

**APPROVED
NO REDACTION NEEDED**



**THE COURT OF APPEAL
CIVIL**

Appeal Number: 2024/59

Neutral Citation Number [2024] IECA 216

Faherty J.

Allen J.

O'Moore J.

BETWEEN/

AGNIESZKA NOWAK

APPLICANT/APPELLANT

- AND -

THE JUDICIAL COUNCIL

THE COMPLAINTS REVIEW COMMITTEE OF THE JUDICIAL COUNCIL

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 2nd day of July, 2024

1. This is an appeal by Ms. Agnieszka Nowak against the judgment and order of the High Court (Ferriter J.) made on 19th February, 2024 by which Ms. Nowak was refused leave to make an application by way of judicial review for an order of *certiorari* quashing what was said to have been the purported decision of the Complaints Review Committee of the Judicial Council dated 2nd October, 2023 and delivered on 19th October, 2023 in relation to a complaint which she had made against a judge.

2. On 18th July, 2023 Ms. Nowak filed a complaint with the Judicial Council concerning the conduct of the judge in the course of a hearing in the Dublin Circuit Court on 19th April, 2023.
3. In accordance with s. 53 of the Judicial Council Act, 2019 the complaint was first examined by the Registrar to ascertain whether it was admissible. The Registrar, for the reasons set out in a four page determination dated 4th September, 2023 decided that it was not admissible.
4. As required by s. 56 of the Act of 2019 the Registrar informed Ms. Nowak of her right to seek a review of his determination by the Complaints Review Committee by making a request in writing within 30 days of receipt of notification of his determination. By e-mail dated 6th September, 2023 Ms. Nowak made such a request.
5. By letter dated 8th September, 2023 the Registrar – on behalf of the Complaints Review Committee – invited Ms. Nowak to submit any observations she might which to make on or before 30th September, 2023. The letter indicated that any such observations should be addressed to the Complaints Review Committee at the offices of the Judicial Council at Green Street or by e-mail to registrar@judicialcouncil.ie.
6. On 29th September, 2023 Ms. Nowak submitted observations by way of a formal six page written submission.
7. On 2nd October, 2023 the Complaints Review Committee decided that the complaint was inadmissible pursuant to the provisions of s. 53(2)(b) and s. 53(3) of the Act of 2019. On 18th October, 2023 the Committee advised the Registrar of its determination and by letter of the following day – 19th October, 2023 – the Registrar notified Ms. Nowak of the determination of the Committee. As required by the Act, the determination of the Complaints Review Committee was in writing and the Registrar sent Ms. Nowak a copy of it.

8. The determination of the Complaints Review Committee showed the names of the members of the Committee which were printed at the end of the document.

9. By her statement required to her ground application for judicial review filed on 8th December, 2023 Ms. Novak set out the grounds on which she sought relief in five numbered paragraphs which were (and I paraphrase):-

1. That the Registrar failed – as required by s. 56(2) of the Act of 2019 – to refer the complaint to the Complaints Review Committee and failed to notify the judge that the complaint had been so referred. It was said that there was no evidence which would prove otherwise. Ms. Novak’s observations – it was said – had been sent to the Registrar on 29th September, 2023 so that it was impossible that the decision could have been made on 2nd October, 2023.
2. That the purported decision had not been signed by the members of the Committee and was therefore rendered invalid.
3. That there was no evidence that the members of the Committee had voted on the complaint, as required by s. 55(10) of the Act of 2019.
4. That there was no evidence that the Committee had notified the Registrar in writing of its determination, as required by s. 55(3) or a referral of the complaint, or part of a complaint, as required by s. 55(4) and the reasons therefor.
5. That the purported decision of the Committee was unreasonable and unlawful on the ground that the Committee, in breach of natural and constitutional justice, had not requested any evidence prior to making its decision.

10. It will be seen that the grounds in paras. 2 to 5 are individual grounds but that para. 1 encompassed a number of allegations.

11. In support of her application, Ms. Novak filed a verifying affidavit on 8th December, 2023 and a second affidavit on 29th January, 2024.
12. In her first affidavit Ms. Novak set out the circumstances in which she had come before the judge concerned on 19th April, 2023 and her complaint as to what the judge had then done. She deposed to the making of her complaint on 18th July, 2023; the determination of the Registrar on 4th September, 2023; her request for a review; what she described as the purported determination of the Committee dated 2nd October, 2023; and the fact that the determination was sent to her by the Registrar on 19th October, 2023. She exhibited a small bundle of papers in connection with the litigation in which she had been involved and the correspondence and papers in relation to her complaint. Ms. Novak also deposed to the fact that she had made a data subject access request to the Judicial Council and a request for a copy of any procedures issued pursuant to s. 55(11) of the Act of 2019 to which – at the time of swearing of her first affidavit – she had had no response.
13. In her second affidavit Ms. Nowak deposed that on 8th December, 2023, after she had filed her statement and verifying affidavit, the Registrar had responded to her data access request and made a number of points; to which I will come.
14. Ms. Nowak’s leave application was heard by the High Court (Ferriter J.) on 19th February, 2024. Having read the papers in advance and having heard what was offered by Ms. Nowak, the judge gave a comprehensive *ex tempore* judgment in which he addressed *seriatim* the five grounds on which leave had been sought. He found that none of them met the threshold of arguability laid down by the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 and recently confirmed in *O’Doherty v The Minister for Health* [2022] IESC 32 and refused leave.
15. By notice of appeal dated 4th March, 2024 Ms. Nowak appealed against the judgment and order of the High Court. The notice of appeal set out the grounds of appeal in seven

numbered paragraphs which did not precisely correspond with the grounds on which leave had been sought but save in two respects raised essentially the same issues. The first numbered ground was that the High Court judge had erred in holding that Ms. Nowak had not met the low threshold of arguability laid down in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. The remaining six paragraphs – reflecting more or less the five paragraphs in the statement of grounds – were that the Registrar had failed to refer the complaint to the Committee; that the Registrar had failed to notify Ms. Nowak and the judge that the complaint had been referred for review; that the determination of the Committee had not been signed; that the members of the Committee had not voted; that the Committee had not notified the Registrar in writing of its determination; and that the determination was unreasonable and unlawful. The first difference between the grounds advanced in the High Court and the grounds of appeal is the suggestion that the Registrar failed to notify her – as well as the judge – that the complaint had been referred to the Complaints Review Committee.

16. As I will come to, any suggestion that Ms. Nowak was not notified by the Registrar in writing that her complaint had been referred to the Committee is not sensible but the difference between the grounds of appeal and the grounds on which leave was sought gives rise to an issue as to the basis on which the Court should deal with an appeal against a refusal by the High Court of an *ex parte* application for leave.

17. *Egan v Murphy* [2019] IECA 7 was an appeal by an applicant against the refusal of his *ex parte* judicial review application. Whelan J. hearing the applicant’s appeal against that refusal stated:-

“*This appeal involves a de novo consideration of the application for leave to seek judicial review of the Roscommon County Registrar’s order of the 20th November 2017.*”

18. Soon after, in *O'Connor v The County Council of Offaly* [2020] IECA 72, Murray J. held, at para. 63:

“That being so, the remainder of this inquiry becomes more straightforward. It reduces itself to whether in respect of the various reliefs pleaded in the case, the respondent has established an arguable claim. That question – I should emphasise – must (at least where leave has been granted ex parte) be determined de novo and in the light of the submissions advanced by the respondent to the proceedings.”

19. In his dissenting judgment in *O'Doherty v. Minister for Health*, as he had previously in his judgment in *Arnold v Judge McCarthy* [2017] IECA 303 – a judgment in which Peart and Finlay-Geoghegan JJ. concurred – Hogan J. suggested that the approach which this Court ought to take to an appeal against a refusal of leave was not precisely the same as that taken by the Supreme Court prior to the establishment of the Court of Appeal but I do not believe that it is necessary for the purposes of this appeal to examine the issue in detail. With the exception of the suggestion in the notice of appeal, which I have identified – that Ms. Novak was not notified by the Registrar that her complaint had been referred to the Committee – and of an alleged absence of evidence – to which I will immediately come – the grounds on which leave was sought in the High Court are the same as the grounds of appeal and Ms. Nowak's arguments in support of her appeal are the same as those which were advanced in the High Court.

20. The second difference between the grounds on which leave was sought in the High Court and the grounds of appeal is the alleged failure of the Complaints Review Committee to request evidence. In her statement of grounds, at para. 5, Ms. Nowak sought to challenge the determination of the Committee on the ground that it had not requested evidence. In her oral submission to the Court this afternoon, Ms. Nowak suggested that the Complaints Review Committee ought to have taken sworn evidence from both sides. This was not

among her written grounds of appeal but as it was an argument advanced in the High Court and so I will deal with it.

21. The first stage of the procedure prescribed by Part 5 of the Judicial Conduct Act, 2019 is a screening procedure to establish whether a complaint is admissible. The Registrar, in the first instance, and the Complaints Review Committee, on any review, is not concerned with establishing the facts but with deciding whether if what is asserted is established in fact, the conduct of the judge may properly be relied on as judicial misconduct as opposed – broadly – to an error made by the judge in the proper exercise of his or her jurisdiction.

22. I turn now to the remaining grounds in the order in which they are set out in the notice of appeal.

23. As I have said, any suggestion that Ms. Nowak was not notified by the Registrar that her complaint had been referred to the Committee is not sensible. By his letter of 8th September, 2023 the Registrar advised Ms. Nowak of the Committee’s practice on review applications to invite submissions and invited her to address any such submissions to the Complaints Review Committee. Ms. Novak’s written submissions argued that the Registrar’s determination was entirely erroneous and should be set aside by the Complaints Review Committee. If there could have been – and I do not believe that there was – any room for doubt, Ms. Nowak’s covering letter of 29th September, 2023 was addressed to the Complaints Review Committee and her salutation was “*Dear Sirs*”.

24. The first substantive ground of appeal is that the judge erred in law in holding that the proposition that the Registrar failed to refer the complaint to the Committee pursuant to s. 56(2) of the Act of 2019 was not a stateable or arguable ground. This makes no sense. Whatever – if any – infirmities there may have been in the manner in which the complaint was dealt with by the Committee, it was obviously dealt with and could not have been dealt with by the Committee if it had not been referred by the Registrar.

25. What appears to be behind this ground is the observation at para. 1(a) that there is no evidence that the Registrar duly delivered her observations but – as directed by the Registrar – the observations were not directed to him but to the Committee.

26. At para. 1(d) Ms. Nowak points out that the Registrar’s e-mail of 28th September, 2023 “*excluded*” her observations which were sent on the following day. This makes no sense. The Registrar could not have “*excluded*” from an e-mail of 28th September a document which was not submitted until the following day. No less, the reference to the Registrar’s e-mail of 28th September, 2023 attaching the complaint and associated documentation is utterly inconsistent with any suggestion that he did not refer the complaint for review.

27. The second substantive ground of appeal is that the judge erred in finding that Ms. Nowak’s proposition that the Registrar failed to notify her and the judge concerned that the complaint had been so referred.

28. For the reasons given, it is technically not open to Ms. Nowak to rely on any alleged failure to notify her of the referral.

29. The proposition that the judge was not notified of the referral appears to be based on the fact that the material made available to Ms. Nowak in response to her data subject access request did not include a copy of any such notification to the judge. The premise of this, in turn, is that Ms. Nowak’s data access request captured all documents and records kept by the Judicial Conduct Committee, the Complaints Review Committee and the Registrar, including any notification to the judge concerned. As the High Court judge observed, the onus is on an applicant for leave to make out a *prima facie* case of an infirmity in the determination of the Committee. The fact that Ms. Nowak, in response to her data subject access request, was not provided with a copy of the notification to the judge concerned does not go to show that the judge concerned was not notified. Moreover, Ms. Nowak was unable to identify how any

such omission – if there was any such omission – could have gone to the proper consideration of her complaint and observations.

30. By the way, Ms. Nowak exhibited a copy letter of 8th September, 2023 addressed by the Registrar to the judge concerned inviting his observations and this was one of the Attachments to the Registrar’s e-mail to the members of the Committee on 28th September, 2023, which she also exhibited.

31. Ms. Nowak’s third substantive ground is that the High Court erred in holding that there is no legal requirement that the determination of the Committee should have been signed in handwriting by the members of the Committee. Ms. Nowak argues that there is nothing in the Act that “*requires no signatures of [the] members*” of the Committee: which I understand to mean that the Act does not dispense with a requirement that the determination must be signed by the members of the Committee. But there is no such requirement. Ms. Nowak asserts that it is a long standing practice that the decision of an administrative body must be signed but could not identify any authority for that proposition. Similarly, Ms. Nowak asserts that a document must be signed – in handwriting – unless otherwise provided in the relevant legislation but could not identify any authority for that proposition either.

32. Pointing to an observation by the High Court judge in the course of his judgment, Ms. Nowak suggests that there is no evidence that the Committee asked the Registrar to convey their decision to her but s. 55 requires the Committee to notify the Registrar of their determination – which it obviously did – and requires the Registrar to notify the complainant of its determination and the reasons therefor – which he obviously did.

33. Ms. Nowak’s fourth substantive ground is that the High Court judge erred in holding that she had no stateable or arguable case to make that the Committee had failed to vote on the complaint, in breach of s. 55(10) of the Act.

34. Section 55(10) of the Act provides that:-

“Where a matter is required to be determined by the Complaints Review Committee, each member of the Committee shall have one vote and the matter shall be determined by a majority of the votes of the members of the Committee.”

35. Ms. Nowak submits that there are no minutes or records of the Committee’s meeting or the voting – or at least that she was not (in response to her data subject access request) provided with any such minute or record. But it is clear on the fact of the impugned determination that the decision of the Committee was unanimous. The typed names of each of the Committee members at the end of the determination plainly conveyed that each of the members agreed with it. The absence of written procedures governing the review process is neither here nor there. By s. 55(11) The Complaints Review Committee is expressly entitled to regulate its own procedures, including procedures in relation to the conduct of its meetings. It is not obliged to adopt written procedures or to follow any particular procedure.

36. Ms. Nowak’s fifth ground is that the High Court judge erred in holding that she failed to make out an arguable case that the Committee failed to notify the Registrar in writing of its determination of the review, as required by s. 56(5). This makes no sense. On her own case, the determination of the Committee was sent to Ms. Nowak by the Registrar under cover of a letter of 19th October, 2023. The Registrar spelled out – in terms – that he had been notified in writing by the Committee of its determination and enclosed a copy.

37. Ms. Nowak’s sixth substantive ground is that the High Court judge erred in holding that she had not made out an arguable case that the determination of the Committee should be quashed on the ground that it was *“unreasonable and unlawful”*. This ground is elaborated in six paragraphs – including that there are no written procedures; that there are no minutes of the meeting; that no voting took place; that the determination was not signed by hand and that the Registrar did not send Ms. Nowak’s observations of 29th September to the Committee on

the day before they were sent by her to the Committee – which repeat what was said earlier and which I have dealt with.

38. Para. 7(f) of the notice of appeal suggests that “*it was impossible that the CRC met on 2 October 2023 (the next working day) and made a valid determination based on the incomplete documentation sent by the Registrar on 28 September, 2023 without the complainant’s observations sent on 29 September 2023.*” This does not make sense. On Ms. Nowak’s case, the Committee had “*the complaint and associated documentation*” on Thursday 28th September, her observations – directly from her – on 29th September and made its decision on Monday 2nd October, 2023. As the High Court judge observed, any suggestion that the Committee might not have had Ms. Nowak’s observations before it conducted its review is manifestly knocked out by the terms of the Committee’s determination, which recorded that the observations had been received and considered.

39. As low as the threshold is, Ms. Nowak has failed to identify any arguable ground on which the determination of the Complaints Review Committee of the Judicial Council of 2nd October, 2023 might be impugned.

40. I would dismiss this appeal.

[Faherty and O’Moore JJ. agreed.]