

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2023-485-000536
[2023] NZHC 2594**

UNDER the New Zealand Bill of Rights Act 1990
IN THE MATTER OF an application for Judicial Review
BETWEEN CHRISTOPHER JOSEPH O'NEILL
Applicant
AND CHRISTOPHER JOHN HIPKINS
First Respondent
DAVID WILLIAM PARKER
Second Respondent

Hearing: On the papers
Judgment: 18 September 2023

JUDGMENT OF WALKER J

*This judgment was delivered by me on 18 September 2023 at 12 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

[1] The applicant tendered for filing in the Wellington Registry of the High Court an application for judicial review naming the Attorney-General and Prime Minister as respondents.

[2] In addition to the judicial review proceeding, there is a second application styled as an interlocutory application without notice within the same proceeding.

[3] Both applications have been referred to me as Duty Judge under r 5.35A of the High Court Rules 2016 (the Rules). That rule provides:

5.35A Registrar may refer plainly abusive proceeding to Judge before service

- (1) This rule applies if a Registrar believes that, on the face of a proceeding tendered for filing, the proceeding is plainly an abuse of the process of the court.
- (2) The Registrar must accept the proceeding for filing if it meets the formal requirements for documents set out in rules 5.3 to 5.16.
- (3) However, the Registrar may,—
 - (a) as soon as practicable after accepting the proceeding for filing, refer it to a Judge for consideration under rule 5.35B; and
 - (b) until a Judge has considered the proceeding under that rule, decline to sign and release the notice of proceeding and attached memorandum for the plaintiff or the applicant (as appropriate) to serve the proceeding.

[4] I have considered the application under r 5.35B which provides:

5.35B Judge's powers to make orders and give directions before service

- (1) This rule applies if a Judge to whom a Registrar refers a proceeding under rule 5.35A is satisfied that the proceeding is plainly an abuse of the process of the court.
- (2) The Judge may, on his or her own initiative, make an order or give directions to ensure that the proceeding is disposed of or, as the case may be, proceeds in a way that complies with these rules, including (without limitation) an order under rule 15.1 that—

- (a) the proceeding be struck out:
 - (b) the proceeding be stayed until further order:
 - (c) documents for service be kept by the court and not be served until the stay is lifted:
 - (d) no application to lift the stay be heard until the person who filed the proceeding files further documents as specified in the order (for example, an amended statement of claim or particulars of claim).
- (3) Rule 7.43(3) does not apply. However, if a Judge makes an order on the Judge's own initiative without giving the person who filed the proceeding an opportunity to be heard, the order must contain a statement of that person's right to appeal against the decision.
- (4) A copy of a Judge's decision to strike out a proceeding must, if practicable, also be served on the person named as a party or, if more than 1 person is named, those persons named as parties to the proceeding.
- (5) *See* rule 2.1(3)(b) concerning the exclusion of the jurisdiction and powers of a Judge under this rule from the jurisdiction and powers of an Associate Judge.

[5] A brief survey of the chronology explains the genesis of the interlocutory application.

[6] On 4 August 2023, the Registry of the High Court at Wellington received a document dated 28 July 2023 from Mr O'Neill. This is the application styled as judicial review against the Prime Minister and Attorney-General.

[7] On 17 August 2023, the Registry returned those documents to Mr O'Neill on the basis they were non-compliant with the Rules. The letter explained in some detail what was required to comply when filing a judicial review and provided a link by way of further clarification.

[8] In a letter dated 21 August 2023, Mr O'Neill returned the documents for filing asserting that they had been wrongly rejected. He added the interlocutory application without notice requiring a judicial decision on acceptance of the documents.

[9] Pragmatically, and although there is still no compliance with the Rules, the Registry accepted the documents for filing rather than returning them once again to

Mr O'Neill. That means the interlocutory application is now moot. The documents have been accepted for filing but referred to a Judge as discussed above.

The proper approach

[10] The Court of Appeal has recently set out the required approach to review under the High Court Rules 2016 in *Te Wakaminenga o Nga Hapu ki Waitangi v Waitangi National Trust Board*.¹ After reviewing the history of this particular rule, the Court said:

[14] The powers conferred under r 5.35B reflect the inherent power all courts have to prevent their own procedures from being misused, for example as a means of oppression or otherwise in a way that is manifestly unfair such that the administration of justice will be brought into disrepute. Lord Bingham described abuse of process as simply being “a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process”. Courts have a duty to prevent such abuse.

[11] The power must be exercised sparingly and only in the clearest of cases because the rule contemplates a litigant being denied the fundamental right of access to the courts with the possibility of the case being halted before it is even served. For that reason, the abuse must be clear beyond doubt.

Discussion

[12] The gist of the judicial review application appears to be Mr O'Neill's view that the respondents created a situation in which he was (from his perspective) denied justice in the Court of Appeal and Supreme Court.

[13] The background to Mr O'Neill's application is a decision of the Judicial Conduct Commissioner dismissing complaints Mr O'Neill made against a number of Judges as vexatious. Mr O'Neill applied in the High Court seeking judicial review of that decision. That application was referred to a Judge under r 5.35B and struck out as an abuse of process.² The Judge held that the proceedings involved circularity. He said:

¹ *Te Wakaminenga o Nga Hapu ki Waitangi v Waitangi National Trust Board* [2023] NZCA 63 (citations omitted).

² *O'Neill v Ritchie* [2022] NZHC 1225.

One of the complaints dismissed by the Commissioner relates to a decision of the court striking out judicial review proceedings as an abuse of process. He now brings these proceedings challenging the dismissal of the complaint relating to that decision.

[14] Mr O'Neill's appeal to the Court of Appeal was set down for hearing but he did not appear. He says that he notified the Court of Appeal (via a call centre number rather than to the Registry of the Court of Appeal directly) that he was unable to attend because he was isolating. The appeal was set down for hearing again two days later and required Mr O'Neill to provide a medical certificate if he did not appear.

[15] Mr O'Neill failed to appear again and did not provide a medical certificate. The Court of Appeal dealt with the appeal on the papers, dismissing it and upholding the High Court decision striking out the claim as an abuse of process.³

[16] Mr O'Neill applied for leave in the Supreme Court. The Supreme Court accepted that the requirement that he produce a medical certificate may meet the leave requirement of an issue of public importance but no other issues he intended to argue met that threshold, and the underlying proceedings face concurrent findings of the High Court and Court of Appeal that it was an abuse of process.⁴ The Supreme Court held that they saw no appearance of a miscarriage of justice.

[17] Against that background, Mr O'Neill's current judicial review purports to address the impact on the right of access to justice wrought by the government's COVID-19 policies. He pleads, contrary to the Supreme Court's finding, that an injustice has occurred through loss of access to justice. He does not plead particularised actions or decisions of the respondents but poses a series of generalised non-justiciable questions about the relationship between the government and judiciary and whether such is healthy.

[18] In my assessment, this pleading is a collateral attack on judgments of the Court of Appeal and Supreme Court. The generalised references to the Government's COVID-19 response and lack of particularisation of any reviewable decision are telling. His real complaint is with the outcome in the Court of Appeal and Supreme

³ *O'Neill v Judicial Conduct Commissioner* [2023] NZCA 152.

⁴ *O'Neill v Judicial Conduct Commissioner* [2023] NZSC 88.

Court. To permit this proceeding to remain on foot would amount to an abuse of process.

[19] I consider it would be manifestly unfair to require the respondents to respond to Mr O'Neill's allegations or to be required to treat this proceeding as a proceeding of the court. Accordingly, the proceedings are struck out. I record as I am required to do so by r 5.35B(3) that Mr O'Neill has a right to appeal this decision.

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Walker J