- the Agent has not explained to the Authority how the conduct occurred nor demonstrated an understanding of how her conduct may be a breach of her obligations
- the Agent has failed to properly respond to this complaint and has not co-operated during the investigation. She has also questioned the jurisdiction of the Authority without basis, and attempted to have the legitimacy of the complaint put into question, thus attempting to evade the disciplinary regime administered by the Authority.

97. Accordingly I am not satisfied that there are real prospects of the Agent rectifying her practices without a period of time where she is not practising and without the intervention of the Authority.

### Mitigating Factors

98. The Agent has not advanced any submissions or evidence with respect to mitigating factors.

99. Whilst I accept that the decision would affect the Agent's financial earning capacity and her livelihood, I am not satisfied that there are specific circumstances relevant to the Agent which makes this a mitigating factor.
100. The Agent has been continuously registered since 29 May 2009. Whilst she has been registered for a period of eight years, that period has not been without complaint. Both the current and previous complaint show that the Agent lacks an understanding of her professional obligations and lacks sound knowledge of migration legislation resulting in loss to her clients. Given the substance of the Agent's complaints and the failure to understand fundamental concepts related to her professional role, I do not give the length of her registration significant weight as a mitigating factor.

#### Aggravating Factors

101. The Agent has placed undue pressure on the complainant to withdraw the complaint.
102. The Agent has refused to cooperate with the Authority, continually refusing to accept that she has an obligation to respond to PN's complaint.

#### **Consumer Protection**

103. 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.
104. I consider that the Agent poses a risk to consumers. I am satisfied that if the Agent were to continue to practice as a registered migration agent, the Agent would not demonstrate the requisite skills expected 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 the subject of this decision, and in the interests of consumer protection.
105. The Agent has not provided the Authority with any explanatory information or insights into her behaviour. She has not accepted responsibility for her conduct or offered remedy to the client. I find that her response to the complaint indicates that consumers are at risk unless remedial action is undertaken.

#### **DECISION**

106. I have considered whether cautioning the Agent or suspending the Agent's registration is a more suitable outcome. In doing so, I have considered the following:
- The Agent has not demonstrated an understanding of her professional obligations
  - The lack of insight demonstrated by the Agent indicates that she is likely to engage in similar conduct and place other clients at risk
  - The Agent has not provided evidence of any steps she took to remedy or address the impact upon the client
  - The Agent has not responded to the client or the Authority with an explanation of her conduct, offering little insight into how it can be prevented in the future
  - The Agent's failure to assist in the complaint investigation indicates a likelihood that she will not cooperate with the Authority in the future.
107. In considering the misconduct found in the current and previous complaint I find that the Agent has shown disregard for her professional responsibilities towards her client and to the Authority. I am of the view that the pattern of disregard for the Agent's professional responsibilities warrants a more severe penalty than a caution but less severe than a cancellation. A cancellation would be unreasonably onerous on the Agent as it would deprive her of the ability to earn an income in the industry in which she has worked since 2009.

108. The issue then to be determined is for what period the Agent should be suspended. In fixing the appropriate period in which to suspend the Agent, I am cognisant of the fact that Parliament has specified the maximum period is five years in paragraph 304(1)(a) of the Act. That is reserved for the most severe cases, which would involve confirmed allegations of fraud, dishonesty or repeated incompetence.
109. On careful reflection, and consideration of the PPM, I consider that the Agent's conduct falls within the higher end of the moderate range. I also consider that the Agent's procedures require review and detailed training needs to be undertaken to address the issues identified in this decision record. Accordingly, I conclude that the appropriate period for which the Agent ought to be suspended is twelve (12) months.
110. I note that the purpose of the regulatory scheme is not to punish registered migration agents but to maintain the adequate protection of consumers of migration services. I have taken this into account in making my decision. I have also taken into account that a disciplinary decision would affect the Agent's financial earning capacity and livelihood. I am therefore satisfied that the desired regulatory outcome can be achieved through the suspension of the Agent's registration for a 12 month period.
111. Following consideration of the information before me, I have decided to suspend the Agent from being registered as a migration agent from the date of this decision for a minimum period of 12 months, and until the Agent has met the conditions set out below.

## **CONDITIONS**

112. The Agent is to provide to the Authority documentation demonstrating that she has met all of the following conditions:
- a) Evidence that the Agent has completed a total of ten (10) Continuing Professional Development points (as approved by the Authority) for every 12 months that the suspension is in force. The Continuing Professional Development activities are to be completed throughout each year that the suspension is in force and should include file management and business management.
  - b) Evidence that within 12 months from the date of this decision the Agent has successfully completed six (6) hours of private tuition conducted by an individual or individuals approved by the Authority prior to the commencement of the tuition, who are Accredited Immigration Law Specialists, and after the completion of condition c. The tuition is to cover topics agreed upon in consultation with the Specialist and with prior approval from the Authority.
  - c) The Agent is to comprehensively review her client cases and case files against the Code and occupation competency standards for registered migration agents ([https://www.mara.gov.au/media/484225/Competency\\_Standards\\_for\\_Agents\\_September\\_2016.pdf](https://www.mara.gov.au/media/484225/Competency_Standards_for_Agents_September_2016.pdf)) under the guidance of the Specialist and prepare a professional development plan to ensure that
    - i. The occupation competency standards are met in the Agent's current practice
    - ii. The Agent's obligations under the Code are met with respect to the Agent's current caseload.
  - d) Evidence by way of a report from the Specialist or Specialists who provided the private tuition sessions indicating:
    - i. they were provided with a copy of this decision before the sessions were conducted,
    - ii. the Agent has successfully completed the relevant sessions
    - iii. the Specialist's assessment of the Agent's ability to meet the standards

- e) The Agent is to provide to the Authority a copy of her professional development plan referred to in condition c.
- f) The Agent is not to accrue CPD points from the private tuition.
- g) A statutory declaration in Commonwealth form stating that the Agent has not made immigration representations for a fee, has not advertised the provision of immigration assistance and has not given immigration assistance during the period of the suspension.

113. A reasonable period of time is to be given to the Authority to assess whether the Agent has met these conditions, after receiving the aforementioned evidence from the Agent, and before the Authority will lift the suspension.

Professional Standards and Integrity Section  
Office of the Migration Agents Registration Authority  
Department of Immigration and Border Protection  
Date of Decision: 8 May 2017



*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.*

*Migration Agents Regulations 1998, regulation 3(1) Interpretation*

*In these Regulations:*

**client**, of a registered migration agent, means a person to whom the agent agrees (whether or not in writing) to provide immigration assistance.

*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.*

## **Relevant extracts from the Code of Conduct**

### **Part 2 – Standards of Professional Conduct**

#### Clause 2.1

*A registered migration agent must always:*

- (a) act in accordance with the law and the legitimate interests of his or her client; and*
- (b) deal with his or her client competently, diligently and fairly.*

#### Clause 2.3

*A registered migration agent's professionalism must be reflected in a sound working knowledge of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, and a capacity to provide accurate and timely advice.*

#### Clause 2.15

*A registered migration agent must not intimidate or coerce any person for the benefit of the agent or otherwise. For example, a registered migration agent must not engage in any of the following:*

- (a) undue pressure;*
- (b) physical threats;*
- (c) manipulation of cultural or ethnic anxieties;*
- (d) threats to family members in Australia or overseas;*
- (e) untruthful claims of Departmental sanctions;*
- (f) discrimination on the grounds of religion, nationality, race, ethnicity, politics or gender.*

### **Part 5 – Fees and Charges**

*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.*

### **Part 6 – Record keeping and Management**

#### Clause 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.”*

#### Clause 6.1A

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

#### Clause 6.3

*A registered migration agent must respond to a request for information from the Authority within a reasonable time specified by the Authority.*

### **Part 9 – Complaints**

#### Clause 9.3

*If the Authority gives a registered migration agent details of a complaint made to the Authority about:*

- (a) the work or services carried out by the agent or the agent’s employees; or*
- (b) any other matter relating to the agent’s compliance with this Code — the agent must respond properly to the Authority, within a reasonable time specified by the Authority when it gives the details to the agent.*