

NOTICE OF DETERMINATION

A notice made under s318 of the *Legal Profession Uniform Law (Victoria)*.

Complainant: [REDACTED]
Respondent Lawyer: [REDACTED] of [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to s290 and s292 of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided to make a binding determination about costs as follows:–

- That the legal costs in this matter in the sum of \$1,475 are fair and reasonable in the circumstances and require no further reduction.

STATEMENT OF REASONS

Background

1. The complaint was received on 5 October 2015 and related to his dissatisfaction with the advice received from the lawyer and the level of fees subsequently charged. The original invoice of 15 May 2015 was for \$1895, and the Complainant complained that the advice received did not accord with his instructions.

Issues in dispute

2. The Complainant states the Respondent Lawyer performed legal work that was not requested. He therefore complains the costs which he has paid are excessive where they relate to advice - on applying for a new visa - which was not requested.

Complaint's case

3. The Complainant is an UK citizen who was granted an Australian entry visa valid for a period of 12 months despite his belief that he was entitled to a 5 year visa.
4. The Complainant complained to the Australian High Commission in London which appears to have referred the matter to the Commonwealth Ombudsman. The Ombudsman made a finding that the visa decision was lawfully made but reminded the Department of Immigration and Citizenship (DIAC) that when exercising discretionary power in accordance with a rule or policy, they must also take into account the merits of the case.
5. It appears that that despite the Ombudsman's finding that the decision was lawful, the Complainant was of still of the view that DIAC had erred in its decision as there may have been an unreasonable fettering of the DIAC decision makers discretion by the department's creation of procedures contained in "Procedural Guidance Manual 3."
6. The Complainant approached a UK solicitor, who in turn contacted the Respondent Lawyer (a migration/immigration law specialist) in Australia via email on 13 April 2015. In the subject line it states "Assistance requested."

7. This request for advice stated “He wishes to instruct you to advise him on whether you believe there is sufficient merit for him to pursue this matter in the tribunal.” It also states that the Complainant specifically seeks the Respondent Lawyer’s advice based on an article that the Respondent Lawyer had written. The UK solicitor indicates her view that there may be two main areas relevant to the Complainant’s matter. These issues were failing to consider the facts, and improper exercise of power. There is no request for advice on how to apply for a new visa.
8. The Respondent Lawyer emailed in reply saying that she was not able to advise on the information provided and required further details first. She said her hourly rate was \$570 (excluding GST), and that \$1,500 needed to be paid on account of costs, adding once she was engaged she would advise on the merits of the case and the options available.
9. A Terms of Engagement letter dated 23 April 2015 sent to the Complainant from the Respondent Lawyer described the work to be undertaken as “Application for subclass 155 Resident Return visa”, giving the fee estimate of \$1,500-\$3,000 exclusive of GST, and referred to the Respondent Lawyer’s charge rate.
10. On 27 April 2015 via email to the Respondent Lawyer, the Complainant said that he was not seeking to submit a new application. He said that he required advice on issues contained in “Document 12”, a tabulated document with a series of issues and opinion created by the Complainant that postulated his view that DIAC’s decision to limit his visa to a one year period was a flawed decision. He said that he was asking about the merits of pursuing the issues he raised in the courts.
11. On 6 May 2015 via email to the Respondent Lawyer, the Complainant said “Please would you clarify the services to be provided.” She replied on the same day saying “We have reviewed your instructions and documents, the law and the policy and will provide our advice shortly.” There was no indication as to exactly what the Respondent Lawyer intended to provide at this stage.
12. The Complainant emailed the Respondent Lawyer again on 7 May 2015, concerned she had not fully comprehended what he was seeking, itemising 6 issues which he sought her view on including questions of “lawfulness” “fettering” and opinion on “legal recourse”. The Respondent Lawyer replied via email the next day saying that he was out of time to challenge the issues raised or raise those arguments, and that “...under current law and policy your chances of getting a RRV (Return Resident Visa) are limited.”
13. The practitioner’s formal advice commenced with a letter dated 14 May 2015. The information given under the heading “The Complexity of Australia’s immigration laws” provides general information somewhat on point to the complainant’ issues raised in “Document 12”. It touches on (but does not develop) the interplay between policy guidelines and the law.
14. The balance and more substantial part of the letter deals with how best the Complainant might apply for a Resident Return Visa in the future, which is advice the Complainant says was not requested or required.
15. A letter from the Respondent Lawyer to the Complainant of 1 July 2015 was more on point and provided legal opinion about DIAC’s powers and how, in her view, a challenge based on the complainant’ interpretation of the facts would be unlikely to succeed.

16. An invoice dated 15 May 2015 for \$1895 issued, and funds held in trust (\$1475) were transferred accordingly by the practitioner's firm, leaving an outstanding balance of \$420.
17. On 23 December 2015 (after the lodgement of his complaint with this office) the Respondent Lawyer provided some additional material to the Complainant relating to the complexity of Australian immigration law in two letters. The shorter of the two (3 pages) provides more detail around why the Respondent Lawyer believed the complainant's issues in "Document 12" were unlikely to succeed. The second document (23 pages) provides general information around the application of policy in departmental decisions.
18. The Complainant says that he engaged the Respondent Lawyer to advise whether he could challenge DIAC's decision to only grant him a 1 year RRV instead of the requested 5 year one. He provided her with "Document 12" (and referred to it on a number of occasions), which contained a number of questions and assertions that he says he was seeking advice on. He consistently maintained to the Respondent Lawyer that he was not seeking to apply for a new visa, and on at least 2 occasions tried to clarify her understanding of his instructions.
19. The Complainant asserts that the Respondent Lawyer did not follow his instructions to focus on his questions in "Document 12", and so believes a reduced fee between \$750 - \$1,000 is appropriate.

Respondent Lawyer's case

20. The Respondent Lawyer states she believed the Complainant had an intention to enter Australia and therefore required advice on his options.
21. She advised the Complainant he was out of time to raise a case for administrative review, but as he still intended to enter Australia, she provided advice on how that could be achieved via a new visa application.
22. The Respondent Lawyer says that she has met the requirements of her instructions, and did not misunderstand them. In her letter dated 23 December 2015 to this office she says that her instructions were drawn from the UK solicitor
23. However she adds that if she had have been aware that the Complainant was simply seeking advice on what might be called an academic exercise of responding to the questions and assertions in "Document 12", she would not have agreed to act.
24. In any event the Respondent Lawyer engaged an experienced legal cost consultant who assessed her overall services at \$6,604.00 for solicitor-client professional charges (exclusive of disbursements) based on the relevant costs scale.
25. However the Respondent Lawyer (as confirmed in her letter dated 13 November 2015 to this office) has reduced the total fee charged to \$1475 on the basis of the complainant's dissatisfaction with the service, and his overseas location making collection difficult (evidenced by note to the Respondent Lawyer's law firm's collection clerk).

Findings on issues in dispute

26. The Respondent Lawyer did not do all she could to clarify what the complainant's precise instructions were.

27. The UK solicitor was not an “instructing lawyer” where all communication needed to be funneled through her. The UK solicitor simply provided an introduction to the Respondent Lawyer and the Complainant then became the Respondent Lawyer’s client. (Evidenced by cost disclosure and agreement).
28. In any event, the UK solicitor’s initial introduction referred to the merits of challenging DIAC’s decision to limit his visa to one year, with no mention of applying for a new visa.
29. Even if the UK solicitor had provided initial instructions, these can change and it was clear from the complainant’s emails that he was seeking advice on matters raised in “Document 12.”
30. The Complainant made it clear he was not seeking to reapply for a visa, yet the advice in the Respondent Lawyer’s letter dated 14 May 2015 is tailored to this assumption. The Respondent Lawyer could have confirmed the precise instructions with the Complainant, revised her cost disclosure accordingly, or declined to provide this form of advice and terminated her services.
31. However the Complainant has received professional advice from a specialist immigration lawyer and ultimately received advice about the matters he sought advice on.
32. The Complainant, whilst perhaps seeking answers to a variety of questions, was not seeking them in a vacuum. The Respondent Lawyer has therefore seemingly presumed that his ultimate goal was to see if he could challenge the decision of DIAC on the basis of an administrative error, with a view to obtaining the visa he initially sought, by overturning DIAC’s decision.
33. The Respondent Lawyer initially jumped to providing an answer to this ultimate question, by stating that the Complainant was out of time to seek any administrative review, and regardless of this, the basis on which he would seek to found his case (fettering of a decision maker) would be extremely difficult to prove and unlikely to succeed.
34. Ultimately his questions have been answered, albeit without expansive analysis and advice at least until he made his complaint.
35. However work was initially done that fell outside the specific scope of the instructions, and the Respondent Lawyer expended time on advice not sought, on how to apply for a visa in future.
36. However the Respondent Lawyer (as confirmed in her letter dated 13 November 2015 to this office) has reduced the total fee charged on the basis of the complainant’s dissatisfaction with the service and his overseas location making collection difficult (evidenced by note to the Respondent Lawyer’s law firm’s clerk).

Determinations & Reasons

37. Accepting the analysis of the legal cost consultant, I am satisfied that the fees as reduced by the Respondent Lawyer are fair and reasonable.
38. The Respondent Lawyer’s fees, purely based on the time to read, comprehend and inform herself of the facts and to form the conclusion that a merits review was not open to the Complainant, would exceed \$1,475.

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39. While it may not be fair and reasonable to invoice the Complainant for the work done in producing advice and communicating with the Complainant in relation to seeking a new visa, these fees have been waived.
40. Further work was subsequently done and advice was provided to the Complainant in the 22 December letters that was in accord with the instructions. This could add to the fair and reasonable costs, but in all of the circumstances have been waived. This is appropriate given the Complainant has been put to all of the associated inconvenience that led to him having to complain.
41. I have considered the factors set out in section 200 of the Uniform Law and the principles set out in section 172. I recognise that the complainant chose the Respondent Lawyer, who perhaps charges at the higher end of the specialist lawyers in the field of immigration law, and accordingly her fees represent this level of expertise.
42. I accept that immigration laws in respect to the type of visa the Complainant was seeking to review can be complex, and administrative reviews of DIAC's decisions are difficult to prosecute. Based on the Respondent Lawyer's skills, knowledge and experience, the reduced fees charged are appropriate in the circumstances, and are articulated in the cost agreement.
43. I accept that the Respondent Lawyer did not clarify her instructions in circumstances where the Complainant made his wishes known, and that fair and reasonable outcome is reflected in this determination.
44. Having considered all of the evidence and relevant law, and having made the above findings on the issues in dispute, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

Russell Daily
Executive Director, Complaints & Intervention
Delegate of the Victorian Legal Services Commissioner

31 March 2016